

# REPORTS OF CASES

ARGUED AND DETERMINED

IN

## **The Court of King's Bench,**

DURING

HILARY TERM, NINTH AND TENTH GEO. IV.

AND

EASTER AND TRINITY TERMS, TENTH GEO. IV.

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WITH AN INDEX,

AND

*TABLE OF PRINCIPAL MATTERS.*

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1831.

**J U D G E S**  
OF THE  
**C O U R T O F K I N G ' S B E N C H**

*During the period comprised in this volume.*

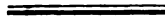


**CHARLES LORD TENTERDEN, C. J.**  
**Sir JOHN BAYLEY, Knt.**  
**Sir JOSEPH LITTLEDALE, Knt.**  
**Sir JAMES PARKE, Knt.**



**ATTORNEYS-GENERAL.**  
**Sir CHARLES WETHERELL, Knt.**  
**Sir JAMES SCARLETT, Knt.**

**SOLICITORS-GENERAL.**  
**Sir NICHOLAS CONYNGHAM TINDAL, Knt.**  
**Sir EDWARD BURTENSHAW SUGDEN, Knt.**



HARRY STOE MANN v. Sir EDWARD WILLIAM CAMPBELL RICHARD OWEN, Knight, WILLIAM HENRY WEBLEY PARRY, and NICHOLAS LOCKYER (a).

1829.

**THIS** was a special case in an action of trespass, commenced in Michaelmas term, 1826. The declaration stated, that the defendants, on the 7th day of January, 1825, together with certain other persons, being then under the control and command of the defendants, with force and arms made an assault upon the plaintiff, imprisoned him, and caused and procured him to be kept and detained in prison there for three months. Special damage was alleged, having reference to the plaintiff's loss of rank &c. as a purser in his Majesty's navy.

The declaration contained two other counts, in each of which the same cause of action was differently stated. Damages 5000/.

In Hilary term, 1827, the defendants pleaded the general issue, not guilty, together with five other pleas, only the second and fourth of which appear material to be stated; but by the terms of the special case either party was at liberty to refer to the pleadings (b). The second plea stated, that the plaintiff was a person in, and belonging to, the fleet of our Lord the King, in actual service, and full pay, in the said fleet, to wit, an officer in and of his said Majesty's naval service, that is to say, a purser in his said Majesty's service; and as such officer and purser, was employed in his said Majesty's naval service as purser of a certain ship of war of his said Majesty, to wit, the ship *Perseus*; and that the said plaintiff being such officer and purser in such actual service and full pay as aforesaid, and so employed as aforesaid, before the said time when &c., to wit, on the day and year aforesaid, on board the said ship *Perseus*, the same then being within the jurisdiction of the

The fraudulent charging, by a purser, of stores which were never issued, and the making of false entries in the ship's books to cover such charges, are an offence punishable "according to the laws and customs in such cases used at sea," as amounting, under 22 Geo. 2, c. 33, s. 36, to "a crime not capital, committed by persons in the fleet, not before mentioned in the act, and for which no punishment is thereby directed to be inflicted."

(a) This and the following cases were argued before three Judges, sitting in the Bail Court, pursuant to the king's warrant, under 3 Geo.

4, c. 102.

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(b) This reservation appears unnecessary, as the Court would be bound to look at the record.

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Admiralty of England, to wit, in the River Thames, committed and was guilty of a certain offence and breach of his duty as such officer and purser as aforesaid, cognizable by a naval court-martial, to wit, of fraudulently and unlawfully charging 26 blankets against 26 supernumerary seamen, to whom none had been issued, and of making, in order to such fraudulent charge, certain false entries in a certain book of the said ship *Perseus*. The plea went on to state a complaint duly made to the Lords Commissioners of the Admiralty within three years after the committing of the said offence; their Lordships' order duly issued to assemble a court-martial, defendant *Owen* being president; the due summoning and assembling of the same; that defendants, with others, duly held the same, for the purpose of trying the plaintiff, on board his Majesty's ship *Prince Regent*, in the port of Chatham; that the court did duly try him for the said offence, and that having weighed and considered the evidence produced against the plaintiff, and his statement and evidence on his defence, the court was of opinion, that the charge of the said offence had been proved against the plaintiff, and, in consequence thereof, did adjudge him to be dismissed from his Majesty's service, and rendered incapable of ever serving as a purser in the navy of his Majesty, his heirs, and successors; that the defendants, with other members of the court-martial, did, within the Admiralty jurisdiction, to wit, in the said port, on board the said ship, cause the plaintiff to be taken into custody with no unnecessary violence, and to be detained on board the said ship during his trial, for the purpose of such trial; as they lawfully might for the cause aforesaid; which are the same supposed trespasses, &c.

