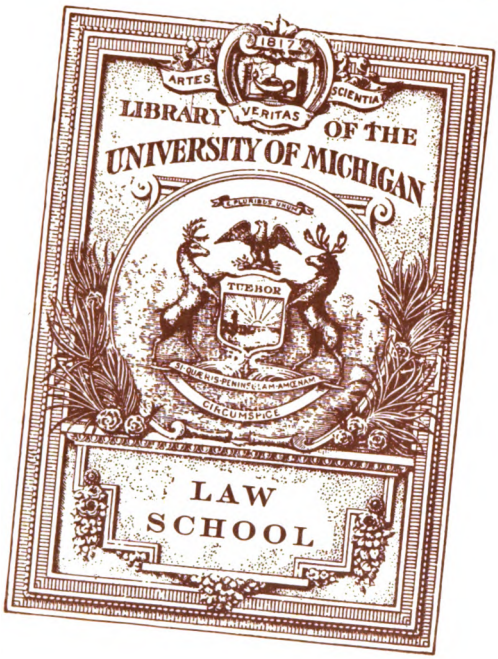

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Library of Useful Knowledge. Sir Edward Coke. *Published under the Superintendence of the Society for the Diffusion of Useful Knowledge.* Committee. Chairman, H. Brougham, Esq. F. R. S., M. P. Vice Chairman, Lord John Russell, M. P. London, 1828.

This short sketch of the life of Lord *Coke*, has brought to our consideration a subject of no small importance to the people of this country. We mean the education of gentlemen of the Bar. The professions of Law and Physic, more or less concern every man in civilized society. Who can say that he is above asking for their assistance? Have you robust health—how long will you keep it? Have you great wealth—will that save you from impositions, and injuries? Are you poor? Disease and oppression await you; and the glorious inheritance of a good name, is equally desired by the wealthy and the wretched. Fortunate, thrice fortunate is he, who lives a long life of usefulness, and comes not into the hands of either of these professions.

By the laws of the land, every man *may* defend his own rights. He may appear personally before any tribunal, and argue his own cause. But when my Lord Coke himself, after having graduated at Oxford, and for six years pursued the study of the Law at Westminster Hall; had been lecturer at Lyon's Inn three years, and for many years concerned in every cause of importance that was tried at Westminster Hall; Recorder of Norwich and Coventry; Solicitor to the Queen;

and lastly Attorney General: we say, when my Lord Coke, after all this, involved himself in great difficulty, on account of having solemnized his marriage, in an illegal form, with Lady Hatton, and only escaped the penalties of the law, by pleading ignorance of that law, we are sure we do not assume too much, when we say, that no man, lawyer or not, exhibits much wisdom, who undertakes to manage his own case. It is in relation to the difficulties of this profession, that we wish to call the attention of the public.

We do not believe that any branch of human knowledge, requires in a higher degree, a good preparatory education, particularly in the classics, history, moral philosophy, logic, metaphysics, and a familiar acquaintance with the language and thoughts of the best English writers of poetry and prose. Short of this, a man with great industry, and greater luck, may become what may be called in his own district, a good lawyer, but he can never count surely upon being great.—Bold and troublesome times bring out, now and then, such men as *Patrick Henry;* but if, in ordinary times, any man sets out to make a Patrick Henry, he will succeed in making himself exceedingly ridiculous. But it is not every one possessed of the qualifications we speak of, who can succeed. It is not every one who gets command of the vessel—but if fortune should so much favour him, he ought to be able to seize the occasion, and to manage it to the best advantage. It has become too common in this country, for young men to talk of talents, and genius, and all that sort of thing, not only in law, but what is much worse, in politics; and disregarding the dull detail and drudgery of truth, run away with the delusions of intuition. Your intuitive sort of politician, always ends his career in inconsistency, blessed with the mistrust of the people; or after contending for half his life, has the mortification of finding, that instead of good, he has been doing injury; instead of blessing, he has been cursing his country; instead of reputation, he has sunk to mediocrity. With us, most lawyers, at some period of their lives, are politicians. Here, where every man may aspire to the highest offices, popular or talented lawyers must come into public life; for notwithstanding the vulgar prejudice against them, as a class of men, they are the most popular. Their employments must make them so; and if they are talented, and honest, and well informed, there are no men who can be

more useful to their country. From the counsellor they soon become the personal friend.

One knows but little about laws or society itself, who thinks lawyers may entirely be dispensed with. It is equally true, that where we can, we had better do without them. No country can be so free, that every man can know the laws. Such is the variety of human affairs, and such the diversity of interests, both public and private, that no code can be made for the least civilized nation, which will not soon become a science known only, and then but imperfectly, to those who make it their daily study, and spend years in the practice of applying its rules to the business of life. Hard study and long practice can alone make a lawyer. The most talented man, unless he be possessed of most unblushing impudence, can scarcely tell whether he stands upon his head or his heels, when he first appears before a grave judge, with an anxious client at his back, and a practised, industrious, self possessed advocate, to oppose him. If ever man feels the weakness of his nature, it is on such occasions; and we are very much mistaken, if his timidity will not be in proportion to his good sense.

Who ever attempts to introduce a new law, or amend an old one, but the lawyers? Who else can well attempt it? One should certainly understand before he undertakes to improve. At the last sitting of the legislature, we had some miserable examples of the truth of what we are saying, to which we may by and by call the attention of the reader. In this country, lawyers cannot and do not represent their profession. That is, they have not ministers to support, with a view to their own promotion. Their promotion can only come from the people. It is a mistake, a very vulgar mistake, to suppose that they make laws for their own use. Of what use is law to them, but as component parts of the people, or as it is administered by their agency between man and man; and frame the law as you please, dishonesty, misunderstandings, mistakes, new cases, and a variety of other causes, necessarily the result of society, must create lawsuits. The more pure and elevated the principles and practice of the law, the more exalted will be the character and reputation of the lawyers, and of course the more popular and influential they will be. It is their necessary relation to society, then, which makes their services indispensable to the people, both

in public and private affairs. They are the officers of the courts. To the courts they are responsible for their conduct, and we are sorry that the courts are so little responsible to the people, for any neglect of this supervisory power, over the manners and habits of the Bar. As for ourselves, we believe there is one great cause, which leads to almost every thing discreditable to the Bar, individually or collectively, in this state; and that the people have been as much if not more to blame for its introduction than the lawyers themselves. We mean the ready admission of persons to the practice of the courts of Law and Equity, who are totally incompetent to the duties of their profession. Persons who have not undergone the necessary, absolutely necessary, process of preparation, even for the commencement of the study; and who, after a few months sitting in a lawyer's office, wasting their time by listening to every person that comes in, filling up a few blanks, and running hastily over a few elementary writers, here a little and there a little, with as much confusion in their heads as in "chaos old," have been pushed into life, with a commission from the courts to ruin as many poor clients as may be silly enough (and there are enough of them, God knows) to trust in such hands their lives, their property, and their character. In this country, a great proportion of lawsuits is among the ignorant classes of community. How can they judge? They are taken with the manners of a pert young man, or the imposing gravity of an old one, and hastily commit cases to their management. Is it necessary to legislate in favor of such lawyers, or of any lawyers, *against* such people? Is the lawyer's interest only to be cared for? Is the weaker to be neglected, and the interest of the many to be sacrificed for the promotion of a few ignorant, indolent or ambitious young men, who may prefer to do other men's business badly, than their own well? Can the client cheat the lawyer? Can he deceive him? Can his ignorance injure him? If he pays him his fee, all his duty to the lawyer is performed. But is it so with the lawyer? There, it only begins with him. For whose protection, then, is it necessary that there should be any legislation as to the admission of persons to the practice of the law? Surely for the people. The lawyers are but few in number. They are mere agents, permitted by the laws of the land. The public, then, have the

right to regulate their admission, altogether with a view to the interest of the client, and on such conditions as are most beneficial to the public. So trifling is the interest of the bar, compared to that of the people, we do not hesitate to say, and we believe every respectable lawyer will agree with us, that it is not worth consideration.

No one would think of enacting laws, to protect the trustee from the acts of the cestui que trust; the attorney against the devices of his principal; the factor against the contrivances of the planter. On the contrary, we all know that the agent is the person who has the principal in his power, that he is entirely at his mercy, and that in fact no law can save the principal from many, very many, acts of mismanagement and bad faith on the part of his agent. The great difficulty of the law then is to defend the many from the acts of the few. Are these few a privileged class, or are they only a necessary component of society—the best means of enforcing justice among the citizens, and of all men occupying the most advantageous position for advancing the interest of their country? Surely they hold this vantage ground. How important it is then, that they should be men of cultivated intellects, pure morals, and elevated principles. Shall the people neglect to enforce this object? Will they overlook their own interest? We solemnly believe that half the evils under which this state now suffers, half the mischief done by the general government, has proceeded from the ignorance and petty ambition of the herd of pettifoggers, which for years have disgraced the halls of Congress—men, who disregard the plain dictates of justice, and abandon themselves to the little prejudices and selfish views of small localities, unable to comprehend the pure and noble doctrines of political economy, or the simple and beautiful operations of a written constitution. In our own state, thank God, we have not, and can never have under our present constitution, "government lawyers, who represent in Parliament nothing beyond their own personal tendencies, and the brief which the minister of the day may put into their hands." But then we have men, who, either through ignorance, or with little schemes confined to their own district popularity, urge with unabated zeal, plans of alterations, retrenchments, pulling down and disorganizing, which soon or late must destroy the high character that Carolinians

have been in the habit of flattering themselves their state possessed. The profession of physic has of late years been more strictly dealt with than that of the law. A diploma is required from some regular institution, or a most rigid examination is enforced. The profession examine and the profession reject. If a physician is admitted to practice, and he is not qualified, it is the fault of some respectable institution, composed of his own class, who admit him upon examination. It is not so readily to be supposed however, that when the profession have the controul of admissions into their own body, that they will be less rigid than if it be placed in other hands. Many of course may be admitted who will never distinguish themselves; but that depends upon other causes. A good education does not necessarily make a distinguished man. It only secures a certain degree of respectability, which we are contending for, a proper self respect, and a forbearance on subjects beyond their powers. This is the general effect of a good education, and that which we think our profession needs most. If the Legislature think the community benefitted by exacting much from medical gentlemen, we think it should be equally rigid in exacting proper qualifications on the part of the gentlemen of the bar.

What are the common topics urged on the other side? That young men in this free country are anxious to be pushing on. That education is a costly thing, and not so easily procured. That to require applicants for the bar to go through a collegiate education, and then to study law three or four years, according to the old law of this state, is to exact of them a little fortune, enough to set them up snugly in any other business? 2nd. That it keeps down poor young men, and excludes them from immediately sharing in the profits and honours of the profession. We have heard no other arguments.

To the first, we reply, that no man can expect to procure any desirable object, without paying value for it—value, either in labour, money, or some other equivalent—unless by act of Congress. We know no other body that has the right to take value from one and bestow it on another. Upon no other principle than that of the Tariff, can any class of citizens seek to be gainers at the cost of the others. Is it just that he who expends his substance, and the labour of years

to qualify himself properly for his business, should be put upon the same footing with those who have neither laboured nor paid? A suitable library for a lawyer costs some thousands. What is a lawyer without his library?—we mean the best of them. He is like a carpenter without his tools. He may borrow—yes, and get on just about as well borrowing as the carpenter. He can never do his work as he wishes it, or as it should be done. Take the case of a father who gives his son a good education, and supports him three or four years during his studyof the law. To set him up in his office as he should be, it will cost him not less than six or seven thousand dollars. This is the capital which he gives his son. He then leaves him to take care of himself. He has done for him what was necessary to qualify him properly and honestly for duties required of him by his profession—by the oath of that profession—and by the sacred principles of justice between man and man; for it is fraudulent in a man to set himself up as competent to the performance of duties, which he knows he cannot be fitted for. And when he has qualified himself by great labour and expense, is it just, or is it good policy, that he should be put on the same footing with one, who thinks it not worth his toil or his money, to obtain the capacity for doing that well, which he is permitted to do imperfectly? Or if he is so ignorant that he knows not his own blindness, should the community neglect their rights, and sacrifice their interest, to gratify his vanity? Is it not anti-republican to put the welfare of the majority at the mercy of the few—to tax the many for the profit of a small class, merely because that small class are eager to have a share of the loaves and fishes? As Twisden, Justice, said, "it is stealing leather to make poor men shoes."

What is the frequent course of these things? A young man a little before he becomes twenty-one, finds it disagreeable to work at a trade. It does not suit his constitution. To stand behind the counter is too vulgar and tame. Farming and planting keeps him so much in the country, and in such dull society. He prefers the ease of *learning*, the *ambition* of the law, and admires the eloquence of Philips and of Curran—he quits the work-shop, deserts the store, or abandons the plantation—hurries off to some village or town, and enters a lawyer's office. Sometimes he only borrows a few books from an office. He has, if he be lucky, a little smatter-

ing of latin—but that very often is not the case. He reads Blackstone's Commentaries, Phillips' Evidence, Espinasse's Nisi Prius, Chitty's Pleading, perhaps East's Crown Law, and in six months he applies for admission. He produces a certificate of moral character, which is very easy to get; for if he cannot get it where they know him, he can get it where they do not know him. A committee of two or three gentlemen of the bar, are appointed by the Court of Appeals to examine him, with half a dozen or a dozen others. The court is cleared. He sits at the bar, and the committee ask them round three or four questions a-piece—exactly such questions too as they expect to answer. What is law? What is a deed? What is murder? What is larceny? What is a trust?—no, not what is a trust, that would be considered *unfair*, too deep—that some of their predecessors might be stumbled at. Then they retire. The committee go out, and the Judges admit them by dozens. As to Equity—that sublime and beautiful science—they perhaps delay another term before they ask for admission into the holiness of her secrets. The applicant in the mean time reads Maddock's Chancery and Mitford's Pleadings—petitions again—is asked the parts of a bill, about uses and trusts, accidents, frauds, mistakes—not all about them good reader, but simply if equity can relieve in such cases. He is again admitted, and becomes a Solicitor in Chancery, and then the first thing that he does is to *bring* a bill instead of trover, to demand a ne-exeat instead of bail, or to mistake a use for a trust. Indeed a case not many years since came under our own observation, where a very worthy gentleman had purchased an estate and took titles, but not having confidence in his own knowledge of the Registry Acts, carried his titles to a gentleman of the bar, who had become nauseated with his old trade of physic, and had turned his attention to the study of the law, which he imagined more peculiarly suited to the developement of his abilities and pretensions as an orator. This Esculapian lawyer took his fee and time to consider, and when his client waited upon him for the result of his reflections, he found him to his very elbows in parchment. He had a bill "of dimensions huge," in the old English form, with the story thrice told. He had called upon the vendor to answer upon his solemn oath, if he had not executed that deed of conveyance, which he exhibited marked A, which he prayed

might be considered as a part and parcel of the complainant's bill, as much so as if it had been particularly and *verbatimly* set out; and to say what objections he could have to the solemn recording, enregistering, and enrolling of the same, in pursuance of the Acts of Assembly, in that case made and provided; and praying that if he could not shew good cause to the contrary, that it should be so recorded, enregistered, and enrolled, as by law required, and for such and other relief in the premises, as to the Hon. Chancellors should seem meet.

Unfortunately for the client, the Court of Equity did not sit for some six months or so afterwards, or the cause was not brought to a hearing, and in the mean time the vendor sold to another purchaser without notice, who recorded his deed, without the advice of counsel learned in the law. Of course the bill was dismissed, and the client lost his land, and had no remedy left, the vendor having become a bankrupt and left the state; and as for his lawyer he could not have indemnified him, even if he had pursued him.

Cases almost as extravagant as this occur every day. Members of the bar look on and smile at them, and frequently the poor client goes off and cannot conceive by what hocus pocus he has been deprived of his rights. He flies into a passion with the law; thinks it all injustice and mummery; lays to the court all his misfortunes, and never once thinks that his lawyer has been wrong. He was a particular friend of his, and therefore must have understood the case. There was some foul means used on the other side; something that was not altogether the *clean thing*. Alas! how many such lawyers we have seen! But to avoid personalities, we will mention a few cases given by Cicero, who is complaining of the ignorance of the lawyers in his time, and in doing so, has stated such as we may really say we have seen over and over—

"Then answers Crassus, not to speak of other innumerable instances, of great importance, and to proceed to your favourite study of the law, can you regard them as orators, upon whom Scævola, with a mixture of mirth and indignation, waited many hours, when he was hastening to the Campus Martius; at which time Hypseus, with a loud voice, and in a torrent of words, insisted before the prætor M. Crassus, that his client might lose his cause. While Cneius Octavius, a man of consular rank, in a speech of equal

length, refused to suffer his antagonist to lose his cause, or that his own client should take the advantage, by the blunders of the other party, of being acquitted of the charge of betraying his ward, and all its troublesome consequences. For my part, answers the other, I remember to have heard Mucius speak of these dunces, but I am so far from allowing them to be orators, that I am for depriving them of the privilege of pleading at the bar. And yet, replied Crassus, these advocates wanted neither eloquence nor address and readiness in speaking; what they wanted was a knowledge of the law. For the one insisted upon more, while he was pleading upon an article in the twelve tables, than the law allowed; and if this was granted him, he of course would have lost the trial. The other thought it unjust that he should be exposed to greater hardship than the charge brought against him implied, and did not perceive that if he had been dealt by in that manner, his antagonist must have been defeated.

"Nay, not many days ago, while we were sitting as assistants to our friend Q. Pompeius, the city prætor, did not one of your eloquent lawyers insist upon the defendant being indulged in an old and common exception, in favour of a debtor who was engaged to pay a sum at a certain day? He did not understand that this rule was made in favour of the creditor; insomuch, that if the defendant had proved before the judge, that the money was demanded before it became due, when the plaintiff came to demand it a second time he might have been precluded by this exception, *because the affair had already been tried.* Can any thing be more scandalous, in words or in conduct, than that a man, who pretends to superintend the interests of his friends, to relieve the oppressed, to administer to the sick, and to raise the dejected, should so stumble in the affairs of the most trivial and obvious nature, as to become an object of pity to some, and of ridicule to others?"

Now we ask whether it is better to require three or four years of study, even should it cost something considerable, on the part of those who wish to adopt the legal profession, in order to fit them for a difficult business; whose services are required in one way or the other by the whole community, to the decided advantage of that community; or that to oblige a few, the whole population of the country should

be subjected to the risk of loss and vexation? It appears to us the strangest infatuation, to come to any other conclusion than that of acting for public, rather than for individual ends.

Should the rights and interests of those who have properly qualified themselves for the business, be also overlooked? After all, the business generally accumulates in the hands of a few, and a mass of non-combattants hang about the bar, mere drones upon society. If there are enough to do the business of the country, and to do it well, should not the principle of demand and supply regulate these matters, as well as others? On the contrary, for some years past it would seem to have been the policy of this country, to make as many lawyers as possible; and true to the principles of the *American System*, to make them like other worthless articles as rapidly as they can be thrown off from the hands of the workmen. Would it not be more wise and useful, that fewer were lawyers, and those learned and skilful; possessing high character, dignified manners, and the confidence and respect of the people? In short, is it not all important, that these universal agents of a free people should be fully competent to the ordinary duties of their calling; and when competent, that they should not be overwhelmed by and confounded with a crowd of ignorant, idle and useless brethren, with whom they cannot associate, with whom they do not sympathize, and for whom they have to bear the indiscriminate abuse so commonly heaped upon the profession, or what is worse, the general suspicions entertained by the people as to the correctness of their motives.

There is no profession or business in which so much confidence is placed, with so little security, except upon the honour of the man, as that of the law, notwithstanding a common feeling of jealousy which is entertained as to the honesty of the lawyers. We are confident in saying, that in no class of men has this confidence been more justly placed, or has been less abused. How all important it is, then, that the character of the bar should be sustained. It is public property, and as such should be protected and fostered.

As to the argument that a long period of study must exclude many clever men from the profession, we have only to say, that government is made for the whole, and not for any particular men. Place the desired object within the reach of those who will qualify themselves to reach it. It

is their business to qualify themselves. Only lay such restraints as are *necessary*. We would not go farther than that. To stop short of that, is injustice to all the rest who constitute the community.

A man may wish to be a merchant, before he has money or credit; a physician, before he knows the healing art; or a lawyer, *before he has read* the laws of the land, but is it public policy that he should be, or that the government should offer him temptations, or grant him a monopoly or exclusive privilege before he is competent? According to the "American System," it would be all right; but according to our poor notions of right and wrong, it would be a gross violation of the rights of the citizens. We are therefore decidedly of opinion, that the legislature should require of those who seek to be admitted to the profession of law, a good education, and at the least, three years regular study of the laws of the land; and that when they apply for admission, they should be thoroughly examined, and that in public; or otherwise permit any and every man to practice law who pleases, and no longer legalize the issuing of commissions to a few, which operate as a fraud upon the ignorant and honest people of the country, by certifying to the competency of a man totally incompetent, and by giving to a thing a false name and false pretensions. The evil is growing daily worse, and should be speedily corrected. Our bar is sinking instead of rising. It is a great conceit to suppose that many men in our country are learned lawyers. In making these remarks, we do not lay the least claim to superiority on our parts: we are well aware of our inferiority to many, very many, but it shall not induce us to shut our eyes or our mouths, from seeing and proclaiming the necessity of improvement generally; and we rely upon the candour and good feeling of the profession to bear us out in the observations we have made. Many who like ourselves, feel their deficiencies, will no doubt be equally ready to acknowledge them, and the necessity of regeneration. It must be acknowledged however, that this plan of making lawyers, to learn the law afterwards, has the high authority of Mr. Simile in the farce:

"*Simile.* Sir, you are very ignorant on the subject—it is the method most in vogue.

