From - Key West, The Last Resort
by Chris Sherrill and Roger Aiello

In 1822 Lt. M. C. Perry, Commander of U. S. Schooner Shark, arrived to inspect and formally take possession of the island of Key West for the American government.

About the time Key West was settled, commerce from Europe was increasing in the Gulf area; and pirates from the West Indies prowled the area, using the numerous keys, inlets and bayous to secrete themselves and their loot. In fact, the "major industry" of the Caribbean was piracy, with an estimated 20,000 men employed in one way or another. In 1822 the U.S. Government ordered Commander David Porter to rid Key West of these "Brethren of the Coast".

Porter, who had previously fought pirates in the Mediterranean, used six small schooners to maneuver in the tricky inlets and reefs. Within a few years, he had routed the pirates not only from the Keys, but also from Cuba and Puerto Rico, both Spanish possessions. (He was later court martialled) He soon became impressed with the strategic importance of the island as a naval base, subsequently in the 19th and 20th centuries, he was proven right. Key West, from it's early history has been closely associated with the U. S. Military.

A REPORT

OF

THE TRIAL

OF

COMMODORE DAVID PORTER,

OF THE NAVY OF THE UNITED STATES,

BEFORE A GENERAL COURT MARTIAL,

HELD AT WASHINGTON, IN JULY, 1825.

BY ROBERT BEALE, ATTORNEY AT LAW.

C'est le crime qui fait la honte & non pas l'échafaud.—Corn.

TO WHICH IS ADDED,

A REVIEW OF THE COURT'S DECISION.

WASHINGTON CITY.

1825

PREFACE.

The intrinsic importance of the case of Com. Porter very early suggested the idea of a full and methodical report of it. As in the progress of the trial some interesting and novel questions of military and general law were discussed, the utility of such a report became more evident. These original considerations were enforced and confirmed by subsequent circumstances.

The publication in the newspapers of the final proceedings of the court, in which not only the judicial sentence upon the matter in issue, but sundry collateral remarks and censures, which were detached from the connecting and explanatory documents and circumstances, and published in advance, made a full and fair exposition of the whole matter necessary to a complete understanding of the new and before unthought of matters disclosed, both in the court's final sentence, and in the partial extracts from collateral proceedings and opinions. It was also understood that the judge advocate had published a pamphlet; which, though originally composed by way of answer to one published by Com. Porter before the trial, was stated to have embraced, by way of supplement, some strictures and notices of the proceedings before the court martial. The reporter speaks of the character and contents of this pamphlet at second hand only. All that was necessary to be known of it, for the present occasion, was to understand that it did animadvert, by way both of censure and of justification, upon transactions at the late trial before the court martial. The reporter was resolved that this report and all the comments upon the occurrences in the course of the trial, should be strictly confined to the matters appearing in the proceedings, and to the reflections suggested by them alone: without reference to any extraneous statements, or to any controversial topics treated elsewhere: leaving the public to judge of the differences, if any, between two independent statements; neither being written with a knowledge of, or in reference to, the other.

The reporter had constantly attended the trial; and taken notes of its progress; not only with a view to prepare himself for the report, but to assist in preparing the materials of the defence. In this way he had access to the official record or minutes of the court's proceedings,—from which he was enabled to take exact transcripts of the *evidence* as it was delivered, and of the intermediate *decisions* of the court;—but all taken with a view to subsequent revision and comparison with the complete record, after it should be transmitted to the Department, and the publication of the final sentence should make it accessible: not doubting that it would be then accessible, according to all preceding usage. But he found, to his surprise, upon application to the

proper Department, after the publication of the sentence, that such access was deemed inadmissible, till the whole record could be printed at large. Knowing that this publication must be extremely voluminous;—that the essential matter of it must be buried under a vast heap of documents, appended to it as necessary to the formal completion of a *record*, properly so called; but the essential matter of many of which, in relation to any real point in issue, was comprised in a nutshell: that, at any rate, a mere undigested *record* was in no case a substitute for a *report*; and in this particular case, that there were many circumstances necessary to a full *report*, that formed no part of a record; and above all that it was utterly impossible to comprehend with any sort of accuracy or precision, the bearing or application of the evidence itself, from the mere record, without infinitely more labour and research than any reader could be supposed willing to undertake, and which none but a professional one could execute; (a fact more particularly exemplified in the list of inaccuracies alleged against Com. P's pamphlet,—but applying, with more or less force, to the whole case;) and that the contemplated publication of the entire record would, in all probability, from its volume, be postponed to an inconvenient period;—it was determined to set about the preparation of the ensuing report from such materials as were in the hands of the reporter, and as were still accessible to him. The unexpected necessity of compiling the report from these materials, very considerably enhanced the labor which it would have cost, if reference could have been had to the official record: and has also left some chasms which it has been impossible fully to supply from the materials on hand. These, as will be evident from those parts of the report where they appear, are of no importance to the main issue; but only as matter of incidental illustration on collateral topics. Such of them as it shall appear proper to supply, with that view, are intended for a supplement, when the materials can be procured. Being in possession of extensive notes and copies of the proceedings taken during the trial; and of duplicates of all the material documents;—having been furnished by the counsel with all his notes and rough draughts, as well of the proceedings as of the arguments; and assisted by him in the arrangement of the same from such notes and from recollection, the following report is offered to the public as a full and accurate report of the trial in all essentials.

In making up the journal of proceedings, reference has been had to the reporter's notes and copies of the official journal kept of the same;—the order of which has been followed;—but with an occasional enlargement and change of form, where such enlargement or change was necessary to the purposes of a full report. The *evidence*, and the *decisions* of the court are given *verbatim*, as recorded. The papers necessary to illustrate the progress of the court's daily proceedings, which seem to be omitted in the body of the *record journal* and referred to as exhibits, are here introduced into the body of the proceedings.—The argumentative parts, proceeding from the accused, are compiled

from rough draughts or extensive notes, and are stated with all the fulness and accuracy necessary to such documents.—The references, in the body of the minutes, to the documents introduced in the course of the trial are, in some instances, confused and evidently inaccurate: which was particularly observed in the references, in the journal of proceedings for the 28th and 30th July, to the documents introduced subsequent to Mr. Monroe's deposition. But having retained possession of duplicates of the entire mass of documents it is believed with entire confidence, that we have been able very effectually to correct any errors of reference, by selecting from the mass such of the documents as were actually used and intended to be referred to; without any material omission.

WASHINGTON, Nov. 10, 1825.

TABLE OF CONTENTS.

[Note. In the following table the references to the number of the page, distinguished by an asterisk, thus 1*, refer to that part of the volume subsequent to page 244. In consequence of the latter part of the volume consisting of the defence, &c. being ready for the press, before other matter intended to precede it, that was put to press first, for the sake of expedition; and the pages numbered in a new series in order to admit it, without confusion, in its proper place in the volume.]

Owing to the great hurry in preparing the copy for the press, as wanted, the reporter is obliged to make the following

ERRATA.

Page 10, 2d line of last paragraph but one. For *received* read *waived*.
Page 36, l. 15. For *Whonn* read *Uhlhorn*.
" l. 44, or l. 2 of the 4th objection. For *Gravaven* read *Gravamen*.
Page 42. Note. l. 4. For *expeugatorious* read *expurgatorius*.
id. l. 8. For *color* and *glossy* read *calm* and *glassy*.
id. l. 12. Instead of "*for the weakness*" read "*by the neatness*."
Page 46. Note. l. 37. For "*of* interrogatories," read "*on* interrogatories."
id. l. 38. For "to present" read "to *be* present."
Page 47, same note, last paragraph, l. 4. For "why *it* should," read "why *the decision* should."
Page 60. Note. 2d paragraph, line 7. For *denial* read *clerical*.
Page 78, l. 2. For 1825 read 1824.
Page 102. Note. l. 8. For *lay* read *lie*.
Page 103, l. 16. Dele "on oath."
id. l. 20. For "*informal* authentication" read "*informality in the* authentication."
Page 104, l. 1. After "provided" dele *for*.
Page 159. Letter, Oct. 21. par. 3, l. 2. After "officer," read "of rank and experience."
Page 160. l. 4 of the protest. After "authority," for *he* read *the*.
Page 166. l. 2 of the number 3. After "return" for *has*, read *had*.
Page 191. l. 6 of the last paragraph. After "disrespectful words," read "and behaviour."
Page 194. l. 20 of the last paragraph. For *We*, read *He*.
Page 217. l. of last paragraph in some of the impressions. For *seriously*, read *summarily*.
Page 31*, last word in last line but one. For *definitely*, read *definitively*.
Page 37*, beginning of l. 8. For *be here*, read *inhere*.
Page 55*, l. 3 of second paragraph in the parenthesis. For *however* read *howsoever*, and for *published*, read *phrased*.

[Note. The publication of the large impression of this report now struck off, and which has been in the press since September, has been delayed very much beyond expectation, by imperious circumstances.]

TRIAL

OF

COMMODORE DAVID PORTER,

OF THE NAVY OF THE UNITED STATES,

BEFORE A GENERAL COURT MARTIAL, &c.

THURSDAY, *July* 7, 1825.

THE naval court martial for the trial of commodore Porter, assembled at the Navy Yard in Washington; and appeared to be composed as follows:

Captain James Barron, *President.*

Captain Thomas Tingey,	MEMBERS.	Captain Jesse D. Elliot,
James Biddle,		James Renshaw,
Charles G. Ridgeley,		Thomas Brown,
Robert T. Spence,		Charles C. B. Thompson,
John Downes,		Alex. S. Wadsworth, and
John D. Henley,		George W. Rodgers.

Richard S. Coxe, *Judge Advocate.*

A precept from the Secretary of the Navy was then read; by which a general court martial composed as above, was appointed for the trial of Commodore Porter, at the time and place aforesaid, upon certain charges and specifications, annexed: and Richard S. Coxe, esq. was named to officiate as judge advocate.

The officiating judge advocate then asked commodore Porter, whether he had any exceptions to make, against any of the members present; and if he had any such, to declare the same, before the members were sworn.

Whereupon, commodore Porter addressed the court, as follows:

"MR. PRESIDENT,

Thus called upon to declare my exceptions, if any I have, to any of those members of the general court martial, here assembled, who are to exercise a judicative function in my case, and to have a voice in pronouncing my guilt or innocence,—I do without hesitation renounce every such exception. Even if it were so, that any member of this court should, unknown to me, be affected by any prejudice or bias, unfavorable to an impartial judgment in my case, I rely too implicitly on the known character of my brethren in arms, to think of scrutinising the motives of any: their own breasts are sufficiently informed, by justice and honor, of the proper course to be pursued, in such a case.

But, sir, I do find myself very reluctantly impelled, not more

by a sense of the justice due to myself, than by a regard for the honor of the service, and for the wholesome safeguards of military jurisprudence, to interpose, at this precise stage of the business, some fundamental objections to so much of the essential material of this court, as consists in the functions of the judge advocate. The grounds of my objections to the gentleman named as judge advocate, in the order for convening this court, detract nothing from the great learning and abilities, for which he is so well known; nor from the general integrity and fairness of his character. That a juror, summoned on a criminal trial before a court of ordinary judicature, or a member of a court martial, may be challenged, either peremptorily or for cause, without the least disparagement of his personal or professional character, is too well settled to require a contrary inference to be disclaimed on any occasion.

My exceptions go, first, to his legal competency and authority to assume and exercise the functions assigned him by the Secretary of the Navy: and, secondly, if he should be found duly appointed, then to the temper and bias of his mind in relation to this particular cause.

1. Then, I ask, does he claim to be judge advocate, *ex officio*; or merely to officiate, as such, under a temporary delegation of authority for this particular occasion?

If the first, let his commission be produced, and the question, on this point, is at once settled. A judge advocate is an officer of such importance in every military establishment, whether of the land or naval service;—and the due administration of his office so vitally affects the most inestimable rights of the officers and men, attached to the service, as makes it altogether inconceivable, how his appointment should emanate from any less authority, or be manifested by any less solemn act, than that of any other officer, civil or military, under the government. This brings us directly to the authority of the President of the United States, executed in the solemn form of a regular commission. Under the constitution and laws of the United States, it cannot be pretended that the Secretary of the Navy, or any authority less than that of the supreme executive, can make such an appointment.

If, however, it be no judge advocate, *ex officio*, who presents himself, but merely one, with a temporary delegation of authority to act, as such, on this special occasion;—then, I ask, who is competent to such delegation of authority;—and from whom does it actually proceed in this instance?

No express provision appears to have been made in the naval, as there has been in the military establishment, for the appointment, either of regular judge advocates, or of persons specially deputed to act as such. Yet the existence of the office, and the practical exercise of its functions, in both descriptions of persons, are recognized in the rules and regulations for the government of the navy: which speak of "the judge advocate," as distinguished from the "person officiating as such:" thus implicitly admitting an authority, *somewhere*, to appoint to the office, or to de-

legate its functions, in either mode. (a) I do not, therefore, question the propriety of assigning the functions of judge advocate, as well in naval as in military courts martial, to any person, either regularly appointed to the office, or specially deputed to officiate, as such, in a particular trial. Then the only question is, how, and by whom may a person be so deputed, to act in the place of an official judge advocate to a *naval* court martial? The laws of the United States being silent on the question, it follows, that, wherever the power may reside, it is, in its nature, strictly *incidental*; and, as such, can be claimed only by that officer, or that tribunal, to whose fundamental constitution and inherent powers, it bears the nearest affinity and the strongest analogy. Upon these principles, I maintain, that it is altogether foreign to the general constitution and power of the Navy Department; and bears no affinity or analogy to the ordinary functions assigned to the head of that department: but, on the contrary, that it is perfectly consistent, and in strict analogy with the peculiar constitution and powers of the court-martial itself; and devolves, among other incidental and resulting powers, upon that tribunal as the appropriate depository of every authority, necessary to the order and the authentication of its proceedings.

Such is the invariable practice of naval courts-martial in England; and it is sustained by the most authoritative precedents in our own service.—I refer to one precedent now in my mind; namely, the court of inquiry on captain Hull: and I doubt not many others are extant. The appointment of its own *clerk* (an office distinctly appertaining to the various functions of judge advocate) may, indeed, be assumed as an universal incident to the constitution of every deliberative body and judicial tribunal: unless vested by express enactment, in some other department. If then the deputation of a person, to officiate as judge advocate in this case, proceed from the sole authority of the Secretary of the Navy (as I understand is the fact) I except to its competency; and maintain that it should be supplied by an appointment from this court.

2. But, if the learned gentleman, named by the Secretary of the Navy, should be found, on examination, to be duly authorized, in any way, to officiate as judge advocate, I except to him, as being actuated, by a manifest bias of prejudice and interest, to labour for my conviction; and to exert the uttermost of his ingenuity, skill and learning, to fix upon me all, or the greater part of the charges exhibited against me. Before I state, more particularly, the facts, upon which this exception proceeds, I beg leave to advert, very cursorily, to the qualifications and functions of a judge advocate, as defined by the concurring authority of all the most approved writers on military jurisprudence. (a) According

(a) Vid. L. U. S. vol. 3. chap. 187, s. 1, art. 36, p. 357. S. 2, art. 3, p. 359. For the *military* articles of war, on the same subject, vid. vol. 4. ch. 20, art. 69, p. 23.

(a) 1 M'Arthur (4th Ed. Lon.) ch. 12, p. 279, 291, 441, app. no. 26, Judge Bathurst's opinion. Adye, (7th ed. Lon.) P. 1, ch. 6, p. 113, 115, 118. Macomb, ch. 9, p. 166, 167, 169, 170—1 Tyler, (3d ed. Lon.) ch. 10, p. 349-363.

to these authorities, he is the *primum mobile*, as it has been termed, of the court: upon him the court depends for an impartial and candid exposition of the law; and should expect to lean upon his advice, with entire confidence. Not only is the absence of every sort and degree of prejudice or bias against the prisoner, indispensably required of him; but *absolute impartiality*, is the *least favourable* state of mind requisite to fulfil the human behests of the law, by which his relative duties, towards the prisoner, are defined: for it is expected that he rather incline to the side of the prisoner; and, upon all doubtful questions, decide in his favor: that, as the recorder of the evidence and of the court's proceedings, he be studious to collect and record every circumstance, that may weigh in favor of the prisoner: nay, in many instances, that he act as his counsel. This last office, I happen to be so fortunately situated, as to be able to dispense with. But cases may possibly arise, when it might be indispensable to the cause of justice and humanity: and I am now contending, upon this, as upon every other question involved in my approaching trial, for principles, which, apart from their practical operation upon my particular interests, are important to the dearest interests of the service: for principles, in the subversion or contempt of which, no officer, or man, in the service, can hold any security, for life or honor, inviolate.

Then, the judge advocate, as acting this essential and prominent part in the constitution and in the deliberations of a court-martial, is unquestionably, as fair a subject of challenge, whether peremptory, or for cause, as any other member of the court. The reason and necessity of the thing are the same: the law cannot be different.

As to the causes of challenge, I might well maintain, upon very respectable authority, that I am not bound to assign any; but that I am entitled to a peremptory challenge.(*b*) I shall proceed, however, to assign my reasons, openly and candidly; with this preliminary illustration of the principles, by which the sufficiency of "challenges to the favor," is usually determined: namely, that circumstances, which raise a *suspicion*, very far short of any direct proof of *bias or partiality*, are deemed sufficient cause, either against a juror, in a criminal trial, or against a member of a court-martial: a strict analogy, between the two, being preserved in military jurisprudence. (*c*)

When the functions and relative duties of a judge advocate are considered, 'tis not to be imagined, that any lower standard can be applied to the qualification of dispassionate, disinterested, and impartial judgment in him: if, indeed, the absolute freedom of his mind, from every interfering bias and passion, be not subject to a still severer test.

The facts, upon which my present exceptions are grounded, furnish superabundant matter for the application of these wholesome and necessary rules. I have direct and certain information,

(*b*) Adye, P. 1. ch. 6, p. 120–3.
(*c*) Id. P. 2, ch. 3, p. 175. Tytler, (3d ed. Lon.) ch. 5, sec. 2, p. 222. Macomb, ch. 4, s. 2, p. 72.

that the gentleman, now claiming to officiate as judge advocate, has written and published, at least, one anonymous piece, distinctly asserting the truth of one of the specifications now exhibited against me: and so, has pledged his credit in a way utterly incompatible with the requisite impartiality, to fix a charge upon me; which, from its nature, may result in a question of veracity between himself and me.

I am further informed, though not upon such direct and certain authority, as in the other instance, but from sources pregnant of probability and truth, that he has employed himself in writing, and has quite or nearly prepared for the press, a pamphlet professing to be a full answer to my published defence against the principal charge, now to be tried: and laboring to establish, by facts and reasonings, the conclusion of my guilt.

Of these facts, I doubt not of being able to produce the most satisfactory evidence; if the voluntary and candid avowal of the gentleman himself should not dispense with it. *(a)*

Then I would ask, what is left for him, on this occasion, but to redeem his public pledges, and to vindicate his own preconceived, divulged and fixed opinion of my guilt?—and how is this to be reconciled with any of the legitimate functions of a judge advocate?"

Thursday, July 7, 1825."

The court was then cleared to deliberate on the exceptions so made to the officiating judge advocate: and, after some time spent in deliberation, with closed doors, commodore Porter received a message from the court requesting him to send in the paper containing his said address; which was done accordingly. When the court was opened, the following proceedings and decisions were announced by the judge advocate:

One of the members of the court proposed the following question:

Shall the question whether the judge advocate be subject to challenge, be referred to the attorney general, through the Secretary of the Navy? which was determined in the negative. The question was then on motion proposed to the court—

Is the judge advocate liable to be challenged by the accused?

One of the members of the court said that he did not feel himself competent to decide the question without legal advice; at his request the judge advocate was called upon by the court for his opinion, which he gave as follows:

"Commodore Porter having taken an exception to my acting as judge advocate of the court, and the court having intimated a wish that I should give my opinion upon the question, whether a challenge, or exception, to the judge advocate may be taken by

(a) NOTE.—Both facts have been since established in the clearest manner. The publication of the anonymous piece in the National Journal, will be found proved and admitted in the subsequent proceedings: and the pamphlet was advertised for sale, on the day after the sentence of the court was published in this case: leaving no doubt that the pamphlet had been composed and was actually in the press, at the time these exceptions were taken.

the accused? I am of opinion that the appointment of the judge advocate rests with the government, and that he holds his office by the same authority which appoints the court; and that, neither has the accused a right to make any exception before the court, nor has the court a right to decide upon any exception to the judge advocate. That no precedent of such challenge having ever been made, has been, or, it is believed, can be produced."*

After reading this opinion, the question was put and decided in the negative.

* NOTE. The conclusiveness of this reasoning is not quite obvious. "That the appointment of the judge advocate rests with the government," that is, with the *Executive Government*, and with that only, is the very point maintained by the exceptions: but with what *department* is the question? The exceptions insist that the regular appointment to the office belongs exclusively to the Supreme Executive, not to any Executive Department; and the temporary designation of a person to officiate as judge advocate, *pro hac vice*, to the court itself; otherwise, to the Supreme Executive, in common with the official appointment: but that, by no possibility, may the Secretary of the Navy fulfil the character, or perform the function of the appointing power, in either instance.

"That the judge advocate holds his office by the same authority which appoints the court," is a mere begging of the question; for the argument, to be answered, proceeds upon the actual case of a special designation of a person to officiate as judge advocate; and concludes, that it is among the incidental powers of the court itself. But take the case of a person claiming the *official station* of judge advocate, is it to be imagined, how or why the court should be foreclosed from inquiring into the *source* or the fact of his appointment; and ascertaining whether it proceed from any competent authority? Each member of the court acts under an appointment, co-ordinate with every other; yet nothing is more clearly established, both in theory and in practice, than for the court to examine and determine the legality of its own constitution and appointment, and the competency, legal and moral, of its members, collectively or individually. Strange, if it may not examine the authority by which its own clerk or recorder claims to administer its judicial oath; to mix in its deliberations; and to conduct and authenticate its proceedings!—Still more strange, if, because his appointment *ought* to be *co-ordinate* with that of the court itself, the court must put up with one that is *subordinate*, or without any lawful authority whatever! The reasoning which has led the court to this extraordinary conclusion, confounds, throughout, the two distinct and independent grounds of exception taken by commodore Porter; the one to the *legal*, the other to the *moral* competency of the person alleging his authority to officiate as judge advocate. This obvious distinction is no less disregarded when it is said "that no *precedent* of such a challenge having ever been made, has been, or can be produced." Had this assertion been made in *open court*, so as to have admitted of an answer before the question was *decided*, a well known, and most authoritative *precedent* would instantly have been referred to, in the case of Martin Van Buren, esq. (now a Senator from N. Y.) who was appointed a special judge advocate to the general court-martial for the trial of Major General Wilkinson, whose exceptions to the legality and competency of the appointment were sustained by the court, and its decision acquiesced in, both by the gentleman who had received, and by the government which had conferred the appointment. For the second ground of commodore Porter's exception, as "*a challenge to the favor*," technically so called, no particular precedent is cited, or recollected; it rests upon the reasoning from analogy, and upon the authorities by which it is supported in the text.

So much has been said for the sake of the *precedent*, in order that future courts-martial, before they adopt and confirm one of such dangerous tendency, may be invited to weigh the *authority* of the present decision, by the merits of the *ex-parte-reasoning*, upon which it has apparently proceeded.

The usual oaths were then administered to the members of the court, and to the judge advocate, respectively, according to the naval articles of war.

The judge advocate then read the charges and specifications, as follows:

"*Charges and Specifications exhibited against David Porter, Esquire, a Captain in the Navy of the United States.*

Charge 1*st.* Disobedience of orders, and conduct unbecoming an officer.

Specification. For that he the said David Porter, being in command of the naval forces of the United States, in the West India seas, Gulph of Mexico, &c. did, on or about the fourteenth day of November, in the year of our Lord one thousand eight hundred and twenty-four, with a part of said naval forces, land on the island of Porto Rico, in the dominions of his Catholic Majesty the King of Spain, then, and still in amity and at peace with the United States, in a forcible and hostile manner, and in military array, and did then and there commit divers acts of hostility against the subjects and property of the said King of Spain, in contravention of the Constitution of the United States, and of the laws of nations, and in violation of the instructions from the government of the United States to him the said David Porter.

Charge 2*d.* Insubordinate conduct, and conduct unbecoming an officer.

Specification 1*st.* For that he the said David Porter did write and transmit to the President of the United States, a letter of an insubordinate and disrespectful character, to wit: on the seventeenth day of April, in the year of our Lord one thousand eight hundred and twenty-five, and did also write and transmit to the Secretary of the Navy, at sundry times hereinafter particularly mentioned, various letters of an insubordinate and disrespectful character, viz. on the thirtieth day of January, the sixteenth day of March, the *thirteenth* day of April, and the fourteenth day of June, all in the year of our Lord one thousand eight hundred and twenty-five, thereby violating the respect due from every officer in the navy to the head of the department, impairing the discipline of the service, and setting a most dangerous and pernicious example.

Specification 2*d.* For that he the said David Porter, after a court of inquiry had been convened, and directed to investigate and make report of the facts in relation to the matters embraced in the specification of the first charge, and after such court had terminated its inquiries and had transmitted its report to the Secretary of the Navy, and before the Executive had published, or authorized the publication of the proceedings of said court, did publish, or cause to be published, a pamphlet purporting to contain the proceedings of the said court of inquiry.

Specification 3*d.* For that he the said David Porter, in the publication made as mentioned in the last preceding specification, did give an incorrect statement of the proceedings of the said court of inquiry.

Specification 4th. For that he the said David Porter did, in the publication referred to in the two last preceding specifications, insert various remarks, statements, and insinuations, not warranted by the facts, highly disrespectful to the Secretary of the Navy, and to the said court of inquiry.

Specification 5th For that he the said David Porter did, in the same publication referred to in the said last preceding specification, without any authority or permission for that purpose, make public, official communications to the government, and official correspondence with the government; and has, on other occasions, between the 1st of October, 1824, and the 15th of June, 1825, without authority or permission therefor, made public, orders and instructions from the government, and official correspondence with the government."

Commodore Porter being required to plead to the said charges and specifications, requested time till to-morrow morning; and, in the mean time, to be furnished with a true copy of the charges and specifications: at the same time stating as a reason for his request, that he had observed a difference between the copy sent to him by the Secretary of the Navy, and that now read by the judge advocate: all which was granted accordingly. He also requested permission to have counsel to advise and assist him in his defence, and a clerk to take minutes of the evidence; which the court also granted, under the usual restrictions upon counsel in courts-martial; and Walter Jones, esq. was then named and admitted as his counsel.

FRIDAY, *July* 8.

The court adjourned, by permission of the Secretary of the Navy, from the Navy-Yard to the Marine Barracks: and being there regularly opened, and all present as before, commodore Porter was called upon to plead to the charges and specifications as read yesterday. Whereupon, with the leave of the court, he delivered, by way of plea, under a protest and reservation of all legal exceptions to the substance, and legal effect and sufficiency of the said charges and specifications, a memorial in the words following:

MR. PRESIDENT,

Before I can be called upon, either to plead, or to except to any charges and specifications, 'tis necessary that it be definitively ascertained what are the charges and specifications which I am *expected* to answer: and, strange as it may appear at this stage of the prosecution, nothing is more uncertain.

On the 22d day of June last, I received, enclosed in a letter from the Secretary of the Navy, ordering my arrest, and notifying me of my trial, a paper purporting to contain the original charges and specifications exhibited against me. 'Tis true the paper was signed by no one; and bore not, upon its face, any form of authentication whatever; nor did it name or refer to any

prosecutor, informer, or judge advocate. Still the official source from which it proceeded, and the strictly official form and nature of the communication that accompanied it, and identified its character, left me no doubt, and, I presume, now admit no doubt, of the authenticity of the paper, as an exhibition of the original charges and specifications against me; which, as such, were definitive and conclusive, and altogether unalterable, in form, or substance, but upon the proviso and under the circumstances provided in the 38th article of the rules and regulations for the government of the Navy of the United States.*

When I was arraigned before the court, yesterday, a paper was produced and read by the judge advocate, purporting, and professing to be nothing more than a *copy* of the original charges and specifications; meaning, as I presumed, of the same exhibited against me at the time, and in the manner before mentioned. But what was my surprise, on a comparison of the two papers, to find a very material variance in the first specification of the second charge. The "various letters, of an insubordinate and disrespectful character," which I am therein charged with having written to the Secretary of the Navy, are no otherwise distinguished, or identified, than by a naked reference to the *dates;* neither their tenor, nor their substance and effect, is set out; and so, I have no sort of notice what letters are designated as of that character, but this naked reference to *dates.* Then the *dates* are of the essence of the accusation: I have been cited here to answer, and have come prepared to answer for those designated letters, and no others. Let the dates be changed, and the substance of the charge is changed; in so far, as I am called upon to answer for other "letters, of an insubordinate and disrespectful character." Now, sir, the copy of the original charges and specifications, produced by the judge advocate on my arraignment yesterday, specifies and complains, in the first specification of the second charge, of such a letter as dated on the *thirteenth* day of April, in the year 1825, whereas no such letter is any where specified or referred to, in the aforesaid original exhibition of charges and specifications.—This variance is manifest, upon a comparison of the copy produced by the judge advocate, with the original which I now here produce for the inspection of the court, with the orignal letter hat accompanied it.

Universal military usage, and the imperative provisions of the aforesaid 38th article of the rules and regulations for the government of the Navy, decide that I can be put to answer nothing beyond the tenor of the charges and specifications originally exhibited against me. But, in this particular instance, I waive the objection; requiring only that the prosecutor do now decide and declare his election, to abide the one or the other specification of the letters complained of, or to adopt both, if he please. At any rate, let the form and extent of the charges and specifications be now definitively arranged and conclusively settled.

This point being settled, I shall pray the leave of the court to

* Vide Laws United States, vol. 3, p. 351.

enter my plea of not guilty to all and singular the charges and specifications, under a protest against their sufficiency; and reserving to myself the right, in the progress of the trial, and in due time, of excepting to the said charges and specifications; as designating no offence known to any law enacted for the government of the Navy; as vague and indefinite, and altogether insufficient to put me upon my trial for the matters therein charged, or supposed to be charged. That these points may be submitted, in a way to admit of the maturest deliberation, I have concluded, if it be the pleasure of the court, to suffer the trial to proceed, for the present, under the general issue; and to submit my exceptions to the charges and specifications, or such of them as I shall conclude to be exceptionable, at a more convenient day.

Friday, July 8, 1825."

Commodore Porter then delivered to the court the original letter from the Secretary of the Navy, dated June 22d, 1825, announcing his arrest, and the appointment of a court martial for his trial; and stating that *the charges and specifications*, on which he was to be tried, were therein enclosed: and he, at the same time, delivered the original charges and specifications, so enclosed. The paper read, as such, by the judge advocate, yesterday, purported, from an endorsement on it, to be a *copy* of such charges and specifications: that delivered by commodore Porter, purported, both on its face, and from the letter enclosing it, to be no other than the original. The latter enumerated no such letter as the one dated on the *thirteenth* day of April, 1825, among those charged as being of "an insubordinate and disrespectful character;" but it did enumerate one dated on the *thirtieth* day of April, 1825, which was altogether omitted in the former: so that there was a difference of *two letters* in the series of correspondence, variously specified in the original and in the copy; or in the two exemplifications of the charges and specifications, produced on each side.*

The judge advocate stated to the court that, as the exception therein pointed out by commodore Porter had been received by the accused, he should proceed with the case upon the charges as *read* before the court *yesterday;* that the variation between the two papers, which had been pointed out, was, that a letter referred to in the one as dated the *thirteenth* day of April, was, in the other, by a mistake of the copying-clerk, dated the *thirtieth.*

Alexander J. Dallas, a master-commandant in the navy of the

* Note. Various copies of the charges and specifications, from the official copy, produced and read by the judge advocate, and which was adhered to as the genuine and correct edition, were made out, for the use of the court, and of commodore Porter; in all, or the greater part of which important errors were detected. In the first copy furnished to commodore Porter, in compliance with his request, precisely the same error, in the dates of the letters, before noticed, was repeated: and in a subsequent copy, in the hand writing of the judge advocate, it was again repeated: and, after being pointed out, was corrected. We are now in the possession of these two copies, so corrected.

These circumstances are here noted as some illustration of the consistency and common sense of charging, as a military offence, verbal inaccuracies committed by a clerk in transcribing the minutes of the late court of inquiry.

United States, being duly sworn according to law, (and the other witnesses having been directed to withdraw,) deposes and says—

"I commanded the John Adams, bearing the pendant of commodore Porter. We arrived some time in November last at St. Thomas, in the island of that name. In the afternoon of the same day, lieutenant Platt, in company with Mr. Cabot, an American gentleman residing at St. Thomas, and, as I understood, officiating as commercial agent for the United States, came on board the vessel. They mentioned to commodore Porter that lieutenant Platt, on a visit to Foxardo, had been very harshly treated by the authorities there. The commodore, on receiving this information, determined to visit the place, and obtain an apology from those who had ill treated lieutenant Platt. I was directed the following day to get under weigh with the John Adams; the Grampus, and Beagle being in company, and proceed to as near Foxardo as we could get. The wind proving light, and the pilot being of opinion that the draught of water of the John Adams was too great to permit an approach near the beach, the commodore directed me to anchor under one of the Passage islands, to get out all my boats, and to prepare an hundred and odd men for the expedition. These preparations taking so much time as to make it late in the afternoon, I was directed to be ready, by one or two in the morning, to go on board the Grampus, which vessel would take the boats in tow. I did so, and we got under weigh in the schooner, and arrived the next morning about eight or nine o'clock in the harbor of Foxardo. On our arrival there we were directed to prepare the boats for landing. Immediately after landing, a battery was observed on the hill, at which there was a number of men, *who, to all appearance, intended firing at us.* The commodore directed one of the boats to proceed and dislodge the men at the battery, and to spike the guns. We then landed, and after forming the men on the beach, lieutenant Crabb, with a portion of the marines, was directed to advance on the road leading to the town of Foxardo, and to take a position there. Lieutenant Stribling was despatched with a flag of truce, and a letter from commodore Porter to the Alcalde of the town. Shortly after Mr. Stribling left us we marched towards the town, leaving a guard of marines under lieutenant Barton to take care of the boats. We marched to within from twenty to forty yards of where the marines under lieutenant Crabb were, when we halted to wait the return of lieutenant Stribling. During our march we fell in with a battery of two guns, which we also spiked. After waiting some time in this position, lieutenant Stribling was discovered returning from the town, with two officers, who were said to be the Alcalde and the captain of the Port. A conversation, through the medium of an interpreter, took place between commodore Porter and those persons, which resulted in an apology to lieutenant Platt; the commodore asking the officers whether they were all satisfied? to which they assented. The commodore was then invited by the Alcalde to visit him in the town. The commodore, in company with myself and several other officers, and the marines under lieutenant Crabb, went so far as to lead us by the

orce collected; after which the commodore returned and gave orders for us all to return to the beach. At the beach the men were refreshed with some grog, got into the boats, went on board the Grampus, and returned to the John Adams.

(Interrogated by the Judge Advocate.)

Q. At what hour did you leave the John Adams to go to Foxardo?

A. Between one and two o'clock in the morning.

Q. At what time was it expected you would arrive at your destination?

A. We calculated upon arriving very early in the morning.

Q. Did any person from St. Thomas accompany you besides the pilot?

A. I am under the impression that there was a young gentleman whose name I do not recollect.

Q. Are you acquainted with the object of taking him?

A. No; I was not.

Q. By Capt. Rogers. Was not the visit of commodore Porter to Foxardo for the purpose of resenting an insult to the American flag, in the person of lieutenant Platt?

A. It was the *ostensible object.*

Q. (By the same.) Were not the arrangements of commodore Porter to land in day light?

A. It was his intention to land as early as possible; certainly by day-light: we calculated to arrive there by break of day.

Q. (By the same.) Could you have made your arrangements to land at night?

A. We could have arranged to land at any time of the night.

Q. (By the same.) In what position did the schooners anchor in the harbor of Foxardo?

A. The Grampus anchored nearly opposite to the battery I have alluded to; the Beagle further up in the harbor.

(Further interrogated by the Judge Advocate.)

Q. Were the colors flying on board the schooners when they entered the harbour, and when they anchored?

A. I think they were.

Q. Was the force despatched to dislodge the Spaniards from the battery, before or after the landing of commodore Porter?

A. Before.

Q. Had it returned before his landing?

A. No.

Q. At what time did it join the main party, and where?

A. It joined us on the beach, and almost immediately on our landing.

Q. How many men and officers landed?

A. I presume near two hundred.

Q. How were they armed?

A. With muskets, bayonets, pistols, cutlasses, and boarding pikes.

Q. How long after you landed was lieutenant Stribling despatched to the town?

A. Almost immediately, or soon after our landing.

Q. What amount of force had the Spaniards collected?

A. I cannot say what amount; but in passing them there appeared to be about sixty or seventy men, with a field piece.

Q. Did they appear to be regular troops, or militia?

A. They had the appearance of militia; they were not in uniform.

Q. Was there any complaint made to the authorities at Foxardo, or communication had with them by commodore Porter, on the subject of the insult offered to lieutenant Platt, before you landed?

A. None that I know of.

Q. (By capt. Rogers.) Do you not think that the most effective way to obtain redress was by landing?

A. Yes.

Q. (By capt. Wadsworth.) At the time of your landing, was any inquiry made by the Spaniards as to what force it was?

A. None. I do not think there was an individual to be seen on the beach.

Q. [By capt. Ridgeley.] Was there any act of hostility committed against any of the subjects of the King of Spain, previous to, or after landing?

A. The boat that was sent to dislodge the men and spike the guns at the battery, succeeded in the object; whether that was an act of hostility must be left to the court. If it was not, I know of none.

Q. [By capt. Tingey.] Was this act of courtesy by the authorities at Foxardo, by invitation into the town, after these transactions you have related?

A. Yes.

Q. [By the same.] Was any complaint, or any remonstrance made by the authorities at Foxardo, to commodore Porter at any time during his stay on shore, against his proceedings there?

A. None, that I know of.

Q. [By capt. Wadsworth.] Do you know the nature of the apology made by the Alcalde and captain of the Port, which you say was satisfactory to commodore Porter, and the officers accompanying him?

A. The apology was made to lieutenant Platt for the injury done him, but I am not able to state the terms of it.

Q. [by capt. Brown.] What was the deportment of commodore Porter towards the Spanish officers whom he met?

A. Gentlemanly and proper.

Q. [By capt. Henley.] Did commodore Porter consult with you previous to his landing? If yea, state the amount of the consultation.

A. He did not consult me.

Q. [By capt. Ridgeley.] What was the conduct of the officers and men who landed towards the subjects of the King of Spain whom they met?

A. We landed as I have stated, and marched up towards the town, committing no personal violence against any one. The conduct of the officers and men was correct.

Q. [By capt. Elliot.] From what you could perceive in commodore Porter, previous to, at, and after his landing with his force, at Foxardo, was he actuated by any other motive than to obtain an apology for the insult offered to one of the officers of his squadron?

A. It appeared to me the only motive.

Q. [By capt. Ridgeley.] Was not the place where you landed considered as one of the rendezvous of pirates?

A. It had been frequently said so; I knew nothing of it personally.

Q. [By the judge advocate.] In the conversation between commodore Porter and the authorities of Foxardo, was any thing said on the subject of piracy or pirates, and was any demand made for pirates, or for property plundered by them?

A. None that I know of: I was not near enough, however, to hear the conversation between them, and it was not until the commodore asked the officers if they were satisfied with the apology, that I approached near enough to hear them.

CROSS EXAMINED.

(Questions by commodore Porter to captain Dallas.)

Question. Were not our proper colors hoisted, both on the schooners and boats, when they came in sight of the harbor, and during the whole time of the approach and of the landing?

Answer. Yes.

Q. Was not every thing done openly and fairly, and in my own character, without any attempt to deceive?

A. Yes.

Q. Did I not land in my uniform, though advised by some of my officers to take it off lest it should make me too conspicuous?

A. You landed in your uniform. I do not recollect any advice.

Q. Did you not, under all circumstances, consider it an effectual course, on my part, to secure the officers from insult and interruption, while engaged in the pursuit of pirates, in that quarter, by intimidating the inhabitants of those towns or districts suspected of harboring and assisting the pirates?

A. Certainly, I think it was a course that would intimidate other places supposed to be a receptacle for pirates; and calculated to prevent them from suffering them to come there; and a means of obliging them to pay more respect unto our officers.

Q. Were not the guns training on us, at the time I ordered the party to land and spike them?

A. I think they were endeavoring to train them on us.

Q. Did not lieutenant Stribling, on his return with the flag, inform me, that the people or authorities of Foxardo, had heard of my coming and were preparing resistance?

A. I heard of the circumstances, but do not recollect how or from whom I heard them.

Q. Were not my orders, to the party who landed, to spike the guns, without injury to the person or property of any of the in-

habitants; not to fire, unless first fired upon; and generally to respect the persons and property of the inhabitants?

A. I consider those as the orders that were given.

Q. Did any of the main body enter the town of Foxardo? and was not our whole force so disposed, as to impress the people with a sense of our disposition, and our power to repel and punish aggression; at the same time that all actual violence was avoided?

A. The main body did not enter the town. To the latter clause of the question, I answer, yes.

Q. Was not the grog, sent to the beach as a present from the town to the men?

A. I did not understand it in that way. The purser was directed to procure some, and when he offered to pay the person from whom he procured it, he was refused and told it was intended as a present. The person from whom it was procured was one of those who accompanied the Alcalde and the flag.

Q. After the negotiations and explanations were ended, did not the authorities and inhabitants appear well satisfied and acquiescent in my proceedings?

A. They accompanied us, in considerable numbers, down to the boats; and there was no other appearance than that of a good understanding between all parties.

CHARLES T. PLATT, a lieutenant in the navy of the United States, being duly sworn according to law, deposes and says,

On the 24th of October, between the hours of seven and eight o'clock in the morning, Mr. Bedford, a clerk in the house of Messrs. Cabot and Bailey, commercial agents at St. Thomas, with a letter from those gentlemen, came on board the Beagle then under my command, lying in the harbor of St. Thomas, informing me, that their store had been robbed the preceding night of goods to not less than the amount of $ 5000. The letter contained a request for me to go in search of the goods. I then went ashore and inquired of merchants in that place, who had been previously robbed, in order to ascertain whether I would be justifiable in proceeding in search of these goods to Foxardo, at the east end of Porto Rico. On making the inquiry I was perfectly satisfied, as far as I could be without knowing positively, that the goods were then on their way to Foxardo. I accordingly got under weigh as speedily as I could, taking with me a pilot, and a clerk of Messrs. Cabot and Bailey, with a description of the goods contained in the advertisement, herewith presented to the court. [Mr. Platt here presented an advertisement to the court describing the goods lost.] On the evening of the 26th, about six o'clock, I anchored in the harbor of Foxardo with my colors flying. I was anxious if possible to get on shore that night, but my pilot, who acted not merely in that capacity, but as my guide and interpreter on shore, through ignorance or otherwise, declined going, stating that he was not able to shew me the way at that late hour. On the morning of the 27th, at an early hour, a boat came along side with some person in it, bearing the appearance of a soldier, who informed me that the captain of the port was anxious to see me on shore, presenting his compliments at the same time. I was,

at that time, preparing to go on shore; I was somewhat fearful that the character of the vessel was not known on shore; and asked the man, whether the character of the vessel was known on shore; he answered that it was. Lest he might have been mistaken, I told him to inform his commanding officer, that it was the United States schooner Beagle, and that I should be on shore as soon as possible. So soon afterwards as was practicable, in company with lieutenant Ritchie, Mr. Bedford and the pilot, I visited the shore. On my landing I was told that I could not proceed to town.—This however, I received from a parcel of ragamuffians, who appeared to me more like highway-men, than any thing I could compare them to. I attempted, after this, to go again on board my vessel; I was prevented from doing so. This led me to inquire what was the meaning of this course of conduct; whether they were authorized. I was informed, by a citizen standing there, that they had no authority to detain me. In evidence of which horses were procured (without my asking,) by the citizens there for myself and all who were with me, to ride up to the village. On my arrival at the village I reported myself, having been advised so to do by some of the citizens, first to the captain of the port; made known to him my business, the object of my visit, and my reasons for my appearing in citizens' dress; and also a letter to Mr. Campus, shewing the character of myself and vessel. Mr. Campus was a man who, from his wealth, stood high as a person of respectability. The captain of the port appeared to be perfectly satisfied with the character of myself and my vessel, took down the names of the officers and the force of the vessel, then directed me to call on the Alcalde. I did so and pursued the same course with him as with the captain of the port. He also appeared perfectly satisfied, and approved very much of my having come on shore in citizens' dress: said it was a very prudent and necessary precaution. He also expressed a confidence in succeeding in securing the goods; said he had no doubt, but he should be able to procure them before night. This conversation was private; there might have been others in the room, but none were, I believe, within hearing, but the interpreter and ourselves.

The court not being able to complete the examination of lieutenant Platt, adjourned till to-morrow morning at 10 o'clock.

SATURDAY, *July 9th.*

The court met pursuant to adjournment of yesterday, present all the members of the court, (excepting captain Elliot,) the judge advocate and captain Porter.

The president announced to the court, that captain Elliot was sick and confined to his bed, and wholly unable to attend the meeting of the court to day. The accused stated that he had no objection to the court proceeding in the business before it, and that when captain Elliot should be able to resume his seat, the proceedings of the court during his absence should be read to him. Whereupon the court decided to proceed.

The court resumed the examination of lieutenant Platt.

"The Alcalde then informed me that the recovery of the goods might probably be attended with some expense: I stated to him that if it were necessary to offer a reward, I was authorized to offer a reward not exceeding one thousand dollars; for which I considered the hand-bill yesterday presented to the court as a sufficient authority. I then proposed to the Alcalde the propriety of my visiting the different stores, with the clerk I had brought with me, for the purpose of examining and identifying the goods. The Alcalde observed that as I had very properly come on shore in citizens' dress to prevent any suspicion; that it was advisable to let the matter rest entirely with him—that were I to accompany him, though in citizens' dress, suspicion might be excited. I then left his office, under the impression that the goods would be procured, before night, by the police of the place. A short time after, I received a message from the Alcalde, saying that he wished to see me at his office. I was then fully under the impression that he had obtained some information, which would lead to the recovery of the goods. Under this impression I went over to the office, accompanied by lieutenant Ritchie and the pilot. On my arrival, I inquired of the Alcalde, whether he had sent for me and for what purpose. I was answered by the captain of the port, in the most insulting, most provoking, and most aggravating manner, that it is possible to imagine; saying that he had sent for me himself, to demand of me my register, on the refusal of which he would confine me in prison. I told them that I thought I had already satisfied them of the character of the vessel; that I had no register to shew them—that a man of war carried none;—that my commission, my uniform, and my colors, were all that I had to shew to establish my character;—that I had already offered to exhibit these, which they considered unnecessary, being perfectly satisfied of my character, without it. I then expressed my astonishment at the course of conduct they had pursued, so unexpected to me, and so unprecedented; and furthermore that I considered it to be a duty, which I owed to my country, to myself and to the officers under my command, to make a formal report of their conduct to commodore Porter. Lest however they might deny having confined me, I left the office, with the intention of returning on board my vessel, and leaving the port, not considering myself as a prisoner by their mere say so. I had proceeded about five rods from the Alcalde's house, when I was pursued by the Alcalde himself, and two soldiers; the Alcalde himself seized me by the collar; I was brought back and placed under charge of a sentry. After, perhaps, an hour's debate among themselves, I inquired of their interpreter, what they meant to do; he informed me that as as they were not satisfied with my character, my having shewn no evidence thereof, they were determined to keep me confined until I should produce some such evidence, or they should hear from St. John's. I then requested permission to go on board with any officer they might choose to send, whom I pledged to satisfy of the character of myself and vessel. This, however, was denied me. I then requested that I might send Mr. Ritchie or the pilot on board,—that they might keep me in bon-

dage if they chose: all was denied me, and there was no chance left. I then made another proposition, that I should send a note by any officer of theirs, whom they pleased, and pledged myself, that if he did not return, they might do with me as they thought proper. This was refused. After perhaps another hour they permitted me to send Mr. Bedford on board for my commission, which, at the time, they said was all they would require. I however directed him to bring my commission and uniform. So soon as he returned, I put on my uniform and presented my commission. After consulting again for, perhaps, half an hour, they pronounced my commission a forgery, and me and my officers a damned pack of pirates. I then, finding the probability of my being confined there some time, proposed the propriety of going to some decent house, where they might place sentries over me. In answer to this, the king's house was recommended, as I understood; I, being at the time fully under the impression, that the king's house was the most genteel house in the place, invited Mr. Ritchie, and even the pilot to accompany me, they being prisoners like myself. On my approaching near enough to discover that it was a mere guard house, well calculated to produce the yellow fever or plague, I declined taking up my lodgings there, unless they forced me to do it. After some few minutes they consented to let me return to the Alcalde's office, under charge of a sentry. Being fully aware of my unpleasant situation, I again, although repugnant to my feelings, did ask the interpreter, what furthermore they required of me; after making the inquiry of the proper authorities, he answered that I had shewn no other commission than one as lieutenant and not one as lieutenant commandant. They were determined to keep me there until they could hear from St. Johns, or until I produced something that was satisfactory. I asked permission to send Mr. Bedford again on board, which was granted. I directed him to bring all my papers on shore, that I might come across some paper which might be satisfactory, and which it would not be improper to shew them. On the return of Mr. Bedford, I produced the orders from commodore Porter to me, directing me to take command of the Beagle. They told me an appointment of that kind could not emanate from any thing less than an admiral; and that they were thoroughly satisfied that I was a pirate: as for commodore Porter, there was no such man in our navy, and that I could not hoax them in that way.

They still continued me confined until a late hour in the afternoon: towards sun down they, without any farther application from me, and for what reason I know not, released me, and allowed me to go aboard my vessel. We left the village mortified, and hissed at by the ruff scuff of the place, went on board, got under weigh, and proceeded to St. Thomas.

On the 12th November commodore Porter arrived at St. Thomas in the John Adams; as soon as I came to anchor I visited the vessel, reported myself to him, and mentioned to him the circumstances which led to my visit to Foxardo, and the treatment I had met with. The commodore informed me it was necessary I should

make out a written report; I stated to him it should have been prepared had I expected him so soon, and that he should have it.

The commodore said, if circumstances justified my going in the manner in which I went, that he would visit Foxardo, and obtain redress for the insult offered to me, and to the flag. I referred the commodore to Messrs. Cabot and Baily, and to Mr. Furnis, both houses being commercial agents at that place.

I went on shore, at the request of the commodore, to request Mr. Cabot to come on board, [Mr. Furnis was then on board,] and to procure a pilot to carry us to Foxardo. Mr. Cabot returned on board with me. The next morning I got under weigh with the Beagle, having the pilot on board, stood out of the harbour of St. Thomas to join the John Adams, then under weigh, delivered my written report to the commodore, and was directed by him to proceed ahead with the pilot for Foxardo. The wind, however, proved light, and we were compelled to lay too, off and on, during the night. The next morning I was hailed from the Adams, and directed to proceed ahead as before. For reasons unknown to me, the commodore gave an order, and the vessels came to anchor about nine o'clock in the morning of the 13th, under the lee of Passage island. At midnight of the 13th, the Grampus, Beagle, the barges, and boats of the Adams, with as many officers and men as could conveniently be spared, got under weigh, and, about eight o'clock next morning, arrived in the harbour of Foxardo. The barges were manned and officered; one barge was sent to attack a fort on an eminence mounting two guns; the rest of the men landed on the beach. The Grampus was anchored off the battery; the Beagle, passing by the battery, anchored so as to cover the landing of the men. I was directed by commodore Porter, as he passed me, to follow him with as many men as I could conveniently carry in my boat. Lieutenant Stribling, about the time of our landing, was despatched to the town with a flag of truce, and a communication from commodore Porter to the authorities of the place. About fifteen minutes after our landing we were directed to fall into line and march up: we got there in, perhaps, about fifteen or twenty minutes from the time we started from the beach. On the out-skirts of the town, I mentioned to the commodore that there were two guns on a causeway on the road to the village. He ordered some officers and men to spike them. After arriving at about forty or fifty rods from the village, we halted; a short time after, we discovered a white flag, which proved to be the flag of lieutenant Stribling, accompanied by the Alcalde, the captain of the Port, the interpreter, and a number of the citizens.

Before they met commodore Porter, they professed their ignorance of the object of his visit. The commodore stated to them that they ought to have known the object of his visit from the tenor of his note; that he came there for the purpose of obtaining suitable redress, or an apology for the insult, that had been offered to the flag of the United States, in my person, [pointing to me.]

This seemed, at first, to create some considerable astonishment, on their part, that they should be accused of having treated me in any way improper.

The commodore then asked the Alcalde, in a very positive manner, whether he had not imprisoned me? His answer was, that he had, after knowing my character as an officer in the United States' navy; but that he was *not to blame*, for that he had been *compelled to do it by others*. The commodore then told him, that, as he was the chief magistrate of the place, he had nothing to do with others; and that he should regard him as responsible for any acts of violence that might have been committed on me; that there was no time for any altercation; that the time had expired, within five or seven minutes, which he had allowed them; that an apology was necessary; such a one as should be dictated by him, a refusal of which would compel him to resort to arms, which should terminate in the final destruction of the village. An apology was made. It was that they had imprisoned me wrongfully; that they were sorry for it, and that, in future, they would respect the United States' naval officers, as their character deserved. After that, we were pressingly invited to come into the village, and strongly urged to take some refreshments. Commodore Porter did advance; passed by a six pounder, which was primed, and a man standing by with a lighted match, and a number of armed men that had been collected.

He then ordered us to return to the beach, without entering the heart of the village. The commodore informed me at the beach, that it was, at first, his intention to have accepted the invitation, and entered the village with the men, but, apprehensive that some difficulties might arise, amongst the sailors and men, he thought it better to return, and have the refreshments brought down to the beach. The refreshments were brought down; we partook of them, proceeded to sea, and re-joined the John Adams.

(Interrogated by the Judge Advocate.)

Q. Was it the object of your visit to Foxardo to recover the property that had been stolen at St. Thomas, or to obtain the persons who had perpetrated the robbery, or both?

A. The object of my visit was to obtain the property, and the pirates, as they were supposed to be, through the police, and through them only.

Q. Was the United States' flag flying on board the Beagle during the time that she lay in the harbour of Foxardo?

A. The flag was flying when we arrived, and was hoisted again at nine o'clock on the following morning, as I presume; such being my orders, and such the regulations of the service.

Q. Was there any flag, ensign, or other distinction, displayed at the time of your landing?

A. None at the time of my landing; but, as I stated before, I entered the harbour with my flag flying, and it was hoisted at nine o'clock the next morning.

Q. When you landed, do you suppose that the Beagle was known on shore to be an American man-of-war?

A. I feel perfectly satisfied that her character was known.

Q. Were there many persons on the shore who saw you land from her?

A. Probably fifteen or twenty.

Q. What was your object in landing without your uniform?

A. To prevent any suspicion, on the part of the boats in the harbour, of which there was a great number.

Q. Could not the flag of the vessel be seen as well from those boats, as from the village of Foxardo, and the character of the Beagle as well ascertained?

A. Yes; but all merchant vessels carry the same flag that we did?

Q. Had you, when you landed, any document of any description to verify your claim to the character of an American officer? If so, what was it?

A. We carried a letter from one of the most respectable mercantile houses in St. Thomas, to Mr. John Campus, a merchant in Foxardo?

Q. Was that an open, or sealed letter?

A. It was a sealed letter; but had been read to me before it was sealed. It was given me for the purpose of enabling me to go on shore in disguise.

Q. Did you see Mr. Campus while on shore?

A. I met him at the entrance of the village, before seeing the captain of the Port, and the Alcalde.

Q. When did you hand him the letter?

A. The moment I arrived at the village.

Q. Did he accompany you to the house of the captain of the Port, and the Alcalde?

A. He was at the captain's of the Port, I think, and certainly at the Alcalde's, and read the letter to them both in my presence.

Q. Do you know whether Mr. Campus had, or had not, at that time, in his possession, the goods of which you were in search?

A. I do not know personally; I can only judge from the evidence that I brought home, and am fully under the impression that he was, at that time, in possession of the goods.

Q. When you were interrupted on the beach, on your landing, do you suppose those who did it knew you to be an American officer?

A. Yes.

Q. From what circumstance?

A. Because they had sent a boat alongside of me, and said they knew my character, and I had sent word to them before landing, of my character.

Q. Did you inform the citizens, who interfered in your behalf on the beach, who you were, and what was the object of your visit?

A. I mentioned that I was an American officer, in command of the Beagle, and that I wished to report myself to the proper authorities.

Q. Did you, in person, proceed to any of the stores in town to inquire after the goods you were in quest of?

A. I was in no store in the place, except Mr. Campus's store when I went to see him. I was in one other, the store of the gentleman who had lent me his horse; I was asked into his house, and passed into the store, but no further, and, with Mr. Bedford, privately examined some of the goods, to see if they corresponded

with what had been taken. This was not done with a view of interfering with the authorities.

Q. Did you see Mr. Campus after you first left the office of the Alcalde?

A. Yes; I found him there when I went to the Alcalde's, after being sent for; he was engaged in conversation with the rest, and appeared very much confused.

Q. Did you appeal to him to verify your character, and what was his reply?

A. I appealed to him; he replied, that he had stated my character; urged Mr. Bedford and myself to go to another place to look for the goods, which I declined: he offered us horses to go, and, I believe, that, if I had been disposed to go, they would have released me.

Q. During the period that elapsed between your first visit to Foxardo, and your seeing commodore Porter, at St. Thomas, had you made any report of the affair to him, or to the government?

A. None whatever. I expected him at St. Thomas, (where I was directed to await his arrival,) though not so soon as he actually came.

Q. Did you, during that period, consider that the flag of the United States had received an insult, which required atonement?

A. Yes, I did.

Q. Did Mr. Bedford, or any other person, accompany you to Foxardo on the second visit? and, if so, for what purpose?

A. Mr. Bedford went down on the second visit, but did not land. The object was, that, if any discovery should be made, he might be there to identify the goods.

Q. In the conversation between commodore Porter, and the authorities, was any thing said on the subject of those goods, and what?

A. I do not recollect that any thing was said on the subject.

Q. What is the distance between the beach where you landed, and the village at Foxardo?

A. About a mile and a half.

Q. Had any complaint been made, or explanation asked, either by yourself, or commodore Porter, for the insult you had received, either of the authorities at Foxardo, or of the island, before your second visit?

A. None by myself, and none that I know of by the commodore.

Q. (By capt. Rodgers.) What is the character of the inhabitants of Foxardo? Is it considered a place of refuge for pirates, and are not pirates openly protected there?

A. Yes; I have heard so. I have understood that hundreds of thousands of dollars worth of property had been stolen at St. Thomas, and remnants, or parts of the goods, discovered there, and in the neighbourhood.

Q. (By capt. Thompson.) Will you please to state to the court the particular instruction, under which you thought yourself authorized to land at Foxardo, in order to recover the property in question?

A. The instructions under which I acted were the general in-

structions from commodore Porter, of which I was furnished with a copy, as well as the other vessels in the squadron.

Q. (By the same.) Do you know the house of Cabot, Bailey, and Co. to be accredited agents of the United States?

A. I know them to be respected as such by the authorities at St. Thomas, and that they act as magistrates; I mean that Mr. Cabot does.

[Cross examined by Commodore Porter.]

(Questions to Lieutenant Platt, by Commodore Porter.)

Q. Had not the island of Porto Rico, and especially the district about Foxardo, been notorious, from common report, before, and at the time of your visit, as a rendezvous and refuge for such of the pirates as were unable to keep the sea; and who were generally said to make that their retreat, with their plunder, after their marauding expeditions?

A. Yes.

Q. Were not these reports communicated to me, and did I not receive frequent and heavy complaints of the piratical character of Foxardo, and the country around?

A. Yes; I was present at a conversation between commodore Porter, and respectable merchants at St. Thomas, after his arrival on the twelfth of November; they stated that protection was afforded to pirates by the inhabitants of Foxardo; that they were generally believed to be concerned with the pirates. They referred him to respectable gentlemen on shore, who had letters from respectable people to that effect.

Q. Were not the guns of the battery trained on the Grampus, as she lay abreast of the battery, before any order was given to land?

A. I do not know; they were so trained before they left the Grampus.

Q. Did the party who landed to spike the guns, make any attack, or offer any violence to the persons at the battery, or use any force to dislodge them?

A. The party landed and took possession of the fort; the Spaniards abandoned it before our men reached them.

Q. Was not the most perfect order preserved among our men on the march to Foxardo?

A. Yes.

Q. Was any violence or injury, of any kind, committed by any of our men, upon the persons or property of any of the inhabitants?

A. None whatever.

Q. Were not the grog shops, on the road from the harbour to the town, thrown open, and temptingly set out with drink, and without any protection?

A. They were; liquor was brought out and offered to me as we were returning; I did not see any thing of the sort as we went up.

Q. Did you see or hear of any instance of the men's quitting their ranks to enter these shops, and had they any other means of getting refreshment until their return to the beach?

A. None whatever.

Q. Were you near us during my conference with the Alcalde, and did you hear distinctly what passed?

A. Yes, I was along side of him.

Q. Did I not exact, in addition to the apology for their ill treatment of you, a promise that aid and assistance should be furnished, and respect shewn to American officers, who might go to Foxardo, in pursuit of pirates; and did not the Alcalde promise such aid and respect, so far as lay in his power?

A. Yes, that they should be respected and the Alcalde promised it.

Q. Did not the Alcalde, on being asked by me, why he had put you in confinement, say that he could not avoid it, that he had been compelled to do so by others?

A. Yes.

Q. Did you not understand, from the said conversation and the excuses made by the Alcalde, that there was some mystery in the transaction; and that the regular authorities of the place had been overawed, and forced from their duty, by the irregular interference of unauthorized persons?

A. I drew that conclusion from the conversation that passed, and the apology made.

Q. Did you not ask the Alcalde, in my presence, if the goods had been recovered, and did he not answer in the negative?

A. I do not recollect any thing of the kind.

Q. Did you know, at the time you went to Foxardo, that Campus had the goods, or did you get that information afterwards?

A. I received the information since.

Q. Did you hear, from many of the persons on shore, after my interview with the Alcalde, that they had been expecting me and preparing to resist me?

A. I understood from the interpreter that the visit was not unpected to him, that he anticipated it.

Q. Did not the Alcalde and the inhabitants, generally, appear to be perfectly satisfied with my proceedings, and did we not all part in good fellowship and with mutual civilities?

A. They did.

Q. Did you hear any complaint from any of the inhabitants, of my landing, or of the treatment they received?

A. None whatever.

Q. Upon your arrival at St. Thomas, after your confinement at Foxardo, what American officer did you find in command there, and did you report to him, either verbally or in writing; or did you give him any information of what had passed at Foxardo, and what advice or instructions did he give you?

A. Lieutenant Sloat came in, some days after. I informed him what had passed, but made no formal report to him. He expressed an opinion, that it was no more than we had a right to expect from them, but gave no advice.

Q. Did you make any formal report to me of those transactions immediately on my arrival at St. Thomas?

A. I did as I have before stated.

Q. Did you afterwards carry your vessels to Ponce, Porto Rico, or go there on other official business, by order of lieutenant Sloat? and how were you received and treated there by the public authorities and inhabitants; was it not with marked distinction and respect?

A. I went, not by orders of lieutenant Sloat, but of myself. I visited Ponce some time after, in consequence of the accompanying letter from Mr. Furniss;* where I was received with the greatest possible attention and respect. I was invited to a public dinner, where there were about forty of the most respectable citizens: and it was known, that I was the same person, who had visited Foxardo; and I landed in the same uniform, that I had on at Foxardo. The particulars of my visit appear in a report made by me to commodore Porter, dated February 10th, 1825.

Q. Did they make any such remark as this, that they were determined to shew by their conduct towards you, that *they* were *not pirates;* and did you understand them as alluding to the affair of Foxardo?

A. No. I understood they were mortified at the treatment I had received at Foxardo, and were determined to shew that they were a different sort of people.

Q. Did not some of the most respectable inhabitants of Foxardo apologize for the conduct of the Alcalde towards you, by saying he was, somehow, under the influence of the populace?

A. Yes, the interpreter himself told me that the Alcalde was swayed by others; and an Irish gentleman there took a very active part on the occasion.

The court adjourned till ten o'clock on Monday morning.

MONDAY, *July* 11*th.*

The court met pursuant to the adjournment of Saturday; present all the members of the court, (excepting captain Wadsworth,) the judge advocate and captain Porter.

A letter was read to the court from captain Wadsworth to the President, accompanied with a certificate from his attending physician, stating that he was too much indisposed to be able to attend the court-martial this day.

The court (the accused assenting,) took the same order on this occasion as on Saturday in consequence of the absence of captain Elliot.

The minutes of the proceedings of Saturday were then read by the judge advocate.

The examination of lieutenant Platt was resumed,

Q. (By the president of the court,) How far is it from Foxardo to St. Johns, and is the communication between the places frequent?

A. I understand the distance is about forty or fifty-five miles, and that the communication between the places is daily.

Q. (By captain Porter.) Was it generally anticipated and un-

* Note.—This letter, of which we have no copy, was delivered to the judge advocate; it is wholly immaterial.

derstood by the officers of the navy on the station, and by the persons at St. Thomas, who had heard of the treatment you had received at Foxardo, that I should proceed to the latter place and get satisfaction for their conduct; and, that in doing so, I should land with an armed force and march to the town?

A. It was hoped by the merchants and respectable citizens of the place, that such would be the case: and was wished for by the officers on the station.

Q. Did this general anticipation of my intended course, proceed from any communication from me to the officers or others, of my intended operations, or merely from the general opinion of the propriety or necessity of the measure?

A. From the opinion of the propriety and necessity of the measure.

Q. Was it the general opinion, and your own, that the course which it was supposed I intended to pursue, was a necessary and effectual measure to repress piracy, and ensure respect and protection to our officers and detachments, when landing in the discharge of their duty?

A. Yes; it was thought to be necessary that such a stand should be taken. Until it happened, no vessel dared leave the port without the protection of a man of war.

Q. Was it the general opinion, and you own, from your experience of the consequences of the operation at Foxardo, that it had made the most beneficial impression, and had produced effects of great practical utility in the accomplishment of the general objects of our cruize,—the suppression of piracy?

A. It was decidedly my impression; and the subsequent treatment I have received from the authorities in the Spanish West-India Islands, and their conduct since, has confirmed this impression. I never before knew of any aid or assistance being furnished by the authorities of Porto Rico; it has been done since.

Q. Had you not been cruizing, a considerable time before your first visit to Foxardo, in the neighbourhood of that place and St. Thomas, in the Beagle? Was not the Beagle well known in those parts, and was there not daily and hourly intercourse by means of small boats between St. Thomas and Foxardo?

A. Yes, I had been on the station a short time; I had been cruizing in the neighbourhood of Foxardo, within sight of the east end of the island, before I went to St. Thomas, and there was a constant communication between Foxardo and St. Thomas.

The examination of this witness being closed,—at the request of a member, who had a proposition to submit, the court was cleared.

The proposition having been submitted, after deliberating upon the same, the court adopted the following resolution.

It appearing to the court that what purports to be the proceedings of this court, and particularly the evidence given by the witnesses, who have heretofore been examined, have been published in a newspaper of this city; and this course appearing highly objectionable, and in particular, virtually annulling a special rule of all courts martial, that no witness previous to his examination shall be permitted to know what testimony has been given by any

other person;—it is ordered by the court, that no spectator, other than such persons as may be particularly employed by captain Porter, and for his use, be permitted to take minutes of the proceedings of the court.

Whereupon the court was opened, and the foregoing proceedings announced.

Robert Ritchie, a lieutenant in the navy of the United States, being duly sworn according to law, deposes and says,

I landed in company with Mr. Platt at Foxardo on the morning of the 27th of October. Mr. Bedford, a clerk of Messrs. Cabot and Bailey, and the pilot, were in company. It was about six or seven in the morning: we met a number of men on the beach. One man, with a cutlass in his hand, but without any appearance of being an officer or soldier, addressed lieutenant Platt, asked him for his register. Lieutenant Platt replied, that he carried no register; told him what vessel it was—that it was the United States schooner Beagle. He inquired for the captain of the port, and was told he lived in Foxardo. One of the citizens offered to show us the way, and we started off. We saw the captain of the port on our arrival at the town, and told him our business. Mr. Platt told him, that he had come on shore in citizens' dress—that he had brought with him a clerk of the house, whose goods had been stolen. The captain of the port asked lieutenant Platt for his register; he replied that he carried none; he was satisfied apparently. Lieutenant Platt shewed him the letter he had for Mr. Campus: he sent a young man with us to shew us where Mr. Campus resided. On our leaving him he appeared perfectly satisfied. After Mr. Campus had read the letter, he offered to render us all the service in our power; said it would be necessary for us to go over to the Alcalde's house, and he would forward our views. On our arrival there we found the captain of the port. Mr. Campus related to the Alcalde, what our object was; he appeared perfectly satisfied, and shook hands with us after an introduction. Mr. Campus then requested the Alcalde, and the captain of the port, to go into a private room, that he wished to speak with them. The door was shut—we heard them in conversation. Lieutenant Platt proposed to me to go over and get some breakfast, as they were busy. We had just finished our breakfast, when a negro came over with a sword in his hand, and told us the captain of the port wished to see us. On our arrival at the Alcalde's house, the captain of the port came up to lieutenant Platt, and demanded of him his register. He replied, I told you and I tell you again, my vessel carries no register. He appeared very angry, and said he would detain us, until he heard from St. Johns: lieutenant Platt then attempted to leave them. The Alcalde took him by the arm and said he must consider himself a prisoner. He asked him why he was detained as a prisoner; the captain of the port replied, you are nothing but a pirate. I began to walk to and fro, and he ordered me into the same room where lieutenant Platt was; and he said if we were not satisfied with that, he would order us to the king's house. Just at that moment, a gentleman came up and accosted me by name. His name is Craft; he is a planter in the

island. He asked me what my difficulty was, and I told him. He turned round to the captain of the port, told him who I was, that he had seen me at St. Johns at the funeral of lieutenant Cocke, and he knew me to be an officer in the navy. The captain of the port appeared very angry, was walking about, and swearing in Spanish. Lieutenant Platt asked him, if he would allow me or any gentleman present to go on board his vessel and get his commission—he said, no, he would send us to the city—St. Johns. The gentleman, who acted as interpreter, and had been the Alcalde before, offered himself to go; he objected to that; and allowed Mr. Bedford, (the clerk of Mr. Cabot,) and Mr. Campus, to go. They brought both our uniform coats ashore, and lieutenant Platt's commission. The commission was read to him by the interpreter. He threw it on the table, said it was a forgery, that there was no lieutenant commandant in it. The captain of the port then became very abusive, walked about, and I could frequently hear him talk of commodore Porter and the officers. I then attempted to come out of the door, and two negroes who stood there with cutlasses ordered me back. Some conversation took place between the captain of the port, the Alcalde and the interpreter, in the back part of the room, but I could not understand what was said.

The interpreter then came forward, and asked lieutenant Platt whether he had any thing to show that he was lieutenant commandant, for that the captain of the Port, as he said, was so ignorant, that he could not beat it into his head. He said he had his appointment from commodore Porter, which he could shew them, his orders to take command of the vessel. Mr. Campus, in the mean while, had brought horses there, and told lieutenant Platt he might probably get the goods at a small town about twenty miles off, the name of which is Naguaba. Lieutenant Platt declined going, and sent Mr. Bedford, and Mr. Campus, on board for all his papers. It was some time before they returned with the papers; and we were kept in the mean time guarded in the room by the negroes. When they returned with the papers, lieutenant Platt shewed the captain of the Port his orders. The captain of the Port did not appear satisfied with the papers, until the interpreter and Mr. Craft told him they knew it to be commodore Porter's signature, that they had seen it before. At this time a number of citizens had met in the room together; a long consultation took place between the Alcalde, the captain of the Port, and the citizens. Mr. Craft, and the interpreter, who appeared very warm in our favour, told them the impropriety of their conduct in detaining us. They at last agreed, about sun set, to let us return to our vessel. We proceeded towards the vessel, and, at the outskirts of the town, we saw some blackguards, who laughed at us. We took no notice of them, but passed on, got on board the schooner about seven or eight o'clock, and made the best of our way to St. Thomas.

We told the captain of the Port, while he had us detained, that commodore Porter was coming out, and we should acquaint him with our treatment. Neither the Alcalde, nor the captain of the

Port, had any uniform on; I asked them why they had no uniform on? they said it was none of my business.

On the morning of the fourteenth November we arrived in the harbour of Foxardo, under the command of commodore Porter. Standing in, the commodore hailed lieutenant Platt, and told him to stand in, and cover, with his schooner, the landing of the troops. We did so, and had every thing clear for action. After the men from the Grampus, and the boats had landed, the commodore, in passing by, ordered lieutenant Platt to come on shore. I landed with Mr. Platt; the troops were then ordered to march. Before we got on shore, lieutenant Crabb had marched with the marines, and Mr. Stribling had gone with the flag. Mr. Pendergrast, and the party who had spiked the guns on the hill, just joined us. We all marched off, leaving Mr. Barton, with a party of marines, to guard the boats. On our passing two guns, about a quarter of a mile from the beach, the commodore directed Mr. Pendergrast to spike them, which was done. On our arrival near the town, I observed lieutenant Crabb, with the marines, stationed about four or five hundred yards from a field piece, at the entrance of the town. The commodore then ordered the men to halt, about one hundred yards from Mr. Crabb. After we had been there ten or fifteen minutes, I observed Mr. Stribling, with the flag, coming down, with the Alcalde and the captain of the Port. When they arrived, the commodore requested all the officers to assemble together under a tree. The commodore told the Alcalde the object of his visit; that he must make an apology to lieutenant Platt for his treatment, satisfactory to the officers round. He did apologize. The commodore told him, that should any officer hereafter land there, he must treat him with every respect that was due to him. The commodore then shook hands with both of them; they gave him an invitation to go into the town. The commodore asked if there were any refreshments, he wished some for his men. I pointed out a man with whom we had breakfasted, who said he would furnish liquor. The commodore walked into the edge of the town with the Alcalde and the captain of the Port He then wished them good by, and said he should march his men down to the beach, where they could get refreshments. I believe I was the last man out of the town. Mr. Campus came up, and asked me if I would carry a letter from him to Mr. Bergeest, at St. Thomas. I said yes, provided it would not detain me. I asked him if he had heard any thing of the stolen goods; he said he had not, though he had made every inquiry. He went for the letter, but not returning soon enough, I proceeded to the beach. On my return I found the houses that had been deserted, as we went up, had their inhabitants in them; they took off their hats to me as I passed, and gave me some water to drink. I got down just as the men did with the liquor; it was paid for, and we went off. Several persons on the beach, on our return, offered us cocoa nuts.

(Interrogated by the Judge Advocate.)

Q. When you arrived on the first occasion, in the harbour of Foxardo, and while you remained there, were your colors flying on board the Beagle?

A. When we arrived it was just at sun set; the colors were then flying, and, as we landed, Mr. Platt ordered them to be hoisted at nine o'clock.

Q. Do you think that when you landed the character of the vessel was known to the people on shore?

A. I think so; for a man who had come off to us, had, by this time, landed; and, I presume, had acquainted them with our character.

Q. Was there any interruption offered to you on the beach when you landed?

A. Only by the man that I before mentioned; who had a sword in his hand, and his head tied up.

Q. Was your character announced to the people on the beach?

A. Yes.

Q. Was it known to all with whom you spoke, that you were American officers?

A. Yes.

Q. What was the object in landing without your uniforms?

A. We thought it would increase our prospect of success, if it was not known who we were.

Q. Why then did you announce who you were?

A. We announced it to the authorities as we had intended, and to the man on the beach; we knew we could get up to the town before him.

Q. Did lieutenant Platt, and yourself, examine any of the goods in any of the retail stores in the town, or make any inquiries there as to the goods?

A. No; we had asked permission of the Alcalde to do so, and it was refused us.

Q. Did either of you go into any of the stores?

A. No; the man who kept the public house had a store, but we did not go in; and we just entered Mr. Campus's, but did not examine any of the goods.

Q. What was the treatment you received from the inhabitants of Foxardo, besides the Alcalde and the captain of the Port?

A. We received from four or five gentlemen there very kind treatment, but from the lower classes our treatment was rough.

Q. Did those who were rough in their behaviour, appear to know who you were?

A. I do not know. Mr. Craft mentioned to persons in the house of the Alcalde, and round the door, who we were.

Q. Did they carry you, or order you to the jail?

A. They ordered me, and the Alcalde took Mr. Platt and led him into a room in his house; and they also spoke of sending us to the king's house. The room, in which we were kept, was occupied as a stable; the front room was occupied by the Alcalde as his office. On reflection, I recollect that Mr. Platt, accompanied by the two negroes, was ordered to the jail, which was about fifty yards from the Alcalde's house. I did not accompany him; he was absent only a few moments.

Q. Did you, at the time, attribute the conduct of the captain of the Port, and the Alcalde, to their ignorance of your characters; or to a wish to insult the American flag, in your persons?

A. I thought, at the time, they wished to insult us: I afterwards understood that they were bribed by Mr. Campus to do it. I had no idea they were ignorant of our character.

Q. When you were released, were you ordered to go on board your vessel with any insulting language?

A. Not by any body else than those I have spoken of at the outskirts of the town. At leaving the captain of the Port, I told him the commodore would pay him a visit shortly; he shook his cane at me, and said something in Spanish, which I thought from his manner was abuse.

Q. When the Grampus and Beagle entered, and anchored in the harbour of Foxardo, were their colors flying, and were they prepared for action?

A. Yes; the commodore's broad pendant was flying on board the Grampus; the flags were flying on board the Beagle, and the boats, and all were ready for action.

Q. Where did the Grampus anchor?

A. The Grampus anchored abreast of the battery on the hill.

Q. Did you see any preparations making in that battery to fire on you, and how soon after anchoring?

A. As we were standing in I saw a number of men standing in the battery on the hill, a company to each gun, and I thought they were preparing for action.

(Cross examined, on the part of the accused.)

Q. Did you not find, on your first visit at Foxardo, some person or persons, in search of property stolen from other islands besides St. Thomas?

A. Yes.

Q. Had you any doubt, at the time of your detention at Foxardo, that they all perfectly knew the real character of yourselves and vessel?

A. I had no doubt of it.

Q. From information since obtained, what do you believe to have been the real object of the persons who caused your detention?

A. I thought at the time the object was to insult us: I have received information which has induced me to believe that Mr. Campus, at that time, had the goods in his possession, and that he had bribed the Alcalde, and the captain of the Port, to act towards us as they did.

Q. Before my visit to Foxardo, and at the time I proceeded from St. Thomas, on the expedition to Foxardo, was that place, and the district around, notorious as the haunt and refuge of pirates?

A. Yes; I have understood, from good authority, that they plundered, not only on the high seas, but on the shore.

Q. Was the general opinion of the officers, and of other persons interested in the suppression of piracy, decidedly in favour of my expedition to Foxardo: and was it not generally anticipated, and thought proper, after the insult to lieutenant Platt?

A. Yes.

Q. Were the practical effect and consequences, of my operations at Foxardo, found to be highly beneficial and useful; and was the measure applauded, even in Spanish towns, and Porto Rico itself?

A. Yes; particularly at Ponce, and Aguadilla, where I afterwards was.

HORATIO N. CRABB, a lieutenant in the marine corps of the United States, being duly sworn according to law, deposes and says—

I was on board the John Adams as commanding officer of the guard. On our arrival at St. Thomas, we heard of an outrage that had been committed, by the authorities at Foxardo, upon the persons of lieutenants Platt and Ritchie. We proceeded from St. Thomas, for the purpose, as I understood, of obtaining satisfaction for the insult. The schooners Grampus and Beagle were in company, and we anchored with the ship off Passage island. The boats of the ship, and the men to be taken from her, were got in readiness for service. We left the Adams about sun set on the evening of the 13th of November, proceeded on board the schooners, and, on the morning of the 14th, between seven and eight o'clock, anchored in the harbour of Foxardo. The first boat that left the Grampus was under charge of lieutenant Pendergrast, accompanied by lieutenant Barton, of the marine corps, with the marines of the Grampus, thirteen or fourteen in number. I do not know the orders that Mr. Pendergrast received: I saw him take possession of the battery, before the rest of the boats had landed, without any opposition. About nine o'clock all the men had landed; we were formed in line on the beach. I received a message from commodore Porter, stating that he wished to see me. I repaired to the place where he was standing, and received orders from him to form my guard—look for the road to the town—proceed, and take up a favourable position to cover the advance of the main body. I found the road without difficulty, marched my guard off, consisting of two sergeants, two corporals, and twenty privates. I had also with me from the ship, a boy, who is the marine drummer; a master-at-arms of the John Adams, and a drummer from the Grampus; the whole, including myself, amounting to twenty-eight persons. At the distance of about half a mile from the beach, there were two long nine-pounders mounted on a platform, in the middle of the road. I halted the men to examine whether they were charged or not; and found they were not: I, at the same time, took off the aprons, and threw them on the ground, after which I continued my march towards the town. When about half way between the beach and the town, I observed a small number of persons following me with a white flag. Not conceiving that I was under the necessity of waiting for them, until I discovered lieutenant Stribling to be one of the persons accompanying the flag, I proceeded on the road. At this time I was within sight of the town, approaching a position where I had contemplated halting to await his arrival. I halted upon that ground until he came up; and, in reply to some observations from him, I told him I would

escort him into the place. He replied, very well. I suffered him to get in advance of me twenty or thirty yards, when I put the men in motion, and followed him at a slow pace. I observed some movements among the Spaniards, which I thought indicated hostility on their part. When lieutenant Stribling came up with me, there was a white flag held by the Spaniards at the entrance of the town. They came out to meet him. I was at the time marching on slowly in his rear; when the flags met, I saw three or four Spaniards kneel, and present their muskets. I had determined to push on at quick step, and render him assistance, if it was necessary. I, however, received a message from him requesting me to halt, until his return from the town. At this time, I was from 150 to 300 yards of the town. Comm. Porter arrived, shortly after lieutenant Stribling left me to go into the town, and halted some distance in the rear of the marines. He came up to the ground I occupied, and directed me to place my men in a position to face the Spaniards, which I did.

The court, not being able to complete the examination of lieutenant Crabb, adjourned till to-morrow, at ten o'clock.

TUESDAY, *July* 12.

The court met, pursuant to the adjournment of yesterday, present, all the members of the court, (except captain Wadsworth, who still continues too much indisposed to attend,) the judge advocate, and captain Porter.

The minutes of the proceedings of yesterday were read. The examination of lieutenant Crabb was resumed as follows:

A short time after, lieutenant Stribling was observed returning, accompanied by the Alcalde, and some other persons from the place. I was directed by commodore Porter to occupy a position on both sides of the road, and to suffer none to pass, excepting those who were in immediate attendance on the flag. Those instructions were obeyed. The commodore returned to where the officers were assembled, and there received the Alcalde. I do not know what occurred there, being at too great a distance to hear what was said: after a short conversation between the commodore and the Alcalde, I observed them approaching me. The commodore, as he passed, directed me to follow him with the marines to the town; stating, at the time, that he had received an invitation for himself, his officers, and men, to partake of some refreshments after their march. We entered the out-skirts of the place. I then had an opportunity of seeing the number of Spaniards drawn up, which amounted to about three times the number of the marine guard. They appeared to be militia, and with muskets. There was also another party on horseback, armed with swords, and a small number with a field piece, which I presumed to be a six-pounder. After some conversation between the commodore and the Alcalde, the former stated, that if refreshments were sent to the beach, they should be paid for; at the same time stating to me, that he did not wish to bring all the men into the place, as he was afraid some excesses might be committed, which would put an end

to the peaceable settlement of the business. Commodore Porter then parted with the Alcalde, as I thought, upon friendly terms, left the place accompanied by his officers, and returned to the beach. I omitted to mention, that when I first received my instructions from commodore Porter, I had particular orders not to suffer my men to commit any outrages upon the property of the inhabitants along the road; nor to commit any acts of hostility myself, unless I met with resistance. On our return to the beach, I brought the rear with the marines; we received the refreshments, after which we embarked and went on board the schooners, and proceeded to the John Adams.

A number of the inhabitants accompanied us to the beach: the persons who brought the refreshments refused to receive payment for them.

Lieutenant RITCHIE produced again—

Q. (By capt. Porter.) Did Mr. Campus give any reason for advising lieutenant Platt, and you, to go to Naguaba, in search of the goods; such, as its being a noted piratical establishment, &c.?

A. He said it had been noted as a place of deposite for stolen goods, and that he had once before found goods there which had been stolen.

Q. (By the same.) Are you acquainted with the situation of Naguaba, and Boca del Inferno, on the coast of Porto Rico; and how far are they respectively from Foxardo and Ponce?

A. Naguaba is about twenty miles from Foxardo, and Boca del Inferno about fifteen miles from Ponce, between Naguaba and Ponce.

Q. (By the same.) Were those places [Boca del Inferno, and Naguaba,] also notorious as piratical haunts?

A. Both.

THOMAS B. BARTON, a lieutenant in the marine corps of the United States, being sworn according to law, deposes and says—

I was on board the Grampus, as passenger, for Thompson's island. On the 14th of November last, about eight o'clock in the morning, the Grampus, and Beagle, with the boats of the Adams, entered the harbour of Foxardo. The Grampus came to anchor opposite a two gun battery, at which time I could plainly perceive fifteen or twenty persons in the battery, loading the guns, and training them towards the Grampus. I immediately afterwards received orders to proceed in the launch with lieutenant Pendergrast, first of the Grampus, with fourteen marines, the guard of the Grampus. Lieutenant Pendergrast received orders from commodore Porter to proceed in the direction of the two gun battery, with as little hazard as possible, and take the fort, spike the guns, and destroy the ammunition. We pulled off from the Grampus about half past eight or nine o'clock.

The people in the fort were, at this time, endeavouring to get the guns of the fort to bear upon the launch. The course of the boat was altered, which prevented them from bringing the guns to bear upon us. They motioned with their hands for us not to proceed. We succeeded in reaching the rear of the fort, and land-

ed; and then in reaching the fort, situated about eighty feet above the level of the ocean. Just at the edge of the fort we saw about three or four Spaniards, the rest had run. We immediately spiked the guns, and destroyed the ammunition, consisting of one round shot, one charge of powder, and a canister of small grape, musket balls, and spikes. One gun was charged, the other about half loaded; it had powder and ball, but the canister was not in it: both of them primed, and each having a lighted match alongside.

Agreeably to our orders, we immediately proceeded down to the beach; followed the motions of commodore Porter, who had first landed with the troops and sailors on the beach, near the road leading to the town of Foxardo. On our arrival on the beach, commodore Porter ordered me to remain in the rear to protect the boats at the landing; I had from twenty to twenty-five men, including marines and sailors. I was particularly ordered not to suffer a single person under my command to commit depredations on persons or property. The troops under the commodore, a short time after, marched off on the road leading to the town of Foxardo. After an absence of about from two to four hours, the main body returned; after receiving some refreshments on the beach, we were ordered to re-embark for the Grampus and Beagle.—Whilst on our way to the vessels, I could discover eight or ten men in the fort endeavouring to draw the spikes out of the guns, but they could not succeed. We got on board, and proceeded immediately out of the harbour.

(Interrogated by the Judge Advocate.)

Q. At what time was lieutenant Stribling despatched with the flag of truce?

A. I do not know. I believe that when we landed on the beach, both he and lieutenant Crabb were on their way towards the town.

Q. Were the Spaniards whom you saw in the battery armed?

A. They had no small arms, I believe.

Elnathan Judson, a surgeon in the navy of the United States, being duly sworn according to law, deposes and says—

Q. [By capt. Porter.] Do you recollect a conversation, between Mr. Platt and myself, when we first landed at the harbour of Foxardo, respecting the omission of Mr. Platt to bring Mr. Bedford on shore, and my reply to his apology for the omission, that we must first inquire for the goods, and, if found, we might send for Mr. Bedford to identify them; or any thing to that effect?

A. I recollect a conversation to that effect.

Lieutenant Platt again called—

Q. [By capt. Porter.] Have you any recollection of asking the interpreter, in the presence of the Alcalde, and myself, whether the goods, you first came in search of, had been found, and what was his answer?

A. I recollect perfectly well of asking the question. It was after the commodore had been invited up to the village. He told me he was not aware of any discovery having been made. I was, at the time, in company with the commodore, within his hearing.

The court adjourned till ten o'clock to-morrow morning.

WEDNESDAY, *July* 13.

The court met, pursuant to the adjournment of yesterday; present, all the members of the court, the judge advocate, and captain Porter.

The proceedings of yesterday were read. The judge advocate then read, and submitted to the court, the following documents:

Instructions from the Secretary of the Navy, to commodore Porter, dated February the 1st, 1823.

Commodore Porter's letter to the Secretary of the Navy, dated November 15, 1824.

Lieutenant Platt's letter to commodore Porter, dated November 11, 1824.

Stephen Cabot's letter to commodore Porter, dated November 12, 1824.

Burgeest and Whonn's letter to commodore Porter, dated November 11, 1824.

The judge advocate stated, that he had no further evidence to lay before the court, in support of the first charge, and specification under it. Whereupon, the counsel of commodore Porter submitted to the court his exceptions to the second charge, and its specifications, as follows:

"The counsel of commodore Porter suggests, that the second charge, and what purports to be the five specifications of the facts and circumstances, intended to be proved in support of such charge, are altogether insufficient to put the accused to answer, or to give this court jurisdiction to try any matter therein alleged.

The following objections to the same, are deemed unanswerable, and fatal:

1. The principal charge itself describes no offence, within the terms of any of the naval articles of war, by which all the military crimes and punishments, affecting officers of the navy, are enumerated, and defined: and is altogether vague and uncertain, as to the nature and degree of the offence intended to be charged.

2. The specifications are not conceived in terms, any more appropriate or precise, to constitute any offence known to the naval code established by such articles.

3. Even if any such offence could be inferred, either substantively from the charge itself, or from the charge and specifications, collectively, still the specifications are altogether vague, indefinite, and uncertain, as to the facts, circumstances, and criminal intents, to be adduced and proved in support of the principal charge.