The fourth plea was the same with the second, except that instead of averring the plaintiff to have committed the offence mentioned in the second plea, it merely alleged that complaint in writing had been duly made to the Admiralty of his having committed that offence.

The replication joined issue on the first plea; and as to all the other pleas, replied "de injuriâ."

At the adjourned sittings for London after Trinity Term, 1827, the cause came on to be tried at Guildhall, before Lord *Tenterden*, C. J., when all the facts stated in the fourth plea were proved; as were also the facts stated in the second plea, except the allegation that the plaintiff had committed the offence with which he was charged; and it was also proved to be the invariable practice in all naval courts-martial, for the party accused to be in custody during the trial. The plaintiff was nonsuited.

In Michaelmas Term last, Lord *Tenterden*, C. J. made an order, that instead of the nonsuit, a verdict should be entered for the defendants on the second and fourth issues, and for the plaintiff upon the other issues.

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

The naval article of war, namely, the 36th, mentioned in 22 *Geo. 2*, c. 33, and upon which the defendants principally relied, is as follows:—"All other crimes not capital, committed by any person or persons in the fleet, which are not mentioned in this act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws and customs in such cases used at sea."

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

*Barnewall*, for the plaintiff. The whole question is,

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whether the plaintiff was charged with an offence for which, by the articles of war, he was liable to an imprisonment. This would be an indictable misdemeanour at common law. The 22 *Geo. 2*, c. 33, does not comprehend a purser. The material articles are 24, 33, and 36. The statute must be construed strictly, as it takes away the right of the party to be tried at common law. This is not an embezzlement within the 24th article. The crime imputed to the plaintiff is within the 33d article, but that article does not apply to the plaintiff, who was not a flag-officer, a commander, or a lieutenant. Then with regard to the 36th article, which is set out in the case, this was not a *crime*. It may be an indictable misdemeanour, but the term *crime* rather imports an offence of higher nature than a mere misdemeanour. The legislature meant to express a crime which might be capital. This article applies only to crimes which are not previously mentioned in the act, or for which no punishment is thereby directed to be inflicted; but the offence with which the plaintiff is charged is mentioned in the 33d article, though not as applying to a purser. [*Bayley, J.* With a view to this plaintiff, the offence is not mentioned in the previous parts of the act. The term purser enters into the consideration of the legislature. The 33d article does not seem to apply to cases punishable at common law as misdemeanours.]

*Maule, contra.* There is no reason why judgment should not follow the verdict upon the second and fourth pleas. At the trial, Lord *Tenterden* said that he entertained no doubt upon the subject. If the plaintiff was not triable by a court-martial, an offence in breach of naval discipline would be dispunishable. If the offence were committed at sea, there would be great difficulty in trying the plaintiff before any other tribunal. The jurisdiction of the Court of Admiralty, in cases of misdemeanour, is very doubtful. A case occurred some years ago, in which the prosecution was abandoned, because it was thought that there was no

remedy. It is true, that by a very late act the law has been altered in this respect; but the clause in question must be construed with reference to the state of the law at the time when the act passed. This is very clearly within the articles of war. It would be a strange thing if the plaintiff, a purser, was not within the articles of war. Upon looking at the general scope of the statute, it is evident that the intention was to provide a mode of trial for offences against the discipline of the navy. No term can be more general than "crime." [*Bayley, J. We say CRIMEN falsi.*] The party must be within the 36th article of war, unless he can shew that he came within one of the preceding articles. This article was meant to form a supplement. The intention must prevail.