O'Cul. What! to make the music first, and then make the sense to it afterwards!

Sim. Just so.

Monopoly. What Mr. Simile says is very true, gentlemen.

O'Cul. Why, Mr. Simile, I don't pretend to know much relating to these affairs, but what I think is this, that in this method, according to your principles, you must often commit blunders.

Sim. Blunders! to be sure I must—but I could always get myself out of them again."

We know of no man in this country, who has made himself eminent at the bar, who did not study some three or four years before his admission. That gentlemen can be pointed out, we do not deny, who in particular causes of great feeling and interest, have made eloquent speeches and great arguments—causes to which they have devoted themselves.—But such persons have generally turned their attention to politics, and only made the bar a stepping stone to preferment. But were they great lawyers? Were they ready to meet an able and practised solicitor in the Court of Chancery, with the same preparation? or on a sudden emergency, without any preparation? Could they go into a difficult cause, and argue it well, *as a lawyer*, without a prepared speech? We have never yet seen that man who could, unless he had been labouring for years in his vocation, toiling night and day over law books and law papers, and having cases as familiar to his mind, as a statesman's principles should be to him. How few instances do we see of the most distinguished lawyers, who have for years been engaged in political life, return with success to the bar? Lord Coke, speaking of the difficulties of the profession, (and no man knew them better, or overcame them with more facility,) of the years of labour and perseverance necessary to be devoted to the acquisition of law learning, observes: "And yet, he that at length by these means shall attain to be learned, when he shall leave them off quite, for his gain or his ease, soon shall he (I warrant him) lose a great part of his learning. Therefore, as I allow not to the student any discontinuance at all, (for he shall lose more in a month than he shall recover in many,) so do I recommend perseverance to all, as to each of these means an inseparable incident."

By prolonging the period of his study, the student will find

his profit, not only in the greater fund of knowledge which he must necessarily acquire, but coming to the bar later in life, he will have more strength, perseverance, self command, independence, knowledge of the world, and in short, the capacity to take care of himself, as well as of his client. Who ever comes to the bar in Great Britain at twenty-one? Indeed who could come to the bar there, and maintain his ground with the learned and able lawyers of that country, at that premature age? He would inevitably sink, never to rise again; and if it is not always the case here, we should rather lay it to the general incapacity of the bar, than to any constitutional difference. By general incapacity we mean expressly to say, that ordinarily our bar is not learned. We have, it is true, some distinguished examples to the contrary, but they are few. Is not the success of such men even proverbial with the whole community? Nothing marks the able and practised lawyer so much as the examination of his witnesses, and the developement of the evidence of the case. He knows the points of his case, and examines exclusively to them. He avoids idle repetitions; never weakens his case by contending for a point, which he knows cannot be maintained by an accurate view of the law. Conceals his object from the witness who is opposed to him, and even from the opposite counsel himself, if he be not equally astute and skilful, until, like an artful general, he has drawn his opponent into his ambush, and holds him ready for a quick and glorious conquest. Let points arise ever so unexpectedly, he is ready to meet them. Can a person of twenty-one carry on the game with such a man, without falling a prey to him? If he does, and does it successfully, let him bless his stars, and sing te deum to his lucky client.

Let us look at the example of those who have been most distinguished in this arduous profession. Lord *Mansfield* did not commence his legal studies till he was twenty or twenty-one; at an age which that great man, and greatest of lawyers, Lord *Hardwicke*, thought too early for a youth to commence travelling. It was not until he was 26 that he was called to the bar, and even then he did not think it advisable to push himself into the practice of his profession, but "full of vigor," he determined, and determined wisely, "to travel into foreign parts, before he set himself down to the *serious prosecution of his legal studies*, to which his genius and his *slen-*

der fortune, as a younger son, forcibly and happily prompted him."* *His* slender fortune it seems then, did not urge *him* to come forward before his time. What an example for the young men of our country! They will not pretend to readier talents, or more precocious judgments than Lord Mansfield's. But even at this age, when he did come to the bar, he was saved, says his biographer, from the "embarrassments" which *juvenile* indiscretions too frequently occasion, by his conciliating the esteem, the friendship and patronage of the great oracles of the law who adorned that period, amongst whom Lord *Talbot* and Lord Chancellor *Hardwicke* were looked up to as the foster-fathers of the science;" and at the age of *thirty*, when he commenced the argument of causes, he is styled by the same writer, "our *Tyro* in the law," "exercising his *dawning* genius and *opening* talents." Thus initiated into his profession, he was immediately engaged, and continued to be employed in the most important causes of the day.

Lord *Somers* did not enter College at Oxford, until he was in his 24th year. He was too poor. He, at the same time that he commenced his studies at College, enrolled himself as a student of the Middle Temple. He, too, was called to the bar at the age of 26, but did not leave college to commence the practice, until six years afterwards; and then, at 32, under the patronage of Lord Shrewsbury, commenced his successful career.†

So of Sir *Matthew Hale*; after having got over his mad fits "for the stage-players," and "martial affairs," did not set himself down to the study of the law, until he had passed his twentieth year; and being very poor, "he studied for '*many years* at the rate of sixteen hours a day, and was 'reclaimed from the idleness of his former course of life,' by that eminent lawyer, Sergeant Glanvil." "Yet (even then, says Bishop Burnet,) he did not at first break off from keeping too much company with some vain people, till a sad accident drove him from it," when, by the assistance of *Noy*, *Selden*, and Chief Justice *Vaughan*, he commenced his lucrative and honourable practice at the bar, which must have been between the 25th and 30th year of his age.

* Holliday's Life of Mansfield, p. 12.

† Maddock's Life of Somers.

It would be more than useless to multiply instances which must be familiar to the profession.

"The early English lawyers do not appear, (says a late work,*) from what we know of the subject, to have been a very eloquent race of men. If we may judge from the reports transmitted to us in the Year-Books, their arguments were exceedingly pithy, and never wandered beyond the technical limits of the question. There is a passage in Sir Thomas Elyot's Governor, which confirms this view of the subject. 'But forasmuch as the tongue wherein it (the law) is spoken, is barbarous, *and the stirring of affections of the mynde in this nature was never used*, therefore there lacketh elocution and *pronunciation*, two of the principal parts of Rhetorike, notwithstanding some lawyers, *if they be well reteined*, will in *a meane cause* pronounce right vehemently." From these observations made in relation to the early lawyers, those of the present day may draw some profitable lessons. How few are good speakers! This is not so surprising as that they should be often ignorant. Any man of good sense may make himself a learned lawyer, with less labour, and even with hours less regular than those prescribed by Lord Coke.† But to speak well is the most noble and difficult task for man. And even, if, as Cicero says, "the multiplicity of suits, the variety of causes, the bustle and confusion of the forum, afford employment sufficient for the most wretched speakers, we ought not, for that reason, to lose sight of the main object of our pursuit. Thus, in those arts which are cultivated, not for the use, but the elegance they bestow upon life, with what accuracy and fastidiousness we form our taste; for there are no controversies to induce people to endure a bad actor in the theatre, as they do an indifferent pleader at the bar. An orator, therefore, ought to be extremely *careful*, not only to please those whom it is his business to please, but to insure the admiration of those who can form a more rational and correct judgment." To the young practitioner the words of Cicero should never be forgotten. With care, diligence and study, he must gain his end. Who ever becomes a profi-

* Law and Lawyers, or Westminster Hall.

† Sex horas somno, totidem des legibus æquis,
Quatuor orabis, des epulisque duas,
Quid superest sacris ultro largite camœnis.

cient musician otherwise? The same cultivation will produce effects equally admirable, and infinitely more profitable. But how sadly it is neglected in our country! It is the consequence of the too early admission to the bar. How can one be eloquent, who is every moment alarmed at his own ignorance of the subject he is discussing? or who is so blind that he cannot see his own weakness? Instead of the "action, action," of Demosthenes, give us the "knowledge, knowledge," of Cicero. It was not (unfortunately for us) until we had been many years at the bar, that we saw, with shame, and bitter mortification, how much we had neglected the admirable Treatise* of that great man, the master of orators. Let us, with melancholy experience, warn our junior brethren against the like folly. Days and nights devoted to the reflections he has left you will yield you a rich reward. To his advice you should look, as coming from the father of your profession. It should, however, be admitted, that it requires one to be somewhat initiated, before he can see the full force of Cicero's work.

But we are speaking of eloquence, when, as to many of our profession, we should descend to teach the elements of our language. It is too true, that in many instances in this country, gentlemen even of talent and high practice, may be heard at our bar, who shew an utter indifference to the language they are uttering, who abolish the moods and tenses, seize with fury upon the wrong words, make verbs of nouns and nouns of verbs, and so utterly confound their mother tongue, that we have often wondered it did not bring up the angry ghosts of all the Johnsons, Walkers, Murrays, lexicographers and grammarians, that have ever breathed "the pure English undefiled." Well might we say, with Ascham in his Toxophilus, that "when a man is always in one tune like a bumble-bee, or els now in the top of the church, now downe no man knoweth where to trace him, or hissing like a reed, or roaring like a bull, as some lawyers do, who think they do best when they cry loudest; these shall never greatly run, as I have known many well learned have done, because their voice was not stayed afore with learning to singe."†

But to return to the subject at the head of this article. It

* Cicero de Oratore.

† Westminster Hall.

should be some consolation to those who have not distinguished themselves in early life, and a spur to their future exertions, that "it does not appear that Lord Coke was distinguished for any of the precocity of talent, or that his boyhood was attended with any of those uncommon circumstances, which sometimes give celebrity to the early years of remarkable men." Speaking of his studies while a student at law, his biographer remarks:

"In this capacity he remained during *six* years; after which time, in consideration of his great proficiency in the law, he was permitted to be called to the bar, though the usual period of probation was then *eight* years. The flattering compliment thus paid by the heads of his profession to his learning and talents, was of itself a sufficient recommendation to insure him early opportunities for bringing himself further into notice. Accordingly we find him engaged as counsel in a case of some importance *so early* as 1578, that is, in the *twenty-eighth* year of his age. He was also appointed reader or lecturer at Lyon's Inn, an office which he held during three years; and his readings, (which were not given, as it is usual to give them at present, merely for the sake of observing an antiquated form,) were so assiduously attended, and so generally admired, that he rapidly attained a degree of repute much greater than that of any other barrister of the same age and standing at the bar. His practice, in consequence, daily increased; and he was at length retained as counsel in almost every cause of importance that was tried in Westminster Hall. He became recorder of the cities of Norwich and Coventry, then solicitor to the queen, and afterwards attorney-general. His career was equally successful in parliament. He was returned by the freeholders of Norfolk as knight of the shire; and in 1592 was made speaker of the House of Commons."

Our object is not to give a biographical sketch of Lord Coke, beyond what is is necessary to illustrate our views on the study of the law; and we shall conclude this article with the following outlines of his character, and notice of his works, from the book before us, which we presume may be from the pen of Mr. Brougham:

"His temper was evidently violent, and his disposition overbearing. In the early part of his career, there were no bounds to his obsequiousness; after he had attained the object of his ambition, it has been seen that his conduct was

any thing but that of a servile courtier; a contradiction that can only be accounted for, by supposing him to have been gifted by nature with an independent spirit, between which and his ambition there was a continual struggle. The former, however, ultimately gained the ascendancy; and (to use the expressions of Mr. Hallam) 'he became, not without some honourable inconsistency of doctrine as well as practice, the strenuous asserter of liberty, on the principles of those ancient laws which no one was admitted to know so well as himself; redeeming in an intrepid and patriotic old age, the faults which we cannot avoid perceiving in his earlier life.'

"It has been elsewhere observed of Coke: 'His advancement he lost in the same way he got it—by his tongue: so difficult is it for a man very eloquent, not to be over-loquent. Long lived he in that retirement to which court indignation had remitted him, yet was not his recess inglorious; for at improving a disgrace to the best advantage he was so excellent, as King James said of him, *he was like a cat, throw her which way you will, she will light upon her feet.* And finding a cloud at the court, he made sure of his fair weather in the country, applying himself so devoutly to popular interest, that in succeeding parliaments the prerogative felt him as her ablest, so her most active opponent.'

"The patriotism and independence of Sir Edward Coke, must ever be considered as the brightest feature in his character. It is as a patriot alone, that he stands superior to his great contemporary Bacon, with whom, throughout the greater part of his professional career, he was placed in constant competition. Both had embraced the same profession, both prosecuted it with ardor and success; one attaining the highest, the other the second dignity it can confer; and both lived to experience the instability of the preferment they had struggled so hard to acquire. But the causes which produced the downfal of these illustrious persons were widely different; and he whose integrity was unimpeached, rose highest in public estimation after his disgrace at court; while all the brilliant qualities of his rival, when sullied by corruption, failed to procure him the consideration and esteem, that to a generous mind form the most gratifying reward of every exertion. As an author, however, Bacon need fear no comparison with Coke. No one can pe-

ruse a production, however slight, of each, without being struck by the wide disparity of their intellects. Bacon was in every respect superior to his age; Coke was merely on a level with it. The former was a philosopher, a statesman, and a lawyer; the latter was a lawyer, and little or nothing more. An absurd opinion is sometimes maintained, that those who devote themselves to the study of the legal profession must sedulously refrain from intercourse with every other department of literature and science.—Perhaps no more striking refutation of such a doctrine can be named, than the great superiority of Bacon's legal writings over those of his contemporary. As a practical lawyer, Coke was undoubtedly without an equal. All the abstruse learning of the common law, the subtle niceties of pleading, and the voluminous enactments of the statute-book, were treasured in his memory; and from this copious repertory he could always draw wherewithal to supply the emergencies of a particular case. But he wanted the lamp of philosophy to enlighten the confusion of so many jarring elements. It would have produced such an effect as the first beaming of day is said to have done on chaos; for though in a confined circle he could move with safety, if not with freedom, he was bewildered and lost when he ventured beyond it. His mind resembled a spacious but ill constructed dwelling-house, stored with furniture in abundance, and of costly workmanship, which, however, for want of order and arrangement, is deprived of much of its utility, and is often found to be more cumbersome than convenient. The difference we cannot fail to perceive between these distinguished individuals, was owing as much to the original dissimilarity of their genius, as to their education and acquired habits of thinking. Coke had not been nurtured in the school of philosophy; and having once fallen into the beaten track of the law, he seems never to have felt a wish to diverge from it. Although endowed with a shrewd and penetrating mind, he loved rather to involve himself in the perplexities of detail, and to treasure up a vast number of unconnected facts, than by arranging and combining these, the elements of knowledge, to discover new and hidden truths. He possessed a memory at once powerful and capacious; industry, which no labour could fatigue, and that sobriety and dispassionate temper of mind which no intri-

cacies could disgust, but he was lacking in the higher and more noble faculty of reason, which is the true and only source of all philosophy. In this his great rival, the father of philosophy, eminently excelled; and while Bacon was gaining by a broader and easier ascent, the vantage ground of his profession, he found leisure to indulge the natural versatility of his tastes, and to make those excursions into the fields of literature and of science, by which his fame has become the property of the world. In none of Coke's writings do we find a single attempt to generalize, to discover those great principles of jurisprudence, from which most of the principal enactments of positive law have been deduced, or to lay down rules for the guidance of future legislators. He is content to know that certain regulations have been made, and that certain consequences must follow; but he goes no further, or if he attempts to do so, he wanders without a compass. No one, who has perused even the speech of Lord Bacon, on his taking his seat in the Court of Chancery, will require to be told that his manner of treating legal subjects is very different.

"It is true that the voluminous writings of Coke, have always been classed among the most important that we possess on the laws of this country. 'His learned and laborious works on the laws,' says Fuller, 'will be admired by judicious posterity, while fame has a trumpet left her, and any breath to blow therein.' But this eulogium must not be understood to imply that they are worthy to be looked up to as models for imitation, either in point of style or method. Their chief merit consists in the extensive learning and sound legal information which they contain; but this is imparted in such a negligent and slovenly manner, as greatly detracts from their value. They resemble a garden filled with the choicest flowers, which, however, are frequently disfigured or concealed by the neighborhood of weeds and rubbish. That want of order and arrangement, which is their principal fault, seems to have arisen not so much from mere carelessness and inadvertence in the disposition of the subjects to be discussed, as from the peculiar habit of Coke's mind, which made him ever more anxious to exhibit his powers of subtlety and copious illustration in reasoning, than to produce only such arguments as might be apposite and well timed. Hence his digressions are not

only frequent but almost interminable; and his arguments are often heaped together till they become tiresome and even puerile. It appears that he was reproached with committing exactly the same faults in extemporaneous speaking. Lord Bacon expresses himself thus on the subject: 'In discourse you delight to speak too much, not to hear other men. This, some say, becomes a pleader, not a judge; for by this sometimes your affections are entangled with a love of your own arguments, though they be the weaker, and rejecting of those which, when your affections were settled your own judgment would allow for strongest. Thus, while you speak in your own element, the law, no man ordinarily equals you; but when you wander, as you often delight to do, you wander indeed, and give never such satisfaction as the curious time requires. This is not caused by any natural defect, but first for want of election, when you, having a large and fruitful mind, should not so much labour what to speak, as to find what to leave unspoken: rich soils are often to be weeded. You cloy your auditory when you would be observed; speech must be either sweet or short.'

"A few examples shall be given of these defects in the works of Sir Edward Coke. The first that occurs will sufficiently illustrate his manner of digressing, his mania for assigning a reason to every thing, and also the particular tone of quaint pedantry which was in some degree the characteristic of his age. It is taken from his Commentary on Littleton. The author having enumerated the different kinds of tenures and services in the following order—*viz*: homage fealty, escuage, knight's-service, frankalmoigne, homage auncestrell, grand serjeanty, petit serjeanty, tenure in burgage, in villanage, and rents, Coke cannot but find something peculiarly appropriate in the arrangement of these heads. After commenting on the four first, he goes on—'Fifthly, *soccage*, the service of the plough, aptly placed next knight's-service, for that the ploughman maketh the best souldier, as shall appear in his proper place. Sixthly, *frankalmoigne*, service due to Almighty God, placed towards the middest for two causes; first, for that the middest is the most honourable place; and, secondly, because the five first preceeding tenures and services, and the other six subsequent must all become prosperous and useful, by reason of God's true religion and service; for *Nunquam prospere succedunt res*

humanæ, ubi negliguntur divinæ. Wherein I would have our student follow the advice given in these ancient verses for the good spending of the day'—

"Sex horas somno totidem des legibus æquis,
Quatuor orabis, des epulisque duas;
Quod superest ultra sacris lagire camœnis."
Co. Litt. 288. a.

"Notwithstanding his undisguised contempt for 'rhyming poets,' this is not the only occasion on which he has thought proper to introduce scraps of Latin verse, and even doggrel, into his legal discussions. Thus, in the following passage—'If the wife elope from her husband, that is, if the wife leaves her husband and tarrieth with her adulterer, she shall lose her dower until her husband willingly, without coercion ecclesiastical, be reconciled to her, and permit her to cohabit with him; all which is comprehended shortly in two hexameters'—

'Sponte virum mulier fugiens, et adultera facta,
Dote sua careat, nisi sponsi sponte retracta.'
Co. Litt. 32. a. 32. b.

"Of his very clumsy and inappropriate mode of introducing quotations in his legal writings, it would be difficult to find a more ludicrous example than the passage which occurs in the beginning of his chapter on the jurisdiction of forest courts. (Inst. iv. chap. 73.) 'Seeing we are to treat,' he says, 'of matters of game and hunting, let us (to the end we may proceed the more cheerfully) recreate ourselves with the excellent description of Dido's doe of the forest, wounded with a deadly arrow stricken in her, and not impertinent to our purpose.'

Uriter infelix Dido, totaque vagatur
Urbe furens, qualis conjecta cerva sagitta,
Quam procul incautam nemora inter Cressia fixit
Pastor agens telis, liquitque volatile ferrum
Inscius: illa fuga sylvas saltusque peragrat
Dictæos, hæret lateri lethalis arundo.*

* These lines are thus translated by Dryden. (Æneis, book iv.)

Sick with desire, and seeking him she loves,
From street to street the raving Dido roves;
So when the watchful shepherd, from the blind,
Wounds with a random shaft the careless hind,
Distracted with her pain, she flies the woods,
Bounds o'er the lawn, and seeks the silent floods
With fruitless care; for still the fatal dart
Sticks in her side, and rankles in her heart.

"And in a marginal note he compares this wound of the stricken doe to 'an evil conscience in the false and furious officer of the forest, if any such be.'

"His constant disposition to account for every thing by uncommon and singular reasons, is nowhere better exemplified than in his derivations of words. Thus, *Parliament*, he says, is so called, 'because every member of that court should sincerely and discreetly *parler la ment* for the general good of the commonwealth.' (Co. Litt. 110. a.) 'The word *placitum* is derived *a placendo quia bene placitare super omnia placet;* and it is not, as some have said, so called *per antiphrasin quia non placet.*' (Ibid. 17. a. 303. a.)— 'Towne (ville) *villa, quasi vehilla, quod in eam convehantur fructus.*' (Ibid. 115. b.) 'ROBBERIE. *Roboria*, properly is when there is a felonious taking away of a man's goods from his person; and it is called robberie, because the goods are taken as it were *de la robe*, from the robe, that is, from the person; but sometimes it is taken in a larger sense.' (288. a.) A hundred other such instances might be quoted.