4. The specifications do not follow and support, but are a departure from the *gravaven* of the principal charge: and (if conceived in terms, tending to any sensible and legal conclusion,) constitute separate and distinct charges, not necessarily comprehended in the terms of the principal charge.

If the learned judge advocate should conceive that this charge, and the several specifications of the same, are susceptible of being justified and supported, the counsel of commodore Porter would very respectfully ask for an opportunity to corroborate his objec-

tions, by authority; and to reply to any reasons that may be advanced, on the part of the prosecution, in answer to such objections.

July 13, 1825."

After mature deliberation, the court determined it would receive any communication from the counsel of captain Porter, in support of the exceptions which he had taken to the second charge, and the specifications thereof. But, that all such communications must be submitted in writing: the court also wishes that the same be presented with as little delay as possible; and, after receiving them, the court will proceed to deliberate upon the same.

The court being opened, the foregoing resolution of the court was announced to the accused.

The counsel for the accused then applied for time till to-morrow morning. Whereupon the court adjourned till to-morrow morning at ten o'clock.

THURSDAY, *July* 14.

The court met, pursuant to the adjournment of yesterday; present, all the members of the court, the judge advocate, and captain Porter.

The minutes of the proceedings of yesterday were read. Captain Porter handed to the court a letter from Mr. Jones, his counsel, stating that a severe indisposition would prevent him from attending before the court to-day. Captain Porter requested the further indulgence of the court till to-morrow. Whereupon the court adjourned till to-morrow morning at ten o'clock.

FRIDAY, *July* 15.

The court met, pursuant to the adjournment of yesterday; present, all the members of the court, the judge advocate, and captain Porter.

The minutes of the proceedings of yesterday were read.

The counsel of captain Porter then proceeded to lay before the court the objections to the second charge, and the specifications thereof; which, he stated, had been drawn up with great haste, and while labouring under great indisposition; and would require to be fairly transcribed, before the paper could be annexed to the record. This he promised to have done, and to transmit the paper to the judge advocate.

The court was cleared, and having come to the resolution that it could not act upon the paper read by the counsel, until it was laid before the court, it would take no order on the subject until that was done.

Whereupon the court was opened, and adjourned till twelve o'clock to-morrow.

SATURDAY, *July* 16.

The court met, pursuant to the adjournment of yesterday; and, at four o'clock, the counsel for captain Porter presented the paper which contained the objections read yesterday; and the court adjourned till ten o'clock on Monday morning.

MONDAY, *July* 18.

The court met pursuant to the adjournment of Saturday; present all the members, the judge advocate and captain Porter. The minutes of the proceedings of Saturday were read. The paper submitted to the court on Saturday, was read by the counsel for captain Porter; and annexed to the record. After hearing the same, the court was cleared, and it was determined that the court would receive the remarks, which the judge advocate had been requested to prepare, with open doors, and would then proceed to deliberate upon the questions that had been raised.

The court being opened and the foregoing resolution announced, the judge advocate proceeded to read his reply to the objections that had been urged on behalf of the accused, which was annexed to the record.* Whereupon, the court was cleared, and after some time spent in deliberation, the court was opened and the following resolution announced.

"The counsel for captain Porter, after pleading generally not guilty, under protest, and reserving a right, at any future stage of the trial, to take exceptions to the form and validity of the charges and specifications, or any of them; has now excepted to the 2d charge and the specifications thereof; insisting that the same are defective in form, and that the facts, therein set forth, do not constitute any military offence, of which a court-martial can take cognizance. It being a matter of doubt, among some of the members of the court, and of the judge advocate, whether a decision upon this question would necessarily involve a final decision of the case; and preclude the accused from proceeding, under the plea of not guilty, to offer any evidence in the case; and should the court decide that it can take cognizance of the charge, &c. it being highly desirable that the whole case should be fully investigated;—the court is desirous of obtaining the opinion of the attorney-general upon the following questions: 1st, whether the second charge and the specifications thereof, are drawn up with sufficient precision, and in legal form; and whether the facts therein set forth, do allege offences cognizable before a court martial? 2d, whether the decision of the court upon the exceptions taken, necessarily preclude the court from calling upon the accused to plead absolutely to the said charge and specifications, and proceeding to trial thereon; or whether such decision will be final, notwithstanding a waiver by the judge advocate of such consequence?—and that the same be transmitted to the Secretary of

* Note.—The respective arguments, in support of, and in answer to, these objections, are placed immediately preceding commodore Porter's general defence; in order to give a connected view of the whole subject.

the Navy, with a request that he submit the same to the attorney-general of the United States, for his opinion thereon.

"Commodore Porter, having heard the order of the court, referring certain questions to the attorney-general, would renew the application, suggested the other day by his counsel, to reply, in writing, to the answer of the judge advocate to his objections, against the second charge and the specifications of the same; if the questions are to be submitted to the attorney-general accompanied by the arguments that have been submitted to this court, on both sides of the question."

The court was cleared to deliberate upon the application, and after some time, the court was opened, and captain Porter was informed that the court had decided not to receive any rejoinder.

The court thereupon adjourned till two o'clock to-morrow.

TUESDAY, *July* 19.

The court met pursuant to the adjournment of yesterday; present all the members of the court, the judge advocate and captain Porter. The proceedings of yesterday were read. The judge advocate stated to the court, that he had communicated to the Secretary of the Navy the resolution of the court on yesterday, with the questions annexed to the same, and that he had just received from the Secretary of the Navy, certain documents, which were read, annexed to the record and marked. *

After reading the same, captain Porter stated to the court, that, with a view of preventing any unnecessary trouble or difficulties, he would withdraw the exceptions, that had been urged on his behalf to the 2d charge and specifications; which, with the permission of the court, should be done to-morrow in writing; and that he would then state the considerations by which he was guided. To this proposition the court acceded. Whereupon, the court adjourned till ten o'clock to-morrow morning.

WEDNESDAY, *July* 20.

The court met pursuant to the adjournment of yesterday; present all the members of the court, the judge advocate and captain Porter. The proceedings of yesterday were read.

Captain Porter stated to the court, that he, being very much indisposed, would ask permission of the court, to read by his counsel, the paper to which he had referred yesterday; to this the court acceded: and Mr. Jones, the counsel for captain Porter, commenced reading the same. While proceeding to read it, the

* NOTE.—These *documents* consisted of a communication from the Secretary of the Navy, giving the result of the application to the attorney-general. That officer declined the giving of any opinion on the question; in as much as the law by which the duties of his office were prescribed, made it his duty "to give his advice and opinion upon questions of law, when required by the President of the United States, or when requested by the Heads of the Departments, touching any matters that may concern their departments:" and he did not consider any question, judicially arising before a court-martial, as embraced in these terms. We regret that it is not in our power to give the attorney-general's reasons, in his own language.

judge advocate stated that he considered a part of the paper as objectionable, in as much as it was a comment upon the reply read by him, to the exceptions which had been taken to the charge and specifications; and to which the court had already announced its determination to receive no rejoinder. Whereupon the court was cleared to deliberate upon the question, and after maturely examining and considering the paper submitted, the court is of opinion, that all that part of the same commencing on the second page, with the words, "I beg leave further to state," and terminating at the bottom of the fourth page; and the passage commencing on the fifth page, with the words, "whether it may hereafter," and terminating at the end of the first paragraph on the sixth page, is objectionable, on the ground stated; and as not pertinent to any matter or question now before the court for its consideration; and consequently cannot be received. Whereupon the court was opened, and the foregoing proceedings read by the judge advocate. The counsel for captain Porter then proceeded to read to the court, the paper, as received by the court.

Here follows the paper, precisely as it was originally produced, and in part read. The passages objected to by the judge advocate, and deemed inadmissible by the court, are the two included within brackets:

Mr. President,

Since the course, which has been taken with the exceptions of my counsel to the terms of the 2d charge and its specifications, is likely to produce delay; and, instead of simplifying, as was intended, rather to perplex and embarrass the procedure of the court; I have determined to withdraw these exceptions, in so far as they present any *preliminary* question to be discussed and decided, upon the face of the charge and specications themselves; independent of any examination into the evidence, to be adduced in support of them.

I have decided on this course, with the less hesitation, in consideration of being distinctly advised, by my counsel, that all these exceptions are equally available, under the general issue of "not guilty," as in any other form: unless, that which turns upon the defect of sufficient minuteness and precision in the specifications of time, place, manner and circumstances of the acts imputed to me, may be an exception. 'Tis not that the latter objection, or the rule, which it supposes to have been violated, is, by any means, to be regarded as frivolous or captious; or as unessential to the great principles of substantial justice, by which the salutary forms of procedure, in such cases, have been prescribed. On the contrary, I am made experimentally sensible, in this very instance, of the value of the rule, and of the practical mischief and injustice resulting from the palpable breach of it, apparent on the face of my pending accusation: for I solemnly declare that, after the minutest recollection and the most mature reflection, upon all the passages of my professional life, which, by any possibility, may be the subject of this complaint, and after all that has been said in the recent discussion, I remain, at this moment, utterly per-

plexed, puzzled, even to conjecture, what are the particular facts and circumstances of my imputed guilt, that are pointed at, and intended to be adduced against me, under several of the most important of these five specifications: and that, as to the rest, (with one single exception,)* I am unable to do more than to form a probable though vague conjecture. Yet, so long as I am assured that I am not to be entrapped, by taking issue upon the charge, to be held to a conclusive admission of its validity, or of the legal sufficiency of the facts to be given in evidence under it, as describing or constituting any offence, for which I am amenable to martial law, I must be content to forego (if such be the necessary consequence of pleading to issue) every advantage from the defect of reasonable certainty and minuteness, in the specifications; and to encounter every disadvantage of ignorance, from the want of fair and regular notice of the circumstances wherein my offence is supposed to consist.

[I beg leave, further, to state, that there are not wanting additional reasons to determine me to this course, of abandoning the *preliminary stand*, taken by my counsel against the charge and specifications in question. I have listened attentively to the long and elaborate essay of the judge advocate, professing to be a vindication of the charge and specifications, against the objections of my counsel: in which it was to be expected, if he deemed the objections susceptible of a satisfactory answer, that he would have met the argument, upon principle; and, without sparing any defect of conclusiveness or pertinency, which could be detected, in the reasons or authorities advanced by my counsel, that he would have fully and freely expounded what he conceived to be the genuine rule of law, applicable to the case. But he has thought proper to depart from this simple and direct course, in order to introduce certain collateral topics, and to advert to certain extraneous circumstances, which, if ever so correctly cited and candidly commented on, had no possible connection with the argument, by which the validity of my objections, in point of law, was to be determined: any further, than as the merits of an argument may be disparaged, by the personal prejudices, which were the evident end and aim of the introduction of their topics. But all the facts and circumstances, upon which this *argumentum ad hominem* proceeded, are, as I shall demonstrate, the result of the most extraordinary misapprehensions of the passages of current events, to which they referred, and of the true and apparent motives by which I have been actuated, in the course of the pending investigation: such misapprehensions, indeed, as I, in my simplicity, should have been surprised to witness in the most thorough-going and vehement of retained advocates, engaged in one of those inflamed controversies, which are so apt to discolor the perceptions, and warp the judgment both of parties and advocates. That they should have found place in a discussion, conducted by an officer, who is presumed to hold the middle ground of a prosecutor, bound to bring forward fairly and fearlessly, whatsoever of law or fact,

* Note.—The exception here alluded to, is the second specification of the second charge. Vid. ante, p. 7.

may legitimately conduce to uphold the prosecution, upon the simple and dispassionate principles of public justice; at the same time that he scrupulously abstains from every topic, calculated to mislead or inflame,—only makes it so much the more necessary that I should discharge myself of the imputations, and disclaim the inferences, resulting from this official and recorded misconstruction of my conduct and motives. I am, besides, instructed with the utmost confidence to conclude, that, upon several points, very material to my defence, the propositions of law laid down by the judge advocate, with the most unhesitating and unqualified assurance of their accuracy, are clear aberrations from the soundest, best approved and plainest principles and precedents of the law; and have been sustained by a misapplication of authorities, quite demonstrative to a professional lawyer: and that these aberrations are more particularly apparent in the new points of doctrine, raised by the judge advocate, in the course of his answer; and which had not, and, by no possibility, could have been anticipated and adverted to, in the opening argument of my counsel.]

Since it appears that I am not entitled to reply to any of these topics,* in the discussion of a preliminary point; and since it is

*Note.—"These *topics*." Query. What *topics?* Expunge from the text, the passages marked as sacrilegious intrusions, within the consecrated precincts of the official argument, and what follows is disconnected and unintelligible. The *index expungatorious*, to be consistent and complete, should have comprehended not only the *topics*, which had been recapitulated, as necessary to be replied to, but all the direct allusions, the relative propositions and the corollaries. The most apprehensive tenderness watches over official statements and arguments, to preserve their color and glossy surface, unruffled by the breath of opposition; they must repose in self complacent security; while the memorial of the commodore is maimed and mutilated, without any regard to the method or the consequences of the operation: in which a careful surgery might have compensated for the weakness of the process, the loss necessarily occasioned by it. How this memorial infringed the decision of the court, against a *reply* to the official argument, is far from obvious. The singular alternative is presented to the accused, either to abandon his preliminary exceptions; and to postpone them to a more unseasonable period of the trial; or to submit, in silence, to disparaging insinuations against his motives and conduct, brought forward in a discussion of mere questions of law. The memorial does nothing more than to state the alternative, to which he is thus reduced; and to explain the necessity imposed upon him to reply to certain topics: but it does not reply to them. Not one word is said in refutation of any matter, either of law or fact, advanced by the judge advocate. The commodore is *permitted*, expressly to give his reasons for withdrawing his preliminary exceptions: and to give reasons growing out of the judge advocate's answer. In assigning such reasons, he recapitulates certain topics of law and fact, from that answer, as imposing upon him a *necessity* to reply: a necessity produced not merely by the extraordinary *doctrines* advanced, but by *facts*, both directly asserted, and intelligibly insinuated,—which it concerned his *honor* to disavow. He complains that, impelled by this necessity, he must abandon his exceptions for the present: because if now persisted in, as *preliminary* exceptions, they must necessarily be *decided*, before the opportunity could possibly be afforded, by his final defence, to reply;—and then reply would be out of place, and ridiculous. By what rule this has been construed as an *actual reply*, and, consequently, as an infringement of the court's negative upon a reply, was never explained. Upon what ground of reason or equity he was debarred of his reply at this stage of the investigation; and postponed till any reply should have been out of season and comparatively useless, will be examined hereafter.

most unexpectedly intimated that doubts on the subject exist with the court; and as I feel that justice to myself equires, that I should have an opportunity of controverting whatever may have been advanced to effect either my honor, or the mere law of my case,—I have taken the only course left open to me: which is to waive the exceptions, as matter of separate and preliminary discussion; and to reserve them, or such of them, as may be available for my general defence.

[Whether it may, hereafter, be thought necessary to push the more recondite and technical rules of special pleading, peculiar to the practice of the courts of *common law*, and recognized in those tribunals, and in those only, to the extreme of contending that this court has nothing to do, under the general issue of not guilty, but to determine the truth or falsehood of certain noted allegations of fact; without deciding the question of their relevancy to any article of the naval code; so that, if the naked fact be true, it should follow, as of course, that it is an offence against that code; as it has already been contended that a denial of the legal sufficiency of the charge, and of the specified facts, to describe or constitute any such offence, is an implied and conclusive admission of the truth of the fact; remains to be seen. I shall, nevertheless, abide the issue; confiding in the equity and good sense of my judges, to shield not only myself, but the whole military and naval corps of the country, from the consequences of such a nice and artificial doctrine, as would construe a denial of the *law*, into a conclusive admission of the *fact;* or a denial of the *fact* into an admission, equally conclusive, of the *law*.]

I do therefore, Mr. President, offer myself ready to go on with the trial of this 2d charge and its specifications, upon the general issue, before tendered under protest; reserving for my general defence all such exceptions, of law or fact, as shall be admissible and available in that defence.

I beg leave, further to suggest, that it is essential to my defence, that I should be more precisely and minutely informed of the propositions of fact or law, advanced against me, than I can be from a cursory reading of the long and elaborate argument of the judge advocate: many parts of which were but indistinctly heard and comprehended, in the course of that reading. I therefore request to be favored with a copy of that document as a part of the proceedings of the court; or such access to it as may be equivalent. I do not anticipate that there can be objection to this request, since the reasonableness of it is so apparent. Although the nature of my objections was distinctly indicated on the second day of this court's session; and more specifically drawn out and stated in writing, as early as Wednesday, the 13th instant: and though the reasons and authorities at large, were distinctly read in open court, on Friday the 15th; yet, it seems, that because, (from some accident which I extremely regret, as it must have infinitely enhanced the labors of the judge advocate,) the fair transcript of the argument in support of the objections, was not put into his hands till 10 or 11 o'clock on Sunday, the 17th,—he was compelled to defer the preparation of his argument, till he was in full possession of the written transcript of that

which he was to answer. If a gentleman, possessing the acuteness and the quickness of perception, the learning and ingenuity, united with the facility thus strongly manifested in the composition of an argument, so full of learned research and various illustration, and so elaborate and diffuse, which occupied no longer time than from 10 or 11 o'clock on Sunday morning, till it was time to meet the court, at ten the next morning;* if one so gifted labored under so much disadvantage from the absence of the paper he was to answer, you may judge, Mr. President, how necessary it is for me to be possessed, *in extenso*, of the arguments by which many important points of my defence are so strongly affected.

The judge advocate then read and submitted to the court, the following documents, referred to in the first specification of the second charge. First, copy of a letter from captain Porter to the President of the United States, dated March 17th, 1825. Certified by the chief clerk of the Navy Department, to be a true copy from the original, filed in that department. The counsel for the accused objected to the production of the certified copy of the letter to the President, and required the production of the original, which, as he stated, appears to be in the Navy Department; he further stated that captain Porter believed that a variance existed between the copy offered and the original, as to the date. The court was cleared, and, after some time spent in deliberation, was re-opened, and the decision of the court was read, that the copy certified by the chief clerk of the department was not admissible in evidence.—Captain Porter then presented the following minute of explanation.

Captain Porter begs leave to explain, that his call for the originals, though founded on one of the most indispensable rules of evidence, which requires the best evidence the nature of the case admits, was not intended to stop the reading of the copies, "*de bene esse;*" with an understanding and proviso, that the original, if extant, shall be produced: he observes some discrepancies between the copies offered, and his own; and, therefore, wishes that exact accuracy shall be attained by the production of the original; which, he understands, can be done, without any inconvenience, since they appear to be among the archives of the navy department. The judge advocate then called upon captain Porter to produce a certain correspondence, between himself and Mr. Monroe, late President of the United States, bearing date the 10th and 12th days of March, 1825; being two notes from captain Porter of the aforesaid dates, to Mr. Monroe; and one note from Mr. Monroe, dated the 12th of March; and such other note from Mr. Monroe,

*Note.—This refers to the exordium of the judge advocate's argument, in which he complains, (if complaint it may be called, when the argument is so advantageously set off by the quickness and facility with which it was elaborated and composed,) that the paper, containing the written notes of the reasons and authorities, which he had to answer, was not put into his hands, till 11 o'clock on Sunday: which left him no more time for the preparation of his answer, than the residue of Sunday, and so much of the next morning as could be spared from the preparations necessary to meet the court, three miles off, by ten o'clock.

if any other there be, referred to in a letter from said captain David Porter to the Secretary of the Navy, dated April 13th, 1825. He further stated that the counsel for captain Porter, and captain Porter himself, had been notified, on the 8th July, instant, to produce the aforesaid papers on the trial of this case.*

To this application captain Porter made the following answer:

In answer to the call made by the judge advocate, for the production of a certain correspondence between captain Porter and "Mr. Monroe, late President of the United States, dated on the 10th and 12th days of March last; being two notes from captain Porter, of the aforesaid dates, to Mr. Monroe, and one note from Mr. Monroe, dated on the 12th;" he remarks, from the reference to dates, after Mr. Monroe had ceased to be President of the United States, that a correspondence merely private, and unofficial, is what this call purports to have designated. He conceived the specification vague and uncertain enough, when it accused him of the writing of insubordinate and disrespectful letters; of which, neither the identity, nor the exceptionable passages, were pointed out, otherwise than by a naked reference to dates. But now, letters, to which not one of the specifications purport to bear the remotest reference, are called for.

Captain Porter, in answer to this call, has only to say, that it is incumbent on the judge advocate, in the first instance, to show the relevancy of this correspondence, to the matter in issue: which, of course, will include the kindred question; By what right, is the private and unofficial correspondence of the accused, to be subjected to this inquisitorial power? Is he to be compelled to disclose his private correspondence, merely to have it examined to see whether it contain any criminating matter? And, if it should be subjected to this inquisitorial power, and should appear ever so offensive in its language, is it to be contended that he could be called to account, before this court, for any offence that could be taken at an unpublished correspondence? But he has this only to remark, in conclusion, that, as Mr. Monroe is a party to the alleged correspondence, is the depository of a part, or of the whole of it, and, of course, is entitled to all the inviolate sanctions of a private correspondent; when he shall give up his part of it to the prosecution, or when it shall be authentically certified to captain Porter, that Mr. Monroe desires the disclosure of it, then it will be time enough to call upon captain Porter to decide on the expediency of surrendering such parts of the correspondence as may be in his hands. But he reverts to the original question, and demands,

* Note. The following is the notice referred to, as above.

"Captain David Porter is required to produce, before the general court-martial, now in session in the city of Washington, that the same may be given in evidence on his trial, a certain correspondence between him and Mr. Monroe, late President of the United States, bearing date the 10th and 12th days of March, 1825, being two notes from captain Porter, of the aforesaid dates, to Mr. Monroe, and one note from Mr. Monroe, dated the 12th March, and such other note, if any there be, referred to in a letter from said captain David Porter to the Secretary of the Navy, dated April 13, 1825.

RICHARD S. COXE, *Judge Advocate.*

July 8, 1825."

from the judge advocate, an explanation, under what specification, and for what purpose, this newly designated correspondence, *prima facie*, so foreign to any thing in the matter of the accusation, is to be offered in evidence?"

The judge advocate then called upon the court for permission to issue interrogatories, to take the deposition of Mr. Monroe. The court was cleared to consider this question; and it determined that the deposition of Mr. Monroe may be taken upon interrogatories: whereupon the judge advocate was directed to prepare his interrogatories, and to submit the same to the accused, who shall be at liberty to file cross interrogatories, if done without delay; and that the same be transmitted to the witness, with a request that he answer the same, and swear to such answers, before any judge, magistrate, or notary public; and that the same be deemed a sufficient authentication of such evidence. Whereupon the court was opened, and this decision announced.*

* NOTE. Upon what authority this extraordinary "*decision*" proceeded, no explanation was ever vouchsafed, other than what may be inferred from the judge advocate's *argument*, in answer to the objections against the second charge and its specifications: in which *argument* it is seriously contended, that courts-martial possess a *legislative* power to define and punish as a crime, any act whatever, which, in their discretion, may be deemed proper to be treated as a military offence; though not comprehended in the enumeration of crimes and punishments, cognizable under the articles of war, or any other law. If they have this legislative jurisdiction over the all-important subject of crimes and punishments, it is but a small stretch, to ordain new rules of evidence, and to repeal the old. That nothing short of *legislative* power, could have authorized this "*decision*," is clear: for it is not only utterly destitute of authority, from any existing law, but a virtual repeal of existing laws directly against it. The universal, and hitherto, unquestioned, canon of evidence, in all criminal trials, whether before civil or military tribunals, is, that the witness shall be confronted with the person accused; except in a few stated cases, specially provided for, by statute; in which depositions, in writing, are admitted, to supply the place of *viva voce* evidence. One of these stated exceptions is to be found in the *military* articles of war; which do admit, in cases *not capital*, the depositions of witnesses, not in the line of the army, to be taken before a *justice of the peace*; "provided the prosecutor and person accused, are *present* at the taking of the same, or are *duly notified* thereof." No analogous provision whatever is found in the *naval* articles of war; but, on the contrary, the 37th of these articles expressly requires all testimony to be on oath or affirmation, administered by the *President* of the court; necessarily requiring the *presence* of the witness, and his examination in *open court*. Thus it appears, that this special enactment of positive law, and the established canon, or rule of evidence, before mentioned, are both *repealed* by the "*decision*" here announced. That "decision," if it had proceeded from an *army* court-martial, could not have been justified under the authority of the 74th *military* article of war. Such court could have justified it, no otherwise, than by its legislative discretion. 1. Because the deposition is ordered to be taken in a *capital case*. 2. Before *any* judge, *magistrate*, or *notary*; whereas the aforesaid 74th article designates a *justice of the peace*, as the sole description of *magistrate* so authorized; with which cautious limitation of the authority, the extreme latitude of "*any magistrate*, or *notary*," is too strongly and obviously contrasted, in terms, to require any illustration. 3. Because the deposition is to be taken, or *interrogatories*, without *notice* to the person accused, to *present* at the caption, as expressly required by the aforesaid 74th article; which is certainly the next best precaution to that of a *viva voce* examination in open court. But it is time thrown away, to be discussing the effect of this "*decision*," upon the supposition of its having emanated from an *army* court-martial, since it so clearly ap-

Captain Porter, having heard the order read, directing the deposition of Mr. Monroe to be taken on interrogatories, as well on the part of the judge advocate, as of the accused, suggests that before he can frame any interrogatories on his part, discreetly pointing to the gist of the accusation, which the correspondence before alluded to, between himself and Mr. Monroe, or the deposition of the latter, may be cited to support; it will be necessary for the requisition upon the judge advocate, contained in captain Porter's answer to the call for the said correspondence, to be complied with; namely, to declare, specifically, the purpose and object of offering the said correspondence in evidence, and the particular point of the accusation to which it is supposed to relate. Captain Porter begs leave further to suggest, that the interrogatories to be exhibited to Mr. Monroe, on the part of the prosecution, will, probably, only go to the authentication of the supposed correspondence; and they will, of course, afford no clue to divine the purpose, or the *gist* of the accusation, for which the correspondence is wanted.

The judge advocate inquired whether the foregoing was designed as an application to the court; to which the counsel of captain Porter replied, that it was an application to him. The judge advocate then remarked, that he must answer in the negative, and decline going into any specification. It was then said, by the counsel for the accused, it would be deemed an application to the court.

The court was cleared to deliberate upon the application, on the part of the accused; and, when it was opened, it was announced that the application is not complied with. The court then adjourned till eleven o'clock to-morrow morning.

THURSDAY, *July* 21.

The court met, pursuant to the adjournment of yesterday; present, all the members of the court, the judge advocate, and captain Porter.

pears that a *naval* court-martial claims such authority; not, like the *army* court-martial, from any express provision in the articles of war, by which it is governed, but directly against the tenor of one of these very articles. The whole difficulty is very compendiously solved, by the simple assumption of this legislative discretion to make and repeal laws. It cannot escape remark, however, what needless pains Congress took, in the 74th of the *military* articles of war, to prescribe the method of taking depositions, and the occasions on which they might be used as evidence; since the power of a *naval* court-martial, to institute new rules of evidence, and, otherwise, to make or repeal laws, cannot be denied to an *army* court-martial: and how much more labour has been thrown away, by the same wise body, when they instituted the existing criminal codes, for the navy and army; comprising in the two sets of articles of war, from ninety to one hundred articles, enumerating and defining military crimes and punishments.

Commodore Porter, for reasons stated by him, in a subsequent part of these proceedings, made no objection to the caption of Mr. Monroe's deposition, when it was ultimately produced by the judge advocate. But that is no reason why it should either slide into precedent, or be repudiated by future courts-martial, without a full exposition of its principles and its merits.

The proceedings of yesterday were read. The judge advocate then proceeded to read, [it being admitted the original is in the hand writing of captain Porter,] the original letter from captain Porter to the President of the United States; and, it appearing that the same corresponded with the certified copy which was offered yesterday, with the exception that the word President was written at full length in the one, and Prest. in the other; that Mr. Randall's name was, in the original, spelled with one *l*, and with two in the copy; and that the date of the original, was April 17th, 1825, and that of the copy, 17 April, 1825: the variations were corrected, and the copy annexed to the record and marked. The judge advocate stated that he had left the documents, which it was designed to exhibit in evidence, at the navy department, with a request that they might be particularly compared with the originals, and that they should be brought down by a witness prepared to swear to their accuracy.*

The judge advocate further stated, that, at the opening of the court, this morning, he had submitted to the counsel for the accused, the interrogatories to be propounded to Mr. Monroe, for the purpose of having the cross interrogatories annexed thereto;

* Note. Why all this parade of minute accuracy, in noting frivolous variances between the copy and the original? Is it meant to insinuate that it was to gratify objections, equally minute and captious, on the part of commodore Porter? The prosecution, doubtless, stood in much need of some such precedent to countenance the charge against the commodore, for alleged inaccuracies in his publication of the proceedings in the late court of inquiry: the enumeration of which inaccuracies, as will presently be seen, descends into *minutiæ*, more frivolous even than the differences, noted in the text, between the original and the copy of the letter referred to. But nothing could be more unjust than to impute to any objections, taken by the commodore, in this, or in any other instance, through the whole course of his trial, a degree of captiousness and futility, unusual even with persons, who, from habit or education, have their views narrowed, and their minds comminuted, for the perception of ideas merely technical and professional: on the contrary, his candour and liberality in this, as in every other instance, through the whole course of his trial, have been conspicuous; and will be so pronounced by all who shall take the trouble to read and judge for themselves. In this instance greater liberality could not have been shown, in an amicable discussion between private gentlemen. A copy of a letter, no otherwise authenticated than by a single certificate of a clerk in the navy department, is produced, which does not agree in date, and some minute particulars, with commodore Porter's private copy. He requests that the originals of this, and the other letters, to be offered in evidence, may be produced, in order to have the copies exact; but, in the mean time, consents to let the reading of the copies go on, subject to future revision and correction by the originals. Even this simple proposition is made the subject of serious discussion in closed doors: "and, after some time spent in deliberation," the court, at length, came to the grave conclusion, that a copy, *certified* by the chief clerk of the navy department, is not admissible. No notice is taken of the offer to go on with the copies, subject to revision and correction by the originals; but there is all this ostentation of superfluous care and minuteness in the comparison, first at the department, and then in court, between the originals and copies; for which comparison at the department, the court had to wait nearly two days, as if the first copies had been offered, and insisted on without such examination; and, as if such comparison, there certified, were to dispense with the production of the originals as the primary evidence in the case. How that matter was managed, will presently appear.

and that it was important to have the same completed, that they might be transmitted without delay; the counsel for the accused replied that he had been unable to complete the same, but would have it done by the opening of the court in the morning.

Captain Porter then submitted to the court the following paper:

Captain Porter having been this day, after the meeting of the court, served by the judge advocate with a copy of his interrogatories to Mr. Monroe, to which, he perceives, is annexed the original correspondence, alluded to in the call made upon captain Porter, by the judge advocate, yesterday; that is, the original letters of captain Porter, of the 10th and 12th of March last, and the rough draught of Mr. Monroe's answer of the 12th, which dispenses captain Porter from any delicacy in saying, that he admits the authenticity of the said letters. But, being still uninformed of the purpose, intended by the introduction of the same, he reserves all proper objections to the relevancy, and admission of the same, as evidence, whenever the same shall be offered as such evidence.

The court having continued in session until near three o'clock, and no witness having appeared, the court adjourned till ten o'clock to-morrow morning.

FRIDAY, *July* 22.

The court met, pursuant to the adjournment of yesterday; present, all the members of the court, the judge advocate, and captain Porter. The proceedings of yesterday were read.

JOHN BOYLE, a witness, being called and duly sworn according to law, deposes and says—

Q. Are you a chief clerk in the navy department?

A. I am.

Q. Have you carefully compared the papers, now shewn you, with the originals on file in that department, and are they exact copies?

A. I assisted in the examination of the papers. All those from commodore Porter, were compared with the originals; those to him were compared with the records in the department; the originals of these letters were transmitted to captain Porter. I believe them to be true copies.

The judge advocate then proceeded to read the following documents:

1st. The residue of the letters referred to in the first specification of the second charge.

2nd. The pamphlet referred to in the second specification, with the letter transmitting the same to the Secretary of the Navy; the publication of the pamphlet being admitted.

The accused submitted to the court his cross interrogatories, accompanied by a protest. The judge advocate stated to the court, that an assertion was contained in that protest, in the following words: "Having repeatedly called upon the judge advocate for some precise specification of the circumstances, wherein the supposed guilt, implied by the accusation under the head of the second charge, consists:" that this assertion contains the first

intimation he has ever received of such application.* He wished also the opinion of the court, whether the protest should be transmitted to Mr. Monroe, with the interrogatories. The court was cleared, and when it was opened, the opinion of the court was announced that such protest was not proper to transmit to the witness, but that the same may be annexed to the record; which was accordingly done, and marked.

The reading of the pamphlet continued until half after three o'clock, when the court adjourned till ten o'clock to-morrow morning.

SATURDAY, *July* 23.

The court met, pursuant to the adjournment of yesterday; present, all the members of the court, the judge advocate, and captain Porter. The proceedings of yesterday were read.

The judge advocate stated, that the interrogatories, and cross interrogatories, submitted yesterday, had been put in the way of going to Mr. Monroe, without delay, accompanied by a letter urging his immediate reply, and pointing out the mode in which the deposition should be authenticated; which letter had been previously submitted to the accused and his counsel. The reading of the pamphlet was continued and concluded.

The judge advocate then proceeded to point out the particulars in which the statement of the proceedings of the court of inquiry was deemed incorrect; and submitted a copy of the original record of the proceedings of the court of inquiry, which was compared with the original record, in the presence of the court. The judge advocate stated that he would particularly state such variances in writing.

The judge advocate then submitted to the court the National Journal, of June 16th, 1825, containing a publication, which captain Porter admitted to be his, under date of June 15th, 1825.

The court then adjourned till ten o'clock on Monday morning.

MONDAY, *July* 25.

The court met, pursuant to the adjournment of Saturday; present, all the members of the court, the judge advocate, and captain Porter. The proceedings of Saturday were read.

The judge advocate stated that he had received no answer from Mr. Monroe, but expected to have it in the course of the day. The judge advocate proceeded to read his note, of all the variances which he had discovered between the original record, and the proceedings of the court of inquiry, as published by captain Porter; which was annexed and marked.

A paper was read by the judge advocate, containing a statement of certain facts, agreed to by both sides, dispensing with the at-

*Note. The meaning of this "*assertion*," and the grounds of it, are so obvious, as to require no remark; all who read the proceedings through may satisfy themselves.

tendance of witnesses to establish them; which was also annexed and marked.

WILLIAM W. SEATON, esq. being duly sworn according to law, deposes and says—

(Examined by the Judge Advocate.)

Q. Are you one of the editors of the National Intelligencer?

A. Yes.

Q. Is the paper now shewn you, of March 30th, 1825, one of the numbers of that paper from your office?

A. Yes.

Q. From whom were the official documents, therein printed, procured, purporting to be from the Secretary of the Navy to commodore Porter, and from commodore Porter to the Secretary of the Navy, being four in number?

A. The shortest, and most acceptable way of answering the question, will be to read a correspondence between the Secretary of the Navy and ourselves, upon the subject; which will shew what answer I am prepared and willing to give. [The court was cleared, and decided that it would accede to the request of the witness, and hear the letters read, to which he had referred; and, being opened, this decision was announced.] The letters referred to were then read.

I am not willing, for the reasons stated in the letters read, to give any other answer than that which we gave to the Secretary of the Navy.

The President of the court having directed the court to be cleared, the accused, by his counsel, stated that, perhaps, the difficulty might be obviated; and read, and submitted to the court, the following paper:

Captain Porter having heard the evidence of Mr. Seaton, and the correspondence between Messrs. Gales and Seaton, and the Secretary of the Navy, as to the author of the publication of a certain correspondence, between the Secretary of the Navy and captain Porter, in the National Intelligencer, of the 30th March last, and perceiving that the witness, as editor of a public journal, has claimed a privilege, as well before this court, as in his correspondence with the Secretary of the Navy, to withhold the name of the author of any publication, not impeached of falsehood; and that the court is about to deliberate upon the objection of the witness, to disclose the author of the publication in question; captain Porter has no hesitation to admit now, as he would have avowed to the Secretary of the Navy, if he had pleased to have directed his inquiries to captain Porter, instead of the printers, that he did communicate, and cause to be published, in the Intelligencer of the 30th March last, the correspondence between himself and the Secretary of the Navy, which that paper purports to contain.

The judge advocate then submitted to the court, the National Intelligencer of March 30th, 1825, containing certain correspondence between the Secretary of the Navy and captain Porter, annexed and marked.

PETER FORCE, a witness, being duly sworn according to law, deposes and says—

Q. Are you the editor of the National Journal?

A. Yes.

Q. Look at the communication in your paper of June 16th, 1825; from whom did you receive that, and when?

A. I received the note, and the accompanying documents, from commodore Porter, on the day of the date of it, June 15th, 1825.

Q. Did any, and what conversation take place between yourself and commodore Porter, in relation to the letter dated June 14th, 1825?

A. (Commodore Porter having, on a suggestion of the witness, absolved him from all obligation of secrecy.) I read the letter in the presence of commodore Porter; and, perceiving that, as I understood it, commodore Porter attributed an anonymous communication, which had appeared in the Journal of the 13th, to the Secretary of the Navy; I informed commodore Porter that it was not from the Secretary of the Navy; and, also, told him, I was authorized, by the author of the communication, to inform him by whom it was written, when properly requested so to do. He replied, by declining to hear by whom it was written. This took place on the 15th June, when I received the communication, the day before it was published in the newspaper. At the same time, I mentioned to commodore Porter, that the anonymous communication was not by the Secretary of the Navy; he remarked, I think, the similarity of the language, in the letter from him of the 13th June, (one of those in that communication,) with the anonymous note published in the Journal, was sufficient to warrant the opinion he had formed.

(Cross examined on the part of the accused.)

Q. When you remarked, in reference to my letter to the Secretary, of the 14th of June, that I was mistaken in supposing that the Secretary was the author of the anonymous note, referred to; did I not point out to you, the striking resemblance and correspondence between the date and the language of that note and the Secretary's letter of the 13th of June?

A. I am under the impression that commodore Porter, referred to it, but cannot recollect whether he pointed it out.

Q. Did you not express yourself as struck with these resemblances, in so much that if you had not known the real author of the anonymous note, you might have drawn the same conclusion?

A. No,—I think I expressed no opinion of the kind; I think I observed there was a resemblance.

Q. Did I not remark to you, that whether the Secretary did or did not actually write or communicate the anonymous note,—circumstances justified me in concluding, at the time I wrote my letter of the 14th of June, that the note had come from an official source, and had been approved or countenanced by him?

A. I think commodore Porter did make such a remark in substance.

The judge advocate stated that he had now submitted to the

court, all the testimony which he purposed laying before it at the present stage of the proceedings, with the exception of Mr. Monroe's deposition. Captain Porter intimated his readiness to proceed with the evidence on his part.

JOHN SIMPSON, a witness produced on behalf of the accused deposes and says,

Q. [By the accused.] Were you employed by me, during the sitting of the late court of inquiry in my case, to copy from the judge advocate's record, the proceedings of the court for my use?

A. I was.

Q. Were you furnished by the judge advocate, with his minutes of the proceedings, for the purpose of being copied for me?

A. I was.

Q. Were the copies which you did make of those minutes, made carefully and accurately, and word for word, with the original as it then stood; except the statement given in the first day's proceedings, of what I said in answer to the question, whether I had any objection to offer against either of the members of the court?

A. The copy I made was a true copy.

Q. Were you present on the first day of the court, when I stated my objection, and did you take particular notice of my words and accurately recollect them?

A. I do not now recollect them; I took particular notice and recollected them for some days after.

Q. Examine the two statements of the terms of my said objection,—first, as it appears at p. 5, of the copy of the original record now shewn you; and secondly, as corrected at page 22 of the same document; and say, according to the best of your recollection now, and when the subject was newer and fresher in your memory, which of these is the true statement of the terms in which I originally submitted that objection?

(The witness is here shown the copy of the original record, produced in evidence by the judge advocate on Saturday, and those passages of the same, wherein the original minutes of captain Porter's objection is entered; in the proceedings of Monday, May 2d, and corrected in those of the Thursday following, are designated for the examination of the witness.)

A. I have a recollection of this, the last is the correct one.

Q. Examine the nine sheets of paper now shown you, and say whether they be the original manuscript, in your own hand-writing, of the copy which you took, as you have before stated, from the minutes furnished you by the judge advocate?

A. They are the original manuscript of my copy, and are an exact copy of the notes furnished me by the judge advocate; (they extend as far as the end of the first paragraph on page 27, of the pamphlet.)

(Cross examined by the Judge Advocate.)

Q. Can you say that no error or omission was by accident made by you in your copying?

A. I believe there was not any.

Q. Was the copy compared with the original, and with whose assistance?

A. I read it over myself.

Q. Look at page 25, of the pamphlet, and see whether the words "holds the highest commission which" were not omitted by you in copying?

A. I do not think I omitted any thing in copying.

Q. Look at the paper handed you, and see if it be the original paper from which you took that part of your copy?

(The judge advocate here exhibited to the witness his original note of this part of the proceedings of the court of inquiry.)

A. I cannot be positive.

Q. Were the papers, submitted to the court of inquiry, by captain Porter, in your hand-writing, exact copies of the original?

A. They were.

Q. Did you copy the latter part of the paper marked B, I mean the copy from which the pamphlet was published?

A. I think I copied it; I am not certain.

Q. Was the copy furnished captain Porter of that paper, an exact transcript of the original?

A. Yes.

Q. Did captain Porter, to your knowledge, ever compare or assist in comparing your copy with the original from which it was taken?

A. No.

Q. Do you know whether the original notes, were read to the court of inquiry as the record of its proceedings, or a fair transcript of the same?

A. I do not think the original notes were.

Q. Do you know whether the record was ever rectified publicly, as for instance, at the request of a witness?

A. I do not.

Q. Was not a letter in your hand-writing, transmitted to the court of inquiry, found to be dated March 6th, instead of May 6th, by your mistake?

A. Yes.

Q. Have you any more confidence in the accuracy of the copies which you have now sworn to, than you had in that before the error was pointed out?

A. I have more confidence.

Q. Did you conceive it possible that any inaccuracy had been committed on that occasion, by you in copying that letter, before captain Porter informed you of the mistake in date, and did you not request to see the paper in your own hand-writing, before you would believe that it could have been made?

A. I did not know that I had committed the mistake until I saw it.

(Re-examined by Captain Porter.)

Q. Did I frequently enjoin upon you, whilst engaged in copying the minutes of the court of inquiry, to be very particular and accurate; and did you take particular pains to be so?

A. I did take particular pains to be so; captain Porter saw I was very particular, and I do not know that he made any such request of me.

Q. [By a member of the court.] Are you much in the habit of copying from manuscript, and were the notes written in a fair, legible hand?

A. I have copied a good deal, and the notes from which I copied, were fair and legible.

Q. [By captain Porter.] Look at the sheet of paper now shown you and say whether it be the same, or like the hand-writing of the minutes from which you copied?

A. I think all I copied, was in that hand-writing; some came after, which I did not copy, in a different hand.

[It is admitted that the paper shown, was in the hand-writing of Mr. Harrison, in whose hand also the principal part of the original record is.]

Q. Was your transcript of my letter, in which the mistake of the date occurred, as above mentioned, taken from my rough draught; and are my rough draughts generally written in a fair hand, or in a very hurried rough way?

A. I do not recollect particularly; it was very easily read; I read commodore Porter's rough draughts very easily. I have been captain Porter's clerk about fifteen months.

The court adjourned till ten o'clock to-morrow morning.

TUESDAY, *July* 26.

The court met pursuant to the adjournment of yesterday; present all the members of the court, the judge advocate and captain Porter; the proceedings of yesterday were read.

John T. Ritchie, a lieutenant in the navy of the United States, a witness on the part of the accused, being duly sworn according to law, and examined by captain Porter, deposes and says,

Q. Examine the four sheets of paper now shown you, and say in whose hand-writing the same are?

(The witness is here shown the manuscript copy from which was printed what is contained in the pamphlet given in evidence, under the 2d and 3d and 4th specifications of the second charge, from where the manuscript copy proved by John Simpson, yesterday, ended, on page 27, to the end of the paragraph ending with the words, "at eleven o'clock," on page 32 of the same pamphlet.)

A. The first three are in the hand-writing of Mr. Sarazan; the last sheet in the hand-writing of Mrs. Simpson, wife of Mr. John Simpson, with the exception of a few words in the latter part of it,—(of which I have no knowledge):—the word *which* in the 4th line from the bottom, and the word *being* in the 3d line from the bottom, these words are in the hand-writing of captain Porter.

Q. What was the character, and in whose hand-writing was the original from which those sheets were copied?

A. They were part of the proceedings of the court of inquiry, and in the hand-writing of the judge advocate.

Q. Did you carefully and accurately compare these four sheets, with such originals, and are they exact copies?

Please state the manner in which you compared the copy and the original, and whether you are certain of the accuracy of the copy?

A. I think I read them over the first three sheets two several times, first I read the copy with another person, (my wife,) who was looking over the original, and afterwards read over the original; she having the copy,—I discovered no error throughout,—the last sheet I examined in the same manner with Mrs. Simpson.

Q. What has become of Mr. Sarazan,—has he left this part of the country?

A. I believe he is in the city of Washington, but I have not seen him myself since soon after this thing occurred. Philadelphia is his home, and he may possibly have gone there.

(Cross examined by the Judge Advocate.)

Q. Do you know whether captain Porter ever saw the original papers from which the copy was taken?

A. I do not.

Q. Would you now recognize any one of these papers as such original?

A. I think not.

The judge advocate then read a sentence from what he stated to be the original minute furnished, of the proceeding of Monday, May 9th, and exhibited the paper to the witness.

Q. Can you not recollect this paper to have been the paper from which the proceedings of that day were copied, from the sealing-wax dropped on it;—and is the second paragraph in the one, an exact copy of the other?

A. I cannot identify the paper,—on a comparison there appears an entire line omitted.

MARTIN KING, a witness produced on the part of the accused, being duly sworn according to law, and by him interrogated, deposes as follows:

Q. Were you at the time of the printing and publishing of my pamphlet, (now shown you,) and are you still foreman in the printing-office of Davis and Force, when that pamphlet was printed?

[The witness is here shown the pamphlet formerly given in evidence by the judge advocate.]

A. I was then and am now.

Q. Examine the thirteen sheets of paper, writing now shown you, and say whether they be the identical copy from which that pamphlet, or so much of it, as is composed of that copy, was printed?

The witness is here shown the same nine sheets of copy mentioned in the evidence of John Simpson, and the four sheets mentioned in the evidence of lieutenant John T. Ritchie.]

A. I believe them to be the same.

Q. Were the proof sheets of the pamphlet, diligently and carefully compared with the copy, and every typographical error th was detected, carefully corrected, and was this comparison made both by the proof-reader in the printing-office and by myself?

A. They were,—I read them over twice, and captain Porter read them over once.

(Question by the Judge Advocate.)

Q. Was all the copy from which that pamphlet was published, with the notes and marks to the different documents therein contained, communicated by captain Porter for the purpose of printing that pamphlet, and was he satisfied with its accuracy?

A. No complaints were made by him of any want of accuracy. I saw one or two noticed in the public prints, such as *clothes* for *colors*, and perhaps one or two others of the same kind.

The accused then submitted to the court, a letter from R. S. Coxe, the judge advocate, dated May 21st, 1825, which was read, annexed to the record and marked.

The judge advocate stated that he wished it to appear on the record, to what application that letter was an answer, and that he was desirous of exhibiting before the court the same statement in regard to it, which he had before submitted to captain Porter.

William W. Seaton called by the accused. A question was proposed to Mr. Seaton on the part of captain Porter: the judge advocate stated that he felt great reluctance to interpose any difficulty in the way of any investigation, which the accused might deem it important to pursue; but that the question now stated, and the inquiry designed to be made, appeared to him so wholly foreign to the inquiry in which the court was engaged, that he felt it incumbent upon him to take the opinion of the court upon the subject. The object of the accused had been communicated to him, but he wished it to be submitted in writing, to the court, to enable it to decide upon the point with accuracy. The reasons having been stated, the court was cleared, and after having maturely considered the same, the court is of opinion that the question be put, which decision was accordingly announced.

Mr. Seaton was then called—

Q. [By captain Porter.] Look upon the 3d paragraph of the third page of the National Intelligencer, under date of May 5th, 1825, in the words, "we are informed that we did not exactly understand," &c. and say by whose request that paragraph was published, and by whom it was communicated, in terms or in substance?

A. I cannot answer the question with propriety. If it be not absolutely essential for the purposes of justice, I should prefer for the reasons stated yesterday, not to give any other answer. I have an additional reason in this case for declining, because the communication was expressly a private and confidential one.

The court was cleared to deliberate upon the course to be pursued.

Upon the opening of the court it was announced, that the court is of opinion, that, although from a wish to afford every facility to the accused, in pursuing any investigation which he may deem important, it did permit the question proposed to be propounded, and would have permitted the witness to answer it; yet, when the court is called upon to determine whether it will exercise the power which the law confers, of coercing the witness to answer,

the question assumes a more serious aspect, and the court, after mature consideration, is of opinion, that the question proposed, is one which cannot, in any material degree, affect the case of the accused; and, therefore, will not compel the witness to reply to it.

The counsel for the accused, then prepared and presented another question, which the judge advocate stated was liable to the same objection as before. The court was cleared, to determine whether or not it should be propounded to the witness. The question is as follows:

Q. Did the paragraph in question, proceed, directly, or indirectly, from the Secretary of the Navy? and what agency had he, if any, in preparing it for the press, and causing its publication?

After having deliberated upon the same, the court determined that the question should not be put.*

The court adjourned till ten o'clock to-morrow morning.

* Note. Nothing can be more imperfect and unsatisfactory, indeed wholly deficient in accuracy, than these minutes of the proceedings of the court, in relation to the testimony of Mr. Seaton, touching the authority on which he published the paragraph in question. The paragraph, itself, as published in the National Intelligencer of the 5th May, 1825, is in these words:

"We are informed that we did not exactly understand, and of course did not accurately state, the ground on which the exception taken by commodore Porter to the court of inquiry now sitting in this city, was overruled by the Secretary of the Navy. The letter of the Secretary to the court stated, that, as far as the Secretary could be called upon for an opinion on that question, commodore Porter ought to have made his application to him at an earlier day, but that the opinion of the department, as to the legality of the manner in which the court was composed, had been expressed in the very act which created and convened the court, and that nothing was discovered in the argument of commodore Porter to change the opinion. The act of the department was placed, therefore, on the ground of its legality, by the Secretary, and not on the ground of time in taking the exception, that circumstance being incidentally introduced into his letter. Our information was obtained in current conversation, and was inaccurate only from not being as fully stated as it might have been."

When the question was first put to Mr. Seaton, as above stated, the judge advocate requested the counsel of the commodore, to state the object of the evidence, and the reasons for offering the same. This request was immediately complied with, in the following terms:

"Being requested by the judge advocate to state the nature and object of the evidence, intended by the question to Mr. Seaton, in order that the court may be enabled to perceive, whether it be pertinent to the matter in issue, the counsel of commodore Porter, without any hesitation, submits the following summary.

The fact intended to be proved is simply, that the publication in question, was directly communicated, in terms or substance, by the Secretary of the Navy, and published at his request.

This evidence is conceived to be material to the defence, upon several points of the accusation; if, indeed, there be any thing material in the accusation itself, upon such points.

1. The first specification of the 2d charge, amongst other "insubordinate and disrespectful letters," refers to one, dated June 14, 1825; and as far as the vague and uncertain intimations, on the part of the prosecution, allow any insight or conjecture of what constitutes the exceptionable matter in this letter, it is understood to be in that paragraph, which is supposed to ascribe to the Secretary of the Navy, some agency in the publication of a certain anonymous note, in the National Journal of the 13th of June last, mentioned in the evidence of Peter Force. Upon this part of the accusation the evidence is

WEDNESDAY, *July* 27.

The court met, pursuant to the adjournment of yesterday; present, all the members of the court, the judge advocate, and captain Porter. The minutes of the proceedings of yesterday were read.

material, in two points of view.—1st. As the publication in the Intelligencer of the 5th of May, purports to be a correct account of a certain part of the proceeding before the court of inquiry, then sitting, and to be an answer to a publication, in the same newspaper of the day preceding, supposed to be incorrect; and in which, commodore Porter takes this occasion to disavow any agency whatever: it serves to corroborate the strong and persuasive circumstantial evidence, the *evidentia rei*, from which he might originally have drawn the conclusion, that the subsequent publication in the National Journal, announcing the supposed inaccuracy of his pamphlet, and an intention, at some future day, to give a more full and correct account of the proceedings of the same court of inquiry, had been made upon the same authority, or with the implicit sanction and approbation of the Secretary of the Navy.

2dly. As the Secretary had published or caused to be published the one anonymous piece; and so, by his own act, had demonstrated his sense of the propriety of such a step; no *disrespect* ought to have been inferred from ascribing to him, under the most cogent circumstances of probability, the publication of another, on the same subject, and having, apparently, a similar intent and object.

2. As the 2d specification simply charges commodore Porter with having published the proceedings of the same court of inquiry, *without authority*, it is material to show that the Secretary of the Navy had previously published, or, by his sanction and approbation, express or implied, had authorized the publication of what purported to be a full and correct statement of an important part of the business transacted in that court; in short, that he had published, or authorized the publication of the proceedings of the court, *pending the inquiry*; and so, had set a precedent, from which commodore Porter had no reason to infer, that there could be any impropriety in doing so, *after the inquiry had been concluded.*

3. As we shall endeavour to show that the statement of the proceeding, published by the Secretary on the 5th of May, was incorrect, it may be material to justify what was considered a more accurate publication of the same proceeding, as it appears in commodore Porter's pamphlet.

4. As the Secretary's publication was, doubtless, intended to be correct, its inaccuracies may furnish an useful illustration of the innocence, with which different men, from the inevitable diversities of impression made on them by the same facts, may fall into differences or inadvertances of statement, without laying any foundation for a criminal inference: if, indeed, contrary to our present expectation and belief, any inadvertences, chargeable to commodore Porter, shall be found in his pamphlet."

When the final decision of the court was announced, against insisting upon Mr. Seaton's answer to the first question, and against putting the question in the modified, and probably more correct form in which it was last presented, it was also announced, that the court had directed the aforesaid paper, containing the reasons for offering the evidence, to be *returned* by the judge advocate; and it was done accordingly. From which it was taken for granted, that it was expunged from the record of the court's proceedings. This circumstance appears to have been entirely overlooked in the minutes of the court's proceedings: in which it is admitted, such a paper was given in; but what became of it, or what reasons it advanced, are no where specified.

Upon the decision of the court on this matter, some remarks may be useful to illustrate the principles of jurisprudence, and the temper by which it was governed, on more important points.

1. It was decided upon mature deliberation, and with the reasons of the accused for offering the testimony, fully expounded to the court, that the evi-

The counsel for the accused proposed reading a paper to the court; the President of the court announced to him, that the opinion of the court yesterday, was, that all communications be submitted to it through the judge advocate.

The counsel declining to pursue that course, the court was cleared, and, when it was opened, it was announced that the court has decided that the following rule of practice be adopted:

The accused may submit his communications, in writing, to the court; the same shall then be publicly read by the judge advocate, the court reserving the right of admitting and receiving the papers, or any part thereof.

The counsel for the accused then submitted a petition to the court, calling upon the court to have the Secretary of the Navy summoned to attend as a witness, or that interrogatories be transmitted to him, stating his reasons for the same.

dence was proper and pertinent to the defence: nothing short of that could possibly have justified the decision that the question be put, notwithstanding the objections on the part of the prosecution. Then when they go into a second deliberation, upon the objection of the witness to answer the question, they do not allow the privilege claimed by him, but undertake to determine, in what *degree* the evidence may be useful or material to the defence. It is material enough to justify the admission of the evidence, if the accused can get hold of it; but not so material as to induce the court to exert its unquestioned power, to give him the means of getting the benefit of it. If it be the province of a court-martial, in deciding upon the admissibility and relevancy of evidence, to take into view the *prudential* considerations, which should govern the party who offers it; to determine the relative utility and effect of the evidence, upon his case; and whether the *quantum* of effect to be produced by it, be so great as to make the evidence *necessary* to his defence; or so small as that he may *dispense* with it: doubtless, it must be one of the indefinite powers, resulting from the *legislative* discretion, before ascribed to courts-martial. 'Tis certain that it is no where recognized, by any authority on the law and practice of courts-martial, as before known and established. As to the law and practice of the civil courts, 'tis scarcely necessary to appeal to professional men for the unquestionable axiom, that the court, whenever a point of evidence arises, has *nothing* to do but to determine its competency and its relevancy, in all the diversified and infinite degrees, of direct or circumstantial proof; of evidence to corroborate, or to discredit, what has gone before, &c. &c. in such questions, the court has nothing to do with the *degree* in which the evidence may operate, either for or against the party who offers it.

2. Why the records of the court should have been mutilated by expunging the reasons which the accused had been called upon to state, for offering this evidence, is not explained; and is certainly inexplicable upon any of the ordinary or known principles of jurisprudence. That the record is mutilated by thus pretermitting an actual proceeding; that it is also mutilated by the omission to cite the order for expunging the reasons, are beyond dispute: though the latter may possibly be a clerical error; and accidental. If it proceeded from a too sensitive and apprehensive delicacy towards the Secretary of the Navy, a more deplorable evidence of the influence of the supposed wishes and interests of the executive, or of a department upon judicial deliberations, could not be adduced. 'Tis only requisite to read the question propounded, and the points to which the evidence was to be applied, as above explained, to see how extremely over-nice and fastidious was the delicacy displayed in this instance: and 'tis but justice to the Secretary of the Navy, to say that, in this instance, it was wholly gratuitous on the part of the court: for it will be seen from a letter which Mr. Seaton afterwards communicated to the court, from the presumed author of the paragraph in question, that the Secretary had no personal objection to the disclosure.

The judge advocate observed, that the uniform practice had been, both in this case, and others, for the accused to hand him the names of such witnesses as he wished to be officially summoned; that such request had been uniformly and promptly complied with; that no application had been made to him for such summons for the Secretary of the Navy; had it been, it should have been afforded the accused without hesitation, and, if now made, should be granted at this time.

The court was cleared, and, when it was opened, it was announced that the paper will not be received, and the judge advocate is directed to return the same to the accused, which was accordingly done.*

The judge advocate received a letter from Mr. Seaton, with a request that the same be laid before the court; which was accordingly done, annexed, and marked.†

* NOTE,—The petition of commodore Porter above referred to, was as follows:

"MR. PRESIDENT,

The unexpected result of the examination of Mr. Seaton, yesterday, obliges me to prefer this, my petition, to the court, to be allowed to prove the same facts by other means. By way of excusing my omission to have the evidence ready, I beg to state, that though I was apprised of Mr. Seaton's intention to claim the privilege of confidence, between himself and the correspondent from whom he received the communication in question, I had been very clearly advised, as I thought, that such privilege was confined to a few cases of professional confidence: which bore no relation to what subsists between the correspondent and the editor of a public journal.

My petition is, that the Secretary of the Navy, be either summoned to attend as a witness, or requested to answer the same questions propounded to Mr. Seaton yesterday.

As I had, when called upon yesterday, so to day, I have no objection to explain the nature and object of the evidence required; in order, that the court may judge of its application and materiality.

The facts expected to be proved are, that a publication in the National Intelligencer of the 5th May last, purporting to be a full and correct statement and explanation of a particular part of the business, transacted before the late court of inquiry, then sitting; in answer to a publication of the day preceding, in the same paper, supposed to be incorrect, was inserted in the said paper, at the request of the Secretary of the Navy, or with his implicit sanction and approbation.

I conceive this evidence to be material to my defence, upon several points of the accusation; if, indeed, there be any thing of substance in the accusation itself."

[The petition then proceeded to recapitulate the points of the defence, to which the evidence was to be applied, in nearly the same terms as before stated, when the question was put to Mr. Seaton. The remarks in the note upon that part of the proceeding, dispense with any additional remark here.]

† NOTE.—The following is the letter referred to:

Washington, July 27, 1825.

SIR:—In answer to a question put to me yesterday by the court-martial, I declined giving the name of the person who was our authority, for a certain paragraph contained in the Intelligencer of May 5th. My unwillingness to answer the question directly, proceeded not from a belief, that the gentleman concerned would feel himself aggrieved by a disclosure of his name; but from a regard for a principle which I deem it important to observe, and a respect for which dictated my answer to a similar question, propounded to me by the court the preceding day, in reference to another publication in the Intelli-

The counsel for the accused stated that he had nothing to submit to the court at this time.

GUSTAVUS HARRISON, a witness, produced by the judge advocate, being duly sworn according to law, and by him examined, deposed as follows—

Q. Were you employed by me during the sitting of the court of inquiry, in the case of captain D. Porter, to copy the proceedings of the court from my minutes?

A. Yes.

Q. Look at the original record now shewn you,* and say whether you copied the proceedings of the said court, excepting those of the last day?

A. It is all in my hand-writing, with the exception of some corrections, and the proceedings of the last day.

Q. At what time were you furnished the minutes from which you took the copy; when did you return me your copy; and where were those corrections made?

A. I generally received them about four or five o'clock in the afternoon, after the adjournment of the court; I copied them, and returned them the next morning, before the meeting of the court; we then examined them, and the corrections were made.

Q. From the time the copy was made by you, until after those corrections were made, was it in the power of any one to have taken a copy from either of those papers, and do you believe any such copy was at any time taken?

A. I am positive that it was not.

The accused not being prepared to cross-examine the witness at this time,† the court adjourned till ten o'clock to-morrow morning.

gencer. It is due to the gentleman who communicated to us, the statement embraced in the publication of May 5th, to acquaint you now with the fact, that having heard of my refusal to give up his name, he immediately addressed to me a note, desiring unequivocally, that I should not be restrained by any considerations of delicacy towards him from giving his name to the court, as it was his intention, in marking his note of May 5, "private," only to withhold his name from the newspaper. This is due to the frankness of the gentleman making the communication, and you will have the goodness to place it before the court—although I do not, by the permission which he gives, feel myself absolved from the obligation which regulated my answer yesterday.

I am very respectfully,
Your obedient servant,
W. W. SEATON.

RICHARD S. COXE, Esq.
Judge Advocate of the Naval Court-martial.

*NOTE.—The official record of the late court of inquiry, transmitted by the judge advocate to the Navy Department.

†NOTE.—The official record, upon which the witness had been examined, was now, for the first time, produced; and its appearance suggested some important inquiries, which required a more minute comparison of its contents, with other documents, than could be accomplished at the moment.

THURSDAY, *July* 28.

The court met, pursuant to the adjournment of yesterday; present, all the members of the court, the judge advocate, and captain Porter. The minutes of the proceedings of yesterday were read.

Mr. HARRISON being again called, by the accused, was, by him, interrogated as follows:

Q. Examine the several interlineations and erasures, in the record proved by you yesterday, as your transcript from the original minutes of the judge advocate, at pages 7, 8, 21, 25, 26, 31, 32, 38, 40, the adjournment at page 38, and the note at the bottom of the page 41, and say by whom they appear to have been made?

A. The interlineations appear to be in the hand-writing of Mr. Coxe; I cannot say whether the erasures were made by him or by myself; the adjournment, at page 38, is in my own hand-writing; the note, at page 41, is in the hand-writing of Mr. Coxe; the (7) in page 41, is, I believe, Mr. Coxe's.

Q. Can you recollect, with certainty, whether the original minutes, when given you to copy, had in them the words and passages which now appear interlined, erased, and added, at the pages above mentioned, of the said transcript?

A. I do not know that I can with certainty.

Q. From your recollection of the general accuracy, or inaccuracy of your transcript, as originally made, can you say that you made the mistakes which these alterations, now appearing on the face of the transcript, indicate?

A. I cannot say that I made all of them; I know that I made a considerable number.

Q. Refer more particularly to the interlineation at page 7, and the note at the bottom of page 41, and say whether you have any recollection of having made those mistakes?

A. I cannot say whether or not it was my omission.

Q. When did you first see that part of the record giving the last day's proceedings, stated as in the hand-writing of the judge advocate? and do you know any thing of the penciled interlineation, in the second paragraph of the same?

A. I do not recollect seeing that part of the proceedings until it was shewn me yesterday, and I know nothing of that interlineation; all that I recollect, is, that when I called, as usual, for the proceedings of that day, I was informed by Mr. Coxe that it was copied by him for the purpose of being transmitted to the department, or words to that effect; I do not think I saw the proceedings of that day, at all, until I saw it yesterday.

Q. (By the judge advocate.) Have you any recollection of my making, on one or more occasions, so many corrections in your transcript, that you proposed taking it back with you to make a fair copy? and what passed on that occasion?

A. I do recollect there were so many corrections in one day's work, as to induce me to ask to re-copy it; your reply was, that there was not then time; that you had to carry them out with you to the court, to read them as the proceedings of the court.

Q. [On the part of the accused.] Did you ever make more than one copy of the record?

A. I have no recollection that I ever did; I think I may have made other copies of the papers exhibited by commodore Porter, but I think I never did for the record.

Q. Look at the sheet now shewn you, and say if it be in your hand-writing; at what time you copied it; whether before or after you made the transcript for the judge advocate; and from what paper, the original, or your transcript, did you copy it?

[The witness is here shown a loose sheet, purporting to be a copy of so much of the record as begins with the words, "the room was cleared," on page 21, and ends with the words "ten o'clock to-morrow morning," on page 24.]

A. The paper is in my hand-writing, and I have a perfect recollection of the circumstances under which I copied it; when I gave the answer I did just now, I thought the paper I had made two copies of, was an original paper submitted by commodore Porter; I now find it was an answer to one of his papers. I copied this before copying the record from the minutes of the judge advocate, for the use, as I understood, of commodore Porter, by the directions of Mr. Coxe; and it was, I believe, the only paper I copied in his office.

The judge advocate stated then, that, if there was nothing further ready on the part of the accused, he should now offer the deposition of Mr. Monroe, in answer to the interrogatories heretofore sent to him.

The accused desiring to see the papers which it was proposed to submit to the court, the same were handed to him by the judge advocate, and, after being perused, were returned. They were accordingly [no objection having been made,] read, and submitted to the court as follows:

1st. The letter from Mr. Monroe to the judge advocate, dated July 25th, 1825.

2d. The interrogatories, cross-interrogatories, and answers thereto, sworn to before Mr. J. Bailey, a magistrate in Loudoun county, Virginia, July 25, 1825.

3d. The copy of a note from captain Porter to Mr. Monroe, dated May 10th, 1825.

4th. Copy of Mr. Monroe's answer, dated March 12th, 1825.

5th. Captain Porter's reply, dated March 12th, 1825.

6th. Certified copy of a letter from the Secretary of the Navy, dated 21st October, 1824, to commodore Porter.

At the request of the accused, the following letters were annexed to the record, and marked.

1st. Secretary of the Navy to commodore Porter, 19th Aug. 1823.

2d. Secretary of the Navy to commodore Porter, 30th September, 1823.

3d. Commodore Chauncey, [acting Secretary of the Navy,] to commodore Porter, 23d October, 1823.

4th. Commodore Porter to Secretary of the Navy, 23th May, 1824.

It was also agreed that the documents, annexed to the original record, as given in evidence before the court of inquiry, are endorsed, and numbered by commodore Chauncey, the President of said court.

The court adjourned till ten o'clock to-morrow morning.

FRIDAY, *July* 29.

The court met, pursuant to the adjournment of yesterday; present, all the members of the court, (excepting captain Biddle,) the judge advocate, and captain Porter.

Captain Spence stated that captain Biddle was prevented by sickness from attending to day. The minutes of the proceedings of yesterday were read.

Captain Porter stated to the court, that Mr. Jones, his counsel, was engaged in the necessary arrangements, and business of this case,* and that he had nothing, at this time, to lay before the court. Whereupon, the court adjourned till ten o'clock to-morrow morning.

SATURDAY, *July* 30.

The court met, pursuant to the adjournment of yesterday; present, all the members of the court, (excepting captain Biddle,) the judge advocate, and captain Porter.

The President announced to the court, that, although captain Biddle was much better than he was yesterday, he still continued too much indisposed to resume his seat.

The judge advocate then submitted, and read to the court, the following documents, some of which were presented at the request of captain Porter, the residue by the judge advocate, to complete the chain of the correspondence.

1. Copy of letter from Smith Thompson, Secretary of the Navy, to commodore Porter, dated Navy Department, 19th August, 1823.

2. Copy of letter from Samuel L. Southard, Secretary of the Navy, to captain Porter, dated Navy Department, 29th September, 1823.

3. Extract of a letter from Hon. Secretary of the Navy, dated 30th September, 1823.

4. Copy of letter from I. Chauncey, acting Secretary of the Navy, to commodore Porter, dated Navy Department, 28th October, 823.

* Note. The counsel was, at this time, engaged in a laborious examination o fa voluminous mass of documents, consisting of the official correspondence between commodore Porter and the Navy Department, and with the officers of the navy under his command; of Presidential messages, and official reports of the Secretary, with the accompanying documents, communicated by the President to Congress; all running through the years 1823 and 1824: in order to select, from the mass, such as were pertinent to explain and rebut the new matters advanced in Mr. Monroe's deposition.

5. Extract of letter from commodore Porter to Hon. Secretary of the Navy, dated 19th November, 1823.

6. Extract of instructions from Hon. Secretary of the Navy to commodore Porter, dated December, 1823.

7. Copy of letter from Samuel L. Southard, Secretary of the Navy, to commodore Porter, dated Navy Department, 17th May, 1824.

8. Copy of letter from D. Porter, to Hon. Secretary of the Navy, dated Sea Gull, Matanzas, 28th May, 1824.

9. Copy of letter from Samuel L. Southard, Secretary of the Navy, to commodore Porter, dated Navy Department, 31st May, 1824.

10. Copy of letter from commodore D. Porter, to Hon. Secretary of the Navy, Washington, 25th June, 1824.

11. Copy of letter from Charles Hay, for Secretary of the Navy, to commodore Porter, dated Navy Department, 29th June, 1824.

12. Copy of letter from commodore Porter to Hon. Secretary of the Navy, dated Washington, August 11th, 1824.

13. Extract of a letter from Charles Hay, [handed in by commodore Porter,] to commodore Porter, dated Georgetown, D. C. 11th September, 1824.

14. Copy of letter from Samuel L. Southard, Secretary of the Navy, to commodore Porter, dated Navy Department, 14th October, 1824.

It was also agreed that the official reports of lieutenant Sloat, and the accompanying documents, and correspondence printed in the pamphlet, from page 100 to the end of that publication, be submitted to the court, as if given in evidence on this trial.

It is also agreed, that the following note, published in the National Journal, of June 14th, 1825, being the anonymous publication, or note, referred to in captain Porter's letter to the Secretary of the Navy, of June 14th, 1825, and in the testimony of Peter Force, and which it is admitted was communicated to the editor of the said National Journal, by R. S. Coxe, esquire, judge advocate to the court of inquiry therein mentioned, with authority to communicate his name, as the author of it, when applied to for that purpose, be annexed to the record, as evidence in this case.

"To the Editor of the National Journal. It appears necessary to apprise the public, that the recent publication of commodore Porter, on the subject of the proceedings of the court of inquiry, in relation to the affair at Foxardo, presents so inaccurate and imperfect a view of that matter, that it will, in due time, receive proper attention. The record of the court, and statement of the facts, transmitted to the executive, not having yet been made public, it being understood that the business had not been terminated, furnished sufficient reasons for postponing to a more suitable period, the rectification of the errors and the supplying the deficiences, which exist in the pamphlet referred to."

June 13th, 1825."

The reading of the documents having been completed, the court adjourned until two o'clock on Monday.

MONDAY, *August* 1.

The court met pursuant to the adjournment of Saturday; present all the members of the court, the judge advocate and captain Porter. The minutes of the proceedings of Saturday were read.

Captain Porter stated, that his counsel not having yet completed the defence which he proposed to submit to the court, requested the further indulgence of the court until to-morrow at twelve o'clock, by which time he would endeavour to be prepared.

The judge advocate then read and submitted to the court, certain documents from the Navy Department.

1st. Copy of a letter from commodore Porter to hon. Samuel L. Southard, dated Washington, October 12th, 1824.

2d. Copy of a letter from same to same, dated Washington, October 19th, 1824.

Captain Porter then objected to the reading of these letters, or more of this kind, that they had no relation to, or connexion with the charges or specifications; that he was prepared to meet any other charge which either now, or at any future time, might be preferred for any part of his conduct, but that he was now without his counsel; he, of himself, objected to the production of this testimony.

The judge advocate remarked, that the letters were offered as the answers to letters read on Saturday, or as letters to which some of them were answers; that a part of the correspondence having been read, it seemed proper to submit the residue of it.

The court being cleared, proceeded to deliberate upon the question; and after some time, it was opened, when the resolution of the court was announced, that the papers should be read, but that the court would adjourn until to-morrow, that the counsel for the accused might be present at the reading of the same.*(a)*

[With this day's proceedings, ends the assistance afforded us by the official minutes of the court's proceedings: not having been able, for reasons stated, to get access to the subsequent record of the proceedings.— This leaves a chasm of a few days, till the delivery of the defence, after which, the published proceedings will enable us to

(*a*) Note.—We omitted to introduce, at the proper place, the correspondence between the Secretary of the Navy, and Gales and Seaton, editors of the National Intelligencer, referred to in the first part of Mr. Seaton's evidence, as explaining the nature of the privilege he claimed, not to disclose the name of anonymous correspondents. (Vid. ante, p. 51.) We have not been able to procure copies of the Secretary's notes to the editors; but their contents are sufficiently intelligible, from the answers of the editors:

"*Office of the National Intelligencer,*
"*April* 16, 1825.

"Gales & Seaton have the pleasure to acknowledge the receipt of the note of the hon. Secretary of the Navy, requesting them "to inform him from whom they received the correspondence, which was published in the Daily National Intelligencer, of the 30th March last, purporting to be a correspondence between the Secretary of the Navy and commodore D. Porter." Gales & Seaton have the honor to state, in reply to this note, that the copy of the correspondence was received from an officer of the Navy. If it be not genuine, or be incorrect, the name of the communicator will be instantly disclosed to the Secretary of the Navy.

complete the report, in the language of the court itself, and in the words of the record. Indeed that is the only part of the minutes, (excepting of course the documentary and oral evidence,) which it was, at all, material to pursue in this report. We had determined, at first, to disregard the form of a journal, observed in the record, and merely to arrange and embody the evidence, with a condensed view of the other proceedings;—but, at length, concluded that it would be more satisfactory to give a detailed history of the trial, in the form of the official journal, as far as a literal copy of it, supplied the materials of a full report. In the interval between this day and the delivery of the defence, there was only one on which any business was transacted, more than the formal meetings and adjournments of the court; and of the transactions of that day, we shall be able to give a satisfactory report.]

TUESDAY, *August* 2.

From the last day's proceedings it appears, that the judge advocate had offered and read certain documents, to which commodore Porter had objected. The judge advocate had also offered a considerable number of other documents, supposed to be of the same description, as being a voluminous official correspondence between the commodore and the navy department, relating to prior transactions, and having no connection, whatever, with any matter embraced in any of the charges and specifications. The decision of the court, that they should be read, is not very distinctly stated, whether absolute, or depending upon cause to be shown, the next day, when the commodore's counsel should attend. The latter was, after some explanations between the counsel and the court, admitted to be the intent and effect of the order: and the counsel accordingly proceeded to draw up a written exception to the admission both of the documents offered yesterday, and of those

The Secretary in a second note to the editors, insisted on his right to demand the name of the person, who had communicated the papers in question, if an officer of the navy: to which they replied in the following note—

"*Office of the National Intelligencer,*
"*April* 19, 1825.

"Gales & Seaton present their respects to the hon. Secretary of the Navy, acknowledging the receipt of his note of the date of yesterday. In seeking for their readers, from sources accessible to them, information of an authentic nature, concerning a matter already spread before the public, by official documents, they were not aware that they should for themselves, or for the gentleman who kindly furnished the copies of the papers referred to, incur the disapprobation of the department.

"The authenticity of those papers not being questioned, and the name of the officer being desired, it would appear, only to disapprove of his conduct, the editors, being unwilling to compromit any one for a service rendered to them, if not the public, take leave most respectfully, to decline a compliance with the request of the hon. Secretary; assuring him at the same time, with great sincerity, that there is not an officer in this government, to whose known wishes, it would give them greater pleasure at any time, to accede.

"P. S. It can hardly be necessary to state, that, in coming to the conclusion above stated, G. & S. have not held any consultation with their correspondent, who furnished the papers in question."

offered in addition to day; consisting of a variety of letters, of the description above mentioned. We have no copy of this exception; which, in substance, turned upon the following points:

"The apology for offering these letters, at this stage of the trial, is, that they are 'answers to letters read on Saturday, or letters to which some of them were answers.' But, after a careful inspection of them, it is not perceived that they come under either description, in relation to any letter produced on the part of the commodore. It was apparent that the judge advocate was, on Saturday, and had been long before, in possession of the whole series of correspondence between commodore Porter and the navy department; and he had, on Saturday, exercised his discretion, without control or interference, in exhibiting such parts of the same as were pertinent to, and explanatory of, such parts of the correspondence as had been exhibited on the part of the commodore. The additional letters offered yesterday, (Monday,) and again to day, are foreign, (as will be obvious to the court on an inspection of the same,) not only to any of the matters comprised in the charges and specifications, but to any of the collateral explanations brought forward by the commodore. It is not perceived that any one of them even professes to be a letter either directly answering to, or answered by any one so produced by the commodore: nor is it pretended that they are, at all, necessary to explain what goes before. The only design or tendency, to be conjectured from their import, is to raise a prejudice, by introducing long-past, and, as it was thought, long adjusted discussions: which, if to be revived for any purpose, should have been brought forward in the form of additional or independent charges or specifications. If they be thought competent to support any such charges or specifications, commodore Porter has professed himself ready to meet them, when he shall be properly called to account, for any exceptionable matter that may be supposed to be contained in the correspondence now offered. But it is highly inconvenient and unfair to load the present trial with this mass of collateral and irrelevant matter. It perplexes and embarrasses the party in his defence; imposes upon him a necessity to answer, by long and laborious explanations, matters of which he is not accused: and, from the most satisfactory and triumphant answer to which, he can derive no positive advantage, to his main defence: while he runs the risk of encumbering the real merits of his case with doubt or prejudice, by failing to explain and rebut, with the requisite clearness and conclusiveness, collateral matters of crimination, thus unexpectedly brought against him; which are not pretended to come within the scope of the promulgated charges and specifications;—and of which he had not any notice, whatever, till this late hour, when actually engaged in arranging his final defence.

It is distinctly admitted that far the greater part of the documents and correspondence, recently produced by commodore Porter, is equally foreign and irrelevant to the real matter of the charges and specifications originally exhibited against him, and to the legitimate scope of a defence, limited to such charges and spe-

cifications. But, at a late stage of the trial, after the evidence, on both sides, at all pertinent to the pending charges and specifications, had been completely exhausted, the deposition of Mr. Monroe had been introduced, on the part of the prosecution; ripping up old, and [as it was thought,] long adjusted topics of difference and discussion; and, in short, amounting to an exhibition of new and distinct matters of crimination or blame; which, from the matters themselves, and the manner of treating them in the deposition, and from the character and circumstances of the party, by whom they were propounded, imposed upon the commodore an indispensable necessity to explain and answer them.* To this necessary explanation, by way of a defence, strictly confined to these new and collateral matters of charge, had the selection of letters offered by commodore Porter, on Thursday and Saturday last, been confined.† 'Tis true enough that the deposition was wholly irregular, inadmissible, and illegal, both in its caption, and in its substance. Let the facts, which it purported to prove, be ever so material and pertinent to the issue, nothing was more illegal, or improper, than to offer proof of them, in the form of a written affidavit, instead of the examination of the witness in open court: and if such an affidavit were admissible to prove any facts, still there was not one proved by this deposition, that was, at all, material or pertinent to the issue. The deposition should therefore have been rejected, if exception had been taken to its admission: but from the imposing name and character of this evidence, and the general curiosity and expectation which it had excited, the accused knew not what popular inferences might have been drawn, from the suppression of it, through his means. He therefore preferred letting it pass, unquestioned, and taking upon himself the burthen of an additional and collateral justification against its imputations, both direct and implied. He had thus been drawn into the discussion and exhibition of matters, irrelevant to the original charges; in answer to collateral and irrelevant imputations advanced by the prosecution. But surely this could be no warrant for pushing the aberration, from the matter in issue, to any further extremes. Surely the accused could not be held to tolerate the unlimited addition of new burthens, because he had not revolted against the first transgression of the prescribed limits of the accusation. He therefore took his stand, at this point; and insisted that the accusations, which he was to answer, should,

* Note. For the time and manner of introducing this deposition, vide minutes of proceedings for Thursday, July 28, ante p. 64. The interrogatories had been despatched, by the judge advocate to Mr. Monroe, on Friday, the 22d, or Saturday, the 23d. (Vide ante p. 49, 50.) At the opening of the court, in the morning of Monday, the 25th, the judge advocate stated that he had *not* received the deposition: (vide ante p. 50,) but when it was actually received, was never announced; nor had the accused any notice whatever of its reception, till it was produced and read in evidence, on Thursday the 28th, as before stated. It was reported, and believed, that the messenger had arrived with the deposition, either in the course of the day on Monday, or on the next morning.

† Vide ante p. 64--5--6.

henceforth, be limited to such as had already been advanced, either in the original charges, or in Mr. Monroe's deposition."

Such were the substance and effect, as now recollected, of the objections urged on the part of commodore Porter.

The decision of the court, after considerable deliberation, in closed doors, was announced. It bore, in substance, that, though great latitude had already been taken in the exhibition of irrelevant testimony, the court had resolved to stop at this point; and the documents offered by the judge advocate, and objected to by commodore Porter, were rejected. The decision did not, as it was understood, include Mr. Monroe's deposition, as among the evidence, so censured as irrelevant; but it was understood as clearly including the documents, that had been offered on the part of the commodore, in answer to that deposition. It may, possibly, have included both.

When the nature and contents of the documents, so exhibited by commodore Porter, come to be seen and compared with Mr. Monroe's deposition, it is respectfully submitted, that the injustice of selecting them out for censure, or even of involving them in a common censure, with the deposition, will be obvious. The only question could have been, do they refute or explain any imputation, expressed or implied by the deposition? If they do, then 'tis clear that the censure, for a departure from the matter in issue, rests upon the introduction of the latter document, exclusively; and not upon documents which it had made necessary to the defence. This question is confidently referred to the decision of the documents themselves; which are presently to be set forth.

It may be also proper to record, in this place, as connected with the subject of these disputed documents, that no prior intimation whatever, of any intention to offer such, had been given to the accused or his counsel. On Friday, the 22d July, Mr. Boyle, a clerk in the navy department, was called and examined, to authenticate a large mass of papers; of which no description was given at the time, or entered on the minutes, further than what may be collected from Mr. Boyle's answer; namely, that they consisted of a voluminous correspondence between the navy department and commodore Porter; but what, or how many letters were comprised in such correspondence, the record does not, to this day, inform us.*(a)* It was obvious to every one, who saw the mass of papers handed to Mr. Boyle, and, indeed, it is proved by his answer, that it contained very many more than the four remaining letters, referred to in the first specification of the second charge, which were then read by the judge advocate.

Commodore Porter's counsel requested a list of the documents that had been authenticated by Mr. Boyle; he was answered that there was no list. He then asked to look at the documents; but was answered that it would be time enough to exhibit them, when offered to be read in evidence. At the request of commodore Porter, who had determined, as far as possible, to avoid raising any more questions upon collateral points, all further discussion on the subject was waived: and the documents remained in the cus-

(a) Vide Mr. Boyle's examination, ante p. 49.

tody of the judge advocate, inaccessible to the accused. It was presumed, and only presumed, that the parts of correspondence, between the navy department and commodore Porter, which were, subsequently, produced in detached parcels and at different times, as noted in the preceding minutes, were among the papers authenticated by Mr. Boyle: of which the letters, which formed the subject of this last discussion, may have been a part. Such was the only notice of an intention to produce any part of commodore Porter's official correspondence, not called for by the specifications; except what was attached to Mr. Monroe's deposition.

Commodore Porter's counsel had, during the last week, transmitted to the judge advocate a list of documents, referring to a letter from the Secretary of the Navy to commodore Porter, dated April the 9th, 1825, with certain papers enclosed in it; and to sundry messages from the President to Congress, with the official reports from the navy department, and other documents accompanying the same, as printed by the authority of Congress; which were to be referred to in the defence, to illustrate various points, applicable to the original charges and specifications, or to Mr. Monroe's deposition, and which it was proposed to enter on the minutes. Some difficulty, not precisely understood from the message received in answer, being made, about the form of the proposed entry, the opportunity was taken, to day, of submitting the detailed list and specification of the documents, with a request to have them attached to the record as evidence.

The court, upon consideration of this request, decided against the admission of the documents: but the decision was qualified by an intimation, that the accused might use and refer to them, as official and public documents, in his defence. Upon some further explanation, as to the intention and effect of this order, it was readily conceded, by the judge advocate, that all form, as to the authentication of the documents, was dispensed with: and that the accused might have every advantage from them, as official and public documents, that the most formal authentication of the same could give him: and so, in effect, it was considered, that all these documents form a part of the evidence, in so far as they are intrinsically relevant and material to any matter in issue; and we shall accordingly arrange them among the documentary evidence in the case.

It was then arranged that the defence should be delivered on Friday next, August 5th.

WEDNESDAY, 3*d*, AND THURSDAY, 4*th August*.

The court met, and adjourned, on each day, according to the previous appointment of Friday for the defence,

FRIDAY, 5*th*, AND SATURDAY, 6*th August*.

These two days were consumed in the delivery of the defence; and in the reading of the documents referred to in it.

We shall now, without regard to order of time, or to the form of a regular journal, arrange and methodize the documentary evidence, as applicable to the several charges and specifications: and then present the arguments, on the preliminary points of law, the general defence, and the official and published minutes of the court's proceedings, subsequent to the conclusion of the defence, on Saturday, 6th August.

DOCUMENTS

As well on the part of the prosecution, as of the defence, under the several charges and specifications.

CHARGE FIRST.—DISOBEDIENCE OF ORDERS, &c.

FOXARDO AFFAIR.

(No. 1.)

[*Letter of instructions from the Secretary of the Navy; which are produced as the orders which Commodore Porter is charged with having disobeyed.*]

NAVY DEPARTMENT, *February* 1, 1823.

SIR,

You have been appointed to the command of a squadron, fitted out under an act of Congress, of the 20th December last, to cruize in the West-India seas and Gulf of Mexico, *for the purpose of repressing piracy, and affording effectual protection to the citizens and commerce of the United States.*

Your attention will, also, be extended to the suppression of the slave trade, according to the provisions of the several acts of Congress, on that subject; copies of which, and of the instructions heretofore given to our naval commanders thereon, are herewith sent to you.

While it is your duty to protect our commerce against all unlawful interruption, and to guard the rights, both of *person* and *property*, of the *citizens* of the United States, *wherever* it shall become necessary, you will observe the utmost caution not to encroach upon the rights of others; and should you, at any time, be brought into discussion, or collision, with any foreign power, in relation to such rights, it will be *expedient* and *proper* that the same should be conducted with as much *moderation*, and *forbearance*, as is consistent with the *honour* of your country, and the *just* claims of its *citizens*.

Should you, in your cruize, fall in with any foreign naval force, engaged in the suppression of piracy, it is desirable that harmony, and a good understanding, should be cultivated between you; and you will do every thing, on your part, that accords with the honor of the American flag, to promote this object.

So soon as the vessels at Norfolk shall be ready for sea, you will proceed to the West-Indies, by such route as you shall judge best for the purpose of effecting the object of your cruize. You will establish, at Thompson's Island, usually called Key-West, a depot, and land the ordnance and marines, to protect the stores and provisions; if, however, you shall find any important objection to this place, and a more suitable and convenient one can be found, you are at liberty to select it as a depot.

You will announce your arrival and object to the authorities, civil and military, of the island of Cuba, and endeavor to obtain, as far as shall be practicable, their co-operation; or, at least, their favorable and friendly support, giving them the most unequivocal assurance, that your sole object is the destruction of pirates.

The system of piracy which has grown up in the West-Indies, has obviously arisen from the war between Spain and the new governments, her late provinces, in this hemisphere; and from the limited force in the islands, and their sparse population, many portions of each being entirely uninhabited, and desolate, to which the *active authority* of the *government* does dot extend. It is understood that establishments have been made by parties of these banditti, in those uninhabited parts, to which they carry their plunder, and retreat in time of danger. It *cannot* be *presumed*, that the government of any island will afford any protection, or countenance, to such robbers. It may, on the contrary, *confidently be believed*, that all governments, and particularly those most exposed, will afford all means in their power for their suppression.

Pirates are considered, by the law of nations, the enemies of the human race. It is the *duty* of *all nations* to put them down; and none who respect their own character, or interest, will refuse to do it, much less afford them an asylum, and protection. The nation that makes the greatest exertions to suppress such banditti, has the greatest merit. In making such exertions, it has a *right* to the *aid* of every other power, to the extent of its means, and to the enjoyment, under its sanction, of all its rights, in the pursuit of the object. In the case of belligerents, where the army of one party enters the territory of a neutral power, the army of the other has a right to follow it there. In the case of *pirates*, the right of the armed force of one power, to follow them into the territory of another, is more complete. In regard to pirates, there is no *neutral* party; they being the enemies of the human race, all nations are parties against them, and may be considered as *allies*.