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BAYLEY, J.—It has been rightly conceded, that the offence with which the plaintiff was charged was an indictable misdemeanour; and the question is, whether such a misdemeanour is within the 36th article of war, the words of which are, "all other crimes, not capital, committed by any person or persons in the fleet, which are not mentioned in this act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws and customs in such cases used at sea." Clergy did not apply to offences committed on the high seas, and therefore the words "other crimes not capital," would be confined exclusively to misdemeanours. The general term is "crime;" the subdivision is, "crimes and misdemeanours." *Blackstone* says (a), "we are now arrived at the fourth and last branch of these Commentaries, which treats of public wrongs, or *crimes and misdemeanours*." He afterwards says, "we are now, therefore, lastly, to proceed to the consideration of public wrongs, or *crimes and misdemeanours*, with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes; thirdly,

(a) 4 Bla. Comm. 1.

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their several degrees of guilt, as principals or accessories; fourthly, the several species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and sixthly, the method of inflicting those punishments, which the law has annexed to each several *crime and misdemeanour*.” (a) The next point relied on is, that the 36th article relates only to such crimes as are not mentioned in the act, and that the 33d article had already provided for fraudulent conduct. That article directs, that if any flag-officer, captain or commander, or lieutenant, belonging to the fleet, shall be convicted before a court-martial of behaving in a scandalous, infamous, cruel, oppressive, or fraudulent manner, unbecoming the character of an officer, he shall be dismissed from his Majesty’s service. This article speaks of officers only, and applies to such frauds only as are committed by persons of a particular description; and if it were held that the words “which are not mentioned in this act” exclude the offences mentioned in the 33d article, by whomsoever they may be committed, we should protect every private sailor from being punished for a misdemeanour, if that misdemeanour fell within any of the words used in the 33d article, as cruelty, &c. I am disposed to think that these words are to be read as if “that is” had been used instead of “and.”

LITTLEDALE, J.—I am entirely of the same opinion. The offence is not within the 24th, 31st, or 33d article. Then the question arises, whether it is within the 36th. It appears to me that the word “crime” has the same force as “offence.” The proper definition of crime, is, that it is an offence punishable by law. It is also insisted that the charge comes within the 33d article, and that it is thereby excluded from the operation of the 36th. I think the 33d article is intended to apply not to crimes, but to conduct unbecoming the character of an officer.

(a) 4 Bla. Com. 1.



PARKE, J.—I think the offence charged against the plaintiff is within the 36th article. The 33d article applies, not to indictable offences, but to conduct unbecoming the character of an officer, committed by a captain, commander, or lieutenant. It appears to me, therefore, that the offence in question is not within the 33d article, and that being an offence not capital, it falls within the provisions of the 36th article.

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Judgment for the defendants.

SMITH v. SURMAN.

**ASSUMPSIT.** The first count of the declaration stated, that plaintiff, on &c., at &c., at request of defendant, bargained with defendant to sell to him, and defendant agreed to buy of plaintiff, a large quantity of timber, to wit, 229 feet of timber, lying and being in and upon certain lands of plaintiff, at a certain price, to wit, the price of 1s. 6d. for each and every foot thereof, to be fetched and carried away by defendant from the said lands of plaintiff, and to be paid for by defendant, at the price aforesaid, within a reasonable time then next following; and in consideration thereof, and that plaintiff, at like request of defendant, had promised defendant to permit defendant to fetch and carry away the said timber from the said lands of plaintiff, defendant promised plaintiff to fetch and carry away the said timber from the said lands of plaintiff, and to pay plaintiff for the same, at the price aforesaid, within a reasonable time. Breach, that defendant refused to fetch and carry away the timber, or to pay for the same. Counts, for goods sold and delivered, and for goods bargained and sold. Plea, non

*A.*, by parol, sold to *B.* the timber of certain growing trees, at a price exceeding 10*l.* *B.* gave directions for cutting the trees, and offered to sell the butts to *C. A.*, by letter, required *B.* to pay for the timber. *B.*, by letter, answered that he had bought the timber, but that it was conditioned to be sound, and was not so. In assumpsit for the price of the timber: —Held, first, that there was no contract for the sale of land, or any interest in land, within the fourth section of the Statute of Frauds, (29 *Car.* 2, c. 3.) Secondly, that there was a contract for the sale of goods within the seventeenth section. Thirdly, that the letters did not constitute a note in writing of the contract, because they varied in their description of the terms of the contract. And, fourthly, that there was no part-acceptance, or actual receipt, of the goods by the buyer.