"Perhaps there is no quality more conspicuous throughout the writings of Coke, than a constant parade of scholastic pedantry. He seldom discusses a subject, however unimportant, without dividing it according to rule under several distinct heads; and it by no means unfrequently occurs that his awkward attempts to establish complete perspicuity create confusion and perplexity where none existed before. It is evident that he was unconscious of this failing. In his preface to the seventh report he says: 'In these and the rest of my reports I have (as much as I could) avoided obscurity, ambiguity, jeopardy, novelty and prolixity. 1. Obscurity; for that it is like unto darkness, wherein a man for want of light can hardly discern any way. 2. Ambiguity; where there is light enough, but there be so many winding and intricate ways, as a man for want of direction shall be much perplexed and entangled to find out the right way.— 3. Jeopardy; either in publishing of any thing that might rather stir up suits and controversies in this troublesome world, than establish quietness and repose between man and man; (for a commentary should not be like unto the winterly sun, that raiseth up greater and thicker mists and fogs than it is able to disperse;) or in bringing the reader by

any means into the least question of peril or danger at all. 4. Novelty; for I have ever holden all new or private interpretations or opinions, which have no ground or warrant out of the reason or rule of our books or former precedents, to be dangerous and not worthy of any observation, for *periculosum existimo quod bonorum virorum non comprobatur exemplo.* 5. Prolixity; for a report ought to be no longer than the matter requireth; and as *languor prolixus gravat medicum, ita relatio prolixa gravat lectorem.*'

"The scholastic method of argument is often clumsily, and sometimes incorrectly, employed by Coke. He was in the habit of falling into that dangerous error, so common among those who use the mechanism of reasoning somewhat carelessly, of being misled by mere verbal subtleties; and in consequence of this failing his style of arguing is not only often loose and perplexed, but occasionally vicious. Instances of this sort may be found in his report of Calvin's case, which also contains examples of the defect before mentioned. The principal question of law brought under the consideration of the court in that celebrated cause was: whether the plaintiff, who had been born in Scotland, after the crown of England had descended to James I., was an alien born, and consequently disabled from bringing any action real or personal for lands within the realm of England. It was observed that there were four nouns, which might be called *nomina operativa*, in the plea, viz.: *ligeantia*, (allegiance,) *regnum*, (kingdom,) *leges*, (laws,) and *alienigena*, (alien.) Each of these subjects underwent a separate discussion.—On coming to the last the reporter observes: 'Now we are in order come to the fourth noun, (which is the fourth general part) *alienigena:* wherein six things did fall into consideration. 1. Who was *alienigena*, an alien born by the laws of England? 2. How many kinds of aliens born there were? 3. What incidents belonged to an alien born? 4. The reason why an alien is not capable of inheritance or freehold within England? 5. Examples, resolutions and judgments reported in our books in all successions of ages, proving the plaintiff to be no alien. 6. Demonstrative conclusions upon the premises, approving the same.' After examining the first five points at some length, he comes to the last head, which, he says, comprises 'six demonstrative illations or conclusions, drawn plainly and expressly from the

premises.' Among these six arguments, it does not require much penetration to discover the unsoundness of the following:

"'Every stranger must at his birth be *amicus* or *inimicus;* but Calvin at his either birth could neither be *amicus* nor *inimicus: Ergo*, he is no stranger born. *Inimicus* he cannot be, because he is *subditus ;* for that cause also he cannot be *amicus*, neither now can Scotia be said to be *solum amici*, as hath been said.

"'Whatsoever is due by the law or constitution of man may be altered: but natural liegeance or obedience to the sovereign cannot be altered: *Ergo*, natural liegeance or or obedience to the sovereign is not due by the law or constitution of man. Again, whatsover is due by the law of nature cannot be altered; but liegeance and obedience from the subject to the sovereign is due by the law of nature: *Ergo*, it cannot be altered.'

"The false positions contained in these arguments are not the less glaring for being delivered under the form of sylogisms. It will be remarked that in each of them the *minor* is open to exception. The whole of Calvin's case is an excellent specimen of the pedantry with which not only Coke himself, but by far the greater portion of his legal brethren were infected; and if any one would form an opinion of the cumbrous and unprofitable learning with which lawyers in those days were wont to load their discourses, he can do no better than read it in Coke's report. It was an occasion of very great display, as appears by his account of the vast interest excited, and the elaborate discussion it underwent. All the fourteen judges, (there being then five in both the King's bench and Common Pleas,) with the Lord Chancellor Ellesmere, argued it, apparently at much length, for only two were heard in each of the eight days during two successive Terms that the debate lasted. Every Judge took his own course, as Lord Coke informs us; and yet he confesses there was not much difficulty in the case, but that its importance only made the judges of the king's bench carry it into the exchequer chamber, where thirteen of the fourteen were, with the chancellor, clear one way. It was evidently made the occasion of an exhibition, a grand legal exercitation, much to the taste of those times. Now, not only is the discussion filled with the most useless and inapplicable

learning, but there is really very little that can be called argument in it. Farfetched analogies, quaint allusions, quibbles upon words, quotations from the scripture and from profane authors, both classical and legal, abound in it; but there is a total want of close reasoning upon principle where principles are introduced. Its only value now lies in the remarks made incidentally upon other points of law foreign to the case at bar.

"It is impossible to mention this celebrated case without noting the great interest which the argument upon it, especially from the bench, appears to have excited in Westminster Hall, and the enthusiasm with which Lord Coke regards it in his report. He seems quite elevated with conscious satisfaction and professional pride when he considers how eminently the judges had distinguished themselves; and speaks as one, not merely relating a very important decision in the law, but as one recording a great triumph of the science and its professors. 'It was observed,' he says, 'that there was not in any remembrance so honourable, great, and intelligent an auditory at the hearing of the arguments of any Exchequer chamber case, as was at this case now adjudged. It appeareth that *juris prudentia legis communis Angliæ est scientia socialis et copiosa;* sociable, in that it agreeth with the principles and rules of other excellent sciences, divine and humane; copious, for that *quamvis ad ea quæ frequentius accidunt jura adaptantur*; yet in a case so rare, and of such a quality, that loss is the assured end and practice of it, (for no alien can purchase lands but he loseth them, and *ipso facto* the king is entitled thereunto, in respect whereof a man would think few men would attempt it,) there should be such a multitude and farrago of authorities in all successions of ages, in our books and book-cases, for the deciding of a point of so rare an accident.' This may serve as a specimen of the manner in which Coke's enthusiasm for the law is wont incidentally to display itself in his writings.

"Although Lord Coke doubtless reckoned the account of Calvin's case his masterpiece as a reporter, deeming the argument itself the first sample of juridical learning and ingenuity, there are many of his cases in every respect far more worthy of commendation. If one were to be selected for the subtlety of the argument, and indeed the importance of the principles to the law, it perhaps would be that of Shelly;

nevertheless, this too is disfigured by very puerile matter.—For instance, when to prove that the date of the use must be referred to the recovery suffered, and not to the execution of the use, reference is made to the case of a man while insane giving himself a deadly wound, and afterwards dying while in his senses, which is by many authorities shown not to make him *felo de se;* a thing so self-evident that we are left in doubt, whether most to admire the serious foolery of those who could gravely discuss and decide it, or of those who could cite it for a purpose so foreign. Perhaps, however, upon the whole, Chudleigh's case may be taken as the best example of legal acuteness in those who argued it. Although not above twenty years before the case of *Postnati*, it should seem that the taste of the bar had been much infected with the growing pedantry of the times during that interval.

"If, indeed, we merely look to the merits of the *Reports*, it is not to any of the great cases, the renowned names, that we should resort. Beside those which have been cited, Corbet's and Mildmay's, Taltarum's, Mary Portington's, Clue's, Albany's, are all more or less open to the charge of prolixity, though very much less liable to it than the more celebrated one's of Shelly and Calvin. But the less pretending ones, which shortly give the resolutions of the court upon certain questions, and with little or no argument beyond what is necessary to explain the decision and its grounds, afford by far the best specimen of the learned reporter's talents for abstracting and recording. Indeed the vast number of points resolved in these cases, and the generality with which they declare the law independent of peculiar facts, and unincumbered of those circumstances denominated by Lord Eldon *specialties*, after the language of the Scottish bar, present a most remarkable contrast to the decisions of modern times, wherein it is oftentimes hardly possible to arrive at a rule through the maze of details and qualifications that beset the course of the judgment.

"It must not, however, be supposed that every short notice of a case in the Reports is free from learned lumber and extravagance. The case of Swans is little enough in bulk, and trifling enough in import, yet is it sufficiently chequered with nonsense, hardly exceeded by the *case of Mares*, in Scriblerus' reports. 'The truth of the matter was that the Lord Strye had certain Swans which were cocks, and Sir J.

Charlton certain Swans which were hens, and they had cignets between them; and for these cignets the owners did join in one action; for by the law the cignets do belong to both owners in common equally, *sc.* to the owner of the cock and the owner of the hen, and the cignets shall be divided betwixt them. And the law thereof is formed on a reason in nature, for the cock swan is an emblem or representative of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature hath conferred on him a gift beyond all others; that is to die so joyfully, that he sings sweetly when he dies; upon which the Poet saith

Dulcia defecta, &c. &c.

And therefore this case of the swan doth differ from the case of kine and other brute beasts.'—*Vide* 7 *Hen.* 4, 9.

"But though all Lord Coke's writings are more or less disfigured by such farfetched and inappropriate arguments as these, it is not to be supposed that he was altogether incapable of reasoning philosophically. It certainly must be allowed that it is not often instances occur in his works of enlarged and comprehensive views, such as the great mind of Bacon delighted to indulge in; but they are sometimes to be met with. His sound and humane remarks on capital punishment, at the close of his third Institute, merit attention, whether we regard the man or the age. 'Wofull experience,' he says, 'has shown the inefficacy of frequent and often punishment to prevent offences. It is a certain rule that those offences are often committed that are often punished; for the frequency of the punishment makes it so familiar as it is not feared.' In the margin we then have, '*Sta, perlege, plora,*' and in the text he continues thus:—'What a lamentable case it is to see so many Christian men and women strangled on that cursed tree of the gallows; insomuch as if in a large field a man might see together all the Christians, that but in one year throughout England come to that untimely and ignominious death, if there were any spark of grace or charity in him, it would make his heart to bleed for pity and compassion.' He then lays down the rules of 'preventing justice,' and at the head of these he places '*the good education of youth.*' Another is the granting pardons very rarely; and the third, the execution of good laws, though this he deems inferior to education.

"Having now adverted to the most conspicuous faults and peculiarities which equally pervade all Coke's writings, it will be proper to give some account of his different works. The first in the order of time was the first part of his Reports, which was published in 1600, while he was attorney-general to Elizabeth. It is entitled 'Reports of Sir Edward Coke, Knight, her majesty's attorney-general,* of divers resolutions and judgments, given with great deliberation by the reverend judges and sages of the law, of cases and matters in law which were never resolved or adjudged before; and the reasons and causes of the said resolutions and judgments, during the most happy reign of the most illustrious and renowned queen Elizabeth, the fountaine of all justice, and the life of the law.' To this report, ten more parts were added during his lifetime, the last in 1615, while he was chief justice of the King's Bench under James I; and after his death two supplementary books of them were published. These, however, not having been revised by the author himself, are not held in such high estimation as those which made their appearance during his lifetime. It has been already stated, that on the disgrace of Sir Edward Coke, he was enjoined by the king to pass the summer vacation in correcting his Reports; 'wherein,' as James affirmed, 'there were many dangerous conceits of his own uttered for law, to the prejudice of his majesty's crown, parliament, and subjects.' After three months' deliberation, Coke gave in a list of such errors as he had detected; but as they were for the most part merely verbal inaccuracies, such as could in no wise support the charge intended to be brought against him, five special cases were selected by the king's order for that purpose. Sir Edward, however, answered all the objections that could be made against them in such a manner, as to satisfy all who understood the points in dispute; and, indeed, it appears that his legal adversaries, whatever might be their personal enmity towards him, or their deference to the commands of the king, were ashamed of the task imposed on them. Lord Chancellor Ellesmere, in particular, whose temperate conduct throughout the whole of the proceeding was highly creditable to him, was exceedingly anxious to be excused from it. 'All that I have

* This, it will be remarked, is not quite a correct designation, since he was not knighted till after the accession of James I.

done in this,' he wrote, 'hath been by your majesty's commandment and direction, in presence of all your learned council, and by the special assistance and advice of your attorney and solicitor. I know obedience is better than sacrifice; for otherwise I would have been an humble suitor to your majesty, to have been spared in all service concerning the lord chief justice.' Nevertheless, though the charge was dropped for the time, it was renewed after Coke's alliance with Buckingham, while Bacon was lord keeper. But as Sir Edward openly demanded that the matter might be investigated by the twelve judges, and that they might certify at the same time what cases he had published 'for the maintenance of the royal prerogative and benefit, for the safety and increase of the revenues of the church, and for the quieting of men's inheritances, and the general good of the commonwealth,' his enemies thought it most prudent to avoid the inquiry altogether.

"Bacon himself has said: 'Had it not been for Sir Edward Coke's Reports, (which, though they may have errors, and some peremptory and extrajudicial decisions more than are warranted, yet they contain infinite good decisions and rulings of cases,) the law by this time has been almost like a ship without ballast; for that the cases of modern experience are fled from those that are adjudged and ruled in former time.'

"In 1614, Sir Edward Coke published his 'Booke of Entries,' and his first Institute, or Commentary on Littleton appeared in 1628. His other works were not published till after his death. They consist of his 'Treatise of Bail and Mainprise,' (1637;) his 'Complete Copyholder,' (1640;) the second, third, and fourth parts of his Institutes, (1642, 1644;) and his 'Reading on the Statute of Fines, 27th Ed. I.' (1662.)

"The first Institute of Sir Edward Coke, is a running commentary on a short treatise of tenures written by Littleton, who was a judge of the Common Pleas in the reign of Edward IV. The merit of the original work has ever been warmly acknowledged by English lawyers. Lord Guilford made it a point never to let a year pass without reading it through. Coke himself calls it 'the ornament of the common law, the most perfect and absolute work that ever was written in any human science,' and if his testimony be re-

jected as partial or exaggerated, no one will refuse to acknowledge that Sir William Jones has not gone too far in attributing to Littleton, whom he styles the English lawyer's great master, 'luminous method, apposite examples, and a clear, manly style, in which nothing is redundant, nothing deficient.' The commentary cannot boast of the same qualities. Strictness of method was not indeed very compatible with the nature of such a work; but the constant digressions of the annotator, of which some few examples have already been given, are multiplied to an extent that must deprive the commentary of all claim to that systematic arrangement, and severe concision, which ought to be considered indispensable in every elementary treatise. The fact is, as Blackstone has well observed, that Coke's Institutes have very little of the institutional method to warrant such a title, and that this commentary, though a rich mine of valuable common law learning, is particularly remarkable for its deficiency in method. Coke himself says, 'I have termed them Institutes, because my desire is they should institute and instruct the studious, and guide him in a ready way to the knowledge of the national laws of England. This work, (speaking of the Commentary on Littleton,) we have called the first part of the Institute, for two causes: first, for that our author is the first book that our student taketh in hand; secondly, for that there are some other parts of Institutes not yet published, viz: the second part, being a commentary upon the statute of *Magna Charta*, Westminster I., and other old statutes.—The third part treateth of criminal causes and pleas of the crown; which three parts we have, by the goodness of Almighty God, already finished. The fourth part we have purposed to be of the jurisdiction of courts; but hereof we have only collected some materials towards the raising of so great and honourable a building. We have by the goodness and assistance of Almighty God, brought this twelfth work to an end. In the eleven books of our Reports, we have related the opinions and judgments of others; but herein we have set down our own.' This description of the four Institutes may suffice. It has already been said, that the three last are hold in less estimation than the Commentary on Littleton, which is partly on account of their being posthumous works, and partly because the subjects of which they treat are, generally speaking, more obsolete. The law of

real property, which forms the subject of the first Institute, though it has undergone some considerable changes since the abolition of the feudal tenures in the reign of Charles II., still remains in many respects the same as it stood in the time of Coke; and his commentary is even now looked upon as one of the most copious and authentic sources of information on the subject. The eighteenth edition of this work was published in 1823, being the sixth which has appeared within the period of thirty years; a convincing proof of the value attached to it by modern lawyers. It may also be considered a testimony of the respect which is borne for Sir Edward Coke and his works, that his Reports, instead of being distinguished from other works of the same nature, by the addition of the author's name, are invariably styled *The* Reports. Indeed, the astonishing acuteness of his mind, his immense stores of legal learning, and his unwearied industry, peculiarly qualified him to go through the arduous task he imposed on himself, in undertaking the various works which have given him a lasting reputation. Had he lived a century later, it is more than probable that the faults with which his writings are disfigured, would have been corrected by the style and the spirit of a more polished age; but even with all his imperfections, he can never cease to be regarded, in every point of view, as one of the most illustrious of the numerous celebrated characters that figure in the annals of the English jurisprudence.

"The Manuscripts of Lord Coke are in the possession of his descendant, Mr. Coke of Norfolk, whom we have already mentioned as his representative, through the female issue of Lord Leicester, the male heir of the chief justice.

"At this gentleman's princely mansion of Holkham, is one of the finest collections, or, indeed, libraries of manuscripts any where preserved; certainly the finest in any private individual's possession. It partly consists of the chief justice's papers; the rest, and the bulk of it was collected by that accomplished nobleman who built the mansion, the last male heir of the great lawyer. He had spent many years abroad, where his taste was improved, and his general education perfected. He collected a vast number of the most valuable manuscripts. Of these the exquisitely illuminated missals, and other writings of a similar description,

which would, from their perfect beauty and great rarity, bear the highest price in the market, are certainly by far the least precious in the eyes of literary men. Many of the finest *codices* of the Greek, Latin, and old Italian classics, are to be found in this superb collection. Among others are no less than thirteen of Livy, a favourite author of Lord Leicester, whom he had made some progress in editing, when he learnt that Drakenborchius, the well known German critic, had proceeded further in the same task, and generously handed over to him the treasures of his library. The excellent edition of that commentator makes constant reference to the Holkham manuscripts, under the name of *MSS. Lovelliana*, from the title of Lovell; Lord Leicester not having then been promoted to the earldom. Mr. Coke, with a becoming respect for the valuable collection of his ancestors, was desirous to have the manuscripts unfolded, bound, and arranged, both with a view to their preservation and to the facility for consulting them. They had lain for half a century neglected, and in part verging towards decay, when he engaged his valued friend, William Roscoe, to undertake the labour so congenial to his taste and habits, of securing these treasures from the ravages of time. From the great number of the manuscripts, the state in which many of them were, and the distance of Mr. Roscoe's residence, this was necessarily a work of time. After above ten years employed on it, the task is now finished. Each work is beautifully and classically bound; and to each Mr. Roscoe has prefixed, in his own fair handwriting, a short account of the particular manuscript, with the bibliographical learning appertaining to it.

"But our present purpose is with the small portion of this collection which descended from Lord Coke. A great part of it is in his own handwriting. There are, among others, the original manuscript of the Book of Entries, and of the Reports, in law French. The student may here enjoy the gratification of reading Shelly's case and Calvin's case, in the reporter's own hand. But there are also unpublished works of the same illustrious lawyer and patriot. Among these, a curious Statistical Account of England has long been known to antiquaries. Another work, much more valuable, if not written by Lord Coke himself, a supposition which appears to be negatived by internal evidence, especially by the man-

ner of citing the Reports, yet seems to have been well esteemed by him, possibly composed under his direction.—Having been favoured with a particular account of its contents, we may render an acceptable service to lawyers by describing them somewhat in detail.

"It is a folio MS. of 225 pages, in English, entitled, '*A Treatise concerning the Nobility of England, according to the Law of England.*' The following is the opening of the work, written pretty much in the style of the chief justice.

"'As in man's body for the conservation of the whole, divers functions and offices of members are required, even soe in all well gouverned commonwealthes, a distinction of persons is necessary. *Nobilitas* generally signifieth, and is derived of the word *nosse*, to knowe, signifying in common phrase of speech, both with the Lattines, and also with us Englishmen, a generositie of blood; and therefore one said, '*Vir nobilis idem est quod notus et per omnia ora vulgatus.*' A nobleman is hee whoe is knowne and through all the tenor of his life is talked of by many men's mouthes. But especially applyed and used to express the reward of vertue in honourable measure, '*et generis claritatem.*' But my purpose at this tyme is onelie to speake of the nobilitye, and especiallye soe much of them as I find written in the bookes of the common lawes and statutes of the realme.'

"After some further preliminary matter, he goes through the different titles of honour severally, beginning with that of *prince*, and then passing to *duke*. Under these heads there is much learning upon the dutchies of Cornwall and Lancaster, and the earldom of Chester. Under the head of *earl*, and between that and *viscount*, he enters largely into the law regarding nobles, and specially the subject of *scandalum magnatum*. In the course of this discussion he breaks forth into a vehement invective against libels.

"'There is another foule puddle that arriseth from the same corrupt quagmire, and distilleth out of a beastelinesse infected with malice and envie, but is devised and practised by another means than the former, which is by libelling, general slandering, and defaming of another; for this backbiter doeth not by wordes harme his adversary in so manifest and turbulent manner, as the hellewick monster in his fury doth, but seeming to sitt quietly in his studdy doth more deepelie punish him, and infixeth a more deadlie and incurable wound

into his fame and credit, than the other boysterous fellow doeth in his body, whoe in a moment threateneth to doe more than peradventure he is willing to perform, or dareth to perform in an age.'