The object and intention of our government is, to respect the feelings, as well as the rights of others, both in substance and in form, in all the measures which may be adopted to accomplish the end in view. Should, therefore, the crews of any vessels, which you have seen engaged in acts of piracy, or which you have *just cause* to *suspect* of being of that character, retreat into the ports, harbours, or settled parts of the islands, you may enter, in pursuit of them, such ports, harbours, and settled parts of the country, for the purpose of aiding the local authorities, or people, as the case may be, to seize, and bring the offenders to justice; previously giving notice that this is your sole object. Where a *government exists*, and is *felt*, you will, in all instances, respect the local authorities, and only act in *aid* of, and *co operation* with them; it being the exclusive purpose of the government of the United States, to suppress piracy; an object in which all nations are equally interested; and, in the accomplishment of which, the *Spanish authorities*, and *people*, will, it is *presumed*, cordially co-operate with you. If in the pursuit of pirates, found at sea, they

shall retreat into the unsettled parts of the islands, or foreign territory, you are at liberty to pursue them, so long only as there is reasonable prospect of being able to apprehend them; and, in no case, are you at liberty to pursue and apprehend any one, after having been forbidden so to do, by competent authority of the local government. And should you, on such pursuit, apprehend any pirates, upon land, you will deliver them over to the proper authority, to be dealt with according to law; and you will furnish such evidence, as shall be in your power, to prove the offence alleged against them. Should the local authorities refuse to receive, and prosecute such persons, so apprehended, on your furnishing them with reasonable evidence of their guilt, you will, then, keep them, safely and securely, on board some of the vessels under your command, and report, without delay, to this department, the particular circumstances of such cases."

Great complaints are made of the interruption, and injury to our commerce, by privateers fitted out from Spanish ports. You will endeavour to obtain from the Spanish authorities, a list of the vessels so commissioned, and ascertain how far they have been instructed to intercept our trade with Mexico, and the Colombian Republic; impressing upon them, that, according to the well settled rule of the law of nations, the United States will not consider any portion of the coast upon the Gulf of Mexico, as legally blockaded, except where a naval force is stationed, sufficient to carry into effect the blockading order, or decree; and that this government does not recognize the right, or authority of Spain, to interdict, or interrupt our commerce with any portion of the coast, included within the Colombian Republic, or Mexican Government, not actually blockaded by a competent force.

All the United States ships and vessels of war, in the West-Indies, of which a list is herewith enclosed, are placed under your command, and you will distribute them to such stations as shall appear to you best calculated to afford complete protection to our commerce; in which you will embrace the object of protecting the convoy of specie, from Vera Cruz, and the Mexican coast, generally, to the United States. Keep one vessel, at least, upon this service, to be at or near Vera Cruz, during the healthy season of the year, and to be relieved, as occasion shall require, both for convoy of trade, and to bring specie to the United States, confining the transportation to the United States only.

You will be particularly watchful to preserve the health of the officers and crews, under your command, and to guard, in every possible manner, against the unhealthiness of the climate; not permitting any intercourse with the shore where the yellow fever prevails, except in cases of absolute necessity.

Wishing you good health and a successful cruize,

I am, very respectfully, sir,

Your obedient servant,

SMITH THOMPSON.

Com. DAVID PORTER, *Commanding*
U. S. Naval Force, West-Indies, Present.

(No. 2.)

[*Commodore Porter's official report of the affair at Foxardo.*]

UNITED STATES' SHIP JOHN ADAMS,
Passage Island, November 15, 1824.

SIR: I have the honor to inform you that, on my arrival at St. Thomas', I was informed that lieutenant-commandant Platt, of the United States' schooner Beagle, who had visited Foxardo, a town on the east coast of Porto Rico, about two miles from the sea, for the purpose of making inquiries respecting a quantity of dry goods supposed to have been deposited there by pirates, was, after being recognized as an American officer, by the proper authorities there, imprisoned and shamefully treated.

Indignant at the outrages which have so repeatedly been heaped on us by the authorities of Porto Rico, I proceeded to this place, where I left the ship, and, taking with me the schooners Grampus and Beagle, and the boats of the John Adams, with captain Dallas and part of his officers, seamen, and marines, proceeded to the port of Foxardo, where, finding preparations were making to fire on us from the battery on shore, I sent a party of seamen and marines to spike the guns, which was done in a few minutes, as the Spaniards fled on the landing of the party. I then landed with two hundred men, and marched to the town, spiking on the way the guns of a small battery, placed for the defence of a pass on the road, and reached the town in about thirty minutes after landing: I found them prepared for defence, as they had received information from St. Thomas' of my intentions of visiting the place. I halted about pistol shot from their forces, drawn up on the outskirts of the town, and sent in a flag, requiring the Alcalde, or governor, with the captain of the port, the principal offenders, to come to me to make atonement for the outrage; giving them one hour to deliberate. They appeared accordingly, and, after begging pardon (in the presence of all the officers,) of the officer who had been insulted, and expressing great penitence, I permitted them to return to the town, on their promising to respect all American officers who may visit them hereafter. We then returned to the vessels, and left the harbor, after being at anchor three hours.

As we were getting under way, a number of persons appeared on the beach, bearing a white flag, and having with them some bullocks, and a number of horses, apparently laden, no doubt a present from the authorities of the place, which they informed me they should send me.

There is no doubt that our persons and our flag will be more respected hereafter, than it has been, by the authorities of Porto Rico.

Every officer and man, on this occasion, conducted themselves in a manner to meet my entire approbation.

I have the honor to be, very respectfully, your most obt. sevt.

D. PORTER.

HON. SAMUEL L. SOUTHARD,
Secretary of the Navy, Washington.

[NOTE.—It was admitted, on the trial, that this letter was received at the Department, on the 4th December, 1824.]

(No. 3.)

[*The Secretary of the Navy's letter of recal to Com. Porter.*]

NAVY DEPARTMENT, *27th December*, 1825.

SIR: Your letter of the 15th of November last, relating to the extraordinary transactions at Foxardo, in the island of Porto Rico, on the —— of that month, has been received and considered.

It is not intended, at this time, to pronounce an opinion on the propriety of those transactions on your part, but their importance demands for them a full investigation, and you will proceed, without unnecessary delay, to this place, to furnish such explanations as may be required of every thing connected with their cause, origin, progress, and termination. For that purpose, you will bring with you those officers whose testimony is necessary, particularly lieutenant Platt, and such written evidence as you may suppose useful.

You will return in such convenient vessel as may be best spared from the squadron, and on your leaving the station, you will deliver the command to captain Warrington, with all such papers, instructions, and information, as may be useful to enable him in the most effectual manner, to accomplish all the objects for which the vessels now under your command were placed there.

I am, very respectfully, &c.

SAMUEL L. SOUTHARD.

Com. DAVID PORTER, commanding U. S. Naval Forces, W. Indies, Gulf of Mexico, &c. &c.

[*Documents referred to in the Defence, as connected with, or tending to, illustrate the aforegoing.*]

(No. 4.)

Resolution of the House of Representatives, passed on the 27th December, 1824, requesting the President "to communicate to the House any information in his possession, not improper to be communicated, explaining the character and objects of the visit of the naval officer of the United States, commanding in the West Indies, to the town of Foxardo, in the Island of Porto Rico, on the —— day of November last."*(a)*

(a) NOTE. The attention of the court was directed in the defence, for reasons there explained, to the circumstance of the Secretary's letter of recal to commodore Porter having been deferred to the very day, on which this resolution passed: though the only information, on which that recal was founded, to wit: commodore Porter's official report (No. 2, as above,) had been received more than three weeks.

(No. 5.)

The President's Message, of the 28th December, 1824, in answer to the foregoing resolution; which, after communicating a report from the Secretary of the Navy, and a letter from commodore Porter, as all the information in possession of the Executive, on the subject, concludes, as follows: "Deeming the transaction, adverted to, of high importance, an order has been sent *(b)* to commodore Porter to repair hither, without delay, that all circumstances, connected therewith, may be fully investigated."

[*The Secretary of the Navy's report, referred to in the foregoing message.*]

NAVY DEPARTMENT, *December* 28, 1824.

SIR: In answer to a resolution of the House of Representatives, of the 27th instant, that "the President of the United States be requested to communicate to the House any information in his possession, not improper to be communicated, explaining the character and objects of the visit of the naval officer of the United States, commanding in the West Indies, to the town of Foxardo, in the Island of Porto Rico, on the —— day of November last," I have the honour to enclose to you a copy of a letter from captain David Porter to the department, dated 15th November, which is the only information on the subject, in possession of this department.

An order has been given that captain Porter should return to this place, without unnecessary delay, and an officer will sail from the United States to relieve him, and take command of the squadron, in a very few days, as soon as a vessel can be prepared for the purpose.

I have the honor to be, very respectfully,
Your most obedient servant,
SAM. L. SOUTHARD.

The PRESIDENT *of the United States.*

[*Note.* The letter from captain David Porter, enclosed in this report, is the same given above as No. 2.]

(b) NOTE. The order bears date the 27th, the day before the message. Vide No. 3, as above.

[NOTE. *The following documents, No. 6, 7, and 8, were introduced to show, (in addition to, and in corroboration of, the oral evidence already given on that point,) the notoriety, nature, and extent, of the piratical haunts and receptacles on the coasts, and in the interior of Cuba and Porto Rico, and of the connexion between the pirates and the inhabitants of certain parts of these Islands; especially of the latter.*]

(No. 6.)

[*Extract from the President's Message to Congress, (18th Cong. 1st Ses.) Dec. 2, 1823. Vide printed Message,* [1] *p. 9–10.*]

"Although our expedition, co-operating with an invigorated administration of the government of the Island of Cuba, and with the corresponding active exertions of a British naval force in the same seas, have almost entirely destroyed the unlicensed piracies from that island, the success of our exertions has not been equally effectual to suppress the same crime, under other pretences and colors, in the neighbouring island of Porto Rico. They have been committed there under the abusive issue of Spanish commissions. At an early period of the present year, remonstrances were made to the governor of that island, by an agent, who was sent for the purpose, against those outrages on the peaceful commerce of the United States, of which many had occurred. That officer, professing his own want of authority to make satisfaction for our just complaints, answered only by a reference of them to the government of Spain. The minister of the United States, to that court, was specially instructed to urge the necessity of the immediate and effectual interposition of that government, directing restitution and indemnity for wrongs already committed, and interdicting the repetition of them. The minister, as has been seen, was debarred access to the Spanish government, and, in the mean time, several new cases of flagrant outrage have occurred, and citizens of the United States in the island of Porto Rico have suffered, and others been threatened with assassination, for asserting their unquestionable rights, even before the lawful tribunals of the country."

(No. 7.)

[*Extract from the President's Message to Congress, (18th Cong. 2d Ses.) Dec. 7, 1824. Vide printed Message,* [1] *p. 12–13.*]

"The force employed in the Gulph of Mexico, and in the neighbouring seas, for the suppression of piracy, has likewise been preserved essentially in the state in which it was during the last year. A persevering effort has been made for the accomplishment of that object, and much protection has thereby been afforded to our commerce; but still the practice is far from being suppressed. From

every view which has been taken of the subject, it is thought that it will be necessary rather to augment than to diminish our force in that quarter. There is reason to believe that the piracies now complained of, are committed by bands of robbers who inhabit the land, and who, by preserving good intelligence with the towns, and seizing favourable opportunities, rush forth and fall on unprotected merchant vessels, of which they make an easy prey. The pillage thus taken, they carry to their lurking places, and dispose of afterwards, at prices tending to seduce the neighbouring population. This combination is understood to be of great extent, and is the more to be deprecated, because the crime of piracy is often attended with the murder of the crews, these robbers knowing, if any survived, their lurking places would be exposed, and they be caught and punished. That this atrocious practice should be carried to such extent, is cause of equal surprize and regret. It is presumed that it must be attributed to the *relaxed* and *feeble state* of the *local governments*, since it is not doubted, from the high character of the governor of Cuba, who is well known and much respected here, that if he had the power, he would promptly suppress it."

(No. 8.)

[*Extract from the Secretary of the Navy's Report, December* 1, 1824, *accompanying the last Message. Vide printed Documents, page* 111.]

"There are few, if any, piratical vessels of a large size in the neighbourhood of Cuba, and none are now seen at a distance from the land; but the pirates conceal themselves, with their boats, in small creeks, bays, and inlets, and finding vessels becalmed, or in a defenceless situation, assail and destroy them. When discovered, they readily and safely retreat into the country, where our forces cannot follow, and, by the plunder which they have obtained, and which they sell at prices low and tempting to the population, and by the apprehensions which they are able to create in those who would otherwise give information, they remain secure, and mingle, at pleasure, in the business of the towns, and transactions of society, and acquire all the information necessary to accomplish their purposes. Against such a system, no naval force, within the control of this department, can afford complete security, unless aided by the cordial, unwavering, and energetic co-operation of the local governments; a co-operation which would render their lurking places on land unsafe, and make punishment the certain consequence of detection. Unless this co-operation be obtained, additional means ought to be entrusted to the Executive, to be used in such manner as experience may dictate."

[NOTE. *The following documents, No. 9, 10, and 11, were introduced, as preceding instances of the sanction given by the government, under the same identical instructions now in question, to descents from our squadron upon Spanish territory: the attack upon persons there inhabiting, and apparently engaged in the ordinary pursuits of the country; the destruction of their villages and other habitations, &c. upon credible information of their being piratical haunts or establishments. These documents accompanied the President's foregoing Message of the 2d December, 1823; and are supposed, from the manner of their transmission, by the President, to have received his implicit approbation and sanction. Vide printed Documents, p. 156—7, 157—8, 173—7.*]

(No. 9.)

[*Extract of a letter from Commodore David Porter to the Secretary of the Navy, dated U. S. Galliot Sea Gull, Allenton, Thompson's Island, May* 10, 1823.]

"Since I last had the honour to address you, I have returned to this place, with the Sea Gull and barges, and found here captain Cassin, with the schooners and barges that accompanied him.

"The report of his cruise is enclosed. Our last cruise has been altogether a most arduous and fatiguing one; and, although we have not many trophies to show, it has not been without effect: the result has been, the capture of a piratical schooner, and a very fine felucca; the destruction of one on shore, the burning of three schooners in the Rio Palmas, and about a dozen of their houses in the different establishments to leeward of Bahia Honda, and inside the Colerados Reef; the complete dispersion of all their gangs, from Rio Palmas to Cape Antonio; and, what will be of no little importance in all our future operations, a most thorough and intimate acquaintance with the whole line of coast, from Cayo Blanco to the east, down to Cape Antonio, in the west. We have taken only one prisoner, and I shall endeavour to use such information as I can squeeze out of him to advantage."

"When I left Matanzas, the country was alarmed by large bands of robbers, well mounted and armed, who had plundered several estates, and committed some murders in the neighborhood of the city. Bodies of horse had been sent in pursuit of them, and the militia were all under arms; some prisoners had been taken, and it was said that those bands were composed of the freebooters which lately infested the coast, and who, being compelled to abandon the ocean, had taken up this new line of business."

(No. 10.)

Captain Cassin to Commodore Porter.

U. S. Ship Peacock,

Thompson's Island, April 28, 1823.

Sir: I had the pleasure to inform you, by a sloop from the Havana, bound to this place, on the 10th instant, of the successful beginning of my cruise, by the capture of the piratical schooner Pilot. After having shewn the Pilot in Havana, and obtained a small quantity of water, I proceeded with the division to Cayo Blanco. We entered within the reef, and proceeded westward, making an average of about twenty miles per day, leaving no bay, inlet, or suspicious place, unexplored. On the 16th, a sloop boat was observed standing to the eastward. The Musquito was ordered in chase; the sloop directly altered her course for the land, was run on shore, and abandoned by her crew, who escaped into the bushes. She was found to have arms of different descriptions, shot, and other articles of a suspicious nature, which satisfied me of her piratical character; and I took possession, with an intention to destroy her, as she was rotten, and an encumbrance to us.

At 10 A. M. on the same day, we anchored in a noted harbor for pirates, intending to examine it thoroughly. Our anchor was scarcely gone, before a felucca was discovered standing out for the Gallinipper, who was ahead, sounding. On opening our vessels, she immediately hauled down her sails, and pulled around the point of an island. The barges were ordered in chase, accompanied by all the boats we could muster. On their getting to where the felucca had disappeared, several houses were discovered, and a number of men busily employed carrying things from them, and, at the moment, were supposed to be fishermen. It was some time before the felucca was discovered, and, when found, was dismantled and covered with bushes, hastily thrown over.

When the pirates (which they proved to be) found she was discovered, they fired a volley of musketry at our boats, which fortunately proved harmless. The officers and crews immediately landed, and pursued them through the bushes, when a running fight of more than half a mile took place, the pirates frequently turning, for a moment, and firing, which was returned occasionally, but without effect, from the eagerness with which they were pursued. So closely were they pressed, that they threw off shoes, clothes, and other incumbrances; but, from the thickness of the bushes, and knowledge of their path, all made their escape. Their establishment, which consisted of five houses, was set on fire, and the felucca brought off. She is a fine boat, coppered, pulls sixteen sweeps, and is, in every respect, equal to any of our barges. She appears to have been recently fitted, and, I presume, was on the eve of making her first cruise. The old boat, which was taken in the morning, I gave to a fisherman, who was serviceable to us as a pilot, she being an incumbrance.

On the 17th, we proceeded, examining all places very minutely; and, from the intricacy of the navigation, did not arrive at cape

St. Anthony until the 21st. From the moment we passed within the reef, until getting to the cape, we were obliged to keep the barges ahead, sounding. The vessels were all trimmed by the head, and every precaution taken, yet we frequently grounded. Many places, for several miles, we found only seven feet water, and frequently less than six, when we were obliged to run out anchors, and heave through the mud. I learnt, on the passage, from the fishermen, that the English attempted the same, but succeeded only part of the way. I also found the British sloop Scout cruising off the cape, from the commander of which we learnt they had numbers cruising in that quarter, and on the south side.

The passage within the Colerados, from beginning to end, I found extremely intricate; but I am much gratified by knowing we are the first who accomplished it. We suffered much for water, and the small quantity we were enabled to obtain, was such as I apprehended would create disease amongst us. And, for the successful termination of the cruise, I tender to lieutenants-commandant Stephens and Valette, lieutenant Stribling, and their officers, my sincere thanks.

I have the honor to be,
Very respectfully, &c.
S. CASSIN.

Commodore DAVID PORTER,
Commanding U. S. Naval Forces in the West Indies.

(No. 11.)

[*Lieutenant-Commandant Kearney to Commodore Porter.*]

U. S. SCHOONER GREYHOUND,
Thompson's Island, August 10th, 1823.

SIR: I have the honor of transmitting, herewith, for your information, the enclosed report of the cruise of this vessel, commenced under circumstances of a vexatious nature, as the report will shew; but, terminating in a manner, I trust, somewhat satisfactory to you, although the principal object pointed out in your letter (respecting the pirates at the Isle of Pines) has not met that success you may have anticipated; but I have the satisfaction to inform you, that, although I have not been so fortunate myself, it has been the fortune of others to apprehend those very villains who committed the outrage upon the American vessels *Reuben and Eliza* and *Mechanic*, as mentioned in your orders.

They are now in prison, at Trinidad de Cuba. Having had a communication with the governor of that place on the subject, I submit herewith my letter, with his answer, (together with some publications to be seen in Spanish newspapers,) for your information. Although I was not successful in getting the pirates into my possession, by the application made through the enclosed letter, and which, indeed, I did not expect; yet you will perceive,

it has drawn an official acknowledgment of these pirates being in possession of the authorities; making it a matter of public notoriety, it becomes more obligatory to pursue their prosecution to a just and proper issue.

I take this occasion to express to you the high sense I entertain of the governor of Trinidad, which his attentions demand. He tendered us every civility and aid in his power in the prosecution of our duties; offering to procure us a pilot, and, altogether, evincing a disposition of friendly co-operation, seldom met with on the island of Cuba.

For your better information on the subject of our visit to Cape Cruz, I beg leave to subjoin the detail of events, in a more circumstantial and particular manner than given in the enclosed report, viz.

On the 20th ult. cruizing in company with the Beagle, lieut. commandant Newton, Cape Cruz bearing S. E. about four leagues, brought too and examined a small armed schooner, of about 35 tons, having three prizes in company. She proved to be a Colombian, duly commissioned, commanded by a Frenchman, and manned by Frenchmen and some others, apparently natives of the country where she belonged. Her commission was dated at Carthagena, last December. Her prizes were examined by capt. Newton, and found to be Spanish drogers, except one, a large canoe, calculated to carry about twenty men, which boat had been taken on shore, near the cape, where she had been abandoned by a party they supposed to be pirates, on being chased by said schooner.

On the following day, we stood in, with the Beagle in company, and anchored under the cape. Captain Newton and myself, as well for recreation as to examine the cape, landed with a small boat; but, finding the walking bad, we again embarked, and proceeded along shore in search of some settlement. Soon after getting out of sight of our schooners, (by doubling around the cape) a sudden and quick fire was opened upon us, from among a thicket of mangrove bushes and rocks, with which the cape is bordered.

The party was armed with muskets and blunderbusses, which were fired around us, alternately, without effect; at the same time, a firing upon us was opened from another quarter, from guns mounted on a high point of rocks a short distance ahead. Thus situated, with a cross fire upon us, enabled only occasionally to return the fire of the party in ambush, as some of them would dodge from bush to bush, or rock to rock; having for our arms but a fowling-piece and one or two muskets, we were induced to return to our vessels, which we did. It being late, we waited till next day.

On the morning of the 22d, captain Newton and myself again set off, hoisting our colors upon the boat: as it was a fair presumption, that, in consequence of a Colombian vessel being on the coast, some mistake on the part of the people on shore, might have been made in regard to our character. But that proved to be groundless: for, having reached within the distance of their guns, they opened upon us with more apparent spirit and deter-

mination than before, from a position inaccessible, apparently, in the rear, from the thickets of bushes and briars; and the same in front, from a precipice of rugged rocks; and so commanding altogether, that, to prevent the loss of lives, I directed both vessels to be warped round the cape, along an extensive reef, which almost encircles it, affording a smooth and shallow harbor. We did not succeed in getting within gun-shot of the establishment, until we had reached five and six feet water, when we anchored.

Lieutenant Farragut, with the marines and some seamen, was ordered on shore, to endeavor to gain a position in their rear, to attack them, or cut off their retreat before the schooner moored, or their landing could be discovered by the pirates—as we had deemed the party we were about to attack. The officers of both schooners volunteered, and accompanied the party on shore, one being only reserved in each schooner, and a sufficiency of men for the guns, hoping to attract the attention of the pirates from Mr. Farragut's party. Several shot were fired from the schooners, which drove the pirates into places of security behind the jutting rocks, where they seemed to be in considerable force; the shot being seen to strike among the rocks behind which they sat; and not until the boats were despatched to land in front, and lieut. F's party was close upon them, did they abandon the advantageous position they occupied. They were pursued, but with so decided a disadvantage to the pursuers, from their want of knowledge of the passes, that none, unfortunately, were taken, except two old and decrepid beings, whose age and infirmities placed them beyond the merited chastisement their more active comrades, had they fallen into our power, would have received.

A four pounder, two swivels mounted on the heights, and some indifferent articles of small arms, were found; they, however, escaped with their muskets and blunderbusses, or else hid them in some of the numerous deep and intricate caverns to be found on the cape: in one of which, various articles of plunder were stowed, but of no value; however, enough to show the character of the wretches who infest that place, human bones were found in the cave. We found eight boats, but not of a large size; their principal one was, no doubt, the one taken by the Colombian cruizer, as before stated; and those men armed with muskets and blunderbusses were, no doubt, of her crew.

From information derived from the prisoners, we learn that the captain of the gang was in prison in the interior of the island, for having burnt an English vessel off that cape. As a singular instance of the growing propensity of the present age for piracy, have to inform you, that even a *woman* and *children* were of this gang, belonging to the captain of them—a second "Helen M'Gregor;" and the old men, too, who can do nothing else, light up the signal fire, which was done in the present instance, on our appearing on the coast.

In another case, a captain of a vessel informed me that he had been plundered by a gang of pirates, who took him by surprise, under the following stratagem, viz.

"An old man, (his bald head and hoary locks exposed to view)

and a little boy to steer the boat, pulled, or sailed along side of his vessel; when it was too late, discovered that a strong party lay concealed in the bottom of the boat, to whom he had to surrender."

The female just mentioned was removed to some place of safety before the attack was made, (said to be the wife of the captain.)

Finding our pursuit of the pirates promised no success, I considered it unimportant to remain longer at the cape, having destroyed their means of doing further mischief for a time; and, taking into consideration the state of our officers and men, worn down by fatigue from a long pursuit over one of the roughest countries I have ever seen, their clothes nearly torn off, from bushes of impenetrable thickness, and their shoes cut off their feet by shap pointed rocks, over which they passed, I abandoned the place, bringing off the arms, &c. of any consequence, and setting fire to every thing else that would *burn*.

One large and well thatched house, and three smaller ones, were consumed, and a quantity of fishing nets; and their furniture, which I have always observed to be a part of the outfits of a piratical establishment; they are merely used for their immediate wants, in procuring sustenance, when their real profession proves unfruitful, and obliges them to it.

I have written you a very long and full account of this affair, in order that you may be possessed of every information in my power to give, in the event of a question arising as to the propriety of landing and burning property on a foreign shore; and should this case be noticed by the supporters of "territorial jurisdiction," (over uninhabited parts of Cuba, notorious only for murder and piracy,) it will be seen that your officers and men's lives have been jeopardized, and the flag of their country made a target for the lawless villains to fire at, at their pleasure, and which will continue so to be, if any restrictions should be put upon our landing in similar places, where no authority exists than the will of the marauders themselves who inhabit those places.

I took the liberty of releasing the two prisoners, as there was no proof to establish them pirates; and I furnished them a boat, with an express condition, that they should never appear again at the cape, and that I should take and treat as pirates, any persons found there hereafter, not furnished with a special licence from the present captain-general of Cuba, setting forth their character and occupation.

This was taking upon myself, perhaps, too much; but it is now submitted to you, whether such a measure would not be proper, not only in regard to that place, but all others of a like position.

That there is a chain of intercourse with fishermen who live in such places, and pirates, I have no doubt; and it must be obvious from several cases of late.

As regards those at the Isle of Pines, they affect to know nothing of the robbery of the vessels your order mentions to me having taken place there; although the very articles of the cargoes of those vessels, I saw in their house.

At Cape Antonio, two years since, I found fishermen's huts filled with piratical goods, papers, and letters, robbed from different vessels, strewed about their floors.

That fishermen, as well as pirates, should be moved from all the capes, or rather uninhabited parts of Cuba, where the proper authorities can have no control, I think necessary, and will I hope be the case.

Very respectfully, I have the honor to be
Your obedient servant,
LAWRENCE KEARNEY,
Lt. Com'dt U. S. Navy.

Com. DAVID PORTER, *Commanding U. S. Naval Forces in the W. Indies and Gulf of Mexico.*

P. S. In my report of the affair at Cape Cruz, I forgot to mention, that we were *not either hailed*, or was there any colors displayed by the party that attacked us, by which we could ascertain their character.

As regards *our character*, they could have *no great doubt:* for they had seen us communicating with an English ship of war, close off the cape, on the same day of our arrival.

I was informed by the governor of Trinidad, of pirates infesting the coast to the eastward of that place, and was induced to proceed within the keys in pursuit.

On my way, boarded a small schooner, belonging to the Grand Cayman island, and the information before received was corroborated by her master.

Under these impressions, I reached Cape Cruz, and our reception there induced a belief that we had met the party complained of.

I am, very respectfully,
Your obedient servant,
L. KEARNEY.

Com. DAVID PORTER, *Commanding U. S. Naval Forces in the W. Indies and Gulf of Mexico.*

COMMODORE PORTER'S correspondence with the governors of Cuba and Porto Rico, are also referred to. By these it appears, that upon his arrival, in the West-Indies, with his squadron, he officially and fully disclosed to these governors, the objects of his command; and invoked their aid and co-operation in the accomplishment of objects, in which the whole civilized world, and the governments of these islands in particular, had a common interest: and that the respective governors gave the most favorable answers, highly approving and commending the expedition; and promising every thing on their parts, to advance the object of exterminating piracy in those seas.

[Vide printed documents accompanying the President's message, December 2, 1823, before cited; p. 136, letter to governor of Porto Rico, March 4, 1823; p. 138, governor Torre's answer; p. 148, letter to governor of Cuba, March 26, 1823; p. 149, governor Kinderlan's answer, March 29th; p. 161, governor Vives'

(successor to the last named governor,) recognition of the same answer; May 10.]

When commodore Porter left the West India station, in obedience to his letter of recal, he commissioned lieutenant Sloat, commanding the U. S. schooner Grampus, to collect documents of the piratical and infamous character of Foxardo, and the adjacent district; and of the circumstantial and presumptive evidence which led commodore Porter to the conclusion, upon which he had proceeded against that place, as a piratical haunt, and the probable receptacle of the plunder, from the store of Cabot, Bailey, & Co. of St. Thomas. The result of these inquiries was communicated by commodore Porter, on the 6th May, 1825, to the Secretary of the Navy, accompanied by the following letter:

(No. 12.)

WASHINGTON, *May 6th*, 1825.

SIR: I have the honour to transmit to you a number of original letters, and depositions, respecting transactions at Foxardo, and the piratical character of the place.

I have the honor to be,
Your obedient servant,
D. PORTER.

HON. SAM'L. L. SOUTHARD,
Secretary of the Navy.

The documents referred to, in this letter, consisted of numerous letters, affidavits, and written statements, in various forms; some purporting to have been sworn to, before lieutenant Sloat; others to have been acknowledged before, and certified by Stephen Cabot, under his official signature and seal, ["*per* his attorney, John G. Bailey,"] as acting for Nathan Levy, vice consul of the United States, for the island of St. Thomas: these persons, [Messrs. C. and B.] being of the same house as Cabot, Bailey & Co. at St. Thomas, the robbery of whose store had been the immediate cause of lieutenant Platt's and commodore Porter's visits to Foxardo. These papers were from persons in St. Thomas, Caguar or Caguas, Foxardo, &c. and gave detailed accounts of numerous robberies committed at St. Thomas, by pirates landing at the town, or on the neighboring coast; of minute investigations into the circumstances and the persons of the pirates, and the disposal of the plunder: all of whom are stated to have been desperadoes, inhabiting in and about Foxardo and Naguaba, [about 20 miles apart,] between which places the plunder was distributed and disposed of, as suited the interest or convenience of the pirates. Various more recent piracies, at sea, by small boats, on the coast of Porto Rico, near Foxardo, are also stated. The following is a list of the robberies, at St. Thomas, detailed in those documents, and traced to Foxardo and Naguaba.

The store of Burgeest and Uhlhorn, to the amount of about 100,000 dollars; of which, Mr. Bergeest, [in a statement certified by S. Cabot, in the form above mentioned,] says, the per-

petrators were, a month afterwards, discovered in the neighborhood of Foxardo, where the goods were sold, but no part ever recovered. He also gave it as his opinion, that Naguaba, near Foxardo, has been, for a length of time, the receptacle of stolen goods; "and it is beyond a doubt, [he continues,] that all the robberies, which, for some years, have been committed in this island, [St. Thomas,] particularly that upon the store of Cabot, Bailey & Co. was, by the *inhabitants* of Foxardo, or its neighborhood; and to which place the goods were carried."

The store of Ellis, Gibson and Co. of the same place, to the amonut of $ 3,500: related by Mr. Browne, one of the firm, in an affidavit, before lieutenant Sloat; the goods were traced to Foxardo, Naguaba and Caguas, on the eastern coast of Porto Rico; for which suits were going on, at great cost, against the purchasers and receivers, who are stated to be responsible persons at these several places: the witness "further solemnly deposes, that he is convinced, from information received by his house, that the late robberies in this place, (St. Thomas,) have been committed by some of the same gang; and the goods secreted along the coast about Foxardo, Naguaba, Caguas, &c. &c."

The store of Saubot, Joubert and Co. of the same place; the robbery of which is stated, (in an affidavit authenticated as the last,) by Mr. Saubot, one of the firm: who states that the robbery was committed in March, 1824; among other things, an iron chest, containing money and papers, was taken: of which, some bills of exchange and other papers were afterwards received from Foxardo; where the papers were said to have been thrown into the house of lieutenant-colonel Villodas, who had been sent there by the government of Porto Rico, commissioned to make investigation of the robberies committed at St. Thomas; and several Louis d'ors, also taken in the iron chest, were afterwards received at St. Thomas; and, to their certain knowledge, from the coast and neighbourhood of Foxardo.

The store of Robert Alexander, of the same place, 5th May, 1824, of goods, to the amount $ 1,200; and an iron chest with $ 300 in gold, and valuable papers. A Spaniard of the name of Cabrero, undertook to secure the robbers and recover the property: who was only able to recover the *papers;* which were found, with the chest broken open, "in Foxardo, or close to it:" and some trifling articles of the merchandize were also found. Some people, supposed to have been accessory, were taken up and lodged in jail in the city of Porto Rico: but what became of them, was unknown.

A letter (15th February, 1825,) from Ellis, Gibson and Co. to Cabot, Bailey and Co. *(sworn to in the form above mentioned,)* states that, in consequence of an application from Mr. Bailey for the particulars, collected, to elucidate the robbery committed on the store of Ellis, Gibson and Co. in January, 1824, they had therein enclosed sundry letters, designated as No. 1, 2, 3, 4, severally dated at Caguas and Foxardo, in January and March, 1824, from a person whose *name* is *suppressed;* and who had been applied to, both by Ellis, Gibson and Co. and by their friend, a

Mr. O'Kelly, to endeavor to discover the robbers and the plunder. No. 1, addressed to Mr. O'Kelly, dated, Caguas, 23d January, 1824, states that the writer had "obtained from credible persons, positive information where there is a considerable of the effects; and indications of the direction that has been given to the rest:" he then recommends a memorial to the captain-general of Porto Rico, for a commission, directed to, or including lieutenant-colonel Villodas, [the same person mentioned in Mr. Saubot's affidavit,] who should join the writer at Caguas, and go with him to Foxardo. The letter concludes with a particular charge to conceal the name of the writer, "for his interests and the preservation of his relations." No. 2, addressed to Mr. Gibson, and of the same date as the last, gives some further details of the persons of the robbers; mentions the commission from the governor, as to a friend and a person of confidence; "considering this the only step that may prudently be adopted, to make the recovery." The writer says, "I might have saved you the expense of a commission, by acting myself; but I assure you this is very *disagreeable and transcendental business* in this island. The commissioner is a colonel of the expeditionary army of Spanish main, to whom I shall have to *pay;* and will therefore, draw on you accordingly, as it may be necessary." No. 3, dated, Foxardo, 27th March, professes to give a circumstantial account of the researches, under the commission, concerning the robbery of Ellis, Gibson and Co's. store. 'Tis stated that, "from the judicial proceedings, had for the purpose, it appears clearly, legally and justly proved, who were the robbers; to what point they conducted the whole of the plunder, and its distribution among them; what portions were introduced, by the coasts, within the jurisdiction of this town, [Foxardo,] and what by those of Naguaba; who were the assistants in the carrying, landing and concealing, and who the purchasers. Among the last, the very persons have been denounced." The names of the pirates; the places, to which they took the plunder;—and the names of the purchasers, of the plundered effects, at Naguaba and Foxardo, respectively, are specified; including, in the latter, "all those who had open shops of merchandize and chandlery."

A great number of details, respecting the robbers, the pieces of merchandize recovered, and the minute process of the investigation, &c. &c. are set forth: The writer concludes with great praises of his friend, the commissioner; and, in the postcript, advises of a draught for two hundred and fifty dollars, to be paid to the commissioner, on account of his trouble. No. 4, to Mr. O'Kelly, dated Foxardo, February 9, 1824, expatiates on the rapid progress and activity of the investigation, under the commissioner; whose energy and perseverance are commended: the great expenses attending the investigation are adverted to, and a promise made by the writer to the commissioner, to pay him the reward, that had been offered, in the papers, for the discovery of the robbery: "for [says the writer,] though it ought not to be offered as a *stimulus*, it ought justly to be given him as an *indemnification* for his extraordinary efforts;—efforts, which alone could have brought the business to the state in which it is."

Ellis, Gibson, and Co. in their letter, enclosing the aforesaid letters, No. 1, 2, 3, and 4, to Cabot, Bailey, and Co. say, "you can make what use, you please, of the above letters, only the writer's name must be kept a profound secret."

A letter from W. Furniss, of St. Thomas, (17th February, 1825,) who had been requested to furnish information, alludes to some recent discoveries of piratical transactions; in which it appears, from other of the documents, that many pirates had been arrested, and were then confined in the fort of St. Thomas: he speaks of having waited on the governor and judge, in company with lieutenant Sloat, to obtain extracts from the records in the governor's office, and the court-proceedings in the trial of the pirates, "which might fix the thing in Foxardo, but were informed there were none." But he has no doubt that strong proof does exist, and may be obtained from the proceedings, in the trial, as to the character of the inhabitants of Foxardo; and intimates that the documents may be obtained from the official depositories, provided a demand is made to the government of St. Thomas, through the Danish minister residing in the United States. "In the piratical business discovered here, (he says,) a Foxardo boat made the principal figure; which boat and her crew are now here under arrest. Piracies continue frequent on the *East* and *South* coast of Porto Rico, committed by open boats and a small schooner." He then gives several instances of recent piracies on that coast, not material to the matter now in hand. He also mentions a fire which, within a few days, had burnt to the ground half the town of St. Thomas; and which lieutenant Sloat, and the crew of the Grampus, were instrumental in extinguishing; and to whom the preservation of the balance of the town is due; though not much is said about it in the papers.

A letter to commodore Porter, from an American citizen, at St. Thomas, whose name is suppressed, dated 6th March, 1825, refers to a former one giving an account of the *fire* which took place on the 12th March, 1824; then supposed to have been accidental, but since concluded, from many circumstances, to have been the work of an incendiary. "The fact is, (says the writer,) that this place and the neighborhood has, for a length of time, been frequented by pirates, and there exists no doubt, but the frequent attempts, seven in number, since the 12th, [meaning, doubtless, attempts to fire the town,] have originated with the *gang*, part of which are lodged in the fort of this place, [as prisoners.] On the 12th, during the fire, and when it was supposed to be gaining on the upper town, the pirates in the fort cheered and appeared to be pleased," &c. "Business is completely at a stand, &c. The government of this island is without force. The prisoners, now in the fort, are nearly equal to the garrison; and, although the governor is using every exertion to preserve the remains of the town, and is inclined to execute the pirates, now in confinement, still the laws are not sufficiently strong to warrant him in so doing. The gang on the coast of Porto Rico must now exceed eighty; and they have several small vessels in which they cruize. The commander of the Grampus does all in his power, but his

force is not sufficient; and if our government does not send out a larger force on this station, I fear that the flourishing trade from our country to this will be done up. The inhabitants of this island are in a state of continued alarm; we are not only on the alert against fire, but fear that these desperadoes will attempt, during the flames, to assassinate the inhabitants. If you can influence the Secretary of the Navy to send us a greater force on this station, you will confer a great favor on all the resident Americans."—The writer requests his name to be kept secret, "as the government use every means in their power to keep the true state of things from coming to the ears of the public, supposing it will be detrimental to the trade of the place."

Among these documents, is the following letter from C. B. and Co. [sworn to as before mentioned,] recapitulating the circumstances of the robbery on their store.

St. Thomas, 16*th February*, 1825.

Captain David Porter, *U. S. Navy.*

Sir: Agreeable to your request, we have collected and put into the hands of lieutenant-commandant Platt, all the testimony regarding the various depredations which have been committed upon this place by the inhabitants of Foxardo and its vicinity, which the present unsettled state of this place will permit, from the unfortunate fire. We will now repeat what our Mr. Cabot had the honor of verbally acquainting you, that our store was broken open and robbed of a considerable amount of valuable property, on the night of the 24th October last, all of which belonged to citizens of the United States. Being fully convinced who the perpetrators of this act were, and the course our goods had taken, from the well known character of the inhabitants of Foxardo, and the facilities *believed* to be rendered by the government of that place, we requested lieutenant-commandant Platt to aid us in the recovery, which he very generously consented to. The circumstances of his reception and treatment at that place, you will receive from lieutenant Platt. We would now add, that about ten days since, we received information, which may be relied upon, that John Campus, of that place, a man whose wealth gives him consequence, and even the then Alcalde of the place, from *interested* motives, or otherwise, forbore to put in force any claim against him, was the actual receiver of our goods, and that he, at the time lieutenant Platt was there, *had them in possession.* It will be recollected that this said Campus is the man to whom our clerk was introduced by Messrs. Burgeest and Uhlhorn, of this place, and who had been the agent of most, if not all the houses in this place, who have been robbed, to obtain justice for them, and he has written us for a power of attorney to act in our place. Three or four days since we received a message from a man in power in that place, whose name is suppressed, but who, we believe, is the present Alcalde of Foxardo, (the Alcalde in the office at the time of your visit is removed,) offering to obtain the value of the goods stolen, if we would relinquish to him one half of the

amount recovered. This we have consented to, and have no doubt but it will be accomplished.

We request you not to give any greater publicity to this letter, and the documents you will receive, than is actually necessary; for the lives of the parties would be endangered.

We have the honor to be, sir, with respect,

Your most obedient servants,

(Signed) CABOT, BAILEY, & CO.

The following letters from lieutenant Sloat, were also among these documents:

U. S. Schooner Grampus,

St. Thomas, 4*th Feb.* 1825.

Sir: I heard, with great regret, that you have been recalled from the command of the West-India Squadron, on account of the Foxardo affair; since which, I have every day been more and more satisfied of the propriety and necessity of treating these people in that way. There is not the least doubt, but the authorities of that place were concerned with, or, at any rate under the complete influence of Campus, a rich and influential merchant, who, we have since ascertained to a certainty, had the goods of Cabot, Bailey & Co. at the time of captain Platt's visit there, and that he was, no doubt, the cause of his and Mr. Ritchie's being confined, to prevent their getting information, and to induce them, with the young man sent from St. Thomas, in the Beagle, to leave the place as soon as released. The *new commandant* of Foxardo has recently sent a person to St. Thomas, to negotiate with Cabot, Bailey & Co. for the recovery of the property, and has entered into a written *agreement* with them, to prosecute this man, and to be at all the trouble and expense, for *one-half of what he gets.* He says he can prove, beyond the possibility of doubt, that this man had the goods; this, of course, must be kept secret at present. Bailey has entered into this agreement, by the advice of the government of St. Thomas; and, after he obtains as much of the property as he can, the governor is to demand of the government of Porto Rico the remainder of the property, and the punishment of Campus. These, and many other circumstances about these people, have come to my knowledge, that may perhaps be serviceable to you in the investigation that is said to be intended about the affair; and I assure you, it will give me much pleasure to throw any light on the subject in my power.

Very respectfully, I am, sir,

Your obedient humble servant,

(Signed) JOHN D. SLOAT.

To Com. David Porter, *U. S. Navy.*

(Extract.)

U. S. Schooner Grampus,
St. Thomas, 12*th March*, 1825.

Sir: I have the honor to enclose you the deposition of the master and owner of the sloop Neptune, of this place. I have taken and forwarded it, thinking it may be serviceable to you in the investigation of the Foxardo affair, as it shews the character of the people of that vicinity. Since you were here, they have robbed and captured several small vessels belonging to this place, and fitted out one or two of them, as pirates. Having obtained this intelligence, I procured two small sloops, such as are used in this trade, manned them, with the intention to examine all the small harbours of Crabb Island, and the coast of Porto Rico, where the Grampus could not enter; and as a decoy, my plan succeeded, and in Boca del Ferno, lieutenant Pendergrast was so fortunate as to fall in with one of them, who gave him chase. On coming near, however, he became suspicious, and tacked. Mr. Pendergrast then fired on him, which he immediately returned, and kept up the action for forty-five minutes, when he ran on shore, and they all jumped overboard, and swam to shore. They were nearly all killed or wounded; ten of those which escaped were taken by the soldiers, five or six of which are wounded, amongst them the famous piratical chief Cofrecinas, who has long been the terror of the coast. The sloop I have taken is the new sloop belonging to the man that pilotted us to Foxardo, and was on the stocks when we were there. He had just got her ready for sea, and had taken her a few miles from that place to take in a cargo, when she was taken from him. By the next opportunity I will send you his deposition.

With respects to Mrs. Porter, I am sir,
Your obedient servant,
(Signed) JOHN D. SLOAT.

To Com. David Porter, *U. S. Navy, Washington.*

P. S. Since writing the above, I have met with captain Low, and have taken his declaration, which is enclosed.

The depositions referred to in the last letter, are, 1st, that of Salvador Pastorise, of St. Thomas, who states, that about the last of January, 1825, he sailed in the sloop Neptune, whereof he was owner, from St. Thomas to *Las Platillas*, in Porto Rico, where he safely arrived, and obtained a permit to discharge at *Hobos*, about twenty-five or thirty miles from *Foxardo:* that, in going into *Hobos*, he was attacked, inside the harbor, by a small piratical boat, which continued firing till the crew escaped in the boat to shore, the master receiving a wound in the head: the pirates seized the vessel, and pursued the crew, with intent to murder them, as believed: the persons of four of the pirates were known, and recognized, three of them as Creoles of Porto Rico, and one Italian settled there, within ten miles of Foxardo: the witness is inform-

ed, and believes that his sloop had been fitted out, and was cruizing, as a pirate, about the coasts of Porto Rico.

Secondly. John Low, master and owner of the sloop Ann, of St. Thomas, swears that, about the 18th February, 1825, he sailed from Foxardo, for cape Rapalma, a small port within an hour's sail of Foxardo, where he came to anchor; and, at midnight on the 20th, was boarded and captured by a small piratical row-boat, and, after being robbed, was compelled, with his people, to jump overboard; all fortunately reached the shore, where they waited for an opportunity to go to St. Thomas. After his arrival at that place, and reporting the affair, he sailed with lieutenant Pendergrast, in pursuit of his sloop, which had also been fitted out, and was cruizing as a pirate: he was present when his sloop was recaptured, identified her, and had her restored to him.

There was also, among these documents, an affidavit of lieutenant T. B. Barton, sworn to before a justice of the peace for Monroe county, in Florida; and giving an account of the landing at Foxardo, spiking the guns, &c. &c. which, being all fully detailed in his evidence, recorded in this trial, it is unnecessary here to repeat.

All these documents were, on the 7th May, transmitted by the Secretary of the Navy to the court of inquiry then sitting; accompanied by a letter, in which the Secretary stated the source from which he come into possession of the documents, &c.

It appears, from the minutes of the court of inquiry, that they were read, "the court reserving all questions, as to their competency and credit, for future deliberation and decision." After due deliberation, the court received the affidavit of lieutenant Barton, as evidence: but, "in regard to the other documents, the court is of opinion that many of them are not sufficiently authenticated to authorize their reception, without an express and sufficient waiver of all exceptions entered on the record. That some of them appear to be of a confidential character, and their contents such, as without affecting this case, ought not to be exposed to the public eye without necessity; and that, collectively, they present no facts or views calculated to elucidate the subject submitted to the court. The court, therefore, direct the judge advocate to return them to the navy department as irrelevant."

These documents were published in commodore Porter's pamphlet, under the title of "Rejected Documents;" and were read by the judge advocate, in this trial, with the rest of the pamphlet.

[As a further illustration of the practical effect and influence of commodore Porter's operation at Foxardo, upon the opinions and conduct of the persons likely to be affected by it, documents of the following effect were produced in evidence.]

In a report from lieutenant Sloat to commodore Porter, dated 12th December, 1824, of a cruize upon which he had been sent by the commodore, he says, "I enclose you the official account from Porto Rico of our expedition to that island. Several gentlemen I have seen from there, informed me, that it created a great sensation, and that La Torres threatens to retaliate on the first American officer he can catch, by making him walk barefooted to

Fajardo. The captain of the Port, and the military commandant, have been broke and confined. The Alcalde made his escape, and is now in this place. As I have no inclination to march barefooted to Fajardo, I cannot go to Porto Rico for water. I shall, therefore be obliged to purchase it at this place, or go down to St. Domingo, which I think I shall do before long, as I intend to visit the Mona Passage in a few days. We have nothing new on the station worthy of communication."

The account of the Foxardo affair, mentioned by lieutenant Sloat, is a publication in a Porto Rico Gazette, of the 23d November, 1824, entitled, "Shameful aggression by captain Porter, of the United States' frigate John Adams, in violation of the rights of nations:" in which the writer undertakes to give a detailed account of the transactions at Foxardo, upon information principally derived from the Alcalde and captain of the Port; and attempts, in a long and abusive article, to prove the conduct of commodore Porter, an unlawful and atrocious violation of the law of nations.

In the several reports of lieutenant Sloat to the Secretary of the Navy, dated U. S. schooner Grampus, St. Thomas, 12th and 19th March, 1825, and the several documents accompanying the same, a more full and detailed account is given of the capture of the pirates, in the harbor of *Boca del Inferno*, by a sloop under command of lieutenant Pendergrast, mentioned by lieutenant Sloat in his foregoing letters to commodore Porter; and also of the conduct of the government and people of Porto Rico, and St. Thomas, in relation to, and in consequence of, that affair.

From these, it appears that lieutenant Sloat, having learned that several vessels had been robbed by pirates near Foxardo, and that two sloops, [those of Pastorise and Low before mentioned,] recently taken by them, had been fitted out, and were cruizing as pirates, obtained two small sloops at St. Thomas, free of expense, by the cordial co-operation of governor Von Scholten; who ordered a temporary embargo, to prevent intelligence of the expedition reaching the pirates. These sloops were manned, and sent, under the command of lieutenants Pendergrast and Wilson, on a cruize after the pirates; but anchored, on the 3d March, at Ponce, where the officers and crews of the sloops were taken on board the Grampus; having missed the object of the cruize. But a sloop, confidently supposed to be one of those fitted out by the pirates, being seen, the next day, off the harbor of Ponce, one of the sloops, before in service, was again manned, and sent in pursuit, under command of lieutenant Pendergrast; who overtook and engaged the pirates in the harbor of *Boca del Inferno;* which is described as very large and full of hiding places. After an action of forty-five minutes, the pirates ran their sloop on shore, and jumped overboard; leaving behind them four dead. The survivors, thirteen in number, with a noted and formidable piratical chief, called *Cofrecinas*, at their head, were met, near a place called *Guayama*, in Porto Rico, by a colonel Renovales, at the head of a party of soldiers; and, after a desperate resistance, were all taken, badly and most of them mortally wounded; and sent to St. Johns, Porto

Rico: to which place lieutenant Sloat proceeded, and addressed a note to the governor, [Torres,] offering the testimony of himself and crew, to convict the captive pirates. The governor's answer is profuse and warm in expressions of thanks and commendation of lieutenant Sloat, his officers and men; and states, that the most energetic orders had been issued, for all the authorities of the coasts to co-operate with the American squadron, in the most efficacious manner. The evidence, offered by lieutenant Sloat, is stated to be unnecessary, as the pirates had confessed enough to convict them. The following is a copy of the orders, referred to by governor Torres.

"The captain of the U. S. American schooner Grampus, (lieut. John D. Sloat,) goes in pursuit of pirates; for which purpose he will visit all the ports, harbors, roads, and anchorages, which he may find convenient. In consequence, you will give him all the necessary aid and notice for discovering them; and in case of meeting with them, the authorities of the coast, both civil and military, will join themselves unanimously with the said commandant, to pursue them by land, while he does the same by sea; and in case any of those wicked wretches should seek refuge in the territory of any part of the island, they will pursue them briskly, until they have possessed themselves of their persons. The government expects, from the known zeal of the authorities referred to, that they will display the greatest activity, efficacy, and energy, in this important service, assuring each, in particular, of the lively interest which it feels for the total extermination of such vile rabble, the disgrace of humanity. Those who shall distinguish themselves in the opinion of the government, will be reported to his Majesty, giving to each one justice, according to his merits. God guard you many years.

"MIGUEL DE LA TORRES.

Puerto Rico, 16th March, 1825.

"To the Military Commandants, and of the Quarters, Royal Alcalde, and other Civil and Mil. Authorities and Functionaries of the Coasts of this Island".

Many of *Cofrecinas*'s confederates were arrested on shore, and sent to St. Johns: five of them are stated to have been sent from Ponce. The Alcalde and military commandant of Ponce communicated, through a Mr. Atkinson there residing, their thanks for the important service rendered them by our officers and men, in the capture and destruction of this noted pirate and his gang: and give the strongest assurances of co-operation and assistance in the cause.

Lieutenant Sloat also communicated the result of the cruize to governor Von Scholten of St. Thomas; who expressed the obligations of himself and the community, to lieutenant Sloat, for the assistance so readily afforded, on every occasion, to the island.

[The three following documents having been particularly designated among those, relied upon by the prosecution, in support of the first charge:*(a)* and having no intimation of the particular use or application of the same, as evidence, for the prosecution, we have thought it safest to give them at large.]

(a) Ante page 86.

(No. 13.)

St. Thomas, 12*th November*, 1824.

Sir: I have the honor to inform you that the store of Cabot, Bailey & Co. was broken open on the night of the 24th ult. and property to a considerable amount stolen; and having strong reasons to believe that the robbery was committed by a gang of thieves who harbor in the island of Porto Rico, I communicated the same to captain Platt, of the U. S. schooner Beagle, who very promptly offered to go there in pursuit of them, and started for Foxardo on the morning of the 25th, with a pilot which I furnished him, and a young man from the counting-house, with a description of the goods, and a letter of introduction to Mr. Juan Campus, from one of the most respectable houses in this place, and well known in that quarter. The manner in which captain Platt was received and treated, has no doubt been communicated to you by him.

I beg leave to enclose a letter from Messrs. Burgeest & Uhlhorn, confirming the facts of the late robberies in this island, having in most instances been traced to the quarter of Porto Rico, where captain Platt went.

I have the honor to be, sir,

Your most obedient servant,

STEPHEN CABOT.

U. S. V. Consular Agent.

To Com. David Porter.

(No. 14.)

Sir: At the request of our friend Mr. Stephen Cabot, we beg leave to state to you some facts relative to the robberies lately committed in this island.

Our own store, and amongst others, those of our neighbors, Messrs. Ellis, Gibson & Co. Jno. Kettell, esq. Robert Alexander. esq. Saubot, Joubert & Co. were forcibly broken open, property to a very large amount stolen, and a considerable part of the goods traced to Naguaba, near Foxardo; in consequence of which, and the circumstances that about ten days previous to the robbery committed in the store of Messrs. Cabot, Bailey & Co. a gang of desperate thieves made their escape from the prison at the city of Puertorico, as also that every search had been made here on shore, as well as in the harbour, and nothing discovered, except that the goods stolen had been carried off by the sea-side, induced us to recommend to those gentlemen sending down a person to Foxardo, as being probable the means of tracing the robbers.

Desirous of assisting our friends, Messrs. Cabot, Bailey & Co. in this object, we gave one of their clerks, and who, we understood, was to go down to the U. S. schooner Beagle, a letter of recommendation to our friend, Mr. Juan Campus, in Foxardo,

who had on former occasions of the same nature, been the means of discovering the property and perpretrators, namely, in the case of Messrs. Ellis, Gibson & Co. and our own.

We have the honor to be,

With sentiments of the highest regard, sir,

Your obedient humble servants,

BERGEEST & UHLHORN.

St. Thomas, 11th November, 1824.

To Com. DAVID PORTER.

(No. 15.)

U. S. SCHOONER BEAGLE,

ST. THOMAS'S, *11th Nov.* 1824.

SIR: At 10 in the morning of the 26th of October last, I received intelligence that the American Consul's store had been forcibly entered on the preceding night, and robbed of goods to the amount of $ 5000. With this report, the American consul requested me, provided it would prove consistent with my duties, to sail in quest of those, whom it was supposed had clandestinely left the harbour the night preceding in a small boat, and generally believed by those acquainted in St. Thomas, to have proceeded to the port of Foxardo, on the east end of Porto Rico.

I directly gave the necessary orders to prepare for sea. Having received a good pilot on board, I was enabled by noon to proceed in quest of the marauders. Standing along the south side of Crabb Island, discovered a sloop in Settlement Bay, boarded her, and received information of a piratical sloop rigged boat to leeward, that had been for some time past infesting the coast. This information induced me to alter my course and steer for the west end of Crabb Island. At 10 A. M. discovered a sloop beating to windward, and the small sloop rigged boat standing from the land: at 10 50 fired a shot to bring the sloop to; at 10 55 fired again, she hove about and stood for the land; spoke the sloop —from St. Croix, bound to St. Thomas—made all sail for the sloop boat, which run into Bay, and her crew abandoned her: at 11 15 came to, and took possession of the deserted boat; at 11 45 made sail, and stood for the S. E. end of Porto Rico, and at sun-set came to in the harbour of the port of Foxardo.

On the morning of the 27th, a Creole visited me from shore, who bore an invitation from the commandant to me to visit him. At 7 A. M. in company with lieutenant Ritchie, the pilot, and the consul's clerk, I landed. For our better success, we appeared in the character of citizens. On my reaching the shore, the register of my vessel was demanded; I explained the object of my visit and the policy of appearing in disguise; this, however, proved of no avail; I was not allowed to proceed to Foxardo. Supposing that the person who made these demands had no authority to detain me, I, in company with lieutenant Ritchie, proceeded to the port of Foxardo, and explained, in the most satisfactory manner

to the captain of the port, the object of my visit, and produced a private letter from Mr. Cabot, American Consul, to a merchant in that place, in relation to the service in which we were engaged. Having observed the necessary forms and ceremonies with regard to the captain of the port, we then waited upon the Alcalde, and further acquainted him with our mission, &c., who proffered us every assistance. Having made a few inquiries in some of the retail stores which had an immediate tendency to bring to light any who may have been engaged in this traffic, we received a positive order to repair to the Alcalde's house, where we were also received by the captain of the port, who damn'd us as pirates, and requesting of me my register, papers, &c. I stated I possessed no register, I carried no papers, other than my commission, and that of my officers. We were seized as culprits and conveyed to prison. To satisfy them of my real character, of which they pretended they had no positive proof, I consented, though repugnant to my feelings, to have my commission sent me; after its production, they declared it a forgery, and again remanded us to prison, declaring he would not release us until he had heard from St. John's. I then demanded to know what was further required? the reply was, "Your appointment as lieutenant-commandant of that vessel is what you must produce." I, at first hesitated, and would not comply, but not wishing on my part to commit any action which might have a tendency to disturb the harmony existing between the respective governments, I produced my appointment as lieutenant-commandant. A council of officers was called with other citizens of the place, who, after having heaped upon us the most shameful outrages, permitted us to depart on board.

I have the honor to be, respectfully,

Your obedient servant,

(Signed) CHARLES T. PLATT,

Lieut. Comm'dt U. S. Schooner Beagle.

To Com. DAVID PORTER, *U. S. Navy.*

[As a part of the *action*, the letter addressed by commodore Porter to the Alcade of Foxardo, and sent with the flag by lieut. Stribling, should have been placed with the evidence of lieutenant Platt and others: it is here given as read, on the trial, from the pamphlet.]

(No. 16.)

U. S. SHIP JOHN ADAMS,

November 12, 1824.

SIR: It has been officially reported to me, that an officer under my command, who visited the town of Foxardo, of which you are the chief, in search of robbers and free-booters, who with a large amount of American property, were supposed to have taken shelter there, and bringing with him sufficient testimonials as to his

object and character, was, after they were all made known to you, arrested by your order by armed men, and shamefully insulted and abused in your presence by the captain of the port- after which, he was sent by your orders, to prison, and when released therefrom, was further insulted and abused by the inhabitants of the town. His object in visiting Foxardo has, by these means, been defeated, and for these offences no atonement or explanation has yet been made.

The object of my visit is to obtain both, and I leave it entirely to your choice, whether to come with the captain of the port and the other offenders to me, for the purpose of satisfying me, as to the part you have all had in this shameful transaction, or to await my visit at your town. Should you decline coming to me, I shall take with me an armed force, competent to punish the aggressors, and if any resistance is made, the total destruction of Foxardo will be the certain and immediate consequence.

If atonement for the injury is promptly made, the innocent of the offences will escape all punishment—but atonement must and will be had, and if it is withheld from me, they will be involved in the general chastisement.

I shall hold the town and vessels in the harbour answerable for any detention or ill-treatment of the officers who bear this letter.

I allow you one hour to decide on the course you will pursue, at the expiration of which time, if you do not present yourself to me, I shall march to Foxardo.

I have the honor to be, with great respect,
Your very obedient servant,
(Signed) D. PORTER.

To the ALCALDE OF FOXARDO.

[Note, as to the documents transmitted by commodore Porter to the Navy Department, on the 6th of May, and by the Secretary to the court of inquiry, on the 7th, and which were printed in the pamphlet, under the title of "*rejected documents,*" (the history and contents of which are above given from page 89 to page 96,) no intimation was given, from the prosecution, that the use of them, as evidence on this trial, was objected to: nor is it conceived that any possible objection can lay against them. The court of inquiry appears to have rejected them for several reasons, stated in the minutes of their proceedings: which reasons it may be proper, in order to give these documents their due weight in this case, to examine.

Objection 1. Many of the papers are not sufficiently *authenticated*, to be received, "without an *express* and sufficient *waiver* of all *exceptions entered* on the *record*." Answer, 1, as to the *authentication:* an officer, engaged in the active operations of war, must, in the nature of things, act upon *probabilities* and *presumptions;* upon credible *information;* of the credibility of which he is the sole judge; upon what is called *moral* evidence, as distinguished from *legal proof*. He would be lost, if he were obliged, not only to collect *information* and *facts*, upon which to

proceed, but to wait till such information and facts, were proved and established by legal evidence; and that evidence authenticated in legal form. His justification depends not on the absolute *verity* of the *facts;* nor on the form or nature of the *evidence* which led him to confide in their verity: the only question, in such case, is whether the facts, if true, justified the operation; or, if not true, whether he had reasonable ground, in the honest exercise of his discretion as a military or naval commander, to believe them. It would be a poor business for him, if his country or the service suffer from his neglect to meet and to repel an imminently approaching or threatened peril, to cavil about the modes of legal proof, or the formal authentication of documents or other evidence. Information, conveyed in letters, certificates, or oral communications, or even by covert hints, or signs, are, according to circumstances, just as operative in the field, as the examinations of witnesses on oath, or the most formal specialties, in court. The information, as to the actual condition of Foxardo in relation to the public enemy, the pirates, collected by commodore Porter, at St. Thomas, or elsewhere, in the form of letters, conversation, &c. came precisely within the principle. The informal authentication of the same, by an oath before lieutenant Sloat, who was not legally qualified to administer an oath; or by the certificate of a vice-consul, is utterly immaterial. If they had been sworn to before any justice or magistrate whatever, the authentication would have been just as insufficient, in a legal view: they would have been mere *voluntary affidavits;* and, as such, could have carried with them none of the sanctions of a *judicial oath.* In that view, the affidavit of lieutenant Barton, which was received by the court, as properly authenticated, was just as destitute of legal authentication, as the affidavits sworn before lieutenant Sloat, or certified by Mr. Cabot, the vice-consul's agent, *per his attorney.* They all stood upon precisely the same ground, of probable information; which a military commander was not only *justified* in giving credit to, but which he would have been *criminal,* if he had disregarded. Of the *authenticity* of the papers, no reasonable doubt could exist; whatever might be said of their *authentication.* They were *original* documents, procured from respectable houses at St. Thomas;—certified by the acting vice-consul of the United States, or his attorney; and by lieutenant Sloat: and they had passed through the hands of two officers of the United States, (lieutenants Sloat and Platt,) directly to those of commodore Porter; from him directly to the Navy Department, and from that, directly to the court. It deserves serious consideration, what a strange predicament, an officer, sent on foreign service, is placed in; if informal evidences of the facts and circumstances, upon which he acted, are not to be received to explain and justify his conduct. He is bound to *act* upon such, at the peril of life and honor, if he neglect to pursue the course, which such informations point out, as necessary: and yet, after he has acted upon them, another and *impracticable* mode of proof must be resorted to, for his justification at home. Impracticable, if it must be legal evidence, formally authenticated: because the

law has not provided for any mode, either for the caption or the authentication of evidence, in foreign parts. Voluntary affidavits, no matter how solemnly sworn to, or how authenticated, are just as inadmissible, under the strict rules of *legal proof*, as letters, certificates, &c. Even if the law had provided any mode of taking regular depositions in such cases, the inconvenience would be incalculable, of holding an officer under arrest, till commissions could be sent out and executed, with the usual formalities in various and remote regions. The rational mode of getting over the difficulty is that which the government seemed disposed to have adopted, in this instance; which was to permit the informations and intelligence which had formed the basis of commodore Porter's conclusions, when called to action, to be laid before the court, *in extenso:* and to pass at their intrinsic value, without regard to the formalities of authentication. Answer, 2, as to the *express waiver*, of exceptions, required by the court: here were two parties before the court, the government and commodore Porter. Now which of these could except; from which of them could any thing in the nature of an exception be apprehended? com. Porter had obtained and transmitted the documents, as evidence in his own *favor;* as tending to justify his conduct in the Foxardo affair. To have apprehended exception from him, against his own evidence, would have been absurd: to have required an *express* waiver, from him, on *record*, of exceptions against his own evidence, would have been no less absurd, and more unjust. He had, some days before, withdrawn himself, as a party, from the court, in consequence of some conditions having been imposed on his intercourse with the court, which he thought unjust and derogatory: he could, therefore, neither urge nor waive exceptions: and so, the condition of an *express waiver*, was equivalent to an absolute rejection of the evidence. Then the only party, from whom it can be presumed that the court apprehended exceptions, or required an express waiver on record, was the government. And had not the government, as represented by the Secretary of the Navy, most distinctly waived such exceptions; and even made the waiver in a form to be *entered on the record?* Surely that question must receive an unanimous answer in the affirmative, after the least reflection upon the circumstances. The documents are transmitted from the navy department to the court, as evidence; accompanied by a letter, from the Secretary, either *expressing*, or as strongly *implying* the assent of the government, to have the documents used in the investigation before the court. Then here was a concurrent act of the only two parties, in the case, making the documents evidence. The means by which the court came into possession of the papers, were, of course, officially known to the court: there was the official letter accompanying them: all these the court might have had entered on the record, as *equivalent* to the required waiver: Why then require an *express* waiver? This *consent* of *parties*, to the admission of the documents, both answered every possible objection to their form of authentication, and dispensed with all necessity for an "*express waiver*" on record.

Objection 2. Some of the documents are of a *confidential character*, and ought not to be exposed to the public eye, without necessity. Answer. 'Tis not perceived what the court had to do with their *confidential character*. The documents had been communicated and belonged to commodore Porter. Whatever *confidence* was attached to the communication, was reposed in him alone; and was to be dealt with, upon his sole responsibility: and, upon that responsibility, he used the documents in his justification and defence. But it was expressly to answer the precise ends of that very justification and defence, (known to, and avowed by all the parties, from whom the documents had been procured,) that they were originally communicated to commodore Porter. All that he is required to do is to conceal the *names* of certain persons, whose safety might be endangered by the disclosure: and he faithfully fulfils that injunction, by suppressing the name of every such person. Even Messrs. Ellis, Gibson, and Co. when they communicate the four letters from a secret agent, resident at Caguas, and stationed at Foxardo; in the centre and heart of piratical power; in the very den of the lion; and consequently exposed to a degree of danger, from disclosure, infinitely exceeding that of any other person concerned; even, in regard to him, the only precaution required, is the concealment of his *name*. For Messrs. E. G. and Co. expressly permit commodore Porter to make *what use he pleases* of the letters of that agent; "only the writer's *name* must be kept a *profound secret*." (Vide ante page 90—2.)

Objection 3. "That, *collectively*, they present no facts or views, calculated to elucidate the subject submitted to the court. The court, therefore, direct the judge advocate to *return* them, to the navy department, as *irrelevant*." Answer. Whatever idea may have been entertained of the nature of the subject, or the extent of the inquiry submitted to that court, there can be no doubt either of the *relevancy* or of the *importance* of the facts, disclosed by these documents, to the questions now involved in the first charge. Is it not of the utmost importance to ascertain the force, the resources and the connexions of the pirates, in and about Foxardo, and the neighboring coasts and districts of Porto Rico? Their numerical strength and physical power; and the nature and extent of their moral influence in those quarters? Is it not precisely to the point, to prove that an *American* house of trade had been piratically robbed, by a daring and atrocious band of marauders from Foxardo; where they had retreated, with the plunder of American citizens and American commerce? And do not these documents teem with such evidence? Do they not abound with the most damning facts, and the most pregnant circumstances, to fix, at Foxardo, the focal points of piratical power and influence? To demonstrate that any other power or influence, was but a name: that their influence and their concerns were ramified through the whole frame of the society: that whatever there was of wealth or prosperity, or of apparent respectability, in that quarter, was in secret league with them; and subsisted on the infamous profits of the connexion: that whatever

there was, wearing the appearance of *authority* or *office*, was either intimidated or corrupted, into the active or passive instruments of the pirates and their connexions: that all the natural and artificial advantages and facilities of the towns, coasts, and fastnesses of the district, were in the hands, or at the unlimited command of the pirates; who had gained as complete a domicil there, as actual pirates can have any where: that, upon those whose morals had not been corrupted by the traffic of piracy, an awful dread of piratical power and vengeance, had imposed a mysterious silence; a silence which they dared not break either to justify themselves, or to accuse the pirates: that this dark and lowering cloud of fearful mystery was not confined to the seat of piratical power, at Foxardo, but even overshadowed the independent island and city of St. Thomas: where persons, of the highest standing in society, and above all suspicion of connivance; indeed the complaining victims of atrocious piracy, find it necessary to adopt the precaution of concealing the names of their agents and informers; whom they have no means of protecting against piratical revenge: where even an American citizen, though resident at St. Thomas, finds it prudent to require the concealment of his name. Do not these facts, and the circumstances attending the recent conflagration of St. Thomas, speak volumes, in proof of the tremendous power which these wretches had established at Foxardo; and of the indispensable necessity and duty of pursuing them to their haunts and holds? The stress laid by the court of inquiry upon the obligatory force of the *confidence*, in which these documents were supposed to be communicated, corroborates every conclusion: as it indicates the implicit credit, given by the court, to the sincerity of the apprehensions, and the reality of the danger, to which the disclosure might expose the persons concerned.

'Tis vain, indeed, to be recapitulating the circumstantial and direct evidence, to every important point of this charge, contained in these documents: for no one can read them, in connexion with the charge itself, and the principles assumed in the defence, without the pertinency and importance of the *facts* and *circumstances*, disclosed by them, appearing manifest.

The admissibility of them, as evidence of such *facts* and *circumstances*, is clearly established by the manner of their transmission to the court of inquiry: and, if that were at all doubtful, the reading of them, without exception, by the judge advocate, in behalf of the prosecution, in this trial, clearly dispenses, according to the best established rules of practice, with all forms of *authentication*. At least the prosecution is concluded from all objection on that head. But so much has been said, out of *abundant*, and, probably, *unnecessary* caution: for, as before remarked, we have no reason to presume that any objection was ever intended on the part of the prosecution.

In commenting, thus freely, upon the decision of the court of inquiry, we have been actuated by no wish to cavil at, or to criticise unnecessarily, the proceedings of that tribunal: and we should, indeed, have submitted our reasons, against its decision, with the

utmost confidence in the candor of its members, if their opinion were to be reviewed by themselves. Our sole motive, for this discussion, has been, to establish the weight of this important evidence, by its true standard: and to free it from the doubt, which the decision of the court of inquiry was calculated to raise, not merely of its *authentication*, but of its *relevancy* to the matter in issue. 'Tis hoped that the manner of the discussion is entirely consistent with the respect really entertained for the court.]

DOCUMENTS

RELATIVE TO CHARGE SECOND.

SPECIFICATION 1. "Various letters of an insubordinate and disrespectful character," being five in number, to which the specification refers, by mention of their several dates.

We have thought it conducive to a clearer understanding of the particular letters, charged as "insubordinate and disrespectful," in this specification, to introduce them in connexion with the entire series of correspondence, of which they formed part; and to place them, in that series, according to the order of date and connexion. The whole series has been introduced, at different times, and authenticated in various modes during the progress of the trial; without any indication, from the prosecution, of the purpose for which they were to be used, or of the point to which they were to be applied: except in regard to the five letters, mentioned in this specification; which were read from the originals, or from office-copies, admitted, or proved, in the course of the proceedings, on the 20th, 21st, and 22d days of July: *(a)* some of them also appeared in the National Intelligencer, of the 30th March, 1825, as admitted on the examination of Mr. Seaton: *(b)* some in the National Journal, of the 16th June, 1825, as proved by Peter Force: *(c)* and others in commodore Porter's printed pamphlet, as admitted on the trial. *(d)* All the other numbers of the following series, appear in one or other of the three printed documents aforesaid, viz. The National Intelligencer of March 30, 1825; the National Journal of June 16, 1825; and the pamphlet.

The five letters designated, in this specification, as "insubordinate and disrespectful," are distinguished, in the following series, by this mark, † (vide No. 2, 5, 7, 8, 14.)

(No. 1.)

[The series is thought properly to commence with the letter of recall, December 27, 1824, from the Secretary of the Navy to commodore Porter, in consequence of the Foxardo affair; being part of the correspondence published in the National Intelligencer, and also in the pamphlet: for which letter see ante p. 78, No. 3.]

(a) Ante p. 44, 48, 49. *(b)* Ante p. 51.
(c) Ante p. 52. *(d)* Ante p. 49.

(No. 2.†)

U. S. Ship John Adams,

Thompson's Island, Jan. 30, 1825.

Sir: I have the honor to acknowledge the receipt of your orders of the 27th ult. informing me of your reception of mine of the 15th of November, relating to what you have been pleased to term "the extraordinary transactions at Foxardo," and recalling me from my command for a full investigation of my conduct in that affair.

Agreeably to your orders, I shall leave this place for Washington "without unnecessary delay," and have taken measures to obtain all the testimony necessary, and such written evidence as I suppose useful, and, on my arrival in the United States, shall hold myself ready to justify my conduct in every particular, not only by the laws of nations and of nature, and by highly approved precedent, but, if necessary, by the orders of the Secretary of the Navy.

To use the emphatic language of Mr. Adams, "By all the laws of neutrality and war, as well as of prudence and humanity," I was warranted in chastising and intimidating the authorities of a place who had not only become the allies and protectors of outlaws and pirates, but our active enemies, by the imprisonment and forcible detention of an American officer, while in the performance of his duties. "There will need," (continues Mr. Adams,) "no citation from printed treatises on international law, to prove the correctness of this principle. It is engraved in adamant on the common sense of mankind. No writer upon the laws of nations ever pretended to contradict it; none of any reputation or authority ever omitted to insert it."

I am willing, sir, to submit my conduct in this affair to the strictest investigation, and if I cannot fully justify it, I shall cheerfully submit to the severest punishment that can be inflicted. But, if it shall appear that the motives which influenced me were founded in patriotism; that the necessity for my conduct really existed, and that "my vindication is written in every page of the law of nations, as well as the first law of nature, self defence," I shall then hope that atonement will be made for this forcible withdrawal, for an alleged offence, from my command, by restoring me to my former station, and allowing me to retire from it in a manner more honorable to myself and my country, and less injurious to my feelings and character.

This, sir, will be an act of justice that I hope will not be denied to me.

I have the honor to be,
With great respect.
Your obedient servant,
D. PORTER.

Hon. Samuel L. Southard,
Secretary of the Navy.

(No. 3.)

WASHINGTON, *March* 1*st*, 1825.

SIR: I have the honor to inform you, that, in obedience to your orders, I have come to this place, and I now await your further directions.

With the greatest respect,
Your obedient servant,
(Signed) D. PORTER.

Hon. SAMUEL L. SOUTHARD.

(No. 4.)

WASHINGTON, *March* 2*d*, 1825.

SIR: Having this day seen, in a print, several letters from Mr. Thomas Randall and Mr. John Mountain, communicated through the State Department to Congress, and highly injurious to the character of myself and other officers belonging to the West India squadron, I have to request that an inquiry may be instituted, to ascertain how far facts will justify their statements and remarks, and the injurious remarks they have elicited on the floor of Congress.

I have the honor to be,
With great respect,
Your obedient servant,
(Signed) D. PORTER.

HON. SAMUEL L. SOUTHARD.

(No. 5.†)

WASHINGTON, *March* 16*th*, 1825.

SIR: It is now sixteen days since I had the honor to report to you my arrival here, in obedience to your order of the 27th December, and I have anxiously since awaited your further instructions.

I am aware, sir, of the interruptions the recent changes in government and other circumstances have occasioned to the transactions of public business, and however irksome and uncertain may be my present situation, and whatever anxiety I may feel on the occasion, it is not my wish to press on the department my own affairs, in preference to those of greater importance. I cannot, however, help requesting that there may be as little delay in the investigation of my conduct, both as regards the affair of Foxardo, and the statements of Mr. Randall and Mr. Mountain, as is consistent with the public interests.

The state of ignorance and uncertainty in which I have been kept, as to the intentions of the government, and the desire of vindicating myself to the government and the public, and relieving myself from a species of suspension and supposed condemnation, must be my apology for now troubling you.

Officers continue to make to me their reports, and to request of me orders. Not knowing whether the department still considers me in command of the West India squadron, I have been at a loss how to act. Will you be pleased to instruct me on the subject.

I have the honor to be,
With great respect,
Your obedient servant,
(Signed) D. PORTER.

Hon. Samuel L. Southard.

(No. 6.)

Navy Department, 16*th March*, 1825.

Sir: It has become my duty to apprise you of the determination of the Executive, that a court of inquiry will be formed, as soon as circumstances will permit, to examine into the occurrence at Foxardo, which was the occasion of your recal, and also to comply with the request contained in your letter of the 8th [2d] inst.

It was the intention of the department, in ordering capt. Warrington to the West Indies, to relieve you from the command of the squadron there.

I am, respectfully, &c.
[Signed] SAML. L. SOUTHARD.

Com. David Porter, *U. S. Navy, Present.*

(No. 7.†)

Washington, *April* 18, 1825.

Sir: I hope it will not be considered obtrusive in me, to remind you of the extremely unpleasant situation in which your orders of the 27th of December have placed me. You will recollect, no doubt, that they required me to repair to this place, *without unnecessary delay*, to explain my conduct in relation to the Foxardo affair. From this positive injunction, they deprived me of the opportunity, without taking on myself great responsibility, of obtaining, by personal application, the written testimony necessary in the case; not knowing the cause which influenced you in urging my recal so speedily, and not wishing to have unnecessary delay ascribed to any wish on my part, the day of my arrival here, (the 1st of March) I reported to you my attendance on your further orders. No notice being paid to this report, after

an interview had with the President, I again addressed you at his suggestion, on the 16th of the same month, and on the same day I received your letter, apprising me, that, by the determination of the executive, a court of inquiry would be formed to examine into the occurrence at Foxardo, as well as the charges of Mr. Randall, as soon as circumstances will permit.

Since that time I have waited patiently your convenience, regardless of the anxiety and importunity of my friends, not wishing to press my business on you to the exclusion of matters which might now appear to you of more importance to the public interest, than the investigation of my conduct in the Foxardo affair, or the charges against myself and others, as contained in Mr. Randall's statements. I must beg leave to observe to you, however, that the manner of my recal proves, that, at the time your order of the 27th December was issued, the investigation of the affair which caused it, was considered of great national importance, and a note subsequently received from Mr. Monroe, not only confirms this belief, but proves that he still thought so, after he had gone out of office. I must also beg leave to observe, that whatever opinion may be entertained now, the punishment to me is none the less on account of the change, if any change has taken place. The affair of Foxardo was the occasion of my recal—the affair of Foxardo was the occasion of my being displaced from my command—it is that affair which now keeps me suspended from the exercise of my official functions—it was that which caused you to pronounce censure on me, to punish and degrade me, before any complaint against me, before trial, and before I was called on for an explanation.

If, sir, opinion is changed; if, by information since received from other quarters, you have been induced to believe that the public interests do not require so much haste in the investigation as you at first supposed, it would seem but just that my own anxieties, and the anxieties of those whose peace of mind I regard, and good opinion I highly respect, should be relieved, by some intimation of your intentions, with regard to me—that there should be in fact some relaxation in the severity of the course adopted towards me.

It is with reluctance that I trouble you with any complaint, whatever, but I feel that I should neither do my duty to myself, to what I owe to others, and indeed to the service to which I belong, if, by a longer silence, I gave reason to believe that I acquiesced in a course of conduct towards me, which, when a full investigation takes place, and all the facts are known, few, I think, will acknowledge is founded on justice.

The executive, it appears, has decided that a court of inquiry shall be ordered to investigate my conduct. Why then deprive me of the opportunity of making my explanation, by delaying the execution of the executive will? Upwards of six weeks have elapsed since I reported my arrival here, and, as yet, I only know the determination of the executive.

The time when, the place where, and by whom the investigation is to be made, are unknown to me. No definite period is

fixed on for the holding of the court, and I therefore most respectfully ask, what is your determination with respect to me? that I may know what course of conduct it would be proper for me to pursue.

I have the honor to be,
Your obedient servant,
(Signed) D. PORTER.

Hon. Sam'l L. Southard.

(No. 8.†)

Captain Porter has the honor, respectfully, to state to the President of the United States, that, agreeable to the suggestion of the President, he, on the 16th of last month, addressed a letter to the Secretary of the Navy, requesting an investigation of his conduct in relation to the affair of Foxardo, and the charges of Mr. Randall, as early as was consistent with the public interests, and on the same day he received what purported to be the Secretary's reply, informing him that the executive had determined that a court should be formed to examine into the occurrences as soon as circumstances will permit. Captain Porter consequently waited with patience until the 13th of this month, when, not being able to learn that any steps were taken towards the accomplishment of the executive will, he again addressed the Secretary in the most urgent but respectful manner, to cause his conduct to be investigated, and allow him, if innocent, to relieve himself from the truly unpleasant situation in which the order for his recal has placed him. No notice has yet been taken of this request, and captain Porter, despairing of justice from any other quarter, begs and intreats that the President of the United States will cause it to be rendered him.

April 17, 1825.

[Note, this letter was never published, till it was produced and read, by the judge advocate, on this trial; as stated in the minutes; *ante*, p. 44 and 48.]

(No. 9.)

Navy Department, *April* 20, 1825.

Sir: Enclosed you will receive a copy of the precept, which has been issued for a court, to make the inquiry, instituted by the executive, into your conduct at Foxardo.—You will perceive that the same court is also directed to make the inquiry which has been granted at your own request.

In your letter of the 13th instant, which has been received, it created some surprise to find the declaration, that the " positive

injunction" in the letter from the department of the 27th December, 1824, to "proceed, without unnecessary delay, to this place," "deprived you of the opportunity, without taking on yourself great responsibility, of obtaining, by personal application, the written testimony necessary in the case." By referring to that letter, you will find that you are expressly charged to "bring with you those officers whose testimony is necessary, particularly Lt. Platt; and such written evidence as you may suppose useful," for the "full investigation," which it was declared the importance of the transaction demanded.*

No change has taken place in the views of the Executive, either as to the necessity or character of the investigation, and any delay which has occurred in proceeding with it, must be attributed to other causes.

In relation to that part of your letter, in which you say, "the affair at Foxardo was the occasion of my recal; the affair of Foxardo was the occasion of my being displaced from my command; it is that affair which now keeps me suspended from the exercise of my official functions," it is proper to remark, that *although that affair was the immediate cause of your recal, yet you are not ignorant, that it was the purpose of the department to recal you from that command for other reasons, as soon as it was found convenient to substitute a competent officer in your place,† a purpose only prevented by this transaction, which intervened previously to its execution.*

No other notice of the style and manner of your letter is deemed necessary at this time, than to remind you of the relation which subsists between you and the department.

I am, very respectfully, sir,
Your most obedient servant,
(Signed) SAM'L L. SOUTHARD.

Com. DAVID PORTER, *U. S. Navy, present.*

*Those acquainted with the geography of the West-Indies, need not be informed that it requires more time to go from Thompson's Island, where the Secretary's orders found me, to St. Thomas's where lieutenant Platt was, and where the documents were to be obtained, than to come from Thompson's Island to the United States. The public, therefore, will be able to judge whether I should have been justified by the Secretary's orders *in obtaining, by personal application, the written testimony necessary in the case.*

D. P.

† On the 19th of October, 1824, while at Washington, before going to the West-Indies, I requested, for various reasons, among others ill health, and apprehension of a West-India climate, that the Secretary would order me to be *relieved* from the command of the squadron. The Secretary, in his reply to this application of the 21st, informs me that if I had made my application earlier I should have been *relieved*, and a *successor* appointed, but having failed to do so, and the presence of a commander on the station being indispensable, I was ordered to proceed. "When it is convenient to the department," (says the Secretary,) "your wish to be relieved shall be gratified." It is to this intimation the Secretary alludes, when he reminds me of the *purpose* of the department to *recal* me.

D. P.

[These two notes accompanied the letter as published in the pamphlet.]

(No. 10.)

NAVY DEPARTMENT, *May 28th*, 1825.

SIR: The court of inquiry, lately assembled at the Navy Yard, Washington, has closed its examination into the matters submitted to it, and made report to the department.

I am instructed by the Executive, to inform you, that it has been found necessary that further proceedings should be had, in relation to the transactions at Foxardo, and that, in the course of a few days, charges will be preferred, you will be arrested, and a court-martial summoned for your trial.

I am, very respectfully, Sir,
Your obedient servant,
SAML. L. SOUTHARD.

Captain DAVID PORTER, *U. S. Navy*.

(No. 11.)

WASHINGTON, *May 30th*, 1825.

SIR: Late on Saturday night, (the 28th,) I received from your messenger, your communication of that date, informing me that the court of inquiry had closed its examination into the matters submitted to it, and made report to the department; also, apprizing me of the intentions of the Executive with regard to me.

Ignorant, as I am, of the report of the court, I can form no idea of the nature of the charges intended to be preferred against me, the motives of the Executive, or the object of the notification—I have the honor, therefore, to ask of you the necessary information to enable me to prepare for my defence.

With great respect,
Your very obedient servant,
D. PORTER.

Hon. SAM'L. L. SOUTHARD,
Secretary of the Navy.

(No. 12.)

WASHINGTON, *June 2*, 1825.

SIR: The accompanying pamphlet, which was put to press shortly after the termination of the proceedings of the court of inquiry on the Foxardo affair, contains all the explanations I shall ever be able to make in justification of my conduct.

I never had, at any time, any doubts of the propriety of the course I pursued—nor have I now; and it will be the source of

great regret to me, if, after a perusal of the pamphlet, further proceedings in the case should be thought necessary.

If it be thought that I have erred in judgment, the purity of my intentions, I presume, cannot be doubted.

I have the honor to be,
With great respect,
Your obedient servant,
D. PORTER.

Hon. SAML. L. SOUTHARD.

[*Note.* This letter was originally dated, by mistake, *May* 2.]

(No. 13)

NAVY DEPARTMENT, 13*th June*.

SIR: Your letter, transmitting a pamphlet respecting the proceedings of the court of inquiry, and the transactions at Foxardo, &c. was received, and the copy, endorsed for the President, immediately delivered to him.

It is the cause of surprise, that you should have considered it proper, while your case and the report of the court of inquiry were still under the consideration of the Executive, to make a publication relating thereto, and especially a publication in so many respects deficient and inaccurate.

I am, very respectfully, &c.
SAML. L. SOUTHARD.

Com. DAVID PORTER, *U. S. Navy*.

(No. 14.†)

MERIDIAN HILL, *June* 14, 1825.

SIR: I have received your letter of yesterday's date, acknowledging the receipt of a pamphlet published by me, respecting the proceedings of the court of inquiry, and transactions at Foxardo, &c. and expressing your surprise that I should have considered it proper, while my case and the report of the court of inquiry were still under consideration of the Executive, to make a publication relating thereto, and especially a publication in so many respects "deficient and inaccurate."

I beg leave to state to you that the publication alluded to was put to press, and nearly ready for distribution, before I received any intimation from you of an opinion on the part of the Executive that further proceedings in the case were deemed necessary; an intimation which occasioned to me great surprise; and it was only with the hope of removing from the mind of the Executive an idea of this necessity, which induced me to circulate it after

being so notified, as you will perceive by the note accompanying the pamphlet sent you a few days after your notification, which, pardon me, sir, I did believe was intended for the sole purpose of stopping my publication, as I could find no other motive for it, nor have I yet been able to find any other, as I am to this day not arrested, as I was informed by you I should be.

If, by an intimation of the deficiencies and inaccuracies which my pamphlet contains, it is intended to convey the idea of a wilful misrepresentation on my part, I beg you to point out in what it consists. The record of the proceedings, as published, are copied from the record of the judge advocate; and the documents, whether rejected or otherwise, *for* or *against me*, so far as I could possess myself of them, accompanying the publication; and I certainly have not omitted any *against* me that were admitted by the court as testimony; to the contrary, I have inserted one of that character, which was rejected by the court as unauthentic, to wit, the Porto Rico government publication.

There are one or two trifling typographical errors, the most important of which is the word *clothes* instead of *colours*, in the testimony of Mr. Platt, page 15, and I think an omission to italicise the words "fearful odds," in page 37, which surely can not be the inaccuracies and deficiencies alluded to, as the first error is calculated to operate against myself, and the other, if it really exists, is of no importance. There is also an unimportant letter from you to the court, transmitting the rejected documents, which by a note in page 31, and the report of the court, which, by a remark in page 32, I acknowledge not to be in my possession. The first was refused to me by the judge advocate; the latter, I am still ignorant of; but the publication of both I now respectfully invite.

The anonymous publication in yesterday's Journal, of the same date of your letter, and taken in connexion with the language of it, leaves no doubt of the source whence it originated. I, consequently, considering my relationship to the department, feel restrained from making suitable comments thereon. It is, therefore, only left for me to express the hope that the promised period for rectifying the errors, and supplying the deficiencies, which are said to exist in the pamphlet, may soon arrive; and until it does, I hereby voluntarily pledge my "sacred honor," that none will appear in it, except those I have indicated, so far as I could, by every effort on my part, obtain a knowledge of the proceedings of the court, and I have no doubt I have obtained them correctly.

If it is intended to intimate that the reasonings contained in my defence are fallacious, and present an improper view of the subject, I can only say, they are the expressions of my honest, unaided opinions and convictions, and that I should have delivered them before the court, had I been allowed the opportunity of doing so. They are before the public; the public will judge of their value; and I now more than ever feel the necessity of appealing to its decision. I am not impatient of it, and wait the convenience of the department, in whatever measures it may think proper to adopt toward me.

I take the liberty to remind you that I am still ignorant of the opinion of the court of inquiry, on the charges of Messrs. Randall and Mountain, and to request it may be laid before the public, that it may be able to judge whether I am innocent or guilty of them.

If the court has pronounced me innocent, I am entitled to all the benefits of their opinion; if I am guilty, I am unworthy of holding my commission, and should wish no longer to disgrace it.

I have the honor to be,

Your very obedient servant,

D. PORTER.

Hon. SAM'L L. SOUTHARD.

(No. 15.)

[This is "*the anonymous publication in yesterday's* journal," mentioned by commodore Porter in the preceding No. 14, which publication bears the same date with the Secretary's last letter, No. 13, viz. June 13: and is published in the National Journal of the 14th. See a copy of the same, ante, p. 66, and Peter Force's evidence concerning the same, ante, p. 52, and commodore Porter's reasons for offering evidence of the Secretary's being the author of a preceding publication, in the National Intelligencer, of the 5th May; ante, p. 57—8.]

[To justify the tone of dissatisfaction and complaint, in commodore Porter's part of the foregoing correspondence, the following documents were produced and cited, on his part.]

(No. 16.)

A letter, dated April 9th, 1823, from the Secretary of the Navy to commodore Porter, in which a reference was made to certain documents, therein enclosed, preferring serious and heavy complaints, from the Spanish minister, against captain Cassin, then commanding the Peacock; on account of the capture of a Spanish schooner, called the *Carmen*, or *Galliga* the third. These documents consisted of a letter from Mr. Anduaga, the Spanish minister, dated March 7, 1823, setting forth these complaints, in the most vehement style of crimination; and charging captain Cassin with the most illegal violence, and wanton abuse in the instance of that capture: a declaration, under oath, of the Spanish master and mate, and a protest of the master and crew, pretending to verify the acts charged by Mr. Anduaga; and which, if true, would have been highly criminal; but which were afterwards proved to be without any foundation. The Secretary of the Navy gave captain Cassin the option, either to return home, and make explanations in person; or to transmit a written explana-

tion.(a) The latter course was adopted; the explanation was perfectly satisfactory; and nothing more was heard of the complaint. The object of this evidence was to show the inequality between the treatment of commodore Porter, in the manner and circumstances of his peremptory recal; and the treatment of another officer, gravely and officially accused of a heinous offence.

(No. 17.)

The resolution of the House of Representatives, of the 27th December, 1824, cited under the first charge; as in connection with the above-cited letter of recal, of the same date;(b) and now cited, under this specification, as concurrent evidence, with the delays and suspense, complained of in the foregoing correspondence, that he was sacrificed, rather to collateral views and motives of expediency and policy, than to any genuine sense of impropriety in the act imputed to him.

THE EVIDENCE
UNDER THE SECOND SPECIFICATION.

Specification 2. The publication of "a pamphlet, *purporting* to contain the *proceedings* of the said court of inquiry;" which is charged as having been done, "after such court had *terminated* its inquiries, and had *transmitted* its *report* to the Secretary of the Navy; and before the executive had published, or authorized the publication of the proceedings."

The only evidence, adduced in support of this specification, (or that we *infer* to have been so intended, for nothing was said about the application of any evidence to it) were the printed pamphlet itself; and the letter from commodore Porter to the Secretary of the Navy, dated June 2, 1825, with which were transmitted copies of the pamphlet, for the use of the Secretary, and of the President. Reference is made to these documents, in the minutes of the court's proceedings, ante, p. 49. The letter itself is found among the series of correspondence, under 1st specification. [Ante, p. 115, No. 12.]

The pamphlet had just been published, when so transmitted to the Secretary: which, as the specification states, was after the court had completed all the business before it; and had sent in the final result of its inquiries, to the Navy Department: where the report had remained ever since the 9th of May. The first

(a) These documents were delivered to the court, without retaining copies; which we have not since been able to obtain: but vouch for the correctness with which the substance and effect are above cited.

(b) Ante, p. 78, No. 3, No. 4, & n. (a)

notice of any ulterior proceeding, being in the contemplation of the executive, was the Secretary's letter of May 28, 1825: (ante, p. 115, No. 10.) when the pamphlet was printed, and just ready to be issued from the press.

A summary of the evidence, explaining the general character and object of the pamphlet, and the circumstances, from which it originated, will be sufficient to illustrate as well its application to the matter of charge, here specified; as the motives of the author for the publication.

Pursuant to the intimation contained in the Secretary's letter to commodore Porter, of the 16th March, 1825, (ante, p. 111, No. 6,) a warrant was issued, on the 19th April, 1825, directed to Isaac Chauncey, esq. captain in the Navy, &c. ordering a court of inquiry, consisting of captain Chauncey, president, and of captains W. M. Crane and G. C. Read, members, and R. C. Coxe, esq. judge advocate, to assemble at the Navy Yard at Washington, on the 2d May then ensuing.

When the court met, on the day appointed, commodore Porter interposed some exceptions to the formation of the court and to the tenor of the warrant, under which it was constituted: to the former as being composed of a majority of officers junior to himself: to the second as not embracing the specific subject of inquiry, which he had requested to be investigated, for the vindication of himself and his officers; as indicated in his letter of the 2d of March:*(a)* and which the Secretary was understood to have promised, in his said letter of the 16th March. In the course of discussing these objections, the court took exception to some expressions, in a written address of the commodore, as an indecorous reflection upon the court: and, in order to guard against a repetition of the offence, passed an order requiring all communications from the commodore, to pass the inspection of the judge advocate, before being submitted to the court. The commodore explained and disavowed, in the most unequivocal and satisfactory manner, as he conceived, the offensive construction, put upon the passage of his address excepted to by the court: but the interdict of direct intercourse between him and the court was not revoked: for which cause he took a formal leave, and during the residue of the inquiry, withdrew himself from all concern with the business of the court.*(b)* He was nevertheless permitted to take copies from the official minutes of the court's proceedings: which he employed clerks to do. After the court had sent in its final report, he found his copies of the minutes, in some respects, incomplete; especially in regard to some of the documents, which his clerks had omitted: and he applied to the judge advocate to supply the deficiency: who answered, in substance, that the investigation being then completed; and the result transmit-

(a) Ante, p. 119, No. 1.

(b) This dispute will be more fully explained in stating the evidence under a subsequent specification: only so much is mentioned here as is necessary to introduce the pamphlet, and explain the motive of its publication.

ted to the government, it was not proper for him to give out any further copies.(c)

The court of inquiry prosecuted the investigation till the 9th May: on which day it made and transmitted its final report, as above stated: commodore Porter in the mean time, offering neither evidence, explanation, nor defence; nor taking any part in the business of the court. Nothing further was heard on the subject, till the Secretary's said letter, of the 28th May, 1825, announcing the determination of the President, to order a court-martial: at which time the pamphlet was printed, and nearly or quite ready for publication.

The following is the *title* of the pamphlet:

"An exposition of the facts and circumstances which justified the expedition to Foxardo, and the consequences thereof; together with the proceedings of the court of inquiry thereon, held by order of the hon. Secretary of the Navy.—By D. Porter. *De hoc multi multa, omnis aliquid, nemo satis.—Extremis malis, extrema remedia.*"

A *dedication* was prefixed, as follows:

"*To JOHN QUINCY ADAMS,*
PRESIDENT OF THE UNITED STATES,

This humble effort to vindicate my conduct and character is most respectfully dedicated by his very obedient, and faithful servant, D. PORTER.

Washington, May 11, 1825."

Which was followed by an *advertisement* in these words:

"The reader will bear in mind that when I was recalled from my command, to account for the affair at Foxardo, I pledged myself to justify it.* By the conduct of the court, to which the subject was referred for investigation, I was driven from its presence, and prevented from making the explanations on which I founded my justification.† Therefore, to redeem my pledge, I submit the following sheets. D. P."

This pamphlet consisted of a voluminous and miscellaneous collection of documents, connected with commodore Porter's command in the West-Indies; with occasional notes and illustrations; and a formal defence of his conduct, in the affair of Foxardo: the pamphlet also contained the minutes of the proceedings of the court of inquiry, as copied by his clerks; and as many of the documents appended to the minutes and proceedings of the court,

(c) The circumstances of this application to the judge advocate and his answer, will also be more fully stated, in a subsequent part of the case; only so much is here adverted to, as shows how completely the court of inquiry, with the investigation referred to it, was *functus officio*, when the pamphlet was published.

* Referring to his letter of the 30th January, 1825, published in the National Intelligencer, of the 30th March. (Ante, p. 109, No. 2.)

† Referring to the interdict of direct intercourse between him and the court: which had caused him to withdraw from the court.

as were in his possession. The alleged deficiencies of the published minutes of these proceedings, in point of accuracy, and the admitted incompleteness of them, as a full and formal record, with the causes and explanations of the same, constitute the subject of the next specification: for the present purpose, 'tis only requisite to give an adequate idea of the design and general scope of the pamphlet, in so far as it "purports to contain the proceedings of the said court of inquiry." Of the 107 pages of this pamphlet, about twenty were taken up with the minutes of the proceedings, comprising the oral evidence delivered before the court, as copied from the official entries by the clerks employed by commodore Porter, interspersed with some remarks, in notes by himself: about sixteen, with copies of papers and documents which had been attached to the said proceedings, and returned with them to the Navy Department: leaving about seventy pages of additional matter; of which the *defence* occupied near twenty pages: a defence never laid before the court of inquiry, on account of the difficulty between the commodore and the court, which, as he says in the advertisement to his pamphlet, had driven him from its presence.

The general scope of the *defence*, in so far as it can be, at all, connected with any matter deemed exceptionable in the publication, may be collected from the following extracts:

"DEFENCE.—Having been displaced from my command, by order of the Secretary of the Navy, to furnish such explanations as may be required of every thing connected with the cause, origin, progress, and termination, of my "transactions" at Foxardo: I must refer to the letters of lieutenant Platt, Mr. S. Cabot, and Mr. Bergeest, for the origin; to my letter to the governor of Foxardo, and my official report to the Secretary of the Navy, for the progress and termination; and to the following explanation for the cause.

"I rest my justification on the laws of nations and of nature, highly approved precedents, and the orders of the Secretary of the Navy."

The defence then proceeds with an argument, strictly confined to the topics of justification, thus premised; till we come to the following passage:

"I might stop here with a perfect confidence of an acquittal from the charge of rashness and indiscretion, in the violation of the territorial jurisdiction and immunities of Spain, or of any disposition to offer to that government any in dignity or insult; but as, without asking of me explanation, and without complaint from Spain, or from any other quarter, it has been thought proper to anticipate even the resolution and wishes of Mr. Archer, (already distinguished for his active hostility towards me in the trial of lieutenant Kennon,) by ordering me from my station, to explain the transactions at Foxardo, which it has pleased the Secretary of the Navy to term "extraordinary;" and as I am placed before the world as a condemned and degraded officer, it is a duty I owe to myself, as well as to the service to which I belong, and it may be useful to others to know, that in all this "transaction" I was acting in as strict conformity with the letter and spirit of my instruc-

tions, as the nature of the case would admit of; that it was provided for as near as could be *imagined*, by the government, and that I have in no instance departed from my instructions, so far as I could by repeated perusal understand them. I have perceived no obscurity in them, and I complain of none. I believe I understand them, and the intentions of those who drew them up; and without national or natural law, or precedent, I feel a confidence that the responsibility of my conduct at Foxardo, if improper, rests upon those who issued the orders, and not on me who executed them. I do not wish it understood, however, that I dispute the propriety of the orders—to the contrary I fully concur in the doctrine laid down in them. They are framed on the laws of nations, were drawn up by one well versed in them, and were intended to supply the want of a knowledge of international law on my part. I not only subscribed to that part which authorizes my landing and pursuing pirates on the territory of a foreign power, and denounces those nations so lost to a sense of respect for their own character and interest, and the respect of others, as to refuse to put down piracy, much less to afford them an asylum and protection; but I subscribed to the yet stronger measures which have been recently recommended by the executive—nothing short of authority to land, pursue, and hold the authorities of places answerable for the pirates who issue from and resort there—to make them answerable by reprisals on the property of the inhabitants, and to blockade the ports of the islands. Nothing short of these measures can put down the disgraceful system. I also coincide in opinion with the President, that neither the government of Spain, nor the government of either of the islands, (Porto Rico and Cuba,) can with propriety complain of a resort to either of those measures, or all of them, should they be resorted to, as the United States interpose their aid for the accomplishment of an object, which is of equal importance to Spain and her islands, as well as to us. To the contrary, it should be expected that they will faithfully co-operate in such measures as may be necessary for the accomplishment of this very important object. Whatever measures, however, may be resorted to by the United States, the first thing necessary to secure success, is to protect, countenance, and support the officer employed to execute them; and in any measures which he may adopt requiring energy of action, he ought not to be discouraged and degraded by punishment before complaint, or removed from his command without being allowed the opportunity of explaining his reasons for his conduct. Without such assurance, no officer in his senses would willingly undertake the delicate duties which I have been performing; and if compelled, would, from his apprehensions of sharing my fate, scarcely meet the expectations of the government and people of the United States. The discouraging circumstance of my removal for the offence of landing on Porto Rico, and punishing the accessories of pirates, the authorities of Foxardo, may have a much more important effect in retarding the suppression of piracy, than is at present apprehended. So long as the governors and people of the small towns of Porto Rico and Cuba, are satisfied that they

may imprison us with impunity, and that punishment certainly follows any attempt on our part to obtain redress and security to our persons, so long the suppression of piracy is impossible; and he who on those terms is willing to undertake it, loses sight of his own respectability, and of the respectability of his nation and flag."

The argument is then continued on the same plan, till we come to the concluding remarks.

"That my motives were disinterested, is certain, from the circumstance of my confining myself to the single object of protection to the persons of our citizens. I had nothing personally to hope for, or to gain, by securing *their* safety; and I had certainly much to lose in making the attempt, for *I placed my life at hazard.*

"If I have failed in justifying myself, I trust that the failure will be ascribed to the peculiarly delicate duties which have been confided to me, involving nice and intricate questions of national rights, and a zealous desire to act fully up to the wishes of the government; and not from a wish to act in opposition to its views, or to infringe on the territorial rights and immunities of others. Should there appear the slightest evidence of my having, for a moment, wilfully disregarded what was due to my own country, and the respect due to the government of Spain, I shall submit with resignation and cheerfulness, to the severest punishment that can be inflicted on me, if it even extends to depriving me of my commission, which I should then be unworthy of bearing.

"For merely doing my duty, I have never asked, nor expected, any reward, beyond the approbation of my country; and if it should appear, that I have, in this instance, done no more than my duty, I confidently hope and expect that I shall escape all punishment, beyond what I have already felt.

"I have stated all the grounds which, in my opinion, justified my undertaking the expedition to Foxardo. I acted on letters of an official character, already referred to, and statements which I had no doubt could be relied on. I acted on what I believed a fair construction of the laws of nations, the intention of those who framed my orders, and the public voice. I did not think it necessary to go through the formality of collecting evidence on oath, to justify me in the attempt I was about making to secure, in future, our officers from insult; had I done so, my object would have been defeated in the time that would have elapsed, and the alarm that would have been excited by an inquiry, which could not have been kept secret.

"Promptness was necessary, and I felt satisfied that the letters which I already possessed, were a sufficient justification for my proceedings.

"The following documents, which have been rejected by the court, and which I do not now offer in vindication of my conduct, but in confirmation of the letters of lieutenant Platt, Mr. Cabot, and Mr. Bergeest,(a) are so full on the subject of the robberies

(a) Vide. These three documents as introduced, on the part of the prosecution, in this trial; ante, p. 98, 99, 100, No. 13, 14, 15.

and piratical depredations from Foxardo, and the piratical character of the authorities and people of that part of Porto Rico, that I deem it unnecessary to make any comment on them. The complicated system of villainy they unfold is disgraceful to the nation to which they belong, and a continuation of it will be disgraceful to the rest of the world, and particularly to those nations most exposed to their depredations. The pirates of Cuba, of Algiers, Tunis, and Tripoli, offer no parallel."

All the preceding correspondence, produced under the first specification, especially commodore Porter's letter of June 2, (ante, p. 115, No. 12,) is cited under this also; as explaining the motive and the necessity for the *publication* of the pamphlet.

THE EVIDENCE

UNDER THE THIRD SPECIFICATION.

Specification 3. "An *incorrect* statement of the proceedings of the said court of inquiry," as given in the said pamphlet.

'Tis thought that the merits of this part of the charge, may be more clearly elucidated, by the collation and methodical arrangement of all the evidence, documentary or oral, supposed to be connected with it.

The pamphlet, in which were published such parts of these proceedings as were in commodore Porter's possession, has been frequently referred to, in the course of this report: and its history, character, objects and contents, are more particularly described, in the foregoing summary of the evidence under the second specification.

The manner in which commodore Porter availed himself of his privilege, to take a copy of the proceedings, and the care and pains, he took, to have the copy complete and correct, may be collected from the evidence of John Simpson, lieutenant J. T. Ritchie and Martin King. (*Ante, 53, 55 and 56.*)

On the 9th May, the inquiry was brought to a conclusion, and the report of the court was transmitted to the Navy Department.

The copy of the proceedings, taken by com. Porter's clerks, was found to be incomplete: the only deficiencies, at that time apparent, were the *report* of the court; and a letter from the Secretary of the Navy, transmitting the documents, before described, as "rejected documents," and communicated by the judge advocate to the court of inquiry, on the 7th May, as before stated, p. 96 and 104. Application had been made to the judge advocate, (after the inquiry had been brought to a close,) to be permitted to complete the copy, from the original record or minutes in his hands: to which application he returned the following answer:

GEORGETOWN, *May* 21, 1825.

SIR: After mature reflection, I regret that it is out of my power to comply with the request made on your behalf, for a part of the record of the proceedings of the court of inquiry, in relation to the Foxardo affair, which your clerk accidentally omitted to copy.

So long as you participated in the proceedings of the court, and the *investigation* remained *uncompleted*, I considered myself as authorized to communicate to you, the proceedings of the court. The *investigation* is, however, now *completed*;—the record has been transmitted to the department; and is beyond my control.—My impression is, that I am not at liberty to communicate my private notes of the proceedings of the court, under these circumstances; particularly for the purpose of being copied, without the knowledge and consent of the government. I presume, however, that on an application to the department, a more correct transcript of the proceedings of the court will be furnished you, than it is in my power to afford.

Very respectfully,
Your obedient servant,
RICH'D S. COXE.

COMMODORE PORTER.

No evidence was given of the nature or extent of the application to which this letter was an answer, but what may be collected from the context of the letter itself. But, it is perceived, that some notice is taken in the minutes *(ante, p. 57)* of some explanation which the judge advocate desired to make appear concerning it. Whether any such was intended to be, or has been annexed to the record, is not known. According to our recollection of a written statement shewn to commodore Porter during the trial, by the judge advocate, it imported that the latter had returned by lieutenant Farragut, who brought the *written* answer of the judge advocate, a special and verbal answer to that part of the application, which related to the Secretary's letter: namely, that he had transmitted the letter to the Navy Department without retaining a copy. The object of this statement, as understood, was to contradict or explain that part of commodore Porter's letter to the Secretary, *(*14th June, ante, p. 116, No. 14,) which says, that the letter had been "*refused* to him by the judge advocate." Commodore Porter however, insisted, that the only answer he ever received from the judge advocate, was the *written* one, above given; which was delivered to him by lieutenant Farragut, without any verbal supplement.*(a)*

On the 28th May, commodore Porter is informed by the Secre-

(*a*) NOTE. Why any distinction should have been made, as to the propriety of supplying one part of the record, more than another, was not explained; and certainly the *reasons*, assigned by the judge advocate, go equally to the *whole*. However that be, his *written* answer to the application, is the only *evidence* of it that we have.

tary's letter of that date, [ante, p. 115, No. 10,] "that it has been found necessary that further proceeding should be had, in relation to the transactions at *Foxardo;* and that, in the course of a *few day's*, *charges* will be preferred, &c."

On the 30th May, commodore Porter replies, [ante, p. 115, No. 11,] that, ignorant as he is of the report of the court of inquiry, he can form no idea of the *charges* intended to be preferred against him, of the motives of the executive, nor of the object of the notification; and, therefore, asks the *necessary information*, to enable him to prepare for his *defence*.

On the 2d June, copies of the pamphlet were transmitted to the Secretary, as containing all the explanations in commodore Porter's power to make, &c. and expressing a hope that such explanations would prove satisfactory; and dispense with the further proceedings, spoken of by the Secretary. [Ante, p. 115, No. 12.]

The first notice he received of any exception to it, was an anonymous article, dated June 13, published in the National Journal of the 14th, which is referred to, in Peter Force's evidence; [ante, p. 52,] and given at large, as the admitted production of the judge advocate; [ante, p. 66.]

This article does not specify the charge of inaccuracy, as limited to the "statement of the *proceedings* of the court of inquiry;" but speaks of "the recent *publication* on the *subject* of the proceedings of the court of inquiry, in relation to the affair at Foxardo;" and of the errors and deficiencies "which exist in the *pamphlet* referred to." Nor does it give any intimation that such inaccuracies were to be made the subject of a *charge* before the court-martial; but simply apprises "the *public*", that the publication presents so *inaccurate* and *imperfect* a *view* of that *matter*, that it will, in *due time*, receive *proper attention:* it then goes on to state, as "sufficient reasons for *postponing*, to a more suitable period, the *rectification* of the *errors* and the supplying the *deficiencies*, which exist in the pamphlet," that "the record of the court and statement of facts transmitted to the executive, had not been made public; it being understood, that the business had not been *terminated.*"*

*Note.—What reason commodore Porter had, when he published his pamphlet, to conclude "that the business had not been terminated," may be decided from the following circumstances:—The record of the court of inquiry informed him, that it had terminated its inquiries on the 9th of May: on the 21st, the judge advocate informs him, that "the *investigation* is now completed;" and, therefore, he has no longer any right, as judge advocate, to give out a copy of any part of the record: 'tis not till the 28th, (when, as commodore Porter in his letter of the 14th June says, the pamphlet had been put to press and was nearly ready for distribution,) that he is notified of the "further proceeding in the contemplation of the executive:" and when, twenty-five days afterwards, that notice is followed up, by the actual exhibition of the charges (as before stated, p. 8 and 10,) the pamphlet is expressly charged as published "*after the court* had *terminated* its inquiries." The *gravamen* is also changed from that urged in the Secretary's letter of the 13th June: to wit, that it was "before the executive had published, or authorized the publication of the proceedings:" not that the "case and the report were still under the *consideration* of the executive," as the letter complains.

On the same day (June 14,) the Secretary's letter (bearing precisely the same date with the anonymous article published in the Journal,) is received; which acknowledges the receipt of the pamphlet, transmitted on the 2d June; and that a copy of which, endorsed for the President, had been immediately delivered; expresses *surprise*, that commodore Porter "should have considered it proper, while his case and the report of the court of inquiry were *still* under the *consideration* of the *executive*, to make a publication relating thereto, especially one, in so many respects, *deficient* and *inaccurate*." [Ante, p. 116, No. 13.]

Commodore Porter, on the same day, replies that his pamphlet had been put to press and was nearly ready for distribution, before he received any intimation of an opinion, on the part of the executive, that further proceedings in the case were deemed necessary; an intimation which had occasioned him great *surprise*; that it was from the hope of removing, from the mind of the executive, the idea of this necessity, that he had been induced to circulate the pamphlet, after being so notified: a notification, which he apologizes for believing, was intended for the purpose of stopping the publication: for which belief he assigns, as a reason, that he could find no other motive for it, as he had not, to that day, been *arrested*, as informed, by the Secretary, that he should be. [This refers to the Secretary's letter of May 28, above-cited, in which he notifies commodore Porter of the necessity for further proceedings, in relation to the Foxardo affair; and of the determination, "in the course of a *few days*," to prefer *charges*, and to *arrest* him, and summon a court-martial for his trial: and to commodore Porter's answer of the 30th above-cited, asking for information of the nature of the charges, to enable him to prepare for his defence. The intention, thus notified on the 28th May, was not carried into effect till the 22d June, as before stated, ante, p. 8, 10.](a) Commodore Porter proceeds, in his reply, to say, that if, by the deficiencies and inaccuracies imputed to his pamphlet, it be intended, to convey the idea of a *wilful* misrepresentation, he *begs* to have it pointed out, in *what* it *consists*: he describes the means by which he had obtained his copy; the pains he had taken to have it correct; and insists on and exemplifies his impartiality by the insertion of a document supposed to make against him; and which had been rejected by the court of inquiry. He then points out certain trivial errors, which were all that, after the minutest examination, he could detect; except the omission of the court's report, and of the unimportant letter

(a) NOTE.—Of the grounds com. Porter had, for making the complaints, expressed in his correspondence, of the extraordinary procrastinations of the requisite measures for bringing the affair to some determinate issue, after his recal, on the 27th December, and his report of himself, as ready for the investigation, on the 1st March; and for drawing the inferences, stated in the text, from the apparent vacillations of intention respecting him; the recent manifestations of despatch and celerity, in disposing of the extremely voluminous and complicated trials of commodores Porter and Stewart, may furnish some illustration: the first having been kept under the advisement of the executive, about four days, and the latter about two, before approval.

from the Secretary of the Navy to the judge advocate: omissions which he accounts for, as already stated. He then refers to the anonymous article in the Journal, between which and the Secretary's letter, the coincidences of date and language, "leave (as he says,) no doubt of the source whence it originated;" and, consequently, restrain him, considering his relationship to the department, from making suitable comments on it. "It is therefore only left for me (he proceeds,) to express the *hope* that the *promised* period for *rectifying* the errors, and *supplying* the deficiencies, which are said to exist in the pamphlet, may *soon* arrive; and, until it does, I hereby voluntarily pledge my sacred honor, that none will appear in it, except those I have indicated, *so far* as I could, by *every effort*, on my part, *obtain* a *knowledge* of the proceedings of the court; and I have no doubt I have obtained them correctly." If it were the *reasonings* contained in his defence, that were supposed to be fallacious, he declares them, to be "the expressions of his *own* honest, *unaided* opinions and convictions; which he should have delivered before the court, had he been allowed the opportunity of doing so," &c. &c. He reminds the Secretary that he is still left in ignorance of the opinion of the court, on the charges of Messrs. Randall and Mountain, and requests it may be laid before the public. "If the court has pronounced me innocent, I am entitled to all the benefits of their opinion; if guilty, I am unworthy of holding my commission, and should wish no longer to disgrace it." (Vide No. 14, ante, p. 116.)

On the 22d June, the charges were furnished; with a specification imputing incorrectness to the statement of the said proceedings, in the general terms already known: the trial of which charges commenced on Thursday, July 7.

On Saturday, July 23d, (being the 17th day of this trial,) the judge advocate proceeded to point out the *particulars*, in which commodore Porter's statement was deemed incorrect: (ante, p. 50,) and on the Monday following, being the 19th day of the trial, presented a "written note of the variances between the original record, and the proceedings as published by captain Porter;" (noticed in the minutes, ante, p. 50.) (a)

Before descending into the *minutiæ* of these variances, some

(a) NOTE.—It is there said, in the minutes of Saturday, July 23, that the judge advocate then submitted a *copy* of the original record, which was compared with the *original* in *presence* of the court. Such comparison was utterly unknown to the accused or his counsel: the first time they saw the original or knew of its being in court, was when it was produced, on Wednesday the 27th, at the examination of Gustavus Harrison; as stated, ante page 62. The note at the foot of that page, that the record was then, for the first time, produced, should, perhaps, be qualified by adding, to the knowledge of the accused or his counsel. All that was seen by them on Saturday, the 23d, was the M. S. *copy* of the record in the hands of a member of the court, who assisted the judge advocate in comparing it with the printed pamphlet, and noting the variances. These circumstances are mentioned, not as being, at all, important in themselves; but merely to account for the difference between our note, page 62, and the entry in the minutes, page 50.

preliminary explanation of the evidence connected with them, may make them more intelligible.

The judge advocate, as recorder of a court-martial, keeps a regular journal, or minutes of the daily proceedings, which is read, next morning, in presence of the court. Of this a fair transcript is made, signed by the court and judge advocate, and sent to the proper department, with the documents annexed: whilst the first rough draught of the minutes is preserved by the judge advocate. Then what is called the *original* record, is the *official transcript* (so authenticated) from the original minutes, in the hands of the judge advocate.

In this case, G. Harrison was the clerk employed by the judge advocate to make the transcript of the proceedings of the court of inquiry, which was signed and transmitted as the official and original record of the court's proceedings; the whole of which was in the hand-writing of Mr. Harrison, except the minutes of the last day's (Monday, May 9) proceedings, and sundry interlineations, &c. in the body of the preceding part; which were in the hand-writing of the judge advocate.

The copy obtained by commodore Porter, and used in the pamphlet, appeared in the hand-writing of three persons; John Simpson, ——— Sarrazan, and Mrs. Simpson, wife of the aforesaid John. John Simpson's part of the copy, comprising nine sheets in manuscript, ended about midway of page 27 of the pamphlet; of the residue of the copy, four sheets in manuscript and ending page 32 of the pamphlet, three sheets were in the hand-writing of Sarrazan, the fourth in that of Mrs. Simpson: but the relative extent of their respective copies, upon the pages of the pamphlet, was not noted; nor is it material. J. Simpson took his copy, from the transcript made by Mr. Harrison; the residue of the copy, was taken from the original draught of the minutes, in the hand-writing of the judge advocate, before Mr. Harrison had transcribed the same. J. Simpson, as has been seen, took great pains to make his copy exact; and had the utmost confidence in its accuracy: he had no assistance, in the comparison of his copy with the original; but carefully examined it himself. The remaining four sheets of the copy (comprising from p. 27 to p. 32 of the pamphlet,) were most carefully and critically examined and compared with the original by lieutenant Ritchie: who took the precaution of two readings and comparisons: once reading the copy while his assistant followed him on the original, and *vice versa.(a)*

Mr. Harrison's evidence, (ante, p. 63,) touching certain *erasures, interlineations,* and *additions,* appearing on the face of the *original* record, (in a different hand writing from the body of it, which is in Mr. Harrison's,) at pages 7, 8, 21, 25, 26, 31, 32, 38, 40 and 41, of the said original record, was explained by a comparison of the same with the printed copy of the corresponding passages in the pamphlet: from which it was found that all these

(*a*) NOTE.—For all these facts relative to the manner of making out the original record and the copy, &c. Vide examinations of Messrs. Simpson, Ritchie and Harrison, ante. p. 53, 55, 62--3—4.

alterations tallied, most exactly, with the *variances*, in the *corresponding* passages of the pamphlet, between such original record and the printed copy: that is, the words *erased*, or blotted out, in the original (and still barely legible) are *found* in the copy: while the words *interlined* or otherwise *added* to the original, are *omitted* in the copy. All such interlineations and additions were very distinctly marked and fairly written. From these circumstances (in addition to the *direct* evidence of Mr. Simpson and lieutenant Ritchie, to the accuracy of the copy,) was drawn the conclusion, urged in the defence, that these alterations were made in the record, *after* the copy had been taken from it by commodore Porter's clerks: and, consequently, that the corresponding variances were not produced either by the *design* or the *mistake* of the copiers, but by the substitution of a new or altered original: considering it of the highest improbability, that there should be such exact coincidences between *inadvertent miscopyings*, and the *alterations* apparent on the face of the original.

The judge advocate, on the other hand, from the course of his examination of Mr. Harrison, (ante, p. 62–3,) is understood to insist, that these erasures, interlineations, &c. were not *alterations* of the original record, but were *corrections* of errors in Mr. Harrison's transcript. The circumstances, on which these opposite conclusions rest, are fully and fairly before the reader.

These coincidences will be more clearly comprehended from the more minute comparison which will be afforded by the judge advocate's "written note of variances:" before the introduction which, one other explanation is requisite.

The original minutes of the proceedings, kept by the judge advocate of the court of inquiry, were not produced in evidence: but, as appears from the examinations of John Simpson and J. T. Ritchie (ante, p. 54 and 56,) certain parts of those papers were shown to these witnesses respectively, and a question asked of each concerning the same: and when the counsel of the accused desired to see them, the same answer was returned as before stated in regard to the papers authenticated by J. Boyle: (a) from which it was understood that the papers were shown to the witnesses, by way of experiment, to see whether they could be identified; and, not being identified, are presumed to have been withdrawn; as nothing more was heard of them during the trial: so much, however, is certain, that the judge advocate declined exhibiting them to the counsel.

That part of the original minute shown to Lieut. Ritchie, (ante, p. 56) and which it was supposed he might have identified, as the original from which the copy was taken, by a mark of sealing wax, was, it seems, compared with the printed copy of the proceedings of the same day; it appears from Lieut. Ritchie's answer, that the copy had omitted a *whole line*; what line is not specified; but it was remarked that the official or original record of the same days' proceedings, had also omitted about the same quantity of matter, necessary to make sense of the sentence;

(a) Vid. this transaction stated, ante, p. 71.

and which the judge advocate had afterwards inserted in *pencil*; not *officially*, as understood, but merely to indicate the sense of the passage: we say not officially, because the office-copy of the record, filed in this trial, omits the words in *pencil*. If these words constituted the omitted *line*, mentioned in lieutenant Ritchie's evidence, then the difference, so far, lay between the first draught of the minutes, and the official record made up from them.

N. B. The part of the original record here referred to, is the minute of the last day's proceedings: which, as before stated, appears in the hand writing of the judge advocate himself; and not, like all the preceding part of the record, in the hand writing of Mr. Harrison.

List of VARIANCES noted by the judge advocate between the pamphlet-copy of the proceedings of the court of inquiry, and the original record.

No. 1. Pamphlet, p. 11. l. 7. "into the *matter* aforesaid:" whereas the original reads "*matters*." [Note, this variance is found in the precept for convening the court of inquiry: where, after recapitulating the subjects of inquiry, it announces the determination of the president to convene a court of inquiry to examine "into the matters aforesaid."]

No. 2. In the same document, *(l. 21)* "and *it* is also empowered:" the pronoun "it" not in the original. [Note. Where "it" is used in the pamphlet-copy, "the court" is *understood* in the original; and is clearly referred to by the demonstrative pronoun in the copy.]

No. 3. This variance is shown by contrasting the two passages in opposite columns:

Pamphlet, page 13.	*Record.*
"Captain David Porter also appeared, and being asked whether he had any objection to offer against either of the members of the court, replied that he had no specific objection to individuals, but he objected to the materials of which the court was composed; and stated further, that he had some remarks to make on the subject, as well as on the precept; that he did not think the court was legally formed. The oath," &c.	"Capt. David Porter also appeared, and, being asked whether he had any objection to offer against either of the members of the court, replied that he had no specific objection to urge, but that he had some remarks which he wished to submit to the consideration of the court, after it was organized, and previous to its proceeding to make the investigation, for which it was convened. Whereupon the oath," &c.

[Note, this is the entry of commodore Porter's exception to the formation of the court, on the first day's session, May 2: in the minutes of the proceedings of which day, it is entered as above in the record: but on a subsequent day of the court he objected to the terms in which his exception had been entered, and requested the court to have it amended, acccording to what he conceived, the true version of the same; and on Thursday, the 5th May, it appears, both by the pamphlet-copy and the original record, that the following proceeding was had:

"THURSDAY, MAY 5TH.

The court met pursuant to the adjournment of yesterday: present as before.

Captain Porter stated to the court, that on perusing the record, it appeared to him that an omission had been made, which he was desirous of having supplied, in stating the proceedings of the first day. He submitted to the court his statement of the remarks which he made before the oath was administered to the members. The court being of opinion that captain Porter is entitled to have his statement inserted in the record, as containing his view of what transpired, directed it to be inserted. It is the words following, viz. Captain Porter being asked," &c.

Then follows the amended entry of the exception, precisely as commodore Porter had printed it in his pamphlet, p. 13.

From this he concluded that the court had recognized and adopted the amended entry, as the true representation of the passage; and that the original entry, in the minutes of the 2d May, was to be made conformable: and he accordingly published it as so amended.]

No. 4. In the minute of lieutenant Platt's evidence before the court of inquiry, giving an account of his interview with the Alcalde, on his first visit to Foxardo, the pamphlet-copy and the record vary, in a particular passage, as follows:

Pamphlet, page 15, *l.* 27.	*Record, p.* 27.
"I accordingly went to a public house, and took my breakfast. I received a message, from the Alcalde, requesting me to call at his office."	"I accordingly went to a public house, and took my breakfast. *About an hour after I finished my breakfast,* I received a message, &c."

[Note. The record, as originally transcribed by Mr. Harrison, gave this passage precisely as it is printed in the pamphlet: the words in *italics*, which are omitted in the pamphlet, constitute one of the *interlineations*, in the hand-writing of the judge advocate, referred to, in Mr. Harrison's evidence, ante, p. 63.]

No. 5. (Same page,) line 38, "*clothes*," instead of "*colours*."

[Noticed by commodore Porter in his letter, of the 14th June, to the Secretary. Ante, p. 117, No. 14.]

No. 6. Pamphlet, p. 16, l. 10. "*cofined*" instead of "*confined*."

No. 7. p. 17, end of 3d line, "*my*" omitted.

[Note. This error occurs in lieutenant Platt's evidence, in which he states the reason, assigned by him to commodore Porter, for not having sooner made "a written report" of his treatment at Foxardo: viz. "that [*my*] not expecting him so soon, was the cause why it had not already been made out."]

No. 8. p. 20, 7th line from the bottom, after the word, "*court*," "the paper was" is omitted.

[Here also the pamphlet agreed with the record as originally transcribed; the words omitted being one of the *interlineations* above described. In the record thus amended, commodore Porter is represented as saying "he had some remarks to submit to

the court, which he read and submitted to the court, [*the paper was*] annexed to the record," &c.]

No. 9. p. 22, 3d line of the proceedings of Thursday, "*receiving*" instead of "*perusing*."

[This error is found in the printed copy of the passage cited in explanation of variance No. 3, in which the printed copy makes him say "that on *receiving* the record," &c. instead of "that on *perusing*," &c. Here also there was, originally, the same agreement between the printed copy and Mr. Harrison's transcript of the record: in which "*receiving*" now appears *erased*, and "*perusing*" *interlined*.]

No. 10. p. 22, 2d line of the last paragraph ("marked F") not in the original.

No. 11. p. 23, first line after paper, "it was accordingly annexed to the record and marked F," omitted.

[Note. These two errors are connected, and thus explained. The passage refers to a paper presented to the court by Com. Porter, immediately after the corrected entry of his exception as above stated, under *variance* No. 3. The printed copy imports that Com. Porter submitted a paper "for the consideration of the court, marked F." It then states the exception taken by the court to the tenor of this paper, and the offer to the commodore, of permission to *withdraw* it. "Captain Porter declined to withdraw the paper:" and here should have followed the words charged as omitted: which words also constitute one of the *interlineations* above described; Mr. Harrison's original transcript having also omitted them.]

No. 12. p. 23, 17th line from the bottom, after the word, *which*; the words, "holds the highest commission which," omitted.

[In this passage the court is answering an objection raised by the Commodore, to its formation, and the sentence should have read thus:

"But this principle can scarcely be carried to an extent which would apply to a court, every individual of which [holds the highest commission which] is known to the American Navy."

No. 13. p. 26, 8th line from the bottom of the text, the word "*some*" omitted before the word "resistance."

No. 14. p. 27, 9th line, the first word "*then*," not in the original.

[This word *had been* in the original, but was *erased*.]

[Note. The following variances refer to that part of the copy taken from the judge advocate's *original* minutes; and not from Mr. Harrison's transcript, as above stated.]

No. 15. 2d paragraph (p. 27) "were" instead of "being;" and the sentence made to end at "*men*," instead of going on through the paragraph.

[Note. This also conformable to the original state of the record, till corrected by the judge advocate.]

No. 16. p. 29, 18th line from the bottom, the word "*up*," not in the original.

["He (Com. P.) halted them (the seamen) some distance in the

rear of my division, and came himself [up] to the ground I occupied," &c.]

No. 17. Page 30, 2d paragraph, "half past ten," intead of "*two*."

(Note, a variance in the hour of *adjournment*.)

No. 18. Page 31. The sentence, "the judge advocate informed the court," &c. (which appears in the original,) before the adjournment, till twelve o'clock to-morrow, omitted; and the two sentences after the adjournment, not in the original.

This variance is best explained by placing, in opposite columns, the passage referred to, as it appears in the *pamphlet*, p. 31, at the conclusion of the proceedings of Friday, May 6, and in the *record* at p. 40:

(Pamphlet, p. 31.)	*(Record, p. 40.)*
"The court adjourned till twelve o'clock to-morrow.	"The judge advocate informed the court that he should probably be in possession of more testimony to submit to-morrow, *but had none to lay before the court, at this time.*
"The judge advocate informed the court that he should probably be in possession of more testimony to submit to-morrow.	"The court adjourned till twelve o'clock to-morrow."
"The court adjourned till to-morrow morning at 11 o'clock."	(Note the words in *italics*, "but had, &c." had also been omitted in the *record*, and interlined as aforesaid.)

No. 19. (Same page of the pamphlet.) In the proceedings of Saturday, 1st paragraph, the original reads, "present all the members of the court, the judge advocate and *captain Porter*."

[Note, the presence of *captain Porter*, is omitted in the pamphlet-copy; had been so in the original; and is one of the *interlineations* so often mentioned.]

No. 20. (same page of pamphlet) 2d paragraph; the communication from the Secretary of the Navy, marked (G) not inserted in the pamphlet.

[Note. The passage in the pamphlet, referring to this communication, does not annex the mark (G) but leaves the mark *blank*, with a reference to this note at the foot of the page, "*Not in my possession.*" Nor is it now in our possession.

This is the letter so often mentioned, as transmitting to the court of inquiry the "Rejected documents:" the "unimportant letter" mentioned in Com. Porter's letter of the 14th June (ante, p. 117, No. 14) as the one refused to him by the judge advocate: and it is also referred to in what is said (ante, p. 126) about the judge advocate's explanation of his answer by Lieut. Farragut to commodore Porter's request to be furnished with a copy.]

No. 21. p. 32. The third paragraph not in the original.

[Note, this third paragraph appears, in the pamphlet, at the end of the proceedings of Saturday, May 7; just after the entry of the adjournment on that day; and is as follows:

"On Monday the court agreed upon their report, and transmitted it to the department."

This was true in fact, as appears by the proceedings of the Monday following, May 9: but how it came to be inserted in the place where it stands, we have no *data* to account; and it is not for us to conjecture.]

No. 22. *(Same page of the pamphlet.)* A *note* attached on the original record, at the end of the first paragraph, omitted.

[The paragraph, to the end of which this note ought, as it is said, to have been appended, is the same before-cited, *(ante, p. 96)* and commented on *(ante, p. 102–7)* wherein the court give their reasons for rejecting the documents there mentioned: and ending with the words, "the court therefore direct the judge advocate to return them, to the Navy Department, as irrelevant."* Here, in the *record*, reference is made to a *note*, at the foot of the page, in these words:

* "It appears by the statement of captain Porter, as well as of his clerk, that the letter from him, referred to in the letter, was dated March 6, instead of May 6, by a mistake of the clerk.

R. S. COXE, *Judge Advocate.*"

This note had also been omitted in Mr. Harrison's transcript of the record: but it now appears there, as an addition, in the judge advocate's hand-writing, in the margin, at the foot of the page.

The letter, so misdated by mistake, is understood to be, that from commodore Porter to the Secretary, before cited, ante, p. 89, No. 12: and the letter, in which it was referred to, the one from the Secretary, so oftened mentioned, and in the record marked *(G)* transmitting to the court of inquiry, the documents, which they rejected.]

No. 23. *(Same page of the pamphlet.)* The 2d, 3d, 4th and 5th *paragraphs* all *vary* from the original: and the *report* of the court is *entirely* omitted.

[The variances, in these paragraphs, not being specified, the readiest way to exemplify them, is to give the last day's proceedings, in opposite columns, as they appear in the pamphlet and in the record respectively: premising that this is the part of the record which appears in the judge advocate's own hand-writing; and not, like the preceding part, in Mr. Harrison's; and that it also appears from the cross-examination of lieutenant Ritchie, *(ante, p. 56,)* that the judge advocate still retained in his possession an original minute of this day's proceedings, differing from the printed copy in one entire line; but the line not specified; as remarked upon, in the preliminary examination: *(ante, p. 131–2)* also premising that "the report of the court," said to be "*entirely* omitted," is accounted for by a note, put in the place where the report should have been in the proceedings; his ignorance of the report having been also distinctly stated by commodore Porter, in his letters to the Secretary of the Navy, of the 30th May and 14th June. *(Ante, p. 115, No. 11, and p. 116, No. 14.)*]

Pamphlet, p. 32.

"MONDAY *MORNING*, MAY 9, 1825.

"The court met pursuant to the adjournment of Saturday: present all the members of the court, the judge advocate and captain Porter.

"The judge advocate stated to the court that he had no further testimony to submit to the court in *reference to the subject into which it was directed to make an* investigation, and the other branch of inquiry having been *granted* at his solicitation.

"The court was cleared, and proceeded to deliberate upon the course to be pursued, and after some time *the court* was opened, and the judge advocate stated that the court had determined to proceed *in* the business which had already been investigated, and to report to the department the facts which have been *formed* in relation to it.

"The record of the proceedings *of the court having been* read, the court was cleared for the purpose of deliberating upon the report to be made to the department.

"(The report here comes in, of which I have no knowledge.)

"After the report had been agreed to and signed, the court directed it to be transmitted to the department, accompanied with a letter, informing the Secretary of the Navy that all the business *which* was before the court is completed. This *being* done, the court adjourned till to-morrow morning at 11 o'clock."

Record.

"MONDAY, MAY 9.

"The court met pursuant to the adjournment of Saturday; present all the members of the court, the judge advocate and captain Porter.

"The judge advocate stated to the court, that he had no further testimony to submit to the court in the investigation,(*a*) and, the other branch of inquiry having been *submitted to the court* at his solicitation.

"The court was cleared and proceeded to deliberate upon the course to be pursued; and, after some time, was opened, and the judge advocate stated that the court had determined to proceed *to complete* the business which had already been investigated, and to report to the department the facts which have been *proved* in relation to it.

"The record of the proceedings *was then* read *by the judge advocate, and* the court was cleared for the purpose of deliberating upon the report to be made to the department."

[Here the report of the court of inquiry followed.

We omitted to take a copy when the document was accessible to us, of the closing paragraph of this day's proceedings. But we believe the only differences between it, and the last paragraph in the opposite column, were in the two words there printed in *italics*: at any rate, we venture to assert, with abso lute confidence, that the variance was not more material, than any other to be found in these columns.]

[Note. The *number*, and the *character* of the variances, apparent in the short space of this day's proceedings; and the extreme improbability that so many and such marked differences of *phrase* should have escaped the very careful and elaborate examination and comparison, which lieutenant Ritchie proves the paper under-

(*a*) At this mark there are interlined, in pencil, the following words: "commodore Porter having declined taking any part in the investigation:" which pencilled interlineation, though necessary to fill up the sense of the paragraph, does not appear to have been intended as an official amendment or correction of the record; because, as before observed, it is omitted in the office-copy filed in this trial.

went, rather indicate that the *record*, as it now stands, was not the actual *original*, from which the copy was taken; than that such palpable though *immaterial* errors, in the copy, should have been committed by any clerical misprision, or afterwards passed over by any inadvertency in the examination. The face of the papers, and all the concomitant circumstances lead to the presumption, and confirm the inference, before drawn from the coincidence of such numerous erasures, interlineations and additions, with such manifest variances between the presumed original and the copy, that the *record*, as it now stands, is a revised and amended *recast* of the record, or of the paper-minutes and entries, forming the basis and materials from which a complete record was to be extended, as the same stood when the copy was taken. For, after all, there is nothing affecting the *gist* or substance of the inquiry, in any one of the variances that have been pointed out; nothing to justify a suspicion of any sinister motive: they go no further than to produce more or less of precision in the mode of expressing the same meaning; or, at most, to pretermit the most immaterial and trivial circumstances.]

No. 24. The communication from the Secretary of the Navy, not introduced into the *original record*, but annexed to the subsequent proceedings; and the word "*proposed*," at the end of the 4th paragraph, instead of "*prepared*."

[This refers to the second *precept* from the Secretary of the Navy to the president of the court of inquiry; directing the court to proceed with a distinct branch of inquiry, relative to the general employment of the squadron, and wholly unconnected with the subject matter of these proceedings; but it is printed in the pamphlet, immediately after the minutes or journal of proceedings, closing with Monday, May 9, as before-cited. The only intelligible, if not the only intended exception to the printed copy of this document, is the misprint of the word, "*proposed*," for "*prepared*," at the end of a paragraph, which simply informs the court that "such documents, as appear to be connected with the subject of inquiry, shall be transmitted as soon as they can be *prepared*." This, on examination of the manuscript-copy, proved to be a *typographical* error; which had crept in, notwithstanding the pains taken with the reading of *proof-sheets*; as proved by Martin King, ante, p. 56.]

No. 25. In the documents given in evidence the *original record* gives

1st. Letter from capt. Porter to Secretary of the Navy, of Nov. 15, 1824.

2d. Same to same, January 1, 1825.

3d. Stephen Cabot to commodore Porter, November 12, 1824.

4th. Burgeest & Uhlhorn to same, November 11, 1824.

5th. Charles Platt to same, November 11, 1824.

6th. Secretary of the Navy to same, February 1, 1823.

In the *pamphlet*, p. 43, &c. the papers 3, 4, 5 are *transposed*;

No. 6 *wholly* omitted, and one inserted, as No. 6, which never was submitted to the court in that investigation.

[From the description already given, of the miscellaneous *composition* of this pamphlet, (ante, p. 121–2) it appears to have been, by no means, the plan of the author to confine himself to a copy of the proceedings of the court of inquiry, or of the documents that had been considered by that court: but such of these proceedings and documents as were in his possession, were to be used, merely as part of the materials of his justification. This necessarily resulted from the circumstances which had, as he said, driven him from the presence of the court: that is to say, had obliged him to decline entering upon any defence, or taking any part in the proceedings, which he could not do under the restrictions imposed on him, without degradation. Accordingly, it has been seen that two thirds of the pamphlet consisted of matter that formed no part of the record of that court. At the end of the twenty pages of the minutes or journal of proceedings closing with those of the last day above cited in explanation of *variance* No. 23, comes the *second precept*, instituting a distinct branch of inquiry, which, as remarked in the note of variance No. 24, had nothing to do with those proceedings. Then follow a number of papers (marked from B to F) that do belong to them: *(a)* and to these succeed a number of other miscellaneous papers, headed "documents;" the first five of which are the same above cited, as given in the original record, from No. 1 to 5, but *transposed*, as it is said; that is, the order in which they were placed in the original record being disregarded, and, evidently, not professed to be regarded: to these five, follow four others, not belonging to the proceedings; then one (the affidavit of Lieut. Barton) that does belong to them; then one (the act of Congress to protect the commerce of the United States, &c.) that does not: then the defence and a voluminous mass of documents, occupying between 50 and 60 pages; all adscititious matter, with one exception.

The paper marked No. 6, in the *record*, and here said to be *wholly omitted* in the pamphlet, is the often cited letter of *instructions* of the 1st of February, 1823, the supposed disobedience of which lay at the foundation of the whole inquiry then pending, formed the *gist* of the justification, which the pamphlet was written to establish; and of the first charge now under trial: and the total omission of which would, indeed, have been a portentous error. The fact, however, is, that a literal extract of it is

(a) Note. The paper A, (being the original precept for convening the court, and under the authority of which the whole inquiry had been conducted) is also *transposed*; for instead of being connected with this series of documents, as in the original record, it is placed some 20 or 30 pages before them; with a series of correspondence not belonging to the proceedings of the court, and inserted in the pamphlet between the advertisement and the minutes or journal of proceedings. Indeed the number of *transpositions* is extremely underrated (as will be obvious in a variety of other instances) when it is limited to "the papers 3, 4, 5."

given in the pamphlet (p. 68–70) comprising every part of it that bore any relation to the then pending subject of inquiry and investigation; and leaving out the three last paragraphs, commencing with "great complaints are made of the interruption to our commerce by privateers," &c. which paragraphs (as may be seen on a reference to them, ante, p. 76, No. 1) related to subjects altogether foreign to the matter of inquiry and justification then in hand: and, therefore, it is presumed, were omitted.

The fact is, so far from there appearing any motive or design to suppress it, that this letter of instructions is introduced into the defence contained in the pamphlet, as in *aid* of the general principles deduced from public law, precedent and usage, to *justify* the operation at Foxardo. Then the alleged variance is expressed with extreme inaccuracy, when it bears that this document was "*wholly omitted*:" at most it should have been arranged among the *transposed* documents; or its *diminution*, in respect of the omitted paragraphs, suggested.

As to the paper said to be inserted, as No. 6, and as not being one submitted to the court in that investigation, it is nothing more or less than the often cited letter of recal, of December 27, 1824; which vid. ante, p. 78, No. 3. The bearing of that document upon the matter then and now in hand, needs no illustration. Why the insertion of this document should have been selected for animadversion, as one that had not been submitted to the court, when it is associated with so numerous a mass of others, in the same predicament, is not explained by any *data* in our possession.]

No. 26. p. 34. Fifth line from the bottom, "*were*," instead of "*was*."

[This, upon reference to the passage, appears to be a mere difference of grammatical propriety, between the expressions, "whether a thing *was* done," and "whether it *were* done."]

No. 27. p. 36. Commencement of sixth paragraph, the words, "I beg leave to state further that," omitted.

[This variance occurs in one of commodore Porter's addresses to the court of inquiry, in support of his objections to the formation of the court, or the scope of the inquiry: and consists in the difference between the following modes of expression: "it was not my intention to make, under any circumstances whatever, objections to any member," &c. and, "I beg leave to state further that it was not my intention to make," &c.]

No. 28. Same paragraph 3d line, after, "*court*," the original reads, "and I should now waive all objections," &c.

[The printed copy reads, "and *even* now I should waive all objections," &c.]

No. 29. Same paragraph, 3d line from bottom the word, "*as*" not in the record.

[Speaking of the terms of the investigation, "*as* asked for by me;" distinguished from those laid down in the precept.]

No. 30. p. 37. 3d line of 2d paragraph, "*the design*," instead of "*designed*."

["It was evidently designed [the design] that," &c.]

No. 31. 9th and 8th lines from the bottom of paper B, "considering the fearful odds I have to contend against," *italicised* in original.

No. 32. p. 41, 3d and 4th lines of 3d paragraph, "*to any subject*," instead of "*to the subjects*."

[Commodore Porter, in addressing the court on the subject of his said objections, speaks of not having made any *request*, in a letter of a particular date, "relating to *any subject* [the subjects] submitted to you."]

No. 33. p. 42. 11th line of 2d paragraph, "*a power*," instead of "*its power*."

[Speaking of the right of the *court* to *decide* a particular point, he says, "I cannot acquiesce either in a [its] power to decide," &c.]

No. 34. [When these variances, and the documents connected with them, were under examination, before the court, one was observed and noted, which is not mentioned in the judge advocate's *note* of such variances; and which is now gratuitously added to the list.]

In the proceedings of Saturday, May, 7, (Pamphlet, p. 31, above-cited in *variance* No. 20.) Lieutenant Barton's affidavit is referred to, as marked H; but in the record the original mark is erased, and the figure *(7)* substituted; which Mr. Harrison believes (ante p. 63,) to have been also by the hand of the judge advocate. This erasure, being with a knife, does not leave the original mark so legible as the others; but from the general outline, and some faint traces, was concluded to have been an H. The same erasure and alteration of the mark appear on the back of the document itself, annexed to the record.

THE EVIDENCE

UNDER THE FOURTH SPECIFICATION.

Specification 4. Inserting, in the said pamphlet, "various remarks, statements and insinuations, not warranted by the facts, highly *disrespectful* to the Secretary of the Navy, and to the said court of inquiry."

The pamphlet, which is the single document to which this specification refers, was simply read, in the course of the trial, from beginning to end, by the judge advocate; without other explanation, or indication whatever, how it applied, or what passages of it were to be selected, as applying to any charge or specification: except the thirty-three variances, enumerated under the third specification as above-stated. The accused, therefore, had to look through the whole document, and to infer, by anticipation, what

were the passages excepted to. In making out this report, we should have been left in the same uncertainty, but for the publication of the final sentence of the court-martial, in this case; which does point out the particular passages, intended to be brought under this specification: and to these the explanatory passages of the context, or other evidence, to be stated under this specification, are to be directed.

For the general description and scope of the pamphlet, vide evidence under the 2d specification, ante, p. 119—24; particularly the "advertisement," p. 121.

Reference is there made to certain preliminary exceptions taken by commodore Porter to the formation of the court, and to the scope of the inquiry submitted to it; which eventuated in an order, expressive of strong disapprobation of certain passages in the commodore's communications in support of these exceptions; and imposing certain restrictions on his future communications; which had caused him to take his leave, and decline any further participation in the business: conceiving that he should be degraded by conforming to restrictions, which he thought derogatory to him, in themselves; and more especially from the declared motive for imposing them.

At the meeting of the court of inquiry, on the 2d May, before the members were sworn, commodore Porter stated a preliminary exception to the formation of the court, and to the terms of the precept, by which the scope of the proposed inquiry was defined. For the terms of this exception, and the versions, given of it by the commodore and by the judge advocate, see variance No. 3, ante, p. 132.

On the same day, after the members were sworn in, he delivered a written memorial, addressed to the court: (the same abovecited as marked B, in variances Nos. 27, 28, 29, 30, 31,) in which he unfolded, at some length, the grounds of his exception, and the reasons in support of it.

The *precept* had indicated two distinct subjects of inquiry; the first, at the instance of the government, and limited to the affair of *Foxardo:* the second, as at the *request* of the commodore himself, and directed to "certain *representations* made to the *government*, in regard to the employment of the naval forces of the United States in the West-Indies and Gulf of Mexico, setting forth, in substance, that, in the year 1824, the said naval forces were not employed in the suppression of piracy, in the *most effective* manner, but were employed in the transportation of *specie*, and in other objects of inferior moment, to the neglect of the public interests."

As to the first branch of inquiry, it was remarked, that as it proceeded upon a charge, preferred by the Secretary of the Navy, he had "a perfect right to couch it in whatever language may appear to him most proper to obtain the end he has in view."

But, as to the second branch of investigation, which the precept professes and avows to have been instituted solely at commodore Porter's *request*, he insists that it should have pursued the terms of that *request*. If it materially varied from such terms,

it could not properly be called an investigation at his *request*; but one equally moved by the government, as that concerning the affair of *Foxardo*. He refers to his letter, March 2, (ante, p. 110, No. 4,) as containing the only request which he had ever made on the subject; and as necessarily constituting the *request*, referred to, in the *precept*. He objects that the particular documents referred to (to wit, the letters of Messrs. Randall & Mountain communicated, through the State Department, to Congress, and specified in his letter of the 2d March) as constituting the injurious charges, which he requested to have investigated, should have been specified in the precept; and that the court should have been directed to inquire into the truth of these specific charges, and "how far facts will justify *their* (Messrs. Randall & Mountain's) *statements and remarks, and the injurious remarks they have elicited on the floor of Congress.*" He also objects that, though the facts, charged in those letters, were highly disreputable, if true, to all concerned; as well to the *officers* under his command, as to himself; and though his *request* for an inquiry had expressly extended to them; whose justification was as necessary as his own; yet that branch of the requested inquiry was omitted in the *precept:* that as a part of the squadron had actually been employed, under the *orders* of the Secretary, "in the transportation of specie, and (perhaps) in other objects of inferior moment;" that is, of inferior moment to the great object of the suppression of piracy; the terms of an inquiry, so limited, might involve a question of the propriety or expediency of such orders: at all events, it did not reach the specific end and object of the inquiry *requested* by him; as it professed to do: which was to investigate the conduct, both of himself and his officers, in relation to the particular charges contained in Messrs. Randall & Mountain's letters; and, upon their authority, promulgated on the floor of Congress. "Messrs. R. & M. (he says) are understood to have said that myself and others under my command, have neglected the duties which were confided to us, to the discredit of the navy and the nation; to the injury of the property, and to the sacrifice of the lives of the citizens of the United States, for the sole purpose of benefitting ourselves by the transportation of *specie:*" and he argues that the precept should, in terms, precise or equivalent, have directed the inquiry to this specific charge.

He then proceeds to expound his objection to what he had termed "the materials of which the court was composed:" and which he had explained to be "no specific objection to *individuals.*" The point, on which this objection turns, is, that the court was composed of officers, the majority of whom were his *juniors* in rank. He disavows being actuated, in taking this objection, by any motive personal, either to himself, or to the members of the court: but reasons it as one of great importance and general interest to the service; and which he did not feel himself at liberty to waive, as others, besides himself, might be implicated in the result of the inquiry.

The court directed the judge advocate to refer these objections,

with the memorial in support of them, to the Secretary of the Navy: which was done in a letter from the judge advocate, to the Secretary, drawn up, under the instruction of the court:*(a)* in which, after introducing the subject and referring to the memorial, the judge advocate, in behalf of the court, proceeds to say:

"You will perceive that an exception is taken to the court itself, as not composed of competent members. This objection applies to a majority of the court, and they consequently feel a *delicacy* in determining a question involving their own *competency*. The court, therefore, has deemed it correct to submit the questions thus raised to your determination, and to adjourn the court for the purpose of obtaining your opinion before proceeding in the investigation."

The Secretary's answer*(b)* was communicated to the court, the next day, May 3; in which, it is remarked, that if captain Porter intended a *challenge*, or a specific legal *exception* to any member, the proper *tribunal* for its decision was the court itself; the proper *time* was before the members were sworn. If, as is presumed, he designed to complain of the manner in which the court was *composed*, as unjust or illegal, he ought, before the meeting of the court, to have applied to the department; which alone possessed the power of affording a remedy: having had timely notice of the composition of the court, and of the designated objects of inquiry, from a copy of the precept, as early as the 20th April. As to the legality of constituting the court, with three captains, of the same rank with captain Porter, one *senior* and two *junior* to himself, the opinion of the department was necessarily *expressed* in the very act, which *created* and *convened* the court: and no argument was discovered, in the paper submitted, to change that opinion.

As to the objection to the terms of the precept, by which the scope of the objects of inquiry were prescribed, the reason and design of addressing, to the *court*, any comment upon it, was not perceived: as the court was not supposed to possess the power to decide either on the form of the precept, or on the proper objects of investigation: but such objection and comments should have been addressed to the *department*, which alone possessed the power to alter the form of the precept, and to change the scope of the investigation.

The President of the United States having thought proper to order an investigation of the transactions at *Foxardo*, it was the duty of the department so to frame the precept as to meet that object: which was thought to have been done with sufficient precision.

As to the other branch of the inquiry, it had been granted at his (Com. P's) request; "and was intended to be so general as to permit him the utmost latitude in proving what had been his conduct on any particular point which he might select; and shewing that he was free from all just cause of accusation, by whomsoever

(*a*) This letter is found in the record and in the pamphlet, marked C.
(*b*) Marked D.

made. If the words be not sufficiently broad to permit such an investigation, they would heretofore have been promptly extended, at his request, and no difficulty will now be made, should he request it, in so directing the court as to accomplish his object. The defect on this point, if one exist, is not perceived. It was not the intention of the department, at the suggestion or solicitation of Captain Porter, to direct the court to inquire into the conduct of other officers, of whose actions the department saw no cause to complain; who had not asked for any inquiry; and for whom, it was not perceived, that he had any authority to demand it. Much less was it the intention of the department, on an inquiry asked by him, to submit to the court the legality or the propriety of the orders given to him. Nor is it believed that the precept can bear any such construction. With this view of the matters contained in the papers submitted, the department has only to direct, that the court, constituted as it is, proceed to make the inquiry directed by the precept."

This communication being read in open court, annexed to the record and marked D, the court proceeded to examine Lieut. Platt; at the conclusion of whose examination, the next day, Com. P. was asked whether he had any questions to propose, "to which he replied (as the record states) that, before proceeding to any steps in his defence, he had some remarks to submit to the court, which he read and submitted to the court; the paper was annexed to the record, and marked E."

The paper thus incorporated as a part of the record of the court of inquiry, and referred to as such by its proper mark, in the pamphlet-copy of the proceedings, is found in the pamphlet, p. 40, as follows:

E.

Gentlemen of the Court: Before proceeding to the examination of any witness in my defence, I must beg leave to enter my protest against the decision of the Secretary of the Navy, as regards the legality of the formation of the court. A question of law and justice, on which the court, either from *incompetency* or delicacy, are unwilling to come to a decision, should not be decided on by the officer with whom the illegality and injustice complained of is supposed to have originated. A question of the importance of the one submitted to you, I was impressed with a belief at the time of presenting it, would be, and am still of the opinion should be, submitted to the Attorney General of the United States, if the court from any cause was unwilling to take the responsibility on itself. And in order that I may not be supposed to have given my assent to any circumstance which by any tribunal hereafter may be supposed to vitiate the legality of your proceedings, I must beg leave to decline taking any part whatever in this investigation, until the question I have submitted to you is decided on by competent authority. A question, not originating in any captious disposition on my part to create difficulties, as it would appear from the quotations in the Secreta-

ry's letter, is supposed to be the case, but from a sincere desire that every proceeding in the case should be conducted according to the strictest principles of law and justice.

If an error, as is intimated, was committed in point of form, in the time taken to state my objection, the court will no doubt recollect that the error did not originate with me.—I apprized the members assembled before its formation, of my intention, and adopted the time suggested to me by the judge advocate. But even if an error had been committed by me, merely in point of form, is it just, considering all circumstances, that the *party opposed to me should avail itself* of this error to my disadvantage, when no intimation whatever of the error was made to me at any time, either by the court or its law adviser? That I did not apply to the department before the meeting of the court, to remedy the evil complained of, scarcely needs an explanation—*if it does, you have it now, in the decision of the Secretary.*

I feel it due to myself in making this protest, to place on the record my reply to the intimation that the precept would have been changed on my application before the meeting of the court. You have already been made acquainted with the language used in my application for the investigation sought for by me; it is therefore unnecessary to repeat it.—The Secretary, in what purports to be his reply, dated on the 16th March, states as follows:

"It has become my duty to apprize you of the determination of the Executive, that a court of inquiry will be formed, as soon as circumstances will permit, to examine into the occurrence at Foxardo, which was the occasion of your recal, and also to comply with the request contained in your letter of the 8th inst."

I must observe that I understood the Secretary to mean, by the letter of the 8th, my letter of the 2d, as I never made any request of him in any letter of that date, relating to any subject submitted to you. Confiding in the assurance of his reply, I was greatly surprised at the wording of the precept, and I must leave you to decide, whether, after it had been issued, the court was not the proper medium through which I was bound to communicate with the Secretary. I will further remark that, in the letter accompanying the precept, the Secretary, from some objections to the style of my letter, thought proper to remind me of the relation which subsists between me and the department; and not willing that offence should in future be taken when none was intended, or to incur a similar reproof, when none was deserved, I thought it safest on my own account, that all my communications should, in future, be made to you, and through you.

[The words in *italics* were those *underscored* by the court of inquiry; to indicate, as it was understood, what passages were excepted to as disrespectful.]

Upon the reading of this paper the following proceeding was had concerning the same; according to the official record of the court of inquiry.

"The room was then cleared, and after some time was opened, when the judge advocate informed Capt. Porter that the court had maturely deliberated upon the paper submitted by him—that after

full consideration, the court is of opinion that the matter of the communication, as well as the language in which it is couched, is in several particulars so highly objectionable that, could the court have anticipated its character and contents, it would not have been suffered to be read.—The court consider it as highly disrespectful, both to the Secretary of the Navy, and to the court itself. This court cannot submit to hear from any officer animadversions on the conduct, and accusations against the head of the department, wholly foreign to the investigation in which it is engaged; nor can it, without forfeiting its own self respect, listen to language so offensive to itself. The court is willing to believe that this objectionable character may be attributed to the hasty manner in which the paper appears to have been drawn up; and that Captain Porter, on consideration, will himself feel disposed as well to perceive, as to rectify the grounds of objection.

In order, however, to prevent a recurrence of such unpleasant circumstances, the court has ordered, that in future no communication be received unless in writing, and the paper must previously be submitted to the judge advocate for the consideration of the court.

The judge advocate further informed Captain Porter that the court had likewise directed him to state, that when the question was asked him, on the opening of the court, whether he had any objections to make to any member of the court, he was understood to say, distinctly, that he had none: but that he wished to submit to the court "some remarks on the precept by which the court was convened, and the materials of which it was constituted." It was then suggested to him that, as the court had not yet been organized, it could at that time hear nothing from him; but that the proper period would be after the members had been sworn in. This suggestion was made by the judge advocate, and apparently acquiesced in by Capt. Porter.

Immediately after the organization of the court, Captain Porter read and submitted to the court the paper which has been annexed to, and constitutes part of the record. Conceiving that it contained, not a challenge to the court, or a specific exception to any member of the court, but objections applying exclusively to the precept under which it had been convened; and that these objections, if presented to the government, might possibly induce some change in the precept, with which the court had no authority to interfere;—feeling, also, that the exceptions which had been urged, involved the competency of the major part of the members of the court, a question on which delicacy forbade them to express an opinion, when it had not been presented distinctly to their decision; the court determined to pursue the course which was adopted, and of which Captain Porter was immediately apprized.

If, however, Captain Porter did design to raise a question for the decision of the court, as to the legality of the precept, under which it is acting, the court has no hesitation in saying that it entertains no doubt upon the subject. Had any doubt existed, the court would have put it in a way to be satisfactorily decided, before proceeding to act under it.

The court is aware that it possesses no power to compel Capt. Porter to take any part in this investigation; but it is equally satisfied that his acts can in no degree interfere with the duty of the court to proceed in the investigation, which it has been charged to make by the competent authority.

The court then adjourned till ten o'clock to-morrow morning."

On the next day the correction of the terms of Com. P's objection, as entered on the first day of the court, was received, as above cited in variance No. 3. ante, p. 132–3.

Com. Porter then delivered a written address to the court, as follows:

F.

WASHINGTON, *May 5th*, 1825.

GENTLEMEN OF THE COURT: Having carefully perused the paper commented on by the court, on account of which it has thought proper to pass censure, and not being able to detect in it a single expression which bears the construction the court has thought proper to place on it, I cannot consent, by any alteration on my part, to admit, that by it any disrespect was intended by me, either to the court, or the head of the Navy Department; and it is the cause of great surprise to me that the court should have entertained such an opinion.

The court having thought proper to underscore as disrespectful, the word *incompetency*, as used by me in relation to it, I beg to state distinctly, that the word was not used in regard to intellectual incompetency, and in no other sense could it be offensive; but with respect to its legal incompetency, (in the opposite sense in which the court itself applied the word competency) which was supposed to be admitted when the subject was referred to the Secretary for his decision. Delicacy I did not conceive to be the only motive for the course taken by the court, as I did not believe it a sufficient and satisfactory one; being under the impression that it was the duty of every officer to perform the service confided to him, however delicate, provided it be legal.

The declining to make a decision on my first application, and referring the subject to the Secretary of the Navy, was, as I supposed, an admission of the incompetency of the court to decide, or a voluntary relinquishment of its right, if it possessed it,—a right which I am of opinion the court cannot again resume, after the opinion of the Secretary is at its request made known. If the court had the right to decide in the first instance, no delicacy should have prevented its decision; but, relinquishing its right, I am under the impression it cannot resume it to decide now as to its legality, and I cannot acquiesce either in its power to decide the propriety of the decision it has come to, or the rule it has established with regard to the course it has thought proper to adopt toward me. If I am not permitted to appear before the court on terms of perfect equality with my accusers, whoever they be, and to defend myself in the way which may appear to me the most proper, (always observing due respect to the court and the Se-

cretary,) I must in justice to myself decline offering any defence which may be liable to be weakened by an interposition on the part of this or of any other tribunal.

With this remark, I beg leave to adhere to the determination expressed in the paper on which the court has animadverted with so much, and I think, with such undeserved severity.

I have the honour to return to the court a copy of the paper commented on, underscored, and marked by it as objectionable; *together with a copy as it was submitted by me to the court.*

I have the honor to be, with sentiments of the highest respect, the court's very obedient servant,

D. PORTER.

To the President and Members
of the Court of Inquiry now in session.

This paper being read, the court deliberated, some time, concerning it: and upon the opening of the court, the following proceeding was had:

"The judge advocate informed captain Porter that he was instructed by the court to say that the paper had been maturely considered—that it is deemed objectionable from the style of animadversion upon what has transpired, and of instruction as to the future conduct of the court. The court, therefore, will permit captain Porter to withdraw it. Should he, however, wish it to be inserted on the record in its present shape, it shall be done, accompanied by such remarks as the court conceives it due to themselves to make.

"Captain Porter declined to withdraw the paper; it was accordingly annexed to the record and marked F, and the judge advocate informed him as follows:

"The court feels constrained to make some remarks upon the animadversions which captain Porter has thought himself entitled to pass upon its conduct. The court did understand captain Porter to waive or decline challenging any of the members of the court, but at the same time to intimate, as an objection which he conceived existed against the organization of the court, that two of the members were his juniors in rank. The court did not, at any time, suppose that this objection had any foundation, either in the letter or spirit of the law. The law is silent on the subject. The only qualification required is, that the members of the court should be commissioned officers. The "materials then of which this court is constituted," are conceived to be wholly free from any legal objection. Nor is there any thing in the spirit of the law which the court has been able to perceive leading to a different conclusion. Every member of this court holds the same commission with captain Porter; all are captains; one his senior, two his juniors, in date of commission. The court, however, is clearly and unhesitatingly of opinion that no law would be violated, either in its letter or spirit, by the appointment of any three commissioned officers to constitute a court of inquiry into the conduct of any officer. Courtesy, and a regard to the feelings of the officer whose actions are to be investigated, will,

it is presumed, in all cases, prevent the government from selecting officers of a very inferior grade to set upon an inquiry into the conduct of an officer of elevated rank. But this principle can scarcely be carried to an extent which would apply to a court, every individual of which holds the highest commission which is known to the American Navy. At all events, this is an objection which the court conceived, and still conceive, can be properly decided only by the executive. This court can in no manner interfere with such a question. In this instance likewise, it appeared to the court to be so connected with other comments upon the precept as to present itself before the court rather as an animadversion upon the conduct of the executive, in thus organizing the court, than as a challenge formally presenting the question for its decision. Captain Porter seems himself to have so viewed it, for he assigns his reasons for making this court the organ of his communications with the department.

"The court thinks proper, further to remark, that the single object for which it has been constituted is, to inquire into the official conduct of captain Porter, and to report to the department the facts which may be proved. The court possesses no power to adjudge captain Porter innocent or guilty; it has no authority to impose punishment. The duties imposed are enjoined by the competent authority. The interference of captain Porter in pursuing this investigation, however desirable it may be, as calculated more fully to elicit the truth, is in no manner necessary. The court is competent of itself to perform the duties imposed upon it, and will now proceed to execute that task.

Captain Porter was then asked whether he had any questions to propose to lieutenant Platt: he declined putting any, and observed he should now take his leave of the court."

To this part of the proceeding as published in the pamphlet, commodore Porter annexes, in a note at p. 24, 25 and 26 of the pamphlet, the following:

"Remark. *However desirable it might have been to myself and others that the investigation asked for by me should proceed; however honorable the result might be to myself and the officers under my command, and however necessary it may be for the reputation of the navy and the nation, I could not consent to defend myself before the court against any charge whatever, until its legality had been decided by competent authority—until I could appear before it on terms of perfect equality with my accusers—until I could be allowed to protect myself in the way which might appear to me most proper; without submitting my defence to the inspection of the judge advocate, who had no right to decide in my case; or to the controul of the court, who would thereby have exercised a power not founded on law or justice; and without the risk of undeserved reproof.*

"For the members who composed the court, individually, no one could have a higher respect than myself, and if a majority senior to me could not be had without injury to the service, I should have been content. But this has not been made apparent, and I owed it to the service as well as myself, that no doubt should remain as to the legality of the principle that the court would have established, that commissioned officers of any class, are a sufficient court for the trial of any officer, their rank depending on courtesy alone. The framers of laws rarely permit justice to depend on courtesy, and I doubt the exception in this case. Too much courtesy might permit the guilty to escape, too little, the innocent to suffer. Justice dispensed on this principle

is never certain, and seldom satisfactory. In this instance, I may with propriety, considering all circumstances, complain that courtesy has not been sufficiently extended; a practical illustration of the effects of which I have had, in the censure the court thought itself justifiable in passing on me. But independent of my objections as stated above, on the ground of legality, equality, and the rules of the court, I object to the precept itself, which does not grant me what I asked. If the Secretary of the Navy had thought my request an improper one, he should have refused it; but after he had informed me, he would comply with it, he should have granted it to its full extent.

"The same principle that induced me to go to Foxardo for the protection of the persons of the officers under my command, induced me to ask for an inquiry, to enable me to protect their characters. They acted in both cases in conformity with my orders, and were entitled to my protection, so far as I could protect them. If in both cases I have failed in my object, I have the satisfaction of knowing that the failure is not attributable to any omission on my part.

"If the court pursues the investigation, I feel no apprehension for the result, whether I defend myself or not; and if the case should be dismissed by the department in consequence of my refusal, it will be a sufficient justification of my conduct against the imputation of Messrs. Randall and Mountain, and of members on the floor of Congress, but it will be no acquittal of the officers under my command, against whom similar charges by the same persons have been made.

"But however desirable a decision in the case may be, I cannot, either on my own account, or on account of others, purchase the good report of the court at the expense of self respect and esteem.

"I take this occasion to express my surprise that the court should have conceived the idea, that I wished to submit the question of its competency to the Secretary of the Navy, as no such wish is expressed by me.

"I wished my objections to the *precept* submitted to the Secretary, and so expressed myself; the question of *competency*, I submitted to the court itself. I beg leave to refer the reader to paper B, wherein he will find I express myself as follows:

"That the court is formed agreeable to the letter of the law, I cannot deny; nor could I were it formed of any of the subordinate classes I have mentioned. But whether it is formed according to its *spirit* and *intention*, and on *principles of strict justice*, is the question I beg leave to submit to you."

"If the court, from any scruples whatever, declined deciding the question thus presented to it, it appears to me, the most proper course would have been to submit it to the decision of the attorney-general of the United States. *But it was the duty of the court to decide whether it was or was not competent; the decision as to its belief on the subject, on oath, was all that was required by me, and the question could have been decided by the court, as readily, and as well, before, as it was, after the instructions of the Secretary had been received; that it did not decide in the first instance, is sufficient evidence that doubts then existed as to its legality.*

"The single object for which it (the court) has been constituted," has nothing to do with the merits of the question of legality; and although the limitation of its powers, as defined in the precept, might have been of itself a sufficient reason for my not defending myself before it, it is not a sufficient apology for the course it has pursued toward me. The court was not authorized to offer an opinion in the case; the opinion of the president, to whom the subject is to be submitted, *cannot* be formed without having all the facts before him; and his opinion I feel confident *will not* be governed by any *act* of the court.

"*Under all circumstances then, I had nothing to lose, or apprehend, by my withdrawal from the court, and I certainly saved a very useless sacrifice of my feelings, as (except in its deportment toward me while before it,) it could do me neither good or harm. A court more powerless, and yet more calculated to alarm the accused, was perhaps never formed.*

"*The charge, first to be investigated, was exhibited against me by the Secretary of the Navy; the Secretary of the Navy selected my judges, two of whom*

were junior to me. The judge advocate, who is the primum mobile of all military courts, received his appointment from the Secretary, and is his warm friend and protege. Under these circumstances, it may readily be imagined, I had every thing to apprehend, and nothing to hope for, while before the court; and to defend myself under the conditions imposed on me, would have been worse than useless. All that was left for me was to retire from the court, and to lay a statement of the case before the highest tribunal on earth. In doing so I mean no disrespect to the government, to the head of the department to which I belong, or to the court; I merely exercise a right which is secured to every American citizen; a right which I do not conceive that I forfeited when I became a public servant.

"I feel that I have been oppressed, and the privilege of complaining is not denied to the meanest slave. D. P."

It appears, since the trial, in a way, by and by, to be explained, that an *instance* of defect of accuracy in point of *fact*, amounting either to wilful misrepresentation, or to criminal negligence of accuracy, or to some other degree or shade of false statement, was suggested to, or by the court-martial, in support of that clause of this specification, which speaks of "various remarks, statements and insinuations, not *warranted* by the *facts*;" in addition to their other imputed character of being *disrespectful*. This suggestion is understood to be distinctly asserted, as having been utterly unknown to, and never the most distantly surmised by the accused or his counsel, during the trial: but it makes an additional statement of the evidence necessary; not otherwise deemed material.

This imputed deviation from fact is supposed to be couched, in a certain *note* (pamphlet, p. 31,) upon that part of the proceedings of the court of inquiry, on Saturday, May 7, in which the reasons of the court are given for rejecting certain documents, as stated, ante, p. 96; and explained, ante, p. 102–7. This note and the proceeding, on which it comments, appear on the same page, and all in one connected series, with the reference to the exhibit G; the omission of which is accounted for, as above explained, under variance No. 20, p. 135. The note in question refers to that part of the court's decision, which assigns, as a reason for the rejection of the documents, "that many of them are not *sufficiently authenticated* to authorize their reception, without an *express* and sufficient *waiver* of all exceptions *entered* on the *record*." Which is thus commented on, in the *note*.*

* "It was the cause of extreme surprise to me, as it was to every by-stander, and as I have no doubt it is to the reader, that such a condition for the admission of the documents on the record should have come from the court. If the documents were proper testimony, they ought to have been admitted without any conditions, and if they were not testimony, they ought to have been rejected. As to the character of the documents, whether confidential or otherwise, that was an affair for me to consider, and not for the court. It was one which the court had nothing to do with. The reader *having the documents before him*, can judge of the propriety of the other point of the objection, to wit: "that collectively they present no facts or views calculated to elucidate the subject submitted to the court. D. P."

Immediately succeeding that note, on the same page, is the note referring to exhibit G, in these words; "Not in my possession."

The nature of the transgression against the truth of the fact here suggested, will be found in its proper place.

THE EVIDENCE

UNDER THE FIFTH AND LAST SPECIFICATION.

Specification 5. The having made public in the aforesaid *pamphlet*, "without any authority or permission for that purpose, official communications to the government; and official correspondence with the government:" and also having made public, "on *other occasions*, between the 1st of October, 1824, and the 15th June, 1825, *orders and instructions* from the government, and *official correspondence* with the government."

It has been already remarked that the whole mass of documentary evidence was produced and read, indiscriminately, without any distinct appropriation, or application of the same, to any one of these five specifications: with the exceptions of the five letters offered under the 1st, and the note of 33 variances above cited under the 3d specification. Among this mass of documents, only three *publications* of any kind (as proceeding from Com. P.) are given in evidence; and all of these contain matter that may admit of application, indifferently, to the several specifications. Of course it becomes necessary to fish out from the mass of matter contained in these publications, every document that may come under the description of official communications, correspondence, orders or instructions; in order that it may appear from their *tenor*, which of them import any obligation of secrecy, express or implied, or were published without authority, so as to bring the publication of them within the terms of this specification.

In the *pamphlet* (which is the only publication specified as containing any documents within the given description) are found the following:

[In this list such of the letters as are already printed in the foregoing pages, are referred to by the dates, &c. the residue printed *verbatim*.]

1. Letter of instructions from Secretary Thompson to Com. Porter, 1st Feb. 1823.

2. Com. Porter's official report to Secretary Southard, of the affair at *Foxardo*, 15th Nov. 1824.

3. The Secretary's letter of recal, 27th Dec.

Navy Department, 29*th Dec.* 1824.

4. Sir: I have thought proper to relieve Captain Porter,—You will proceed to the Constellation, if ready, if not ready, in the

Shark, with all despatch to Thompson's Island, and if Captain Porter be not there, to such place as you may be induced to be believe you will be most likely to find him. If on your passage to Thompson's Island, you receive information where he is, you are at liberty to change your route; the object being to find him as early as possible.

You will deliver the letter directed to him, and on his leaving the station, receive from him the command of the squadron, with such papers and instructions as he may furnish. You have enclosed copy of the original orders to Captain Porter, dated 1st Feb. 1823, with extracts from others. You will take them for your guide, and follow their directions. It is confidently expected that you will exhibit zeal, caution, and perseverance, in discharge of your duties.

I am, very respectfully,
SAML. L. SOUTHARD.

Capt. LEWIS WARRINGTON, *Norfolk, Va.*

U. S. SHIP JOHN ADAMS,
Thompson's Island, Jan. 1st, 1825.

5. SIR: I have the honour to transmit you copies of the statements made to me, which induced me to take the step I did, as regards the Spanish authorities at Foxardo.

I have the honour to be, your obedient servant,
D. PORTER.

Hon. SAML. L. SOUTHARD.

6. Com. Porter to the Secretary of the Navy, 30th Jan. 1825.
7. Do. to Do. 1st March.
8. Do. to Do. 2d March.

WASHINGTON, *March* 8, 1825.

9. SIR: The officers named in the enclosed list, will be necessary as witnesses, to enable me to repel, in a suitable manner, the foul charges of Mr. Thomas Randall, and Mr. John Mountain, and the injurious insinuations and assertions on the floor of Congress, against myself, and the officers under my command.

Understanding that vessels having some of them on board are about sailing, I beg that they may be detained, provided it can be done without injury to the public service.

I have the honor to be,
Your obedient servant,
D. PORTER.

Hon. SAMUEL L. SOUTHARD.

10. Com. Porter to the Secretary of the Navy, 16th March.
11. The Secretary to commodore Porter, 16th March.
12. Com. Porter to the Secretary, 13th April.

13. The Secretary to commodore Porter, 20th April.
(a) 14. Commodore Porter to the Secretary, 6th May.

Of these, as has been seen, several were published, in various modes, by *official* acts: as printed among congressional documents; or directly mentioned, or referred to, in them: and as communicated to the court of inquiry; and either annexed to its record, or mentioned or referred to, in its proceedings, or in official documents, annexed to such proceedings.

What are the *various other occasions*, on which such obnoxious publications have been made (as charged in the second branch of this specification,) it is extremely difficult to conjecture: because the only other publication, falling within the designated *period* of *time*, is the National Intelligencer of Marh 30, 1825;(b) which contains only the two entire letters, 3 and 6, and short extracts from two others, 10 and 11, all published at full length, in the *pamphlet*.

The only remaining publication of com. Porter, of which any evidence has been given in the course of the trial, is in the National Journal of June 16, 1825:(c) which cannot be presumed to have been intended as evidence, under this specification; as it does not come within the limited period of time, between October 1, 1824 and June 15, 1825. But what was or was not the actual intention of introducing it, is impossible to be inferred, with any certainty, from the course of this trial. The articles of official correspondence, contained in that paper, are found, at full length, ante, p. 115—116, Nos. 10, 11, 12, 13 and 14.

They are prefaced by the following address to the printer:

MERIDIAN HILL, *June* 15, 1825.

SIR: In consequence of an *anonymous* publication which appeared in your paper of the 14th, and dated the 13th, respecting my pamphlet containing the proceedings in the Foxardo affair, &c., I have to request you to publish the accompanying correspondence.

Very respectfully,
Your obedient servant,
D. PORTER.

Mr. PETER FORCE.

[*EVIDENCE at large, not being referable to any of the promulgated charges or specifications.*]

The history of the introduction of Mr. Monroe's deposition, and of the progressive orders on the subject, are found, ante, p. 44–7, 48–9, 49–50, 64, 69–70.

(a) All the letters comprised in the foregoing list (except 4, 5 and 9) are printed at full length, ante, p. 74–8. Nos. 1, 2, 3, and p. 109—114, Nos. 2, 3, 4, 5, 6, 7, 9, and p. 89, No. 12.

(b) Ante, p. 51.

(c) Ante, p. 52.

From the time and manner of introducing the application to the court, for the order to take the deposition, it had been inferred that the sole object was to authenticate a certain correspondence, which had, just then, been the subject of some discussion. Accordingly, when it was perceived, from the interrogatories filed by the judge advocate, that the prosecution was already in possession of the correspondence; and, consequently, that Com. P. was dispensed from all *delicacy* in regard to it, he came forward and admitted its authenticity; still concluding that it was the *main* end, and only *operative* inducement for resorting to Mr. Monroe's evidence: though it was perceived that the interrogatories had been framed with a more extensive range, and embraced circumstances still more foreign (as it was thought) to the subject matter of any charge or specification then pending, than the correspondence itself. The judge advocate, nevertheless, persisted in the execution of the order for the deposition; and required cross interrogatories to be filed without delay. The attempt to introduce depositions to any fact, in a capital, or, indeed, any other case, before a naval court martial, was viewed with astonishment on the part of the accused; as contrary to the clearest and best established rules of evidence in criminal trials, and to positive law: the irrelevant and inadmissible nature of the facts apparently aimed at, independently of the irregular mode of proof resorted to, was thought to be no less evident and indisputable. Accordingly, the cross interrogatories were prefaced by a formal protest against the whole procedure, and a distinct reservation of all exceptions to the evidence when it should be offered. The deposition, when produced (which was not till Thursday, July 28, being the 22d day of the trial, after all the evidence under the several charges and specifications had been got through) was found to have taken a still more extensive range than what had been indicated by the interrogatories: reviving topics of discussion and dissatisfaction that were thought to have been long adjusted and forgotten: in short, it was considered as amounting to new and substantive accusations of official misconduct or impropriety, more grave in their import, than most of the promulgated charges which were in a course of trial: and incapable of bearing upon those charges, otherwise than by communicating inflamed aggravations of them to minds susceptible of prejudice from extraneous impressions. The deposition, however, was produced and read by the judge advocate, without opposition, Com. P. having determined to waive all preliminary objections to its introduction, for reasons already stated. *(a)*

Interrogatories to be propounded to the Hon. James Monroe, in the case of Capt. David Porter, now in the course of trial before a General Court Martial, at the city of Washington, exhibited Thursday July 21, 1825.

Interrogatory 1. Are the accompanying papers, numbered one and two, purporting to be from Capt. David Porter to you,

(a) Ante, p. 69-70.

original letters received by you from him, and when were they respectively received?

2. Is the paper numbered 3 a copy of a letter written by you to the said Capt. David Porter, in reply to his letter No. 1, and was the same transmitted to him? Have you any and what reasons for believing that the same was received by him?