"Under this head we meet with a curious note, as follows:

"'Note—that if a man doth write unto another scandalous words and reports touching a noble-man, and this letter be sealed with his seale, and subscribed with his name, yet upon this letter, shewed in evidence, this noble man may recover damages in an action *de scan. mag.* whereof you may see presidents in Crompton; but if a man doe write any matter in defamation to the party himselfe, that is thereby traduced, and subscribe and seale the same without other publication done by himselfe—quære?'

"Certainly there could now be no question in this matter; there being clearly no act of publication to the damage of the party slandered; whereas in the case first put, there is plainly a complete publication against the nobleman to a third person, and consequently a manifest damage done.—In discussing the application of the maxim, *Possessio fratris facit sororem esse heredem*, to titles of honour, and showing that it extends not to them, he argues etymologically on the meaning of *possessio;* 'which,' says he, 'is no other than *pedis positio*, and can only be of things whereof there is entry.' How plainly we perceive, in this as in a thousand instances of Lord Coke's undisputed writing, the tendency of the learned of those days to pass over the obvious and the true derivation, in order to get at some etymon of a fanciful and farfetched kind, which may serve the purpose of his argument! Can any one doubt that *possedere* comes from *posse sedere?*

"He next discusses the 'Privileges incident to the Nobility, according to the Laws of England.' Of these, trial by peers is the first; and under this head he lays it down that bishops have not this privilege, 'because they cannot try, and trial is mutual;' a dictum long since overruled.

"Exemption from attendance upon the leet and tourn is the next privilege handled by him; and then the right of having chaplains. Then follows the privilege they have in equity suits, happily abridged by one of Sir Samuel Romilly's acts. This subject is closed with a discussion of the case 'wherein a lord of parliament hath noe privilege.'

"The title of *Baron* is an important and an ample one.—The author treats it under three heads, Barony by Tenure, Barony by Writ, and Barony by Patent. Of these the first is the most curious, and being upon a chapter of the law now become nearly obsolete, it possesses peculiar interest, as containing the doctrine in acceptation among lawyers, in the time when that subject was more familiarly known.—The author gives a great number of instances of Baronies by Tenure; tracing the descent or transmission of each in such a line as showed the peculiarity of the territorial holding, and giving tabular schemes of the persons taking a passed one. He then lays down certain canons respecting such honours, restricting exceedingly the powers of the owners of the territory and castle, once the descent of the barony.

"Under the head of Baron by Patent, he discusses a subtle question: 'If a nobleman and his heirs have for a long time been called to Parliament, and be barons by tenure or by writ, and have had in regard thereof a place certain in Parliament; if afterwards the same be created a baron of *that* barony, and by the same name, by letters patent; whether shall he and his heirs retain his oulde place in Parliament which he had according to the former dignity; or whether should he lose his oulde place, and take a new accordinge to the tyme of his second onelie?'

"There follows a concluding discussion on 'nobilitie or lades in reputation onelie.' 'Under this head we have treated, the subject of courtesy and forein ladies—noble women—the postnati of Scotland—and ladies in reputation.'

"It is certain that this manuscript is well worthy of the attention of the learned; and we venture to hope that Mr. Coke will permit it to be published."

RIGHTS AND POWER OF JURIES.

When we first proposed this Journal, we contemplated an original article on the "*Rights and Power of Juries.*" From this labour we have been almost entirely relieved, by a very learned article on the subject, which has just reached us in No. XVI of the Westminster Review. The article is one of considerable length, but as it discusses with great ability a question of vast importance to the citizens of this country, we republish it with the hope of bringing it more into notice; as the talented Journal from which it is taken has very little circulation here.

The object of the article is to prove, "that *Juries have, and always had, and of right ought to have, the power of deciding, incidentally, questions of Law*, [in all criminal cases, or cases involving constitutional questions,]—or in other words, *to determine the whole issue submitted to them*, by pronouncing a general verdict; and that that power imposes upon them *the obligation of so doing.*"

If this proposition be true in England, which we think every candid mind will admit, after perusing the article we are about to re-publish, a fortiori, should it be regarded as true here. By the Constitution of the United States, as well as of the state governments, the trial by jury in all criminal cases, as well as in suits at common law where the value in controversy exceeds $ 20, is secured to the defendant.

In ordinary cases juries are not likely to be called upon to exercise this power against the opinion or wishes of the Judge, but in great political questions, it becomes of vast importance that they should know their power, and that on proper occasions they should exercise it. With us governments are established by written Constitutions, and all constitutional questions must arise upon the construction of

words contained in these written instruments. Every individual, or nearly every individual, in this country, for some cause or other, takes an oath to support the Constitution of the general government and of the State of which he is a citizen. Whether he takes the oath or not, he is considered under moral as well as political obligations to do so. The leading questions upon which parties are formed, are those which arise upon the construction of clauses of the constitution of the general government. The one side contending for the power, and the other denying it. These questions generally are made upon the encroachments of the majority upon the rights of the minority; and if the majority is so corrupt as not to listen to reason, they having power, it may often become a matter of vast importance to the minority, that the jury box should be kept free from the controul of Judges, either appointed by the majority, or agreeing with them in opinion, from personal interest or political feeling. Judges and Juries are like other men—they too must have their political opinions. Indeed it is a natural feeling to entertain a contempt for any one who is either so indifferent to his own situation, or those of his friends and fellow countrymen, as not to have an opinion, and that an animated one, in relation to the important measures of the government. We can neither respect the head nor the heart of the man, who can be so callous to the welfare of his state, to the prosperity of his neighbour, and even to the happiness of his posterity, as to regard all the operations of the government as indifferent to him, so long as he receives his salary at quarter day, and can quietly take his glass of wine after a comfortable dinner. Are insignificant persons always elected Judges? Are not the elections generally made from the lawyers who are prominent in political life? Do not these elections often turn on the force of political parties? And if so, is it to be supposed that a lawyer is to give up the opinions which he has warmly and zealously supported, or those of his party who have placed him in power as a reward for his maintaining these opinions? He must know very little of mankind who would believe that. Judges then, like other men, have and should have their political opinions. They are sworn to support the Constitution—of course according to their own honest and bona fide construction of the Constitution, and not the Constitution as his political opponents would have

it. But the Juryman may have his opinions also. He too is entitled to his opinion of the meaning of an instrument which he has sworn to support. He too may have his political party; and is he to submit his conscience to the keeping of his political opponent? Is the political opinions of an individual to exact that devotion from the rest of the community, which amounts to humble submission, because he receives a salary, and is called Judge? We could place this matter in various ways, which would equally exhibit the force of the view we have taken, but the limits of our number forbids us.

It should be remarked, however, before we close our observations, that in 1822, this question, as far as it relates to indictments for libels, was discussed in the late Appeal Court of Law, in South Carolina, in the case of the State vs. Allen, (1 M'Cord's R. 525,) and the rights of the Jury were ably maintained in an argument of great research, covering much of the ground so fully gone over by the Westminster Reviewer, by Mr. Nott, (now Professor Nott,) but which has not been reported. The Judge (Mr. J. Johnson,) who tried the cause on the circuit, adopted the rule to the full extent as laid down by Lord Mansfield and Mr. Justice Buller—or in other words, he charged the jury that "*it was not within their province to decide on the* intention *of the defendant, Allen, or whether the publication was libellous or not!!* but that the only questions for their consideration were—

1st. Whether the defendant was the publisher of the piece charged in the indictment? and

2ndly. Whether the inuendoes were true? (or in other words, whether the publication related to the prosecutor.) That the *intention was an inference of law (!!)* to be decided by the Court, after the fact of publication and the truth of the inuendoes had been found by the jury, and that a general verdict would amount to no more than finding the fact of publication, and the truth of the inuendoes."

In delivering the opinion of the majority of the Court of Appeals, (Justices Colcock, Gantt, and Richardson, concurring with him,) his honour Mr. Justice Huger, assumes, "That the rule as laid down by Mr. Justice Johnson, was the law of England, prior to the Statute of 32 Geo. III." and yet in the very preceding paragraph he admits that "a dif-

ference of opinion existed in England, as to the rights of Jurors on this subject, as was very apparent from the Parliamentary and Judicial history of that country. In the Senate and at the Bar, as well as in the public prints, a most decided opposition was kept up for years; and it was only terminated by the Statute of the 32 Geo. III. (Mr. Fox's Act,) which RESTORED to jurors, the right of deciding upon the intention as well as the fact of publication and the truth of the inuendoes;" and the Court gets over this strange inconsistency of opinion, by declaring, that the reason of the rule did not apply in this country, under our free institutions; and that cessante ratione cessat et ipsa lex, they were of opinion "that the intention with which the publication was made, as well as the fact of publication and truth of the inuendoes, were involved in the general issue; and that the whole case, law as well as fact, was resolved by a general verdict."

The reader when he has finished the article succeding these observations, will then judge of the force of the observations of Mr. Justice Huger, who speaking of the rule as prescribed by Lord Mansfield, Mr. Justice Buller and others, says: "In opposition to decisions so *uniform* and commanding, the opinions of Jurists at the Bar and in the Senate, however respectable, cannot be regarded as authoritative. They may indeed show what the law ought to be—but to the Courts *alone* we can resort, to ascertain what the law is." We rather think that the reader will come to the conclusion with us, that these Jurists at the Bar and in the Senate, knew rather better what the law was, than even the distinguished Judges who declared these "uniform and commanding" decisions, with all the authority of the Courts to aid them.

"That this rule is at variance (says Mr. Justice Huger,) with the general principles of law, is not denied. *In every other case*, without exception, where the general issue is joined, a general verdict resolves both law and fact." The reasons assigned by his honour, in delivering this opinion, for the growth of the doctrine assumed by Lord Mansfield, in the English Courts, are so just and appropriate, that we shall conclude our remarks by an extract from them—

"It was not, I apprehend, because jurors are less qualified to infer from circumstances, the intention with which a libel had been published, than that with which a note had been

executed, or that intention was not as essential to the constitution of a libel as a forgery, that the law of England has reserved the first to the Judges and given the other to the Jurors. In the peculiar form of the British government, I think is to be found the reason of the exception. Composed of three distinct orders, King, Lords, and Commons, much regulation was required to preserve each in its respective sphere. The history of England is scarcely more than the history of an almost perpetual contest for power, between these different orders. Each in turn has gained the ascendancy; but neither has been able to destroy the other. The patronage of the king, the wealth of the nobility, and the physical power of the commons, acting in different combinations, and under different circumstances, have hitherto preserved that balance of power, on which the preservation of the government is supposed to depend. In these different contests, each order resorted to all the means it possessed for aggression or defence. Perhaps the most formidable power which can be arrayed against prerogative, is the press. If unrestrained, its success would seem to be almost inevitable. So formidable was this power regarded by all parties, and so vitally connected was it supposed, with the doctrine of libel, that we find the friends of prerogative, among whom have always stood preëminently distinguished, the Judges of England, invariably contending for the rights of the Court, and the friends of the Commons, as invariably contending for the rights of Juries. If to this peculiarity of the British government, the rule in question is properly traced, it would only be consistent with a very common maxim of the common law itself, *cessante ratione cessat et ipsa lex*, to declare it not of force in this State, where we have but one order, and that order the people. But on this point, the act of the Legislature, which makes of force the common law in this State, is explicit. *It is of force, only so far as is consistent with our constitution, customs and laws.*

"In the case of State vs. Lehre, this point did not necessarily arise, but the Court incidentally noticed it and observed, that they were unanimously of opinion that the intention with which the publication was made, as well as the fact of publication and truth of the inuendoes, was involved in the general issue; and that the whole case, law as well as fact,

was resolved by a general verdict; and such is now the opinion of this Court."

Before we dismiss the subject, we should, however, remark, that in our judgment Mr. Justice Nott, was alone right, for he, though he concurred with the other Judges in the result of their opinion, took the occasion to say, that he did so because he thought it was the rule of the common law, as well as the law of South Carolina. The following article we think must satisfy the most sceptical of the truth of his opinion:*

" *An Inquiry into the Power of Juries to decide incidentally on Questions of Law.* By George Worthington, Esq. 8vo. 1825. pp. 197.

" Such is the title which Mr. Worthington has thought fit to prefix to his book, and which, according to usual practice, we have transcribed; but it is altogether undescriptive of the contents or objects of the work. The book pursues no *inquiry* whatever; it does not, in any manner, investigate the subject, but asserts in positive terms the disputed doctrine, with a reference to authorities on one side only of the question; and assumes the point in dispute to have been proved, without attempting to submit it to the tests of evidence or of argument. He is not satisfied with suppressing, in his pretended *inquiry*, almost all the authorities opposed to his views, but has quoted partially and unfairly, and in many instances untruly, even those on which he relies. His object has clearly been, not to *inquire* into the constitutional power of Juries, but to undermine and destroy it. If his book had been truly entituled, it might have been called, after the style of DeFoe, 'The Shortest Way with Juries; or Proposals for the Establishment of absolute Judges:' or, in the manner of Swift, 'A Modest Proposal for preventing Juries from being an obstruction to arbitrary Judges, and for making them subservient to Despotism.'

Dr. Middleton was once told, that a book he had published, had been answered twenty years before the date of its publication. If it were not profanation to associate the wri-

* The reader will please correct the gross errors contained in p. 39—read *as* after *considered—or to that* instead of "*or those*"—for "*as his political,*" read *as their political.* In page 40, read *are the political,* instead of "*is the political.*"

ter of the book before us with the very learned person just named, we might offer a similar repulse to Mr. Worthington; adding, however, many years to the period of the anticipated disproof. His book has been answered by the productions of many able writers, both legal and unprofessional, who applied themselves to the investigation of this subject, when Lord Mansfield attempted to bind the press by the doctrine Mr. Worthington now contends for. It was answered even by earlier writers; but, in modern times, it has been answered by the eloquent arguments of Mr. Erskine, at the Bar; by the speeches of Mr. Fox, Mr. Burke, Mr. Pitt, and of other celebrated men, in the House of Commons; by the speeches of Lord Camden and of Lord Loughborough, and of other peers of unquestionable talent, in the House of Lords; and finally, by the declared sense of the legislature in the Libel Act.

It may be asked, perhaps, why, under such circumstances, we think this book worthy of notice? Why we are induced to bestow attention on a weak attempt to revive an exploded doctrine? Our answer is, that we consider the right of Juries to give a general verdict, and to decide upon the whole question of the guilt or innocence of those who are tried before them, to be absolutely essential, not merely to the liberty of the press, but to the general existence of constitutional freedom in this country. If this right be wrested from them, and transferred to the Judges, the protection of trial by Jury, in all cases of contest between the crown and the subject, would, in our opinion, be destroyed; and though we undoubtedly think that better securities might be provided for the due administration of justice than can be obtained from the Jury system, in any shape, yet it is of the highest importance that the securities which such a system undoubtedly may and does offer to that all-important end, should not be swept away by the arbitrary determination of our Judges, aided and assisted by the misrepresentations of despotism-advocating scribes.

It would, however, seem that the subject is not quite inopportune. The following case, copied from a report in *The Times* newspaper, of the 1st of June, 1826, shows pretty plainly, that the doctrine attempted to be revived by the publication before us, is by no means out of favour with the Bench at the present time.

'COURT OF COMMON PLEAS, MAY 31.

'*Walker (Clerk)* v. *Ridgway.*

'This was an action tried at the last assizes for the county of Hereford, against the defendant, a farmer [for] not having set out properly the tythes; and the Court granted a new trial, on the ground that the verdict for the defendant was contrary to evidence and to law, as propounded by Mr. Justice Burrough at the trial.

'Mr. Serjeant Wilde had since obtained a rule to shew cause why the venue should not be changed, on the ground that a fair trial could not be had in Herefordshire, on account of the strong prejudices excited there by publications that had appeared in the *Hereford Journal.*

'Mr. Serjeant Taddy yesterday shewed cause against the rule.

'The Lord Chief Justice spoke at some length, and in the course of his remarks, took occasion to say, that in order that he might not be misunderstood (as it had often been tauntingly said, that those who professed themselves friends to the liberty of the press, were not so in effect,) he would state what the liberty of the press was. The liberty of the press was, that a man, unrestrained by the horrors of the law, might publish whatever tended to the advancement of useful knowledge, and to prevent the effect of error in cases where the public interest was concerned, and on such subjects writing with a becoming spirit. God forbid that any man should suffer, either in purse or in person, for any thing that he might so write! But, if the press took upon itself to teach Juries to perjure themselves, if the government of the country did not interfere to prevent it, it would be the duty of that and every other Court to do so. And let it not be forgotten, that they had the power in their hands to put a stop to it; for it was impossible for any man to read the paragraphs in those papers, without seeing that they were gross contempts of that Court, and which the Court would immediately punish by fine and imprisonment. But they were most anxious never to avail themselves of that most extraordinary authority; they did not like, at any time, to place themselves in the situation of Judges and Jurors, for that they were when they so punished; they therefore, forbore, as long as they could, to exert the power which the legislature, in ancient times, invested them with. He should

think that they were deserting their duty, if such practices were not stopped in another quarter, if they did not put a stop to it [them]: if they did not, we might boast of the laws of England, but they would be at an end; it was a thing so absurd and ridiculous. It was said that the *dicta* of Judges were not to be attended to—that they were constantly conflicting with each other. There might be uncertainties in the law; but if Juries were not to attend to the Judge, on matters of law, would there be any law in the country? If cases were not to be decided by some rule, which rule the jurisprudence of the country had laid down, but to be left to the arbitrary and uncontrolled direction of persons placed in a jury-box, no man in England would know what his rights were. A man might claim; but if the Jury were not to attend to the Judge, as to what the rules were, there was an end to his property, to his rights, and to his character. And this was what those who contended for a certainty of decision, were contending for. He, for one, would say, that those who advised Juries not to attend to the Judge, advised them to perjure themselves. He was sure that those Judges near him would never take upon themselves the withdrawing of the decision of facts from the Jury; but let the question of law be with the Judges; they were to answer for it, and Juries were to attend to their directions. He would state, for one, that, whatever were the consequences, he would be for punishing for contempt of Court those who acted in such a manner as he had described.

"The other Judges concurred.—Rule absolute."

This doctrine is still more plainly promulgated by the same chief justice, in the following case, which came before the Court in Easter Term last. We extract the report from *The Morning Chronicle.*

"*Levy* v. *Milne.*—Mr. Serjeant Wilde shewed cause against a rule, obtained on a former day by Mr. Serjeant Adams, to shew cause, why the verdict should not be set aside, and a new trial had. This was an action brought by Mr. Levy, a sheriffs' officer, against the proprietor of a periodical publication, called *The Spirit of the Times*, to recover a compensation in damages for a libel published in that work. The alleged libel was in the form of a song, which was headed, 'Levy the Bum.' The trial took place before the Lord

Chief Justice, at Westminster, at the sittings after last term, and the Jury returned a verdict for the defendant.

"Mr. Serjeant Wilde, in shewing cause against the rule, observed, that this was not a case in which a Jury had given a hasty verdict; but they had taken time to deliberate upon the facts proved in evidence; and after calm and cool reflection, they had come to the conclusion, that the defendant was entitled to their verdict. * * * The jury who tried the cause were of about the same rank as the plaintiff, and were fully able to judge of the object, character, and tendency of the publication; and they had pronounced it to be no libel on the plaintiff. He therefore contended, that, as the jury, in case of libel, were judges of the law, as well as the fact, their verdict ought not to be set aside.

'The Lord Chief Justice Best, said, that he would not trouble Mr. Serjeant Adams to reply, the Court having made up its mind on the question under discussion. One of the most beautiful parts of our constitution was, that if any thing was done in error in our Courts of Justice, it could afterwards be set right in the Court above. If this were not the case, trial by Jury, instead of being a blessing to the country, would prove the reverse. If the Jury were judges of the law, as well as of the fact, much evil would arise from arbitrary decisions. In the present case the Jury had found a verdict against the law. The learned Judge who tried the cause, pronounced the publication to be a libel on the plaintiff; and he was authorized to do so, after evidence was received that it applied to the plaintiff, and imputed to him that he had acted wrongfully in his character of sheriffs' officer, and held him up in a most ridiculous light. * * * The Jury had returned a verdict in direct opposition to the law and the Judge's opinion. His brother Wilde had often stated, that, in cases of libel, Juries were judges of law, as well as of fact; but that he denied. The opinion of the learned Serjeant was probably founded on the 32d of George III, c. 60, which act of Parliament only applied to criminal cases, and had no relation whatever to civil actions. His lordship, however, protested against the doctrine of Juries being judges of law in criminal cases. They were bound to confine themselves to the fact, whether the inuendo were proved, or not—they, however, might return a general verdict. His lordship further observed, that if a Jury had a right to act

in defiance of, and in direct opposition to, the opinion of the Judge—if Juries were allowed to do so, the character of Judges would be left to the arbitrary discretion of Juries, and would not be protected by the law.. He was firmly convinced, that the publication was libellous, and that the rule ought to be made absolute.'

"The other Judges concurred with his Lordship. The rule was made absolute."

We shall endeavour so to conduct our investigation as to escape the perils of the commination denounced in the first of these cases, and keep ourselves free from the pains and penalties of fine and imprisonment; but we confidently hope to make it appear, *that English Juries have, and always had, and of right ought to have, the power of deciding, incidentally questions of law*—or, in other words, *to determine the whole issue submitted to them, by pronouncing a general verdict;* and that that power imposes upon them *the obligation of so doing.*

Mr. Worthington, with a pretence of research, which a perusal of his book will in no respect confirm, professes it is prepared for those 'who may not have access to old law books, or who may feel disinclined to remove *the learned dust* reposing on unopened folios;' and he proposes to establish the side of the argument which he has adopted, 'by ample quotations from established authorities.' [Preface, p. vi. vii.] But they who look into his book, with the means of forming a judgment on the subject, will find abundant evidence, that this gentleman has not soiled his fingers with 'the learned dust,' of which he speaks so affectedly. They will discover also, that his 'old law books' are quoted through the medium of modern translations. Thus we are favoured with Glanville and Bracton in English, except when he transcribes from some author who has inserted a passage from the original. So his historical deductions are almost all traceable to Reeves's 'History of the English Law,' Hume's 'History of England,' and other similar books; but with references, not to the modern works from which he obtained them, but to the recondite sources resorted to by the authors to whom he has applied. His contributions are levied, very frequently, without any acknowledgment whatever; but, in a few instances, he artfully inserts some introductory matter, with a slight allusion to the author

brought under contribution, and then gives important extracts, without any further recognition, and apparently as his own matter. Thus in his statement of the origin of Juries, [p. 2,] he alludes generally to Dr. Pettingal's learned 'Inquiry into the Use and Practice of Juries among the Greeks and Romans,' and quotes in substance, not literally, the result of that elaborate dissertation; he then, without any acknowledgement, either in words, or by typographical marks, inserts four pages from Dr. Pettingal's work, *verbatim.* In order to make detection more difficult, he has broken the matter into paragraphs differently from Dr. Pettingal, so that it is only by a verbal collation of the passages, which we have made, that the extent of the depredation can be ascertained; and he has altered the punctuation; in both which deviations from his original he has been (as may be expected) very far from accomplishing any improvement. We could not trace him through this work of deception and disguise, without calling to mind Sheridan's admirable comparison of such plagiaries to gipsies, 'who disfigure stolen children, to make them pass for their own.' With respect to his boasted reference to authorities, we have to observe, that he has quoted on one side only, and the scantiness of those references, manifests either gross ignorance, or wilful suppression, of the history of the controversy which is the subject of his book.

The object of the publication is stated in the following terms; in citing which we shall carefully retain Mr. Worthington's *italics*—

"Eminent writers have contended for the *propriety* of Juries' shewing the most respectful *deference* to the advice and recommendation of Judges, on points of law. It is the object of this inquiry to demonstrate, that, on every point of law, Juries *are bound to obey* the direction of the Judge presiding at the trial."—*Preface*, p. v.

The full and regular refutation of this position must, for the sake of method, be referred to a subsequent part of this article; but, as the position may be considered somewhat in the nature of a definition of the point in dispute, we will bestow one word upon it here. If the Jury be *bound in duty* to find their verdict in *obedience* to the direction of the Judge, then the Judge has a right to *command* what verdict they shall deliver. Command and obedience are relative terms; they are the reciprocal qualities of power and of du-

ty, and are essentially co-existent. The duty of obedience can never be claimed from any man, when the right of command does not reside in the claimant. Mr. Bentham has expressed this reciprocation in such clear and forcible terms, that although so plain a point can but little require the aid of authority, we are tempted to add his very practical illustration:

"I. That may be said to be my duty to do, which you have a right to have me made to do. I have then a duty towards you; you have a right as against me.

"II. What you have a right to have me made to do, is that which I am liable, according to law, upon a requisition made on your behalf, to be punished for not doing.

"III. I say punished; for without the notion of punishment, no notion can we have of either right or duty."*

Fragm. on Gov. p. 132, n. (a) Edit. 1823.

We shall find hereafter, from unquestionable authority, that Juries are absolutely dispunishable for finding a verdict contrary to the direction of the Judge.

It has been said by the author of 'Eunomus,' [Dial. 3, s. 53,] that the right of Juries to find a general verdict upon the whole matter in issue, has been made use of chiefly in the case of libels; and he ventures to add, that, 'perhaps it would never have been contended for, as a general doctrine, if it was not to serve particular purposes.' It is undoubtedly true, that the controversy before us has chiefly arisen in political cases—cases of libel, or of treason—because they are almost the only cases in which Judges have any temptation to encroach on the province of Juries; but Mr. Wynne would have been much nearer the fact, if he had stated, that this right of the Jury has hardly ever been denied, but in political cases, and probably would never have been denied, but

* This point is stated in terms of most remarkable coincidence, by an author who is among the very *antipodes* of Jeremy Bentham. Dr. South says, 'No power can *oblige*, any further than in taking cognizance of the offence, and inflict penalties in case the person obliged does not answer the obligation, but offends against it. This proposition stands firm upon this eternal truth, that nothing can be an obligation that is absurd and irrational. But it is absurd for any person to give laws and obligations to that of which he can take no account, and which, upon its transgression against them, he cannot punish.' [South's *Serm.* v. 5. p. 228.] This sermon, which was preached at Westminster Abbey, on the 5th of November, 1663, is worth reading, as an unqualified and most outrageous assertion of the duty of passive obedience and non-resistance, and 'the right divine of of kings to govern wrong.'

for political purposes. The state trials (which, on account of the exposure they contain of judicial irregularities, have been denominated, 'Libels on the Judges,') clearly prove this; and Mr. Wynne himself is obliged to admit, in this very discussion, that, in political cases, 'the Judges' directions have been carried too far; nobody,' he adds, 'can read the State Trials, in particular, without owning it.' [Eunom. in loc. citat.] That Judges appointed by the Crown (and, according to the modern and unconstitutional practice of judicial translation, with the prospect of further promotion in view,) should have a leaning towards the possessors of power and the distributors of rank, may, we suppose, be taken for granted. Indeed Blackstone, courtier as he was, candidly admits, that, "It is not to be expected from human nature, that the few should always be attentive to the interests of the many—and that whenever the administration of justice is entirely intrusted to the magistracy, a select body of men, and those generally selected by the Prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity."—Comm. v. 3. p. 379.

But to apply ourselves to the immediate subject before us. —The doctrine in question having originated in cases of libel, its soundness will, perhaps, be best examined by considering it in connexion with a law of libel; although its application, if it be really law, must be of universal application in all cases of trial by Jury.

The offence of libel is scarcely traceable, in the history of English jurisprudence, beyond the institution of the Star-chamber. It is indeed noticed by Bracton [l. 3. de corona] in a detail of personal injuries, in words which are almost a literal transcript from Justinian's Institutes, [l. 4. tit. 4. de injuris,] but there is no adjudication of authority in English law books, until the case of L. P. in the Star-chamber, Easter Term, 3 Jac. 1. In this case, the particulars of which are not material to our present purpose, six points were resolved upon by the Court, which are said to be the leading rules of doctrine in cases of libel down to the present time, but which, if strictly enforced, would operate to the almost entire prohibition of public writing. Of these points we would say, with Dr. Jones, that, "though their author, Lord Coke,

refers to them in terms of high approbation [5 Rep. fo. 124, 125, &c.] and though they have been held as rules of law in cases of libel from the age of Coke to the present time, they are quoted with unwillingness by every friend of liberty, who considers any, whatever, vestige of the Star-chamber, as the remnant of a dissolved despotism."—Jones, de Libellis Famosis, p. 6.

It has not been the good fortune of the Star-chamber to have many defenders, much less eulogists. Lord Bacon, indeed, in his History of Henry VII. speaks highly of this Court; but this fact has generally been produced as a lamentable illustration of the force of political prejudice over the noblest human intellect. In modern times, however, this Court has been abandoned to almost universal execration. Even Hume, with all his inclination towards despotism, and notwithstanding his occasional attempts to excuse some of its outrageous judgments, does not hesitate to say—"there needed but this one Court, in any government, to put an end to all regular, legal, and exact plans of liberty. * * * I much question, he adds, whether any of the absolute monarchies in Europe contain at present so illegal and despotic a tribunal." [Hume's Hist. regno Eliz. App. III.] But this Court has lately found a most determined champion in Mr. Holt. He characterises it as "a most useful subsidiary irregularity." [Holt's Law of Libel, p. 27.] If Mr. Holt had referred to his Statutes at Large, he would have found this Court more correctly described in the act of Parliament which abolished it, the 16 Car. I. The statute declares, that "the Judges of the Star-chamber have undertaken to punish where no law doth warrant; and to make decree for things, having no such authority; and to inflict heavier punishment than by law is warranted; and the proceedings, censures, and decrees, of that Court have been found to be an intolerable burthen to the subject, and the means to introduce an arbitrary power of government." Mr. Holt being an advocate for arbitrary Judges, cannot be expected to favour trial by Jury, and he accordingly says, in express terms, with reference to cases of libel, that, "even the reason of the Constitution almost seems to dispense with Juries, where they can be of so little use!" [Holt, Law of Libel, p. 27.] He extols the judges for "their contempt of the dangerous praise of keeping pace with the liberality of the

times;"* and he classes the offence of libel with "murder, arson, larceny, and other atrocious crimes." The extent of liberty which he would allow to the press will be seen in the following quotation, which he makes from the speech of Sir Philip Yorke, Attorney-general, in the case of Rex. v. Franklin, [9 St. Tr. 255.] "The liberty of the press is to be understood of a legal one. A man may lawfully print and publish what belongs to his own trade;" [Q. Shop-bills, and trade-advertisements?] "but he is not to publish any thing reflecting on the character and reputation, and administration of his majesty, or his ministers; nor yet to stain the character or reputation of any of his subjects; for, as I said before, to scandalize and libel is no part of his trade."—This Mr. Holt calls "an admirable and explanatory statement of the true grounds and principles of the law of libel. [Holt, Law of Libel, p. 114.] But we can refer Mr. Holt to a more compendious and judicial limitation of the liberty of the press. In the reign of Charles II. the twelve Judges resolved that it was unlawful to write any thing respecting government, in the following plain and unequivocal terms—"If you write on the subject of government, whether in terms of praise or censure, it is not material; for no man has a right to say any thing of government."—See the case of Henry Carr, How. St. Tr. v. 7. p. 1127.

But to return.—As the doctrines of the law of libel originated in the Star-chamber, and that Court assumed the decision of all offences of that nature, and did not allow the intervention of a Jury, the question now under investigation could not come into discussion, in such cases, until after the abolition of that tribunal. Nor did it in fact arise immediately after that event. It has been suggested however, with great probability, that the claim subsequently advanced by the Judges to take from the Jury, and assume to themselves, the right of deciding upon the guilt or innocence of a person accused of publishing a libel, under pretence that that is matter of law, arose from the circumstance that originated in the Star-chamber, where there was no Jury, the Judges

* In this compliment Mr. Holt has been rather anticipated by the notorious Earl of Strafford, who extols the Judges of his times for ministering wholly to uphold the sovereignty, carrying a direct aspect upon the prerogative of his Majesty, *and not squinting aside upon the vulgar and vain opinions of the populace.*"—Strafford's *State Letters.*

of that Court did of necessity determine the whole issue.*

The instance which has generally (but not with historical accuracy) been relied on as the first authority in support of the doctrine in question, is the case of The King v. Clarke, 3 Geo. 2, A. D. 1729, [Barn. Rep. p. 304,] in which it was insisted, on the part of the Crown, that as the defendant was charged with publishing a seditious libel, the malice was immaterial; and Lord Raymond, C. J. before whom the cause was tried, directed the Jury, that they had nothing to try, but the printing and publishing. The same Judge, a few years afterwards, (1731,) in the case of The King vs. Franklin, [9 St. Tr. p. 255,] held the same doctrine, telling the Jury that, "the question of criminality was for the Court, and that the Jury had nothing to do with it." In the case of The King v. Owen [10 St. Tr. app. 196, A. D. 1752,] Chief Justice Lee followed the example of Lord Raymond; as did Chief Justice Ryder, in the case of The King v. Nutt, [cited in 3 Term Rep. p. 430, in the notes.] Lord Mansfield held the same doctrine, and Mr. Justice Buller, and Mr. Justice Barrington, likewise maintained it in the celebrated case of The King v. The Dean of St. Asaph, in the year 1783. Lord Kenyon also was a strenuous supporter of this doctrine, in all the cases which came before him. To which we may add, that an attempt was made to establish the same doctrine in America, in 1735, in the case of The King v. Zenger, by the Ch. Justice De Lancy.

This is all the authority which the most learned Judges and Crown-lawyers, who have maintained this doctrine, have been willing, we do not say able, to bring together in its support. Of the value of this scanty authority, contradicted as it is by the opinions of other Judges of equal pro-

* See "*Another Letter to Mr. Almon, in Matter of Libel*," p. 41.—We presume that these celebrated letters are included in Mr. Worthington's denunciation of "the ephemeral publications on this subject." [*Worth.* p. 136.] What productions he intended to include in that censure, it is impossible to say exactly; for his book does not evince the slightest acquaintance with any of the controversial publications which have appeared on this subject, with the single exception of the *Letters of Junius*. Indeed Mr. Worthington displays gross ignorance of the history and particulars of this celebrated controversy. In vindication of "*Almon's Letters*," we will mention, that they are said to have been written by Mr. Greaves, a very learned Master in Chancery, at the desire of Lord Camden and of Mr. Dunning, and to have been corrected, before publication, by those eminent lawyers.—See Rex v. Hart, How. St. Tr. v. xxx. p. 1276.

fessional learning, and of greater reputation for political impartiality; opposed also, as it is, to the general rules and principles of English law, we shall inquire hereafter. At present we give this summary of the authorities relied upon by the partizans of the doctrine, merely to fix its age. That no ancient authority could be found on which the assertors of the doctrine could safely rely may well be believed; for in the case of The King v. The Dean of St. Asaph, in which the question was fully discussed, and in which the Court manifested the plainest determination to enforce, and the most painful anxiety to vindicate, this doctrine, Mr. Erskine, the defendant's counsel, openly and in express terms defied both the Court and the counsel for the prosecution, "to produce one ancient authority." On that occasion, Mr. Justice Buller, who, at the trial at which he presided, had exerted himself violently in the promulgation of this doctrine, and now defended it in full Court, justified it upon the ground of "modern practice," and said, that, "upon tracing the question back," Lord Chief Justice Raymond had held the same doctrine in 1731; and he even conceded so much to the nonage of this law, as to observe, that, "as for twenty eight years the counsel of defendants had yielded to the doctrine, it seemed to him that gentlemen ought not to agitate it again." So likewise Mr. Justice Barrington, at the trial of the Dean of St. Asaph, declared, that, "the right contended for by the defendant's counsel, was contrary to what had been ruled by every Judge since the time of the revolution" —an assertion, however, which we shall presently shew to be incorrect.—[See the trial of the Dean of St. Asaph, p. 71.]—Lord Mansfield, whose whole soul seemed to be in the question, and whose judicial reputation was unquestionably involved in it, expressly put the vindication of this doctrine upon the ground of "uniform judicial practice since the revolution;" and the Court, in discharging the rule for a new trial, rested their judgment "on the cases cited by Mr. Justice Buller (viz: Lord Raymond's and C. J. Lee's decisions,) and "the uniform practice of the Court of King's Bench, for more than a hundred years." [See 3 Term. Rep. 428.] That no sound ancient authority could be produced to sanction this "modern practice" is evident; because when these modern decisions had been pressed against Mr. Erskine in argument, he expressly and manfully said—

"I deny the authority of these modern cases, and rely upon the rights of Juries as established by the ancient law and customs of England." [See Ersk. Speeches, v. 1. p. 260.] And again—"I wish it to be distinctly understood, that I found my motion in opposition to those decisions. It is my duty to speak with deference of all the judgments of this Court, and I feel an unfeigned respect for some of them, because they are your lordships', but comparing them with the judgments of your predecessors for ages, which is the highest test of English law, I must be forgiven if I presume to question their authority."—Speeches, v. 1. p. 297.

Mr. Worthington, indeed, with the characteristic indiscretion of an ignorant advocate, pretends to carry the doctrine back to the earliest records of the law; and, recurring to his "learned dust," and "unopened folios," cites some cases from Dyer and Plowden, which have not the slightest applicability to the question. They are cases which merely decide, what no man denies, that matters of mere law unmixed with fact, are to be decided by the Judges; but the point in controversy is, whether, in cases of complicated law and fact, the Jury have not a right to determine the whole issue. To such a point his cases are wholly inapplicable. There are, however, two cases of some antiquity to which we can refer Mr. Worthington, which are direct authorities in support of his doctrine; whether he was ignorant of their existence, or prudently forebore to cite them as being rather too strong for use, we know not. The first case to which we allude, is that of Udal, a puritanical clergyman, who was tried for seditious words in the reign of queen Elizabeth. This offence, being charged as a capital one by statute, he could not be tried in the Star-chamber, but was turned over to the Court of Queen's Bench. Udal had written a book called "A Demonstration of Discipline," in which he inveighed against the government of bishops. It was pretended that the bishops were part of the queen's political body, and that to speak against them was really to attack her, and was therefore felony by the statute. The counsel who conducted the prosecution told the Jury he would prove, 1st, the malicious intention of the prisoner in making this book; 2ndly, that he was the author; and, 3rdly, that the matters contained in the book were felony by the statute. But Judge Clarke thought all this unnecessary, and

told the Jury they were to inquire only, whether Udal was the author of that book? "all the rest, he said, is matter of law, and has been already determined before we came here." Some hearsay evidence was then adduced to prove that Udal had acknowledged himself to be the author, and the Judge would not allow the prisoner to contradict this by direct evidence. The Court tendered the prisoner an oath, by which he was required to swear that he was not the author of the book, and his refusal to give that testimony was held to be evidence of his guilt. After much delay, and frequent messages from the Judge to the Jury, they were finally prevailed upon to bring in a verdict of Guilty. "This, it must be confessed," says Mr. Rous, in an excellent tract on this subject, published in 1771, and republished in 1785, "is a strong authority in favour of this doctrine; though considering the multipled iniquities of the trial, this decision will scarcely be thought sufficient to establish it." [See Rous's Letter to the Jurors of Great Britain, p. 41.] The other case we allude to, and which is, perhaps, even more directly in point, is the celebrated trial of Algernon Sydney, for high treason. The defendant said, "They have proved a paper in my study of Caligula and Nero; this is compassing the death of the king, is it?" Lord Chief Justice Jefferies—magnum et memorabile nomen—said, "That, I shall tell the Jury, is a point in law, which (addressing himself to the Jury) you are to take from the Court, gentlemen; whether there be fact sufficient, that is your duty." [St. Tr. v. 3. p. 805.] But, unfortunately for the prevalence of this venerable authority, the legislature though fit, in the reign of William and Mary, to pass an act of Parliament for annulling and making void the attainder of Algernon Sydney, "on account of the Judge's misdirection to the Jury."*

* We have seen, by reference to the case of the dean of St. Asaph, Lord Mansfield and Mr. Justice Buller fathering this doctrine on Lord Chief Justice Raymond; but this affiliation was not quite fair toward Lord Chief Justice Jefferies, who clearly had a prior title. But it was doubtless thought, that the name of the more ancient authority would not have sounded so well, and it was therefore discreetly passed by. The late Mr. Sheridan, with that felicity of expression which characterized his taunts, once said of sir Edward Law, Lord Ellenborough, then Attorney General, during the discussion of a constitutional question in the House of Commons, that "the honourable and learned gentleman had shewn a

This leads us to observe—In truth not one of the Judges who has maintained this doctrine has pretended that it was sanctioned either by common or statute law; they have all relied wholly on "the modern practice of the Court"—a sandy foundation we fear, for English security in political cases. It has been well observed by Dr. Towers, that "it would perhaps be as reasonable that kings should be suffered themselves to determine the bounds of their own prerogatives, as that Judges should be permitted finally to decide, when that is the point in contest, what is the extent of their own jurisdiction, and what is the extent of that of Juries." [Towers's Tr. v. ii. p. 36.] Another obvious, but important, remark on this subject is, the fatal force which English lawyers give to *precedents*. Well might Junius say, "one precedent creates another—they soon accumulate and constitute law. What yesterday was *fact*, to day is *doctrine*."*

Another proof, and in our judgment not a slight one, of the conscious infirmity of this doctrine, is to be found in the manner in which it was attempted to be introduced. In laying down doctrines of law, serviceable to the Crown in political cases, the Courts do not usually condescend to solicit the acquiescence of the bar; when, in such cases, their positions are tenable, they are generally imposed with all the weight of official authority, and enforced with the expectation of absolute submission. But when the independent and uncompromising spirit of Mr. Erskine refused to bow down to what he knew to be a judicial usurpation, the argumentum ad verecundiam was resorted to; surely, he would not be a solitary example of professional opposition to the bench? "The counsel of defendants (says Mr. Justice Buller, in the case of the Dean of St. Asaph,) had yielded to the doctrine for twenty eight years, and it seemed to him that gentleman ought not to to agitate it again." In another part of the same trial, the same Judge reproached Mr. Erskine with asserting a doctrine which had been abandoned by Mr. Lee, whom he described as "a warm partizan,

very *loyal ignorance* of some of the most important parts of English history." We suppose this *discreet oblivion* constitutes a very important part of professional education and of legal practice. (In England.)