3. Has it been a usual or unusual thing for a Captain in the Navy of the United States to solicit by letter permission to pay his respects to you in person? If the latter, are you acquainted with the reasons or causes which induced such application on the present occasion? Be pleased to state such reasons fully and in detail.

4. Is it true, as is stated in your letter No. 3, that the orders which were given to Capt. Porter, relating to his command in the West Indies, and particularly the orders to Capt. Porter in October last, to return to his station, and the order of December last, recalling him, were given at your instance and under your inspection, and have you any reasons for knowing or believing that this fact was known to Capt. Porter?

5. Have you ever seen any reason to believe or to disbelieve that the Secretary of the Navy, in his official correspondence with Capt. Porter, indicated any hostility to Capt. Porter, or was influenced by any feeling of unkindness? State particularly such facts and circumstances, within your knowledge, as are calculated to illustrate this question.

RICHARD S. COXE, *Judge Advocate.*

Correspondence referred to in the foregoing interrogatories.

MARCH 10, 1825.

Commodore Porter presents his respects to Mr. Monroe, and asks (if agreeable) when he may have the honor of paying his respects to him. This request would have been made at an earlier period, but for the recent changes in the government, which have no doubt fully occupied the Executive, and but for the hope entertained by Captain Porter, that ere this he would have been afforded the opportunity of explaining his conduct, and be enabled to present himself to Mr. Monroe, free from censure. The desire of paying his respects to, and taking his leave of, his late Chief Magistrate, and as he has had reason to believe friend, has overcome all other considerations.

WASHINGTON, *March* 12, 1825.

SIR: I received your note of the 10th in the spirit in which it was written, that of kind feelings for one, under whom you have acted for the last eight years, and who has now retired to private life.

I should most willingly meet you, and receive the explanation which you are disposed to give, but for reasons which I will frankly communicate to you.

All the orders which were given you, relative to your command in the West Indies, were given by the Secretary of the Navy, at my instance, and under my inspection. They were dictated by a sense of duty to my country, and with no unkind feelings towards you. Your letter of the 26th of October 1824, to me, from New Castle, was received shortly after its date, and to which I deemed it improper to give any reply.

It has become the duty of my successor to examine and decide on that important subject, in all its parts, in the manner which shall appear to him most proper.

In this stage, although retired to private life, I do not think that I ought to interfere, or to receive any explanations, relative to transactions in which our country is interested, over which another has control, and in which I have no concern.

Holding in high estimation your gallantry and patriotism, I beg you to be assured of my good wishes for your welfare, and that of your family.

With great respect, I am your very obedient servant,

JAMES MONROE.

Com. D. PORTER.

MERIDIAN HILL, *March* 12, 1825.

RESPECTED SIR: I have received your highly esteemed letter of this date, and feel much gratified at the friendly sentiments and assurances it expresses. I can only beg to assure you, that you will carry with you in your retirement the best wishes of a grateful and affectionate heart.

I regret to observe that you are under wrong impressions as to the object of my note. Nothing was further from my wish or intentions, than to make any explanations, or touch on any subject of an unpleasant nature to you. I should have made the request to see you at an earlier period, but for the most scrupulous delicacy, not wishing it for an instant to be believed by any one, that I sought protection, or to give the slightest cause for such belief.

I feel confident of the correctness of my conduct, and I am satisfied that the government will approve it, when I shall have an opportunity of explaining it. My visit was intended as one of pure personal respect, and unconnected with any considerations of a selfish nature, only so far as my feelings were concerned; I was not certain whether it would be acceptable, and desirous of guarding against any thing disagreeable to you, I thought it advisable to address you a note.

The circumstances which caused me to address you from New Castle, I regret most sincerely, and I do assure you, it would give me more pleasure to learn that I was in error, than to believe that my impressions, at the time of writing, were correct; the serious charge, at the time, brought against me, and the consequences, I

did not think I merited; the very circumstance of claiming protection from you, was of itself an evidence that I did not think you were actuated by any unfriendly feelings towards me, but I did think you were under wrong impressions, which caused me to enclose you the copy of a letter which I was charged with neglecting to write.

I hope, at some future period, I shall have an opportunity to assure you of the high respect and consideration with which I have ever held your exalted character and virtues.

D. PORTER.

Hon. James Monroe.

Navy Department, *October* 21, 1824.

Sir: Your letter dated the 19th instant has created surprise. Looking to the good of the service, every attention has been shewn to you which your station required, and which could be dictated by a just estimation of your public service.

The command which was given to you, at your earnest request, on the 1st of February, 1823, was a highly important one, and your conduct in discharge of its duties, satisfactory to the President. The interval since you left that station, has been interesting, and it is understood that piracy has revived and is making extensive ravages in our commerce.

Communications have been made to you, to apprise you fully of this fact.—The presence there of an officer is of course necessary. The size of the vessel in which he sails is matter of small moment, and must depend upon circumstances. You are aware of the intention to send the Constellation to that station as soon as she can conveniently be prepared.

Your return to this place without permission, or apprising the department of a necessity for it, was unexpected. But no complaint has heretofore been made of your remaining here, because it was believed that your health was not perfectly good, and your shoulder lame and painful.

But this obstacle has been removed, and had you earlier apprised the department that you considered this place within the limits of your station, that the command had ceased to be pleasant to you, and that you were apprehensive of the climate, you would have been relieved, and a successor appointed. But having failed to give this information, and the presence of a commander on the station being now indispensable, you will proceed to it.

When it is convenient to the department, your wish to be relieved shall be gratified. Upon a re-perusal of your orders, you will find that no intimation is given, that Thompson's Island alone, is to be considered as the station, and that you are to remain stationary there.—nor that you are to lead in person every expedition fitted out from it.

I purposely abstain from comment upon certain matters in

your letter,—you will hereafter hear from the department on the subject.

I am, very respectfully, &c.
SAM'L L. SOUTHARD.

Com. DAVID PORTER, *Com. U. S.*
Naval Forces, West-Indies, &c. Present.

[*The last letter referred to in the foregoing interrogatories, is the letter of recal, December 27, 1824, from the Secretary of the Navy to commodore Porter, and already given, ante, p. 78, No. 3.*]

[PROTEST *originally annexed to the following interrogatories on the part of com. Porter to Mr. Monroe; and delivered in with the same, on Friday, July 22, 1825.*]

Captain Porter having examined the proposed interrogatories, to Mr. Monroe, on the part of the judge advocate, is, after mature reflection, and with the best aid of legal advice, in his power to obtain, utterly at a loss to conceive, by what authority he proposed commission to examine Mr. Monroe, in the manner proposed, has been claimed by the judge advocate; or how any evidence, to be taken under it, can be admitted, in the place of the testimony of the witness, in person, before the court: or what legitimate relation or bearing the evidence, which the said interrogatories import an intention to produce, can have to any matter involved in the present trial. Having repeatedly called upon the judge advocate for some precise specification of the circumstances wherein the supposed guilt implied by the accusation, under the head of the 2d charge, consists; and of the *gist* or point of the accusation to which the proposed evidence applies,—he forbears any further attempt to penetrate the mysterious and studied silence, by which all reasonable information on these points is concealed. He, therefore, simply proposes the following interrogatories, on his part; being all that, under present circumstances, he can conjecture to be, at all, pertinent to any *fact*, of which the judge advocate's interrogatories indicate an intention to make inquiry and proof. But he does so under a solemn protest against the legality, the justice and the fairness, upon any principle of law, equity or candor, of the whole proceeding: and distinctly reserving to himself, when the execution of this pretended commission shall be produced, every proper exception to the regularity or competency of such commission, and of the execution of the same: and to the pertinency and admissibility of any evidence to be offered under it: if to him, it shall seem necessary or proper to interpose such exception.

July 22, 1825.

[INTERROGATORIES *to Mr. Monroe, on the part of Commodore Porter: delivered, under the foregoing protest, Friday, July* 22, 1825.]

1. Please to say whether, in the latter part of June, or the beginning of July, 1824, (or about that time,) you sent a message by commodore Chauncey to me, to say that I must not visit you

until after I had seen the Secretary of the Navy, then absent, nor until you had received some explanation as to the cause of my re- from the West-Indies?

2. Were you not induced so to interdict personal communication with me, in consequence of having received the impression that I had left the West-India station without having apprised the Navy Department of there being a necessity for it?

3. Was the letter from the Secretary of the Navy to me, of October 21, 1824, (a certified copy whereof is annexed,) containing a peremptory order for me to proceed to the West-Indies, in the John Adams, contrary to my express and known wish and entreaty, and explaining the reasons for giving such order, written or dictated by yourself, in form or substance? If not, was it shown to you, and by whom, before it was despatched to me? Please state, particularly, by whom the original draught of this letter was prepared.

4. Was not the impression you had received of my having departed from the strict line of my duty, in quitting the West-India station, the operative inducement, or did it weigh any thing with you in either writing, or causing to be written, or sanctioning after being written, such peremptory order to go out in the John Adams, instead of waiting a few weeks for the Constellation, as I had requested?

5. Was it not represented to you, and have you not expressed yourself as having received the impression, that I had only vented, upon the authorities and people of Foxardo, my own angry feelings and personal pique, at having been ordered out in the John Adams in the manner I was, or something to that effect; or was any such imputation addressed by any body to you, or uttered in your presence, and by whom?

6. In consequence of the interdict to my personal intercourse with you, as above suggested in my first interrogatory, did I not forbear to call on you, even on the 4th of July, and continually, till afterwards repeatedly invited to do so by special messages from you?

7. When, and where, and upon whose application, did you communicate and deliver to the Secretary of the Navy, the said letters of the 10th and 12th March last, annexed to the judge advocate's interrogatories? If they were so delivered on a written application, please annex it to your answers; if upon a personal one, please say from whom, and when, and where.

8. Was that correspondence so communicated with an intention that it should be deposited among the archives of the Navy Department, and when was it so deposited?

9. Do you know, at the time I wrote you the said letter of the 26th October, 1824, mentioned in yours of the 12th March last, I had been made acquainted with the fact of your having either originally draughted, or dictated, or directly approved, the said letter from the Secretary of the Navy of the 21st of the same month?

ANSWERS *of* JAMES MONROE *to* the interrogatories propounded to him, in the case of commodore Porter, in the trial now depending before a general court-martial, at the city of Washington.

[*Produced and read, Thursday, July* 28, 1825.]

1st. To the first interrogatory, on the part of the United States, I answer, that the letter or paper numbered one, is, according to my recollection, a correct copy of a letter, from commodore Porter to me. I return the paper, with a note to this effect on it.

The letter numbered 2, is an original letter from commodore Porter to me. They were both received about the time of their respective dates.

2d. Answer to the second. The paper numbered three, is a copy of my letter to him, of the 12th of March last, and, as I believe, a correct one.

3d. Answer to the 3d. It was not usual for a captain, or any officer in the navy or army, to solicit an interview with me by letter. They always called, when they had business; and generally on their arrival in town or departure from it; and I always received them without form, when I happened to be free from other engagements.

The interview, in the instance stated, was asked, as I presume, in consequence of my having recalled him from the command in the West-Indies, on account of the attack made by him on Foxardo, in the island of Porto Rico. That recal implied a doubt of the propriety of his conduct in making the attack, which had never been removed by any intimation from me, either by inviting him to see me, or otherwise. His return, occurring so short a time before I left office, I deemed it improper to take any step in regard to the attack, while I remained in office. I thought it more just and candid towards commodore Porter, to leave the affair to be acted on by my successor, especially as the measure, in connection with others relating to him, might be thought to involve, in some degree, the propriety of my own conduct.

4th. Answer to the 4th. The orders relating to the command of commodore Porter in the West-Indies, from the commencement to its termination, including, of course, that of October last, directing him to return to his station, and that of December, recalling him from it, were given at my instance, and under my immediate inspection. The command was deemed a very important one, requiring great discretion in its execution. The object was the suppression of piracy; but in stationing a naval force there, I knew that it would attract the attention, not of Spain alone, on whom it more immediately bore, but of the new governments, our neighbours to the south, and, in certain respects, of several of the powers of Europe, who were neutral in the contest between the belligerent parties. The question, whether free ships should make free goods, the extent of contraband of war, the transportation of specie, and other questions of the kind, ne-

cessarily occurred, when that force was detached to that station, for the special object designated. They had been frequently under the consideration of the administration before, and were brought more pointedly before it on that occasion. My impression is, for I have not a copy of the instructions then given, that they were drawn with great care, and dictated by a desire rather to err, if error should be committed, on the side of moderation, than to risk a variance with any of the parties concerned. These questions were to be settled by treaties, and especially with the new governments, and which required time. My intention was, that the commander of the squadron, and all acting under him, should take nothing on themselves, but confine themselves to the duty specially enjoined on them, and obey strictly their orders.

When informed, in June last, that commodore Porter had left his station, and returned to the United States, I asked the Secretary of the Navy, by what authority he had done it? Had leave been given him? The reply was, none had been. I then asked, did his original instructions authorize him to come home, when he thought fit? I do not recollect the precise answer, or that any such was given to me, but my impression was, that they did not. The Secretary had made arrangements for his departure from town, on a visit to his family, and I saw no reason why he should delay it, on account of the arrival of commodore Porter. Nothing material, more, that I recollect, passed between us. I did not see him again before his departure. I reflected much on the subject, and decided, on the next morning, the course which I should pursue, in regard to commodore Porter. I arose early, and sent for commodore Rodgers, and was informed that he had gone to Norfolk. I then sent for commodore Chauncey, and after expressing my deep regret that commodore Porter should have left his station without leave, which was the only question I made in the case, I told him that the subject merited inquiry, and that, as the Secretary had left town, I could not see him till the Secretary returned, nor until I should, on further, and more mature consideration, decide what course should be taken in the case. I requested him to see commodore Porter without delay, and to prevent his calling on me in the interim; but to do it in the most delicate manner that he could: for, having high respect for his services and merit, and a personal regard for him, I wished to take no step which should wound his feelings, which I should not be compelled to do, from a high sense of duty to my country, and an earnest desire to support the credit of the navy. An interview between commodore Chauncey and commodore Porter took place, whereby an interview between commodore Porter and me was prevented.

In conversations with Com. Rodgers, after his return, and with Com. Chauncey, who made friendly explanations, in regard to Com. Porter's conduct and views, and in consideration, also, of his having been wounded in the late war, and an intimation that he then suffered from the wound, I thought myself justifiable, especially as I had given a decisive proof of the sentiment which I entertained of his return from his station without leave, to pass

the affair over without further notice, and of which I requested them to inform him. He accordingly called, afterwards, and was received with kindness. My desire was, that he should return soon to his command, but I do not recollect that any thing was said to that effect by me. I presumed that what had already passed, would be a sufficient proof of that desire. His remaining, however, so long in the country, gave me concern, especially as we were repeatedly advised that piracy had revived, and was doing much injury to our commerce. I, however, delayed noticing it for some time, under feelings of the kind stated; and in expectation, also, which I continually indulged, that he would soon depart. I at length requested the Secretary to instruct him to resume his station without delay, and to do it in the John Adams, which the Secretary did. To this, I recollect that the Commodore gave a reply, which was deemed highly objectionable; and respecting which I had great doubt, as to the part, regarding the office I then held, which I ought to take. On great consideration, however, I decided to order him immediately to his post; with intention that, being there, and in rule, to decide afterwards, what it would be proper to do in the affair. In taking this course, I yielded to feelings that were favorable to him; and in the hope that his conduct, at his station, and towards the government, would be such, as to permit the whole affair to be adjusted; or rather to be passed over, without injury to the service.

According to my recollection, I drew a sketch of the order in question; or so much of it as to give a distinct idea of what I intended; and certain I am, that I saw the letter, that of the 21st of October last, before it was sent.

The decision was soon taken after the affair of Foxardo, to recal Com. Porter, that, being present, he might explain the circumstances, and reason of his conduct. I saw the order and approved it. I do not know that Com. Porter was acquainted with the fact, further, than in speaking of the subject to friends afterwards, I frequently mentioned it; and that I intended to include that with the other orders, and particularly the order of October preceding, in the letter which I wrote to him, after I retired from office, in reply to his already noticed.

5. I never saw any proof of unkind feelings in the Secretary of the Navy, towards Commodore Porter; nor have I any reason to believe, that he ever acted under the influence of such. I saw, on the contrary, proof of a different disposition, in more instances than one. Having, from the considerations above stated, been very attentive to the conduct of this squadron, from the beginning; and, indeed, to the others, in other seas, and prescribed the measures to be taken, and orders to be given, after due consideration, and consultation with those on whom I had a right to call, I was anxious that my own responsibility, in its full extent, should be known, in every instance, and especially to those concerned, before I left office, and it was on that principle that I expressed myself so fully to that effect, in my letter to Com. Porter in March last. It was on that principle that I deemed it proper to deposit in the department, before I left town, the evidence of

that correspondence, consisting, according to my recollection, of his letter to me, and a copy of my reply.

1. To the first interrogatory proposed on the part of Commodore Porter, I answer, that I did authorize Com. Chauncey to see him, and to prevent his calling on me, at the time stated, and for the reasons that are particularly and fully explained, in my answer to the 4th interrogatory on the part of the United States.

2. I took the step for the reasons stated in reply to the 4th interrogatory above referred to.

3. To this interrogatory, an answer has, also, been already given, in reply to the 4th interrogatory on the part of the United States.

4. To this interrogatory, an answer has likewise been given, in reply to the 4th, referred to above. I have thought it better to give a full and connected explanation of the measures taken in the instances in question, and of the considerations on which I acted, in reply to one interrogatory, which embraced several, than in detail, in reply to each.

5. When the account of the attack on Foxardo was received, much remark was made on it, and with others, that of the kind suggested. I am inclined to think, that I made it myself; but in that case, to some friends of Com. Porter, and rather in a confidential way than otherwise, though certainly under no injunction to that effect. I probably mentioned it to others, in the same spirit, and particularly to the members of the administration, or to some of them. The answers already given to the other interrogatories, and particularly to the 4th on the part of the United States, and the documents referred to in them, will explain the cause, to which such an idea is to be attributed; which, however, was merely incidental and casual. I do not recollect receiving any letter suggesting that idea, nor do I believe that I did, though it is possible that I might.

6. To this interrogatory an answer has already been given.

7. To this, also, an answer has been given.

8. The correspondence was deposited in the Navy Department, as a document relating to my public conduct, in an occurrence, interesting to others as well as to the public, to be used only for public purposes, should such present themselves, to make the use thereof proper and necessary. I readily admit, that Com. Porter did not ask the interview for any purpose other than that stated in his reply to my letter, but still I thought it more consistent with the part I had acted in that affair, and with what I owed to him as well as to others, to decline the interview; to state to him the part I had acted in the concerns in question, and to deposit the evidence thereof for the purpose stated, in the department while I was at Washington.

9. I had never seen Com. Porter after the date of his letter to me of October 26th: nor made to him any communication by letter, and, therefore, do not know that he was apprised of the particular interest which I had taken, and of the part I had acted in regard to the letter from the Secretary of the Navy to him of October last, referred to in this interrogatory. The subject being

delicate and interesting in many views, I never spoke of it but in a guarded manner, unless to friends, and among them, some whom I knew to be his friends also, and with a view to produce a good effect in relation to the interests and parties above referred to.

JAMES MONROE.

VIRGINIA, LOUDOUN COUNTY, *Sct.*

This day, James Monroe personally appeared before me, John Bayly, a magistrate of the said county, and made oath that the facts stated in his several answers contained in this sheet marked (3,) and two other sheets, one of which is marked (1,) and the other (2,) are true, to the best of his knowledge and belief.

Given under my hand and seal the 25th day of July, in the year 1825.

J. BAYLY, [SEAL.]

This deposition was understood to imply charges or reflections upon commodore Porter's past conduct, to the following effect:

1. That he had left his station in the West-Indies, in June, 1824, without authority.

2. That he had not apprised the Secretary of the Navy of the necessity for so doing.

3. That after being apprised of the disapprobation with which his return has been viewed by the government, and of the necessity for his presence in the West-Indies, he had, nevertheless, remained, to the apparent neglect of his duty, till compelled to return by a peremptory order in October, 1824.

4. That his request to be permitted to remain, a short time longer, in order to have a ship of a larger class, fitted out for the service, was unreasonable.

To justify himself on these points, he produced a mass of documents; undertaking to prove thereby the following facts:

1. That the question whether "his original instructions authorized him to come home when he thought fit," as propounded by the President, according to Mr. Monroe's deposition, ought to have been answered in the *affirmative*.

2. That, acting upon that understanding of his instructions, he had, the year preceding, returned home, when least expected by the government; and had been received, without the slightest intimation of disapprobation: but, on the contrary, with distinguished marks of approbation: and so, that his return, the year following, under the like circumstances, was justified by *precedent* and *acquiescence*.

3. That he had taken every necessary and proper precaution to *apprise* the Navy Department of his intention to return, in the summer of the year 1824, and of the necessity for it.

4. That after he had explained the authority and the reasons for his return, in the summer of 1824, he had every reason to conclude that it was approved, and the government entirely satisfied.

5. That during his whole stay here from June to October, he

received no intimation, that the government desired his return to the West-Indies, or that the public service required it.

6. But, on the contrary, he had every reason to conclude, that his stay was not only approved, but necessary; and that the preparations for his departure were not completed: and also that piracy had been so far repressed as, at that time, only to require watching with a few small vessels, and to dispense with his presence for the time.

7. That the propriety and necessity for a ship of war, of a large class, on the station, had been repeatedly acknowledged, and repeatedly promised, for nearly a year before he received his orders to resume his station in October, 1824.

The mass of documents produced to these several positions were of the following effect:

1. As to the general and express authority to return, when sickness or other causes made it necessary.

1st. The last clause of the general letter of instructions, of February 1, 1823, from Secretary Thompson: ante, p. 76: recommending the utmost watchfulness, to guard, in every *possible way*, against the unhealthiness of the climate, &c.

2d. Letter from Secretary Thompson to com. Porter, August 19, 1823.

"In the last paragraph of your letter dated the 1st instant, transmitted by the United States' schooner Ferret, you mentioned, that circumstances will, towards the fall, render your return to the United States, for a short period, necessary; you will please to avail yourself of the time most suitable for this purpose, and return to the United States, in the manner most convenient to yourself, and least pre-judicial to the interests of the service."

3d. Extract Do. from Secretary Southard, Sept. 30, 1824.

"The schooner Shark, having on board commodore Rodgers, and several surgeons, will leave New-York about the 1st of October, and reach Thompson's Island as soon as practicable. The uncertainty and anxiety which prevail as to your own health, and the health of the squadron, and a desire to furnish the best assistance, and procure information, which may be a safe guide on all future occasions, are the inducements to this measure.

The orders of commodore Rodgers will be communicated to you on his arrival; and you will render all the aid, which your health will permit, in accomplishing the object of his visit. It is intended that you shall remain in command of the station, or return home as your health may require, and your inclination prompt. Commodore Rodgers will return immediately after he shall have accomplished the object of his visit."

2. As to the authority implied from *precedent* and *acquiescence*, exemplified by the approbation with which his return, under similar circumstances, though entirely *unexpected*, in October, 1823, had been received.

1st. The last mentioned letter, showing that commodore Rodgers had been despatched, the last of September, or beginning of October, with the *expectation* of *finding* commodore Porter at his *station* in the West-Indies.

2d. Com. Porter's official report, (dated Washington, Oct. 27, 1823) of his arrival from the West Indies, and the causes &c.

(EXTRACT.)

"SIR: I have the honor to report to you my arrival here, in the U. S. galliot the Sea Gull, from Thompson's Island, in forty-three days; and from which place I was driven with the squadron, by a pestilence which made its appearance there, carrying off, in a short time, for the want of the necessary medical aid on the station, a great number of valuable officers and men. This circumstance induced me to order the large vessels to Hampton Roads, there to remain for a short time, where medical assistance, if required by them on their arrival, could be obtained. But I am happy to inform you that, with the exception of some intermittents, contracted since their arrival, they are perfectly healthy, as all the small vessels were which were left on the station."

3d. Answer of Com. Chauncey, acting for the Secretary of the Navy, in his absence.

NAVY DEPARTMENT, 28*th October*, 1823.

SIR: Your letter of the 27th inst. has been received. On your recovery from a dangerous illness, produced by great exposure and much suffering, you will be pleased, Sir, to accept my sincere congratulations.

In conducting the movements of the squadron entrusted to your charge, you have displayed that intelligence, promptitude, and vigor, which effectually arresting the depredations of the freebooters, have afforded security to our trade, and justly entitle you to the unqualified approbation of this Department, and to the thanks of your country.

The conduct of the officers and men under your command, has been such as might have been expected, from the example of their chief: and you will be pleased, Sir, to assure them of the consideration in which their services are held, and the high sense entertained of their devotion to a *most arduous and dangerous service.*

The want of medical aid, of which you so justly complain, will claim the early and special attention of this Department.

If the state of your health will permit, you will take upon yourself the general superintending direction of the equipment of the vessels of your squadron, now at this yard and at *Norfolk.* Let their commanders report to you their wants, that you may make them known to the Board of Navy Commissioners, who will cause every requisite supply to be furnished.

I am, very respectfully,
Sir, your most obedient servant,
I. CHAUNCEY,
For the Secretary of the Navy.

DAVID PORTER, ESQ.
Commanding a Squadron in the West Indies and Gulf of Mexico.

4th. *The Secretary of the Navy's report to the President, Dec.* 1, 1823.

EXTRACT.

"Captain David Porter was appointed to the command of the squadron, and sailed from Norfolk about the 10th of February last. His station was at Thompson's Island, from which he despatched his vessels, in such way as he judged best suited to attain his objects. The annexed extracts from his letters and reports exhibit the results.

"The size of most of the vessels, the nature of the duties, and the exposure of the officers and men, called for a display of perseverance and fortitude seldom required of those engaged in our service—but the call was well answered. Every thing was accomplished, which was anticipated from the expedition. *Piracy* as a *system*, has been *repressed*, in the neighborhood of the Island of Cuba, and *now* requires only to be *watched*, by a proper force, to be prevented from afflicting commerce, any further in that quarter. The public authorities of the Island of Cuba manifested a friendly disposition towards the squadron, and rendered much assistance in the pursuit of its objects."

"The squadron was healthy and prosperous, until about the middle of August, when a malignant fever broke out at the station, and destroyed many valuable lives. The first reports of this calamity were brought to the Department on the 17th September. At the time they left the island, Capt. Porter and most of the medical officers were sick, and there was great cause to fear that the squadron would be deprived of its commanding officer, and of the medical assistance necessary to its safety. Under these circumstances it was considered expedient to send to the station an officer of rank and experience, with a sufficient number of surgeons, to furnish, in any event, the aid necessary for the safety and proper conduct of the squadron, with power to remove it, should that be found necessary. Capt. Rodgers cheerfully consented to encounter the hazard and responsibility attendant on such an expedition. He sailed from New York as soon as a vessel could be prepared for the purpose; but, before his arrival, Capt. Porter had become *convalescent*, and, with the *greater part* of the squadron, had *returned* to the United States. The reports of these officers will fully explain their views of the causes of the disease, and the means by which a recurrence of it may be prevented."

5th. The President's message to Congress, Dec. 2. 1823.

(EXTRACT.)

"In the West Indies and the Gulf of Mexico, our naval force has been augmented, by the addition of several small vessels, provided for by the "act authorizing an additional naval force for the suppression of piracy," passed by Congress at their last session. That armament has been eminently successful in the accomplishment of its object. The piracies by which our commerce in the neighborhood of the island of Cuba had been afflicted, have been repressed, and the confidence of our merchants, in a great measure, restored.

"In the month of August, a very malignant fever made its appearance at Thompson's Island, which threatened the destruction of our station there. Many perished, and the commanding officer was severely attacked. Uncertain as to his fate, and knowing that most of the medical officers had been rendered incapable of discharging their duties, it was thought expedient to send to that post an officer of rank and experience, with several skilful surgeons, to ascertain the origin of the fever, and the probability of its recurrence there in future seasons; to furnish every assistance to those who were suffering, and, if practicable, to avoid the necessity of abandoning so important a station. Commodore Rodgers, with a promptitude which did him honor, cheerfully accepted that trust, and has discharged it in the manner anticipated from his skill and patriotism. Before his arrival, Com. Porter, with the greater part of the squadron, had removed from the Island, and returned to the United States, in consequence of the prevailing sickness. Much useful information has however been obtained, as to the state of the Island, and great relief afforded to those who had been necessarily left there."

3. As to the notice given by Com. P. to the Navy Department, of his intention to return, in the summer of 1824; and the reasons for the same.

To the Hon. the Secretary of the Navy.

SEA GULL, *Matanzas, May 28th*, 1824.

SIR: I regret to be under the necessity of informing you that the fever has made its appearance on the Island, and that the inability of the acting surgeon's mate in charge of the medical department there, to attend to his duty from sickness, renders his return to the north necessary. I have sent another to take his place, but this leaves us deplorably off for medical men.

I purpose removing the principal part of the forces to the north about the middle of next month, as the only means of guarding against the consequences of a deficiency of surgeons.

I have the honor, &c.

D. PORTER.

This letter was despatched by Lieut. Legare, in the Wild Cat, from Matanzas, on the 29th May: Com. P. sailed from the same place, on his return to the U. States, on the 15th June: both voyages were prosecuted without interruption: and yet Com. P. in the Sea Gull passed the Wild Cat in the river, and arrived at Washington some hours before her: so that the Secretary of the Navy did not receive the letter of the 28th May, till the 24th June, after the arrival of Com. P. had been announced: upon hearing of which he expressed surprise; as a thing unexpected by him.

[Commodore Porter's official report of his arrival, &c.]

WASHINGTON, *June* 25, 1824.

SIR: I have the honor to inform you that I arrived here yesterday in the Sea-Gull, from the coast of Cuba, in nine days, and

shall be prepared to return to the West-Indies, so soon as the season will render it safe to do so; and my health, which requires a respite from the effects of a tropical climate, will admit. My former communications have apprised you of my intentions of removing most of the vessels under my command to the North, during the sickly season. Orders have been given by me on the subject, and every arrangement made to give as much protection to our commerce, as the force remaining on the station will admit of. I had purposed sailing from New-York, and visiting in my way out, as heretofore, the windward islands, so soon as I can get a sufficient force together; and leaving a small detachment in the *neighbourhood* of St. Thomas, for the protection of our commerce there, where it was asked for, by our merchants, when I last visited that place.

The John Adams, it is probable, will require heaving out on her return, which will be in a week or two; which will leave me with only one sloop of war.

As the health of captain Wilkinson required his return, I have left lieutenant Oellers in command at Thompson's Island, with full instructions as to the duties to be performed there, and I have left all necessary orders, also for the commanders of such vessels as may arrive during my absence.

The island promises to be healthy this season.—I have left about sixty officers and men there, but I am sorry to say, I had only a surgeon's mate to leave to attend them, during the sickly season. I have, during this season, greatly improved the comfort and condition of the island, and thereby lessened that repugnance to remaining there, which formerly existed among both officers and men. I shall proceed to New-York in a few days, to hasten the despatch of the stores for the squadron and island, which are now preparing there, and which are much required. If there are any instructions from the department affecting my various duties, I shall be happy to be furnished with them as early as possible.

I have the honor to be,
Very respectfully,
Your obedient servant,
(Signed) D. PORTER.

Hon. Secretary of the Navy.

4. 5. 6. That Com. P. had every reason to conclude and implicitly believe (after the explanations required of him had been communicated to the President, and after the *kind reception*, given him, in consequence) that the government was entirely satisfied with his return, and his continuance, for the time, in the U. States: That he was, during the whole time, issuing orders to the officers under his command in the W. Indies, &c. &c. receiving from them, and communicating to the Department, official reports of their operations in the W. Indies, &c. and of the progress of repairs and other preparations, in different ports of the U. S., to place the squadron in an efficient state for active service; busily superintending or directing these preparations; making official

reports relative to every department of duty appertaining to his command; receiving, from the Department, official orders and instructions, to be executed by means of intermediate orders from him to his officers in the W. Indies, &c. and, in other respects, unremittingly and laboriously employed in the active duties of his command; except when prevented by ill health, and absent at the springs: That as late as the 11th Sept. (the date of one of the letters found in the following series) the preparations, for sending out his squadron to the W. Indies, were not considered by the *Department*, any more than by himself, as complete: That the government, during the whole time, manifested entire content, with his continuing to exercise, *here*, his command, in all its departments foreign and domestic; and participated in such mode of executing its duties: That all the intermediate complaints, from the W. Indies and elsewhere, of piracy and other interruptions of our commerce, were communicated to him, from the Department, expressly with a view to his despatching *orders* to enforce the proper measures of redress or precaution; and not to his going in *person:* That he received not, till October, the most distant intimation of his presence in the W. Indies, being expected or required: and, finally, that two months after he had departed, in obedience to his orders, his return to the U. States, during the summer, and the reasons for it, were officially communicated to Congress, with apparent approbation: Such are the points, to which the following documents are supposed to apply.

1st. Refer to his two letters, May 28, and June 25, as above cited; the one announcing his intention to return; the other his actual return; with his reasons.

NAVY DEPARTMENT, 29*th June*, 1824.

2d. SIR: I have the honor to transmit to you, herewith, copies of letters, bearing date the 23d of April, 15th, 17th, 24th, and two of the 31st of May, 1824, addressed to you at Thompson's Island, which it is presumed you have not received, and to which I beg leave to call your attention. Should I find, upon further examination, any more which possibly may not have been transmitted in time to reach you, copies shall be immediately furnished.

I am, with great respect, sir,
Your obedient servant,
(Signed) CHAS. HAY.

Capt. DAVID PORTER, *Commanding*
U. S. West-India squadron—present.

NAVY DEPARTMENT, 19*th July*, 1824.

3d. SIR: I have received letters this day from lieutenant-commanding John D. Sloat, announcing his arrival at New-York. I send you, herewith, a copy of a petition, from sundry inhabitants, and merchants, and others, of Matanzas, praying for a more efficient protection to our commerce.

You will perceive, from this statement, the necessity for the immediate return of the Shark, Grampus, and Spark, to their station, and you will therefore order them out as speedily as possible.

I am, very respectfully, sir,
Your obedient servant,
(Signed) SAML. L. SOUTHARD.

Capt. DAVID PORTER, *Commanding*
U. S. West-India squadron, Bedford Springs.

NAVY DEPARTMENT, *July* 20, 1824.

4th. SIR: It is the wish of the Department, that you cause a portion of the naval force under your command, to touch, occasionally, at the port of Tampico in Mexico, and to afford protection to the citizens of the United States, engaged in commerce with that port.—Your attention is particularly directed to this part of the Mexican coast, in consequence of the representations contained in your communication of the 14th inst.

I am, very respectfully, &c.
(Signed) SAM'L L. SOUTHARD.

Com. DAVID PORTER, *Comm'g U. S. Naval Force,*
West-Indies, Gulf of Mexico, and Coast of Africa, present.

NAVY DEPARTMENT, *July* 28, 1824.

5th. SIR: I enclose to you copy of a letter from capt. Wm. Norris, commander of the brig John, of Newport, R. I. detailing outrages committed on him and his crew near Matanzas; and I have to request that you will take such measures on the occasion as the case requires.

I am, very respectfully, sir,
Your obedient servant,
(Signed) SAM'L L. SOUTHARD.

Com. DAVID PORTER, *Commanding*
U. S. Naval Force, West-Indies, Gulf of Mexico, present.

NAVY DEPARTMENT, *July* 29, 1824.

6th. SIR: I enclose a copy of a letter from William Neilson, esq. President of the American Insurance Company of New-York, in relation to the capture of the Mercator, having on board a valuable cargo; and I request that you will make such a disposition of the force under your command as will render piratical aggressions of this description less frequent, if it be possible.

I am, very respectfully, sir,
Your obedient servant,
(Signed) SAM'L L. SOUTHARD.

Com. DAVID PORTER, *Commanding*
U. S. Naval Force, West-Indies, Gulf of Mexico, &c. Bedford Springs.

WASHINGTON, *August 9th*, 1824.

7th. SIR: I have the honor to transmit you the enclosed copy and translation of a correspondence between lieutenant-commandant John Ritchie and the commandant of Tampico; and,

in reply to your instructions of the 20th ult. requiring protection to the citizens of the United States engaged in commerce with that port, have to state, that the Shark and two of the small schooners have been sent to the Gulf of Mexico, to afford the protection required.

This, under existing circumstances, is all the force which, at present, can be sent on that service. The sickly condition of some of the vessels that have returned to the United States, which has caused them to be placed under quarantine; the want of repairs in others; the revival of piracy about Cuba and elsewhere, and the reduced state of my squadron, from these and other causes, prevent my affording, with the means at my disposal, as much protection to the citizens of the United States engaged in commercial pursuits within the limits of my command, as I could wish.

I have the honor to be,
With great respect, &c.
DAVID PORTER.

Hon. SECRETARY OF THE NAVY.

8th. Commodore Porter's answer to, and explanation of the various rumours and complaints, that had been communicated to him, through the department, of piracies in the West-Indies, &c.

WASHINGTON, *August* 10, 1824.

SIR: I have the honor to acknowledge the receipt of your letter of the 29th ult. enclosing a copy of a letter from W. Neilson, President of the American Insurance Company of New York, complaining of the capture of the Mercator, near the port of Matanzas, when some of our vessels of war were stationed there, reflecting on the government of Cuba for permitting the seizing of "numerous and valuable vessels and cargoes, sailing under our flag," charging it with connivance or imbecility, and justifying the government for taking decisive measures for the protection of our trade. I have also received your letter enclosing an application from the merchants of Matanzas, for further protection to our commerce in that port, as well as your letter of the 28th July, enclosing a copy of a letter from the master of the brig John, of Newport, recounting the circumstance of the robbery of that vessel near the harbor of Matanzas, asserting that there were no United States vessels on that side of the Island of Cuba, and stating that there had been six captures between Matanzas and Havanna. In the various letters accompanying these statements, it is enjoined on me to use my efforts, and make such disposition of the force under my command, as will render piratical aggressions of this description, less frequent, if it is possible. The whole history of my operations, in conjunction with the authorities of Cuba, against the pirates, renders any defence of my conduct, or the conduct of those under my command, against any imputations of neglect, from any quarter, unnecessary; as it is well known to the Department that we have been devoted to the inglorious service, sacrificing health, comfort, and personal

interests, for the sole object of suppressing a system of long continuance, the existence of which was disgraceful to the civilized nations whose citizens and subjects were victims to it, and which the peculiar state of the government of Cuba, arising from the various changes in Spain, and the numerous facilities to piracy, arising from the nature of the population of the island, and various other causes originating in the suppression of the slave trade, and progress of the South American revolutions, put it out of the power of the local authorities to suppress, without aid from other quarters; which was no sooner obtained, by our presence, than the most zealous co-operation was commenced on the part of the government of Cuba, which has ever since continued; and has changed, entirely, the character of piracy from the bloody and remorseless manner in which it was conducted, to simply plundering of property; and the means from large cruising vessels, to open boats. This latter mode of carrying on their depredations, renders it extremely difficult to detect them, and is calculated to baffle the efforts of the most vigilant, from the ease with which they are enabled to possess themselves of boats along the Coast of Cuba, the certainty of being enabled to escape to the unsettled coasts of the island, and the certainty, for some hours, in the early part of every day, that merchant vessels may be found, becalmed, near the land.

Nothing but resistance, on the part of those who call on us for protection, can put down the present system; and from the small force employed by them, the mere show of resistance, in a few instances, is all that is required. We have seen it stated, that one of the vessels robbed, was taken possession of by a boat with seven men, and plundered, the crew beaten, and confined below. Surely, sir, blame should not be attached to us, or to the government of Cuba, for the dastardly conduct of those who, with the most ordinary means of defence, which every merchant vessel affords, could permit such an act: as well might this, or any other government, be charged with imbecility, and its officers with neglect, for not detecting every highway robber, housebreaker, incendiary, or counterfeit. The charge of imbecility must rest on those who fail to defend themselves against their petty aggressions; and the cause is attributable, almost entirely, to the parsimony of the owners, who fail to furnish a few weapons to put into the hands of the crew of vessels destined to Cuba.

Those robberies are committed most frequently by the persons employed in loading the vessels, who are well acquainted with their destitution of fire arms at the time of sailing.

I have taken the liberty of enclosing you reports from lieutenant McIntosh, the commandant of Thompson's Island, by which you will perceive that every vigilance has been exercised by him in endeavouring to recapture the vessels taken, and punish the offenders; that at the very time that Wm. Norris states that no United States' vessels were on the north side of Cuba, the Terrier, lieut. Paine, and Diableta, were cruizing there; and I have also to state, that the Ferret, lieut. Farragut, was on that coast and had been, daily, (until a few days previous) employed in

giving convoy in and out of the harbour, sometimes with his vessel, and sometimes with his small boats. I have further to state, that the John Adams, corvette, the brig Spark, the schooner Grampus, the Jackall, Weazel, and the Beagle, have, a short time since the date of Mr. Norris's letter, all visited the coasts and ports of Cuba, zealously employed in the protection of our commerce, in the performance of which duty, I regret to state, that lieutenants Montgomery and Cumming, with several others, have fallen victims.

The reports of captain Dallas, lieutenant-commandants Newton, Sloat, Lee, and Zantzinger, and acting-lieutenant Farragut, with which you have already been made acquainted, will show the arduous duties they have performed; and the report of acting-lieutenant Pinkham, the successor of lieutenant-commandant Montgomery, will show the result of his arduous, useful, and disastrous cruize. There is, at this time, on the Coast of Cuba, and on their way there, the ships Hornet and Decoy, the schooners Shark, Wild Cat, and Terrier, and six barges; and, in a short time, the force will be augmented by the departure of others of the schooners, large and small. The charge, then, or intimation in any shape, of neglect, on the part of myself or officers, to the interest of the merchants, who have no feeling but for their own pecuniary concerns, is, as you perceive, unfounded. It is true, that, warned by the dreadful mortality of last year, and by approaching disease, I left the West-Indies, and ordered home the greater part of the force under my command; and the only cause of regret to me now is, that I did not remove them earlier, by which many valuable lives would have been saved; and that there should be a necessity for their return at this unfavourable season, which will undoubtedly cause the death of more.

I beg you to excuse my going so much into detail, but as the frequent applications to the Department, from the merchants concerned in the Matanzas trade, for protection, might induce the belief of neglect on my part, I have felt that this explanation is necessary.

I cannot conceal to you, however, my mortification at their conduct, after the devotion we have all shown to their *particular* interests, which entitled us to their warmest gratitude.

I have the honor to be,
With great respect,
Your obedient servant,
D. PORTER.

Hon. Samuel L. Southard,
Secretary of the Navy.

[This correspondence was preceded and followed by an infinity of orders in the form as well of circulars as of detailed instructions, dated at Washington, and running through the months of July, August and September, 1824, from commodore Porter to the officers of the squadron, on the various services in the West-Indies, Gulf of Mexico, and in the ports of the United States. To set out these at large, would swell the volume with details

that could afford no adequate illustration of the case. Suffice it to say, that these orders exhibit commodore Porter, whilst he remained in the United States, during that summer, as in the efficient and active command of the squadron, and superintending and directing all the details of the service, incident to the nature of his command. Early in August he had ordered captain Dallas to proceed to the West-Indies in the Corvette John Adams, as soon as she could be got ready for sea; and it is presumed the order would have been executed, if she had been ready for sea, before commodore Porter received the order to proceed to Thompson's Island himself, in the same vessel: upon receiving which, he ordered captain Dallas to drop down to New Castle, ready to receive him on board, and to put to sea, on the shortest notice.]

9th. *Extract of a letter from C. Hay, esq. chief clerk of the Navy Department, to commodore Porter, September* 11, 1824:

"I have heard from the Secretary, who has ordered the *Constellation* to be fitted for you, and authorized me to tell you so. But as she is not *officially* ordered to you as yet, I would not interfere with her. However, of this you are the best judge.—Your letters about money have been received, and will be submitted to the Secretary on his return; in the mean time, Thornton can supply you with what is necessary. The Secretary is *very anxious*, that you should be out again, with as little delay as possible, and will no doubt facilitate your *preparatory operations*."

10th. *Extract from the report of the Secretary of the Navy, December* 1, 1824, *accompanying the President's message, of December* 7, 1824:

"The manner in which the force assigned to the protection of our commerce, and the suppression of piracy in the West-Indies, has been employed, will be seen by the annexed letters and reports of commodore Porter, marked Q. The activity, zeal, and enterprize of our officers, have continued to command approbation. *All* the *vessels* have been kept *uniformly* and *busily* employed, where the *danger* was believed to be the *greatest*, except for *short periods*, when the *commander* supposed it *necessary* that they should return to the United States, to receive provisions, repairs, and men, and for other objects *essential* to their *health*, *comfort*, and *efficiency*. No complaints have reached this department, of injury from privateers of Porto Rico, or other Spanish possessions, nor have our cruizers found any violating our rights. A few small piratical vessels, and some boats, have been taken, and establishments broken up, and much salutary protection afforded to our commerce. The force employed, however, has been too small, constantly to watch every part of a coast, so extensive as that of the islands and shores of the Gulf of Mexico, and some piratical depredations have therefore been committed; but they are of a character, though, perhaps, not less bloody and fatal to

the sufferers, yet differing widely from those which first excited the sympathy of the public, and exertions of the government."

[See also the extract from the same report cited, ante, p. 81, No. 8; being the passage immediately following the above.]

7. As to the utility and necessity of adding, to the squadron under Com. P's command, a ship of the line or frigate of a *large class;* and the reason he had to expect that such would have been fitted out for the service, before he returned to the West India station, in the summer of 1824, the following documents were cited.

1st. *Com. P's original representations of the utility and necessity of the measure, in two letters, written from Thompson's Island, on the 10th and 22d May, 1823, and communicated by the President to Congress, with his message of Dec. 2, 1823.*

Extract from the letter of the 10th May.

"I beg you, Sir, to take into consideration the uncomfortable situation of myself and those with me, and, as early as may be possible, send me a frigate or a large sloop of war fitted for the climate, or I shall otherwise, most reluctantly, on account of health, be compelled to relinquish a service which I set my heart on accomplishing—the total suppression of Piracy in the West Indies and Gulf of Mexico; it has been effected about the north side of Cuba, and, with suitable means, I have no doubt of effecting it elsewhere."

Extract from the letter of the 22d May.

"I beg, Sir, that our situation may be taken into consideration, and that some means may be speedily employed to ameliorate it. The principal thing wanting, is a large vessel, and the aid and comforts which she would afford: At present I have no place to shelter me but the awning of this small vessel, (the Sea Gull.) I cannot obtain hands enough for my use to man a boat. I have no comforts whatever, and I find my health gradually sinking. I would be the last to complain without cause: but the rainy and sickly season is now coming on, and I should fail in my duty, were I not to acquaint you with our true situation."

2d. *Com. Rodgers' report of the result of his mission to enquire into the causes of the sickness, &c. at Thompson's Island; and to suggest remedial measures, &c. Nov. 24, 1823.*

(EXTRACT.)

"Without further remark on this interesting subject, permit me, sir, to observe, that, whatever objections may be made to the Island as a rendezvous, in its present unimproved and uncultivated state, even these may be rendered harmless, or, at least, measurably unimportant, by substituting the following description of force, for that now employed in the protection of our commerce in the West Indies and Gulf of Mexico:

"The Independence 74, depriving her of her lower deck guns, and giving her a crew of 450 seamen, ordinary seamen, boys, and marines, with an extra complement of commission officers, and double the usual number of midshipmen; the sloops of war John Adams, Hornet, and such other vessel of that class as can, from time to time, be spared from other service; the brig Spark, and schooners Grampus, Porpoise, and Wild Cat, and five or six barges, such as are now at Thompson's Island, for occasional service."

3d. *The Secretary of the Navy's report, Dec.* 1, 1823, *accompanying the President's message to Congress of Dec.* 2, 1823.

(EXTRACT.)

"For the protection of Commerce, and the suppression of piracy in the Western Atlantic and Gulf of Mexico, it is proposed, in the ensuing year, to continue Thompson's Island as the station for the vessels employed in those objects; to place there a ship of the line, armed and manned as a frigate, for which purpose the Independence is well fitted; and to attach to the command the John Adams and Hornet, and one other sloop of war, with four of the larger schooners, the Grampus, Porpoise, Shark, and Spark, one of the smaller schooners and the barges. This force is competent to protect all our interests. The ship of the line, placed in a proper position, will afford comfortable accommodations to those who are obliged to remain at the station, and prevent the necessity of intercourse with the Island, when danger is suspected. The cruises of the other vessels, except those which visit the coast of Africa, may be limited to four, five, or six weeks, and on their return, their crews may be exchanged for others, who, during that time, have been stationary. By these means, and a proper attention to cleanliness, both in the men and the vessels, and avoiding intercourse with places known to be sickly, the health of all will probably be preserved. For the proper execution of such a system, full reliance may be placed in our officers. The island itself, by clearing, draining, and cultivating, will, after a time, probably become more healthful."

4th. *Additional instructions from the Secretary of the Navy to Com. Porter, Dec.* 1823.

(EXTRACT.)

"It is the intention of the Department to increase the force under your command, as soon as it can be effected: To this end the frigate Congress will, after her arrival in the United States, be ordered to join you, and in the course of the spring, one or more sloops of war will be added to those already with you."

5th. *Extract of a letter from the Secretary of the Navy to commodore Porter, May* 17, 1824.

"Congress has not, until within a few days, passed an appropriation-law for the current year. This will account to you for one or two of the drafts of Purser Thornton not having been honored, and for the delay in preparing the vessels to join you. It

was impossible, without funds, to fit out the Hornet, or the Porpoise, and to prepare a *larger* vessel.

There will be now as much activity as possible; but it is feared *one* cannot be prepared in time to reach you, before the *sickly season commences*. It shall, however, be done if possible."

6th. *Do. from same to same, May* 31, 1824.

"You have now under your command, the John Adams, Hornet, Spark, Porpoise, Shark, Sea-Gull, Decoy, and seven small schooners,—in all, fourteen vessels, exclusive of the barges. I did intend to send a *larger vessel* than any of them, but the amount of the appropriation, and the time it was made, will probably put it out of my power. It shall still, however, be done, if it can be accomplished."

7th. *Extracts of a letter from commodore Porter to the Secretary of the Navy, dated Washington, August* 11, 1824:

"Understanding it to be the intention of the government, to give me a ship suited to my rank in the service, I have ordered the John Adams to proceed to the West-Indies, and thence to the Gulf of Mexico, for the protection of our commerce, where her services are much wanted.

"Should a frigate be selected, I beg leave to state, that it will be most agreeable to me, that there should be no commander appointed to her, as I should wish the particular and personal command to be vested in myself alone."

"I shall be glad to be apprised as early as possible, of the ship intended for me, that I may give my *personal attention* to her *outfits*."

8th. The above-cited letter from C. Hay, esq. chief clerk, to com. Porter, of September 11, 1824; saying that he was *authorized* by the Secretary to tell him (Com. Porter) that the frigate *Constellation*, had been *ordered* to be *fitted for him*.

9th. *Extract of a letter from the Secretary of the Navy to Com. Porter:*

"Navy Department, 14*th Oct.* 1824.

"Sir: It is deemed expedient by the executive, that you proceed, as speedily as possible, to your station in the *John Adams*; that, by your presence there, the most efficient protection may be afforded to our commerce, and you may be ready to meet any contingencies which occur.

"*The Constellation will be fitted for sea and sent to you as speedily as possible.*

"I enclose, by order of the President, an extract from a letter lately received from the island of Cuba; you will consider it confidential, and to be used for your information, so far as you may find it useful.

"With the *Constellation*, directions will be sent for you to proceed to the island of Hayti, there to accomplish certain objects

which will be particularly explained to you and instructions given."

The residue of the letter relates to matters foreign to the present subject.

10th. Refer to the Secretary's aforesaid letter of October 21, 1824, (annexed to the interrogatories to Mr. Monroe, ante, p. 159,) in which the Secretary says, "you are aware of the intention to send the *Constellation* to that station as soon as she can conveniently be prepared."

In obedience to these peremptory orders, commodore Porter proceeded to his station, in the John Adams: which continued to be his flag ship; his expectations of a ship of the line or a frigate, never having been realized.

The evidence in the case, being concluded, we now lay before the reader the preliminary argument, upon the sufficiency of the 2d charge and the several specifications of the same. It will be recollected that, on the 2d day of the court, (Friday, July 8,) commodore Porter entered his plea, of "not guilty," to the several charges and specifications, "under a *protest* against their *sufficiency*; and reserving to himself the right, in the progress of the trial, and in due time, of excepting to the same; as designating no offence known to any law enacted for the government of the Navy; as vague and indefinite; and altogether insufficient to put him upon his trial for the matters therein charged, or supposed to be charged." (Ante, p. 9—10.)

This protest and reservation of exceptions extended, in terms, to *both* charges: but on the Wednesday following, (July 13,) after all the evidence, in support of the 1st charge, had been announced to be concluded, the counsel for commodore Porter, delivered a written summary of *four* specific exceptions, applying to the 2d charge, and the specifications of the same exclusively: (ante, p. 36,) which on the Friday following, (July 15,) were supported by reasons more at large; of which the following *notes* were delivered in.(a) This was all done before the examination of any evidence under the 2d charge; with a view to obtain the decision of the court, upon a *preliminary* exception to the sufficiency of that charge and its specifications. Why that course was abandoned, has been already stated. Ante, p. 39—44.

(a) Perhaps some slight variations, in the turn of expression, in a few instances, may have arisen, in the course of transcribing and correcting, from an extremely rough first draught, between the copy of these notes, as here printed, and that delivered in to the court-martial. These, if they exist, however immaterial, were intended to have been corrected by a comparison and revision of the two copies. Being disappointed of an opportunity to do so, these verbal differences must remain: with the assurance that they are wholly immaterial to the argument; and change not the meaning, in any instance.

Notes of the principal heads of argument and authority, in support of the objections taken by the counsel of Com. Porter, to the 2d charge and the specifications of the same.

The counsel is well aware how much out of place, before a court martial, are the nice and abstruse subtleties, and the merely technical rules, peculiar to some branches of practice in the courts of common law. He will, therefore, implicitly follow the advice of a learned civilian, who has made military jurisprudence, and the analogous principles and practice of civil and criminal judicature, the subject of an elaborate, practical, and useful essay; and who very prudently and properly recommends to counsel, engaged in the conduct of a defence before a court martial, to avoid every topic calculated to perplex and embarrass the judgment of gentlemen not professionally conversant with the law, by "forcing the discordant and unsuitable axioms and rules of the civil courts, upon a military tribunal." Accordingly, no "*rules or axioms of the civil courts*" are adverted to upon this occasion, but such as have been distinctly invoked to the practice of "military tribunals;" or such as, being founded in the immutable principles of right and justice, are necessarily common to both; and cannot be dispensed with, by either, without consigning the subjects of its jurisdiction to an unqualified tyranny. The truth is, there is no essential difference, either in the form of procedure, or in the principles, by which both are guided in the administration of *criminal* justice. The course of proceeding, in British courts martial, is said to assimilate more nearly to trials for *high treason*, in the courts of common law: because prisoners, tried for that crime, have greater privileges allowed them by statute, than what are allowed in criminal prosecutions for other offences. *(a)*. All the forms of procedure in the civil courts, in the department of *criminal judicature*, are simple and concise: they are clear of the technical subtleties, and of the nice and artificial distinctions, which have resulted from the abstruse and complicated rules of property, and the perplexed dialectics of special pleading: they are the result of great sagacity, long experience, and a practical insight of human affairs; exerted in the compilation of a system of rules, necessary to the protection of property, life and reputation, against the irregular, capricious, or vindictive action of power. 'Tis beyond the reach of human sagacity, to institute or digest any system, which is to act with infallible and undeviating truth and accuracy, in all the diversified occasions of practice. Consequently, in some particular instances, the forms, with which human rights are fenced in and guarded, may rather inconveniently fetter and retard the march of substantial justice: these forms are nevertheless wholesome and necessary;—and 'tis better to endure some partial inconveniencies, than encroach upon the conspicuous and well defined land-marks intended, as impassable

(a) McArthur (4th ed. Lon.) B. 1. ch. 12. s. 1. p. 282.

barriers against the oppressions of the mighty upon the weak. And of all the modes, in which might can demonstrate its cupidity or its wrath, to the danger of individual security and justice; and against which every free community is the most provident and circumspect in devising, and most tenacious in maintaining wholesome checks and restraints, is that of high seated power bearing down, on its victim, with all the weight and circumstance of official splendor and influence, in a state-prosecution.

A vulgar error has sometimes prevailed, to the great disparagement of the military character, that a military establishment must necessarily be composed of men, who have voluntarily surrendered all the essential rights of citizens, and who have abandoned every thing sacred and dear in life and honor, to the uncontrolled will and unregulated power of the government. Against such an absurdity, it would be superfluous to contend, before an intelligent and experienced tribunal, composed of gentlemen who have been disciplined in the rights and duties, alike of civil and of military life: as every man, aspiring to wield the arms of an enlightened Republic, must be; or sink into the pernicious and degraded instrument of usurpation and despotism.

Then it is one of the fundamental and uncompromising maxims, as well of martial, as of every other human law, that it should define, before hand, and with precision, the offences which it punishes: the only alternative is to leave it to the absolute discretion of every successive court martial, to determine, without any fixed rule or guide, upon each particular accusation, whether the act charged be one which the law either designed or ought to have punished. This alternative is universally held to be of the very essence of tyranny; and utterly incompatible with any sound principle, by which either military discipline and police are maintained, or the forms of civil government instituted. Wholesome restraints of the ceaseless tendency of power to excess and to irregular exertions of its force, and well defined rules, by which individuals may certainly know what actions are enjoined or forbidden, are just as necessary to the conservation of the military, as of the social virtues. Once beat down the barriers, by which the essential rights of the soldier are protected against the invasion of vindictive or capricious power, and every tie of subordination, but that of brute force, is dissolved: the generosity of soul that enobles valour, and gives all its moral elevation and dignity to the military spirit, is extinguished: his rapid degeneracy makes him no longer formidable to any, but to the state, which has degraded and debased him. No government, whose institutions bear the remotest affinity to our own, has ever acted upon the notion, that persons in military capacities were to have their relative rights and privileges, defined or guarded by any less fixed, certain, known and precise laws and rules of conduct, than their fellow citizens, in civil capacities: or that criminal justice was to be administered, in military courts, with any less regard to the fundamental principles of legal justice, than in other courts of judicature. The rights and privileges of the Janissary are just as well defined in theory, and respected in practice, as those of any

other of the subjects of Turkey: where all are equally exposed to the arbitrary caprices of a power; which is despotic only because it is of indefinite extent, and vague and uncertain in its limitations, and in its rules of action. These same Jannissaries, at once the instruments and the terror of the despotism they uphold, are but the type of what every military establishment must become, when placed out of the pale of the general law, by which the relative rights and duties of individuals are defined; and which determines, by fixed, known and precise rules, the offences which may draw down the penalties of vindictive justice.

Accordingly all the regular governments of modern times, which have made much progress in civilization and improvement, have been at great pains to digest codes, for their fleets and armies; in which all military crimes and punishments have been enumerated and defined, with more or less of precision.(a) In Britain, it has been, for a century and an half, the subject of anxious and minute legislation, in successive parliaments; which has resulted in a compilation of criminal law, for their navy, as elaborate, and, perhaps, more systematic and complete, in its kind, than any they have, hitherto, framed for the community at large. The British articles of war, both military and naval, have been respectively adopted by Congress; with such modifications as were thought necessary to fit them to the peculiar organization of our own establishments: and it must, in candor, be confessed, that our alterations of the British system have not been uniformly for the better: but, in one or two particular instances, (presently to be remarked upon) decidedly for the worse.

Of the forty-two articles adopted by the act of Congress, for the government of the navy, thirty (from the 3d to the 32d inclusive) constitute what may be called the criminal code of the navy: in which all the offences, cognizable by a naval court-martial, are enumerated and defined; the appropriate punishments, for each kind and degree of offence, prescribed;—a tribunal for the trial of them constituted; and a few of the most essential and indispensable forms of procedure, laid down.

Then the first and radical question, in every prosecution before a court-martial, is whether the matter of the accusation be cognizable by the court, as constituting any offence, enumerated and defined in the given code of criminal law; there the offence is to be found, or no where: by that authority it is to be punished, or by none.

In Britain, 'tis said, that "the crimes, cognizable by courts

(a) Note.—So manifest is the expediency, and indispensable the justice of extending to military men and to military tribunals all those essential and generally received principles and forms of judicial justice, which are supposed to constitute the sanctions of property, life and reputation, to the citizens at large; that the practice is said to prevail in many of the foreign services, on the continent of Europe, of extending to soldiers the privilege of being tried by their peers: for which purpose, some of the same rank with the prisoner, from officers of the highest rank to privates, are admitted as members of courts-martial. This practice has, it seems, been recommended, but, for very satisfactory reasons, successfully opposed, in the British service. Adye, ch. 2, p. 43-4.

martial, are pointed out by the mutiny act and articles of war; which every military man is or ought to be acquainted with:"*(a)* and again, that "martial law is laid down in so plain and simple a manner, that every military man is or ought to be acquainted with what are thereby deemed crimes."*(b)* 'Tis further said not to be necessary to refer, in the charge, to the particular article of war supposed to be violated; because the *specification* of the criminal *act* itself is sufficient intimation to the prisoner;" who may "always dispute its *relevancy*, and call upon the prosecution to show in *what respect*, it falls under the *prohibitions* of that *law*."*(c)*

A favorite idea has prevailed among military men, and with some military tribunals,—that a court-martial is not only a solemn tribunal of criminal judicature, but also, a court of honor; privileged to exert a sort of censorial power over the minor morals of the profession: and, as such, to take cognizance of certain immoralities and indecorums, or of certain departures from the more delicate and refined points of honor,—indispensable to the character and conduct of an accomplished officer and gentleman; but not prohibited or condemned by any positive law. This idea, to a certain extent, is not without some support from reason, authority and practice: but, to the extent here stated, is certainly erroneous; and contrary to the best established principles and precedents. 'Tis true to any extent, only because the military *code* has, by *positive enactment*, extended the *judicial cognizance* of its courts,—to more minute transgressions of private morals, than are cognizable in other courts: not that the military, any more than the civil courts, have any authority to try or to punish any act, not expressly constituted an offence, punishable under some fixed and known law. For instance, the British articles of war, both naval and military, make "*scandalous infamous* behaviour, such as is unbecoming the *character* of an officer and a gentleman," an offence punishable by dismission from the service:*(d)* and this article has undergone a version, in its adoption into our *military* code, extremely disadvantageous to its precision, and to every other commendable quality of a penal law: for, there, it is stripped of all the aggravations by which the offence is characterised in the British articles; as "behaving in a *scandalous, infamous, cruel, oppressive* or *fraudulent* manner, unbecoming the *character*," &c. and marks out, for reprobation, and for the same sort and degree of punishment, as the British articles,—conduct, simply characterised as, "unbecoming an officer and a gentleman:"*(e)* without specifying how or to what degree it must be unbecoming; whether, to his *character*, moral or professional; or to his person, or his manners. This article is not to be found, in either of its

(*a*) Adye, (7th ed. Lon.) pt. 1, ch. 2, p. 62.
(*b*) id. pt. 2, ch. 5, p. 225.
(*c*) Tytler, (3d ed Lon.) ch. 5, s. 1. p. 216-17.
(*d*) Tytler, p. 212. 1 McArthur, app. No. 1, art. 33, p. 335.
(*e*) Vide, Rules and articles for the government of the *armies* of the United States, art. 83. Macomb, p. 63, 241.

forms, among our *naval* articles of war; but the third of these, corresponding to the second of the British naval articles, enumerates "oppression, cruelty, fraud, profane swearing, drunkenness, and *other scandalous conduct*, tending to the destruction of *good morals*," as among the offences punishable by a court-martial.(a)

Now here, it must be confessed, is ample scope for the exercise of a *sound discretion*: the court being called upon to decide, in one case, what acts are *scandalous*, *infamous*, &c. in another, what are "unbecoming an officer and a gentleman;" in another, what immoralities come under the denomination of "other scandalous conduct tending to the destruction of good morals;" and whether the acts, specified and proved under such a charge, equal or exceed, in scandalousness and turpitude, the immediately preceding enumeration of "oppression, cruelty, fraud," &c. Still 'tis nothing more than a *sound* discretion, acting under the authority and by the express mandate of the law: not an unlimited discretion to legislate new offences into existence. When the nature and degree of the offence are once ascertained by the application of that sound discretion to the facts of the case,—and these facts are found to bring the case within the operation of the law,—'tis then an offence as emphatically embraced within the purview of the law, and as positively prohibited, as if it had been therein designated by name, or by the most specific description. After all, it is nothing more in principle, than the ordinary discretion of every court of law, to construe, interpret or expound, the obscure, perplexed and doubtful terms of general statutes. There is also vested, in courts-martial, an extensive discretion, in the application of *optional* punishments to various transgressions. So the civil courts exercise a wide discretion over both the kind and the degree of punishment, appropriated to various misdemeanors: as fines from one cent, to any indefinite amount; imprisonment for an hour, for years, or for life; pillory, &c.—and of these, in many instances, they have the option of any one or more.

In short, the exercise of this *sound, legal* discretion, by whatever court, civil or military,—and to whatever degree, is nothing more or less than the judicial exposition, or the judicial execution of a positive law: and leaves the conclusion, untouched, that no offence is cognizable by a court-martial, but what is prohibited and punished, by some article of the military code, under the sole authority of which the court acts: and, consequently, that every accusation or charge must set out, *in terms*, an offence, so prohibited and punished; or be excluded from the cognizance and jurisdiction of the court.

The defect of power, in a court-martial, to erect itself into a court of honor, and, as such, to assume censorial jurisdiction over such breaches of good manners, or good morals, or of decorum and gentlemanly demeanour, as are not made positively unlawful by the articles of war, or some statute, is strikingly illustrated by the case of a British officer, tried at the Cape of Good Hope,

(a) Vide, Laws U. S. p. 351, ch. 187, art. 3. 1 McArthur, app. No. 1, art. 2. p. 325.

under a charge of "scandalous, infamous conduct, unbecoming the character of an officer and a gentleman;" exemplified by the fact, of his having first made a present of a horse to a general officer, and then sent in a charge of £600 for the same horse. Upon which, the court acquitted him of the graver part of the charge, "*scandalous infamous* behaviour;" but found him guilty of mean, dishonourable and ungentlemanly conduct; for which they sentenced him to six month's suspension. Yet, upon an appeal, to the king in council, it was solemnly decided, that the court had no jurisdiction over this inferior immorality, of mean, shabby conduct: but that, having acquitted him of the *legal* part of the charge, he stood acquitted altogether.(*b*)

The point may, therefore, be taken as clearly established; that *a court-martial, having no jurisdiction but one limited and defined*, in respect both of persons and offences, can take no cognizance of any impropriety of word or deed, but such as is prohibited and punished by positive law: and can exercise no *discretion*, in determining either the legal or moral character of such impropriety, any farther, than simply to decide, from facts and circumstances, whether it be an offence of the same species and degree, as that described and prohibited by the law.

This brings us to the consideration of the form and substance of the accusation, or charge: in order to determine, 1st. whether any offence, cognizable by the court, be set out, in terms: and, 2dly, if there be, then whether set forth, in such manner and form, and with such specifications, as, according to the established law and practice of courts-martial, may justify calling upon the prisoner to answer.

A *more particular examination of the terms, in which the charge and specifications, now objected to, are conceived*, may be usefully preceded by a succinct analysis of the rules, by which the form of such accusations is prescribed. These rules shall be deduced from the most approved writers and authorities, upon *martial* law alone: all of whom concur, with undeviating unanimity, in the terms of the rules now to be cited: and, rival each other in the amplifications and illustrations, by which the utility and necessity of a strict observance of them are enforced.

Then there must be a *certainty* of the *offence* committed: it must be set out in such terms, as bring it unequivocally and clearly within the law or statute by which it is made punishable: in some instances, even words, *synonymous* with those of the article prohibiting the offence, do not suffice; but the *very words* of the law must be used; as in case of mutiny, &c. and the *special manner* of the whole *fact* must be set forth, with certainty, in the specifications. All the circumstances of the *time, place* and *manner* of the *acts* charged, must be *minutely* described. If disrespectful, contemptuous, or mutinous words be imputed to him,—the very words must be specified: and, in the proof of any acts or words charged against the prisoner, it is not enough for a witness to say, that acts or words of such or

(*b*) 2 M'Arthur, ch. 8. p. 297-8.

such *effect*, were done or spoken; but he must describe the very acts, and prove the very words. The more general and vague the description of the offence in the article, by which it is punished, the more particular and minute, must be the specifications, in the accusation, of the facts and circumstances intended to be proved in support of it. 'Tis agreed, on all hands, that there must be the same precision and the same minuteness (and, in many instances, greater minuteness) as in *indictments*, in the civil courts. One author, Mr. Tytler, a Scottish advocate, and of course a civilian, would rather compare it to a *libel* (which is equivalent in the tribunals of the *civil or Roman law*, to an indictment or criminal information at *common* law) because the libel deals in more minute and diffuse specifications of the facts and circumstances charged: and 'tis certain that a court-martial more resembles a tribunal of the civil law, than of the common law; since the members unite, in their own persons, the character both of judge and juror.*(a)*

The *rationale* of the rule is the same in all courts: which is that the prisoner, being thus minutely informed under what *law*, for what *offence*, and of what *facts* he is accused, may duly prepare himself for his trial. In the same spirit, 'tis required that he be furnished with a copy of the *charges* and *specifications*, and the *names* and *descriptions* of the *witnesses*, for the prosecution, in due time before his trial. The object of this rule is, not only that he may be prepared to meet the *matter* of the charge; but to canvass and, if necessary, impeach the competency or the credit of the witnesses. The charges, after a copy of them has been thus served upon the prisoner, are unalterable, but under peculiar and extraordinary circumstances. *(b)*

Such are the established *law* and *practice* of courts martial; deduced from the strongest analogies of judicial justice; and unanimously enforced and illustrated by all the best and most approved elementary treatises, which have been received as authority for the law and practice of such courts. But, in this country, it does not rest upon such authorities alone; cogent and conclusive as they are: but upon these authorities, recognized, adopted, and embodied into our naval articles of war: by which it is expressly enacted that the "person accused shall be furnished with a true copy of the charges, with the *specifications*," &c. *(c)* If, therefore, the general doctrine required any corroboration from statutory enactment, here it is: for, in the use of the term "*specifications*," every thing is implied, that, either by definition or in practice, had been authentically held to be involved in its true meaning and effect.

Now let this 2d charge and its specifications be brought to the test of these rules.

First of all, as an *indictment* or *information* for an offence cog-

(*a*) Adye, pt. 1, ch. 6, p. 127–8. Tytler, ch. 5, s. 1, p. 206—218. M'Arthur, B. 2, ch. 1, s. 3, p. 6—12. Macomb, p. 61–8.

(*b*) Adye, p. 127–8. Tytler, p. 217, 244, 358. 1, McArthur, 281–2. Macomb, 89, 172.

(*c*) Vid. Laws U. S. vol. 3. p. 358. art. 38.

nizable by a court of common law; it is impossible for any lawyer to hesitate, one instant, in pronouncing, that it would be utterly vicious and void: not for the want of any *forms* or *solemnities* merely technical; but for the most essential and palpable defects of matter and substance.

Then, by this test, it fails; there is a plain and incurable failure; the whole must be rejected and set aside.

But, let the context of the charge be minutely examined and tried by the loosest rules, that the greatest latitudinarian, in the forms of military jurisprudence, could desire.

Before its validity, as the description of any offence, within the terms of the naval articles of war, can be determined, its *meaning* must be ascertained: and that is the most uncertain, obscure, and perplexed imaginable.

The charge itself, considered separate and apart from the specifications, consists of two members: but both, 'tis presumed, intending the same identical act or offence; and only describing it with superadded aggravation: the conduct imputed, was unbecoming an officer, because it was *insubordinate.(a)*

The first member of the charge is "*insubordinate* conduct;" and here we are at sea, without chart or compass: for the conduct, imputed to the accused, is characterised by an epithet unknown to our language. Being unable to discover it in any vocabulary, or other document of the language, either of science or of general literature; it was presumed to be a term of art; and peculiar to the art military. But no research, in our power to make, into the nomenclature of that art, has been attended with any greater success. The next process was to resort to the etymology of the word: and presuming it to be used in the negative or privative sense of "subordinate," the validity of the charge, as a precise accusation under some naval article of war, was tried by that test. But it was not found that any quality, negative or positive, to be inferred from the privative form of that adjective, could, by any possibility, be made out to be such an accusation. Then presuming that the adjective "subordinate" might have some peculiar and technical meaning, distinct from what is affixed to it in the language of science and general literature,—military dictionaries and other works, upon the art military, have been consulted, but in vain, to detect any such technical meaning. On the contrary, the only book, on military affairs, (and that is one expressly written on military jurisprudence,) in which our very partial research has discovered the word,—uses it precisely in the same sense, as in the language of science and general literature: that is, as indicating the regular *gradations* in the series of military ranks:*(b)* a sense, entirely conformable to the generally received definition, given by the best authorities: "inferior in order; descending in a regular series." Then adopting the negative form of this definition, the charge should be interpreted, "*conduct not* inferior

(a) Vid. the terms of the charge, ante, p. 7.
(b) 1 M'Arthur, ch. 2, s. 1, p. 15—16.

in order; not *descending* in a regular *series*:" and, if such qualities be, at all, predicable of any human conduct, moral, civil or military, under what article of war, may such conduct be brought? But, the process of etymology has been pushed still further, in order to discover the true meaning of this charge: the substantive, "*subordination*" has been pressed into the service: and 'tis found that, in military language, it has acquired a meaning somewhat more extensive, if not different from that by which it is generally defined and understood: namely, an obedience to orders. (*a*) Then if, by any legitimate coinage, "insubordinate conduct" could be understood as expressing the negative quality of subordination, we have nothing more or less than a charge of "disobedience of orders and conduct unbecoming an officer:" a repetition, *verbatim & literatim* of the *first* charge; the trial of which, upon the evidence, is now in actual progress, before this court.

This identity of the first and second charges, thus elaborated from the devious circumlocutions, and loose analogies of the *periphrasis*, supposed to be couched in the terms of the second charge, is the most favorable interpretation: for the dilemma is fairly put; it must have that meaning, or no meaning.

In that sense of the charge, which of the five specifications, or what circumstance in any of them, squints at any *disobedience of orders?*

The second member of the charge, "conduct unbecoming an officer," though free from the solecism of language apparent in the other, is equally foreign to the terms and definitions of any naval article of war. Even, under the extremely vague terms of the 33d military article of war, (which is here distanced in vagueness and uncertainty,) it would be utterly untenable: but as the naval code contains no analogous article, there is so much the less room to entertain this indefinite and unintelligible charge. Nothing is more uncertain, or more dependent upon the evanescent caprices of taste and fashion, than what may "*become an officer.*" It may be very unbecoming in him, to do a thousand of the most innocent or indifferent things in the world: he may wear his hat, or his sword, or his coat, after a very unbecoming fashion: what might be very excusable, in a young subaltern of twenty, might be quite unbecoming, in the time-honoured veteran: in short, there is no end to the minute instances, in which he may transgress the decorums of life and good breeding, without bringing himself within any of the penal prohibitions of military law.

The charge itself being vicious and incurably defective in its terms, it becomes, in a measure, useless to inquire into the nature of the specifications: for if the charge fall, the specifications fall with it: the whole *substratum* on which they rest, with every thing that may give them significancy or application, being taken away.

We have not, however, stopped here; but have endeavoured to discover whether these specifications, ascertained, with any more precision, the true meaning and *gravamen* of the charge. The result will be found in the following summary of them.

(*a*) Duane's Military Dictionary in Voc.

1st specification.—In explaining the meaning of the charge, by this specification, a notable instance of the old paradox of the *ignotum per ignotius*, of the obscure, explained by the more obscure, met us at the threshhold. Nothing but "confusion worse confounded" followed, from having "insubordinate conduct" explained by "*insubordinate letters.*" We are here told that the conduct, complained of in the charge, consisted in the writing of "*various* letters of an *insubordinate* and disrespectful character." Here our old difficulty, from the new coined word, *insubordinate*, again opposes our research after a meaning: a difficulty certainly not diminished by its being applied to *letters*. Our former analogical definition, "disobedience of orders," seems to be further from the mark, than ever. It might be well enough conceived, how a man might be ordered not to write a letter; and might, by writing one, disobey the order: or *vice versa*: but how the letter itself could acquire the quality or character of being "*insubordinate*," is not so easily apprehended.

Now take the other characteristic of these letters; that of being "*disrespectful*;" and what article of war denounces "disrespectful letters" as a military offence? Besides,—neither the tenor, nor the substance and effect of these letters, is set forth: then *how* are they disrespectful; in what degree; in what does the disrespect consist; and to *whom* was it offered? All these particulars are left to the vaguest and most uncertain conjecture. There would be no end to the *possible* modes and degrees, in which a letter may be deemed *disrespectful*. The disrespectful character, here imputed to these letters, may, for aught that appears, consist in such a minute transgression of high breeding, as that mentioned in a certain popular novel: where a very refined and fastidious gentleman, receiving a letter sealed with a wafer, instead of *wax*, indignantly spurns at it, as if contaminated with the spittle of the writer.

Upon this whole subject of "*disrespectful* letters," or "*disrespectful* conduct," or "disrespectful insinuations," it may be sufficient to say, that no such offence, in any of its modes or degrees, is to be found among the naval articles of war.—The 5th & 6th of the *military* articles do, indeed, punish contemptuous or disrespectful words, towards a certain description of enumerated personages:(*a*) but there are no such articles in the naval code: and if there were, there is no charge or specification to bring the case within them. The naval code punishes *mutinous* words: and the treatment of a *superior officer* with *contempt*.(*b*) There is no pretence here, that any conduct or any language of Com. Porter, was liable to either of these imputations. "*Con-*

(*a*) "Any officer or soldier who shall use *contemptuous* or *disrespectful* words, against the President of the U. S., the Vice President thereof, the Congress of the U. S., or the chief magistrate or Legislature of any of the U. S. in which he may be quartered, if a commissioned officer, shall," &c. Art. 5.

"Any officer or soldier, who shall behave himself with *contempt* or *disrespect* towards his *commanding officer*, shall," &c. Art. 6.

(*b*) Art. 13.

tempt" to a "*superior officer*," is a technical term; and is, by no means necessarily comprehended in the imputation either of "disrespectful letters," or disrespectful insinuations."—Besides, there is not in this charge, or in any of the specifications, the least suggestion, that any disrespect was conveyed, either by the letters or by the insinuations, to any *superior officer*, within the meaning of the 13th naval article. But the specifications are all so radically and incurably defective, in other respects, that this is scarce worth mentioning.

2d. Specification.—This might be discussed by a single question: namely, what article of war, or what other law had made it unlawful, or, in any sense, *improper*, to publish the proceedings of the court of inquiry; *after* that court had made its report; had finally disposed of the subject; and had been dissolved? The proceedings of the court were necessarily open and public to all the world: all the world was free to publish them: and why not Com. Porter? If, indeed, it be not a solecism in terms to accuse him of publishing what had already been made public, without any agency, active or passive, on his part.

This presents a very different question, from that of publishing, during the *progress and pendency* of a trial, detailed and piece-meal reports of the evidence, from day to day: a practice peculiarly incompatible with the order of proceeding, in military courts; and highly improper and mischievous, for many obvious reasons, in any court. If Com. Porter had violated the respect and duty incumbent on him, as a party before the court of inquiry, by making any such obnoxious publication, he would, doubtless, have been called to a summary account by the court, in the exercise of its incidental power to punish the contempts of parties and witnesses. But with the trial, every reason against a detailed and public report of the proceedings ceased: and, accordingly, it is one of the most ordinary, and, at the same time, of the most unquestioned rights, to publish such reports, *after* the trial. In this case, the *functions* of the court of inquiry, upon which such publication might have operated improperly, had ceased: and if any inconvenience has been experienced, in practice, from publications which may operate on the deliberations of the executive, by convincing or informing his judgment, it will be time enough to punish the act, when some law shall have made it criminal. From this specification there is the absence of every circumstance that might have shown how this publication was either *actually* or *possibly* mischievous. The nature of the proceedings so published, and the *motives* and objects of the publication, are circumstances that are altogether overlooked.

3d Specification.—"An incorrect statement of these proceedings." Here, again, we ask, what definite idea, either of the *fact*, or of the *gravamen* of the charge, does this specification afford? Wherein does the incorrectnes consist? Is it in the *punctuation*, the *orthography*, the *syntax*, or any other transgression of grammatical rules?(a) In what degree, and to what extent is

(a) This anticipation proved prophetic. Indeed, when the *incorrectness of statement*, charged in this specification, came, in the course of the trial, to

it incorrect; and with what design or motive was it made so? Is it in material or immaterial circumstances; from inadvertency or design? Here, again, we are left to illimitable conjecture, for all these particulars; which should have been distinctly and precisely detailed and set forth in the charge and specifications: but which, indeed, after they had been drawn out, in the minutest detail, could have constituted no offence, cognizable by the court; unless *criminal falsehood, from corrupt, or malicious motives*, could have been imputed; so as to make out a charge of *scandalous* conduct, &c. under the 3d naval article of war.

4th Specification. Here, we have nothing but a new version, without the least amendment, in point of minuteness or precision, of the 3d specification. It contains only some additional *aggravation*; but not one additional *fact:* the aggravation is, that the same publication contained various *insinuations* highly *disrespectful* to the Secretary of the Navy, and to the court of inquiry. This might, also, be disposed of by a single question: namely, what article of the naval code, makes any such *disrespectful insinuations* criminal? But it may be further asked, what passages of the publication were fraught with these insinuations, and with what insinuations were they fraught? Why were not all these particulars specified, so that the court might have judged, for itself, whether the *innendoes* were legitimate deductions from the context; and, if so, whether disrespectful, and in what degree, and to whom?—As it now stands, the whole matter is left so vague and uncertain, as to defy the sagacity of the most experienced jury of sworn guessers: if, as has been reported, but I know not upon what authority, there ever were, at any time or place, any such auxiliary to the regular administration of justice.

5th Specification.—After what has been said of the others, this requires little or no comment. What particular documents are here alluded to and intended, under the general description of "official communications and correspondence," or of "public orders and instructions;"—whether there were any injunction of secrecy respecting them, either express from a competent authority, or nececessarily implied by their nature and character; to whom they were disclosed;—the time when, the place where, and the manner how; are circumstances unexplained, and altogether overlooked: which it would be vain to guess at: and if, perchance, they should be come at, by the most fortunate and miraculous of guesses, they would be utterly inconsequential and useless, under the existing frame of the principal charge. No one circumstance, either of the distinctive description and identity of the documents, or of the time, place, or manner of their publication, is given; except that one set is said to have been "made public" "in the same publication," referred to in the former specification: and that the other set, is said to have been

be afterwards deduced into particulars, it hinged upon matters even more minute than what were here anticipated: as appears from the "list of variances," explained, ante, p. 132—141. Nos. 1, 2, 5, 6, 7, 9, 10, 13, 14, &c.

"made public, on other occasions," within a given period of about eight or nine months.—Now, if every other objection were out of the way, what should be said to this latitude of *time*; in the face of the conclusive authorities, above cited; by which the utmost latitude allowed (and that only in extraordinary cases and from an evident necessity) is an alternative, either, of the *day*, or of the *month*, immediately preceding or succeeding some *certain* day or month named in the specification?*(a)*

The aim and ultimate end of these objections are analagous to a motion to quash an indictment, in a court of common law, for any inherent vice in its frame; which makes it evidently vain and fruitless to proceed with the trial of it.

The counsel would beg leave, in conclusion, to remark, that in raising these objections, against the regularity and the efficacy of the procedure in this case, and in taking some pains to explain the grounds of his objections, he has been actuated by public considerations, apart from the particular interests, and unconnected with the personal wishes and inclinations of his distinguished client. The principles, involved in these objections, are certainly of general interest, and permanent importance to the service: and now, amid the repose of a profound peace, is the accepted time to adjust the land-marks, and consolidate the bulwarks of right and justice, in matters of military judicature; to establish well considered and safe precedents; and to supersede all such, if any there be, as, amid the haste and confusion of active service, have been unadvisedly and silently admitted in practice, to the peril of individual security, and of the dignity and respectability of our military establishments.*(b)* All these considerations, doubtless, deserve, and will receive the deliberate attention of this court: but they are not such, as, alone, should have determined the professional course of the counsel, in the conduct of his client's defence. We clearly perceived from the frame of the 2d charge and its specifications, that the whole matter of accusation, therein exhibited, was not within the prescribed limits of this court's jurisdiction; and that, so being *coram non judice*, the trial of it must necessarily be a vain and fruitless consumption of time and labor; without any determinate issue, or conclusion of guilt or innocence: and, consequently, that his client could neither be acquitted nor condemned, *judicially*, of the *facts* charged against him. Under such circumstances, it was his imperious duty, to advise the quashing of a tedious and unpleasant discussion; irksome to all who feel an interest (and it is an interest coextensive with the limits of the country) in the tranquillity and reputation of the eminent and meritorious public functionaries, involved in the dispute. To the force of these reasons Com. Porter has, at length, yielded: after the earnest representations and unequivocal advice of his counsel had overcome a very natural and unaffected reluctance to do, or to have done, in his behalf, any thing that might expose him

(a) 2 McArthur, p. 8. Tytler, p. 214.
(b) Vid. Adye, p. 98.

to any possible suspicion of a desire, to evade a trial of the charge, upon the evidence.—Indeed, enough may be inferred, even, from the very vague and unsatisfactory intimations of the charge and the specifications; from their cautious evasion, or timid recoil from a direct approach to a charge of any thing *criminal* or dishonorable; (without adverting to other matters of public notoriety) to repel every possible presumption of his fearing, or having reason to fear the least detriment, from the most comprehensive and minute investigation of the facts connected with this branch of the accusation."

We very much regret the want of the document, that should here follow; being the answer, at full length, put in by the judge advocate, to the objections raised by the counsel, as explained in the foregoing notes: and that we should be compelled to substitute a meagre summary, from notes taken during the delivery of the answer, before the court. We shall not pretend that it is in our power to do justice to the manner, the language or the illustrations, with which the argument of the judge advocate was sustained: but simply to state, fairly and concisely, its essential points: so as to make what is said, in reply, intelligible. As soon as the argument can be obtained, *in extenso*, it shall be added, in an appendix.

[*Having got possession of the judge advocate's argument, as published by authority, in time to cancel what had been composed of our summary, and insert the argument, at large, in its place; we have stopped the press for the purpose; and here present it to the reader, as so published.*]

Answer of the Judge Advocate to the preceding objections submitted by commodore Porter's counsel.

The paper submitted to the court on Saturday was stated by the counsel of captain Porter not to be precisely in that state in which he wished to annex it to the record. With a view of enabling him to complete the transcribing of it, and to correct any verbal inaccuracies which might, in the hurry of copying, have inadvertently crept into it, it was left with him under an engagement that it should be transmitted to me in the course of the evening. Not having received it, I was compelled to despatch a messenger for it on the following morning, and it was not until about half after ten o'clock that it was put into my hands.

These circumstances are now referred to as my apology to the court for the imperfect manner in which it may be supposed I have replied to the long and ingenious paper of the accused, the work of an accomplished and skilful lawyer and scholar, prepared with ample time for reflection and research, and to which I am thus unexpectedly called upon to reply in the brief period of a few hours. Unwilling, however, that any delay in the proceedings of the court should be attributed to me, I shall endeavor to present to the court as full an exposition of my views and opinions upon the question, submitted for its decision, as, in the circumstances to which I have referred, is practicable.

It will scarcely be expected or desired by the court, that I should follow the learned and ingenious counsel thro' the discursive course which his exuberant powers enable him to pursue, with so much facility, beauty, and fancy, upon almost every occasion. I shall consider the questions in a simple and practical manner, and only labour so to present my views, as that they be at once perfectly intelligible to the members of a court, who are not presumed to be very deeply skilled in legal technicalities or philological criticisms, and at the same exhibit a full answer to the argument that has been submitted.

Before proceeding, however, to examine critically the various objections which have been urged to the second charge, and the specifications thereof, I would beg leave to submit a few preliminary remarks for the consideration of the court.

The analogy, which it has been the object of the learned counsel to draw between the proceedings of civil courts and military tribunals, and on which he has exhibited so much ingenuity and deep research, is admitted to a considerable extent. The object of all forensic proceedings is the same, and the forms of practice calculated to attain the end in view, may well be supposed,

even in different ages and in remote countries, to bear a considerable resemblance to each other. Still more reasonable is it to presume that the original practice of military courts was in a great measure borrowed from that which had been previously established in the civil tribunals of the same country. The principles of both were originally the same, the forms of proceeding were analogous, and though modifications would inevitably be introduced, from a variety of causes, and many forms familiar to the one be unknown to the other, yet a considerable resemblance would continue to subsist. It is, therefore, generally laid down by all writers on military courts, that when their own rules of practice and principles of decision are not calculated to meet the exigencies of a particular case, reference should be made to the civil courts of the same country to supply the deficiency. A reference ought perhaps to be made on the present occasion, to the practice of the common law courts, and the result of such reference may be widely different from what is contemplated by the accused. No principle of law is better established in the civil courts of our country, as well those of criminal jurisdiction, as those which are confined to the decision of private controversies—those which are governed by the principles of the common law, as well as those which draw their origin and derive their principles of proceeding from the civil or Roman law, than that the accused in criminal prosecutions, and the defendant in private controversies, may avail himself, by way of defence, of a defect or informality in point of law in the charge alleged, or may controvert the facts upon which he is sought to be convicted. In the case of an indictment at the instance of the government, he may deny the facts with which he is charged, or admitting them, may deny that those facts amount to a criminal offence. He may, to employ technical language, either demur, or take issue upon the indictment.—He cannot, however, do both. He cannot plead *not guilty* to the indictment, and at the same time controvert its sufficiency in point of law. He may resort to either defence, but cannot at one and the same time adopt both. The rule is the same in civil controversies, and the practice of the civil law courts is precisely analogous.