* In this concise and nervous expression Junius seems to have had his eye on a passage in Tacitus—*Quod hodie exemplis tuemur, mox inter exempla erit.*—Tacit. Anal. l. par. 8.

and of the same party with Mr. Erskine;" but when the matter afterwards came before the whole Court, Mr. Erskine denied, in the presence of Mr. Lee, that that gentleman had ever maintained, either directly or indirectly, the doctrine imputed to him; and Mr. Lee confirmed that denial by his silence. So also, the same Judge, on the trial of Bate Dudley, for a libel on the Duke of Richmond, 22nd June, 1780, told Mr. Erskine, that "it seemed strange he should be contesting points which the greatest lawyers in the Court had submitted to before he was born." But the most singular and bold attempt to prop up this doctrine was made by Lord Mansfield in misquoting a political jeu d' esprit, in the course of his giving judgment in the case of the bishop of St. Asaph. Referring to a ballad, said to have been written by Mr. Pulteney some years before, on the occasion of an acquittal of the printer of the Craftsman, on a charge of libel, and which his lordship denominated "a famous, witty and ingenious ballad," he proceeded—"Though it is a ballad, I will cite the stanza I remember from it, because it will shew you the idea of the able men in opposition, and the leaders of the popular party in those days. They had not an idea of assuming, that the Jury had a right to determine upon a question of law. The stanza I allude to is this—

'For Sir Phillip* well knows,
That his inuendoes,
Will serve him no longer,
In verse or in prose;
For twelve honest men have decided the cause,
Who are Judges of fact, though not Judges of laws.'"

That Lord Mansfield, profound as he was in legal disquisition and constitutional learning, should have resorted to a political doggrel, instead of legal authorities, to authenticate a disputed point of law (the discussion of which, by the most eminent men of that time, had occupied the Court for many days) is of itself sufficiently surprising, and shews the distressful want of sound argument and of available authority, to which he was reduced; but what will the reader think of Lord Mansfield's fairness when he learns, it will be found, on referring to the publication cited, which appears in 1754, that the two concluding lines of the citation ought to have been quoted thus—

* Sir Philip Yorke, then Attorney General, afterwards lord Harkwicke.

"For twelve honest men *have determin'd the cause,*
Who are Judges alike of the facts and the laws."*

That Lord Mansfield misquoted this passage through defect of memory, will scarcely be credited by those who consider the extraordinary perfection in which he possessed that faculty; but the passage itself, from its very nature, was insusceptible of such an accident. The ballad as produced by his lordship himself, was intended to celebrate a popular triumph over the Crown; but it must be obvious to every one, that it could have been no matter of popular triumph, that a point of political law had been left to the decision of the king's Judges.†

We will observe, *en passant*, if Lord Mansfield had considered that the point in question could have been determined by political anecdotes, he might have found an authentic one which would have told directly for the popular side of the argument. There is a medal of the celebrated lieutenant-colonel John Lilborne, representing his effigies with this remarkable inscription—"JOHN LILBORNE, SAVED BY THE POWER OF THE LORD, AND THE INTEGRITY OF HIS JURY, WHO ARE JUDGES OF THE LAW, AS WELL AS FACT. Oct. 26, 1649." [See Evelyn's Medals, p. 171.] He likewise published his trial, with a frontispiece containing his portrait, with a label from his mouth, containing a similar inscription. This case of colonel Lilborne is so extraordinary (and, with

* Erskine's Speeches, v. i. p. 375, *apud notas.*

† And well might a triumph over such an enemy of the press, as sir Philip Yorke was, be matter of popular exultation. We have seen in a former part of this article, that he confined the right of publishing to matters "which belonged to a man's own trade"—shop-bills, perhaps, though probably not even those, if they prefessed that the advertiser's goods were better, or cheaper, than those of his neighbour. In the year 1735, while he was Chief Justice, he endeavoured to fasten another restraint upon the press, by denying truth to be a justification for alleged libel in a civil action. In Rex v. Roberts, M. T. 3 Geo. II. MSS. [cited 2 Selw. Nisi Prius, p. 936,] on a motion for an information against the defendant for a libel, Lord Hardwicke, Chief Justice, thus expressed himself: "It is said, that if an *action* were brought, the fact, if true, might be justified; *but I think this is a mistake. I never heard such a justification in an action for a libel even hinted at. The law is too careful in discountenancing such practices.* All the favour I know that truth affords in such a case is, that it may be shewn in mitigation of damages in an action, and of the fine upon an indictment, or an information." Thank heaven! every legal novice knows, that the law of libel in England, bad as it is, is not quite so bad as this. But the sentiment shewed the man; the spirit was willing, though the judicial power was weak.

reference to the point under examination, so satisfactory,) that we cannot omit bringing it under the particular notice of the reader. Colonel Lilbourne was indicted for high treason. He addressed the Jury in the following words—"My honest Jury and fellow citizens, who I declare, by the law of England, are the conservators and sole judges of my life, having inherent in you alone the power of the law as well as fact."* The Jury acquitted him, and they were afterwards most illegally examined by the privy-council concerning their verdict. Their general reply was, "that they had discharged their consciences by their verdict;" and most of them refused to give any other answer; but James Stephens, one of them, stated, that, "the Jury, having weighed all which was said, and conceiving themselves, notwithstanding what was said by the counsel and bench to the contrary, to be judges of law as well as of fact, they had found the accused 'not guilty.'" Michael Rayner, another Juryman, answered nearly to the same effect. Gilbert Gayne, another of the Jury, said, that "the Jury did find as they did, because they took themselves to be judges of the law as well as of the fact, and that although the Court did declare they were judges of the fact only, yet the Jury were otherwise persuaded from what they learned out of the law books." [See St. Tr. vol. ii. p. 81, 82, 3rd ed.] And yet Lord Mansfield would have the world believe, on the authority of his misquoted ballad, that such an assumption was before unheard of.

But to return. This doctrine, founded, as it is professed to be, on mere judicial practice, has not even the frail sup-

* Colonel Lilborne addressed the Judges thus—"You Judges, that sit there, are no more, if the Jury please, but cyphers, to pronounce the sentence; or their clerk, to say *Amen*, to them, being at best, in your origin, but the Norman Conqueror's intruders." [See *St. Tr. in loco citato.*] We quote this, not in admiration of the decency or decorum of its language, but to remind the reader of its singular coincidence with a celebrated modern address. In the defence of an action brought by Mr. Fox against Mr. John Horne Tooke, tried 30th April, 1792, the defendant said to the Jury: "There are only three efficient and necessary parties—Mr. Fox the plaintiff, myself the defendant, and you, gentlemen, the Jury. The Judge and the crier of the Court attend alike in their respective situations, and they are paid by us for their attendance; we pay them well; they are hired to be the assistants and reporters, but they are not, and they never were intended to be, the controllers of our conduct; for the whole of this business is compromised in Mr. Fox's action, in my defence, and in your verdict."—*Trial*, p. 4.

port—frail, when unsanctioned by constitutional law—of judicial unanimity. We mean even as respects trials for libel; for to other criminal cases it has not been attempted to be applied, except in one or two flagrant instances, which have been expressly, and with merited reprobation, reversed and set aside.

Passing over, for the present, the invaluable case of Bushell, as not being strictly a case of libel, and which, therefore, we shall refer to that head of our investigation which will treat of criminal charges generally, we will begin with the great leading case of the Seven Bishops who were tried on a charge of libel in the reign of James II. We shall see that even in that case, tyrannical as were the times in which it occurred, and infamous as were the Judges who presided on that occasion,* those Judges did not, and dared not, attempt to withhold from the Jury the consideration of the whole issue. To which remark we shall add the emphatic exclamation of Lord Camden, in the House of Lords during the discussion of Mr. Fox's libel act—"What would not the Judges of king James II. have given for this doctrine! It would have served," he adds, "as an admirable footstool for tyranny!"

In the case of the Seven Bishops, [St. Tr. vol. v. p. 542,] the Attorney General peremptorily told the Jury that they had nothing to do but with the bare fact of the publication; and said that he should make no answer, therefore, to the arguments of the bishops' counsel, as to whether the petition was or was not a libel. But Chief Justice Wright (no friend to the liberty of the subject,) as Mr. Erskine truly observed, in his argument in the Dean of St. Asaph's case, [Ersk. Sp. vol. i. p. 205,] interrupted him, and said, "Yes, Mr. Attorney, I will tell you what they offer, and which it will lie upon you to answer; they would have you show the Jury how this petition has disturbed the government, or diminished the king's authority." And in his charge to the Jury, he assigned to them reasons to induce them to concur with him in concluding that the paper was a libel. Mr. Justice Powell said to the Jury, "I have given my opinion, (that it was a libel,) but the whole matter is before you,

* In Rex v. Wilkes, 2 Wils. 159, Lord Chief Justice Pratt declared from the bench, that "Judge Powell was the only honest man of the four Judges who presided at this trial."

gentlemen, and I leave the issue of it to God and your own consciences." Mr. Justice Holloway, addressing himself to the Jury, said, "If you are satisfied there was an ill intention of sedition or the like, you ought to find them guilty; but if there be nothing in the case that you find, but only that they did deliver a petition, &c., I cannot think it is a libel, It is left to you, gentlemen, but that is my opinion." Even Mr. Justice Allybane, who insisted that no man could be allowed to write at all concerning government without leave from the government, although he declared his opinion that the writing was a libel, yet *he* did not attempt to withhold the consideration of that question from the Jury.

In like manner, upon the trial of Nathaniel Thompson and others, for composing and publishing libellous remarks upon the administration of Justice, the Chief Justice (Sir Francis Pemberton,) concluded his observations to the Jury by saying, "Gentlemen, I leave it to you whether upon this evidence you do not believe them all to be guilty of this design of traducing the justice of the nation."—Rex v. Thompson, St. Tr. vol. iii. p. 37.

So on the trial of John Tutchin for a libel in the year 1704, [St. Tr. vol. v. p. 546,] Chief Justice Holt, in his charge to the Jury, after reciting some passages from the alleged libel, says—"You are to consider whether the words I have read to you do not tend to beget an ill opinion of the administration of the government;" thereby plainly leaving the libellous or innocent quality of the publication to the finding of the Jury.

In the case of Rex v. Horne, [Cowp. Rep. p. 680,] Lord Mansfield himself, in a manner singularly inconsistent with his other charges in cases of libel, expressly left the whole issue to the Jury. The publication being admitted by the defendant, his Lordship said to the Jury. "Why then there remains nothing more, but that which the reading of the paper must enable you to form a judgment upon * * When you read that, you will form your own conclusions yourselves."

Lord Kenyon also, with similar inconsistency, in the case of Rex v. Stockdale, A. D. 1789, told the Jury—"In order to see what is the sense to be fairly imputed to those parts that are culled out as the offensive passages, you have a right to look at all the context; you have a right to look at the

whole book; and if you find it has been garbled, and that the passages selected by the Attorney General do not bear the sense imputed to them, the man has a right to be acquitted." This was clearly leaving the whole issue, involving the question whether the publication was libellous or not, to the finding of the Jury.

In another case, Rex v. Hart, tried before Mr. Justice Clive, at the summer assizes at Nottingham, A. D. 1762, reported by Burn, in his Ecclesiastical Law, vol. ii. p. 188, the Judge at Nisi Prius having restrained the defendant's counsel from arguing that the paper in question was no libel, upon the ground that "such a question was more proper to be determined by the Court above," the defendant was found guilty; but, on a motion for a new trial in Michaelmas term following, the Court of King's Bench set aside the verdict as illegal, and ordered a new trial. In this case, we see that all the Judges of the King's Bench determined that the question—libel or no libel?—was a proper question to be argued before the Jury.

In point of *fact*, this question is always argued before the Jury. The counsel for the prosecution does not confine himself to the mere question, whether the book was published or not? but enlarges, sometimes in very long and laboured speeches, on the imputed criminality of the writing; the defendant's counsel, generally admitting the publication, insists on the innocence of the matter published; and the Judge afterwards taking up those topics, discusses them in his turn. In addition to all this, the Jury have an admitted and unquestionable right to have the book or paper charged to be libellous delivered to them, that by a perusal and consideration of the whole of it, they may judge of its import, tendency, and character. And yet it is pretended, that the defendant's criminality is not to be inquired after by the Jury; or, in the memorable words of Lord Raymond [Rex v. Franklin, St. Tr. vol. ix. p. 255,] the criminality is for the Court upon the record, and it is "a question with which the Jury have nothing to do!"—that Jury who are required to say, on their oaths, whether the defendant be guilty, or not guilty! We shall conclude this topic with Mr. Fox's remarks upon it, during the discussion of his libel act: "This part of the noble Lord's (Lord Mansfield's) doctrine appeared strange and unaccountable. It was admitted that

the parties had a right to bring the whole matter before the Jury. Now, on what principle, he asked, were the jury to look at the whole, but that they might know whether the paper was libellous or not? If the jury had nothing to do with the guilt or innocence of the paper, but were only to give a verdict on the publication, it would be perfectly idle and ridiculous to lay the whole evidence before them."—Fox's *Speeches*, vol. iv. p. 258.

Numerous other cases might be adduced to prove the judicial inconsistency in which this doctrine has involved its promulgators; but those which we have cited are sufficient for the purpose. "Here we have," to use the words of Mr. Erskine, [Ersk. *Sp.* vol. i. p. 351,] "the court of King's Bench against the court of King's Bench; chief justice Wright against chief justice Lee; Lord Holt against Lord Raymond; to which we will add, on the authority of the additional cases referred to by us, lord Kenyon against lord Kenyon, and lord Mansfield against lord Mansfield.

We now turn to the consideration of the question, as it respects criminal cases in general.

So far is it from being true, as is intimated by Mr. Worthington, and some others of those who argue on his side of the question, that Juries in the early times of their institution had no right to give a general verdict, comprehending both the law and the fact, "and never thought of doing so," that the very reverse of this position is the fact. The truth is, that in former times, the judges frequently compelled juries to find the law as well as the fact, in cases where they were inclined to limit their finding to the fact only. It appears clearly from Bracton [*Bract.* 185, *b.* 186, *b.*] that juries had a right to deliver a general verdict, finding both the law and the fact; and the Statute-book, in addition to other records of legal history, informs us that the judges were accustomed to compel jurors, to bring in a general verdict, finding both law and fact, even in cases wherein they wished to deliver a special verdict. To remedy this oppression, the statute 13th Ed. I, c. 30, was passed—by sec. 2 of which it was enacted and ordained, that "the justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseizin, or not; so that they do show the truth of the deed, and require aid of the justices; but if they of their own head will say that it is disseizin, their verdict shall be admitted at

their own peril." Now disseizin being "an unlawful dispossessing a man of his land, tenement, or other immoveable or incorporeal right" [Blount's Dict. in voce] when the jury determined that question wholly, they clearly determined both law and fact. Littleton who wrote in the reign of Edw. IV, says, evidently alluding to this statute, "If the inquest will take upon themselves the knowledge of the law, they may give their verdict generally." [Litt. Ten. s. 368.] Lork Coke commenting on this passage, concurs with it, though he advises a special verdict in cases of doubtful law, as "safer" for the Jury, with reference to the penalties of an attaint. (Co. Lit. 228.) But as no attaint would lie, at the instance of the King, Vaugh. Rep. 135. (Rex v. Dean of St. Asaph,) this cautionary recommendation is inapplicable to criminal cases. The same learned and authoritative writer also says, in express terms, that this right of finding either a special or a general verdict extends alike to civil and to criminal cases (Co. Litt. 226, b. 227.) And in another place he states this statute to be in affirmance of the Common Law (2 Inst. 25.) Mr. Worthington endeavors to explain away this conclusive authority by stating (p. 132,) that "Littleton introduced this passage into his book of tenures in explaining the pleadings in real actions, relative to estates upon condition." Be it so; but how does the occasion of its introduction affect the authority of the doctrine?

Littleton, whose authority is unquestionable, states in express terms, that the jury may find both the law and the fact: now in what page of his book that doctrine is to be read, seems to us to be as unimportant, as whether the book be bound in calf skin or in Russia leather. Lord Coke adopts the doctrine, and affirms it to be law not merely by statute, but also by common law. But, when Mr. Worthington endeavored to confine this doctrine to the pleadings in real actions, was he really ignorant that Lord Coke, in the place we have above cited, expressly states, that the doctrine is applicable "to all cases of common pleas, as also to pleas of the Crown?" If he knew this, he attempted to mislead his reader; if he did not know it, he was reproachfully ignorant of the question he undertook. The author of "Trials per Pais" also cites this passage of Littleton to prove (what, he adds, "daily experience tells us") that the jury may decide both the law and the fact.—*Trials per Pais*, p. 230.

Mr. Wynne, the learned author of *Eunomus*, is likewise sadly embarrassed with these authorities. "Littleton (he says) and his great commentator, have been made advocates on this occasion: they have been thought to say, that Jurors are judges of the the law as well as [of] the fact." (Eun. Dial. 3. s. 53.] No: not thought, but proved to have said so, and that not ambiguously or doubtfully, but expressly, and with reference to authorities. Mr. Hargrave, though no friend to the doctrine, treats the matter with that manly fairness, which characterizes all his writings. Annotating on this passage, he candidly admits, that "the jury may, as often as they think fit, find a general verdict; I therefore think it, (he adds) unquestionable that they may so far decide upon the law as well as fact, such a verdict necessarily involving both. In this (he proceeds,) I have the authority of Littleton himself," for which he refers to the passage above cited, and he concludes, by recommending juries, as this right is only incidental to the complication of law and fact, "to show the most respectful deference to the advice and recommendation of judges." (1 Inst. 155, b. w. (5.) From this recommendation no reasonable man will dissent; it is, indeed, nothing more than the statute of Westminster, before cited, suggests, viz. "requiring the aid of the justices, but Mr. Worthington, as we have already seen, spurns this deference, and insists upon the judges' right to dictate the verdict; he contends that the duty of the jury towards the judge, is not "deference," but "obedience."

These authorities sufficiently establish that juries *originally* had the right now contended for, and the soundest constitutional lawyers have constantly recognized it. Indeed it is a truth which forces itself so unconsciously upon the mind, that its doctrinal acknowledgment may be found not only in legal writers, whose principles are constitutional and liberal, but in authors whose evident inclination is towards arbitrary power. A few authorities may be mentioned to show that this doctrine is not confined to ancient authors.—Sir Matthew Hale says expressly, that "it would be the most unhappy case that could be to the Judge, if he must take upon himself the guilt or innocence of the accused;" and adds, that, "if the Judge's opinion is to rule the verdict, the trial by Jury would be useless." [Hale's Pl. Cr. v. i. p. 313.] In another place he says, still more explicitly—

"The Jury may find a special verdict, or may find the defendant guilty of part, and not guilty of the rest, or may find the defendant guilty of the fact, but vary in the manner," (*i. e.* in the legal result.") "If a man be indicted of burglary, quod felonicè et burglariter cepit et asportavit, the Jury may find him guilty of the single felony, and acquit him of the burglary and the burglariter. So if a man be indicted of robbery, with putting the party in fear, the Jury may find him guilty of the felony, but not of the robbery. The like where the indictment is clam et secrete a personâ," (Hale's Pl. Cr. v. ii. p. 301.) So again, "In an indictment for murder, suppose the prisoner killed the party, but yet in such a way as makes it no felony, as if he were of non-sane memory; or if a man kills a thief that comes to rob him, or to commit a burglary; or if an officer, in his own defence, kills one that assaults him in the execution of his office; whether is it necessary to find the special matter, or may the party be found not guilty? I think so; and so I have known it constantly practised; the party in these cases, may be found not guilty, and the Jury need not find the special matter." [Hale's Pl. Cr. v. ii. p. 303.] Now, as the author of Trials per Pais says, in the place before cited, the right to bring in a general or a special verdict, as the Jury choose, "is a plain proof that the Jury are judges of the law as well as fact; for leaving the judgment of the law to the Court (in a special manner) implies that, if they pleased, they had the power of judgment in themselves."

In like manner Chief Justice Holt held, that, "In all cases, and in all actions, the Jury may give a general or special verdict, as well in causes criminal as civil, and the Court ought to receive it, if pertinent to the matter in issue; for if the Jury doubt, they may refer themselves to the Court, but are not bound to do so."—Salk. Rep. v. iii. p. 373.

So also on the trial of Col. Cosmo Gordon, at the old Bailey, London, A. D. 1784, for the murder of General Thomas in a duel, Mr. Justice Eyre stated to the Jury—"Gentlemen, I am bound to declare to you what the law is, as applied to this case, in all the different views in which it can be considered by you upon the evidence. Of this law and of the facts, as you shall find them, your verdict must be compounded."

The authority of Blackstone, also, (an author by no means

disposed to enlarge popular rights,) is quite express on this point. In one place he declares, that, "Jurymen have a right to decide questions of nice importance, in the solution of which some legal skill is requisite, especially where the law and the fact, as often happens, are intimately blended together. And (he adds, by way of inducing laymen to acquire some knowledge of law,) their general incapacity to do this with any tolerable propriety has greatly debased their authority, and has unavoidably thrown more power into the hands of the Judges, to direct, control, and even reverse, their verdicts, than perhaps the constitution intended." [Bl. Comm. v. i. p. 8.] In another place he says, "The Jury may, if they think proper, take upon themselves to determine at their own hazard, the complicated question of fact and law; and without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant." [Bl. Comm. v. iii. p. 378.] Again he says, "If the Jury doubt the matter of law, and therefore choose to leave it to the determination of the Court, they may bring in a special verdict, though they have an unquestionable right of determining upon all the circumstances of the case, and finding a general verdict, if they think proper."—Bl. Comm. v. iv. p. 361.