Conceding then that the analogy exists, for which the accused so strongly contends, and which, with certain modifications long and well established, undoubtedly exists; it would seem to follow, necessarily, that the accused in the present instance has a right which it is not intended to controvert, to make his option, whether he will demur to the charge, as insufficient in law, or deny it as unfounded in fact. He has chosen the former course, and the consequence of such election may be ascertained by reference to the practice of those courts from which his right is derived. "If the defendant demur to the indictment, whether in abatement or otherwise, and fail in the argument, he shall not have judgment to answer over, but the decision will operate as a conviction." Such is the doctrine laid down by one of the writers of criminal law of the highest authority.(a) Unless in cases

(a) 1 Chitty, 301, (442)

where the punishment is death, in which, from principles of humanity, a greater latitude is allowed, a prisoner who demurs to the indictment, admits the facts with which he is charged, and rests his defence upon the law alone. Should the indictment be determined sufficient, he is adjudged guilty. The analogy then for which the accused contends in the present case would, if pressed to the extent to which it must be carried, if admitted at all, involve this consequence, that if it should be determined by the court that the present charge and the specifications under it, do contain an averment of an offence of which this court can take cognizance, he is precluded from going into any evidence either of exculpation or mitigation, but must, by the decision of the court against the validity of these exceptions, be adjudged guilty to the full extent of all with which he is charged. Having selected the ground on which he will rest his defence, the very doctrine for which he so vehemently contends, confines him to that, and to that alone.

The present application to the court is assimilated by the counsel for the accused to a motion, sometimes made in criminal courts, to quash the indictment. The resemblance is defective in numerous particulars. It will be unnecessary to refer to more than one which is perfectly decisive of this question, and which is distinctly stated by the same author from whom I have just quoted. "It is therefore, a general rule, that no indictments which charge the higher offences, as treason or felony; or those crimes which immediately affect the public at large, as perjury, forgery, extortion, conspiracies, subornation, keeping disorderly houses, or offences affecting the highways, not executing legal process, will be thus summarily set aside."(*b*)

Another remark is eminently entitled to the consideration of the court, not merely as strongly corroborating the conclusion to which I have already pointed, but from its own intrinsic importance. At least two of the specifications charge a fact, which it is presumed, will not be controverted, and the only question which could seriously be contested before this court, would be that now raised;—do the facts therein set forth, constitute offences for which the accused can be made amenable before a military tribunal. It will scarcely be denied, and indeed the counsel for captain Porter, has intimated to me, that the fact of publishing the pamphlet alleged in the second specification, and various instances of the facts averred in the fifth specification, will be admitted. The facts being conceded, not merely by inference of law, but literally, the only question remaining is, do they constitute an offence of which this court can take cognizance. The determination of that question is, at all events, therefore, to that extent, a decision as to the guilt, or innocence, of the accused. By the oath administered at the organization of the court, the promulgation of the sentence of the court, is prohibited to each of its members, and to the judge advocate. If, therefore, this question should now be decided, as merely a collateral one, and that de-

(*b*) 1 Chitty 303, (300.)

cision not be regarded as a final determination of the case, and as such announced to the department, the consequence seems inevitable. So much of the sentence of the court, as ascertains whether the accused is or is not guilty, is promulged contrary to the oath which has been taken. These considerations can scarcely have escaped the notice of the very able counsel of the accused; and it is not to be presumed, that the consequences which have been pointed out, were not anticipated. At all events, the court has been placed in this dilemma by the accused, and upon him must the consequences rest.

I would beg leave, respectfully, to submit to the consideration of the court, another view of this question, not confined, in its application to the present case, but of great and general importance. Military tribunals are, as has been conceded by the counsel for the accused, in many essential respects, courts of honor. Many of the charges, which it is usual to try before them, involve considerations of infinitely higher moment, to the individual arraigned, than the mere punishment to which, if found guilty, he will be exposed. The honor of an officer in the navy, should be infinitely dearer to him than any other consideration. The members of such courts are far better qualified to decide upon questions of this character, than upon the subtleties of special pleading, or the refinements of verbal criticism. It will be a subject of regret should it become common in the service, for officers charged with conduct unbecoming their character, involving their personal honor and veracity, to rest their defence upon technical formalities and critical niceties; which, even if allowed to protect them from punishment, will leave them exposed to obloquy and odium as guilty, in point of fact, of what is perhaps in inaccurate language, alleged against them. What gratification will it hereafter afford, either to the high-minded honourable gentlemen, who usually compose a court-martial, or to the high-minded and honourable associates and companions of one arraigned before them, for conduct unbecoming his rank and station, if on the strength of a precedent established by such authority as this tribunal, the accused should be absolved from punishment, because the person who drafted the charges, has committed a verbal inaccuracy, or technical error, which, though it may nullify the charge in point of form, leaves the character of the accused, burthened with all the odium which the accusation itself creates, augmented by the tacit admission of guilt, which is involved by resting his defence, not upon a denial of the fact, but a nicety of special pleading or a philological criticism.

So long as the members of a court-martial can perceive, that the offence charged, is couched in language sufficiently perspicuous and precise, to apprise the accused of what he is called upon to answer, so long, it is hoped, will they be averse to receive any defence, grounded upon mere defects of form. Such tribunals will ever be opposed to trying a brother officer, upon charges purposely couched in ambiguous language, calculated to mislead or entrap the accused. While they will be disposed to exact on the part of the prosecution, all information, and every light

which can be required by the prisoner, fairly and fully, to meet and refute the charge, they will be equally indisposed to demand that degree of precision and formality which, while it contributes no aid towards preparing the defence, or guarding against oppression or surprise, only enlarges the field for the display of ingenious and captious criticism.

When such ceases to be the regulating principle of courts-martial, all that now constitutes the pride and honor of the service, will be at an end. Officers, instead of devoting their time and attention to their professional duties, instead of cherishing a lofty and chivalrous sense of honor, instead of encouraging that spirit and feeling, which, while it confers dignity and magnanimity upon the superior, gives elevation and respect to the inferior in rank; will resort to the quirks and quibbles of the special pleader, the subtle casuistry of the professional logician, or the pedantic refinements of the verbal critic. How far such a change is desirable rests with this court to determine. With great justice has it been remarked, that the decisions of this tribunal will be looked to with respect and deference. Precedents here established will be followed hereafter; and great weight will necessarily be attached to every opinion emanating from such high authority. An appeal of a somewhat personal kind was a day or two since, made to me. A hope was intimated, and that hope is now enforced by something bearing the appearance of a threat, if not gratified, that the judge advocate would drop the charge, to which exception has been taken. It seems to be intimated that an investigation would, or might, disturb the tranquillity or reputation of some eminent and meritorious public functionaries involved in the dispute. Such a step, under these circumstances, would be repugnant to the wishes, and under any, would be wholly beyond the powers as well as incompatible with the duties of a judge advocate. The charges have been preferred by the government, and by it submitted to this court for adjudication. The power which preferred can alone withdraw the accusation—the tribunal to which it has been referred, can alone judicially decide it.

It may, however, be observed, that the government cannot be supposed to be tenacious upon this subject, nor is the smallest solicitude felt by the judge advocate as to the decision of this question. Those who alone are interested, are the accused and others belonging to the service: and such a decision as is craved may well be deprecated by them. The offences charged, are such as the government possesses ample means to punish. It can vindicate its own authority, and protect itself from contumelious or insulting language. Disrespectful conduct and letters, to the head of the Navy Department, have heretofore been punished without the instrumentality of a court-martial, and may be again. If this court shall determine, that such conduct and such language constitute no offence, of which it can take cognizance, the consequences of that decision will be felt, and felt only by those belonging to the service. The government, instead of submitting cases of this description to the determina-

tion of such a tribunal, instead of bringing those who have offended before their peers, for a fair and impartial trial, will be compelled by the principle of self preservation, to exercise the power which it possesses, of punishing the offenders. The act of submitting this case, therefore, to this court, so far from being a measure at which the accused ought to take exception, should be received by him in the same feeling in which it was done. The only object was to afford him an opportunity of submitting to the impartial determination of his peers, whether any justification, any extenuation, any apology, could be offered for conduct, which, in itself, seemed so highly reprehensible and so deserving of punishment. If this court shall determine that, in point of law, every officer in the navy may, without violating any article of the naval code, and without subjecting himself to punishment, before a military tribunal, write disrespectful and insubordinate letters to the President of the United States, and to the Secretary of the Navy; may publish to the world his orders and instructions from the government, and his correspondence with the department; may publish accurate or inaccurate statements of the proceedings of courts of inquiry, while the same are under advisement of the executive; may make charges and insinuations, not warranted by the facts, highly disrespectful to the Secretary of the Navy and the members of a court appointed to investigate his conduct—so let it be. The individual, charged by the government with such insubordinate conduct, should be the last to desire to withdraw such an accusation from the decision of his brother officers.

On this occasion, as on all others, in which it prefers charges, the government has expressed its opinion that the acts which the accused is alleged to have committed, are reprehensible, and deserve punishment. All charges brought before a military tribunal, necessarily involve the idea, that the person who prefers them, conceives the facts set forth to be criminal, to the extent in which they are so charged, unless some circumstances of justification or mitigation can be presented. The single object of submitting the charges to the consideration of the court, is to ascertain judicially, whether or not, he has acted as he is charged with acting, and whether he was justified by the circumstances in which he was placed, in so acting. In the present instance, an opportunity has been afforded to the accused before this high tribunal, of proving that he was authorized to use the language which is accused of being disrespectful; that the assertions and insinuations alleged to be not warranted by the facts were true, and that he was justifiable in the conduct which is charged to be reprehensible. Instead of availing himself of this opportunity, he insists that these allegations, if true, contain no matter to which he can be called upon to answer before a court-martial. He rests his defence upon the law, and by the law his case must be decided.

I shall now proceed briefly to examine the objections both general and particular, that have been urged, and shall endeavour to

satisfy the court by reason, by positive enactment, and by precedents of high authority, that this charge, and each and every of the specifications, are sufficient in point of law.

On the present occasion it may be considered as superfluous to disprove the correctness of a general position which has been asserted with so much confidence by the very able counsel for the accused, that no offence can be tried before a court-martial, but one which is specially prohibited by some positive statutory enactment. To shew that the learned counsel has been in this particular not quite so accurate as might have been expected from his known accomplishments and varied erudition, I shall beg leave to cite a single passage from an author to whom he has frequently referred. Mr. Tytler, after quoting the 36th section of the British mutiny act, thus proceeds to comment upon its provisions.—"Although it follows from these clauses, that no crime which is mentioned and defined by the articles of war, is punishable by a court-martial in any other manner than that which is specially directed by those articles; yet it does not follow that there are no crimes punishable by a court martial, but such as are enumerated and declared to be punishable by the articles of war." *(a)* He then proceeds to shew that a court-martial may inflict punishment for any breach of the regulations or orders respecting the army, though nothing touching the same should appear in the mutiny act or articles of war. In the following page he continues—"But there are offences which admit of no precise definition, and yet, which in the military profession, are of the most serious consequence, as weakening and subverting that principle of honor on which the proper discipline of the army must materially depend. Of these, a court-martial, which is in the highest sense a court of honour, are themselves appointed the sole judges, or rather the legislators; for it is in their breasts to define the crime, as well as to award the punishment."

Every officer in the Navy, occupies a particular relation with the President of the United States, his commanding officer, by whose appointment, and at whose pleasure he holds his commission. Many instances of crimes of a military character might be enumerated, which are not in terms prohibited by any code of naval law. Many military offences it would be impossible to define, with the same accuracy with which offences at common law are defined. Many are wholly dependent upon the relationship which subsists between the officer and his superior. Among these is *insubordination*, a term perfectly well understood, both in civil life and in military service. The definition, or rather description of *subordination*, has been given with great accuracy in one of the works to which the learned counsel has referred, and it will hereafter be particularly cited. Without subordination no service can exist, no discipline be enforced, no harmony preserved. It is peculiarly a military duty, though by no means exclusively so. The general peace of society, the domestic tranquillity of families, cannot co-exist with insubordination. The general

(*a*) p. 107—8.

meaning of the term subordination, may be distinctly comprehended, but it would be impossible to enumerate all the cases, much less to describe them with logical accuracy, in which an officer may be guilty of insubordination. The meaning of the term being comprehended, and no soldier can long remain ignorant of its signification or of the necessity for enforcing it, its application to particular cases, must be determined by the sound discretion of the court. In this respect, it is analogous to mutinous conduct, disobedience of orders, &c. which must always and necessarily be equally vague and indefinite, and be equally applicable to a thousand wholly dissimilar actions.

So also, in regard to conduct unbecoming an officer, or as the same idea is frequently expressed in military books, and before military courts, unofficer-like conduct, a form of expression which, though perhaps not found in any vocabulary, is as intelligible as any other in the language. Whether any particular act merits this epithet, can scarcely be a matter of serious doubt among officers whose own characters and demeanour clearly demonstrate that they perfectly well understood in theory, and never omit in practice, a conduct which becomes their rank and station. If doubts on such a question should arise, they will never be solved, nor will the minds of the members of the tribunal whose duty it is to decide them be illuminated, by special pleading or verbal criticism. The instances are numerous in which officers in our own service have been arraigned before military courts for acts which are stigmatised as unbecoming their station, and perhaps it would be difficult to conceive a more complete disqualification for holding a commission, than an actual ignorance of the meaning of these phrases.

The learned counsel, in commenting upon this charge, has alleged that "the conduct imputed to the accused, is characterised by an epithet unknown to our language;" and, after exhausting his critical talents in conjecturing its meaning, he comes, at last, to the conclusion, that the signification to be attached to it, the most favourable to the prosecution, is, that as *subordination* has, by one single author, been made to signify *obedience of orders*, *insubordination*, or *insubordinate conduct*, must mean *disobedience of orders*.

Without indulging the idle expectation, that it will be in my power to compete with the ingenious gentleman in his philological reseaches, or to do full justice to a *specimen of verbal criticism*, which, however suitable an appendage to the diversions of Purley, seems to have wandered out of its proper sphere, when it found its way into the proceedings of a court-martial, I must beg the indulgent attention of the court to a few remarks.

One of the most beautiful and philosophic writers, whose works embellish English literature, commenting upon a similar effort of ingenuity, asserts that it proceeds "on a supposition, founded on a total misconception of the nature of the circumstances, which, in the history of language, attach different meanings to the same words, and which, often, by slow and insensible gradations, remove them to such a distance from their primitive or ra-

dical sense, that no ingenuity can trace the successive steps of their progress." *(a)*

The signification which the learned counsel has quoted and attributed to the words *subordinate* and *subordination*, is unobjectionable; I shall, however, shew, that they are employed by high authorities, in a sense perfectly appropriate to the present occasion.

In the report made by general Scott, containing a system of field service and police, submitted to Congress, Dec. 26, 1820, p. 50, and approved by that body, in giving his definition of discipline, he attaches to it this meaning: "correction, or the enforcement of subordination; the award and infliction of punishment, consequent on a breach of that subordination, that is consequent on a neglect or breach of some duty."

In the present military code, it is repeatedly, it is believed, employed in the same, or closely analogous sense. In Duane's military dictionary, quoted by the learned counsel, it is thus described: "a perfect submission to the orders of superiors; a perfect dependence, regulated by the rights and duties of every military man—from the soldier to the general. Subordination should shew the spirit of the chief in all the members; and this single idea, which is manifest to the dullest apprehension, suffices to shew its importance. Without subordination, it is impossible that a corps can support itself—that its motions can be directed, order established, or the service carried on. In effect, it is subordination that gives a soul and harmony to the service; it adds strength to authority, and merit to obedience; and while it secures the efficacy of command, reflects honour upon its execution. It is subordination which prevents every disorder, and procures every advantage to an army."

In the same sense is the word employed in the first article of the rules and regulations for the government of the navy; "the commanders of all ships and vessels of war are strictly enjoined and required to shew in themselves a good example of virtue, honour, patriotism, and *subordination*."

In the 2d vol. of Marshall's life of Washington, p. 245, 6, that eminent authority remarks—"The army was consequently found in a state of almost entire disorganization, and the difficulty of establishing the necessary principles of order and *subordination*, always considerable among raw troops, was greatly increased by the short terms for which enlistments had been made."

In a letter from general Washington to governor Henry, of Virginia, note XIX, at the end of the same volume, he says—"discipline and *subordination* add life and vigour to military movements."

If the signification of this term should be considered as ascertained by the foregoing citations, which have been introduced, for the purpose as well of showing the military sense of the term, as the high importance of the military duty of subordination; it would, perhaps, be unnecessary to consume time in shewing, by reference to equally high authorities, the meaning of the word,

(a) Stewart's Philos. Ess. 239.

and the dangerous character of insubordination. It might be sufficient to quote from Dr. Johnson's preface to his dictionary, a single passage, to shew why this term is not found in any vocabulary of our language, if such indeed be the fact. That learned lexicographer observes—"of some forms of composition, such as that by which *re* is prefixed to denote repetition, and *un* to signify contrariety or privation, all the examples cannot be accumulated, because the use of these particles, if not wholly arbitrary, is so little limited, that they are hourly affixed to new words, as occasion requires, or is imagined to require them."

I shall, however, cite a few examples of the use, as they will serve to shew the signification of the word.

The chief justice, in the 2d volume of his life of Washington, p. 327, speaking of the character of the American troops, at an early period of the revolutionary struggle, observes—"a spirit of *insubordination* seemed to pervade the whole mass." In page 366, referring to the condition of the American army in Canada, under the command of general Sullivan, he observes, "the whole were in a state of total *insubordination*."

The word is employed repeatedly by the very able and accomplished gentleman, who prepared, as counsel, the defence of lieut. Kennon. In p. 75 of the report of that case, he says, "do not believe I am an advocate for insubordination. If one expression of that character can be found in my letter, I merit punishment, and will patiently endure it." In p. 88: "the testimonial which this court has deigned to afford me by their evidence, permits me to say, and to say proudly, that I have never dishonored it by one act of insubordination, or the smallest departure from duty." In p. 91: "discipline is exposed to two foes, coming from opposite quarters, and assailing it at different points. Insubordination, which founded on man's natural impatience of control, often leads the inferior to resist necessary authority, &c." Again, in the same page; "if insubordination, in its restlessness, has sometimes raised its arm against rightful authority, &c." And in p. 92: "I venture to anticipate such a decision as will remove this unfounded opinion, maintain the true discipline of the navy, and convince all grades of service, that, though insubordination will always receive its merited punishment, oppression will find neither countenance nor impunity." On the same trial, the sentence of the court, drawn up by the judge advocate, bearing the same name with the learned counsel, whose ingenious criticisms have given occasion to this, I fear, tedious examination, and, as I understand, nearly allied to him, contains this sentence: "the court cannot, by its silence, give sanction to sentiments, which, though, clothed in the mantle of a defence, are calculated to diffuse principles of insubordination in the navy."

A single reference to an English work will be sufficient. Mr. Tytler, whose learning has been highly commended, and whose authority has been recognized by the learned counsel, in p. 86, 7, of his treatise, says, speaking of Cromwell: "finding that the whole army would be speedily in a state of anarchy and total insubordination, he determined, by a daring exertion of power, to remedy this alarming disorder."

After these citations, I feel myself fully warranted in saying, that if the word *insubordination* had been employed, instead of the phrase *insubordinate conduct*, no possible exception could have been taken to it, either as "a solecism in language," or indefinite in its signification. I will respectfully submit to the court whether it is possible even for the microscopic perceptions of the learned counsel to distinguish the difference between them. The signification of both is the same, and the obvious meaning to be attached to either form of expression is, such conduct as is wholly unsuitable to the relation which subsists between the person guilty of it, and his superior in rank and authority.

As has been already intimated, my object in multiplying quotations, has been not merely to shew the propriety and legitimacy of the expression employed in this charge, but also to establish the next position upon which I shall proceed to make an additional remark, that subordination is a high military duty, and insubordination a high military offence. It has been shewn that, by the 1st article of the regulations for the government of the navy, all commanders of vessels, &c. are strictly enjoined to shew in themselves a good example of virtue, honour, patriotism, and subordination.—Why this injunction, if those to whom the example is set are not bound to follow it: if insubordination or insubordinate conduct be not a military offence? To require that the military law should specially enjoin subordination, or prohibit insubordinate conduct, would be as wise as to require that a particular statute *should* be passed, specially forbidding the violation of any law, and requiring obedience to law. Every citizen, independently of special enactment to that effect, by entering into the social compact, by the very act of becoming a member of the community, engages to obey the laws of that society to which he has attached himself. In like manner, every soldier, by connecting himself with the service, assumes upon himself the obligation to perform the military duty of subordination.

A man accused before a court of common law, or before a court-martial, of treason or murder, may with equal shew of reason demand to have the particular statute pointed out, which prohibits those high offences. None such can be produced. In the law of God is found the prohibition "thou shalt do no murder;" it has not been introduced into any statutory code of social or municipal law, with which I am acquainted. The prohibition in them is tacit, the offence is described, and the punishment affixed.

It is said, however, that the language of this charge is too vague and equivocal: that it does not apprise the accused of what he is called upon to answer. Numerous authorities have been cited to enforce and illustrate this position. A reference to them will shew, that the learned counsel has required far more minuteness of detail than is warranted by any writer upon military law, or by the practice of courts-martial. Tytler, in the passage read by the learned counsel, p. 213, speaking of the only instance in which the British military code enjoins a particular specification, says—"it might perhaps be argued that in other crimes such specification is not essentially necessary: and it must be owned, that, in

practice, it has too frequently been dispensed with, and a general charge allowed, as of mutiny, disobedience of orders, disrespectful conduct to superior officers, &c. But the generality of such charge, although it may not be absolutely reprobated by the military law, or amount to an avoidance or annulling of the indictment, affords, in every case, a competent and weighty objection upon the part of the accused, which he may urge, to the effect of having the charge rendered special, by a pointed detail of the particular facts on which it is founded." The same idea, in the same language, may also be found in McComb's treatise. From this passage it clearly appears, that a prisoner may be arraigned before a court-martial, upon the general charge of mutinous conduct, disobedience of orders, and the like, without any specification; that such generality of language does not vitiate or annul the indictment, as it has been termed; and that the only course by which the accused can remedy or guard against the inconvenience to which he may be thereby subjected, is to require of the prosecutor particularly to specify the facts which he intends to prove by testimony. In the present instance, therefore, the accused would be unable to succeed in his present application to the court, if the charge had been as general as it now is, and unaccompanied by any specification of the circumstances in which the alleged criminality consists. If he apprehended inconvenience, or surprise, he might have applied to the court to require such detail, before he undertook to plead to the charges.

The learned counsel has indeed intimated that this cannot be done in this country, because one of the articles for the better government of the navy, prohibits any alteration in the charges, after the same have been furnished to the accused. To this remark, two very sufficient and conclusive answers present themselves. *First*—The statement of the prosecutor, under the order of the court, of the particular evidence by which he designs to substantiate the general charge, neither is an alteration of such charge, nor does it require such alteration to be made; it is a wholly extrinsic act.—*Secondly*—This provision is made for the sole protection of the accused, and no principle of law is more clearly settled, than that any one may renounce the benefit of a statutory provision designed for his own advantage. If then the accused had called for such a detail, as Mr. Tytler says he may, and the court had deemed the present a case in which he was entitled to a more particular specification of the facts designed to be given in evidence, such detail might have been furnished without any violation of the law. It is understood that precedents of this kind exist in our own service, and if none has yet been established, it would have furnished no valid exception to the application.

I shall now briefly proceed to cite a few cases in which this generality of charge has been allowed without exception. In the case of captain Shaw, the second charge was "unofficer-like and ungentleman-like conduct." In the case of sailing-master James B. Wright, the charge was "unofficer-like conduct." In the case of lieut. Benjamin Richardson, the charge was "conduct

unbecoming an officer and gentleman." In the case of sailing-master Daniel Dobbins, the charge was "ungentlemanly and unofficer-like conduct." In the case of midshipman Payne, the first charge was "defamation of character," and the second "unofficerlike, ungentlemanlike, and scandalous conduct." These cases are sufficient to shew that such a charge as has been preferred in the present instance, is as well established by precedent in our own service, as I have shewn it to be by a reference to writers on military law, of the highest authority and respectability.

It is however, to take an imperfect and incorrect view of this question, to consider the charge as perfectly insulated, and standing by itself. Connected with the specifications, which point out the particular instances in which the conduct of the accused is alleged to be insubordinate, and unbecoming an officer, he could scarcely have been induced to suppose that the particular dress in which he might choose to appear, the fashion of wearing his sword or hat, or the other minor directions from fashion, or the common routine of society to which reference has been sportively and facetiously made, could have been intended as the particular instances in which he had rendered himself amenable to this charge. All the vagueness and indistinctiveness alluded to by the counsel, vanish when a reference is made to the particular facts stated in the specifications of this charge. It is not by the charge alone, but by the charge accompanied by the specifications, that this point is to be determined.

To these specifications I shall now recur, and submit to the consideration of the court a few remarks upon the particular exceptions that have been urged against them.

The first specification charges the accused with writing, and transmitting to the President of the United States, and to the Secretary of the Navy, the letters therein referred to, which are alleged to be of an insubordinate and disrespectful character, thereby violating the respect due from every officer in the navy to the head of the department, impairing the discipline of the service, and setting a most dangerous and pernicious example.

It is objected to this specification, that it does not set out the language alleged to be disrespectful, and that it does not charge any offence, cognizable before a court-martial. It is somewhat singular that such an exception should now, for the first time, be presented to the consideration of a court-martial. In the case of lieutenant Abbot, the third specification is in the following words: "in that he did, during the time, on the station aforesaid, on or about the 11th day of January, last past, address a letter to the Secretary of the Navy, covering a communication written in his own hand-writing, or by his direction and request, containing numerous false, scandalous, and malicious charges, against his superior officer, captain Isaac Hull, calculated to deprive the said captain Hull of his honourable fame." Here a letter is referred to by its date only, as containing charges of a very serious character, against the individual therein mentioned, but not a word of that letter is recited in the specification. The charge and specifications, in that case, were drawn up and signed by captain

Porter, in his official character as navy commissioner.—The court, consisting of members, of whose intelligence and capacity, it would, on this occasion, be indelicate to speak, as three of them are now sitting on this case, tried lieutenant Abbot, found him guilty, and sentenced him to be punished on this specification. Neither the accused, nor the very eminent counsel concerned in his behalf, William Sullivan and Samuel L. Knapp, esqrs. ever conceived that it was necessary to set forth those passages in the letters, which were deemed reprehensible; and it escaped the observation of the Secretary of the Navy, now one of the judges of the supreme court of the United States. If the objection in the present case is sustainable, with how much propriety and force might it not then have been urged? So, in the case of lieutenant Kennon, in which also the same prosecutor preferred the charges, and, on the trial, of which three of the members of the present court sat, the first specification charged the accused in a still more vague and general manner, than captain Porter is now charged, "by falsely and maliciously publishing, in the Norfolk and Portsmouth Herald, of the 13th of December, and in the column dated the 12th of the same month, a letter purporting to be from me to him, when I never wrote such a letter." It is true that all objections arising out of defects of form, are, on that occasion, distinctly waived by the accused, who rested his defence exclusively upon the broad denial of the fact, but no intimation was given by any one, that such a specification was deficient in that particular. So in the case of midshipman Payne, under the general charge before mentioned of "defamation of character," the specification was, "that he did on or about the 2d of December, 1821, send or deliver to commodore Jones a letter, containing a number of charges, charging midshipman Purvyance with theft, cowardice and other disgraceful acts." In all these cases, whether because such an exception never occurred to the accused as sustainable, or because they preferred meeting the charge on the broad basis of fact, no such technical objections were urged. These now constitute precedents of high authority, and their weight is increased by the high rank of the accuser in the two first cases, the exalted character of the court by which they were tried, and the eminent abilities and legal erudition of the counsel, employed by the accused.

The second specification contains the charge of publishing to the world, what purports to be the proceedings of the court of inquiry, without the authority of the executive. Whether an officer is not guilty of insubordinate conduct, and conduct unbecoming his station, in making an appeal to the nation, and endeavoring to prepossess the community with the merits of his case, and to forestall public opinion, while that case is undergoing the examination and consideration of the executive, may be submitted to this or any other tribunal. The pernicious consequences that may result from such a step, cannot escape the notice of the most superficial observer, and can scarcely be exaggerated in the imagination of the most timid.

If this be reprehensible and erroneous, still more must it be to publish an inaccurate report of such proceedings. Whether such inaccuracies be deemed trivial or important, is a matter of subordinate consideration. The liability to fall into error, though inadvertently, affords one of the most conclusive reasons to shew the impropriety of any such unauthorized publication.

It is, however, alleged that the inaccuracies should have been specified. The authority of Tytler has been already referred to, for the purpose of shewing that a charge is not vitiated by being couched in general language, and unaccompanied with any specification, and the inference is irresistible that, if a specification is made, it is not an essential defect that it does not specify the particular inaccuracies which are contained in a publication specially referred to. The first specification, in the case of lieutenant Abbot, prepared by captain Porter, is in the following words: "in that, moved by a spirit of envy or base motive, he hath, upon the Boston station, and within a year, now last past, scandalously attempted to take from his superior officer, captain Isaac Hull, his good name." The second, "in that he has, during the time, and on the station aforesaid, made numerous scandalous and false insinuations against the official character and conduct of his superior officer, capt. Isaac Hull, calculated to stamp his name with opprobrium and infamy." In the second specification in the case of lieutenant Kennon, the accused is charged with "having, within a year, last past, maliciously used base means for defaming my character, to wit: by publishing, or causing to be published, in the Norfolk and Portsmouth Herald, a statement, bearing his name, containing falsehoods which were calculated to injure my character, and which he permitted to remain without being publicly contradicted, until his attention was drawn to the subject, by the remarks in a Georgia paper." "By repeated attacks made by him on me, in the public newspapers, and by falsely declaring in the Herald, that he never made me a reluctant apology, and publicly recalling it after he had obtained all the advantages resulting from a reluctant apology made to me." "By having used towards me, in a public print, a term which is seldom applied to other than pick-pockets, rogues, gamblers, &c." Surely if these specifications are not utterly illegal, from their vagueness and generality, from the looseness of their references, and the uncertainty as to the real ground of accusation, those, now under consideration, must be beyond reproach. The sufficiency of those charges, is established by the authority of captain Porter, who drew them—of the court, which tried the accused upon them—of the department, which directed such trial, and approved the proceedings in both cases.

The fourth specification is supported by the same high authority.

The fifth admits of reference to precedents to support it equally unobjectionable. I shall cite but two. In the case of captain Shaw, already referred to, the accused was found guilty of so much of the eighth specification as alleges "that captain Shaw, contrary to his duty as an officer, did expose to view, and suffer chaplain Cheever Felch and other officers of the navy, to examine and peruse his official communications with the Navy Depart-

ment." For this offence was he punished. If that be a military offence, cognizable before, and punishable by a court-martial, how far more reprehensible is it to submit orders and instructions from the government, not merely to one or two brother-officers, but to publish them to the world, through the medium of a pamphlet and the public gazettes. I shall trouble the court with a reference to but one more authority on this point—it will be found in the thirty-fourth and thirty-fifth pages of the report of the trial of lieut. Kennon, where it will appear that captain Porter, under examination as a witness, expresses his decided opinion, that it is highly improper to publish orders received, even from a superior officer in the service, and that he would not commit such an act.

The foregoing references, as so completely decisive upon another point, raised by the accused on this occasion, viz: that this specification is vicious, inasmuch as it embraces so large a period of time, within which the offence is charged, to have been committed, that it will be unnecessary to examine that question further. In both the cases of lieutenants Abbot and Kennon, the offences are charged to have been committed "within a year now last past." In the present case, this specification charges the publications to have been made between the first day of October, 1824, and the fifteenth of June, 1825. If, in the cases cited, the specifications were right, in this, they cannot be wrong.

It will not be denied, that the language of our naval code, is in some respects, loose, vague and inaccurate; and that the defects of the system are numerous and important. Vague and inaccurate, however, as it confessedly is, it contains one sweeping clause, sufficiently comprehensive, to embrace this charge, and each and every of the specifications under it. "All crimes, committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." This section is a legislative recognition, that there may be crimes committed by persons belonging to the navy, not specially embraced in any of the navy articles; and such are to be punished, as I understand the latter clause of the section, by the instrumentality and at the discretion of a court-martial. Such cases are those in which, to use the language of Tytler, the court assumes the functions "both of legislators and judges."

Before the court shall determine, that the charge and specifications in the present case are vicious, for want of form and fulness of detail, I must beg it to pause, and to consider what it is that is required.—What if these objections are valid, would be requisite to free the proceedings from their force. In the first specification, it would be necessary to set out all the letters therein referred to by date, being five in number, and some of them of considerable length. In the second, the entire pamphlet published by the accused, must have been introduced, because that is specially referred to. In the third, the real proceedings of the Court of Inquiry should have been set out, and the variances between them and the publication distinctly pointed out.

In the fourth, it would be required that all the remarks, statements and insinuations, disrespectful to the Secretary and the Court of Inquiry, should have been introduced verbatim: And in the fifth, that all the papers therein referred to, should appear in the charges. Such is the length to which these objections extend.

If this were necessary or even useful in assisting the accused in defending himself from the charge, if it were required by positive law or enjoined by the practice of Courts Martial, no objection to such a requisition ought to be listened to. When however the positive law is silent on the subject, when as has been shewn, the practice is wholly different, when no one reason has been or can be assigned, why this should be done, this Court can scarcely hesitate to declare that the ground assumed by the accused is wholly untenable.

It may not be necessary to refer to objections which were incidentally urged by the counsel when he, to use his own form of expression, enunciated his ideas upon this subject, but which are not very zealously pressed. It was understood they had been waived, but if so, for what purpose they are again and again recurred to, is not distinctly perceived. I allude to the objection that the accused was not furnished with a copy of the charges upon which he was to be tried, and with a list of the witnesses that would be adduced against him. The accused did intimate at the opening of the court when he was arraigned upon this trial, that he had not been furnished by the government with a copy of the charges to which he was now called to answer, and did solemnly call upon the court to furnish him with such copy. It did however appear upon his own exhibition, that he had been regularly furnished at the proper time and in proper form, with a paper, which, with the exception of two letters in one of the words, was a literal transcript of the charges that had been read. In giving the date of one of the letters alleged to be insubordinate and disrespectful, the copying clerk had inadvertently dated it the *thirtieth* instead of the *thirteenth* of April. No other variance has been, or it is believed can be, discovered.

As regards the right of the accused to have a list of the witnesses furnished him, it is wholly denied. That such a doctrine is laid down by some of the writers on Courts Martial is conceded, and probably this practice may prevail in the army to some extent, but it is apprehended that it is wholly unknown to the navy practice, and the high authority of Sir Charles Morgan, the distinguished Judge Advocate General of Great Britain, is decidedly against it. In p. xii of the advertisement to the 3d. Edit. of Tytler, that experienced gentleman says, "I have never understood it to be the duty of the Judge Advocate in all cases to furnish a prisoner, previous to the trial, with the names and designations of the witnesses, by whose testimony any act objected against him is expected to be proved; nor on the other hand, do I consider that it is requisite for the prisoner to furnish the Judge Advocate with the names of any other witnesses than those whom he wishes to be officially summoned. I think such communica-

tion might possibly in some instances lead to inconvenience on either side." The navy articles are wholly silent upon this subject. They require that he shall be furnished with a copy of the charges and specifications, but do not enjoin that he shall be furnished with a list of the witnesses. At all events when the objection is formally presented, it will be time to discuss and decide upon its validity.

Upon the whole I submit with great respect to the court my clear and unhesitating opinion that each and every one of the specifications, as well as the charge, are sufficient both in substance and in form; that they do specify offences of a military character for which the accused may be arraigned and tried before a Court Martial.

It is to be regretted that such a discussion should thus prematurely have been required. Every objection now taken could have been taken with equal efficacy and propriety in the defence. It would then have been analogous to the motion in criminal courts to arrest the judgment. The argument into which I have thus unexpectedly and with very limited opportunities for research and consideration been driven, this full and distinct enunciation of my opinion, and the premature decision of half the case by the court, would have been postponed to a more suitable period. The course pursued by the accused has however imposed upon me an arduous and responsible task, and I should feel myself unworthy of the situation which I occupy, before this court, were I to shrink from the discharge of any duty, however unpleasant or however irksome.

REMARKS

On the decision of the court, prohibiting a direct reply to the argument of the Judge Advocate, in answer to the preliminary exceptions taken on the part of the accused: and also on the principal points, attempted to be established by that argument.

This decision of the court, and the strange *dilemma*, in which it placed the Commodore, have already been stated.*(a)* It has been seen that though a direct reply, as in the discussion of *preliminary* exceptions, was prohibited, yet it was admitted that the argument of these exceptions might be resumed, and pushed, by way of reply, to any extent, in the *defence*: and so, in fact, when the general defence came to be delivered, was it done, without interruption or objection. The necessity, which certain statements of the Judge Advocate had imposed upon Com. P. to repel what had been there asserted or insinuated, to the prejudice of his personal motives and conduct, is set forth in his memorial, already before the reader:*(b)* and the reasons by which he was actuated, in that instance, will be more obvious, when the answer of the Judge Advocate, comes to be seen *in extenso*; in connection with the comments upon certain passages of it, in the defence.

That the situation, in which this *postponement* of a *reply* till the *opportunity* should be afforded for it, in the general and final defence, placed the accused, was altogether *unprecedented*, and, supposing a real necessity for such a reply to exist, extremely embarrassing, was supposed to be clear and indisputable.

The right to the reply was claimed, as clear upon general principles, and according to all judicial practice and usage: 1st. as belonging to the party who had made the motion, and an opening argument to sustain it: 2dly. as being claimed by that party, with this general right of the *proponent*, enforced and corroborated by particular circumstances, which are usually deemed sufficient to concede a *special* right of reply, to a party not otherwise entitled: to wit, the introduction of *new matter*, and the citation of numerous authorities, which he has had no opportunity to answer. Nothing is more usual than to stop a party from the further prosecution of an argument, when the court's opinion is already made up on his side: but, here, serious *doubts* are professed to have been entertained: insomuch as to require the assistance of the Attorney General to solve them; and the question is to be remitted to his decision; with a partial view of the grounds upon which the exceptions of the accused rest; since he was to be deprived of the benefit of such additional reasons and illustrations, as might have been advanced, in reply to the arguments and authorities of the Judge Advocate.

But the essential right to justify the original grounds of exception, by additional reasons in reply to the answer, put in by

(a) Ante, p. 38–44.
(b) Ante, p. 40.

the Judge Advocate, was not disputed;—it was distinctly admitted. The *time* and the *occasion* only were objected to:—if he postponed it till the *defence*, the accused might then range, uncontrolled, over the whole ground.

Now whether this were any thing more than a practical denial, under a merely specious and illusory admission of the right, let circumstances decide.

The question, raised and argued upon these exceptions, called for a *preliminary* decision, upon the validity of the 2d charge and its specifications, as exhibiting no accusation of any offence known to, or cognizable under the naval articles of war: a question to be decided, upon the *terms* of the charge and specifications, without reference to the *evidence*, to be adduced in support of the *facts* specified: and *before* the introduction of such evidence. The defence, for which the argument in support of these preliminary exceptions was postponed, could not, in course, be delivered, till *after* the evidence had all been produced and examined: and after the *decision* of the *preliminary* exceptions: and therefore the decision must necessarily *precede* the *argument*, the force and validity of which was the very matter to be decided. The argument, at the time to which it was postponed, could, at the utmost, have availed nothing, but to persuade the court to reconsider and reverse its own opinion: and upon what principle of justice to the party, convenience to the court, or consistency of judicial procedure, the party shall, of predetermined purpose, be laid under such disadvantage, is inconceivable. 'Tis certainly not uncommon for a court to entertain a motion, and to listen to arguments, directed to the reconsideration of decisions, made after full *discussion*, and mature deliberation: but this is generally the result of extraordinary and *accidental* circumstances, of novelty or difficulty in the original question; or of the subsequent suggestion of new and important reasons, not before presented to the consideration of the court. But, that the party should be told, when he offers his reasons, to the consideration of the court, while the question is actually under discussion: "though we are in great doubt, we cannot hear you now: wait till we have decided: and then we will hear you; not to clear up our *doubts*, but to convince us, if you can, of our *error*:" is certainly a novelty in jurisprudence. The argument of *exceptions* to the sufficiency and legal effect of the *terms*, in which a criminal charge is couched, was sufficiently awkward and misplaced, if not absolutely irregular, under any circumstances, when introduced into the defence, upon the trial of the general issue, or plea of "not guilty:"—but to be so introduced after a deliberate and well considered decision against the exceptions, would have been still more embarrassing. Com. Porter therefore determined, as before stated, to abandon the stand, which he had taken, *in limine*; and to reserve his objections, or such of them as might still be available, (whether upon principle or by concession) under the general issue.

The complaints of the inconveniences and embarrassments, arising from the court's being called upon to decide the legal sufficiency of the charge, before they entered upon the examination of the evidence, were heard with surprise. If the judge advocate had rested entirely upon the broad ground, that it was wholly immaterial, in what terms the accusation was conceived; whether it imported any offence cognizable by a court-martial; or gave any notice of the nature of the real charge, and of the facts to be alleged in support of it; or if he had utterly denied the authority of the court to examine and decide the legal sufficiency of the accusation, *in terminis;* his course would, at least, have been intelligible. But when it is contended that the exceptions to the legal sufficiency of the accusation, *in terminis*, were more properly triable and equally available, under the *general issue;*—and are then triable in a mode analogous to a motion in *arrest* of *judgment!* rather than to a motion to *quash* an indictment; a proposition is *enunciated*, which is equally perplexing to the professional lawyer, as to the plain man of common sense.

Upon principles of mere conveniency and consistency, it should seem quite clear, that if the accusation is to fall, at any *stage* of the procedure, from its own inherent defects and vices, independent of the strength or weakness of the *evidence*, on which it rests, it should be discussed and dismissed, *in limine*, before the time and labour of the court shall have been expended, in a fruitless examination of evidence; which must be utterly nugatory and inconclusive, if there be no valid accusation or charge, to which it can be applied. Once admit that the validity of the accusation may, at any stage of the proceeding, be tried by its own *terms;* and all evidence, offered under it, be received or excluded, according to the sufficiency of such terms; and it necessarily follows that the most *convenient* time, and the most consistent with all the analogies of judicial practice, for discussing and deciding the question, is *before* the examination of the evidence.

The complaint, that this discussion had been *prematurely* forced upon the court; whether it refer to the analogous principles of judicial practice, in general, or to such as are supposed to be peculiar to courts-martial, is equally difficult of comprehension. There is no civil court, known to the Roman, British or our domestic jurisprudence, to which *preliminary* exceptions, in some form, to the sufficiency and validity, *in terminis*, of the plea, by which either the matter of the complaint or of the defence is set forth, are not familiar, both in matters of civil and of criminal judicature: the effect of which exceptions, if sustained, is to *quash* the proceeding, upon an insulated view of the plea itself; without adverting to the evidence by which it is sustained. That such a course of practice is familiar to courts-martial, both in Britain and in this country, is vouched by the highest authority; if the actual experience of military men, and the notoriety of the thing required any corroboration from authority for the well established and well known practice of "*dismissing* a charge and throwing it out, altogether, as irrelevant.*(a)*

(*a*) Tytler, Macomb, ch. 1, p. 15.

The proposed reference of this discussion to a motion *in arrest* of *judgment*, before a court-martial, by no means diminishes the difficulty: but the idea of introducing such a motion, in the *defence*, that is, in the *trial* of the *general issue*, makes it absolutely incomprehensible.

How is a motion in arrest of judgment to be made, before a tribunal like a court-martial, the members of which unite, in their own persons, the character both of judge and juror? In tribunals where these functions are separately exercised by judges, who decide the *law*, and by jurors, who decide the *fact*;—where the first draw the legal consequence, and pronounce the *judgment* of the law, upon the *facts* found by the other; where the jury, by a distinct verdict, *convicts* of the fact; and the court, upon that fact, passes sentence of condemnation; why it is all in course, if the frame of the indictment be thought defective and vicious, to interpose a motion of *arrest*, between the *conviction* of the jury and the *judgment* of the court. This is plainly incompatible with the organization and practice of a court-martial: which, in the very act of convicting the accused, passes upon every question of law and fact involved in the case. Was it ever heard of, that a court-martial stopped at that part of its judgment which finds the prisoner *guilty* of the charge; in order to announce the verdict to him, and call upon him to declare whether he had any thing to say, why *judgment* should not pass against him, according to the practice of the civil courts? On the contrary, is not the practice of courts-martial invariable and notorious, immediately to pass on to the final sentence, after finding the prisoner guilty?—who knows not whether he be acquitted, or convicted, till the promulgation of the final sentence.

When it is considered that, according to the practice of all courts, the general issue involves simply the trial of the truth of the *facts* put in issue; it was sufficiently difficult to conceive that any question, depending on the frame and matter of the charge or indictment itself, could be entertained: and accordingly the counsel for the accused appears to have been entirely aware, how much more safe and consonant to the analogies of jurisprudence, in general, it was to propound, *in limine*, his exceptions to the terms of the accusation itself. But when he is told that such exceptions may and ought to be taken advantage of, on the trial of the *general issue;* and then as a motion in *arrest* of *judgment;* such a confusion of ideas ensued, as nothing but some positive and overruling authority of law or precedent could settle.

The exceptions, in this case, were professedly urged, as in the nature of the ordinary motion, in a court of common law, to *quash* an *indictment;* to which motion, the one, equally familiar to courts-martial, to dismiss a charge as irrelevant, is in such strict analogy. But it is objected that a motion to quash, in a court of common law, is entertained only, when the indictment presents some of the lighter species of misdemeanors; but that indictments for graver offences are not so summarily disposed of: the party being turned over to his motion in arrest of judgment. The power and jurisdiction of the court to quash a defective in-

dictment for any offence, is not disputed;—'tis a mere matter of practice, turning upon *the discretionary* exercise of the power: as applied to cases sufficiently light to admit of that summary mode of decision; distinguished from such as are of so serious a character as to require a more deliberate and solemn investigation. It may then be pretty clearly inferred that this distinction between the cases, to which the one or the other mode of exception applies, is merely artificial, and, in a great measure, arbitrary: depending on the views of expediency and convenience, peculiar to the organization, and regulated by the discretion of particular courts. The fact is well known, that the distinction depends not upon any fundamental and positive law; but is one of a system of rules which have been gradually and successively unfolded in practice, as experience, from time to time, suggested the necessity of them, to the *discretion* of the courts of law. But before this arbitrary distinction, between such cases as are light enough for a motion to quash, and such as are grave enough to require a motion in arrest of judgment, could prevail in the present question, several postulates must be conceded. 1. That courts-martial, in the exercise of a like discretion, have also distinguished the degrees of *military* offences, by a scale, graduated to the more or less summary modes of deciding upon their character and import, as described in the body of the accusation. 2. That the second charge and its specifications, do indicate an offence of the graver kind. 3. That a motion, in arrest of judgment, or one analogous to it, can prevail in a court-martial. All of which are conceived to be utterly incompatible, either with the peculiar constitution, or with the established law and practice of such courts.

It already appears how absolutely incompatible with the constitution and practice of a court-martial, is the motion in arrest of judgment: which, indeed, one of the judge advocate's objections against the motion to *quash* or *dismiss* the charge, has made more palpable; when he relies upon the injunction, contained in the judicial oath of the members, not to divulge the *sentence* of the court, till approved by the proper authority: an objection which, if it have any kind of application to the *dismission* of a charge, as irrelevant, must apply with incalculably greater force to the disclosure of the *conviction*, under the general issue, in order to allow the prisoner to interpose his motion in *arrest*, between *conviction* and *sentence* of condemnation. But, on the other hand, a preliminary exception to the legal effect and sufficiency of the accusation, *in terminis*, or a motion to *dismiss* the charge as irrelevant, is strictly analogous, not only to the motion to quash an indictment, to which it has more particularly been assimilated, but to the course of procedure and practice, admitted to prevail in all courts, whether of civil or criminal judicature: where, in some form or other, to be determined by the constitution and modes of practice peculiar to each court, preliminary exceptions to the form and matter of the accusation or charge itself, are universally entertained. 'Tis loss of time and labor, however, to be arguing from analogies, however strong in reason and au-

thority, when we have the clear and ruling authorities, above-cited, to prove that it is the actual law and practice of courts-martial to *dismiss* charges, for defects of form and substance.

The difficulty, from the judicial oath of the members of this court, as opposed to the preliminary discussion and determination of these exceptions, vanishes at the first reflection.—Is an order of the court, dismissing a charge as insufficient or irrelevant in terms, "the *sentence* of the court;" the premature disclosure of which, is intended to be prevented by the oath? And if it be, what *necessity* is shown for the disclosure of it, till it be *approved* by the proper *authority?* It might be well maintained, upon reason and analogy, that the *sentence*, intended by the oath, is that of condemnation or acquittal, under the general issue. But that question is wholly immaterial to the present argument;—for if the preliminary decision, and the final sentence be specifically distinguishable, the oath applies not to the former: if identical, then the rule, prescribed by the oath, is just as practicable and operative, under the one form of procedure as the other.

An objection, considered as novel and extraordinary, now remains to be noticed.

After the Judge Advocate had undertaken to show that a motion to *quash*, was precluded by the rule of practice, adopted in the common law courts; which admitted of such a motion, only in a particular class of offences; after arguing that the motion in arrest of judgment, was the analogous and proper remedy, for the alleged defects in the second branch of the accusation: though he had utterly failed to advert to any analogy between the degrees of the offences, treated in the courts of common law, as proper subjects for either motion, and military offences: yet it was supposed that he would have been content to set aside the motion to dismiss the charge; and to turn the party over to his motion in arrest of judgment.—Far from it: the benefit of neither motion is allowed: but it is contended that these exceptions, urged, as they were, expressly and professedly, as in the nature of a preliminary motion to *quash* or *dismiss* the indictment or charge, shall be converted, by the mere act of the court, into a *demurrer;* and be followed by all the strict and technical consequences of a demurrer, in a court of *common law:* in so far as that if they be overruled, the act of propounding and maintaining them shall be held as a conclusive admission of the fact: and it is even matter of serious doubt, whether this consequence is not so imperiously demanded by the law, as that it is not in the power of the law-officer of the court, to whom the conduct of the prosecution is entrusted, to waive such consequence; and admit the party to plead to issue.

How any analogy, between these exceptions and such a demurrer, may be brought about, is not explained, and is thought to be wholly inexplicable. No authority upon military law, or the practice of courts martial, has the remotest allusion to any such form of pleading as a *demurrer*. Any other plea than the general issue of not guilty, is extremely rare: though the pleas

of a former acquittal or conviction of the same offence, of a pardon, and to the jurisdiction, are recognized as admissible before a court martial.(a)

A techical demurrer, to be followed, if overruled in law, by the consequence of a conclusive admission of the fact, is peculiar to the practice of the courts of common law; and, it is believed, has no precedent or analogy in the practice of any other courts, or in the rules of any other system of jurisprudence. In the courts of the *civil* or *Roman* law, a form of proceeding, giving to the party every advantage of a demurrer, was used under the name of *exceptions;* which were either *peremptory* or *declinatory*, according as they went to the substance or the form of the action; or were followed by an absolute, or dilatory judgment. But if such exceptions were overruled, they were never held as admissions of the fact; the party excepting was still permitted to go on to the *contestation of suit;* which was equivalent to the *general issue* in courts of common law; and then the whole merits were discussed. So the courts of equity, which both in their forms of procedure and principles of jurisprudence, had been modelled more after the *civil* than the *common* law, adopted the form and the name of the *demurrer;* but discharged of its common law-consequence, of standing as a conclusive admission of the *fact*, when overruled in point of *law:* so that, under the name of a demurrer, the exceptions, peremptory or declinatory, in the courts of the civil law, are essentially preserved; and the demurrant is left at large, in his answer, upon all matters of fact. Now in courts-martial, where demurrers, as a form of pleading, are wholly unknown, it must be extremely difficult to find any analogy, which shall annex their legal consequences to *exceptions*. So in the published state-trials before the courts of session & justiciary in Scotland, where the civil law prevails, we find the advocates for the *pannel*, or accused, *pleading* to the *libel*, before they join issue on the fact; and when their plea to the libel, (analogous to the exceptions of the civilians, and to the demurrer of the common lawyers,) is overruled, they still go on to plead to the fact. That the accused, in all courts, and under all systems, should have the means and opportunity, in some form, to question the legal sufficiency of the charge itself, is indispensable to the due administration of justice; and that, in courts-martial, which are supposed by Tytler, to be more analogous, in their constitution and forms of procedure, to the courts of the *civil* than of the *common* law, such exceptions should be admitted upon the terms usually practised in the great majority of judicial tribunals, rather than adopt the narrow and technical rules of practice peculiar to any one set of courts, is but reasonable.

The question, indeed, should be considered as settled by the fact, that a *demurrer* has never been admitted nor mentioned among the pleas available before a court martial: and, in truth, demurrers to *indictments*, have fallen into disuse; since the same advantages may be taken, as well in the courts of common law as

(a) Adye. pt. 2, ch. 2. p. 118.

in courts martial, by the more summary motion to *quash* or *dismiss* the indictment, or charge, or to arrest the judgment; without any danger of being concluded to the fact, if found to be mistaken in the law. Even in the common law-courts, this is, by no means, admitted as a well settled principle, in *criminal* cases; great authorities have differed on the point; and it might well be maintained, that the weight of reason and authority was against the extension of the strict and technical rule, from mere questions of *property* to *criminal prosecutions*. Sir W. Blackstone (4 com. ch. 26, p. 333–4) speaking of the differences of opinion upon this point, says, "Some have held,(*a*) that if, on demurrer, the point of law be *adjudged against the prisoner*, he shall have judgment and execution, as if *convicted* by verdict. But this is denied by others,(*b*) who hold that, in such case, he shall be directed and received to plead the general issue, *not guilty*, after a demurrer determined against him." The author then goes on to argue that the latter opinion is more reasonable, and more conformable to the principles of criminal judicature, in analogous instances. He remarks, however, that upon this *doubt*, demurrers to indictments are seldom used. The distinction between *civil* actions and *criminal* prosecutions, is clearly established, in respect of special *pleas* in *bar*: as *autre fois acquit*, *autre fois convict*, pardon, &c. &c. which, in the one case, are *conclusive* if found against the defendant; but not in the other, against the prisoner. This is fully and perspicuously explained by the same author.

"Before I conclude this head of special pleas in bar, it will be necessary once more to observe; that though in *civil actions* when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him; (as if, in an action of debt, the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet*, as he might at first: for he has made his election what plea to abide by, and it was his own folly to choose a rotten defence;) though, I say, this strictness is observed in civil actions, *quia interest reipublicæ ut sit finis litium*: yet in *criminal prosecutions*, *in favorem vitæ*, as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court; still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty. For the law allows many pleas, by which a prisoner may escape death; but only one plea in consequence whereof it can be inflicted; *viz*: on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury."(*c*)

It would have been strange, indeed, if courts martial, which are exclusively courts of *criminal* judicature, and which had not,

(*a*) 2 Hal. P. C. 257. (*b*) 2 Hawk. P. C. 334.
(*c*) 4 Black. Com. ch. 26. p. 338.

in their original constitution, been shackled with the same technical forms of pleading and rules of practice, which the common law courts have been endeavoring to shake off, should have gratuitously adopted them; and have pushed them even to extremes, from which the more liberal and improved practice of the other courts had receded. Accordingly we find that all these liberal and enlightened rules, so ably and perspicuously expounded by Sir William Blackstone, have been specifically recognized and adopted as the law and practice of courts-martial.(c)

But the difficulty, thus gratuitously raised in *anticipation* of the court's decision upon these exceptions, was the more surprising, since no one, to whom the objection itself could have occurred, can be ignorant, how essentially the long prevailing practice of the courts of law has relaxed the strictness of the ancient rule, even in *civil* actions; and gives the party the full benefit of his defence upon the merits, by allowing him, even after the point of law has been decided against him, to withdraw his demurrer, and plead to issue. Yet, it seems, a *court-martial*, which, in its original constitution had not been trammelled with these technical forms of special pleading, was under a necessity to deduce and assimilate their harshest and narrowest principles, from far fetched and strained analogies, to its own peculiar system of jurisprudence; to seize upon the *apices juris*, which the civil courts had abandoned:—nay more,—after having rejected the meliorations, by which these rigors had been mitigated by the gradual progress of improvement in judicial polity, in the courts to which they were indigenous, to be so tenacious of them, as to refuse the privilege of an amendment of the pleadings, even with the express *consent* of the only party, entitled to take advantage of any slip in pleading, or mistake of the law. Such, at least, was one of the questions gravely propounded to the attorney-general of the United States.

But, after all, the question which, at the first blush, produced such amazement, returns with unresolved perplexity:—by what species of dialectic alchemy, exceptions, taken expressly as in the nature of a motion to quash or dismiss an indictment or charge, had been elaborated into a technical *demurrer* to an indictment. To say that a motion to quash an indictment, for any of a certain specified class of offences, as treason, felony, &c. &c. is not entertained in a court of law; because it is not expedient to dispose of such offences, by so summary a procedure, but to turn the party over to his motion in arrest of judgment; is only to say that the offence described in the second charge and its specifications, is identical, or exactly equal, in degree, with the enumerated species of offences punishable in a court of law, from which the motion to quash an indictment is excluded; and, therefore, that the present motion should have been simply *overruled*; and the question referred to some more solemn mode of decision. For certain it is, that the analogy, now contended for, between a motion to quash, and a demurrer to an indictment, holds not

(c) Vid. Adye, Pt. 2. ch. 2, p. 162-3.

in the courts of law: since, according to the authority cited, if the motion be made in a case, involving any of the higher species of offences, it is simply rejected; still leaving open to the party, the various other remedies of plea, demurrer, or motion in arrest of judgment. To say that all this results from the analogies of jurisprudence, before deduced by the counsel for the accused, in support of his exceptions, only supplied new matter of astonishment: because the reasons and authorities, upon which the exceptions had been founded, were introduced by the counsel, with an express disavowal of all "the nice and abstruse subtleties, and the merely technical rules, peculiar to some branches of practice in the courts of common law;" and of all "the rules or axioms of the *civil* courts," but such as had been *distinctly* invoked to the *practice* of "*military* tribunals;" or such as, being founded in the *immutable* principles of right and justice, were necessarily common to both; and could not be dispensed with, by either, without consigning the subjects of its jurisdiction to an unqualified *tyranny*. Accordingly, there is not found, in the argument of the counsel for the accused, after a critical review of the same, from beginning to end, a single proposition of law, cited in support of the exceptions, from any but approved authorities upon the law and practice of *courts-martial* exclusively: and not one, but what is borne out by such authorities, express and positive to the point.

If the skill of the attorney-general (perfect as talent, learning and experience have made it,) could have unravelled the tangled skein of all this analogical ratiocination, 'tis much doubted whether any other were competent to the task; and it is much to be regretted that the object of a reference, so judiciously made, should have failed.

Now, reverting to the leading principles, upon which these exceptions and the opposing arguments of the judge advocate turn, the whole may be resolved into two questions: 1st. The *jurisdiction* of a naval court-martial; and the nature of the offences cognizable by it: 2dly. The terms in which it is necessary to charge and to specify such offences; in order to fulfil the two fold end, of bringing the matter of the accusation within the limited cognizance of the court; and, at the same time, of informing the prisoner, with due precision and minuteness, of the nature of the accusation, which he is to answer, and of the particular facts to be adduced in support of it.

1. The very plain and undeniable proposition (as, at the first blush, it appeared to be) that the jurisdiction of the court was necessarily limited to the particular class of persons and offences, enumerated and described in the naval articles of war; the reasonableness and necessity of the rule, and the authorities, by which it is recognized and enforced, have been all fully developed and explained by the counsel for the accused. The opposite proposition, (which appears, indeed, to have been, in some degree, anticipated, but certainly not to the extent, in which it was afterwards enunciated) is that the jurisdiction of a court-martial is limited only, in respect of the *persons* subject to it:

but that, as to *offences*, it is unlimited; and may exercise a sort of legislative discretion to punish any action of a person in a military capacity, as an offence; if, in the opinion of the court, it tend to the prejudice of good order, subordination and discipline. For this latter proposition, the authority of a writer, frequently quoted in the course of the discussion, and cited as the main pillar of the opposite rule (in so far as it depended, at all, upon *authority*) laid down by the counsel for the accused, is relied upon by the judge advocate. This writer is quoted, as saying, that, though no crime, which is mentioned and defined in the articles of war, is punishable, in any other *manner* than in that specially directed by those articles; yet it does *not follow* that there are no crimes punishable by a court-martial but such as are enumerated and declared to be punishable by the articles of war: and further, that there are offences, which admit of no *precise definition*; and yet, in the military profession, are of the most serious consequence, as weakening and subverting that principle of *honor*, on which the proper discipline of the army must materially depend: that, of these, a court-martial, which is, in the highest sense a *court* of *honor*, are themselves *appointed* the sole judges, or rather the *legislators*; for it is in their breasts to *define* the *crime*, as well as to award the punishment.(*s*) Such phrases are indeed to be found in the passages cited from the essay of Mr. Tytler; but they are wholly misapplied, when detached from the context, and propounded as generalized rules of law. As such, it was, with the utmost surprise, that they were heard cited, as upon the authority of Mr. Tytler's essay; so utterly inconsistent as they are with the rules so distinctly and repeatedly propounded by himself, and by three other authors of equal authority; two British, and one American. That "the crimes cognizable by a court-martial are *pointed* out by the mutiny-act, which *every* man is or ought to be *acquainted* with:" that "martial law is laid down in so plain and simple a manner, that every military man is or ought to be acquainted with what are thereby *deemed crimes*:" that, "in the accusation or charge, the offence must be set out with certainty and precision, so as to bring it, *clearly* and *unequivocally*, within the *terms* of the law or articles of war by which it is made punishable:" are the terms of the rule, as cited from Mr. Tytler and the three other authorities, who have all enunciated it, with undeviating unanimity.(*t*)

These wholesome and necessary rules are particularly illustrated and enforced both by Mr. Tytler himself, and by general Macomb, who respectively assign the reason why it is not necessary, in the body of the charge, to refer to the particular article of war, supposed to be violated: which is that "the *specification* of the criminal *act* itself is sufficient intimation to the prisoner, of the *law* by which it is *punished*; and the prisoner may always dispute the *relevancy* of the charge, and call upon the prosecutor

(*s*) Tytler, p. 107–8–9.

(*t*) Adye, p. 62, 225, & 127–8. 1 M'Arthur, p. 23, s. 5. 2 id. p. 6—12. Tytler, p. 206–18. Macomb, p. 61–8.

to show in what respect it falls under the *prohibition* of the *law*."* In the advertisement to the 3d edition of Mr. Tytler's essay, are found various remarks by the late Sir C. Morgan, judge advocate-general of England, upon certain passages of the essay, which he thought required either correction or illustration. Among others, he remarks upon what is said, relative to the propriety of referring, in the charge, to the particular article of war, supposed to be violated: in which he agrees with Mr. Tytler, that it is not necessary; but with one exception; and that is where the offence is against any article of war, which is *mandatory* of certain duties, it is necessary expressly to refer to the particular article, in the charge: otherwise where it is against an article merely *prohibitory*. In explaining the distinction, in this respect, between *mandatory* and *prohibitory* articles, he most clearly adopts and confirms the general doctrine and rule, so emphatically and unanimously laid down by Mr. Tytler and the other authorities, as to the limitations of military jurisdiction. Upon this point he remarks, that it is not expedient to *express* a crime to be in breach of the articles of war, unless it be of such, as are *mandatory* of certain duties; that the finding of the prisoner *guilty*, implies that he is punishable by *some* or *other* of the articles of war: that it is not necessary, in every case, but in very *few*, to set forth the article, on which the court rest their judgment; but it certainly is proper that the court should be satisfied that their *judgment* is *warranted* by some *article* of war.†

Well might it have been presumed, therefore, that the text of Mr. Tytler had been wrested from its proper connection and subject, by which the limitations and the application of the passages quoted should have been determined; when he is represented as ascribing this unlimited jurisdiction to courts-martial, of defining, at pleasure, what acts shall be added to the enumerated list of offences, punishable under the articles of war; and of *legislating* on the important subject of crimes and punishments. Accordingly, upon reference to the context, we find the whole clearly and rationally explained. In the first passage, which admits the existence of military "crimes punishable by a court-martial, and not enumerated and declared to be punishable by the *articles* of *war*," reference is expressly had to the peculiar power granted to the crown, by the mutiny-act, to make and issue *regulations* for the *army*, independent of the established articles of war; and having all the binding force and effect of military law: with certain limitations as to the extent of the *punishment*, that may be inflicted under such regulations. The same matter is more fully and clearly explained by Mr. M'Arthur; who, in his treatise, takes a comparative view of military law, as applied both to the *military* and *naval* establishments of Britain. He shows that, while the *naval* articles of war have been established by successive acts of parliament, from the reign of Charles the 2d, to that of George the 3d, and have been digested with unusu-

* Tytler, 216–17. Macomb, 67–8.
† Vid. Adv. to the 3d edition of Tytler, p. 19

al care and system; while they are irrepealable and unalterable, but by the authority of parliament; and enumerate and define *all offences* cognizable under them; with the appropriate punishments annexed to them: there is this curious anomaly in respect to the *army*; which is governed by articles of war, not instituted by any act of parliament; but at the discretion of the crown; and repealable or alterable at the pleasure of the crown: besides the general power of the crown to superadd the penal *regulations*, just mentioned. In this respect, the author very justly expatiates upon the advantage which the *seamen*, in the British service, have over their brethren in the *land-service*.(*u*)

The second passage, cited from Mr. Tytler's essay (p. 109) to prove the *legislative* power of courts-martial, as courts of *honor*, to define the crime and award the punishment, is equally misapplied to the present argument; and such misapplication is clear from the context: though, even, as it stands so connected, its accuracy and precision cannot be entirely defended. He refers these terms expressly to some peculiar and special provisions, found both in the *military* and *naval* codes of Britain; but not, in our own naval code: the author, by no means, intends it as the enunciation of a general rule or maxim of military law, but as the result of certain special enactments; which, it may be remarked, fall somewhat short of the sweeping effect which he ascribes to them. The particular provisions, to which he refers, are, 1st, the article of war, which punishes commissioned officers, convicted of "behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman:" 2dly, the 23d section of the mutiny-act, making it "lawful for courts-martial to inflict corporal punishment, not extending to life or limb, on any soldier, for *immoralities*, *misbehaviour*, or *neglect* of *duty*." The same provisions are commented on, by McArthur; who, with more accuracy and precision, both of conception and language, explains them, as giving to courts-martial a wide discretion, not to *define* by a legislative act, new offences, but to *discriminate* the *shades* of guilt: and, as it relates to the article by which scandalous and infamous behaviour in a commissioned officer, is punished, it is further explained that the court should discriminate between such actions as come up to that standard of moral turpitude, and such, as, however improper and blameable, fall below it: being cognizable by a court-martial, in the one case, and not in the other.(*x*) These sweeping expressions of Mr. Tytler are further countenanced by a most extraordinary article of the British *military* code; from which it has been transplanted into our own *military* code: but not recognized in the British *naval* code; nor, in the remotest degree, approximated by any article of our *naval* code. It authorizes *military* courts martial to take cognizance of *all* crimes, not *capital*, and of all *disorders* and *neglects*, which officers and soldiers may be guilty of, to the *prejudice* of good *order*

(*u*) Vid. McArthur, vol. 1, ch. 2. s. 3, 4, 5, 6. p. 20, 22, 23, & 25. and ch. 4. s. 1. p. 40–1–2.

(*x*) Vid. 1 M'Arthur, ch. 4, s. 1. p. 42. 2 id. ch. 8. s. 9. p. 207.

and military *discipline*; which are not enumerated in the foregoing articles; and to punish them at *discretion*.†

Now, a very considerable *discretion*, resulting from the vagueness and generality of the terms, in which certain military offences were described by the articles of war, and from the power to inflict *optional* punishments, has been conceded, by the counsel for the accused, to courts martial. But it was explained to be a *sound* discretion; instructed by the law, and operating through the law: and essentially different from a *legislative* power to punish offences, not classed and specified by the articles of war. For instance, if an officer be charged with contempt, or disrespect; or with contemptuous or disrespectful words; or with scandalous, infamous behaviour; or with conduct unbecoming an officer, &c. the court must exercise a sound discretion, in discriminating the moral and legal character of the particular acts, charged and proved as coming under any of these denominations of offence: it is, nevertheless, absolutely bound by the legal definition of the offence, however general; and, before conviction or punishment could follow, it must judicially determine the words or acts, to be contemptuous or disrespectful, or scandalous, and infamous, or unbecoming, &c. and that, upon no *inferior* species of immorality, could it judicially animadvert. So that, in effect, the court was exercising the ordinary function of expounding the true intent and operation of a statute, from general or doubtful terms: a function only rendered so much the more difficult and perplexing, as the terms were vague or doubtful: and, though the *acts*, that constitute the offence, were not *defined* by the law, yet the *offence*, as a *species*, was defined: and the court was bound by that definition. It was also admitted, that, in so far as the general heads of offence, laid down in the articles of war, embraced aggravated, though undefined misconduct or immoralities, the court, in the exercise of that sound discretion, by which the moral character of actions was to be determined, might be viewed, as, in some sort, a court of *honor*: because the actions to be animadverted on, were to be judged by rules of honor, and not by strict legal definitions; but in so judging them, the court was absolutely bound by the law, to take cognizance only of such improprieties as amounted to the degree of moral turpitude required by the law. The court, 'tis certain, had the *power* to adjudge any thing scandalous and infamous; but then its solemn judgment must be, and that upon the responsibility of its judicial character and oath, that the act was scandalous, infamous, &c. If any inferior degree or lighter shade of misconduct or immorality should be so determined, it must rest upon the conscience of the court, as a misjudgment, and an abuse of the law. In short, the law had, in general terms, defined the species, the quality and degree of the offence; and it was the duty of the court, before it condemned or punished, to see that the facts came up to the legal definition; ample as was the field of

† British article of War, s. 20. a 3. Adye, p. 164. Vid. Rules and articles for the government of the armies of the United States, art. 99.

judgment and discretion, in respect of the infinite variety of actions, and the nice and diversified shades of their moral character, which might be embraced in the general terms of the definition. It has been remarked, that the only part of our naval code from which this function of a court of *honor*, can be, in any sense, inferred, is the *third* naval article of war; which after enumerating, among the heads of offence, punishable by it, oppression, cruelty, fraud, &c. ends with the sweeping clause of "any other *scandalous* conduct, tending to the destruction of good morals."*(a)* The more vague and general description of "immoralities, misbehaviour, disorders, and neglects," punishable in Britain, under the mutiny-act and articles of war; or of "conduct unbecoming an officer and a gentleman," punishable under the *military* articles of war in this country, are wholly omitted from our *naval* code: of which the 3d, modelled after the 2d of the British naval articles,*(b)* is stated to be the only one that gives any pretence whatever, for a naval court martial in this country, to assume a character approximating that of a court of *honor*. But, upon the principles, already laid down, it was conceived to be clear that this court, as a court of *honor*, judging the moral character of actions under this article, could take no cognizance of any that fell short of the aggravated degree of misconduct supposed by the article: namely, "*scandalous conduct*, tending to the destruction of good morals;" and, at least, of as grave import, as the preceding enumeration of "oppression, cruelty, fraud, &c.

But after all, a notable discovery has, it seems, been made in the body of our naval code itself, of a clear and express warrant for this legislative faculty to define and punish offences, at the discretion of a court martial. The article (being the 32d) from which this sweeping authority is deduced, declares that "all *crimes* committed by *persons* belonging to the navy, which are not specified in the foregoing articles, shall be *punished* according to the *laws* and *customs*, in such cases *at sea*." This is copied, with a slight variation of phrase, from the 36th of the British naval articles; which in the concluding member of the sentence, speaks of "the laws and customs *used* at sea."*(c)* 'Tis wonderful that it should have escaped observation, how unlikely it was that the article could have had any relation to the powers or jurisdiction of courts martial; since all the authors, who have with more or less of labor and minuteness, treated of the law and practice of such courts, or of military law in general, have preserved an absolute silence on the effect of this article. From that circumstance, connected with the very unusual and almost singular omission, in the body of the article, of any reference to a court martial, the inference should have been quite obvious, if it had been at all doubtful from the terms, that it alluded to crimes not cognizable by such court. What instance can be produced of a charge exhibited or tried under that article, either

(a) Laws U. S. vol. 3. p, 351.
(b) Vid. 1 McArthur, app. No. 1. p. 325.
(c) Vid. 1 McArthur, app. No. 1, p. 334.

in Britain or in this country?—'Tis impossible, but such a charge must be held as senseless or absurd. But if it were otherwise, how does it bring us to the conclusion which it is cited to prove; namely, that the court may "assume the function both of *legislators* and *judges*?"—It communicates no power or authority to any tribunal or person whatever, either to define the crime or to prescribe the punishment: but, as a mere declaratory law, simply denounces certain crimes, as being already defined and punishable, according to certain known and established rules, designated as "the *laws* and *customs* used at sea." Suppose these to be unwritten laws; a sort of *common law* of the navy; contradistinguished from its *statute law*, as comprised in the naval articles of war: they are, nevertheless, supposed to be fixed, known and obligatory: and this court, if it receive any enlargement of jurisdiction from them, receives it only of such *crimes* as are punished by them. These laws and customs must, in that case, be proved and ascertained; or known to the breasts of the court: as denouncing the criminality and the punishment of the acts charged and specified. If these laws and customs be known to the judge advocate, or to the court, let them be expounded, and applied to the terms of the charge and specifications: if unknown, let old and experienced commanders, versed in the traditionary lore of marine law, be examined to identify and explain them. They must be known before any act can be punished, as an offence against them: in the absence of such knowledge, they cannot be supplied by any discretion, judicial or legislative, in this court.

An illustration (which certainly we do not clearly comprehend) seems to have been drawn from the operation of the *common law*, as a penal code, competent to define and punish *murder* and other crimes, without the help of *statute-law*: as if any objection or argument, urged on the part of the accused, had rested upon any distinction founded in the *form* or *name* of the *law*, by which the offence was supposed to be created and punished. All that probably was, or could have been intended by such argument or objection, was to insist that some fixed and authoritative law or rule, so creating and punishing the offence, should be shown: whether in the form of a prescriptive unwritten law, or of a more recent and positive enactment, must have been held immaterial: though certainly there can be no pretence for claiming *military* cognizance of offences at *common law*. What argument may be deduced from the punishment of offences at common law, or from any analogy in the jurisdiction of its courts, to the assumption of a legislative jurisdiction, over crimes and punishments, by a court-martial, is by no means obvious. The analogy is, indeed, wholly against the argument, for which it has been cited: the common law being just as positive, fixed and limited a rule of conduct, as the statute-law. The very fact of the co-existence of the two systems proves that the courts arrogate no extension of jurisdiction, bordering on legislative discretion, from the unwritten or prescriptive authority of the common law: but, on the contrary, when the public good requires any innovation on

the established and defined boundaries of the common law, or any extension or modification of the jurisdiction of its courts, a recourse to the legislature, to supply its defects, by statutory enactment, becomes necessary.

Then if there be a *common law* of the *navy*, implied by these "laws and customs used at sea," let it be exemplified, and applied to the case, with the same certainty and precision, as the common law to murder, or other offences defined and punished by it.

But, in truth, this 32d article of our naval code, refers not to any crimes punishable by a court-martial, or at all in the nature of military crimes. Its sole scope and end were simply to declare (what perhaps would have been sufficiently clear without it,) that all persons belonging to the navy should be amenable to the law, precisely as persons in civil capacities, for all crimes committed on the high seas; other than such as had been expressly constituted military crimes; or subjected to the cognizance of a court-martial. So far the scope and end of this article sustain and illustrate the rule contended for; by which the jurisdiction of this court is limited to the crimes and punishments enumerated and described in the naval articles of war. Whether this article refer to crimes cognizable by a naval court-martial, or otherwise, it can have nothing to do with any of the matters specified under the second charge: which all relate exclusively to transactions on shore; in the heart of the country; and wholly unconnected with any routine of the naval service.

II. Having thus disposed of the question, relative to the nature and the limits of the *jurisdiction* of courts-martial, we come to the second general question: namely, the frame and substantial requisites of the charge and specifications, proper to bring the matter of the accusation within the limited cognizance of the court; and to put the prisoner to answer. This resolves itself into two questions, conformable to the given ends and purposes, which determine the frame of the accusation: 1st. whether the accusation do, *in terms*, set out and describe an offence within the limited cognizance of the court: 2d. whether it do so, with such specifications of facts and circumstances, as to inform the prisoner, with the requisite precision and minuteness, of the particular facts to be adduced against him.

1. As to the sufficiency of the accusation, *in terminis*, to charge the accused with any offence cognizable by this court, it was held liable to two objections: 1st. as being utterly defective of the requisite precision of language, and appropriateness of terms, to convey any distinct proposition, or intelligible idea of any offence legal or moral: 2dly, as not describing, in so far as the terms were intelligible, any offence within the purview of the naval articles of war. 1st. As to the propriety and significancy of the terms, in which the second charge is couched, the analysis already made of them; and the manifest failure to expound, from them, any definite meaning; far less a precise accusation of any specific act, punishable under the naval articles of war, leave room but for a few additional remarks, to explain

or justify the original ground of objection: which, on this point, principally regarded the grammatical and legal significancy of the terms "insubordinate *conduct*," as imputed to an officer of the navy; and "insubordinate and disrespectful *character*," as applied to his *letters*. The objections, founded on the misapplication of these terms, have been characterised as a puerile indulgence of the most futile and reprehensible species of "*verbal* criticism" or "*philological* criticism;" and as "a *specimen* of *verbal* criticism more suitable as an appendage to the diversions of Purley, than to the proceedings of a court-martial." How appropriately or justly these terms bespeak the genuine character of the objections taken by the counsel for the accused, may be safely left to the objections themselves, and to the argument stated in support of them: without stopping, at present, to examine either the courtesy or the efficacy of this most happy expedient, for evading the force of an argument which, if to be fairly met and answered by any human skill or ingenuity, seems, as yet at least, to have been, left in the victorious and indisputable possession of the field.

When exception was taken to the new coined, or new compounded adjective, "insubordinate," nothing less was intended than verbal criticism. It was with no idea of denying absolutely the propriety, on suitable occasions, and with the necessary skill and taste, of introducing words in new forms of composition; or with any other impress of a new coinage. The lawfulness of such coinage, and the rules by which it should be governed, have been too long established by the celebrated canons of a witty poet and critic of antiquity, to be now questioned: though, it must be confessed, the dry and solemn details of an indictment, or criminal charge do not furnish the happiest occasion, or the most legitimate subject for such adventurous essays. Neither the propriety, in general, of the arbitrary composition of a noun with a privative particle, when the writer desired to express some quality of contrariety to the primitive noun; nor even the *callida junctura* of "insubordinate," when opposed to the same philosophical or determinate ideas expressed by the primitive adjective, was called in question. Far different from such divertisements of lettered liesure or strenuous idleness, were the *gist* of the objection, and the scope of the criticism upon the terms of this charge. That the adjective, *subordinate*, had never acquired, by well established use, nor even by any use, either technical or popular, any meaning different from that affixed to it, in philosophical and literary language: that such meaning was utterly unappropriate and incompetent to denote the presence of any military *virtue*, or other moral quality in an individual, is clear and indisputable upon authority; and is distinctly admitted by the judge advocate; when he admits, as he does, without qualification, the definition cited by the counsel for the accused, as comprising all the received significations of the word. Then is not the conclusion irresistible, that the new and arbitrary composition of the word with the privative particle (unknown, as it certainly is, to any vocabulary of the language, and without any

fixed or known meaning, either technical or popular, beyond the mere *contrariety* of its primitive) was equally unappropriate and incompetent, to express the presence of any military *vice* or *crime* in an individual; to say nothing of the still more incomprehensible idea, which it conveys, of the *character* of a *letter?* 'Tis not intended to go over the ground already so much trodden: but let the exceptions, taken by the counsel for the accused, to the 2d charge and its first specification, be carefully re-examined; let the import and meaning of the phraseology therein used to define the offence, be brought to the test of the uncontroverted and incontrovertible definitions, by which such phraseology has been analysed; and see what can be made of "insubordinate conduct;" what of the naked and unconnected charge of writing sundry "letters of an insubordinate and disrespectful *character:*" without explanation, or reference to the means of having explained what is meant by such a character; in what it consisted; or (whatever be the *character* intended to be given of the *letter.*) how that character reflected upon the character or conduct of the writer;—in what degree; how or whom it offended; or what duty it transgressed.—Give the utmost allowable latitude to the import and meaning of the terms; adopt the most relaxed and indulgent rule, for the framing of military accusations;—task, to the uttermost, the learning and industry devoted to the maintenance and vindication of the charge; nay, "resort to the subtleties, *quirks* and *quibbles* of the *special* pleader, to the subtle *casuistry* of the *professional* logician, to the *pedantic* refinements of the verbal critic;"* task all the resources and ring all the changes of "*verbal* criticism,"* and "*philological* criticism:"* and, after all, he who shall deduce, from these terms, a precise or intelligible charge of any definite offence known to the military law, or to any other law, human or divine;—*ille mihi erit magnus Apollo.*

A conjecture was hazarded that "insubordinate conduct" might possibly have been intended as a paraphrase of another composition of a noun with a privative particle, forming *insubordination:* from which no appropriate or definite meaning, applicable to any matter of military accusation, could be inferred, but *disobedience of orders:* which reduced the *second* charge to the identical terms of the *first;* and stripped it of all relation to and support from the *specifications* annexed to it.(b) The substantive, *subordination,* was admitted to have legitimately acquired, in military language, a peculiar signification, (namely, an obedience or submission to orders) unknown to the language of general science or literature; and very remotely, if at all, deducible from its radical or primitive sense: while, on the other hand, the adjective, *subordinate,* was invariably used, in military language, as in all admissible usage, with the strictest conformity to its radical sense, and with no analogy to the peculiar sense of the substantive, as a military term: and therefore the ad-

* Elegant extracts from the judge advocate's *argument* in answer to the exceptions taken to the 2d charge, on the part of the accused.

(b) Ante, p. 1, 90.

jective, whether simple or compounded, being so confined to its radical sense, cannot be made to denote the quality or condition signified by this peculiar and extended sense of the substantive either simple or compounded. The hypothesis just stated could not, therefore, have been intended as a concession, either that "insubordinate conduct" could be legitimately expounded into a definite and valid charge, by its relation to *insubordination;* or that it was admissible to *frame* so solemn an instrument as an indictment or charge before a court martial in terms which required such bold and conjectural emendations of the text, in order to come at a meaning: it was stated as the most *favorable* interpretation, to give sense and meaning to the charge: but, as such, reducing it to a mere repetition of the first charge; without one specification to support it. The judge advocate, though he rejects the particular interpretation which thus reduces the two charges to a state of absolute identity, has nevertheless seized upon "*insubordination,*" as convertible with "insubordinate conduct." How, or upon what authority they are made so convertible, is not explained: and, certainly, if he adheres to his own interpretation of the former, the convertible quality, thus assumed, of the two phrases, is not consistent with his explicit admission of the respective definitions, of the same given by the counsel; which established an absolute diversity. Numerous authorities are cited to prove that *subordination* denotes the presence of certain valuable and necessary qualities in military bodies both collectively and individually; and some respectable writers are quoted for *insubordination* as denoting the absence of such qualities in *collective* bodies; though not one is found to have used it, as denoting any military crime, or specific misconduct in an *individual.* The end and aim of all this learned and laborious research, are to prove that *subordination* has other significations, in relation to military matters, besides obedience or submission to orders: and, by parity of reason, that *insubordination* may signify something besides disobedience of orders. Doubtless, the primitive noun is used in a variety of senses, in reference to military matters:—when applied to *collective* bodies, it denotes the regular series and gradations of ranks, and the principles of cohesion, organization and discipline which preserve their order and efficiency: in that sense, it is opposed to anarchy or disorganization: so, when applied to an individual, it may denote the possession of all the military principles and virtues which adorn his professional character: but, certainly, the simple *denial* of the general qualities so predicated of military bodies, collectively or individually, by the word taken in any of these senses, constitutes no specific or definite charge of any military *crime.* Such a crime must consist of some overt act, of commission or omission, which the *law* has seen fit to lay hold of and to punish, as bad in itself, or of evil tendency and example. 'Tis not sufficient to disparage, in vague and general terms, the *character* or *qualities,* either moral or professional, of the individual: which would be nothing more than to institute arbitrary comparisons between the relative degrees of military excellence and virtue. An obedience or submission to

orders should, by no means, have been understood as the *only* sense of the word, in military language: but as the only one which could possibly serve to predicate of an individual any quality or conduct at all to the purpose of a criminal charge. Now, after the judge advocate has rejected this application of the term, and after all the long and devious huntings after a meaning, what more precise or definite, or more to the purpose than this has he found? Which of them reduces "insubordinate conduct" to the definition of any certain or known offence; or even approximates a meaning for the "insubordinate *character* of *letters?*" Let all his own definitions be examined, and see what definite or intelligible idea of military crime the simple *negation* of the qualities, described by them, would present: for such is the utmost effect of prefixing the privative particle to the noun. In truth, the argument, in support of the charge, creditable as it is, in other respects, to the learning and ingenuity of its author, is just as void of precision and of specific intent, in respect of the nature and degree of the offence denoted by the term "insubordination," as the charge itself, in respect of the supposed paraphrase.

The alleged resemblance between the criticisms of the counsel upon the phrascology of the charge, and the impracticable speculation censured by Professor Stewart, of cramping and impoverishing written and oral language, by repudiating every signification not deducible from the radical or primitive sense of words; as if the different significations must all be *species* of the same *genus*, is visible only to the "microscopic eye" which has discovered it. Those criticisms plainly and in terms admit an unlimited departure from the radical sense, provided it be sanctioned by known and approved usage. The sovereign power of use or custom to determine the meaning and various significations of words was not only admitted, but insisted on: and was particularly illustrated in the definitions of the words, subordination and subordinate. It was, indeed, objected that an indictment, or any other criminal charge was, above all other writings, bound by the accustomed, known, and established signification of words, both technical and popular: and that it was utterly inadmissible to introduce into such instruments either new coined words, or old words in novel and unaccustomed senses; the meaning and application whereof were to be sought from vague analogies, or remote etymologies. The reasonableness, the justice, and the plain common sense of all this are perfectly clear. When these criticisms, therefore, are described as "a similar effort of ingenuity" to the scholastic refinement commented on by Professor Stewart, it is difficult to determine whether the criticisms, or the author cited against them, have been read with the least attention.(a)

2dly. The second ground of objection to the charge and specifications, as not describing in terms (even where the terms themselves were intelligible) any offence within the purview of the

(a) Vid. the passage cited by the judge advocate, from Stewart's essays, 237-9.

naval articles of war, appears to be perfectly conclusive, if that part of the judge advocate's argument which asserts an unlimited discretion and a legislative jurisdiction in courts martial, over the whole subject of military crimes and punishments, has been successfully answered. The sufficiency of the charge, in terms, is not professed to be supported on any other ground; nor is it pretended that any one of the naval articles of war applies to it; or designates any of the specified facts or circumstances, as an offence under such articles. The contrary appears to have been implicitly admitted: at any rate, it is perfectly plain and clear from the comparative analysis which has been made of those articles, in reference to the terms of the charge and specifications. Then, setting aside this all pervading and all controlling legislative faculty ascribed to the court, full sway is given to the rule which has been cited from so many *concurring* authorities; and which bears that "in the accusation or charge, the offence must be set out with certainty and precision, so as to bring it *clearly* and *unequivocally* within the *terms* of the law or articles of war by which it is made punishable; that there must appear a *certainty* of an *offence* committed; and, in some instances, that it must be charged in the very *words* of the article or statute supposed to be violated: an *indictment* or criminal information in the courts of common law, or, as preferred by some, a *libel* in the courts of the civil law, being referred to as the lowest admissible standard of the certainty, precision, and particularity required in a military accusation or charge:"*(a)*—by no means understanding from this that the mere *solemnities* and *technical forms* of such pleadings are requisite in a military accusation; but only those substantial parts that go to inform the party accused, circumstantially and certainly, of the specific quality and degree of the offence charged against him.

Now, bringing the terms of the charge and specifications, as compared with the naval articles of war, to a test far less rigid than what this rule proposes, the utter failure of the charge, under the test, appears obvious and palpable.

The heads of the accusation may be summarily stated as follows.

General charge, *conduct* characterised as *insubordinate* and as *unbecoming* an officer: exemplified, 1st. by the writing of insubordinate and disrespectful letters: 2dly. by the *unauthorized* publication of the proceedings of a court of inquiry: 3dly. by an *incorrect* statement of such proceedings: 4thly. by various remarks, statements and insinuations, doubly aggravated as being *not warranted* by the *facts*, and highly *disrespectful* to the Secretary of the Navy, and to the court of inquiry: and 5thly. by the unauthorized publication of official communications.*(b)*

Now, as to any breach of *subordination*, at which the charge is supposed to squint, it may be remarked (setting aside all criticism upon the meaning or significancy of "insubordinate conduct" and "insubordinate letters") that the only acts which the

(a) Ante, p. 184–5. 187–8. 224. and the authorities there cited.
(b) Ante. p 7, 8.

law has thought fit to be laid hold of, as constituting any such breach, are enumerated under specific and distinct heads, in the naval articles of war: viz. neglect of the orders of a commanding officer in battle, &c.; disobedience of the lawful orders of a superior officer; drawing or raising any weapon against him, &c. mutinous assemblies; seditious or mutinous words; contempt of a superior officer, being in the execution of his office, &c.*(a)* Then if the design had been to charge any breach of subordination, it should have been *clearly* and *unequivocally* brought under one or other of these general heads, or descriptions of the offence; with distinct specifications of the facts and circumstances, &c. As to "conduct unbecoming an officer" there is no such title or head of offence in the whole naval code:*(b)* but every departure from such conduct, which the *law* has deemed a fit subject of judicial animadversion and punishment is, in like manner, enumerated under specific and distinct heads, in one or other of the twenty-nine articles which constitute the criminal code of the navy: and which it is only necessary to read, in order to perceive the obvious and simple course; which they indicate to every prosecutor of reducing his charge to one or other of these heads; and supporting it by proper specifications. The impertinences and frivolities which might be involved in a charge couched in such loose and indefinite phraseology, as conduct *unbecoming* an officer, has already been adverted to.*(c)* As to the *disrespectful* matters, alluded to in the specifications, the same remark applies, as to the two members of the general charge: that there is no such title or head of offence in the whole naval code, as *disrespect*. The difference between the *military* and the *naval* articles of war, in this particular, has already been remarked: disrespectful words and behaviour towards a specified class of personages (from which the Secretary of War is excluded) being recognized in the former, as substantive offences cognizable by a court martial. In the *naval* articles no equivalent provision is found: but it is nevertheless to be now *interpolated*, as it seems, by the *ex post facto* legislation of a court, itself the creature of these very articles, and created for the express and only purpose of executing their intents: and what is more, with an indefinite extension of its terms beyond the prescribed limits of the offence as defined in the military articles:*(d)* for here the disrespect is stated as affecting the Secretary of the Navy and the *court* of inquiry: no manner of disrespect to either of whom could be brought within the terms of the offence as defined in the military articles. By the naval articles no *words*, oral or written, are punished, except *seditious* or *mutinous* words:*(e)* a description of words essentially and specifically different from *disrespectful* words.