But not only has this right been conceded to Juries theoretically and in the way of doctrine, it has been actually exercised, and is now almost constantly exercised by them in various cases. It is on political occasions only that they are denied its use. For example, the question "manor, or no manor," is quite as much, indeed more, a question of law, as that of "libel, or no libel;" and yet the former is fearlessly left to the Jury. [Plowd. 712, pl. 1.] We may advert also to a very strong case cited by the author of Trials per Pais. "In the case of Manby v. Scott, T. T. 13 Car. II, B. R. one question was, if the verdict was well found, in an action on the case against a husband for wares bought by the wife; the verdict finding that the wares were necessaries, and according to her degree. It was objected that they ought to have found the degree of the party, and the value of the wares, and have left it to the Court to judge. But it was answered and resolved that the Court (*i. e.* the Judge presiding at the trial) informs the Jury of the matter of law, and they find it accordingly; and so it belongs not to this

Court." [Tr. per Pais, 230.] So in all cases alleged to have been committed against an act of Parliament, the Jury are required to find, whether the defendant did the act imputed to him "against the form of the statute;" and which finding necessarily includes an interpretation of the statute. It is manifestly absurd (as Mr. Starkie observes, Starkie on Libel, p. 11.) to maintain that in such cases the Jury have no right to decide upon the matter of law; for nothing can be more clearly matter of law, than the construction of an act of Parliament. Very many other cases might be stated in illustration of this topic; but one or two more will suffice. Take, for example, cases of ejectment, in which complicated matters of law and fact, constituting the title in question between the parties, are decided by the Jury, assisted, no doubt, by the presiding Judge, but still themselves determining the cause by their verdict. Look also to the issues which are constantly sent from the Court of Chancery to a Jury, to try the validity of a will, or the validity of a commission of bankrupt, &c., questions which necessarily involve both law and fact, and of which combined the verdict is compounded. So in criminal cases—a charge of murder, for instance—whether the circumstances of the case amount legally to murder, or to manslaughter, or to chance-medley, or to justifiable homicide—all questions of combined law and fact, and which we have before seen are acknowledged in theory to belong to the Jury—are points always left in actual practice to the determination of the Jury. So, in charges of house-breaking, it is always left to the Jury to find whether the entry was burglarious, or not. And in cases of theft, the legal character of the act is always left to the finding of the Jury, who declare by their verdict, whether the offence amounts to a capital felony, or not. Indeed the Libel Act, (32 Geo. III, c. 60,) to which we shall hereafter have occasion to refer more particularly, at the same time that it declares the Jury to be entitled to decide the whole issue, law and fact, in cases of libel, expressly declares also, that that is the law in all other criminal trials.

It is but fair, however, to acknowledge, that there is one case to be found in which this right to decide the whole issue in criminal cases was denied to a Jury, and they were punished for exercising it contrary to the judicial denial. That the author of this atrocity may have the matter stated un-

exceptionally, it shall be given in his own words. The case is reported by Chief Justice Kelyng in his own Reports, p. 50, as follows—

"Memorandum.—At Lent Circuit, at Winchester, 18 Car. II, one Henry Hood was indicted for the murder of John Newen; and, upon the evidence, it appeared that he killed him without any provocation, and thereupon I directed the Jury, that it was murder; and I told them, they were judges of the matter of fact, viz: whether Newen died by the hand of Hood; but whether it was murder or manslaughter, that was matter of law, in which they were to observe the direction of the Court; but, notwithstanding, they would find it only manslaughter; whereupon I took the verdict, and fined the Jury, of whom John Goldwier was the foreman, 5*l.* apiece, and committed them to gaol till they found sureties to appear at the next assizes, and in the mean time to be of good behaviour; but after, upon the petition of the Jurors, I took their fines at 40*s.* apiece, which they all paid, and entered into recognizances."

This, it must be admitted, was a bold attempt to establish the doctrine, that Juries are to confine their functions to matters of fact. Whether Mr. Worthington omitted to cite this case, so directly in point for him, through ignorance of its existence, or through a discreet misgiving as to the soundness of its law, we know not; but we shall refer him to the Journals of the House of Commons for a comment on it.

"Die Mercurii, 11 Decembris, 1667.

"The House resumed the hearing of the rest of the report, touching the matter of restraint upon Juries, and upon the examination of divers witnesses in several cases of restraint put upon Juries by the Lord C. J. Kelyng, thereupon resolved as followeth:

"1st. That the proceedings of the said Lord Chief Justice are innovations in the trial of men for their lives and liberties; and that he hath used an arbitrary and illegal power, which is of dangerous consequences to the lives and liberties of the people of England, and tends to the introducing of an arbitrary government.

"2nd. That, in the place of judicature, the Lord Chief Justice hath undervalued, vilified, and condemned, *Magna*

Charta, the great preserver of our lives, freedom, and property.

"3rd, That he be brought to trial, in order to condign punishment, in such manner as the House shall judge most fit and requisite."—See Com. Journ. v. 9. p. 35–37.

In consequence of these Resolutions, he was apprehended and committed to prison; but, unfortunately for the cause of public justice, he, like Jeffreys, escaped "condign punishment," by dying in prison before he could be brought to trial.

But the great and unanswerable case, which is absolutely decisive of the general question, is that of Bushell, reported by C. J. Sir John Vaughan.

"At the Sessions in London, September 1670, Penn and Mead, two Quakers, were indicted for tumultuously assembling with a great many others, in Gracechurch Street, *vi et armis*, to disturb the peace; and that the said Penn did then and there preach to the said Mead and others, in the open street. The prisoners pleaded Not Guilty. It was proved that there was a meeting, at the time stated in the indictment, in Gracechurch Street, of three hundred people in the open street; that Penn was speaking, or preaching to them; but what he said, the witnesses, who were officers and soldiers sent to disperse the assembly, could not hear." This was the evidence, and the Recorder, sir John Howell, charged the Jury in these words: "Gentlemen, you have heard what the indictment is; it is for preaching to the people in the street, and drawing a tumultuous company after them, and Mr. Penn was speaking. If they should not be disturbed, you see they will go on. There are three or four witnesses who have proved this—that he did preach there, and that Mead did allow of it.* After

* It is impossible not to admire the adroitness with which Mead defeated the insidious conduct of the Recorder, and turned the maxims of his own profession against him. The case being likely to fail against Mead, for want of evidence, the Recorder put this artful question to him: "What say you, Mr. Mead, were you there?" He, without hesitation, made the following reproachful and apposite answer: "It is a maxim of thine own law, *Nemo tenetur seipsum accusare*, which, if it be not true Latin, I am sure it is true English, that no man is bound to accuse himself. And why dost thou try to ensnare me with such a question? Does not this show thy malice? Is it like unto a Judge, that ought to be of counsel for the prisoner at the bar?"

this you have heard by subsequent witnesses what is said against them. *Now you are upon the matter of fact, which you are to keep to, and observe, at your peril.*" The Jury having retired and deliberated some time on their verdict, returned it in these words: "Guilty of speaking in Gracechurch Street." The Court told them, "they had as good say nothing;" adding this inquiry, "Was it an unlawful assembly?"* and, on the Jury declaring, that they did not find it an unlawful assembly, they were sent back to reconsider their verdict, and they afterwards returned the following verdict in writing, signed by all:—"We do find William Penn to be guilty of speaking or preaching to an assembly in Gracechurch-street, on the 14th of August, 1670, and Wm. Mead not guilty of the said indictment." The Court refused to receive this verdict, and after reviling William Bushell, one of the Jury, as "a factious and impudent fellow," they again sent back the Jury to reconsider their verdict, and for that purpose adjourned the court till the next day; (Sunday) but the Jury then persisting in their verdict, the court was further adjourned until Monday morning, when the Jury brought in a general verdict *not guilty*, as to both the prisoners. This verdict was recorded accordingly; but the Court immediately fined each of the Jury forty marks, and sentenced them to be imprisoned until payment.

Bushell sued out a writ of *habeas corpus*, in the Court of Common Pleas, on behalf of himself and his fellow Jurymen. The sheriffs in their return assigned many causes for the detention of the Jury, but the only one material to our present purpose was, that the Jury had acquitted Penn and Mead, against the direction of the Court in matter of law, of and upon the premises to the said Jurors against the said William Penn and William Mead, openly in court given and declared.† The validity of this return came on afterwards

* This case strongly illustrates the inconsistency and absurdity of the doctrine in question. The very Court which told the Jury, that their functions were confined to "the matter of fact," and denied them the cognizance of the law, refused to record a verdict which found the fact only, and expressly inquired of the Jury, "was it an *unlawful* assembly?"

† Contra directionem curiæ in materia legis, hic de et super præmissis eisdem juratoribus versus præfatus Penn et Mead in curia hic aperte datam et declaratum de præmissis iis impositis in indictamento prædicto acquietaverunt; in contemptum Domini Regis nunc, et legum suarum, et ad magnum impedimentum et obstructionem justiciæ, necnon ad malum exemplum omnium aliorum juratorum in consimili casu delinquentium.

to be argued in the Court of Common Pleas, when the Chief Justice, Sir John Vaughan, delivered the decision of the Court in a very elaborate judgment. After noticing several other matters in the return, not material to the point before us, he proceeds thus—"We come now to the next part of the return, viz: that the Jury did acquit those indicted, against the direction of the Court in matter of law openly given and delivered to them in Court.

"The words 'that the Jury did acquit against the direction of the Court in matter of law,' literally taken and *de plano*, are insignificant and not intelligible; for no issue can be joined of matter in law; no Jury can be charged with the trial of matter of law *barely;* no evidence ever was or can be given to a Jury of what is law or not; nor no such oath can be given to or taken by a Jury, to try matter in law; nor no attaint can lie for such a false oath; therefore we must take off the veil and colour of words which make a show of being something, and in truth are nothing. If the meaning of the words 'finding against the direction of the Court in matter of law' be, that if the Judge, having heard the evidence given in Court, shall tell the Jury, upon this evidence the law is for the plaintiff, or for the defendant; and you are, under the pain of fine and imprisonment, to find accordingly; and the Jury ought of duty to do so; every body sees that the Jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and the tryals by them may be better abolished than continued; which were a strange new-found conclusion, after a tryal so celebrated for many hundreds of years.

"But if the Jury be not obliged in all tryals to follow such directions, if given, but only in some sort of tryals, as, for instance, in tryals for criminal matters upon indictments or appeals, why then the consequence will be, though not in all, yet in criminal cases, the Jury, as of no particular use, ought to be either omitted or abolished, which were a greater mischief to the people than to abolish them in civil tryals." And after stating that the imputation of finding against the direction of the Court in matter of law is "not conceptible," and declaring that "they may legally vary from it, if they find cause, and are not thereby concluded," he reports, that the Judges were all of opinion, that the return in this part of it, as in the others, was wholly insufficient.

In the course of his judgment, the learned Judge gives a very plain and satisfactory exposition of the maxim so often pressed against the popular side of this argument—ad quæstionem juris non respondent Juretores, ad questionem facti non respondent Judices. This, he very properly remarks, relates to questions of *mere law*, or *mere fact*, but not to questions of mixed law and fact—"the Jury," he concludes, "cannot answer of the law *de plano*, but they may and do answer of the law and fact *complicatedly*."

"But," he adds, "that this question may not hereafter revive, if possible, it is evident from the resolution of all the Judges, that," &c. [he then proceeds to show, from decided legal authorities, that a Jury cannot be lawfully fined or imprisoned by a Judge, for a finding contrary to his direction, and he continues] "To what end is it that so many qualifications are required in Jurymen, and so many precautions and formalities observed in their appointment"—the particulars of which he specifies at length—"if after all this they must implicitly give a verdict by the dictates and authority of another man, under pain of fine and imprisonment, when sworn to do it according to the best of their own knowledge? A man cannot see by another's eye, nor hear by another's ear; no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right a Jury gives, yet they, not being assured of it by their own understanding, are forsworn, at least in foro conscientiæ."—See Vaugh. Rep. p. 135, et seq.

It will scarcely be credited that Mr. Worthington has the assurance to cite this case as a direct authority to prove that the Jury are bound in all cases to obey the direction of the Court, and cannot include matter of law in their finding. [See p. 124.] Of course he omits the passages we have quoted from that decision.* Another imposition he attempts to put upon the reader, is evidenced by his referring to

* This unfairness pervades Mr. Worthington's book. We could multiply examples, but have room for one more only. From the manner in which he refers to Doctor Pettingall's book on Juries, and commends his "learning and ingenuity," the unsuspecting reader might be led to infer, that that writer supported Mr. Worthington's doctrine; but the fact is just the reverse. After contending, that the Dikastas of the Greeks, and the judices of the Romans, were not, as is commonly supposed, Judges of the bench, presiding over the trial, but sustained a character analogous to that of our Jury—"a body of men provided by the state to inquire into the

Freeman's Reports for the report of this case. In those reports the decision is stated thus—"Vaughan delivered the opinion of the greatest part of (he should have stated of all) the Judges, that the prisoners ought to be discharged. The reason given *(ut audivi)* was, because the Jury may know that of their own knowledge, which ought to guide them to give their verdict contrary to the sense of the Court." [See 1 Freem. Rep. p. 1.] Now, whatever might have been Freeman's want of information, Mr. Worthington knew perfectly well, from Vaughan's own report of the case, that that was not the ground of the decision. But in order to avoid the effect of this case, he affects to treat it as one in his favour, on the authority of an *ut audivi* report, published more than half a century after the decision, in opposition to the report of the Judge who delivered the judgment of the court. Besides, Mr. Worthington either knows or ought to know, the comparative worth of these Reports. Vaughan's Reports were published, as the *imprimatur* prefixed to them shews, with the approbation of the Lord Chancellor and of all the twelve Judges; and their worth has been judicially recognized in modern times; [See Raym. Rep. vol. i. p. 469,] but Freeman's Reports, having been stolen by a servant, were published without authority, after the author's death.—See Burn v. Burn, 3 Ves. Jur. 580.

But it really appears to us, that the right of the Jury, in criminal cases, to decide, as a mixed question, the law as well as the fact, is proved incontestibly by the circumstances, that their verdict cannot be set aside, and that they are wholly dispunishable. The former position is unquestionable, and

rectitude or obliquity of an action, and to make their report of acquittal or punishment." [Pref. xii. xiv.] And after proving incontestibly, that they were judges both of law and fact, he refers to our own law books, and reasoning from the doctrines found in them, and from the nature of special verdicts, he insists that English Juries have a right to decide complicated questions of law and fact. He proceeds—"this, beyond all doubt, is right and just; for how can a Jury declare *guilty* or *not guilty*, unless they compare the law with the fact, and thereby judge how far the fact comes within the penalty annexed to the breach of the law? And how can they compare, without being judges of one as well as of the other? But, notwithstanding, this doctrine of their not being judges of law, broached in bad times, and designed for the worst purposes, long prevailed in Westminster Hall." [Pettingall's Inq. p. 121, 122.] It is thus Mr. Worthington conducts his "inquiry;" he seems to resort to his "learned dust," for no other purpose than to endeavour to throw dust into the eyes of his readers.

requires no authority to support it; the latter also is now equally indisputable. "There is no case in all the law," says Chief Justice Vaughan, in Bushell's case, "of an attaint for the king, nor any opinion but that of Thrning's [10 Hen. IV. *title* Attaint, 60 and 64,] and for which there is no warrant in law." And when Mr. Erskine quoted this doctrine in the case of Rex v. the Dean of St. Asaph, and was proceeding to argue upon it, Lord Mansfield interposed, and said, "to be sure; that is so." Now we think, with Chief Justice Vaughan, that this is absolutely conclusive as to the Jury's right.*

We have seen that, in the origin of this contest, it was boldly maintained, that Juries had nothing whatever to do with the law in any case; but when it was found that the power of Juries to return general verdicts, and thereby to take the whole issue into their consideration, was becoming too strong to be resisted, a most jesuitical, but unfounded, distinction was set up between their *power* and their right to do so. Mr. Justice Ashurst illustrated this very prettily. Speaking of their right and power in this respect, he ob-

* As all our readers may not be aware of the dreadful nature of the judgment of attaint, we shall shortly state its particulars. They were originally, 1st. That the Jury shall lose their *liberam legem* for ever; that is, they shall be so infamous as never to be received as witnesses, nor be of any Jury. 2nd. That they shall forfeit all their goods and chattels. 3rd. That their lands and tenements shall be taken into the king's hands. 4th. That their wives and children shall be thrown out of doors. 5th. That their houses shall be razed and thrown down. 6th. That their trees shall be rooted up. 7th. That their meadows shall be ploughed up. 8th. That their bodies shall be thrown into gaol, and the party shall be restored to all he hath lost by their verdict. Lord Coke's comment on this outrageous punishment is—"The severity of the punishment is to this end, *ut pœna ad paucus, metus ad omnes perveniat.*" And he adds, "*prudent* antiquity inflicted this severe punishment, seeing that all trials depend on the oaths of twelve men." This punishment was somewhat mitigated by the statute 23 Henry VIII, c. 3, in cases where the attaint was grounded on that statute; but it was left quite unmitigated if the party brought his writ; as he might as his option do, at the common law, and not under the statute.

To the honor of Mr. Peel, and the credit of the nation, this barbarous law is now repealed by the statute 6 George IV. c. 50, s. 60. The last lawyer who referred practically to this writ was the late Lord Ellenborough. When he was Attorney General, he intimated, in the course of a forensic argument, that "Juries would do well to remember, that the law of attaint, though obsolete, was not abolished." Thank God, no English barrister, can now put forth such an intimidation.

served, that "a highwayman has the *power* to rob you, though the deed be a crime against both divine and human laws." This is a fine specimen of those bold official sophisms which are occasionally delivered forth to serve political purposes; but it is the most flimsy of flimsy fallacies, arising from the intentional confusion of terms. The power contended for on the part of Juries is a lawful power—now lawful power and lawful right are convertible terms. Mr. Justice Ashurst's highwayman had the physical, but not the legal, power to rob; if he had had the legal, he would have had a rightful power. It may, perhaps, appear like affectation to refer to Jurists upon so plain a point, but reference to Grotius [b. 1, c. 1, s. 4] and Puffendorf [b. 1, c. 6, s. 15] will show that, in the opinion of those writers, jus and potentia are synonymous. To the same effect also we may refer to Burlanquie's book. [part 1, c. 10, s. 6, and part 2, c. 4, s. 23.] But the case of Rex v. the Dean of St. Asaph, so often referred to, gave rise to a most triumphant answer to this insidious distinction. Mr. Bearcroft, one of the counsel for the prosecution, having admitted in argument the *right* of the Jury to judge of the whole charge, Lord Mansfield, ever eager to limit the jurisdiction of Juries, interrupted him by saying, he supposed Mr. Bearcroft meant the power—not the right. But instantly rejecting the distinction, that gentleman answered, "I did not mean merely to acknowledge that the Jury have the power, for their power no body ever doubted; and if a Judge were to tell them they had it not, they would only have to laugh at him, and convince him of his error, by finding a general verdict, which must be recorded. I meant, therefore, to consider it as a right—as an important privilege, of great value to the constitution."—See Trial of Stockdale, p. 124.

Mr. Capel Lloft, however, has stated this point so logically and philosophically, that we cannot refrain from adding his statement, even at the hazard of incurring the imputation of accumulating unnecessary proofs. He says, in an essay intituled "Considerations on Libel, suggested by Mr. Fox's Notice of Motion" p. 8—"It is pretended, that a complete uncontrollable power can exist in the Jury without the right. In the constitutions of civil government, (legal) power and (legal) right are, and must be, convertible terms. Civil power and civil right are the mere creatures of the law, and

know no other limits than (what) the law imposes on them. The law speaks the language of prohibition—not of admonition. What it permits to be done uncensured, and confirms when it is done, it has delegated the power to do; and the exercise of that power is of right."

We have shown, that the doctrine contended for by the writer before us, is unsanctioned by ancient law or ancient practice; and that even during the period of its modern usurpation, it has not had the uniform support of judicial authority, but has been opposed in theory by some of the most upright and enlightened Judges, and been defeated in practice by the constitutional resistance of Juries. We have also proved, that the opposite doctrine has the sanction of ancient law and ancient practice. It will be found also to be supported by the soundest constitutional principles, and the plainest dictates of reason. "I desire," says Swift, "no better proof that a doctrine must be false, than to find it accompanied by great absurdities." Now, it will be seen on examination, that the doctrine we impugn is attended with monstrous absurdities.

The Jury are to pronounce upon their oaths, whether the defendant is guilty or not guilty; but the law, we are told, confines their view to the fact done, and will not allow them to investigate its innocent or criminal character; they are to find the defendant guilty or not guilty, but an examination of the guilt or innocence of the act done is not to be allowed to them. Pharoah's task-masters required the Hebrew bondsmen to make bricks, while they refused the necessary means of straw; the Law of Libel, if it be what it is represented, is an equally unreasonable task-master to Jurymen.

But this is only half the absurdity of the case; the Jury, it is said, are to find the fact of publication only; the Court is to apply the law which denominates the publication as innocent or criminal; but, notwithstanding this, the Jury are required to find the guilt or innocence of the defendant. The learned author of "Eunomus," in his anxiety to throw a decent covering over this matter, says that, "the law is pronounced to the Jury from the Bench," and, he asks exultingly, "Does not the Judge betray his trust in not telling them how the law is? [Eun. Dial. iii. s. 53) Let a Judge answer him—"I have been pressed very much by the counsel," says Mr. Justice Buller, in Rex v. the Dean of St.