To treat with *contempt* his *superior* officer, *being* in the *execution* of his *office*, is also an offence under the same naval article: and if it were not as essentially different, as it certainly is, from

(*a*) L. U. S. v. 3. p. 352–3. a. 5. 13, 14.
(*b*) Ante, 185–6.
(*c*) Ante, p. 190.
(*d*) Ante, p. 191. n. a.
(*e*) a. 13.

the disrespectful letters, statements or insinuations now complained of, the difference between the superior officer, described in the article, and the Secretary of the Navy or the court of inquiry would be conclusive. As to the other facts and circumstances stated or alluded to in the specifications (if indeed it be not an abuse of terms so to denominate any thing contained in these meagre and marrowless skeletons of specifications,) it might be sufficient to say that there being no valid and appropriate *charge* to which they can be attached; and *specifications* being nothing more than the mere detail of the facts and circumstances upon which the charge depends, neither can stand without the other: the charge failing, the specifications go with it: for an *acquittal* of the *charge*, followed by a *conviction* of the specification, would be altogether unprecedented and absurd. 'Tis therefore immaterial whether the specifications contain any matter that might have been moulded into a valid charge, or not. The matter of these specifications has, however, been brought, in the course of the discussion, to the same test as the charge; and, in that view, have been fully considered and treated: *(a)* which dispenses with any further notice of them, upon that point, but a very cursory and rapid review. This may be most concisely and expeditiously accomplished by putting the question successively to each:—what article of war or other law subjects an officer of the navy to punishment by a court-martial, for the naked, insulated fact, (without any superadded circumstance of criminality or aggravation,) of having written "various letters of an insubordinate and disrespectful character;" or of having published "various statements, remarks and insinuations highly disrespectful to the Secretary of the Navy and to the court of inquiry;" facts which, if they can make him amenable to any legal process, seem to indicate a civil action for libel, as the appropriate remedy: or of having reported and published the proceedings of a court of inquiry; such proceedings having been publicly transacted; brought to a conclusion, and the court dissolved: or of having "given an incorrect statement of such proceedings:" without any suggestion that it had been done of malice or design; or that the inaccuracy of statement had been produced otherwise than by mistake, accident, or clerical misprision: or of having published "various statements, remarks and insinuations *not warranted* by the *facts*;" without the suggestion of any collateral circumstance of moral aggravation, to approximate a charge of *scandalous* falsehood, &c.: or of "having made *public* official communications to the government," &c. without the violation of any injunction of secrecy, express or implied, which might have brought him under a charge of disobedience of orders; without any one circumstance, either intrinsic or collateral, in the papers themselves or in the circumstances of their publication, to infer actual or possible mischief or inconvenience to the service; far less to impress upon the act the stigma of gross and scandalous immorality, &c. within the purview of the 3d naval article of war.

(a) Ante, p. 191

From this it appears that, if the argument in favor of the unlimited jurisdiction of this court, as a court of *honor*, had proved ever so unanswerable, it must have ended in a merely abstract conclusion; without any practical consequence in regard to this charge and its specifications: since, in the failure of any *legal* guilt, the utter absence of any *moral* turpitude, deducible from the terms of the accusation, upon which a court of *honor* could animadvert, is clear and demonstrative upon the face of the charge and specifications.

The judge advocate, indeed, seems to have taken a very different view of the matter: for he is so transported at the enormity of the offence indicated by the terms of this charge, that he compares it to the highest of crimes known to the laws of God and man; to the blackest of those denounced in the decalogue; and as being punishable by the *tacit* prohibition of every law human and divine. It must be confessed, however, that his instances of treason and murder, as being crimes only *tacitly* prohibited, though the offences be *described* and the *punishment* affixed by *law*, are not the most intelligible of illustrations.

2. We come now to the last question;—whether the specifications (so called) have set forth the particular facts and circumstances, with all the precision and minuteness of detail required as well by the established law and practice of courts-martial, as by a positive enactment of the naval code.

The judge advocate contends that more minuteness of detail has been required, than is warranted by any writer upon military law. This must be determined by the rule, as laid down by the authorities and confirmed by the naval articles of war, compared with the alleged defects of the specifications. The rule bears that "*the special manner of the whole fact must be set forth* with *certainty*; that all the circumstances of *time*, *place*, and *manner* of the *acts* charged must be *minutely* described:" and an indictment or criminal information in the courts of *common* law, or, as preferred by Mr. Tytler, a libel in the courts of the *civil* law, is made a criterion: and Mr. Tytler, in a passage quoted by the judge advocate and presently to be noticed, makes the specification of a charge to consist in "a *pointed detail* of the *particular facts*" which the prosecutor may be required by the prisoner to furnish; a requisition which, he says, "*is founded in material justice;* and which no court-martial can *legally refuse*." Such is the rule fully developed and clearly expounded by the concurring authority of all the most approved writers on military law.(*a*) The palpable instances and infinite degrees, in which these specifications fall short of the rule, have been so fully stated as to make any recapitulation of them superfluous.(*b*)

The *inconvenience*, arising from the necessity imagined to be imposed by a strict observance of this rule, of stuffing out the specifications with voluminous documents; among others a printed pamphlet of more than 100 pages, and a voluminous record of a court of inquiry, all to be set out *verbatim et literatim*, is objected:

(*a*) Ante, p. 187–8, and the authorities there cited.
(*b*) Ante, p. 191–4.

as if so necessary and beneficial a rule of law should give way, in order to save the prosecutor some labor in writing.

But this objection is merely fanciful. What more simple and easy than to have specified the *passages* of the letters, supposed to be "insubordinate and disrespectful;" and to have shown wherein their imputed character consisted: the passages of the published proceedings of the court of inquiry, alleged to be incorrect; which, by no means made it necessary to set out the pamphlet, *in extenso*, or any part of the original record, with which it was to be compared; the particular *passages* being identified, and averred to be incorrect, would have been all sufficient; the *record* need only to have been produced in evidence at the trial, to sustain the averments of incorrectness. So of the passages of the pamphlet, supposed to contain the "various statements, remarks and insinuations *not warranted* by the *facts* and disrespectful," &c. and so of the official communications, &c. supposed to have been published without permission: these are not described even by a reference to the dates, nor by any one circumstance, intrinsic or extrinsic, by which they can be identified. These passages need only to have been specified with the same particularity and conciseness as in an indictment or declaration for a libel: and surely that is no such mighty inconvenience as to set aside a positive rule of law.

But there were not wanting expedients to evade the force of an exception unanswerable, as we think, in its terms. "But the *generality* of the charge, (it was said on the authority of Mr. Tytler,) although it may not be absolutely *reprobated* by the military law, or amount to a voidance or annulling of the *indictment*, affords, in every case, a competent and weighty objection, upon the part of the prisoner, which he may urge, to the effect of having the charge rendered *special*, by a *pointed detail*, from the prosecutor, of the *particular facts* on which it is founded: and this requisition by the prisoner, which is founded in *material justice*, no court-martial can legally *refuse*."(a) The hypothetical and qualified terms, which thus indicate a process for botching the defects in the original frame of the charge, are assumed as *absolute*, in the argument of the judge advocate; and as ruling that such defect "is not absolutely reprobated by the military law; and does not amount to a voidance or annulling of the indictment;" that a more precise and special statement of the matter of the charge is merely *recommended* as of *favor*; not required as of indispensable obligation: and it is concluded that the proper time and mode to have taken advantage of the objection, was before *pleading* to the charge; and then that the judge advocate should have been called on for the "*pointed detail* of *particular facts*, on which the charge was founded;" a "requisition (it seems) founded in *material justice*, and which no court-martial can *legally* refuse." Be it so:—but it has entirely escaped observation that this remedy applies to only *half* the objection; that it is limited, in terms, to the *generality* of the charge.

(a) Tytler, ch. 5. s. 1. p. 213–14.

and specifications; and has nothing to do with so much of the objection as turns upon the inaccurate, confused and unmeaning terms and phraseology, in which the charge itself is couched. An indictment or other form of accusation may be extremely objectionable for its *generality*; while its meaning may be manifested by language quite grammatical, clear and intelligible. 'Tis, also, somewhat perplexing to comprehend, why the *court-martial* cannot "legally refuse" the requisition for this "pointed detail of particular facts;" if there be no *legal obligation* on the *prosecutor*, to "*prevent* the *objection*" and the consequent necessity for such a requisition, by avoiding the original fault that is to produce them. It might, further, be asked, upon what authority this requisition is restricted to the time of *arraignment* before *plea*; especially a plea admitted under a protest, reserving the identical exception; and why the evident defects of the charge and specifications have not, when so repeatedly complained of, been amended; as might have been done, with a tythe of the pains and labor bestowed upon the justification of them?

But the mode of evading the force of the objection, by proposing a *succedaneum*, was anticipated, and effectually obviated, in the preliminary argument by which the objections were sustained. It was shown that the rule did not rest upon the general law and practice of courts martial only; cogent and conclusive as were the authorities, by which such law and practice had been ascertained: but that it had been incorporated and consolidated with the mass of our naval articles of war; and so, had acquired all the force and authority of positive enactment. For this the 38th article was referred to; which expressly requires, that "the person accused be furnished with a true copy of the *charges*, with the *specifications*, at the time he is put under arrest:" and makes them afterwards unalterable but upon certain extraordinary contingencies, specially stated in the body of the article.(a) Now, as the full import and meaning of the term *specifications*, had been determined by the precedent law and practice of courts martial; it must be held to have been adopted by congress, according to its technical import; and to have had precisely the same effect, as if congress had descended to more minute legislation; and had, in terms, required all the "pointed detail of particular facts" which, it seems, a court martial could not have *legally* refused to enforce, when properly required. Mr. Tytler, in the very passage which is relied upon, as conceding the practice of amending the charge after the court has assembled for the trial of it, clearly excepts charges under a particular article of war, in which it was thought just, on account of the *generality* of its terms, expressly to require specifications: and he very hesitatingly yields to the inference, that, because they are not expressly required under the other articles, the omission is not fatal and incurable under any other; and "*may not amount to a voidance or annulling of the indictment.*" Indeed the practice of altering the charge, after the court has assembled, is directly

(a) Vid. Laws U. S. vol. 3. p. 358. a. 38.

contrary to the general rule stated by all the authorities before cited; and the few precedents, that have formed exceptions to it, are stated as very questionable in principle.

But take the proposition in the uttermost extent to which it has been thought the authority of Mr. T. could carry it. It was deemed expedient expressly to require specifications to charges under one particular article, which punishes "scandalous infamous conduct unbecoming the character of an officer and gentleman;" because of the generality of the terms in which the article and the charge under it are couched: therefore the duty to furnish such specifications is *imperative*, and the omission fatal: but as to other charges, the duty, not being prescribed by positive enactment, may be so far modified or supplied, at the discretion of the court, as to enable the prosecutor to supply the defect at the trial: but it must, at all events, be supplied if required. But the 38th article of our naval code just as imperatively requires specifications to *all* charges, without distinction, as the British article, to the particular charge therein designated: therefore the duty is equally imperative, and the omission equally fatal to every and any charge, under our naval articles of war, as to a charge under the British article particularly referred to. The *reason* of the thing applies with infinitely greater force; as will be obvious, from a comparison of the vagueness of the terms of the charge now in question, and of one framed under the British article, for "scandalous infamous behavior unbecoming the character of an officer and a gentleman." In the latter there is a positive, distinct, and intelligible charge of gross misconduct, highly deserving (in a military sense) of reprehension and punishment: the only defect is the absence of specifications of the particular facts, on which the charge rests; which are requisite to put the accused on his guard and enable him to prepare for his trial.

The answer offered to this argument is curious. 'Tis said that this statutory rule, requiring specifications, and forbidding subsequent alteration of the charges, was introduced for the benefit and advantage of the person accused; who is always competent to renounce it: and if he desires more minute specifications, he must renounce the rule, and permit the amendment. So a rule introduced for the benefit of the person accused, and of imperative obligation upon the prosecutor, is violated by the prosecutor to the disadvantage and injury of the person accused: but he cannot except to such illegal violation of the rule, unless he agrees to purge his adversary's fault, by renouncing the very right that has been invaded. If this be not a virtual repeal of the law, why, the chasm in the chain of cause and effect is utterly imperceptible to our common sense.

The rationale of this rule, and its highly beneficial character, were illustrated by the citation of another rule, vouched by the same authorities, and designed for the same beneficial end: and which required that the person accused should be furnished with a list of the witnesses to be adduced against him; together with a copy of the charges: to enable him not only to make the best preparation to meet the *facts*, to be adduced against him, but al-

so to *invalidate* the testimony of the *witnesses*, if practicable.* The concurring authority of the four authors, already cited, is unceremoniously set aside, upon the supposed authority of some posthumous notes of the late judge advocate general of England; introduced into the advertisement to the last edition of Mr. Tytler's essay. But a more careful examination of those notes will show that the rule is not denied as one of *general*, but of *universal* application: and that nothing more than its relaxation, in certain *excepted* cases, is insisted on.†

But against all the force of general learning and authority, confirmed by statutory enactment, numerous examples of the actual form of charges and specifications, tried before our courts-martial, have been industriously collected. And for what purpose? Is it imagined that any possible number of bad precedents, silently creeping into practice; and never having received the sanction of a judicial confirmation, can be competent to override a rule of law, so positive and so authentically vouched? The authors, who have laid down the rule and illustrated its utility and necessity, all advert to certain *practical* violations of it; which are not cited as precedents, but as examples of irregular practice to be avoided. 'Tis true, that the precedents, collected by the judge advocate, seem, for the most part, to be extremely defective in minuteness and precision of specification: but, by how many degrees do they excel the present charge in legal precision and propriety of phrase. There is scarce one of them but charges, in direct terms, some heinous offence; as *scandalous falsehood;* forged letters; malicious and false and scandalous libels, &c. &c. But whatever be the character of these precedents, they cannot be opposed to a well defined and positive rule of law; but may only serve to illustrate the necessity of enforcing it, and the wide spread and inveterate mischiefs likely to result from the violation of it.

After all, the only expedient that can possibly redeem this charge from the consequences of its inherent and manifold vices, is the one first thought of; a recourse to the dispensing power of the court; the efficacy of which cannot be doubted, if that tribunal do indeed possess the legislative power ascribed to it:—which so far surpasses that of any regular legislature, as it goes the length of enacting *ex post facto* laws.

[NOTE. In the foregoing remarks is embodied what was said in the defence, in reply to the technical or strictly legal points of the judge advocate's argument. The reply to such points has, for the reasons already stated,*(a)* been abstracted from the defence, and made to take its proper place in the series of the discussion; that is, immediately following the argument to which

* Ante, p. 188. and the authorities there cited.
† Vid. Advt. to 3d Edit. of Mr. Tytler's essay, p. xii.
(a) Post, p. 34.*

it replied. Certain statements, rather digressing from the matter in hand, have doubtless struck the attention in the course of reading the judge advocate's argument, as calling for some notice. These have been passed over in the foregoing reply, because the remarks by which they were originally repelled (and more seriously perhaps than they deserved) find an appropriate place in the defence; to which the reader is referred.(a) One additional remark, however, has been suggested to us.

If, at the time this preliminary discussion upon the sufficiency of the second charge and its specifications occurred, the list of variances between the published statement of the proceedings of the court of inquiry and the original record, which was afterwards brought forward to support the 3d specification,(b) had been disclosed, Com. Porter might not only have received some useful lessons in the "refinements of verbal criticism," but have learned to view with more indulgence, and possibly as intended compliments, what he seems to have understood as gratuitous and illiberal reflections upon the moral merits, apart from the legal effect and conclusiveness of his exceptions.—Accordingly when he heard them denounced as going to establish a *precedent* whereby "the accused should be absolved from *punishment* because the person who drafted the charges has committed a *verbal* inaccuracy or technical error, which though it may nullify the charge in point of *form*, leaves the *character* of the accused burthened with all the *odium* which the accusation itself creates, augmented by the tacit *admission* of *guilt* which is involved by resting his defence, not upon a denial of the fact, but a nicety of special pleading or a philological criticism:"—when he heard the court warned against the consequences of encouraging the officers of the navy, "instead of cherishing a lofty and chivalrous sense of honor," and a deal of other fine sentiments, to "resort to the *quirks* and *quibbles* of the special pleader, the subtle casuistry of the professional logician, or the pedantic refinements of the *verbal* critic:"—all this, if he had been earlier instructed, by such high authority as the aforesaid "list of variances," in the transcendent merit of using such weapons in the *attack*, might have been received as highly flattering commendations of the *defence*, bestowed in the most liberal spirit of polemical courtesy, so highly becoming to gentlemen and scholars. He would probably never have surmised that "pedantic refinements of verbal criticism," or "the *quirks* and *quibbles* of special pleading" could have signified any *reproach* in the vocabulary from which had been elaborated a *criminal* charge hinging upon the minutest of clerical and typographical errors; and upon grammatical, and even mechanical slips in every degree from violatad syntax and bad spelling, to inaccurate *punctuation*, misplaced *emphasis* and *transposition* of documents. If he had been said to "cavil on the ninth part of a hair," or to argue the difference between its "north and north west side," it should have been received as

(a) Post, 29*—33*
(b) Vid. "List of variances," &c. ante, p. 132—141.

no less honor than a crown of *bays* from the same hand. But unfortunately the contrary impression had been made before the means of correction were supplied; and appears never to have been effaced. Perhaps the strange and unaccountable statement of the personal appeal said to have been made to the *mercy* of the judge advocate to induce him to drop the charge; and said to have been followed up by an attempt to intimidate him into it by a *menace*, may have contributed to make the first impression more indelible.—As having to repel, by an emphatic contradiction, what had been asserted or insinuated in the aforesaid statement, he seems to have been less disposed to take in good part even the complimentary passages with which it was garnished.]

DEFENCE.

Mr. President and Gentlemen of the Court-Martial,

After having endured a long and mortifying suspense; the frown of undefined indignation; and the anxieties of ambiguous censure, I have experienced a sensible relief, from a public investigation, promising a determinate issue; which, in no event, can place me in a situation, less tolerable than that from which it takes me. Even the hard measure that has been dealt me, in the manner and spirit of the prosecution, both before and during the progress of my present trial, is amply compensated, whatever be the event, by the opportunity afforded me, of a full and open justification before the world; and, especially, before a tribunal, between the members of which and myself, at least so much of intelligence and community of sentiment exists, as to free me from the apprehension of receiving *less* than justice at their hands; and to acquit me, in their minds, from the suspicion of appealing to their favor, for any thing *more* than justice. If preparatory censures have tended to wound my feelings, or to prejudice my cause; if a stern and jealous inquisition, have probed every part of my professional character and conduct, where the sensitiveness of a man of honor, or the presumed defects of human frailty, might be supposed to shrink from the searching point; and if, taken unawares by the suddenness of the attack, or the novelty of my situation, an excruciated sensibility may, for the time, have broke through the guards, that should have preserved me unmoved and self-balanced in mind and temper; yet, after all, I bow, with humility and experimental conviction, to the moral system of compensations, that bringeth good out of evil: for innocence, made but the more manifest and clear, from the severity of its trials, is the bright reversion, that might have animated hope, and endued me with the passive fortitude of endurance, through a longer and more penal term of tribulation.

The accusations which I am now to answer, present this singular feature: while they branch out into two distinct classes of offence, the most dissimilar and the most unequal in the quality and degree of the legal and moral guilt imputed, as in the importance and interest, to the community, of the principles involved, and of the actions to be condemned or justified; they all originate in the same source;—and are closely connected by the causes, that have produced them;—and by the passions and motives that uphold them.

The first branch of the accusation brings into discussion the most important and vital principles of the high and awful sanctions, by which national sovereignty is to be maintained and vindicated by arms: while the second hinges upon the minute punctilios of ceremonious respect. That a devoted servant of the republic, who had consumed the flower of his years, and the vigor

of his life, in arduous, and, as he hoped, acceptable services; who had looked for approbation, if not honor, as his reward, for an unstinted exposure to labors, privations and dangers; so much the more disinterested, as, however beneficial to his country and to mankind, it promised few of the personal gratifications, which may laudably be sought, in the renown of more striking and brilliant achievements; who was conscious of having acted with the most implicit respect and exact fidelity, to what he understood to be the views and instructions of his superiors; who, with wasted powers of life, but untiring activity and zeal, had exerted, for the fulfilment of those instructions to the utmost scope of their letter and spirit, whatsoever of efficient energy, a constitution, worn and broken in the public service, had left him;—that such an one should have been somewhat sore and impatient under rebuke, that came, like a portent and a wonder, upon his astonished senses, was far more natural, than that complaints of misconstruction and injustice should have been interpreted into disrespect; and free, but decorous remonstrance, treated as little less than mutiny.

In my justification against these charges, I must regret the necessity of occupying a larger portion of the valuable time of this court, than any intrinsic difficulties, in the questions themselves, might possibly have required. But the terms, in which the charges have been framed;—their often complained of vagueness and uncertainty, as to the nature and degree of the offence intended to be charged;—the mystery observed as to the application of the facts and circumstances, given in evidence, to the gist of the accusation; and the defect of any advertisement of the points intended to be insisted on, in the prosecution, or that were supposed to require elucidation in the defence: all these circumstances compel me to traverse a wide field, as well of conjectural as of obvious justification.

Charge I. Before I proceed to discuss any matter of fact or law, put in issue by the first charge, it may be useful to attain as distinct an understanding, as practicable, of its terms; and of the nature and degree of the guilt imputed by it.

The general head, under which the offence, intended to be charged, is classed and characterized, consists of two members: first, "disobedience of orders;" second, "conduct unbecoming an officer." The first, doubtless, falls under a general description of military offence, common to every organized body of military force in the world: but, in every military code, by which such an offence may be punished, the character and functions of the officer from whom the orders are supposed to emanate, and the nature of such orders, are usually defined, with all reasonable precision. In the 5th and 14th of our naval articles of war, this species of offence is defined, in terms nearly equivalent to the corresponding articles in the naval and military codes of Britain;(a) and in our own military articles of war. (b) Our 5th naval ar-

(a) M'Arthur, vol. 2, p. 275, art. 11. p. 277, art. 22. p. 278, mutiny act, sec 1. p. 279, military articles, 3, 4, 5,

(b) Article 9.

ticle of war is, in terms, restricted to the orders of a *commanding* officer, when preparing for, or joining in, or actually engaged in battle. But the 14th article, conceived in terms somewhat more comprehensive, enacts that "no officer or private shall *disobey* the lawful orders of his *superior* officer, or *strike* him, &c. while in the *execution* of the *duties* of his *office*." The punishment of the offence, in either of its modes or degrees, is "death or such other punishment as a court-martial shall inflict." Then, if by the "disobedience of orders," here charged, be intended any offence known to the naval articles of war, and punishable under them, it implies that I had received, from some *superior officer*, in actual command, either, while engaged, or about to be engaged *in battle*; or otherwise, "in the execution of the duties of his office," some order, which I had disobeyed: and so, had come in the danger of a *capital* offence: as every military offence is denominated, which is punishable with death; though it be left to the discretion of a court-martial, to inflict any less punishment.

When this general charge comes to be deduced into particulars, in the form of a specification, *no orders*, either commanding or forbidding me to do any act whatever, are set forth, either in terms, or in substance: no commanding or superior officer, from whom they are supposed to have issued, is either named or described. The specification simply sets out the naked and insulated fact, of a certain invasion, by force of arms, upon the territorial sovereignty of Spain; accompanied by "*divers acts of hostility* against the *subjects* and the property of that power;" and, instead of any averment that, in so doing, the orders of a commanding or superior officer had been disobeyed, the conclusion of the specification branches out into a "contravention of the *Constitution* of the United States, and of the *law of nations*; and a violation of *instructions* from the *government* of the United States." Now, whether any "*contravention* of the *constitution* or of the *law of nations*," not involved in a disobedience of military orders, be an offence cognizable, under this charge, by a court-martial: or whether general *instructions* from the *government* be identical with the *orders* of a *commanding* or *superior officer*; and a *violation* of such *instructions*, equivalent to a *disobedience* of such *orders*; are questions of grave import; and will doubtless, in their due order, receive the deliberate consideration of the court. At present, however, we are endeavouring to ascertain the essential character and terms of the offence, actually intended to be charged: its *legal* attributes and consequences may be separately considered.

As to the second member of the general charge, "conduct unbecoming an officer;"—whether it be intended to describe a mere incident to every act of military disobedience; or to impute some gratuitous and superadded circumstance of aggravation, in the mode and degree of it; and to inflame the guilt of simple disobedience, by some wanton abuse in the manner and circumstances attending the commission of the act: as in the "divers acts of hostility," said to have been committed "against the subjects and property of the King of Spain;" are questions left in the charac-

teristic obscurity and uncertainty, which have, all along, veiled the "head and front of my offending," from any distinct view of it, that might have enabled me to perceive or to divine its *extent*.

I shall hold myself, however, completely dispensed from any obligation or necessity, to pursue further the labyrinths, into which this indefinite member of the charge might lead us: since, I think, if any proposition can be made clear, by human evidence, it would be impossible, for the most vindictive accuser, to find any pretext, in the facts of this case, for pushing the charge, beyond a simple departure from the letter or spirit of the positive rule of action, supposed to have been prescribed to me: whether it be the Constitution of the United States, or the law of nations, or my instructions. If I have offended at all, it is in the simple transgression of that rule: "the head and front of my offending hath that extent, no more." I shall therefore leave it to the court, without further remark, to decide, from the evidence, whether it were possible to have conducted a military operation, on neutral territory, with a more scrupulous regard to all the rights of person and property; which such an operation could, in the nature of things, have left inviolate. If the act were unlawful in itself, I must abide the consequence: but it lies not, I think, within the compass of human ingenuity or malice, to contend, that the act, as being either lawful in itself, was stripped of its legal sanctions, and had its quality of lawful changed to unlawful; or as a sheer trespass, that it was inflamed beyond its intrinsic character and degree, by any wanton aggravations or abuses, in the manner or concomitant circumstances. The question then, is presented in the simple form: whether the act complained of were, under the circumstances and inducements that led to it, an infraction, either of the *Constitution* of the United States, or of the *law of nations*, or of my *instructions* from the *government* of the United States: and, in that order, I proceed to consider it.

Whether a belligerent operation, in the course of an authorized war, be constitutional or not, is a question which, if it have any significancy, or be capable of any solution, may be considered as nearly identical with the other question suggested by this charge; namely, whether it be consonant to the law of nations: supposing the law, here intended, to consist of the conventional, or customary rules, by which civilized nations have agreed to control and mitigate the ferocity and the calamities, incident to a state of war; and which constitute what is called the law of war. All that the Constitution of the United States has to do with the matter is, that it has delegated, to the general government, the unqualified jurisdiction of war and peace. The power to carry on war, offensive or defensive, involves, in its terms, every right immediately, or remotely incidental to that state and condition of human society. In what these incidental rights consist, must be determined by the known or necessary conditions and consequences of war. Whatever of these the most comprehensive signification of the term may embrace, are necessarily constitutional: but the law of war, as it is called, is, in many respects, so vague, and so dependent upon arbitrary views of necessity or expediency, to be judged of

by hostile parties, and to be justified by an infinite and incalculable variety of peculiar circumstances, that it scarce furnishes a definite or intelligible rule, by which it may be predicated of any military operation, that it is either constitutional or unconstitutional. The only constitutional question, therefore, is, whether the war itself were authorized? that is, whether commenced, or carried on by that authority, to which the constitution has exclusively delegated this high power.

This brings us to the consideration of the second test, which, it is suggested, should be applied to my conduct, on the occasion in question; and that is the law of nations.

That branch of public law which determines the correlative rights and duties either of the hostile belligerents, as between themselves, or of neutrals and belligerents, as between themselves, or of allies or co-belligerents, as between themselves, constitutes a voluminous code; which is, perhaps, the theme of as much undeterminate controversy, both as to its principles and its authority, as any that ever undertook to prescribe rules of human conduct: and it would scarce be practicable to deduce, from it, any definite rule, applicable to the infinitely varied circumstances of actual war; and by which a military officer might be condemned for a presumed violation of the law; any more than of the Constitution of the United States. In this case, however, 'tis not necessary to trouble the court with any reference to the more recondite and theoretical definitions of general rules: because, in so far as my conduct depends, for its justification, upon such rules, it may be referred to an authoritative and practical exposition of them; as applicable to the particular circumstances, under which I acted.

The rights and duties incidental to a state of war, as it affects every party directly or indirectly concerned, have been the subject of such frequent and elaborate discussion, in our own intercourse with foreign nations, and have received such lucid definition and such various illustration from our most eminent statesmen, that we may be said to have compiled and digested, from the best authorities and the most enlightened views of the subject, a system of public law, upon these topics; which, if it be not generally adopted by the family of civilized nations, as the moral and political influence of our example extends, may, at least, be received among ourselves, as superseding, to every practical purpose, a reference to the more general and less applicable doctrines of elementary writers. Our discussions with the powers of Europe, while they were belligerent and we were neutral, have settled, for ourselves, the positive *rights* of neutrals: and our more recent discussions and collisions, with one of those powers, while we were belligerent and she neutral, have equally well settled the positive *duties* of neutrals. The rule, to be deduced from the latter, is so much the more intelligible in its doctrine, and obvious and practical in its application, since it has grown out of collisions and discussions of the belligerent rights of the United States, as correlative to the neutral duties of this very power, Spain; whose territorial sovereignty I am charged with having

violated: and more especially of her neutral duties, as determined by the peculiar circumstances of her colonial dependencies; in one of which the scene of my supposed transgression is laid.

The right of a belligerent, in the prosecution of a lawful war, to involve, in all the practical consequences of war, such parties, as, not being enemies, assist the enemy by active or passive co-operation, has been so clearly expounded in the doctrines of public law, and illustrated in the history and practice of our own government, as to leave but little to be said on that subject, at this day. Whatsoever ground of controversy may remain as to the extreme limits, or necessary modifications of the rule, depends upon principles, entirely foreign to any question applicable to the present case. In so far as the doctrine or practice is now in question, it is placed beyond doubt, or controversy, by the concurring authority of all the most approved expounders of public law; and, above all, of our wisest statesmen; who have been called upon, so frequently, to unfold its principles, and apply them, in practice, to the actual condition and relations of the country.

The actual extent of the correlative rights and duties of such parties, and the circumstances that may justify the treatment of presumed friends, as actual enemies, are, in some degree, determined by their relative position, either as strictly neutral, or as allies embarked in a common cause: the positive duties of the latter being, of course, increased, both in number and obligation; and many acts permitted to a neutral, being unlawful in an ally.

If a neutral, through perfidy, partiality, or weakness, (and it is perfectly immaterial which,) permit, or be compelled, by superior force, to suffer his territory to be seized by one belligerent, or, in any manner, used, to the annoyance of another, the latter has a perfect right to invade that territory; and to use it, with all the means and facilities of war that it affords, to the same extent that his adversary is permitted to use, or has, by force, usurped the same. The territory, the inhabitants, and whatsoever else there may be there, which have been thus converted into means of annoyance, are, for the time, impressed with the character of enemy, and may be treated accordingly. It is one of the most ordinary and undisputed, as well as the least harsh of these rights, to pursue an enemy into neutral territory, if he retreat there for refuge; or take his station there to be ready to sally forth and attack his adversary, as occasion and opportunity may serve. If this abuse of neutral territory proceed from the weakness of the sovereign, and his inability to protect it from violation, the rule is, that at the point, and in the degree that his authority ceases to be exerted, with practical efficacy, that of the party injured by its relaxation, commences and extends. In the emphatic language of Mr. Adams "The right of the United States can as little compound with *impotence* as with *perfidy*." All this infers no hostility against the neutral; but proceeds upon the great principle of self defence; which justifies a belligerent to disarm his adversary; to turn upon him his own weapons; and deprive him of the permitted, or usurped means of annoyance. There may be occasions, when the misconduct of a neutral sovereign might expose him to the resent-

ment of the belligerent sovereign, and make him an actual party in the war: but I here speak merely of those incidental rights of actual war, which affect him in his neutral character, and require not the decision of the sovereign will to authorize the enforcement of them; which are inseparable from belligerent operations, and are summarily exerted, in the exigency of the moment, at the discretion of the commander to whom the conduct of such operations is entrusted. "Of the necessity for which, [says Mr. Adams, speaking of the invasion and occupation, by military force, of neutral territory, including its fortified places and garrisons, whenever the effectual prosecution of hostilities against the enemy shall, in the opinion of the general, make it necessary,] he has the most effectual means of forming a judgment; and the vindication of which is written in every page of the law of nations, as well as in the first law of nature, self-defence."*(a)* The principle is not confined to neutral territory, but extends to all the ramifications of neutral sovereignty, and to all the modifications of neutral property: for it is the same identical principle, modified by circumstances, that authorizes naval commanders, from the admiral of a fleet, to the lieutenant-commandant of a schooner, or a barge, or even the captain of a privateer, to seize, upon the high seas, neutral ships, carrying contraband, infringing a blockade, or committing other unneutral acts. In these cases, the ships seized are good prize; but, like the territory, (of which they are an emanation of the sovereignty,) they are also liable to temporary seizure and detention; as when found laden with enemy property. This practical exertion of belligerent rights, upon the high seas, is, in principle, just as high-handed an interference with the exclusive domain of foreign sovereignty, in order to repel open or insidious hostility, in neutral guise, and by neutral means, as any analogous invasion or occupation of the actual territory of the same sovereign. The flag of a nation is just as inviolable an emblem of sovereignty, as territory; and the ship that bears it, is, constructively, a part of the territory, and just as much entitled to protection.

"There will need (to borrow again the language of Mr. Adams, the condensation and force of which, added to its authority, may dispense with other illustration,) no citations from printed treatises on international law, to prove the correctness of this principle. It is engraven, in adamant, on the common sense of mankind; no writer ever pretended to contradict it; none, of any reputation, or authority, ever omitted to insert it."

I cannot forbear, however, adding to the domestic documents of our public transactions, by which both our belligerent, and our neutral rights, are so amply unfolded, and accurately defined, the authority of the venerable and illustrious Grotius; who may be stiled the father of the modern law of nations. In laying down the rule, by which neutrals may expose themselves to the treatment of enemies, he also *recommends* certain modifications of the

(a) Vide American reply by Mr. Adams, to the Spanish note by Mr. Pizarro, on the subject of General Jackson's invasion, and occupation of the Floridas: being the letter, of November 28, 1818, from Mr. Adams to our Minister at Madrid. 15 Niles' Register, p. 272.

strict belligerent right; not as necessary limitations or exceptions, which a neutral may insist on, but as being merely *recommended* by a spirit of moderation and humanity; and which a belligerent may disregard, according to his own discretion, or his estimate of necessity or prudence, under existing circumstances, without incurring the odium of having violated the established rules of civilized warfare; and it may be satifactory to the court to see, by how many degrees, my operations, at Foxardo, fell short, not only of what strict right authorized, but of what the most beneficent construction of the right would have recommended, as within the bounds of moderation and humanity. 'Tis also worthy of remark, that this author, in the same passage here cited, illustrates belligerent, as correlative to neutral rights, by the known and conceded right to attack a ship manned by pirates, or a house occupied by robbers; although, in that ship, or in that house, there may be many innocent persons, whose lives are endangered by the attack.*(b)*

Such are the correlative rights and duties, as between belligerents and parties merely *neutral*. But their reciprocal rights and duties are infinitely extended, when the parties assume the nearer and more intimate relation of allies, embarked in a common cause. An act, perfectly lawful in a mere neutral, may be absolutely unlawful in an ally, and subject him to be treated as an enemy by the forces of the other ally. For instance, nothing is more lawful than for a neutral to trade with either or both of the belligerents; yet it is unlawful in the subjects or citizens of an ally, and exposes their ships and other property to seizure, as prize, precisely as enemy property; and their persons to captivity and punishment.*(c)*

A nation is not even bound to wait till the injury is actually felt, from the abuse of neutral or foreign territory; nor, even till an enemy appears, who may take advantage of its means, and convert it to purposes of hostility: but, in case of imminently approaching, and foreseen peril, it seems to be lawful to take military occupation of such territory, in *anticipation* of the injuries that may accrue from expected and future hostility. This is strongly exemplified by the conduct of our government, and the principles on which it was publicly and officially justified, in the occupation of Amelia Island and Galvezton: the one in the undisputed possession of Spain, and within the uncontested, and incontestible limits of her then province of East Florida; the other in the actual possession of Spain, and claimed as within the limits of her province of Texas; but, within what we claimed, and Spain contested, as the limits of Louisiana.* The military establishments, at these places, in the hands of certain adventurers, acting under the authority, real or assumed, of some of the revolutionized provinces of South America, were suppressed by military force; and the places held, by military occupation, till Amelia Island

(*b*) Grot. de Jur. bel. & pac. B. 3, ch. 1. sec. 1, 2, 3, 4, & 5, (3 Camp. Gro. p. 92—108.)

(*c*) Vide Chit. L. N. p. 11. Naiade, 4 Rob. 251.

* Note. Now admitted as on the Spanish side, in the settlement of limits by the treaty of the 22d February, 1819.

was restored, by an arrangement with the Spanish government. Among the reasons for this strong measure, given by the President of the United States, in his justificatory expositions of its policy and necessity, it was said, that an extensive system of *buccaneering*, throughout the Gulph of Mexico, was about to be organized at those establishments; menacing the United States, and the commercial world, in general, with all the horrors of piracy.*(a)* Then the apprehension of piracy, as the possible and imminent consequence of these obnoxious establishments, justified far stronger measures, and more decided acts of hostility upon Spanish territory, than any committed by me, in the course of flagrant war against actual pirates; who had established themselves in another part of Spanish territory, where the sovereign authority of Spain was equally relaxed: where these pirates, with whom I was engaged in active hostilities, found shelter and associates, with persons under nominal allegiance to Spain, but who neither *felt*, nor acknowledged her authority, for any purpose, but as a cloak to their villanies. The documents, relative to this transaction of our government, furnish strong illustrations of the extent, to which the great and sacred principle of self-defence authorizes either *corrective* or *preventive* measures, operating upon neutral territory.

I now come to such of our public transactions, and the documents that illustrate their history, and the principles on which they proceeded, as bear the nearest affinity, and the strongest analogy, both in principle and in circumstance, to the conjuncture in which I was called to exercise a sound discretion, in the practical application of these principles, to the actual state and condition of existing circumstances; when, as a naval commander, I was delegated to display the flag, and carry the arms of my country to remote regions, and there, upon my sole responsibility, without other counsel than my devotion to her glory and prosperity, to fulfil the imperious duties of this high and most delicate of trusts, by upholding the just power, and vindicating the sovereign rights, appertaining to her belligerent character, according to the laws and customs of war, and the dictates of military prudence: rights, which I could neither abandon, relax, nor compromise, without diminution of her glory, and derogation from her dignity; nor without bringing contumely on her flag, and overwhelming myself with disgrace.

The principles established by the documents now adverted to, regard Spain in her simple character of strict *neutrality;* without reference to her higher and more sacred obligations, as an *ally.*

In the late war with Great Britain, in which the Indians of Florida took part against us, general Jackson was expressly authorized, by President Madison, to take Pensacola, if it were found to have fostered Indian hostilities, by ministering to their wants, and affording them the means of annoyance. "If [proceeds the order,

(a) Vide President's several messages to Congress, viz: 2d December, 1817, 13 Niles's Register, p. 257. January 3, 1818, id. p. 338-9, and 26th March, 1818, 14 id. p. 100, and the official correspondence on the same subject, id. p. 169, &c.

as indited by Secretary Armstrong,] the Spaniards admit into their towns, feed, arm, and co-operate with the hostile Indians, you must *strike*, upon the broad principles of self-preservation."

The principle, thus concisely and forcibly enunciated, was developed, and followed out, to all its consequences and analogies, in the campaign of 1818, against certain Indian tribes of Florida, called Seminoles and Redsticks; who had commenced hostilities, and carried on the most savage warfare against our southern frontier: Spain being then just as much at peace, and in as positive a state of amity with us, as at any time since. She held the undisputed sovereignty of both the Floridas; where she maintained civil and military governors, numerous garrisons, and fortified places. But the extent of country, over which she exercised any practical sway, was very inconsiderable, in proportion to the extensive regions, occupied by numerous tribes of savages and outlaws; who, nevertheless, inhabited a country under her nominal sovereignty: and the physical power of each was in the same proportion. When general Jackson, in the winter of 1818, took command of the army, assembled to repel the incursions of the Indians, he found his predecessor, then second in command, general Gaines, in possession of certain limited and defined instructions for entering Florida, in pursuit of the hostile Indians, if it should be found necessary to repress their inroads. The savage foe was soon driven to his fastnesses, within the Spanish territory and jurisdiction; and pushed by his victorious pursuers to the vicinity of St. Marks, a fortress regularly garrisoned by Spanish troops, but well ascertained, by the general, to be a place of resort for the savages, where they obtained aid and comfort, and were abetted in their hostilities against our frontier. For these reasons it was entered by our troops, with violence, and held during the residue of the campaign. A British subject, domiciled there, under the protection of Spanish laws, was executed, as a spy and incendiary, who had instigated the savages to hostility.(e) The general then carried his victorious arms to Pensacola, the capital of the province, which was entered by our troops without resistance; the Spanish garrison having retreated to the neighbouring fort of Barrancas. This last was instantly invested, and, after a severe cannonade, in which some lives were lost, was on the point of being stormed, when the Spanish governor and his garrison entered into a regular capitulation, surrendered the fort, and were transported to Cuba. Thus, in possession of the capital, and of all the strong places of the province, it was treated as a conquered country; the civil and military departments were organized; the laws of Spain continued in force; the preservation of the archives provided for; accompanied by all the minute arrangements usual after conquest. The stated provocations to these acts of apparent hostility, but satisfactorily explained as only strong and active measures of self-defence, are the inadequacy of the power of Spain to resist the encroachments of the savages; the provisions and ammunition, with

(e) Vide General Jackson's official reports to the Secretary of War, 25th March, 8th April, and 5th May, 1818. (Niles's Register, Vol. 15, pages 307, 308, 311.)

which these last had been supplied; either extorted from the weakness, or granted from the bad faith of the Spanish authorities; and, lastly, the interruption, by the Spanish governor, to the passage up the Escambia, of supplies from New Orleans for our troops.

The Spanish governor, hearing of general Jackson's approach, had issued a proclamation, forbidding it, in the most indignant terms; and threatening to employ force, if he did not immediately evacuate the country. "This new and unexpected enemy," says the general, "was made to feel the impotence of his threats." In the general orders and proclamation, setting forth these and other reasons for the measure, it is justified by the sacred and immutable laws of self-defence; as Spanish *authority* could not be maintained in Pensacola.*(f)*. Having thus overrun one Spanish province, expelled its garrisons, and taken all its strong places!; and thinking, with good reason, that Indian hostilities had been effectually checked, the general retired from the field. But hearing, in the course of the summer, fresh accounts of renewed or threatened hostilities, and of continued abuses of Spanish territory and means, to our prejudice, he despatched an order to general Gaines, directing him, if he should be satisfied of the fact of the Indians having been excited to hostility, by Spanish agents and officers about St. Augustine, and fed and furnished from that place, immediately to occupy it, and make prisoners of the garrison. This order was countermanded by the Secretary of war; not from any disapprobation of what had been done, or was about to be done, but because an amicable arrangement had, in the mean time, and unknown to general Jackson, been made between the two governments, for the restoration, upon certain conditions, of the Spanish posts already taken; with which arrangement it would have been altogether inconsistent to have proceeded with the capture of St. Augustine. All this was fully and satisfactorily explained to general Jackson.*(g)*

These proceedings became the subject of the most animated and spirited controversy between the two governments. It was also doubted by many, and respectable citizens, both in public and in private life, whether the general had not transcended his authority, and exercised the power of war and peace beyond all constitutional limits: and it became the subject of long and serious debate in Congress. But, his conduct, in all its extent, was elaborately and victoriously justified by our government, in all its relations and departments, foreign and domestic. The complaints of Spanish ministers were triumphantly answered, and finally silenced, by the official replies of the Secretary of State. The messages of the President, to both houses of Congress, ex-

(f) Vide general Jackson's general order, giving a detailed account of the campaign, dated Barrancas, 29th May, 1818; his proclamation of the same date; the capitulation of Barrancas, &c. &c. (Niles's Register for July, 1818, Vol. 14, p. 334--6. Also his letter to the Secretary of War, June 2, 1818, and other documents, id. Vol. 15, p. 319--21.)

(g) Vide general Jackson's order to general Gaines, 7th August, 1818; his letter to the same, 10th August, 1818; and the Secretary of War's countermand to general Gaines, 1st September, 1818. (Niles's Register, Vol. 16, pages 80---1.)

plained and justified the grounds of the general's procedure: and the vote of the House of Representatives adopted and confirmed the justification offered by the executive. *(h)* Against all which, there remained nothing to be set off but an adverse report of a committee of the Senate; which has been suffered, ever since, to repose in utter neglect; notwithstanding the General, at the next session, presented a memorial to the Senate, remonstrating, in free and decided terms, both against the course of investigation pursued by the committee, as unfair; and against their conclusions as unsound in doctrine, and partial and uncandid in the views taken of the subject.

Now let the principles, so clearly deduced from these most authoritative precedents, be applied to my situation and conduct, as commander of the squadron in the West-Indies, engaged in actual war against the pirates.

From a variety of causes, too obvious to be mentioned, the Spanish Islands in the West-Indies were, for the most part, more destitute of any practical, steady and efficient governments and police, than the inhabited parts of the Floridas. The pirates, who sought shelter there, were not, like the miserable savages of Florida, insulated and cut off from access to other quarters for relief; so as to be dependent on Spanish towns and garrisons, for occasional supplies of provisions, arms and ammunition. On the contrary, their enterprizing and successful piracies, and the accumulated plunder of land and sea, gave them influence and favor, not only in the more barren or thinly inhabited districts; but in some of the more considerable towns and settlements: while their numbers, their resources and their ferocity, overawed and intimidated those, who were not seduced by participation in the spoils of piratical enterprize. When the hot pursuit of our cruizers had driven them from the sea, and destroyed all their vessels, capable of keeping the sea, they retreated into various parts of Cuba and Porto Rico; in some places, banded themselves against the local authorities, and effectually defied every effort to reduce them; in other places, they assumed various disguises, as fishermen, druguers, pedlars, &c. &c. As fishermen, they built huts and villages, upon the coasts of these two islands; and kept up a constant intercourse with the inhabitants; from whom it was extremely difficult to distinguish them. The innumerable bays, inlets, shoals and harbours, about these islands, enabled them to conceal the boats, in which they nightly sallied forth from their holds, and committed innumerable piracies; as well upon the high seas, as in the towns and settlements, on the neighboring coasts. They then retreated, with their plunder, to their secret haunts; reassumed their disguises; and eluded detection and pursuit.

(*h*) Vide Presid. Mes. to Cong. 25th March, 1818, (Niles' Register for April 1818, vol. 14, p. 100.) Presid. Mes. Nov. 17, 1818. (id. vol. 15, p. 213.) Note from the Spanish Secretary of State to the American minister at Madrid, 29th Aug. 1818, and the reply of Mr. Adams, 28th Nov. 1818. (Niles' Register, vol 15, page 367 & seq.)
General Jackson's memorial to the Senate. (id. vol. 18, p. 329.)

They were occasionally, however, detected; and their huts with all their boats, fishing tackle, &c. burnt and destroyed. Several instances of these descents, upon the coasts of Cuba and Porto Rico, by the officers of my squadron, are found in the official correspondence and reports now before the court: especially in my report to the Secretary of the Navy; and in the reports of captain Cassin, and of lieutenant-commandant Kearney to me, in the spring and summer of 1823. *(i)*

This state and condition of the Spanish Islands was not only perfectly notorious; but has been officially ascertained and promulgated, and is now matter of authentic history: for, in the President's messages to Congress, on the 2d December, 1823, and 1824, and the reports of the Secretary of the Navy, on the 1st of December, in the same years, accompanying these messages, all these facts are fully detailed; the good dispositions of the colonial governors, at least of the governor of Cuba, are acknowledged; and the toleration of the piratical establishments, within their jurisdictions, explained by the weakness of their means, and the relaxed state of their authority. So strong were these representations, that at the last session a bill was introduced and seriously debated, authorizing a blockade of the Spanish ports in Cuba and Porto Rico;—the latter having been designated, in the official communications from the President, as most notorious for numerous and pernicious haunts of pirates.

As to Foxardo, you have it clearly proved, how notorious were that town and district, and an extensive tract of country around, as the most pernicious of these haunts for pirates: including two other noted places, on the same coast, from 20 to 25 miles from Foxardo, called Nauguaba and Boca del Inferno, equally notorious for the resort of pirates, and as receptacles for their plunder. It was to the latter of these places, known by so characteristic an appellation, that the crew of the piratical vessel, driven on shore by lieutenant Sloat, attempted to retreat; as reported in his letter to the Secretary of the Navy of the 19th March last. I did not, however, act upon the sole authority of report or notoriety; more than sufficient, as they are, when sufficiently credible, to justify military movements. It was not till an American merchant, resident at St. Thomas, had been robbed of property, to a considerable amount, in one of these marauding expeditions, traced, upon credible information, to Foxardo; nor till after an officer of my squadron, who had landed, in the most peaceable and inoffensive manner, to inquire after the pirates and the plunder, had been treacherously seized, and disgracefully treated, at Foxardo; that I determined to land and make an impression upon that place. I presume no military or naval man is to be blamed, for acting upon credible and circumstantial information; he is not to be expected to wait for either legal or moral certainty of proof. The necessity and propriety of the measure, and the correctness of the information, upon which I proceeded, are amply confirmed. 'Tis in proof that the spontaneous opinion of the mer-

(i) Vide documents accompanying the President's message to Congress, 2d Dec. 1823. p. 156, 157, 174.

chants of St. Thomas, and of the whole squadron, without any particular communication from me, was clear and decided, not only for the necessity and propriety of the measure, but that it must and would be executed. My intentions were, as clearly, inferred from what circumstances decided that they ought to be, as if I had fully declared them. The whole course and event of the action entirely confirmed every anticipation. I no sooner approached the harbour, under the most unequivocal demonstrations of the real character of my squadron, than I found a party, no wise distinguishable, in arms, equipment or appearance, from the pirates usually found on shore; and who, in the instances before mentioned, had attacked captain Cassin, and lieutenants Kearney and Newton; by whom their villages and huts had been burnt and destroyed. This party stood ready, with two guns, on a point of rock; and, the instant I had anchored, without one act of hostility or menace, on my part, and without any previous parley, on theirs, commenced hostilities by training the guns on my nearest vessel; and then on the boat which was approaching the shore: and nothing, I presume, but the perplexity, in which they were kept, between the two objects, prevented them from firing on us. They dispersed, before our party reached their battery; the guns of which we spiked. We found the village entirely deserted; no human being to be found, with whom we could hold parley. When it is recollected that I had established a good understanding with the governors of Cuba and Porto Rico; was acting in concert with them; had remitted, to their jurisdiction, pirates whom we had taken, and who had been punished by the local governments;—when all this was known and notorious; how could I, in reason, account for these demonstrations of hostility, immediately on my approach to the harbour of Foxardo;—and for the flight of the party at the battery, and the desertion of the village? Was I not authorized, nay bound, to conclude from these circumstances, taken in connexion with the infamous character of the place, that it was a piratical establishment? Did it not require, at any rate, further investigation; and that I should proceed to examine into the state of things at the small town of Foxardo, only a mile or two from the harbour?—Nothing, I think, can exceed the caution and moderation with which I proceeded. A flag was sent, in advance, with a letter, addressed to a sort of inferior magistrate, called an Alcalde; the only officer, except a very low and disreputable person called the captain of the Port, who was to be found there. As we followed the flag into the interior, the most perfect order prevailed among our troops; and no whisper of complaint has been heard, of the slightest injury to the persons or property of the inhabitants. The further we advanced, new circumstances of suspicion arose, to confirm all we had heard, and all we had inferred from what we saw at our first landing. There was the same irregular assemblage of armed men; equally equivocal in character and appearance, as those who had been dispersed at the battery; without any of the ordinary badges to distinguish them, as belonging to the government of the country; and, by their causeless hostility, justifying the worst

suspicions of their character and intentions. When I met the Alcalde, accompanied by some of the better sort from the town, he excused himself, for his conduct to lieutenants Platt and Ritchie, as having been under *compulsion* from *others:* and this was repeated to lieutenant Platt, by the interpreter and another person in the Alcalde's train. The nature of the compulsion, and the persons from whom it proceeded, were not explained; and, as lieutenant Platt declares, there appeared some strange mystery about the transaction. The mystery may, perhaps, be very satisfactorily cleared up; when it is recollected that lieutenants Platt and Ritchie, at their former visit, had, at first, been received by the Alcalde with civility: but that the rabble were extremely exasperated against them. From all which, connected with the infamy of the place, and the very suspicious conduct and appearance of the people, whom we encountered, it might, reasonably enough, have been concluded, that the pirates were strong both in numbers and influence; and had overawed and held, in subjection, the miserable functionary, who bore the badge, without the substance of a regularly constituted authority: whom it would have been absurd, and derogatory to any government to have treated, as qualified to challenge the respect due to a sovereign, in the person of his representative.

Then, was not here presented a clear case of the "jurisdiction of Spain ceasing at the point where her weakness failed to maintain her authority?" What possible distinction, between the hostile appropriation of Spanish territory and Spanish means to our injury, by the pirates, in this instance, and by the Seminoles and other savages in Florida? In truth, every circumstance and every reason that were admitted as the most triumphant justification of the course pursued in the campaign in Florida, are here more clear and pronounced: and yet, because I merely displayed my force on Spanish territory, by way of intimidation; exacted an apology for the past, and promise of amendment for the future; and spiked two guns, from which, on leaving the harbour, I should have been in imminent danger of a raking fire, from a lawless banditti, who might have secreted themselves from pursuit and punishment; for this I have been recalled, in displeasure; and subjected to a rigorous and penal prosecution: notwithstanding the clear proof, now manifest to the court, that the most beneficial consequences had resulted from this operation; that, instead of producing any impediment to the service, from the ill will and irritation, either of the authorities or inhabitants of the island; it served to awe the disaffected, and to inspire universal respect for our arms and character. From the subsequent correspondence of lieutenant Sloat, it appears that governor Torres had been reported to have dropped some hasty expressions of anger; but, if he really uttered such, it was a momentary ebullition; for his letter to lieutenant Sloat of the 17th of March last, sufficiently demonstrates his good will: and, indeed, contains warmer expressions of thanks for our exertions, than are to be found in any of his preceding communications. The effect, upon the public in general, was decided and instantaneous: indeed, the increased

respect and confidence in the vigor, determination and efficiency of our measures, and the consequent facilities likely to be obtained, in the pursuit of our object, exceeded all expectation. The public honors bestowed on lieutenant Platt, at Ponce, only 40 miles from Foxardo, and expressly on account of the share he had borne in the affair of Foxardo, may give some idea of the prevailing sentiment.

As I have said, *nothing could exceed* the astonishment with which I received an intimation of the displeasure of my own government. The only apprehension, I entertained, and the only circumstance, having the remotest tendency to self-reproach, in the whole affair, were, that I had fallen too far short of the point, to which my authority would have reached, and to which my duty, under existing circumstances, should have pushed it: that I had too scrupulously and indiscriminately applied that precept of the divine teacher, which is so humanely recommended by the venerable Grotius, in mitigation of the rigors of war; and had suffered the tares to grow, where there was no wheat in danger of being rooted up with them; or so little, in proportion, that it must necessarily be choked by the tares: that I had not used due precaution to ascertain, that *there were even ten righteous persons* to be found, among them, whom I encountered at Foxardo. Indeed, if I were, at this day, under trial for not having seized and garrisoned, or destroyed the village at the harbour; and even the town of Foxardo, as pernicious pirate-nests;—for not having arrested and made prisoners, the people; or those, at any rate, who had made any demonstrations of hostility; I should have conceived myself in far more danger of censure, for having left undone those things, which I ought to have done; than now, for doing those things which I ought not to have done. My best, if not my only defence, in such case, would have been, the want of the force and the means, necessary to give complete effect to the operation; and the eventual benefits resulting from the actual and more moderate operation.

It may, possibly, be doubted, whether the pursuit and arrest of pirates on the high seas, under a regular commission from a sovereign power, and with the public armed force of the country, be a *war;* or a mere exertion of the power of internal police, for the arrest and judicial punishment of criminals. In short, whether the want of a regular declaration of war may be insisted on.

'Tis a remarkable fact, that what with the continually recurring wars with the Indian tribes, the Barbary states, and, more recently, with England; not omitting what has been called the *quasi* war with France, in 1798, this country has enjoyed but very short intervals of peace, since the formation of the government; and yet, there stands upon record, but the single instance of a declaration of war, in that against England, on the 18th June, 1812. The constitution has vested, in Congress, the exclusive power of declaring war; but they may also provide for the calling out of the necessary force to suppress insurrections and repel invasions: and they have executed this last power by a special act, empowering the President to call out the proper force on such occasions,

All our Indian wars, carrying with them every characteristic and concomitant of the most regular war, have resulted from the mere act of having placed, at the disposal of the President, a military force for the protection of the frontier, and to repel the hostile incursions of the Indians. Wars, commencing in this merely defensive operation, have resulted in all the incidental consequences, which we have seen exemplified in general Jackson's campaigns in Florida, and in all the preceding Indian wars; for none of them were commenced under any more formal declaration, or with any more solemn preliminaries, than that of a hostile invasion repelled by force; and of a defensive war pushed, in its consequences, to offensive operations, in order to make the defence effectual and complete. So the wars with the Barbary states were commenced in the same way; a naval force was placed at the disposal of the President, for the protection of our commerce against the Barbary cruizers: and the history of our naval operations is too well known to this court, to justify me in taking up their time, by recounting the captures by sea, the blockades, the menaced bombardments, the intercepting of enemy property in neutral bottoms, and all the other concomitants and incidents of the most regular of maritime wars; and which have all resulted from this simple measure of defence.

So the modified hostilities with France, limited, as they were supposed to be, by the terms of the law, that authorized them, to a mere resistance of the abused right of search; and to the capture of such of their public or private armed ships, as should be detected in committing aggressions upon our commerce, immediately blazed out in all the ardor of a maritime war; unlimited, in its spirit and extent, but by the scarcity of objects, in the then condition of the French marine, upon which the valour and enterprize of our navy could be displayed. We did not wait till a French frigate, flagrant with aggression, could be met; but, in what place, condition, or circumstances soever, met, she was, instantly, attacked, taken and held as lawful prize of war.

The war against the pirates, in the West Indies, was just as formally declared as any of our preceding wars, by land or sea, except the late war with England; and carried, with it, all the concomitants and incidents of a public war; without regard to the form of the preliminaries, or the circumstances of its commencement. The machine, being once put in motion, was impelled by its own inherent energies; without the help of proclamations, or other paper muniments. A naval force was placed, by Congress, at the disposal of the President, to be employed, in the most effectual way, according to the *best of his judgment*, and under *suitable instructions* to the commanders, to repel the aggressions and depredations of the pirates.*(l)* Under the authority of this act, and the instructions of the President, the war against the pirates was commenced and carried on. That it was a regular war, against public enemies, and entitled, not only to equal, but to greater respect, from other nations, than ordinary wars, is clearly established by reason and authority.

(l) Vide Act of March 3, 1819, Vol. 6, p. 412.

Pirates are not the enemies of one nation only, but of the whole human race: and all civilized nations are, or ought to be, in league against them. There can, in the nature of things, be no neutrals in such a war. As I have before remarked, the rights of war, in general, seem to have been derived, for the most part, from the analogies of war against pirates. We find that the President, in his message to Congress, explaining and justifying the conduct of general Jackson, towards the Spanish authorities in Florida, enumerates (as he had before done in regard to Amelia Island and Galvezton,) their encouragement of *buccaneering*, as one of the enormities which had forfeited their neutral character. General Jackson, himself, in his official correspondence, justifying the apparent severity of his proceedings, against persons claiming Spanish protection, can find no more emphatic reprobation of their character, as placing them and their abettors out of the pale of the law of nations, and as justifying every extremity against both, than to denominate them *land-pirates*. Grotius, as I have remarked, infers belligerent rights, in regard to third parties, not being enemies, from the analogous right to destroy pirates, though to the danger and probable damage of innocent persons.

If the question rested on general reason and authority, it would seem to be settled: but I have a stronger and more practical warrant, in the very instructions which I am charged with having violated; a document that loses none of the authority, due to its official character, from having been signed, and probably indited, by a gentleman whose talents and learning had illustrated a high judicial station in New York, before he was called to the administration of the navy department; and are now added to the splendid assemblage of the same qualities, on the bench of the Supreme Court of the United States. These instructions lay down the doctrine, and apply it to the actual case, in terms that leave not the shadow of a doubt of the relations in which I was to hold myself, as well towards the pirates, as the Spanish authorities and people.

"You will announce," says my letter of instructions, "your arrival and object to the authorities, civil and military, of the island of Cuba; and endeavour to obtain, as far as shall be practicable, their *co-operation;* or, at least, their favourable and friendly *support;* giving them the most unequivocal assurance, that your sole object is the destruction of pirates.

"The system of piracy, which has grown up in the West Indies, has obviously arisen from the war between Spain and the new governments, her late provinces in this hemisphere; and, from the limited force in the islands, and their sparse population, many portions of each being entirely uninhabited and desolate, to which the *active authority* of the government does not extend. It is understood that establishments have been made, by parties of these banditti, in those uninhabited parts, to which they carry their plunder, and retreat in time of danger. It cannot be presumed that the government of any island will afford any protection or countenance to such robbers. It may, on the contrary, confidently be believed, that all governments, and particularly those most exposed, will afford all means in their power for their suppres-

sion. Pirates are considered, by the laws of nations, the enemies of the human race. It is the duty of all nations to put them down; and none, who respect their own character or interest, will refuse to do it; much less, afford them an asylum and protection. The nation that makes the greatest exertions to suppress such banditti, has the greatest merit. In making such exertions, it has a *right* to the aid of every other power, to the extent of its means, and to the enjoyment, under its sanction, of all its rights in the pursuit of the object. In the case of belligerents, where the army of one party enters the territory of a neutral power, the army of the other has a right to follow it there.

"In the case of pirates, the right of the armed force of one power, to follow them into the territory of another, is more complete. In regard to pirates there is no neutral party; they being the enemies of the human race, all nations are *parties against them, and may be considered as allies.*"

I lost no time in establishing an understanding with the governors of Cuba and Porto Rico, as recommended by these instructions; and as fully appear from the documents accompanying the President's message to Congress, December 2, 1823, before referred to. From these it has been seen that both the governors recognized, without hesitation, the meritorious character of the war; pledged themselves for every aid and co-operation in their power; that, in various instances, they did co-operate; and actually received prisoners, taken by our squadron, both at sea and on land, and had them executed. Thus, the *presumption*, upon which my instructions proceeded, that the local governments of these islands were to be considered and treated as allies, in a regular war, was confirmed and consolidated into a solemn compact, followed by all the practical and open evidences of alliance and common cause.

I conceive it to have been clearly made out, that, in the simple character of *neutrals*, the conduct of the people of Foxardo would have justified stronger measures, than any adopted by me, towards them: but as the subjects of an ally, embarked in a common cause, they were out of the pale of protection from their own state; they were identified with the enemy of their own state; and the worst species of enemy, pirates: they were themselves, either actually or constructively pirates; and, in attacking and subduing them, (if I had gone that length,) I should have attacked and subdued the enemies of the very state, whose territory and sovereignty I am charged with having violated.

The only question, then, that remains, is, whether it were a violation of my instructions to have awed these people into some regard for their own duties, towards both the *allies*, and some greater respect to the *allied arms*, by a display of military power, pushed no further than to produce the moral effect of operating on their fears; by a demonstration of what we could, and would do, if they persisted in their iniquities. The question, then, may be reduced to this; whether a set of instructions, which had passed through the hands of so eminent a lawyer and judge, as Secretary Thompson, and had received the sanction of his name, had

been so improvidently phrased, as to forbid me from doing the very thing I was sent to do; namely, from protecting the *commerce*, and the *citizens* of the United States, from piracy; when it should so happen, that the perpetrators, or (what is the same thing,) the abettors, associates and accessories of the perpetrators, and so identified in appearance and circumstance with them, as rendered it impossible to make any specific distinction between principal and accessory, appeared in the persons of men, who had added to the crime of piracy, that of flying in the face of the authority of the government under which they pretended to live. An absurdity upon the face of the proposition; and therefore impossible to be inferred from any sensible and well advised instructions.

Still it may be more satisfactory to enter into some analysis of that document, in order to see, if its terms give any colour to so strange an imputation on its consistency.

Let it be remembered, that the question is not whether my instructions, in terms, import an authority to do the act; but, whether they prohibit it. It has already been shown, from reason, authority, and precedent, that, in proceeding upon the principle of self-defence, to attack or repel the enemy by the same means that he uses for our annoyance, no act of hostility is supposed to be committed against the neutral or allied sovereign; when his territory or his subjects are involved in the consequences of belligerent operations. That it was not to attack or punish Spain, but simply to repel the attack of the enemy, through her instrumentality, and with her means, was the principle assumed throughout the whole of general Jackson's justification. To have made war upon Spain, for any cause, either for her violation of treaties, or for her breach of neutrality, could have been justified, in no other way, but by the express authority of Congress; who have the exclusive jurisdiction of war and peace; and are the exclusive judges when, and for what provocations, war shall be declared. It is for them, and them alone, to decide whether national insults or injuries shall be resented or waived. The utmost extent of the President's power is to call out the force of the nation to repel invasions: in the exercise of which power, it is true, almost all our belligerent operations, since the existence of the government, have been carried on. All these operations, then, upon Spanish territory and subjects, by way of self-defence against our enemy, result from the incidental rights of actual war; as fully vested in every naval or military commander, to whose hands the arms of the republic are committed, as in the President himself. The only difference is, that the President, in his quality of commander in chief, may restrain or modify, at pleasure, the practical exercise of the right, by them in command under him; but, in the absence of such restraining order, these high belligerent rights exist, in their full force, in the person of the officer in immediate command, whatever be his rank. Upon that principle, was the capture of the Spanish towns and posts, in Florida, explained and justified. The American note, before cited, expressly states that general Jackson had no order, from his government, to take them; but that he decided, from his own discretion, upon the measure;

"of the necessity for which he had the most *effectual means* of forming a *judgment;* and the vindication of which is written in every page of the law of nations, as well as in the first law of nature, self-defence."

Then my justification requires no order or instruction, commanding or authorizing, while it is indispensable to the crimination of my conduct, that some order should be shown forbidding me to exercise the otherwise clear right, to adopt the highly expedient, necessary, and, in all its public results, most fortunate measure, now in question. The incidental power, to its fullest extent, was inherent to my command; unless that command had been stripped of it, by a positive order.

This brings us directly to the question, whether my instructions of the 1st February, 1823, do, in terms, forbid me to exercise this power?

I maintain, not only that there is the absence of any such prohibition, express or implied, but that the course of conduct which I pursued, is enjoined by my instructions: and if I had neglected that injunction, I should, at once, have basely betrayed the high and sovereign rights of war, with which the glory and safety of the nation are so essentially connected; and have violated the letter and spirit of my instructions, by a course of conduct directly opposite to that now imputed to me as a disobedience of orders.

I shall proceed to lay down a few simple rules of interpretation, by which the sense, in which I so clearly understood and acted upon my instructions, may be demonstrated as their true import and meaning.

1. The reason or final cause; the main end to be accomplished, deserves the first consideration. Then, I was appointed to the command of the squadron, "for the purpose of repressing piracy, and affording *effectual protection* to the citizens and commerce of the United States." I am told that it is my "duty to protect our commerce against all unlawful interruptions, and to guard the rights, both of persons and property, of the citizens of the United States, wherever it shall become necessary." Such is the final cause, or end of the armament; and, upon that, did general Jackson mainly rest the justification of his operations in Florida, when he appealed to that part of his instructions from the war department, which recommends a speedy and successful termination of the war, as being required by the honour and interest of the United States: and he argues that he pursued the only means, by which he could have effectuated such intent: and that the intent, both general and particular, which is expressed in the order, justified the means: these means being, in themselves, entirely conformable to the established laws and usages of war.*(a)* The means, by which I was to have accomplished the object of my command, were left to my discretion, under the guidance of some general rules, not, at all, more restrictive of the inherent authority of my station, than those prescribed to general Jackson; if as much so. The limitations of my authority, from which any thing, like a prohibition, may be inferred, are expressed in two clauses. I am, in

(a) Vide Niles's Register, Vol. 18, p. 331—2.

the first place, told that "where a *government* exists and is *felt*, you will, in all instances, respect the *local authorities;* and only act in *aid* of, and *co-operation* with them:" and again, "in no case are you at liberty to pursue and apprehend any one, after having been forbidden to do so, by *competent authority* of the local *government*." Now the term, "government," or "local government," certainly means the supreme power of the country: and, in reference to the Spanish islands, means the several provincial governments, there established; called *local*, in contradistinction to the government of the mother country, which is supreme over all. It cannot be pretended that the term comprehends the inferior magistrates of obscure towns and villages. Then this government must not only *exist*, but must be *felt:* and felt to what purpose, and to what extent? Surely to no less, than to maintain, practically and efficiently, its sovereign and active authority in the country; to the purpose and to the extent of holding it inviolate from the common enemy. In a preceding part of the instructions, places, to which the "*active authority* of the government does not *extend*," are spoken of: nor can it be less than the active authority of the government, in any case, that I was bound to respect. I am told, repeatedly, in my instruction, that I am to *presume* that the Spanish *authorities* and *people* will make common cause with me, and *cordially* co-operate with me: I am told so in the very clause, which requires me to respect the local governments; and strange, indeed, if I had been required to respect them, on any other terms. I was acting not only upon this presumption, but upon the faith of direct and positive assurances, from these very local governments, that they would so co-operate; confirmed by unequivocal acts of co-operation. When I came to discover, upon these islands, extensive settlements of pirates, in the various disguises of fishermen, &c. when I found considerable districts in the possession, or under the controlling influence of pirates, would it have comported with due respect to the local governments, to have *presumed* that such infamous abuses were by their authority; and that, by attacking the pirates, I should be invading the rights and dignity of the governments? Are these pirates to be viewed, in such circumstances, as either "Spanish authorities or people;" in the sense of my instructions? If such were the presumptions upon which we were to act, we committed innumerable transgressions, in the instances of the several piratical establishments broken up and destroyed, without complaint, on the coast of Cuba, as before mentioned. But the meaning of this injunction to respect the local authorities, where a government exists and is felt, is decided by its immediate context;—for it goes on to direct that I shall "only act in *aid* of, and *co-operation* with them." Now, the one of these injunctions is just as obligatory as the other. Them, whom I am to "respect," I must also co-operate with and aid: they must be in a condition to challenge, for themselves, both or neither. Then, if I am to *respect* the people and authorities of the islands, who are identified in character and conduct with the pirates, I must also "act in aid of, and co-operation with them:" and how consistent this may be with the main end and aim of re-

pressing piracy, and affording effectual protection to the commerce and citizens of the United States, needs no remark to illustrate. When I am told that I must not continue the pursuit of pirates, on shore, "after having been forbidden to do so by *competent authority* of the *local government;*" should I have been justified in accepting the prohibition of the pirates themselves, or of their known, or strongly suspected associates and accessories, as from such *competent authority?* The only prohibition ever received by me, was in the form of open hostility and resistance; no otherwise to be accounted for, than as an attack upon the *suppressers*, and a defence of the *professors* of piracy. Lieutenant Platt was not forbidden the pursuit and inquiry, which occasioned his first visit to Foxardo: but he was, at first, received with insidious civility, and a professed respect to his official character and mission: and, in that guise, was conducted to the town; where the treatment, he afterwards received, was equally unaccountable, upon any other ground, than that of the people, or a great majority of them, making common cause, or being identified with the pirates.

I am further directed, if "the crews of any vessels which I have either seen engaged in acts of piracy, or have *just cause* to *suspect* as being of that character, retreat into the ports, harbours or settled parts of the islands, I may enter in pursuit of them, for the purpose of *aiding* the local *authorities* or *people*, as the case may be, to seize and bring the offenders to justice; previously *giving notice* that it is my sole object." Then here is an affirmative direction (not necessary to communicate the authority, but only declaratory of an authority already inherent to my command) to pursue the enemy into the ports, harbours, and settled parts of the islands;—but qualified by a limitation, which necessarily supposes the presence of *authorities* or *people* who have the *will*, and, with my aid, the *power* to seize the offenders and bring them to justice. But suppose no *authorities* or *people* of that description are to be found; and, though the country be ever so thickly settled, it is occupied and held by pirates and their accessories; who exert a controlling influence and effective power over the district; and hold what people or authorities, there may be, in check, or in close alliance: is not the hypothesis, upon which the limitations of my otherwise absolute authority are expressly founded, done away; and is not such authority, consequently, left in its pristine force?—Is there any possible construction of the document, that could require of me to aid and assist people to seize and bring themselves to justice? The very case, put by my instructions as requiring the pursuit of the piratical crew, was presented: I had just cause more than to *suspect* that such a crew, which had robbed an "*American citizen*," at St. Thomas, had retreated with their plunder to Foxardo; and, in the pursuit of them, I am encountered, at the threshold, by men of the most equivocal appearance, who stand forward to resist the *pursuers*, and to defend the *pursued;* without parley or warning of any kind. Then, was I not bound to conclude that these men knew what they were about; and that the defenders and the persons pursued were the same? I knew, to a certainty, that they were

not, and, in the nature of things, could not be acting under the authority of the local government; but I had the strongest grounds to presume, that they were acting against it. What reason had I to presume, that they had any better authority than the pirates who fired upon captain Cassin, near Cayo Blanco, and upon lieutenants Kearney and Newton, at Cape Cruz; and who, on other occasions and at other places, committed the like violence; and, upon being pursued to the interior, were found to be settled in fishing villages, defended by cannon advantageously posted on the rocks?

It seems to me plainly impossible to construe my instructions, as a prohibition of the operation upon Foxardo, consistently, either with their context, or with the prominent and declared reason, or final cause of the course of service, which they prescribed. A learned and judicious author has said that "the nature of every law must be judged of by the end for which it was made, and by the *aptness* of things, therein prescribed, unto the same end:" a rule which absolutely concludes the present question.

2. The rule, which requires an expression to be interpreted "from its relation to what goes before and what follows the place where it stands," has been embraced under the head of *rational interpretation* already considered. But another rule, entering largely into every question of interpretation, is derived from the "circumstance of the same, or equivalent expressions, being used by the same person, to express the same intentions, on other similar occasions." *(m)*

Upon this point, it becomes material to examine the orders, or instructions, under which general Jackson acted, in the campaign before mentioned. The restrictive clauses of these orders, being more directly to the point, shall be more particularly noticed. These are explained by two documents: 1st. the President's message to Congress, 25th March, 1818, declares that, "to the high obligations and privileges of the great and sacred right of self-defence, will the movement of our troops be confined; *orders* are accordingly given to the general, *not* to *enter* Florida, but in *pursuit* of the enemy; and, in that case, to *respect* the Spanish authority wherever it is *maintained*:" *(n)* 2dly. In Mr. Adams's letter to our minister at Madrid, the order is laid down in nearly the same terms. *(o)* The only difference between the terms of the restriction upon him, and upon me, is, that in my case the government must be *felt*; in his, its authority *maintained*: And what possible difference there may be, between these terms, is explained (if indeed explanation can be necessary,) by the President's subsequent message, of November 17, 1818, where this very expression of a government's being *felt*, is used: *(p)* and, though there was a regularly organized colonial government, in possession of towns and fortified places, with well appointed garrisons;

(*m*) Gro. de jur. bel. & pa. B. 2. ch. 16. § 7. 2 Camp. Grot. p. 145-6.
(*n*) Vid. Niles's Register, vol. 15, p. 100.
(*o*) Vid. ibid. p. 371.
(*p*) Vid. Niles's Register, vol. 15, p. 213.

within the precincts of which, Spanish authority was paramount and undisputed; yet, because their authority was confined, almost exclusively, to the walls of St. Augustine, Pensacola, &c.; because they could not exercise an *efficient* and *active* authority, over those without the walls; and because all these strong holds were made subservient to the purposes of Indian hostility; the authority of the government was held not to have been "*felt*", any more than "*maintained*", even within the walls of garrisoned towns; not even in the capitals of their provinces, where the government actually resided. These very places were taken; because the authority of the government was neither *maintained* nor *felt*, to the *extent* required by her neutral duties, and necessary to allow complete effect to our lawful means of repressing Indian hostilities. When the general found that the government was not sufficiently *maintained*, or *felt*, to fulfil the final cause or end of his military operations; but tended to defeat it; he was justified in concluding, that it was not maintained or felt, to the degree, supposed by the limitation in his instructions: and, of course, that the *limitation* fell with the *hypothesis*, upon which it had proceeded.

Lest it be surmised that the government was secretly actuated by any policy to attack and undermine Spanish power in the Floridas;—not applicable to the state of things in the West-Indies: (if it be necessary to vindicate the government against any such double dealing,) I may refer to the successive orders, from the War Department, to generals Gaines and Jackson, from the 2d December, 1817, to the 6th February, 1818.*(q)* By these it appears that it was contrary to the policy and inclination of the government, to be embroiled with Spain, at that time. The state of the pending negotiation is expressly referred to, as rendering it impolitic to provoke her; and general Gaines is instructed, that, if the Indians, when pursued into Florida, *shelter* themselves under a *Spanish fort*, he is to stop and give notice to the government.

A practical construction is given to my orders, by the toleration of all our previous descents upon Cuba; followed by the destruction of settlements, having all the appearance of innocent fishing villages: and which were, nevertheless, found to belong to pirates in disguise. It has been seen how far the arts of deception were carried, on the coast of Cuba: where the spectacle was presented of old men, "with bald heads and hoary locks exposed to view," like the venerable sires of a peaceful and innocent generation of fishermen; and of matrons, as if present, either to implore protection for themselves and helpless offspring, or (according to the account of one officer,) like a celebrated heroine of a modern romance, by their exhortations and example, to inspirit their husbands and sons to defend, or avenge their homes and altars:*(r)* but where all these plausible and imposing appearances proved to be only deceitful covers, to the most atrocious of piratical establishments: for the utter extinction of which,

(q) Vide Niles' Register, vol. 15, p. 303—5.
(r) Vide Lieutenant Kearney's report before cited, (and ante, p. 86.)

upon no other warrant, or authority, than the discretion of the officers sent in pursuit of pirates; and acting upon the evidences and presumptions, by which their conduct was to be determined, in every new exigency of the service, these officers had received the approbation and applause of the government and the country. Then, if it were lawful to seize and chain these modern Proteii, on one shore, why not on another, equally the theatre of their frauds? Had they possessed the fabled spirit of prophecy, ascribed to their ancient prototype, it must have puzzled themselves, to divine, how I could have incurred the displeasure, either of the Spanish government, or my own, by pursuing them on the coast of Porto Rico, any more than on that of Cuba; at Foxardo, any more than at Cayo Blanco or Cape Cruz; as before practised, without censure or question, in former instances.(s)

But suppose I have failed to establish the construction of my orders, as understood by myself and now explained: does it follow that I am guilty of any *disobedience* of *orders*, under the naval articles of war? The negative may be clearly maintained on two grounds.

1. The naval articles of war look only to orders given by a *superior* officer in immediate command: not to general instructions from the government: the observance of which, it is supposed, the government has, in its own hands, the means of enforcing.

2. The instructions are *discretionary*; and no officer can be charged with the breach of a discretionary order, unless he wilfully and corruptly misconstrue and pervert it. For no mistake of judgment can be, in the nature of things, punishable. Here is the law of nations laid down to me, in my instructions; to be applied, in a great variety of supposed circumstances, to facts as they arise. A number of rules, defining the relative rights of the parties, are prescribed; requiring the exercise of a discreet judgment to expound them. I apprehend it to be impossible for any man to review the circumstances of this case, without admitting, whatever be his opinion of my judgment or my reasoning, that I might, in the honest exercise of my reason and judgment, have done the act, with which I am charged.

To bring me within the scope of this most penal charge, it must appear that I was, either, positively ordered to do something that I omitted; or positively forbidden to do something that I did: or that, under pretence of executing a discretionary authority, I corruptly or maliciously abused it.

CHARGE SECOND.

The second branch of the accusation has, from the first, occasioned me no little perplexity; which has, in no degree, been relieved by any elucidation, in the course of the present trial. Whether any, and what sort of justification it made incumbent on

(s) Vide Commodore Porter's report, May 10, 1823; Captain Cassin's report, April 28, 1823; and Lieut. Com. Kearney's report, August 10, 1823, before cited. (Ante, p. 82—4, No. 9, 10, and 11.)

me, was not so easy to determine, from any matter of crimination, either distinctly pronounced, or properly to be inferred from the context of the charge or the specifications.

The process, neither of the evidence nor of the argument, by which the gist of the prosecution, and the points on which it turned, should have been distinctly explained or openly vindicated, has tended to possess me with any more clear, or detailed information of the specific quality and degree of the offence, charged, or of the penal consequences supposed to be attached to it, than mighthave been collected from the extremely vague and indefinite, if not unintelligible terms of the charge and the specifications. Indeed, the impenetrable reserve, affecting mystery, if not studious of concealment, by which such dim and partial views of these points have been vouchsafed, would seem to indicate the darkest suspicions; and a necessity for a prosecution as unrelenting in its purpose, and as unscrupulous in its means, as could be at all admissible in any judicial procedure; as if it were dealing with some wily and veteran offender, skilled and experienced in all the subtilties of evasion; and who was to be caught, in his iniquities, only by pouncing upon him unawares; and by concealing from him the quarter of attack; till the unseen blow, pushed home and felt in all its force, should have overwhelmed him with the shame of open detection; while unprovided with a subterfuge, and cut off from all retreat.

I was instructed by the clear and unhesitating advice of my counsel, confirmed by as clear an insight into the merits of the question as could be obtained by my own common sense, to conclude, that this branch of the accusation purported to charge me with no offence, of which this court had any judicial cognizance: and my own conscience, as far as it had been enlightened by any knowledge or conjecture of the transactions, so darkly alluded to, was equally void of any offence; to which any degree of guilt, either legal or moral, could be imputed. Indeed it was clear enough, upon the face of the accusation itself, how sedulously the responsibility of having imputed any thing, immoral or dishonorable, had been guarded against: and, accordingly, that instead of a definite and precise charge, supported by specifications, in any proper and legitimate sense of the term, vague censures clothed in loose generalities, and in the most ambiguous and perplexed phraseology, had been introduced, by a strange abuse of terms, under the name of a charge and specifications.

Perfectly consistent with the original frame of the accusation, has been the method, in which it has been followed out, in the proof and in the argument.

Voluminous masses of documents, consisting of a miscellaneous correspondence, and a printed pamphlet of more than one hundred pages, were produced in evidence, under the several specifications; and indiscriminately read, from beginning to end; without any specific designation, or reference whatever, to the passages or circumstances, wherein the offensive matter was supposed to consist: with the single exception of the alleged omissions, deficiencies, and verbal inaccuracies, charged upon that part of my pamphlet, which purports to set out the proceedings of the court of

inquiry; which were, indeed, vouchsafed after the trial had proceeded for more than a fortnight. Additional masses, little less voluminous, of documents and other collateral evidence, have been introduced, and, in like manner, read indiscriminately, from beginning to end, without the slightest intimation of the charge or the specification to which they were to be applied; far less of the bearing, they were supposed to have, on any point of the accusation; or of the purpose and object of their introduction.

In two instances, witnesses have been introduced to authenticate numerous documents, without naming or describing them; and even without any enumeration or description of them being entered on the minutes, which record the evidence by which they are authenticated. Our request to have these documents openly exhibited and subjected to our inspection; or, at any rate, to be furnished with a list and specific description of them, has been denied; and all, that was vouchsafed to us, was an intimation, that it would be time enough for us to see and inspect the documents, when they came to be successively produced, as wanted, from time to time, in the progress of the trial. In the mean time, they have been kept, under lock and key, wholly inaccessible to me; and, to this very day, I am ignorant, how many, or what part, or, indeed, if any of these documents have since been found useful to subserve the ends of the prosecution, or have been actually used as evidence; though I presume, (but without any responsible assurance of the fact,) that some part of my official correspondence with the navy department, since read and attached to the record, entered into the composition of this strange paradox, of documents openly proved in a court of justice; and yet unknown either to the court, or to the party against whom they were produced. At a late stage of the trial, interrogatories are exhibited, for the examination of a witness by deposition. Explanation is asked, and unhesitatingly denied; first, of the authority for taking a deposition, instead of confronting the witness with the accused; as indispensably required (with a few stated exceptions, expressly provided for by statute,) in every criminal case; and, above all, in every capital case; and this, not only in the absence of any direct authority to be found in the naval articles of war, or other law, but in the face of an article expressly requiring that the witnesses, examined before a naval court-martial, shall be sworn by the President of the court: 2d, of the purpose for which this deposition was wanted, and of the point to which it was to be applied; in order that I might frame the cross interrogatories, which I was called upon to furnish, with a discreet forecast of the operation and effect of the evidence upon my cause. The deposition, taken before a county-justice of the peace, after having been held up, for some days, without any notice to me that it had been received, is at length produced and read to the court, under the same silence and reserve, as to the bearing, or relevancy, it might be supposed to have upon any matter put in issue by any one of these charges and specifications: the want of relevancy and pertinency, to any such matter, being apparent upon its face.

Whether these rigors were irregular or admissible, in the practice of courts-martial, this court has not been called to decide; for I was myself wearied out, and apprehensive of fatiguing the court, and exhausting its valuable time, by raising my voice, so frequently, against the continually recurring aberrations, from the established and salutary forms of procedure, usually observed in criminal prosecutions; and equally indispensable to the due administration of justice, in a military, as in a civil court. I made this sacrifice of my right to complain and to remonstrate, with no other hesitation, but what arose from my reluctance to sanction a dangerous precedent; the pernicious consequences of which, to the principles of military jurisprudence, were incalculable. My own innocence I knew to be too firmly seated in conscience, too strongly fortified by its internal strength, and too well guarded by external evidence, to fear either secret sap or open assault; and it shall not be my fault if any transgressions, against the wholesome rules of judicial trial, be drawn into precedent hereafter.

My own reason informed me, and the clear and decided authority of every approved author, who had treated of the elements or practice of military law, was united, with undeviating unanimity, in pronouncing, that every alleged offence against military law, as against the general law of the land, must be determined by some fixed and known rule of action, instituted by positive law, and defining the character and degree of the offence; and that it must be shewn, by the terms of the accusation, to be cognizable and punishable under such law. The grounds and principles, upon which this proposition may be demonstrated, and by which the present accusation, after having that test applied to its terms, is necessarily excluded from the legal cognizance of the court, have been amply unfolded, in the preliminary exceptions, taken by my counsel, to the 2d charge and its specifications. In the answer to these exceptions, the undisputed power of the executive to discharge, from service, any officer holding under its appointment; in other words, to revoke a commission granted during pleasure, is adverted to.—'Tis intimated that this power has been exercised, and may be again, to protect the executive from the contumelies of its subordinate officers; that, in this instance, the executive was under no necessity to have remitted me to a court-martial for trial; but might have judged and punished me by its own inherent jurisdiction, and upon the responsibility of its discretionary power; and that, having this inherent power and jurisdiction, it has, by the act of preferring these charges, pronounced its own opinion of my conduct; and has required, of this court, nothing more than to inquire and ascertain, whether the offence, of which it is taken for granted that I am guilty, may be explained or palliated by any circumstances of excuse or mitigation. Then if I may rightly comprehend this reasoning, this court is now exercising a jurisdiction, *ex gratia*; as a mere concession from the executive; without any necessary and legal cognizance of the matter; and, instead of a grave tribunal of criminal judicature commissioned to pronounce the solemn judgments

of the law, upon the guilt or innocence of a prisoner accused of high offences against the law, we have an anomalous sort of inquest, or council of ceremonies; which is to report, to some superior authority, every breach of decorum or good breeding, from boorish rudeness, to the slightest deviation from obsequious respect, by which fastidious pride, or apprehensive delicacy might be offended. In that view, no punishment is to be inflicted by the judgment of this court; but the case is to be again remitted to the executive, for him to decide, from the circumstances reported by this court, upon the expediency of exerting his power to remove me from office. 'Tis further implied, if not laid down in terms, that the executive requires not the opinion of this court, whether the facts specified under the second charge be true, nor whether they do, in themselves, amount to "insubordinate conduct and conduct unbecoming an officer;" both the fact and the corollary being already established, by the opinion of the executive manifested in the exhibition of the charge; and the function of this court being limited to a report of any circumstances of excuse or mitigation to be offered on my part. Still, the argument of the judge advocate, in answer to the exceptions taken by my counsel, concludes with a clear and unhesitating opinion, that the charge and specifications are not only sufficient, in substance and form, but that they do specify offences of a military character; for which the accused may be arraigned and tried before a court-martial.—Whether *punishment* be understood to be involved in the *arraignment* and *trial*, here spoken of; or to be deferred to executive discretion, so as to reduce arraignment and trial to a mere inquisition into circumstances of excuse and mitigation: or whether a judicial power to try and punish, concurrent with the executive power to judge, summarily, upon view; and to punish, by removal from office, be affirmed;—are questions which it would be difficult to determine, by any lights in the preliminary exposition, that has been elicited, of the principles upon which the jurisdiction of this court may attach itself to the case.

Having still to grope my way, through a dubious twilight, to a knowledge of what may constitute the gist of my offence, and the essence of the accusation, in point both of law and fact; I must proceed, by the help of anticipations and conjectures of the point of attack, to defend myself, the best I may, on every ground.

Though I had yielded my conviction, with such absolute confidence, to the force and conclusiveness of the reasons, by which the preliminary exceptions of my counsel, to the sufficiency of the 2d charge and its specifications, had been sustained; yet I should not have been, in the least, disconcerted, nor, as I imagined, materially curtailed of my defence, if such exceptions had been overruled, by any new and unexpected arguments, which the learning and abilities, enlisted against me, might have suggested in answer. I should, without regret, have given undisputed sway to the philological and legal disquisitions, which were supposed to have furnished such victorious arguments, in vindication of the charge and specifications, excepted to. But when I found myself assailed by a species of *argumentum ad hominem*, digressing in-

to circumstances foreign to the point in question; and proceeding upon the most extraordinary misapprehensions of my language and conduct, and of the motives inferred from them; I could not forbear to discharge myself from the imputations, and disclaim the inferences, that might have resulted from the official and recorded misconstruction of my conduct and motives.

I adhere, with undiminished confidence, to the propositions of law, which have been stated and illustrated by my counsel, to acquit me of any necessity to answer the 2d charge and its specifications: but before I advert to the grounds, upon which they are either maintained or contested, I must be permitted to pass, very briefly, under review, the collateral topics of disparagement, which have been brought in aid of the argument against them.

1. As an evidence of my disposition to raise captious and futile objections, if not of my want of candor, it has been stated that I complained, on the first day of the court, of not having been served with a copy of the charges and specifications; and yet, the next day I produced a copy, with which I had been regularly served, and which differed from that, upon which I had been arraigned, only in *two letters*. The fact is well remembered, that I gave, as a reason for demanding a fresh copy of the charges and specifications, a difference I had discovered between the copy read, and that in my possession; and my written explanation, the next day, which I hope forms a part of the record, minutely explains the difference between the two. Nor is the stated result of the minute calculation, which reduces the variance to a mere difference of *two letters*, in the spelling of a word, by any means correct or fair. The variance (no matter in how many letters or words it consisted) was in the date of one of my letters, specified as "insubordinate and direspectful:" the letters were, no otherwise, specified or identified, than by a naked reference to *dates*;—the one copy of the specifications gave a letter of one date; the other copy omitted that, and gave a letter of another date; and so, the variance consisted not in the difference between the spelling of *thirtieth* and *thirteenth*, but in the *entire letter*, which constituted one of the documents of the charge; and, in one sense, indeed, answers to the result of the judge advocate's calculation of differences; namely, a difference of *two letters*. But if it be true, as has been suggested, that the only office of the court, in this trial, is to offer propitiation to another authority, by which I stand already condemned, upon the strict law and the fact; how hopeless the task of exculpation or excuse, if the spirit, in which the charges have been instituted, be consentaneous with that by which they are prosecuted to judgment. For here am I charged with litigiousness, illiberality, and want of candor; because I had simply pointed out an important defect in the procedure against me; all advantage from which I had voluntarily *waived*; and had even conceded to the prosecution an *election* to adopt either or both of the letters referred to, in the two copies of the specification; only requiring that the election should then be definitely made.

2. I am also represented as having appealed to the judge advocate to *withdraw* the second charge; and even to have followed up that application with some intimation sounding in *menace:* and it is thought necessary gravely to expound the relative powers and duties of the judge advocate, from which any discretionary authority to *withdraw* a charge is excluded. The only circumstance from which, as I am given to understand, this attempt to escape from the prosecution, either by the lenity or the fears of those who were to uphold it, has been inferred, was a simple appeal made by my counsel, purely out of the courtesy usual on such occasions, to the *candor* of the judge advocate, as the law-adviser of the court, upon the validity of the exceptions to the second charge. As I, and every person present, with whom I have compared notes, most distinctly and clearly understood the passage of the transaction alluded to, my counsel was *insisting upon the right of reply,* if, contrary to his expectation, any answer should be offered to the reasons advanced in support of his exception to the 2d charge and specifications; and, after explaining that, according to all judicial practice, the right of reply lay with that party who had originated the motion, and supported it by an opening argument, he qualified his application to the court, by saying that he really did not anticipate a necessity for any such reply in that instance; as he entertained a very confident hope and expectation, that the judge advocate, when he should have deliberately considered the question, would candidly admit the force of the objections, instead of attempting to answer them; and would abandon the charge and specifications, as untenable.

Why such an appeal to the candor of an opponent, should be abhorrent to the principles, upon which this prosecution is conducted, concerns only him or them to whom the conduct of it is entrusted. I ask no favors, no concessions: nothing, in short, but the strictest debt of justice, cast up by the hardest reckoning: nor have I ever desired to wrest it from any withholder, by other than the moral force of law and justice. As to the menace, so strangely surmised, it is said to be inferred from some expression in the written argument of my counsel. Whatever be the exceptionable passage in that document, it now stands recorded, for the condemnation or acquittal of its author: and dispenses me from any explanation, further than that I have looked, in vain, for the passage, from which any mind, not afflicted with an extreme susceptibility of offence, could have inferred a menace. Every well wisher, to the credit and success of this prosecution, must hope, that its character for nerve and determination, should rest upon some less equivocal evidence, than the power to withstand the instances of this shadowy phantom of a menace. As yet, certainly, no infirmity of purpose, in the course of the prosecution, has given ground for any doubt, either of the active courage or the passive fortitude, by which it is upheld; and I shall be the last to undervalue the efficacy of the tremendous ordeal, to which those high qualities seem to have been voluntarily destined, by the manner in which they are exerted upon this occasion.

3. I am also reproached with having taken refuge under nice cavils of law and grammar; with having taken advantage of verbal criticisms, and legal technicalities, in order to escape the legitimate consequences of the charge; and with having manifested more dread of punishment, than sensibility to character; as if I were willing to go forth, acquitted by the judgment of the law, but condemned by the moral sense of mankind: unpunished in person, but tarnished in fame. To little purpose, indeed, have I so long lived and acted in the public eye, if there exist a man who could, in his heart, entertain the suspicion that I could incur any more grievous punishment, in this life, than a degraded name, or could aspire to any higher reward than a pure conscience and a spotless reputation. But if it were otherwise, and it were true that I could have been reproached with a design to escape investigation, by resting upon any legal advantage, it is without precedent, I believe, either in England or in this country, that the law-officer of the government, charged with the conduct of a public prosecution, should have attempted to affix a stigma upon the character of the accused, as a substitute for legal conviction and punishment; or, if there be any instance, either among the crown lawyers of England, or the law-officers of the United States, of any such gratuitous infliction upon the feelings of the accused, it has been held up as a beacon to be reprobated and avoided, rather than as an example to be followed. The humane dictate of public justice, in every such case, is, that the law and its ministers either judicially acquit, or judicially condemn, without qualification: whom the law acquitteth, its ministers presume not to condemn; but for every moral offence, without the cognizance of vindictive justice, the party is remitted to his conscience, and to the bar of public opinion. But, in this case, my exception to the charge turned upon the utter absence of any imputation either of *legal* or *moral* guilt; and insisted upon the vague and unintelligible phraseology of its terms; or, in so far as any intelligible point of accusation could be deduced from it, that it hinged upon minute and trivolous fault-findings, altogether beneath the dignity of judicial animadversion. And now, that this long rod of investigation has had its full swing: unlimited by time, place, or circumstance, every anticipation of the frivolousness and want of gravity, in the essential matter of the charge, is more than verified in the event.

Before I proceed to discuss the 2d charge and its several specifications in their order, I must beg permision to advert to some points in the argument of the judge advocate, in answer to the exceptions taken by my counsel; which are left in a state, not a little perplexing to me.

[Note. Here our copy of the *written* defence, sent in to the court-martial, ends; and even so far we have had no opportunity to *compare* the two copies; and cannot therefore exactly say what verbal differences or slight omissions may be found in them; any further than to be certain that there cannot be one at all material to the argument, the statements or the sense of the document. The two copies were respectively taken by different

clerks from an extremely rough and hasty first draught; some parts of which had been found somewhat defective in the connection of the sentences, and were corrected in the copies: and hence possibly some very slight and immaterial variations may have arisen. As to the residue of the defence, it never had been written out till so done for the court-martial; and then it was principally written by a clerk by *dictation* from voluminous notes, with here and there some passages written out: the whole defence, as is well known, having been delivered *orally* from such notes, with occasional passages of written composition. The defence at large, as orally delivered, went copiously and in much detail, into the argument and authorities on the various points of law, with a minute analysis of the evidence. But when written out for the court-martial it was very much condensed; it being extremely difficult to make the same copious details intelligible in a written composition, as in an oral argument: and the court having been possessed, by the latter, of these details, made it unnecessary to do any thing more than give a concise summary which would serve to recal and methodise the details. And we have concluded, in making up this report, to pursue nearly the same course; but giving the analysis (that is a methodical statement) of the evidence and the points to which it applies, in the preliminary statement of the case; and also abstracting from the defence the argument upon the technical points of law, connected with the preliminary exceptions of the accused; with a view to place it in the proper order of the discussion, immediately after the judge advocate's argument, to which it was intended as a reply. From the original notes of the defence, which have been preserved, aided by our own recollection and that of the counsel, we shall be able to present a full and accurate report of the statements and arguments contained in the original defence: adhering as nearly as possible, or as necessary, to the method, manner and style of the original. In the following part of the defence we shall introduce only such passages commenting on the matter of the preliminary exceptions as serve to illustrate the motives and general principles which had induced commodore Porter to adhere to them, and to enter into an elaborate vindication of them in his defence.]

After arguing the technical question on the proper mode and time of taking advantage of the matter of these exceptions: whether as a motion to dismiss the charge, in arrest of judgment or by way of *demurrer*, the argument on that point was concluded by remarks, in substance as follows:

Hence it plainly appears, that a *demurrer* is a plea wholly unknown to the practice of courts-martial: and that a motion in arrest of judgment would be absurd and impossible. But the right to except, in some form, to the legal sufficiency of the charge being admitted, it necessarily follows that the questions of law, thence arising, must be discussed before proceeding to try the issue of fact; or reserved, under protest, to be considered at some subsequent stage of the trial. This surely is the only practicable or rational course.

I have been the more particular upon this technical point, because I cannot foresee the consequence to which the doctrine, contended for by the judge advocate, may be pushed to my prejudice: and the talents and learning, manifest in his argument, make it unsafe to trust too confidently to the apparent inconclusiveness of his reasoning; without taking some pains to demonstrate its fallacy. Had it been true that I could not except to the *law*, without admitting the *fact*, it might also have been concluded that I could not plead to the *fact*, without admitting the *law*. In that case I might have laid myself open to conviction, upon mere proof of the naked *fact*, that I had written certain letters, or published certain proceedings, without any consideration whatever, of the *legal effect* or moral character of such acts. The judge advocate seems to admit that, at some stage or other of the trial, I may have the advantage of exception to the legal sufficiency of the charge; but at the peril of being held to a conclusive *admission* of the *fact*: and, as I know not how the matter of such exception may be any more regularly taken up, or safely or effectually urged, when mixed up with matters of fact, than when separately considered, I have thought it more safe and expedient to maintain the original ground of exception.

[After concluding the argument on the nature and extent of the court's jurisdiction, particularly in reference to the *legislative* faculty ascribed to it; and its unlimited cognizance as a court of *honor*, remarks to the following effect were made:]

But it has been asked by my counsel, and I ask, again, what is there in the charge, or in any one of the specifications, that imputes, either directly or by inference, any act within the jurisdiction of a court of *honor;* or which may not and ought not to be the subject of special and positive enactment, if it be thought that sound policy and the good of the service require that they should be brought under the judicial cognizance of a court-martial? This question was put in reference to the terms of the accusation. I now put it in reference to the *proofs:* and challenge the severest test for every word and deed which the minute industry of the prosecution, stimulated by provocations real or supposed, has been able to call up against me. Whatever errors or inadvertences, or indiscretions it may please them to impute to me, let any one word or deed be pointed out, as approaching, in the remotest degree, to the character of scandalous conduct; or as, in any other sense, soliciting the animadversion of a court of honor. I understand this legislative power, over the subject of military crimes and punishments, to be claimed for this court, not only in its imputed capacity as a court of honor, but, in right of a general jurisdiction, extending to every sort of transgression which, according to sound and discreet views of policy and expediency, ought to be repressed, as tending immediately or remotely, to the relaxation of discipline; and which the good of the service require to be punished as military offences. I shall not stop to dilate upon the nature or consequences of a doctrine, so abhorrent to the first principles of civil and military polity: these topics have been amply treated, by my counsel, in reference to *military*, as distinguished from *civil* life.

[In the course of discussing the prescribed forms and substantial requisites of a valid accusation, as compared with the terms of the present, it was remarked in substance as follows:]

The question on the legal sufficiency of this charge and its specifications in reference to the prescribed forms and requisites of military accusations, was supposed to have been settled by a concurrence of so many and such pointed authorities, all coinciding with the plainest dictates of justice, and with the most indispensable safe-guards of individual right and security, as to leave little or nothing to be said on the subject. There seemed to be little occasion, either in the general principles propounded, or in their application to the present case, for any strictures upon the mischievous consequence of permitting an evasion of justice, by means of nice and technical objections to form, or of captious verbal criticism. It had been thought to be as obvious to the philosophical, as to the professional and practical observer, upon the principles of a regular and discreet jurisprudence, that it was far more just and safe to compel the ministers of the law, to care and precision in the forms of procedure; than to set them loose from every wholesome restraint. The necessity and the value of these land-marks to human rights, are enforced, no less, by the rules of criminal judicature in *military* than in *civil* tribunals: the theory in both is precisely the same; and the practice assimilated, by the closest analogy. One of the most celebrated and useful of the authors, who have treated of the law and practice of courts-martial, has not failed to insist upon the comparative mischiefs arising from a disregard on the one hand, or a strict adherence on the other, to established forms; and to demonstrate the wide spread and incalculable evils resulting from the one, and the very partial and occasional inconveniences from the other.*(t)*

These exceptions were, in the first instance, urged on my part, under a firm conviction that they were unswerable; and having embarked in them, their importance required that they should be sustained. I have felt, however, no other solicitude, as they relate to my own particular case, but to beware of being entrapped, by vague and ambiguous phrases, into such a *dilemma*, as that the court should feel itself compelled to find the *fact* against me, of having written or published what I never denied; or of any other frivolous matter in the specifications; without the necessity of imputing to it any specific degree of legal and moral impropriety.

[After a critical examination of the terms of the charge separate and apart from the specifications, the first of these was discussed to the effect following:]

First Specification.—If the strictures upon the terms and phraseology of the charge itself be at all founded, surely this specification must be still more untenable: while the most successful argument in support of the general charge could not help the specification. For, after it shall be made to appear that "in-

(*t*) 2 McArthur, p. 11.

subordinate *conduct*," predicated of a moral agent, is equivalent to *insubordination*; and that this last denotes some definite offence in such agent, it must still remain an enigma, what "insubordinate *character*" means when predicated of his letters. The moral agent may commit a breach of subordination by writing a letter, when forbidden, or not writing when commanded: but what positive quality of subordination or insubordination may inhere in the letter itself, is the mystery. Besides, to charge either a moral agent, or a letter on the score of general *character*, is a novelty:—and far more so to specify such character as the particular *fact*, circumstance and manner of the offence. The obnoxious *acts* and motives of the one, or tenor of the other can alone satisfy any reasonable idea of a *specification*.

The "*insubordinate* character" charged upon these letters being altogether unintelligible and absurd, their "*disrespectful* character" (if at all more significant) is too vague and uncertain for any legal consequence. What should constitute disrespect *in any communication oral or written*, is in a great measure arbitrary; and may depend upon minute observances of etiquette wholly beneath the gravity of judicial notice.

Disrespect, in any form of words written or oral, is not recognized as a species of offence in the *naval* as it is in the *military* articles of war. In the latter it is defined and limited by a specific enumeration of the personages to be protected against it; and from that enumeration the Secretary of War is excluded; and there can be no possible reason why the feelings of the one Secretary should be held any more sacred and inviolable than the other; still less that the naval articles should have interpolated in them a new and fanciful species of offence, merely for the sake of giving to the one of these officers pre-eminent privileges over the other. The naval articles punish *contempt* to a superior officer, while in the exercise of the duties of his office; no species of disrespect short of contempt, so manifested, could be punished under these articles.—Contempt so manifested implies something more than mere *words*: it implies either acts or words attended by the practical consequence of insulting and impeding a superior officer in the very act of discharging his duty: it stands next in degree to *mutinous* words, if not to actual mutiny.

But grant that "letters of an insubordinate and disrespectful character" are equivalent to "*contempt* to a superior officer," &c. within the meaning of the naval articles; still the Secretary of the Navy, if he be the person to whom the disrespect was offered (a matter to the last degree equivocal and uncertain on the face of the specification) answers not to the description of *superior officer* contemplated by the articles of war; which evidently refer to the gradations and relations of mere military or naval rank. The Secretary of the Navy is exclusively a *civil* officer without military or naval rank, or other connection with it, than as the organ of communication between the executive and the officers of the Navy.

But, after all, what is there *disrespectful* to any body in these letters? They complain of real or supposed grievances. They freely remonstrate, it is true; and when officers of the army or navy may not do that with impunity, they must be abject indeed, if not debased. The *military* articles of war expressly authorize the appeal of the meanest soldier, and so through all the gradations of military rank, when he thinks himself *wronged*. Then any officer or soldier of the army may complain of *wrong* from his immediate superior, without offence:—and what shall restrain an officer of the navy from complaining and remonstrating against alleged injustice?—The question is not now presented to this court, whether I were well grounded in my complaint; but whether it were urged in indecent or abusive language.

The examples of free and of uncensured complaint and remonstrance, from military men, to or against their superiors, are frequent in the services of this country and of Europe.

I have already remarked that I am not called upon to explain or justify the tone of complaint indicated by the correspondence now produced; but I should be at no loss to specify such reasons as, upon the coolest reflection, I still think well founded. The manner of my recal so incommensurate, as I then knew and still know, with the merits of my conduct; which if it had been as well understood then, as it must be now, I do verily believe would have received applause instead of censure: the inequality between the treatment I received, and that extended to others under like circumstances:—the continuing to hold me up as an ambiguous object of denunciation and calumny, or of indefinite suspicion, without investigation, for so long a time after I had tendered myself prepared for the investigation to which I had been cited:—were all circumstances that bore hard upon my thoughts.—The magnanimous and triumphant support given to General Jackson against a heavy and menacing cloud of discontent;—the delicate treatment of Captain Cassin (as explained in the order from the Navy Department to me of the 9th of April, 1823) who had the option to come home and explain his conduct, or to transmit a written explanation against grievous complaints (severe and unjust as they were) of the Spanish minister;—altogether presented so strong a contrast to the manner and circumstances of my recall as convinced me that I had, in some way, forfeited the favor of the administration. Nor did the administration appear so instantly and spontaneously struck with the enormity of my transgression at Foxardo, as to account for my severe treatment. For my official report of the transaction lay unnoticed in the department, for more than three weeks after it had been received; and my letter of recal bears date on the very day that the inquiry concerning the affair was moved in congress. It was my *misfortune* and not my *fault* if any circumstances made it impolitic, or in any manner inexpedient or unpleasant for the administration to stand the brunt of another congressional inquiry; or if from my want of favor, or of official or personal importance and influence, there were no adequate motive to bring forward, on their responsibility, the justification which I

could so easily have supplied. 'Tis true the Secretary's letter to me (April 20, 1825) seems willing to ease off the weight of the blow, by mixing up other causes for my recal. I had indeed, intimated a conditional wish to be relieved from the command: but I could never have inferred, from my letter of recal, that it was in any degree caused by such intimation. Besides, if that recal had proceeded, at all, from a disposition to gratify my particular wishes, why was it not so *announced?*—Why was it *promulgated* as resulting solely from the necessity under which I was laid to justify my conduct?—Why was the matter left for four months in equivocal suspension infinitely more penal than express disapprobation, or determinate accusation? No reason has been assigned, or can be fairly conjectured, even to this day, for having so long postponed my repeated and pressing instances for a speedy and effectual investigation.

I take this occasion to say, that I should despise myself if I were capable of insult or rudeness to gentlemen, to whom I stood in my then or present relation to the President and to the Secretary of the Navy:—I should hold it as unmanly, as to stand mute and awe-struck, when I conceived myself justly entitled to complain. If any passage of my letters could reasonably have borne such a construction, I should have been grieved; and have instantaneously disavowed the inference.

On the other hand, I am not sensible of any impropriety in the matter or the manner of my letters, for which I can be censured by a court-martial, without exacting from the officers of the navy the basest servility: without condemning them to a pusillanimous silence under the strongest sense of injury, or to cringe at the doors of departments and bureaus for justice.

I have discussed thus generally the merits of these letters, because the generality and vagueness of the accusation enabled me not to be more particular. The letters, as simply referred to by their dates in the specification, have been produced and read, without the slightest intimation of the exceptionable passages; or of the person against whose dignity or feelings they transgressed; or wherein the offensiveness of them consisted. I must therefore leave it for others to discover or conjecture which of them or what parts of them, an officer of the navy, who honestly thinks himself aggrieved, dare not address to them who owe the duty and possess the means to redress him.

Second Specification.—This charges the naked fact (without one circumstance of aggravation, or the remotest suggestion of any ill intent or mischievous consequence) of having published a pamphlet purporting to contain the proceedings of the court of inquiry, before the Executive had authorized the publication of such proceedings.(a) The lawfulness of this act, as stated on the face of the specification, was farther insisted on; but for the reasons already stated, the argument on that point is here omitted. The evidence, it was said, had supplied no new illustration. The publication was admitted. The court had not given, nor was

(a) Ante. p. 7.

competent to give any opinion on the subject matter of inquiry; not having been so required. No injunction of secrecy, express or implied, was imposed on the proceedings of the court; but they were publicly conducted, and, as it were, the property of the public. The business of the inquiry had been completely executed for more than three weeks; and the court had been dissolved.

THIRD SPECIFICATION.—This was also said to have advanced nothing but a simple charge, without the slightest aggravation from intents or consequences, of having given an *incorrect statement* of the *proceedings of the court of inquiry*. Upon this the defence went into an elaborate and minute examination and comparison of the instances of incorrectness so charged, and set forth in the detailed specification and list of the same laid before the court by the judge advocate. Upon the plan above stated, of collating the more complex parts of the evidence in the statement of the case, and arranging and illustrating its application methodically to the various points to which it was adduced, we shall here present a mere summary of the statements, illustrations and reasonings before the court, in explaining this specification.

The numerous and complicated list of particulars cited as instances of *incorrectness* in the published *statement of the proceedings* is resolved into two classes. I. The total omission or suppression of documents. II. Clerical errors in the transcription of the record, or typographical errors in the printing of it.

I. The entire record, as exhibited before the court, consisted of the minutes or journal of the proceedings; comprehending the examinations of witnesses, and winding up with the final report of the court; to which are annexed fourteen exhibits distinguished by numbers from 1 to 7; and by letters from A to G; all of which except *two* are admitted to have accompanied the statement of the proceedings as published in the pamphlet. The list of particulars, specifying the instances of incorrectness, charges the suppression or omission of these two documents and of the *report* of the court of inquiry: making *three* instances of suppression in all; which are successively accounted for as follows.

1st. The exhibit No. 6, [being the original letter of instructions of the 1st of February, 1823, from the Secretary of the Navy, upon the imputed violation of which the first charge now in a course of trial is founded,] which is *not* suppressed or omitted; but actually published in the pamphlet, with the omission only of some concluding paragraphs, entirely foreign to the then pending subject of inquiry. A comparison between the printed copy, and the original now produced is confidently appealed to as demonstrating that the passages so omitted had no sort of connection with the subject matter of the inquiry; and that the insertion or omission of such passages was a matter of utter indifference. It was given as an extract; and therefore no one could be deceived by taking it for the entire letter. The same reasons demonstrate the absence of any improper motive or design in the *suppression of the concluding passages*: though the charge hing-

es not upon the omission of those passages but of the whole letter. So far from any such motive or design being imputed or imputable the letter was expressly cited in my defence; I relied upon it as containing a full and conclusive justification of my proceeding at Foxardo; I reasoned then as I do now, that my instructions not only justified that operation, but commanded it as a duty. It would have been a portentous mistake indeed, to the disparagement of my own reasonings, and beating from under me one-half of the ground on which I professed to justify myself, if I had suppressed that document.

2d. The exhibit G is also charged as being suppressed. This is explained to be a letter (May 7, 1825) from the Secretary of the Navy to the judge advocate, while the court of inquiry was in session, and during the progress of the inquiry, into the Foxardo affair. If it were true that it had been not only omitted, but entirely overlooked and passed by in silence, what possible evidence could it have afforded of suppression, in any bad sense of the term? That must be determined by the nature of the document, its connection with the subject, and the possibility of its having supplied any inducement of interest, or other bad motive for the suppression. The mere *designation* of the document, as a letter from the Secretary of the Navy to the judge advocate, shows that, in the nature of things, it could not have contained any evidence or other matter which it was my interest to have concealed. Look at the letter itself; and what is it but a formal communication merely announcing that certain documents, therein mentioned, (some of them as received from me, and some from the Department of State, relative to the subject matter of inquiry,) are transmitted for the consideration of the court. In a statement of the proceedings, given merely for the purpose of exhibiting the real evidence and the substantial matter and result of the investigation, nothing would have been more allowable than to have given an extract of the substantial parts alone; and to have omitted the merely formal appendages of the record. This, doubtless, would have been done, on the responsibility of the party; and, if any thing had been omitted which he could have had any possible interest to suppress, would have laid him open to suspicion and censure. Whatever interest I had in this omitted letter led to the publication, not to the suppression of it: because it supplied a conclusive argument for the *admission* of the documents which the court of inquiry had *rejected*; and which are nevertheless published in the pamphlet as a part of my justification; with a note *contesting* the propriety of the decision by which they had been rejected. But what is to be said of this charge, now that it appears that I was so punctilious and so sedulous to make my copy of the proceedings minutely and literally correct, as to have taken considerable trouble to obtain the few unimportant parts of the proceedings that were wanting to make my copy complete; and this very letter among the rest; in which I failed for the reasons stated in the judge advocate's letter of May 21, 1825? This evidence, however, was not necessary to

produce amazement at finding myself charged with the omission of this letter: since the fact stands recorded on the face of the very publication, wherein it is said to have been suppressed, that such a letter was produced to the court, but "not in my possession;" and in my letter to the Secretary of the Navy of June 14, (among the letters now exhibited as "insubordinate and disrespectful,") written more than a week before my arrest and before the exhibition of the charges, and in which conjectures are made as to what parts of my publication were charged with being "deficient and inaccurate," the omission of this identical letter is mentioned, and accounted for as having been "refused to me by the judge advocate." At the time my clerk took a copy of the minutes of proceedings, it appears that the *mark*, by which this document was to be distinguished, was left blank; and was afterwards filled up in the record with the letter G. In my copy of the minutes (page 31 of the pamphlet) the note, just mentioned, was affixed to the reference to this document, the mark of which is so left blank, importing that it is "not in my possession," for the express purpose of accounting for the omission. Thus is this *particular* of that anomaly, a *general* specification, just as uncertain in respect of the *gist* and *intent* of the complaint, as the original charge and specification: for I hold it impossible, under such circumstances, that a charge of suppression, in any criminal sense of the term, can have been gravely intended:—and if not that, what is it?

3d. The next and last *item* in this formidable list of *suppressions*, is that of the *Report* of the court of inquiry: and as to that, every fact and every reason, by which the omission of the exhibit G is accounted for, applies with identically the same force and effect. 1. As to the *materiality* of the paper; and any possible interest or sinister motive which I could have had to suppress it. This document gives, as the result of the inquiry, a dry and unvarnished summary or recapitulation of the naked *facts* proved in the case:—it names or refers to all the evidence *seriatim*; and professes to give a methodical and literal statement of it, without color or comment of any kind. The court was not required, by the precept, to give an opinion; and, of course, the slightest intimation of such is carefully avoided. When, therefore, the evidence itself was published, every thing, of which the report of the court could or ought to have informed the public, was given. If, on the contrary, the report had stated more or less than the evidence, it might be presumed that I should rather have seized upon it as a distinct ground of exception and complaint; rather than have concealed it: as I had unfortunately differed with the court, so materially, about certain of their proceedings in the conduct of the inquiry; the propriety of which had not only been contested before the court, but was still controverted in the pamphlet. 2. As to the actual suppression of the documents;—the chasm, which should have been filled up with it, is distinctly indicated in the published copy of the proceedings; where the existence of the report is recognized and its omission accounted for; as follows:

("The report here comes in of which I have no knowledge,")

The remark is repeated in the same letter of June 14, where the omission of the exhibit G is mentioned and accounted for; and where I respectfully invite the publication of *both*.

So far then I stand charged with one omission which is directly contradicted on the face of the document itself: and, not a whit more unreasonably, with two others which are admitted and explained on the face of the same document; which is supposed to have been falsified by such omissions.

II. The specification of simple incorrectness in my statement of the proceedings, appeared to be frivolous enough on the face of the specification itself; but it turns out to be still more so in the proof: for if every minute variance, between the printed report and the record, could be justly charged as the mistake of the former, they were wholly immaterial; and it was too favorable a representation of them to say that they were merely *verbal*; for they descended into the minutiæ of punctuation and orthography, and even of emphasis, if such may be understood by the term, *italicising*. The only circumstances that could have given any legal or moral effect to the specification, was to have charged substantial errors, materially varying the sense; and to have charged them as proceeding from some sinister motive. These defects of averment, so far from being supplied, are made but the more manifest by the evidence. The pains I took to have the record accurately transcribed, by competent and experienced clerks employed for the purpose;—and afterwards to have it correctly printed, are fully proved. This proof alone was sufficient to repel any charge against me for clerical misprisions or typographical errors committed in the course of transcribing or printing: the frequent and innocent recurrence of which, and the difficulty to avoid them are notorious. But the proof does not stop here; it goes the length of establishing the fact that these variances, casual, immaterial and innocent as they may be, are not chargeable to the account of my clerks; but thatthe great mass of them (in what exact proportion to the whole is not absolutely certain) was produced by *alterations* made in the *original* after my *copy* had been taken from it; and without notice to me of such alterations. This fact, I consider as directly proved in numerous instances, and by the clearest evidence; and very satisfactorily to be inferred in others, from a comparison between the copy and the original.(*a*) The direct proof is substantially this: that numerous *interlineations* and additions, in a different hand writing (that of the judge advocate) from the body of the original, are all *omitted*, without exception, from the copy: while words *erased* in the body of the original, but so as to be barely legible under the erasure, are all found in the copy. In all these passages, my copy reads to the greatest exactness with the fair transcript of the original as it stood before it had been so altered: *retaining* all the words *erased*; and *omitting* all *interlined* and

(*a*) The instances were particularly pointed out, with reference to the proofs: but here omitted with a view to be introduced into the statement of the case.

added. Then there are two witnesses, besides the *evidentia rei*, to establish the *original* correctness of my copy, and the subsequent alterations of the original: to wit: the clerk, Mr. Harrison, who was employed by the judge advocate to transcribe from his rough minutes the fair record which was signed and sent to the Department, with these interlineations, additions and erasures on its face; and my clerk, whose copy varies in all these particulars, from the original as it now stands, and agrees with it, as it stood before, all concur in proving that the original, as it formerly stood, was correctly copied, and that the variances now apparent between it and the copy, were produced, not by clerical errors in the latter, but by subsequent departures of the original from itself. This proof is corroborated, if proof so plain can be corroborated, in these very instances, by the nature of the existing differences between the original and the copy: the interlineations and additions being so perfectly plain in the autograph, so distinctly marked and so conspicuous: and in several instances, making so remarkable and palpable a difference in the phraseology; more particularly remarkable in a note of several lines, added to the original at the bottom of page 41, (and in the hand-writing of the judge advocate) as make it, in the highest degree, improbable that any clerk should, even in the first instance, have committed such palpable blunders; but far more so that they should have escaped the very careful revision and comparison proved by Mr. Simpson and lieut. Ritchie to have been made between the original and the copy. This conclusion from the *evidentia rei* is carried still beyond the particular instances, wherein these interlineations, additions and erasures appear in the original. For all the other variances (with one or two very trivial exceptions) are in like manner marked by such palpable and conspicuous (though, to any essential purpose, immaterial) differences in the phraseology of the two texts, as leave scarce a possibility that such differences should have arisen from mere clerical misprision; far less that they should have been overlooked in the subsequent *revision*. One other circumstance, connected with this subject, is worthy of observation. The minute of the last day's proceedings (Monday, May 9) is in the hand-writing of the judge advocate himself; and not, like the preceding part of the record, in that of his clerk: in that a whole line necessary to make sense of the sentence, but not otherwise material, is omitted: but when he came afterwards to review the minute, he was so struck with this chasm in the sense, that he has added, in *pencil*, the words required to fill it up: merely to indicate what it should be; and not as an official correction of the original: for this interlineation in *pencil* is altogether omitted in the *office-copy* sent from the Department, for the use of this court. Upon the whole, a careful and critical examination of these differences makes it evident that they could not have arisen from the mistake of the copyer; but from a revision and recast of the original, after the copy had been given out. These alterations of the original are not stated and insisted on, as complaining of them: because I presume that the judge advocate made

them at a time and under circumstances which warranted and justified the act: but I do complain and the moral sense of all the world must uphold me in the complaint, that the differences between the two texts, produced by these same alterations, should have been made the ground-work of a criminal charge. The only exception, of any consequence, to this mode of accounting for the differences noted in the judge advocate's list, is the only one among them which is of the least importance: and that is the entry, on the first day's proceedings, of my exception to the formation of the court. The terms, in which this exception had been entered in the minutes of the first day, were objected to by me; and I offered to the court a written minute of the exception, as I had actually intended and made it: which the court received and ordered to be recorded in my own terms. Clearly understanding this to be an admitted amendment of the original entry, I amended it accordingly, in its proper place, in my copy: whereas the judge advocate left the original entry as it was; though he made a minute, in another place, of the amended entry as proposed by me and accepted by the court. So far, I contend, that my copy is the more correct history of the transaction.

There remains only one of these special instances of incorrectness to be remarked upon: and that requires a separate notice, only because it is *unique* in its kind; and comes not within either of the two preceding classes: it consists of the *transposition* of *documents;* which, being explained to mean simply an inversion of the order, in which they had originally been placed and numbered, requires no defence, if I can acquit myself of the imputed mistakes of syntax, orthography, punctuation, emphasis, &c.

Fourth Specification.—[After a particular reply in support of the legal exception to this specification, the defence proceeded, in substance as follows:]

What is not warranted by fact, or what disrespectful to the Secretary of the Navy or to the court of inquiry, in any of the remarks, statements, or insinuations here complained of, has never, to this day, been explained. That complaints are made to the Secretary of the Navy, of acts to which he was a party or of which he was the organ is true: it is equally true that certain proceedings of the court of inquiry are remarked upon and freely criticised, but in terms wholly unexceptionable.

I have not assailed their motives nor their understandings; but have endeavoured to demonstrate certain errors of judgment, which bore hard, as I thought, upon my particular case. What may be the standard of the deference due from a military or naval officer to a military or naval court of inquiry, I know not; but this I know that complaint and remonstrance in far more bold, decided and censorious terms, from persons far more delicately situated towards the persons addressed; and intercourse between whom is guarded by far more jealous punctilious, has been applauded by the nation, and tolerated by them who might have resented and punished it, if it had been considered as transgressing the proper boundaries of complaint and remonstrance. I al-

lude to a military officer and the legislature of his country:—and I cite as an example the memorial of General Jackson to the senate; in which he censures, with some severity, the proceedings of a committee of inquiry instituted by that body.(a) Yet the senate, after debate and full deliberation, voted the memorial unexceptionable and ordered it to be printed. And General Jackson yet lives in the heart of the nation: an honored member of the very senate which had so magnanimously brooked the freedom of his remonstrance; and only second in the competition for the highest honours of the nation.

Now let my complaints to the Secretary, and my remarks upon the proceedings of the court of inquiry be compared with General Jackson's memorial;—and it will plainly appear how far I kept within the allowed limits of complaint and remonstrance.

FIFTH AND LAST SPECIFICATION.—[This, it was said, indicated the extremely vague charge of having published in the pamphlet, before mentioned, and on *other occasions* between the 1st of October, 1824, and the 15th of June, 1825, official communications to the government, &c. What documents, or what *other occasions* on which they were published, this specification was intended to comprehend, have not, to this day, been designated: though, among the masses of documentary evidence introduced in the course of the trial, sundry documents answering this description, but equally applicable and necessarily to be applied to other specifications, were included in the general mass. After various remarks, more in detail, upon the legal effect of this specification, and the nature of the documents conjectured to be alluded to, the defence proceeded, in substance, as follows:]

This specification, both as stated in terms and as made out in proof, assumes that it is a military offence punishable by a court-martial for an officer to make public any official communication whatever, no matter how innocent or indifferent, without first obtaining leave. Upon what authority so strange a position is assumed is not explained, nor may it easily be conjectured. If secrecy be enjoined either expressly by the terms of the communication, or implicity by its nature and the injury to the public service, which a disclosure might produce, the publication of it would be highly improper; and, according to circumstances, might bring him in the danger of the legal charge of *scandalous conduct*. But as to official communications in general, not impressed with this special character of secrecy, there is usually less delicacy or reserve concerning them, than is customary with the correspondence of private gentlemen; because the former are, in some sort, public documents; and the same motives of delicacy are not applicable to them. The correspondence here charged as published, without leave, was thought necessary to the explanation of some part of my conduct before the public; and there was no possibility of injury to the service from the publication of it.

Having gone through all the stated charges and specifications, it seems I am called upon to answer some collateral matter having no manner of connexion with the real merits of any question

(a) Vid. 18 Niles's Reg. p. 329.

involved in the present trial; unless it be supposed to be a legitimate mode of attack, to eke out the defects of the existing charges and evidence, by throwing the weight of an eminent man's character and opinion into the scale against me.

But I have never made it my ambition to bask in the smiles of power; nor to rest my hopes of preferment, either personal or professional, on *favor*; nor, consequently, to court such favor by any unmanly tone of adulation or subserviency. I have always considered my life and services as dedicated to the nation and myself as the servant of the nation: though undoubtedly responsible directly to the government, and bound not only to implicit obedience to all lawful commands, but to all proper deference and respect in my official and personal intercourse: and indeed deriving heartfelt enjoyment, when such intercourse gave me an opportunity to cultivate the friendship of great and good men, whose talents and virtues had raised them to power. Upon these principles I feel less mortified than might have been supposed at the present attempt to raise any prejudice against me by the introduction of this extraneous matter: and I think too highly of this court to apprehend any unfavorable influence from it upon the merits of my cause.

I allude to the deposition of Mr. Monroe, taken without any legal authority, and containing within itself not a tittle of evidence that can or ought to operate against me with any, but the narrow minded and the servile. In so far as it imports any disapprobation of my conduct, it is by ripping up some old causes of dissatisfaction which ought not to have had any influence upon the conduct of the late administration in relation to the affair of Foxardo: and if it shall appear that they had such influence, I should rather consider it as furnishing me with new ground of complaint, instead of accumulating or aggravating any of the complaints, whether well or ill-founded, against me. I do infer, in the absence of all explanation of the purposes for which this deposition is adduced, that one of them is to take upon the late President all the responsibility of the various orders from the Navy Department, of which I had at different times complained. If this means that I should have complained of the President, instead of the Secretary of the Navy, it implies that what was disrespectful to the head of the Department would have been quite decorous to the chief magistrate. The truth is, that all my complaints of the manner of my recal, were addressed to the Secretary of the Navy as the regular organ through which I communicated with the administration: and whatever use I made of the personal pronoun in describing the source of the measures complained of, I should have been understood as speaking of the administration collectively.

This deposition, by ripping up some old topics of dissatisfaction which had been thought to be long ago adjusted and forgotten, has thrown upon me the burthen of explanation and defence upon points foreign to the stated accusation, against which I have been put upon my defence.

[The defence then went into detailed and minute explanations of the matters alluded to in the deposition;—with a view to de-

monstrate from numerous documents: 1st, that he was authorised by his orders and by circumstances to return from the West-Indies, in June, 1824: 2d, that he had every reason to conclude, from the language and conduct of the administration, after he had explained his authority and his motives for so returning, that they were entirely satisfied with the measure; and acquiesced in his remaining: 3d, that his request and expectation to be furnished with a flag-ship of a larger class, before returning to the West-India station, were warranted by frequent and repeated acknowledgments of the utility and necessity of the measure; and as frequent and repeated promises to have it executed: 4th, that his unwillingness to go till the ship, promised him in his order for sailing, could be fitted out under his own superintendence, was justified by the event; as he never got the ship at all. The various documents adduced to these points will be found in the statement of the case.—The defence then concluded in substance as follows:]

—As to the short correspondence between Mr. Monroe and myself in March last, it was with the utmost surprise that I received an intimation during the present trial that it had been deposited in the Navy Department. Not that I mean to complain of its surrender to the purposes of the prosecution, but simply to express my surprise that a correspondence so trivial in itself, and merely personal in its concern, should have received so solemn a destination. Indeed the inoffensiveness of its contents serve to shew how securely I might challenge investigation, since the most unscrupulous use of a private correspondence had produced nothing of which I ought to be ashamed. If there were any thing that I could now desire to have expunged, the wish was dictated by a feeling of pride which I think it meritorious to repress; without regretting any errors of sentiment into which I may have been betrayed by any warmth or cordiality of temper.

[Note.—In the foregoing sketch of the defence from the point where our copy fails us, the first person singular is used, for the sake of conciseness and convenience;—not as professing to give the precise language throughout: but from copious notes, and detached passages written out, connected by recollection (throwing out the law-argument on the more technical points, and the detailed statements and comparative analyses of the evidence, for the reasons already stated) it is given as a faithful report of the sum and substance of the topics treated in the original delivery of the defence. The law-argument, sustaining by way of reply the original exceptions, and also the methodized statement of the evidence will be found at large in the preliminary discussion and in the state of the case respectively, as digested from copious notes.

After the delivery of the defence, the sessions of the court were held in closed doors: of course we can know nothing of what then passed, but from the publication, by authority, of the final proceedings and sentence; which are found in the National Journal, National Intelligencer, &c. of the 18th August last, as follows.—]

TUESDAY, *August 9th.*

The Court met, pursuant to the adjournment of yesterday, present all the members of the Court, and the Judge Advocate. The room being cleared, the residue of the proceedings was read.

The defence not having been transmitted, the Court came to the following resolution:

Resolved, by the Court, That this Court has felt and exhibited a disposition, during the progress of this trial, to allow every indulgence to the accused which the most cautious regard to his feelings and wishes could dictate: That, with this disposition, delays and a course of practice have been submitted to in which the Court has reluctantly acquiesced: That arguments, instead of being prepared, when offered to the court, in such a state as to be annexed to the record, have, after an ample allowance of time, been delivered orally, and an equal length of time afterwards consumed in committing the same to writing: That, in regard to the defence, after having waited for an unusual period of time, it was, in fact, delivered to the court orally, and as a written document it has not been presented to the Court this third day after its public delivery: The court feels constrained to notice this conduct, which it cannot pass over without an expression of its disapprobation, and has determined that unless the paper is ready by the meeting of the Court to-morrow, the court will proceed to judgment without it. And it is requested of the judge advocate, that a copy of this foregoing resolution be transmitted to the accused this afternoon.

At 3 o'clock the Court adjourned till 10 o'clock to-morrow morning.

WEDNESDAY, *August 10th.*

The Court met, pursuant to the adjournment of yesterday; present all the members of the Court and the Judge Advocate. The minutes of the proceedings of yesterday were read.

The judge advocate stated, that in compliance with the wishes of the Court, he had left a letter directed to Captain Porter, containing a copy of the foregoing resolutions, with the counsel of the accused yesterday, on his return from the Court.*(a)*

The Defence not having been transmitted, the Court proceeded to deliberate upon the charges, specifications, the evidence

(a) NOTE. There must be some great misapprehension of fact in this matter. We state upon the authority of Com. Porter and his counsel, and their positive assertion that they never saw or heard of the resolutions above mentioned before the publication of the same in the newspapers with the final proceedings of the court on the 18th of August. Mr. Jones states that, to his knowledge, he had not seen, and certainly had no communication with the judge advocate, either written or personal, after leaving the court, on Saturday the 6th of August. It is therefore presumed that it was not intended to say that the resolutions were delivered to the counsel in *person*; though the saying that they were *left with* him does import as much. Whatsoever the mode of conveyance, it certainly miscarried.

that had been submitted, and what had been alleged in behalf of the accused: and during the deliberation, the defence upon the first charge was communicated to the Court, annexed and marked (P). After having carefully and maturely weighed and deliberated upon the matter, the Court is of opinion that the specification of the first charge is fully proved, and does adjudge the accused GUILTY of the first charge.

The Court is also of opinion that the first specification of the second charge is proved in part: That it is fully proved so far as regards the letter to the President of the seventeenth day of April, 1825, and the letters to the Secretary of the Navy, of the 30th day of January, the 13th day of April, and the 14th day of June, 1825—each of which the Court conceives to be of the character attributed to them in the said specification; but it does not consider the letter of the 16th day of March as liable to the same censure, and, therefore, so far as regards this last mentioned letter, the Court is of opinion that this specification is not proved. The Court is also of opinion that the second, third, fourth, and fifth specifications of the second charge are fully proved. The Court is of opinion that the second charge is fully proved, and does, accordingly, adjudge the accused GUILTY of the same.

In deciding upon the first charge, and the specification under it, the Court, however, feels itself called upon to ascribe the conduct of the accused, which is deemed censurable, to an *anxious disposition* on his part to *maintain* the *honor*, and *advance* the *interests* of the nation and of the *service*.

The Court also thinks proper to state, that in deciding that the third specification is proved, it is of the opinion, that, so far as respects the *inaccuracies pointed* out by the Judge Advocate, in the *paper annexed* to the record, and *marked* No. 15, this specification is *fully proved*; but the Court sees no reason to believe that the errors and inaccuracies therein indicated, were the result of *design* or of *improper motive*: That, with the *exception* of such errors as have been particularly noted, the publication by the accused of the proceedings of the Court of Inquiry, appears to be a correct transcript of the record.

In forming its opinion upon the fourth specification, the Court is satisfied that the same is fully proved in the following particulars.

In the Advertisement: "By the conduct of the Court to which the subject was referred for investigation, I was driven from its presence, and prevented from making the explanations on which I founded my justification."

In the *remarks*, p. 24: "I could not consent to defend myself before the Court against any charge whatever, until its legality had beeen decided by competent authority:—until I could appear before it on terms of perfect equality with my accusers—until I could be allowed to protect myself in the way which might appear to me most proper; without submitting my defence to the inspection of the Judge Advocate, who had no right to decide in my case: or to the control of the Court, who would thereby have exercised a power not founded on law or justice; and without the risk of undeserved reproof."

In p. 25: "But it was the duty of the Court to decide whether it was or was not competent; the decision as to its belief on the subject, *on oath*, was all that was required by me, and the question could have been decided by the Court as readily and as well *before* as it was *after* the *instructions* of the Secretary had been received; that it did not decide in the *first* instance, is sufficient evidence that doubts *then* existed as to its legality."

"Under all circumstances then, I had nothing to loose or apprehend by my withdrawal from the Court, and I certainly saved a very useless sacrifice of my feelings, (except in its deportment toward me while before it,) it could do me neither good or harm. A Court more powerless, and yet more calculated to alarm the accused, was, perhaps, never formed."

"The charge first to be investigated was exhibited against me by the Secretary of the Navy, the Secretary of the Navy selected my judges, two of whom were junior to me. The Judge Advocate, who is the *primum mobile* of all Military Courts, received his appointment from the Secretary, and is his warm friend and *protegé*. Under these circumstances, it may readily be imagined, I had every thing to apprehend and nothing to hope for while before the Court; and to defend myself under the conditions imposed on me, would have been worse than useless."

In the remarks in p. 31, it appears to the Court to be implied, that *all* the *documents* upon which the Court of Inquiry founded its *opinion* were contained in the pamphlet—which was *not* the *fact*. The Court also *includes*, as proof of this specification, the second paragraph of the *paper* marked E, in p. 40 of the pamphlet.

The Court does therefore sentence and adjudge the said Captain David Porter to be suspended for the term of six months, from the date hereof.

Having come to the aforesaid determination, and the residue of the Defence not having been transmitted, the Court, for the purpose of enabling the Judge Advocate to prepare in due form, and record the said findings, and it being after four o'clock, adjourned till eleven o'clock to-morrow morning.

THURSDAY, *August 11th.*

The Court met pursuant to the adjournment of yesterday—present all the members of the Court, and the Judge Advocate. The proceedings of yesterday having been read, the Court proceeded to sign this, the record of its proceedings, the finding and sentence.

JAMES BARRON, *President.*

THOMAS TINGEY,	J. D. ELLIOT,
JAMES BIDDLE,	JAMES RENSHAW,
C. G. RIDGELY,	THOS. BROWN,
ROBT. TRAIL SPENCE,	CHAS. C. B. THOMPSON,
JNO. DOWNES,	ALEX. S. WADSWORTH,
J. D. HENLEY,	GEO. W. RODGERS.

RICHARD S. COXE, *Judge Advocate.*

THURSDAY, *August* 11*th.*

The record of the proceedings in the case of Capt. David Porter having been signed and transmitted to the Department, the Court, by virtue of an order for that purpose from the Secretary of the Navy, directed to the President, and hereunto annexed, and marked A, adjourned to meet to-morrow morning at ten o'clock, at the building on first street east, and the corner of Maryland avenue, formerly occupied by the Congress of the United States.

FRIDAY, *August* 12*th.*

The Court met pursuant to the adjournment of yesterday—present, all the members of the Court, and the Judge Advocate. The Judge Advocate read and submitted to the Court a letter from the Secretary of the Navy, which was annexed, and marked B. and the record of the proceedings, as transmitted yesterday to the Department, with the paper referred to, as a continuance of the defence of Captain Porter.

The paper having been read: on motion of a member, the court determined that it will adjourn until ten o'clock to-morrow, and that captain Porter be informed that the court will receive the residue of the defence at that hour.

The court adjourned till to-morrow at ten o'clock.

SATURDAY, *August* 13.

The court met pursuant to the adjournment of yesterday—present, all the members of the court, and the Judge Advocate. The proceedings of yesterday were read. The residue of the defence was received at near twelve o'clock, and the court proceeded to read the same.

After completing the reading of the document—the following motion was made and adopted: the judge advocate having stated that he had received from the accused certain papers, purporting to be the residue of his defence, the same were read and considered. The court is decidedly of opinion that these papers vary in many respects from the defence which was delivered on behalf of the accused by his counsel: that, in particular, the severity of animadversion upon the conduct of the judge advocate, which appears in these papers, did not appear in the defence that was delivered, and the court deems it due to itself to state, that the conduct of the judge advocate during the trial was, in its opinion, free from the censure imputed to it.

As, however, the court is not in possession of the defence, which, in violation of its rule and of precedent, was delivered orally, and from notes under the appearance of reading it, the court has annexed this document to its proceedings, with this further observation, that nothing is perceived in it which can in the least vary the conclusion to which the court had arrived.

JAMES BARRON, *President.*

RICHARD S. COXE, *Judge Advocate.*

The court adjourned till ten o'clock on Monday morning.

Approved, JOHN QUINCY ADAMS.

17*th of August*, 1825.

REVIEW

Of the foregoing resolutions and decisions of the court.

It has been thought but just and reasonable to admit this *review* of the court's decision; not with any design to argue over again any question of law or fact, involved in the preceding discussions; but to examine only such *new* grounds of blame or censure as have, for the first time, been disclosed in the delivery of the opinion. When it is recollected how impossible it was, upon many points of the original accusation, to anticipate the particular points on which blame was attached; how slowly and by piece-meal the points of attack were unfolded in the latter stages of the trial; and how effectually they had, till then, been kept out of view: but above all, when it was perceived that, after the court had closed its doors and retired into conclave, to deliberate on the final sentence, that new articles and particulars (in the genuine nature of new specifications, of which not the slightest glimpse had been vouchsafed to the accused, during the trial) had been elaborated from the vast and undigested mass of papers which had been thrown promiscuously on the table of the court; without having been distributed and appropriated even to the vague specifications themselves; far less to any minuter subdivisions of the charges; or so partially as only served to mask more effectually the unspecified and undivulged uses and applications, that were intended to be made of them: under such circumstances, the justice of giving to the public *both sides* of the question, upon these fresh topics of accusation, was manifest and indispensable. If this were reasonable in regard to the new discovered points of attack and crimination, connected with the original charges, and the mass of matter accumulated under them,—how infinitely more so when it is discovered that the party had been *accused* in conclave, *tried* in conclave, and so *condemned*, without a hearing, or being in any manner put upon his defence;—and all this for matters not pretended to be brought under any of the stated charges, or the evidence produced to support them; but entirely of recent and subsequent origin?—Why, in such case, a defence before the public is not merely, as in the other, the only possible means of justification or apology left open to him;—but the public is precisely the tribunal to which alone his *accusers* have cited him. We repeat, that it is to the *public* alone that his accusers have *addressed* their censures: because these censures, or the circumstances that produced them could have had no influence upon the *judicial sentence*;—entered not at all into the elements of his *judicial* condemnation and punishment. To say that such circumstances had the least imaginable weight in determining the great question of guilty or not guilty of the charges; would be an apology worse than any reprobation of the judical sentence, short of malice or corruption. If a party commit any irregularity or impropriety, in his quality and relations as a party standing before a court of judicature, he should be summarily attached and punished for it; under the inherent

power of the court to assert and vindicate its own dignity, and authority against abuses of the privileges incident to parties. But, in that case, the party is called up to answer for his contempt; all the circumstances of justification or mitigation are weighed; and punishment awarded, according to the degree and circumstances of the offence. Upon such an arraignment he is entitled, not only to the same but to greater privileges in his defence, than in any other form of accusation: because he is admitted to purge the contempt, by his own oath. Here, as already stated, the accusation was in *conclave*; the whole proceeding, was *ex parte*, and in *conclave*; and was followed, not by any *judicial* determination or punishment whatever; but by *complaint* and *disapprobation* repeated from day to day, in *conclave*; without any efficient measure either to punish the party, or to coerce him to a due respect for the violated rules and orders of the court.

As a further and conclusive proof of this *extra-judicial* appeal to the public,—the proceedings containing these *ex parte* and *extra-judicial* censures are separated from the mass of the proceedings in the case; from all the evidence, facts and circumstances of the case; and are published by *authority* in the *newspapers*: and all this, months in anticipation of the time, when there was any probability that the voluminous mass of proceedings, with which these partial and garbled extracts were associated, could possibly meet the public eye. 'Tis no apology to say that they were published along with the final sentence; which it is usual to publish, in anticipation of the body of the proceedings: because they had no necessary or proper connection with the final sentence; any more than any other of the interlocutory opinions or decisions upon collateral points delivered by the court in the progress of the trial: indeed, as already remarked, it could have had no possible connection with the final sentence, but what was opprobrious to both. If the sentiment of disapprobation on the score of this alleged irregularity, prejudiced, or in any manner influenced the mind of the court, in determining the general issue, guilty or not guilty of the stated charges, or the quantum of *punishment* to be awarded in consequence of conviction, both the discretion and the motives of the Judicial sentence are most opprobriously impeached: for whatever the misbehaviour of the party, before the court, that sentence should have proceeded purely upon the merits of law and evidence exclusively applicable to the *charges*, upon which the court was to pass: wholly uninfluenced by any adventitious circumstances. If, on the other hand, it were apprehended that the real merits were inadequate to sustain and justify the judicial sentence in *public opinion*; and that it was necessary or expedient to eke out the radical defects of law and justice, in the main points of the accusation, by these incidental topics; and to induce the public to think that Com. Porter was guilty of disobedience of orders, in the Foxardo affair, and of insubordinate conduct in the other instances alleged, that it was necessary to prejudice and inflame the public mind against him, by showing that he had com-

mitted irregularities in the conduct of his defence; then the opprobium rests equally upon both judgments or opinions; and reflects, reciprocally, from one upon the other:—upon the *judicial* opinion, because it is thus confessed to have been so naked of merits, as to require such adventitious aid:—upon the *extra judicial* opinion, because it was made up and published, not from a conviction of its intrinsic justice, but of its expediency as a help to the other. In no possible way, then, can any necessary connection, between the two, be alleged as an apology for the publication,—without leaving it still as a mere appeal to the public; but with superadded *opprobrium* from the alleged connection and motive. Viewed, in any light, it stands confessed, an *ex parte* and *extra-judicial* censure, volunteered at the bar of public opinion; and to be considered as such *simply*, without any collateral motive or object, is the most *favorable* light in which it can be viewed. At that bar then, let it be tried; since there, and there alone, can any effect be given to the great maxim, *audi alteram partem*.

The same reasons apply, in all their force, to the *new discovered* specifications of the general *charge*; or new discovered *items* of the general *specification* (however they may be published) which have been elaborated in secret conclave, and promulgated, for the first time, with the final and irrevocable sentence, by which the party has been condemned and punished for them. In regard to them, the above cited maxim has been equally a dead letter;—and can receive life and energy no where but at the bar of public opinion. To these two subjects, with a few passing remarks upon the avowed *principles* which appear to have guided the court to the main conclusion of guilt,—shall this review be confined.

The resolution of the court, on Tuesday, August 9, passing a censure, because the defence had not been reduced to writing, and transmitted to the court, on the day before, according to the appointment made on Saturday, when the oral delivery of it was concluded, is introduced with a recital of the great indulgence shown by the court to the accused. The urbanity and indulgence of the court, and their delicate and liberal treatment towards the accused and his counsel, in all the minor accommodations and facilities, and in all proper observances of personal respect and politeness, are gratefully acknowledged: notwithstanding the remarkable fact that upon all the points, (and they were not a few,) of controversy, between the prosecutor and the accused, on incidental questions, the former was invariably sustained and the latter overruled, with one single exception; wherein certain documents offered by the former were rejected: but the decision amply atoned for and compensated by a gratuitous censure upon the irrelevancy of other documents, not then in question, but which had before been introduced;—under an evident necessity to repel preceding evidence on the other side, which was most clearly irrelevant and inadmissible,—but which had passed without censure.(a) This is said, not by way of retracting or qualifying the merit just conceded to the court:—

(a) Vid. Proceedings relative to Mr. Monroe's deposition.

but, in all candor and sincerity, to preserve the just and necessary distinction, which was thought to be quite obvious in the progress of the trial, between the unfriendly bias of the *judicial* mind,—and the indulgent disposition resulting from the liberal spirit and habits of officers and gentlemen. No possible complaint against the equitable disposition of the court could be made, so long as one appalling question, which had subtilly and imperceptibly insinuated itself into the marrow of the subject, and commixed itself with all the elements of perception and judgment, could be kept out of view: so long as the dreaded, but imaginary and unfounded alternative could be parried of a *condemnation*, to be made as light as possible in the penal consequence to the *accused*, or an *acquittal* portending consequences infinitely more penal, if not fatal to the accuser. But that ideal spectre continually reared its gorgon crest, to petrify the heart of justice, blast the eye of intellectual vision, and wither the nerve of independence. If, upon several of the incidental points, occurring in the course of the trial, the accused has not been overruled, plainly and obviously against all law, reason and common sense: and if, in the opinion of intelligent and impartial men who shall have carefully examined the subject, the final proceedings and sentence, both in their results and professed principles, do not manifest aberrations perfectly astounding: why then it must be fairly acknowledged that great injustice has been done to the proceedings and opinions of the court. As to the great indulgence to the wishes and feelings of the accused, spoken of in the resolutions of the court, it must be confessed that the circumstances of his case were peculiar;—and called for extraordinary indulgence. Not to recur again to the *crambe recocta* of vague and indefinite charges, which nevertheless descended, in their details, into an infinity of minute and complicated matters;—and the want of which precluded the usual preparations for the defence *before* the trial;—it is only necessary to recollect how strangely the true ground of attack was masked by the prosecution, till the latest practicable stages of the trial; and information on these points, when distinctly asked for, broadly denied:—masked it is said, to the latest practicable stages of the trial,—it should have been said till after the *trial*, properly so called, was over;—till the court had retired into conclave to deliberate; when no party but the representative of the *prosecution* was present. The more prominent exemplifications of these remarks are:—1st. the delay of any motion to take Mr. Monroe's deposition (involving a laborious and minute research into voluminous documents to answer the new charges suggested by it) till the 20th July, just a fortnight after the court had been in session; the refusal then to disclose the objects or the points of the accusation to which that evidence was to be applied; and the holding up that deposition, several days after it was received, to wit, till the 29th July, without communicating its contents, or even the fact of its being received, to the accused: (*a*) 2d, the holding up the numerous and complicated list of differences be-

(*a*) Ante, p. 46–9—61.

tween commodore Porter's published statement of the proceedings, and the original record, relied upon to support the 3d specification, till Saturday the 23d and Monday the 24th of July: (a) 3d. the withholding altogether all specifications of the instances of disrespectful statements and insinuations, and such as were not warranted by *fact*, which were intended to be adduced under the 4th specification, till the same were unfolded in *conclave*: 4th, the instances, relied upon to support the 5th specification, have never to this day been specified. The evidence, of all kinds, was closed on Tuesday, the 2d of August; and the court indulged the accused till the Friday following, (the 5th,) to prepare his defence: on which day and the next (the delivery of the defence and the reading of documents connected with it having consumed two days) it was delivered *orally* before the court: and further time was allowed till the Monday following, (8th of August) to reduce it to writing, and present it, in that form, to the court: the failure to have it ready, at the time last appointed, gave occasion to the resolutions of censure on Tuesday the 9th.

Such are the literal facts, apparent on the face of the record: from which the extent and the merits of the indulgence granted by the court, and of the abuse of it, may be determined without a single comment or explanation.

We now proceed to examine the particular grounds and terms of the censures occasioned by this delay of the defence. These appear to be conveyed in several resolutions; the first on Tuesday the 9th, in consequence of the failure to produce the written defence according to appointment, on the day before: the second, on Saturday the 13th, when (it is presumed) the court met to reconsider their opinion, in connection with the written defence. These censures (in so far as the involved and perplexed phraseology of some passages in them can be understood) seem to resolve themselves into *three*, independently of the general one for the delay: 1st, that an *oral* defence before a court-martial is a violation of all rule and precedent: 2d, that when reduced to writing, it *varied*, in many respects, from the oral defence; particularly in the severity of animadversion upon the conduct of the judge advocate: 3d, that it was delivered *orally* from *notes* under the *appearance* of *reading* it.

1. As to the first of these censures, it is positively denied that an *oral* defence is any such violation of rule and precedent: it is asserted, on the contrary, to be at the *election* of the accused to present his defence either written or oral; and this is asserted upon the clearest authorities both English and American. The rule is laid down by Mr. Tytler and general Macomb in nearly the same terms, as follows:

"When the evidence in support of the charges is closed, the prisoner may submit to the court, either *verbally* or in writing, a general statement of those defences which he means to support by evidence."

"When the whole evidence on both sides, is closed, the prisoner may, if he think proper, demand leave of the court to sum

(a) Ante, p. 50-1.

up, either *verbally*, or in a written statement, the general matter of his defence; and to bring into one view the import of the proof of the charges: with such observations as he conceives are fitted to weaken its force: and the result of the evidence in defence, aided by any arguments that are capable of giving it weight. *(a)*

But if it were otherwise,—the proper time to have corrected the irregularity, was when it was committed: having submitted to it then, however reluctantly (the *reluctance* being entirely confined to the breasts of them who felt it, without the slightest intimation of it to the offending party,) it was strange it should afterwards be found fault with: and certainly it is no satisfactory answer, to say that it was mixed up with other and distinct topics of censure, merely to enhance the *gravamen*.

2. As to the *variances*, in *many respects*, (here is the *crambe recocta* of variances again dished up) between the oral and the written defence,—what do they signify?—Was it in the nature of things to expect that an elaborate, minute and diffuse examination of important and complicated questions of law and evidence, should be exactly the same in the written as in the oral form?—The necessity and propriety of giving somewhat of a different dress to the two;—of pruning, where the oral argument was too diffuse for the written form; and of adding illustration, where the significancy of oral delivery failed in written composition;—all this must be obvious to the reflection and experience of every candid man. Besides, suppose the defence had been originally in writing, would any court have complained of or rejected any supplemental remarks, which the party might afterwards suggest?—And what possible objection to the addition of such, when the party comes to present, in writing, the substance and effect of what had before been delivered orally?—But as to the alleged instance of variance, in the *severity* of animadversion upon the conduct of the judge advocate,—it is asserted that the same statements that now appear in the defence, relative to the irregular modes of conducting the prosecution, &c. were substantially stated originally;—and what is more, the statements are not denied and are undeniable in point of *fact*. If they import any severity of animadversion, it is the fault of the *fact* not of the *narration*. However there is no intention here to discuss the merits of the judge advocate, as a public prosecutor, in respect to any one of the requisites, moral or intellectual, for such an office. Whosoever prompted or conducted the details of the prosecution, the mode has been complained of as unprecedented;—and as very far exceeding, in rigor and obduracy, that equitable forbearance from the utter lengths of partizan-zeal, commonly observed in public prosecutions; and which distinguishes between proper energy in fairly presenting the case of the prosecution, in its legitimate force; and the *apices juris*, which are laid hold of when the aims of public justice are exasperated by adventitious provocations.—The facts and the comments are before the world: the judge advocate stands acquitted of all censure by the court: he is understood to have pub-

(a) Vid. Macomb, ch. 4. s. 3. p. 96-7. Tyler to the same effect.

lished his own vindication to the world: and there may the question rest. In repelling certain statements and reflections, which were viewed as *digressions from the main course of the argument* in hand, and as tending to the personal disparagement of the accused, we are assured that nothing less was intended than any retaliation in the way of personality. If there be the slightest departure from polemical comity, the same impartial world must decide, after reviewing the course of the several discussions from the first to the last of the trial, on which side it commenced; or what necessity there was for interposing the shield of the court in the conflict. As to the questions of law and fact, discussed under the second charge and its several specifications, an attempt was made to execute the very laborious task (which, in reference to the frivolousness of the matters made necessary by the accusation to be investigated, might well be described as *operose nihil agens*) of reducing to a written and detailed explanation all the minute points of evidence, which nothing but a very careful and tedious comparative analysis could make intelligible. This task (the nature and extent of which may be judged by the digested statement and analysis of the evidence intended to accompany this report) was undertaken under some circumstances peculiarly adverse to its speedy and effectual execution: and, after some time spent upon it, the counsel finding himself mistaken in his computation of the time it would take, and the necessity for sending in the defence pressing, drew up or dictated a concise summary of the principal points both of law and fact;—trusting to the court's recollection of the details.—In this respect, doubtless, the written defence varied very considerably from the *oral* one. So far, however, it was all to the disadvantage of the accused;—and the same may be said of the imputed neglect to send it in due time; the court, if convinced that such delay was unreasonable, had only to pass on to judgment, without it; and no more needed to have been said. The disadvantage would have been on the side of the *accused* alone: he would have forfeited the advantage of his defence, before the President, when the sentence should be presented for his approval. That, in all reason, should have been deemed penalty enough, without launching against him the *brutum fulmen* of *extra-judicial* censures.—They did in fact, the next day, resolve so to pass on to judgment, without the defence: and yet, four days afterwards, repeated and *extended* their censure, as noticed under the next head.

3. As to the last presumed topic of censure, which would indicate that the court were deceived, by having an oral defence palmed upon them for a written one;—it is thought extremely probable that we have been mistaken in drawing this inference from the perplexed terms of the resolution.—'Tis held to be impossible that the court itself could have been conscious of any such inference being involved in the terms of the resolution they were passing: 'tis rather concluded, if these terms, in the original draughting of them were indeed framed with any view to such inference, (which is scarce credible under the circumstances) that their covert aim was not at all adverted to by the court. This conclusion, must, for the present, be held clear for the fol-

lowing reasons. 1st. It was a matter perfectly notorious, at the time, that the defence was delivered orally;—and is here positively asserted, upon the most direct and undeniable authority, that it was so distinctly known to the court and to the judge advocate. 2dly. So much appears on the face of the court's proceedings;—wherein it appears that time was given, after the oral delivery of the defence, to reduce it to writing and present it in that form to the court: and the court, in the *first* resolution (on the 9th) wherein they pass any censure on this subject,—mention it as one of the instances of irregularity to which they had *reluctantly submitted:* and if they submitted to it reluctantly it could not have been ignorantly. It is only in the second resolution, passed some days afterwards, that the expressions, giving *color* to this obnoxious inference are found. To disavow such inference is far more necessary for the honor of all concerned, than to have repelled any of the animadversions alluded to in the resolution.—For ourselves, we have no hesitation to avow a clear belief that these expressions were not understood in any such sense.

In reviewing the decision of the court upon the *merits* of the charges and specifications, no remarks, in the nature of a re-argument of the original grounds of accusation or defence, shall be admitted;—but, as already intimated, the whole will be limited to the new grounds disclosed, for the first time, in the definitive sentence.

Charge 1. The only remarkable circumstance that distinguishes the finding under the 1st charge, is a *judicial* discrimination between the criminal *act* and the criminal *intent*. Not only is the act, for which he is condemned, discharged by the terms of the conviction from any bad design or intent whatever; but the negative innocence of intent, from the absence of bad motives, is enhanced by the positive *merits* of the intent, from the presence of the most laudable motives: for the criminal act is expressly and exclusively ascribed "to an anxious disposition on his part to maintain the honor, and advance the interests of the nation and the service." Now the universal maxim of jurisprudence is that the *intent* is just as essential an ingredient of crime as the *act* itself; and that they are inseparable: the bad or unlawful intent being either expressly proved, or necessarily implied from the bad or unlawful act. Therefore a judicial acquittal of the *intent*, accompanied by a judicial condemnation for the *fact*, is universally held to be a solecism in terms. If this maxim prevail in ordinary cases, how infinitely more imperious its sway, when applied to a military accusation for the disobedience of a *discretionary* order: wherein, as explained in the defence,(a) the essence of the charge is necessarily a corrupt or malicious or other ill design to abuse and pervert to bad purposes the *discretion* vested by the terms of the order. In effect, Commodore Porter now stands convicted, under this charge, of nothing more or less than the execution of his orders in a manner dictated by "an anxious disposition on his part to maintain the honor and advance the interests of the nation and the service."

(a) Ante, p. 26.*

Charge 2.—*Specification* 1. The court, in deciding upon the *character* of the *five* letters, referred to in this specification, have acquitted *one* of them, and brought the other *four* within the censure of the law, as "insubordinate and disrespectful." All we have to say upon this matter is to request the reader to turn to the very first of these, designated by the court as of the condemned character: viz: the letter to the President of April 17, 1825: and having carefully read it, let him calmly consider within himself, what is the sort of style, and what the strain of complaisance, with which the officers of the navy must hereafter, upon the authority of this decision, address either *request* or *complaint* to the Executive. If, in its present shape, it be *criminal*, what must it have been to be *aggravable?*

Specification 3. Under this specification he is convicted of *all* and *singular* the *inaccuracies*, (without exception) pointed out by the judge advocate in a certain paper described as being marked No. 151—which, it is presumed, is the list of variances between the printed proceedings of the court of inquiry, and the original record: which, upon reference to the same in the state of the case in the foregoing report, will be found to consist of the minute and immaterial variances so often mentioned and explained: in one instance a typographical error of no moment: in other and numerous instances, minute clerical mistakes, in the course of transcribing;—or as argued in the defence, variances arising from alterations of the *original* made after the copy had been given out: and in other instances, omissions of documents, acknowledged and explained on the face of the publication, as not in his possession; and which it had not been in his power to obtain, &c. These variances (from whatever cause proceeding) descend to the *minutiæ* of putting a noun in the singular instead of the plural; or *vice versa*;—of misspelling one or more words;—of making a sentence end at one place instead of another; a variance reducible to the difference between a *comma* and a *full stop*, &c. &c. Here, as was very natural, the court has followed the precedent of their decision under the 1st charge; by making a judicial discrimination between the *intent* and the *act:* having fully *acquitted* him of all *design* and improper *motive*, but nevertheless *convicted* him of each and every of the inaccuracies.—Then the decision amounts to *this*, that the most innocent and trivial mistakes of a copyer or printer, employed by an officer of the navy, constitute an offence cognizable by a court martial, in such officer: though he, and his clerks and printers be clearly acquitted of any "design or improper motive" in the commission of such inaccuracies. Now supposing every one of these inaccuracies to be chargeable to the mistake of the copyers and printers;—and that there is nothing in what is said about accounting for them by the alleged alterations of the originals,—it is asked what officer, according to this rule of estimating military crimes, can possibly escape conviction and punishment, if his superiors have any desire or interest to convict him, sufficiently strong to prompt such minute industry in the investigation of trivial inadvertencies and mistakes, equally innocent of intent as of consequence?—The *innocence* of the act in point of

intention, is no longer matter of dispute;—it is *judicially* ascertained and promulgated: no other badge of criminality, no practical mischief or bad consequence of any kind, is even pretended either in the specification itself, or in the judicial *conviction* under it.

Well might Com. Porter insist in his defence upon the necessity of adhering to the exceptions taken by his counsel to the sufficiency of these specifications, lest he might "lay himself open to conviction upon mere proof of the *naked* fact of having done such or such things, without any consideration whatever of the *legal effect* or *moral character* of the acts charged:" well might he "beware of being entrapped, by vague and ambiguous phrases, into such a *dilemma*, as that the court should feel itself compelled to find the *fact* against him, without the necessity of imputing to it any specific degree of legal or moral impropriety."*(a)* The apprehension of such consequences from the course of the prosecution, has been more than verified by the event: not only has it been thought competent for the court to convict him of the *fact* "without the necessity of imputing to it any moral or legal impropriety."—but here he stands convicted of the *fact*, with a distinct and positive acquittal of all *intention* of evil:—nay more,—having distinctly ascribed to him intentions positively good and praiseworthy:—Then for acts perfectly harmless in effect,—and thus graced with innocent and even laudable motives, is it *judicially* avowed that he has been convicted and punished.

Specification 4. Now we come to the new-discovered *specifications* of the general charge, or particulars of the *general* specifications *(*howsoever it may please the discoverers of these phenomina to phrase them*)* which were first discovered in *conclave;* and for the first time promulgated and made known to the party charged, in the official publication of the final sentence by which he has been condemned for them. Whether it were possible for human foresight or human reason to have anticipated such;—or if it were, whether such anticipation should not have been deemed a libel upon the prosecution, and a gross insult upon the court,—is confidently submitted to the impartial reader, upon the bare statement of the case.

This specification bears a double aspect;—charging the "*various* remarks, statements and insinuations," in the pamphlet, as faulty in two respects;—viz: as "*not warranted* by the *facts*, highly *disrespectful* to the Secretary of the Navy and to the court of inquiry."*(b)* It has been remarked and positively asserted in the course of the defence, and nothing appears in the proceedings to raise the least doubt of the correctness of the assertion, that not the slightest intimation was given in the whole course of the prosecution, of what parts of the pamphlet were liable to this charge of untrue or disrespectful remarks, &c. The pamphlet had been given in evidence under the two preceding specifications;—and under the third the particular instances of incorrectness complained of, were at length, and after great delay as al-

(a) Ante, p. 35 & 36.
(b) Ante, p. 8.

ready remarked, pointed out with sufficient minuteness. But as to this specification, it remained wholly unnoticed, in regard to any appropriation of evidence, from the mass on the table of the court, to support it. This task, it seems, was reserved for the private ear of the court, after they had retired into conclave, to deliberate on the final result.

It might have been inferred and anticipated from the course of the prosecution in parallel instances, though certainly from no analogy to the sound principles of law or reason, that every remark in the pamphlet, tending to controvert or question, no matter how dispassionately and decorously, any opinion or proceeding either of the court of inquiry or of the Secretary of the Navy, would be laid hold of as within the censure of this specification. Accordingly, no surprise was felt at the first five passages extracted from the pamphlet, and quoted in the opinion of the court. But the two last instances cited by the court;—the one as a "statement not warranted by the facts," and the other, it is presumed, as containing the disrespectful remarks or insinuations, did, indeed transcend all that could have been imagined of extravagant and desperate expedients to make out the semblance of a criminal charge: after all preceding experience, they were astounding.

1. The first of these instances bears that "in the remarks in p. 31 [of the pamphlet] it appears to the court to be *implied* that *all* the *documents*, upon which the court of inquiry founded its *opinion*, were contained in the pamphlet—which was *not* the *fact*."

Now the first question is, which of the *documents* of all those upon which the court of inquiry founded its *opinion*, can the court possibly have intended as those not contained in the pamphlet? Though not designated by the court, they may be identified with equal certainty: and for this purpose, reference must be had to the detailed list of inaccuracies delivered in by the judge advocate; and which the court has referred to as No. 15: no other documents can have been intended, because the court has expressly said that, with the exception of the errors therein particularly noted, the proceedings of the court of inquiry, as published in the pamphlet, are a *correct transcript* from the *record*. According to the analysis of that list, stated in the defence,(a) (which is confirmed by a careful and accurate revision of the analysis as compared with the paper itself) the pamphlet is *charged* with the omission of only *two* of these documents: 1. The original letter of instructions, Feb. 1, 1823, from the Secretary of the Navy to Com. Porter: 2. a letter from the Secretary of the Navy (May 7, 1825) to the judge advocate of the court of inquiry; cited as exhibit G.

Here it may be useful to note the distinction between the *two ways* which are made of the alleged omission of these documents. Under the 3d specification, they are charged as instances of inaccuracy in the published copy of the proceedings;—under the 4th, that inaccuracy is now aggravated by imputed falsehood; in asserting, by *implication*, that the documents were, in fact, contained in the pamphlet.

(a) Ante, p. 40—1*

The only "remarks" of any kind to be found in page 31 of *the* pamphlet, are contained in the *notes* upon the proceedings of the court of inquiry on Saturday, May 7: in one of which notes (and the only one that could possibly have been alluded to) the decision of the court of inquiry rejecting certain *documents* which had been transmitted by the Secretary of the Navy, with his aforesaid letter G, is discussed.—The nature of the assertion, supposed to be implied in this note, cannot be better explained than by giving the entire passage, from p. 31 of the pamphlet: including as well the proceedings of the court of inquiry, for Saturday, as the *notes* upon the same.

[SATURDAY, 7TH MAY.

The Court met pursuant to the adjournment of yesterday: present all the members of the Court, and the Judge Advocate.

The Judge Advocate informed the Court that he had received a communication from the Secretary of the Navy, to be submitted to the Court; which was read, annexed to the record, and marked (*) The accompanying documents were also read, the Court reserving all questions as to their competency and credit for future deliberation and decision.

After reading the papers, the Court was cleared, and the Court proceeded to deliberate upon the papers submitted to it, and after having maturely considered the same, the Court was opened, and the Judge Advocate stated that the Court is of opinion that the deposition of Lieut. Barton, dated February 6th, 1825, be annexed to the record, which is accordingly done, and the paper is marked (H.)

In regard to the other documents, the Court is of opinion that many of them are not sufficiently authenticated to authorize their reception, without an express and sufficient waiver of all exceptions entered on the record.* That some of them appear to be of a confidential character, and their contents such, as without affecting this case, ought not to be exposed to the public eye without necessity: and that collectively, they present no facts or views calculated to elucidate the subject submitted to the Court. The Court, therefore, direct the Judge Advocate to return them to the Navy Department as irrelevant.

* It was the cause of extreme surprise to me, as it was to every by-stander, and as I have no doubt it is to the reader, that such a condition for the admission of the documents on the record should have come from the Court. If the documents were proper testimony, they ought to have been admitted without any conditions, and if they were not testimony, they ought to have been rejected. As to the character of the documents, whether confidential or otherwise, that was no affair for me to consider, and not for the Court. (I was one which the Court had nothing to do with. The reader *having the documents before him*, can judge of the propriety of the other point of the objection, to wit: "that collectively they present no facts or views calculated to elucidate the subject submitted to the court."

* Not in my possession.]

The blank left for the mark of the communication from the Secretary of the Navy, *referred to in the above minute of the* proceedings, was afterwards filled up with the letter G.

Now this new specification, thus elaborated in secret conclave, and for the first time promulgated with the final result of the deliberations in such conclave, bears upon its face three distinct refutations, so obvious and palpable, and so unanswerable, as might well have raised our special wonder if they had escaped the most casual and careless observer: but that they should have escaped an intelligent tribunal, assisted by a learned professor of the law,—who had all spent weeks in a laborious and minute investigation of the subject, is utterly irreconcileable with any preconceived idea of judicial accuracy and attention to the matter in hand.

Of the three answers to this specification, evident and palpable on the face of the very documents on which it professes to be founded, any one is absolutely demonstrative and conclusive.

1st. What part of the above cited note *implies* that "all the *documents* on which the court of inquiry founded its *opinion*, were contained in the pamphlet?"—The concluding remark in the note certainly more than *implies* that the reader has some documents before him: what they are is to be decided by the context only:—and who can read that context, and hesitate, for an instant, to perceive that the documents alluded to, can by no possibility, be any of those "upon which the court of inquiry founded its opinion?"—Surely it must be an insult to any ordinary understanding to *argue* from such context that the only possible documents alluded to are those which, for the reasons above stated in their proceedings, that court had *rejected*;—and "directed the judge advocate to *return* to the Navy Department, as *irrelevant*." They were so returned; and formed no part even of the documents attached to the record of proceedings;—far less of those "on which the court founded its *opinion*." These rejected documents are nevertheless inserted in the pamphlet;—and the remarks in the note were evidently intended to show that they were relevant, and ought to have been received as evidence. Then it is perfectly *manifest*, upon the face of the paper, that the remarks in p. 31 of the pamphlet, do not *imply* "that all the documents on which the court of inquiry founded its opinion were contained in such pamphlet."

2dly. But suppose it were so implied;—we assert, without hesitation or qualification, that such implication would have been strictly and demonstratively true: allowing for the inaccuracy of the expression used by the court martial, when they speak of the simple *report* of the *facts*, made by the court of inquiry, as the *opinion* of that court.

The precept, by which that court was convened, required of them no *opinion* on the subject: but simply a *statement* of the *facts*, and a report of the causes which led to the descent upon Porto Rico. Accordingly the court refrain from any expression or intimation of opinion whatever; and limit themselves to a *Report* containing a mere statement of the facts; and a reference to the evidence, documentary and oral, by which such facts are established. Now two things are obvious and palpable on the face of the papers. First, that neither of the documents alleged

in the judge advocate's detailed list of inaccuracies to have been omitted in the pamphlet, is either mentioned or alluded to in the *Report* (or *opinion* as it is called) of the court of inquiry That court had no occasion whatever to refer to the letter of instructions;—for they were not authorised, neither did they profess to decide whether such instructions had been obeyed or disobeyed: and they carefully avoid any allusion to that question. As to the letter, marked G, from the Secretary to the judge advocate, communicating the *rejected documents*, there was still less reason for saying that the opinion was, or by possibility could have been founded upon that: there is not the remotest allusion to it in the report. Secondly, the pamphlet does, in fact, contain *every* document upon which the report or opinion of the court of inquiry was founded;—or, in any manner, alluded to in that report. This depends not upon assertion; nor even requires the trouble to refer to the documents which demonstrate it on their face: it is distinctly admitted by the court martial, when they admit that the proceedings, as published in the pamphlet, are a *correct transcript* from the record, except in the instances particularly noted in the detailed list of inaccuracies. For that list notes the omission of no document whatever, but the *two* just mentioned: and the report is not founded upon them or either of them;—nor, in any manner, cites or alludes to them. Then a conclusion, directly the converse of that stated by the court martial, is clear and demonstrative upon their own showing: namely, that it *is the fact* that *all* the *documents* upon which the court of inquiry founded its report, were actually *contained* in the pamphlet.

3dly. As to the first of the documents alleged, in the list of inaccuracies, to have been "*wholly* omitted;"—viz. the original letter of instructions;—two of the *postulates* assumed by the court martial might safely be granted; while the third and most material would be still as manifestly contradicted by the very papers before them. Suppose this to have been one of the documents actually referred to in the note, and therein *implied* to have been contained in the pamphlet; and suppose further, that it was one of "the documents upon which the court of inquiry founded its opinion;"—still it is not true that it was wholly omitted;—it *is* a *fact* that it *is contained* in the pamphlet: in so far as an extract containing every word of it, which bore any relation whatever to the then pending subject-matter of inquiry, is found at page 68—70 of the pamphlet; as is stated with absolute accuracy in the defence. (*a*) As to the other document, it is expressly mentioned, and its *omission* accounted for as "not in my possession," in a *note* at the same page 31,—and just along side of the other note which is supposed to have *implied* that the document was *contained* in the pamphlet. So that the one note is made to *imply* the *assertion* of a fact, which the party, in the same breath, has most distinctly and unequivocally *disavowed*, and stated to the *contrary*.

'Tis, however, waste of time and labor thus to pursue the manifold and manifest inconsistencies and absurdities of this new divulged specification: since the plain reading of the note

(*a*) Ante, page 40-1.

so absolutely excludes the idea of any thing being asserted or implied concerning any one of "the documents upon which the court of inquiry founded its opinion," or even of those which formed any part of its record.

2. "The *court* also *includes*, as proof of this specification, the second paragraph of the paper marked E, in p. 40, of the pamphlet."

Here we could, with difficulty, credit our own senses, when we perceived that the court-martial had laid hold of a transaction before the court of inquiry itself; for which the party was clearly amenable to that court; and for which he had been actually censured and punished by that court: in short that he was to be twice tried and punished for the same identical offence. The paper marked E, here spoken of, is no other than the identical address from commodore Porter to the court of inquiry (forming a part of the record of their proceedings) which that court voted disrespectful to themselves and to the Secretary of the Navy;—and, as such, censured and punished by interdicting direct *intercourse, in future*, between commodore Porter and the court; and subjecting all his subsequent communications to pass the inspection of the judge advocate, before they could come to the eye of the court: a resolution which in effect put an end to all further participation on his part in their proceedings; and, as he says in the advertisement to his pamphlet, drove him from the presence of the court, and prevented him from making the explanations on which he founded his justification. For the nature of this paper, and the grounds on which it was so censured and punished as disrespectful by the court of inquiry, reference must be had to the proceedings of that court, and to the preliminary state of the case, in the foregoing report. That matter has nothing to do with the question now in hand.—For the present purpose, 'tis only necessary to say that for any disrespectful paper presented to the court of inquiry, or for any other blameworthy word or deed, there uttered or transacted, that court had complete and summary jurisdiction, in the exercise of their incidental powers, to censure and punish the party guilty of the contempt: or, if any enormity, requiring a heavier punishment than it was competent for that court to inflict, had been committed,—they might have elected to remit the party to a court-martial. But, in this case, they elected to take direct cognizance of the supposed offence, and to censure and punish it, in the degree which, to their judgment and discretion, seemed mete; and not to remit the party to a court-martial:—they did, in fact, exert their summary jurisdiction over the case;—and did apply the remedy which, to their judgment and discretion, seemed fitting, adequate and effectual. After this,—what the court-martial could possibly have had to do with the matter is inconceivable; even if it had been included among the matters charged against commodore Porter upon the present occasion. But it is not so charged. There is no possible construction of the specifications that can include it, without an absolute reprobation of them as devices and snares contrived,

of set purpose, to surprise and entangle the accused in hidden pitfalls, or invisible meshes: instead of giving him fair warning of the grounds of accusation, and the points to be defended.—We have therefore no hesitation to acquit the original framer of the charges and specifications from any such design: and to conclude that it was an afterthought, suggested by the desperate necessity of picking up every rag and remnant to cover the bald and naked matter of the real accusation. The specifications, in terms, impeach the pamphlet of four distinct offences: 1st, as publishing, without *authority* from the executive, the proceedings of the court of inquiry: 2d, as publishing an *incorrect* statement of such proceedings: 3d, as having *inserted* in it various *remarks, statements,* and insinuations highly disrespectful, &c. 4th, as publishing certain official documents without leave.—Now the third of these constitutes this fourth specification, under which has been brought the disrespectful address (as it was thought) to the court of inquiry; which constitutes a substantive and necessary part of the record of that court's *proceedings*. Then who could have imagined that the disrespectful matter, charged in this specification, alluded to any thing but the *remarks* and *comments*, in that pamphlet, upon these identical proceedings; or that this specification meant to charge him with having "*inserted*" in his pamphlet an essential part of the same proceedings, which the next preceding specification required him to have inserted to the minutest tittle?—Under the third specification he is to be punished if he fails, in a single word, letter, comma or emphasis, to set out the whole of the proceedings: by the fourth, he is to be punished because he did not diminish and falsify the printed copy of proceedings by leaving out nearly two closely printed octavo pages of the same; or at any rate one entire paragraph: for such is the clear and indisputable effect of ranking the paper E, or the second paragraph of it, among the remarks and statements which he is charged with having "*inserted*" in his pamphlet. To push the strictures upon this sentence further would be worse than superogation: already have they gone too far: for when a proposition, either negative or affirmative, rests upon principles perfectly plain and obvious to our common sense, it requires far more skill to discuss it, without blurring and obscuring its inherent brightness, than to elucidate by argument or evidence the abstrusest and most involved of questions. The taper that illumines the midnight darkness, but confuses and discolors the effulgence of the noon-tide ray.

Thus do we profess to have supported our challenge (over bold and confident as it may have seemed) to justify the decision here discussed upon any principle of law, reason or justice: and until it can be so justified to impartial and intelligent opinions, founded on a careful examination of the evidence and the principles on which it rests, the party affected, either by its legal penalties or its *extra-judicial* censures, may look with calm indifference upon the moral consequences of either: unless indeed his public spirit prompt him to grieve over them, as they may affect an establishment of high interest and importance to the common weal.

Details of Naval Trial.