Asaph, "to give an opinion upon the question—whether the pamphlet is or is not a libel? * * * It is not for me, a single Judge, sitting here at *nisi prius*, to say whether it is or is not a libel. * * * In a *future stage* of the proceedings, if the defendant is found guilty, he will have a right to demand my opinion, and if ever that happens it is my duty, and I will; but till that happens, I do not think it proper, or by any means incumbent on me. Therefore I can only say, that if you are satisfied that the defendant did publish the pamphlet, and are satisfied of the truth of the inuendoes, you are bound, in point of law, to find him guilty." (See the Trial, p. 17.) This doctrine was afterwards confirmed by Lord Mansfield and the whole Court of King's Bench. It was ratified also by the opinions of the twelve Judges, delivered to the House of Lords, in answer to the seventh question referred to them on the occasion of Mr. Fox's Libel Act.* Now let us advert for a moment to the point at issue. The inquiry is, the legal guilt or innocence of the defendant, in respect of a particular act, the Jury are required to establish the one or the other upon oath, and being incapable of themselves, according to the court-doctrine, of knowing the legal character of the act done, the court refuses to assist them with any opinion on the subject. They are, in the language of the Judges, "to take that from the Court;" but that Court withholds its opinion, though that opinion, according to their own doctrine, is the only medium of intelligence. We know but of one parallel to this absurdity. The government of Munich published a catalogue of forbidden books, but forbade, under a heavy penalty, the reading of the prohibitory catalogue!

But the most monstrous absurdity is, that the very Judges who insist that the Jury can decide nothing but the fact, never did, and never would, receive a verdict finding the fact only. We have already seen, that in the case of Rex vs.

* The answers of the Judges to the questions put to them by the House of Lords on this occasion exhibit a curious specimen of professional mystification. They may be found in Dodsley's Ann. Reg. vol. xxxiv. p. 62. They were commented upon with great and deserved severity in Parliament, and the general opinion of the public respecting them may, perhaps, be well expressed in the words of Dr. Towers—"It would be difficult to point out any piece of writing in which perspicuity has been more successfully avoided." [Towers's Tracts, vol. ii. p. 169.] Or they may be characterized in a line of Smart's—

"The mental nonsense, neither true nor false."

Penn and Mead, indicted for speaking or preaching to an unlawful assembly, when the Jury pronounced a verdict of "Guilty of speaking," the Court told them, "they had as good say nothing," and expressly required of them to find whether the assembly was unlawful or not. So in the case of the King against the Dean of St. Asaph, in 1784, Mr. Justice Buller sent back the Jury, telling them, that "Guilty of publishing only" was no verdict. In the King v. Stockdale, in 1789, "Guilty of publishing only" was treated as no verdict. So likewise in the King v. Perry, tried 9th December, 1793, the Jury found the defendant "Guilty of publishing, but with no malicious intention;" Lord Kenyon refused to receive the verdict, and said, "it was no verdict at all." So that the Jury, who are told they perjure themselves if they extend their consideration beyond the mere fact, are yet required by the very men who impose that limitation on their functions, to declare on oath the legal character and quality of the fact.

Besides, is it not incompatible with every principle of reason and of justice, that a man's guilt or innocence should not be investigated at his trial? Is it not as tyrannical as it is absurd, first to convict and punish a man, and afterwards investigate his alleged guilt? If this be justice, it is after the order of Rhadamanthus, who was said to punish first, and hear the case afterwards—*castigat, auditque dolos.* Or it may find a more practical precedent in a custom mentioned by Dr. Brown, son of Sir Thomas Brown, who, in his Travels, p. 123, says—"Among the odd customs of Carinthia, there is an old one, that if a man was vehemently suspected of theft, they hanged him, and some days after (at the return of the *postea*, as a lawyer would say,) they judged of his guilt. If he was found guilty, they let his body hang till it was corrupted; if otherwise, they took it down, buried it on the public account, and said prayers for his soul."

By confining the duty of the Jury to the mere finding of the fact, the whole decision of the case is virtually taken from the Jury, and transferred to the Judge. The Jury would thus retain a mere nominal function. In cases of libel, for instance, the fact of publication, and the applicability of the innuendoes, are usually uncontested; the whole struggle of the cause is generally applied to the nature of the publication—its guilty or innocent character. To leave the

whole of the contested matter to the sole decision of the Judges, would be to annihilate, virtually, the office of the Jury. Nothing would be left for the defendant to contend for; he would be surrendered up an unresisting sacrifice to special pleading. Mr. Fox well illustrated this in the discussion of his Libel Act—"Apply this doctrine," he said "to high treason. Suppose they had a right to try me for high treason, for a writing that was considered by the Court of King's Bench as an overt act; the Court would have a right to say to the Jury, 'Consider only whether the criminal published the paper; do not consider the nature of it; do not consider whether it is treasonable, whether the overt act it intended was to accomplish the king's death; for whether it was or was not, that will depend upon the words set out on the face of the record, and the accused person will be guilty of high treason; and if no motion be made in arrest of judgment, let him be hanged and quartered.' Would Englishmen endure that this should be the case? Could men permit death to be inflicted, without a Jury having had an opportunity of delivering their sentiments or verdict, whether the defendant was or was not guilty? If this doctrine were true, and applied to high treason, then the overt act would be unnecessary; the person who wrote the paper would, probably, confess he published it, and would not have a word to say in his defence; he must be found guilty. His liberty and life would not depend on the verdict of twelve persons, but on four lawyers; I do not mean to speak with disrespect of the Judges; but the verdict must depend on four men, who drew their deductions from books, and not from the facts and circumstances of the times. A man might thus be in a situation to lose his life, without the judgment of his peers. This point is stronger in the case of high treason, than in that of libel; but it is only stronger inasmuch as death is of more importance than temporary confinement." Fox's Speeches, v. iv. p. 261.

But why not trust the Judges? "Why," says Mr. Erskine, "may not Judges be trusted with our liberties and lives, who determine upon our property and every thing that is dear to us? The observation is plausible for the moment; but where is the analogy between ordinary civil trials, between man and man, where Judges can rarely have an interest, and great state prosecutions, where power and free-

dom are weighing against each other, the balance being suspended by the servants of the executive magistrate.* If any man can be so lost to reason as to be a sceptic on such a subject, I can furnish him with a case, for one instance, directly in point. Let him turn to the 199th page of the celebrated Foster, to the melancholy account of Peacham's indictment for treason, in a manuscript sermon, found in his closet, but never published, reflecting on King James the First's government. The case was too weak to be trusted without management, even by the sovereign, to the Judges of those days; it was necessary to sound them, and the great (but, on that occasion, the contemptible) Lord Bacon, was fixed upon for the instrument. His letter to the King remains recorded in History,† where, after telling him his successful practice on the puisne Judges, he says, that 'when in some dark manner he has hinted this success to Lord Coke, he will not chuse to remain singular.' Mr. Erskine adds, "When it is remembered what comprehensive talents and splendid qualifications Lord Bacon was gifted with, it is no indecency to say, that all Judges ought to dread a trust which the constitution never gave them, and which human nature has not always enabled the greatest men to fulfil."—Erskine's Speeches, vol. i. p. 253.

The instance of judicial delinquency mentioned by Mr. Erskine, is by no means a solitary one; English history teems with such examples from the very earliest records. We need not go back to the reign of Alfred, who caused forty-four justices to be hanged in one year for false judgments and other acts of violent aggression against the rights of the subjects; [Horne's Mirror of Justices, p. 108, 238] nor to that of Edward I, who complained bitterly of the universal corruption of the Judges, and fined most of them very heavily; [Rapin's Hist. v. i. p. 364] we may come within the period of what lawyers denominate "legal memory."

* Even Blackstone, high prerogative lawyer as he was, has candidly acknowledged this predisposition of the Judges towards the crown. "The antiquity and excellence," he says, "of the trial by Jury for the settling of civil process has been before explained at large, and it will hold much stronger in criminal cases, since in times of difficulty and danger, more is to be apprehended from the violence and partiality of Judges, appointed by the crown in suits between the King and his subjects, than in disputes between individuals."—Black. Comm. vol. iv. p. 361.

† See Lord Bacon's Letters.

If it were not notorious matter of history, it would not be credited, that sworn Judges, including the two Chief Justices, actually decided in the reign of Richard II, that "the king is above the law." [Rapin, v. i. p. 464, n. 6.] For this judgment, however, Sir Robert Tresham, the Chief Justice of the King's Bench, was afterwards deservedly hanged at Tyburn; his fellows in iniquity received the same sentence, but their lives were spared, and they were merely banished. [Rapin, v. i. p. 465.] Henry VIII, had the fortune to possess, in Empson and Dudley, two Judges who, with reference to their official iniquities and moral unworthiness, may be said to have been "equal to all things, for all things unfit," and who justly paid the forfeit of their crimes by a public execution on Tower-hill. (Rapin, v. i. p. 707.) The reign of Charles I, is conspicuous in this particular. All the twelve Judges (or, as they thought fit to express themselves, "every man by himself, and all of us together,") deliberately resolved, that in cases of necessity, the king might levy money without consent of Parliament, and that of the necessity his majesty was the sole Judge."* [Rapin, v. ii. p. 295.) Of lord keeper Finch, that active and indefatigable instrument of judicial corruption in the same reign, who declared, that while he was keeper, an order of council should always with him be equivalent to law, and who, when impeached for his crimes, fled from justice, we will say no more. (See Hume's Hist. v. vi. p. 305.) Of Scroggs and of Kelyng, in the next reign, that of Charles II, it is still less necessary to say any thing, beyond the mention of their names. It is more to our present purpose to observe, that in this reign, all the twelve Judges declared, under their hands, in a certificate to the king and council, that, "whoever printed or published any thing, anywise relating to the government, without particular licence from the government for so doing, was guilty of a great offence and misdemeanour, and severely punishable. (See Rex v. Carr, v. ii. St. Tr. p. 554.)† In alluding to Jeffreys, what can we do bet-

* The infamous Strafford declared this opinion of the Judges, to be "the greatest service which the profession had rendered in his time to the crown."—See Strafford's State Letters.

† This declaration was the more atrocious, as having been made several years after the unconstitutional act for regulating the press had expired; but a similar doctrine was held, as we have before seen, by Mr. Justice Allybone, in the trial of the Seven Bishops. And that worthy person-

ter than to adopt the energetic language of Burke, used on another occasion, and say, that "his memory has stunk in the nostrils of all succeeding times?" The reign of James II. has its full share of judicial iniquity. The Judges solemnly determined, that the king, by virtue of his royal authority, might, at his will, "suspend or dispense with the laws." [Rapin, vol. ii. pp. 755, 759.]* Other particulars of judicial oppressions may be found specified in the declaration of the rights and liberties of the subject, and the consequent Bill of Rights, at the Revolution in 1688. Is such an order of men fit to be trusted with the uncontrolled disposal of the subject's liberty in political cases?

But we shall perhaps be told, that these things occurred in times that are passed, and can never return; that our present Judges are men of a totally different character, and may safely be trusted. With all due respect for several of our present Judges, we doubt whether the ameliorated condition of modern judicature is not to be ascribed more to the change of times, than to any essential difference in the judicial character. It would be by no means difficult to state many

age, Sir George Jeffreys, afterwards Chief Justice, when he was Recorder of London, lost no time in propagating this doctrine. He put forth a sort of judicial proclamation, intimating that "all the Judges of England having met together for the purpose, had resolved that no person whatever can expose to the public knowledge any thing concerning the affairs of the public, without licence from the king or from such persons as he thought fit to intrust with that power." Lord Camden, observing on this resolution of the Judges, asked, with constitutional abhorrence of the doctrine, "Can the twelve Judges extrajudicially make a thing law, to bind the kingdom, by a declaration that such is their opinion? I say no; it is a matter of impeachment for any Judge to affirm it."—See Woolrych's Mem. of Jeffreys, p. 56.

* Four Judges were found sufficiently virtuous to refuse their assent to this doctrine—Sir Thomas Jones, William Montague, Esq., Sir Job Charlton, and Sir Edward Neville; they were, of course, displaced. [Rapin, vol. ii. p. 755, and ib. n. 2.] The answer of the first of these conscientious men deserves to be remembered. When the King told the Judges "he would have the twelve Judges of his own opinion," Sir Thomas Jones told him—"Possibly you may find twelve Judges of your opinion, but you will scarce find twelve Lawyers to be so." [Rapin, vol. ii. p. 755, n. 1.] The learned Judge was mistaken, however, in this conjecture. On the 11th June, in the following year, (1687,) the members of the Middle Temple, in a body, presented an address to the King, in which they assured him, that "they would defend with their lives and fortunes, all the prerogatives claimed by him, upon the authority of that divine maxim, *a Deo Rex, a Rege lex.*"—Rapin, vol. ii. p. 759.

"modern instances" but too well calculated to excite a distrust of judicial impeccability, and to satisfy us that our best security in this respect, consists in the improved spirit of the age. Judges could not now do, even if they were willing, what Judges have done heretofore. Jeffreys himself, if now on the bench, with the same sanguinary and tyrannical disposition which actuated him in his past career, could not do now what he formerly did. But power is power, and has a natural tendency towards usurpation and abuse; and judicial power has in all ages been obnoxious to its full share of that reproach. We are unwilling, therefore, to remove or relax any of those restraints which the constitution has given us, and which have led to the present amelioration, and among which restraints, the liberty of the press has been by far the most efficient. But on the prevailing disposition to compliment the Judges for the time being with the attribute of official perfection, we do not know that we can express ourselves better than in the language of a sensible little pamphlet on the Law of Libel, published by Hunt, of Tavistock street, in 1823—"We are perpetually boasting," says the writer, "of the integrity of the Judges. The Judges on the bench are always, for the time being, the best of Judges, the wisest and most upright of men; men who will neither do nor suffer injustice; men who will drive from their presence all who seek to pervert the law, or take advantage of its defects to injure any one. Yet how few are the dead Judges, whose conduct has not been impeached, and that, too, on good grounds! Were the Judges really and truly independent of the executive power, and were the people at liberty, as they ought to be, (but as, with the consent of the Judges, they never will be,) to canvass the conduct of a living Judge to the necessary extent, so that no Judge could commit acts of folly or of injustice with impunity, very few such acts would be committed. Had this security been taken, and this freedom been enjoyed in time past, the evils which have been accumulating for ages would have had no existence; the law would have been precise, clear, and sufficient, and its administration very different indeed from that which we are compelled to witness."—Pp. 5, 6.

But to return from this digression. The authorities to which we have referred, are chiefly of a strictly legal kind; but great collateral aid might be given to our argument, by

reference to books of a less professional character. We have not space to do so in detail, but we may make a passing reference to the following few, viz: to Lord Somers's celebrated "Security of Englishmen's Lives; or, the Power and Duty of Juries," A. D. 1681; the "Guide to English Juries," A. D. 1682; the well known "Dialogue between a Barrister and a Juryman," by Sir John Hawks, solicitor-general to king William; Dr. Towers's tract on "The Rights and Duties of Juries; [Tract v. ii. p. 1,] Mr. Capel Lloft's "Considerations on the Matter of Libel;" to the celebrated "Letters to Mr. Almon," before noticed; to Baron Masères's papers "On the Doctrine of Libel," published in 1792, and republished in 1809; [Miscel. Tr. p. 183,] to De Lolme, "On the Constitution;" [ch. xiii. p. 176,] to a very argumentative note in "Boswell's Life of Johnson;" [v. iii. p. 11, n. (1)] to Mr. Rous's masterly "Letter to the Jurors of Great Britain," originally published in 1771, and republished in 1785; and to the late Lord Stanhope's elaborate book, entitled "The Rights of Juries Defended," A. D. 1792, which displays the clearness of statement, energy of language, and extensive research, that characterized all the works of that high-minded, intelligent, and independent nobleman. These references combine a great body of authority, derived from men of all parties, and of various ranks and professions in life, in support of the doctrine we contend for.

But the great final and conclusive authority is, the statute 32 Geo. III. c. 60, commonly called the Libel Act, usually ascribed to Mr. Fox, who brought it into Parliament, but the merit of preparing which is now clearly proved to belong to Mr. Burke. [See Prior's Life of Burke, p. 81.] By this statute, after reciting that doubts have arisen whether, on the trial of an indictment or information* for making or publishing any libel, on the plea of not guilty, it be competent to the Jury to give their verdict upon the whole matter in issue, "it is declared and enacted, that on every such trial,

* We have seen that in Levy v. Milne, Chief Justice Best attempted to confine this law to criminal cases, (or rather, denied its existence altogether,) but this is mere sophistication. Lord Coke, in the passage before cited, expressly states, that the right of the Jury to decide the whole issue applies equally to criminal and to civil causes. [1 Inst. 226, b. 227.] When this statute was passed, no doubt existed as to civil cases, and the act declared the doubts which were suggested as to criminal cases to be contrary to law.

the Jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue, upon such indictment or information; and shall not be required by the Court or Judge to find the defendant guilty, merely on proof of the publication by such defendant of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information; (sec. 1) but the Judge shall, according to his discretion, give his opinion and direction to the Jury on the matter in issue, in like manner as in all other criminal cases.† (sec. 2.)

This statute (which—to his immortal honour be it remembered—would never have passed but for Mr. Erskine's unwearied and independent resistance against Lord Mansfield's

† In the year 1793, a statute was passed in the Parliament of Ireland to the same effect. The law of Scotland has always been acknowledged to be to this effect, and therefore required no statutory declaration. [See Borthwick's Law of Libel and Slander, p. 141.] We add the following act of the State of New-York, in America, which was passed on the 6th April, 1805, as a model of just and reasonable libel law—

"Whereas, doubts exist whether, on the trial of an indictment or information for a libel, the Jury have a right to give their verdict on the whole matter in issue—I. Be it, therefore, declared and enacted, &c. that on every such indictment or information, the Jury who shall try the same shall have a right to determine the law and the fact, under the direction of the court, in like manner as in other criminal cases; and shall not be directed or required by the Court or Judge to find the defendant guilty, merely on the proof of the publication by the defendant of the matter charged to be libellous, and of the sense ascribed thereto in such indictment or information; provided, nevertheless, that nothing herein contained shall be held or taken to impair or destroy the right and privilege of the defendant to apply to the Court to have the judgment arrested, as hath heretofore been practised.

"II. That in every prosecution for writing or publishing any libel, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as libellous; provided also that such evidence shall not be a justification, unless on the trial it shall be further made satisfactorily to appear, that the matter charged as libellous was published with good motives, or for justifiable ends.

"III. That any person or persons who shall, after the passing of this act, be convicted of writing or publishing a libel, shall not be sentenced to an imprisonment exceeding the term of eighteen months, or to pay a fine exceeding the sum of five thousand dollars.

"IV. That from and after the passing of this act, it shall not be lawful to prosecute any person or persons, by information, for writing or publishing any libel."

A similar law prevails, with slight variations, throughout the United States.—See Digest of the Laws of the United States.

doctrine) clearly establishes, not merely that, in cases of libel, as in all other criminal cases, the Jury are to decide the whole issue, but that this was the constitutional law of the land—for it is a declaratory statute—promulgating what the law was, and not creating a new law. This has been a bitter pill to the enemies of the rights of Juries. Lord Kenyon, while he yielded an unwilling submission to the statute, mis-stated its nature, in a judgment delivered by him soon after the passing of the act, in the King v. Holt, 5 Term. Rep. p. 436, saying, "the Jury were now enabled to decide upon the whole question, including the intention of the party accused."* Mr. Holt, as might be expected, sneers at its declaratory character, though, bold as he is on the subject, he does not venture to *deny* it. "This statute," he says, "has often been deemed as declaratory only of the common law; it affects, indeed, merely to declare it in terms; it declares and enacts," &c. [Holt's law of libel, p. 305.] Mr. Worthington, however, whose intrepidity never fails him, when a bold assertion is required, states in express terms, but in as express contradiction of the statute, that "this act of parliament enlarges the province of the Jury" [p. 146.] The statute expressly professes to be declaratory; and when we consider the vehemence with which it was opposed by lord Thurlow and lord Mansfield, and all the judges, it is not possible to believe that it would have been suffered to pass in the form of a declaratory act, if that important character could have been denied to it.†—Mr. Fox, in his introductory speech, expressly characterized

*Lord Ellenborough's manly mind, however, disdained such practices Strongly as he was inclined against political libels and popular rights, he honestly and fully admitted in several cases, that the Jury "had cognizance over the whole issue in cases of libel, as in other criminal cases."—See in particular Peltier's Trial, p. 201.

†Even sir John Scott, then solicitor-general, with all his disposition to carp at the bill, did not venture to deny that it was declaratory of the common law. That learned person exhibited, on this occasion, his peculiar faculty of frittering away popular rights by specious qualifications.—The preamble stated, "Whereas doubts have arisen whether it be competent to the Jury to give their verdict upon the whole matter in issue," &c. He proposed to introduce, "with the assistance and under the direction of the judge," thus insidiously attempting to do the very thing which the act proposed to undo. "What" exclaimed Mr. Fox, "you want to keep up the old quarrel; you want again to let loose the judge upon the jury." The amendment was rejected, and, as his biographer observes, "the wily assailant of the bill returned to his lair disappointed of prey."—See life of Lord Eldon, Lond. 1827.

it as a declaratory bill; he protested against "attempting any thing like innovation;" he reprobated the doctrine of the judges as of "modern date;" and when the bill was committed he called for the sense of the House upon this very point, in terms which put the matter beyond doubt. He said that "although he had shown the House that this (lord Mansfield's) law of libel was contrary to the original principles of law, and dangerous to the constitution, yet when he would suggest a remedy for those evils, he found himself incapable of doing it without the assistance of the House. If the committee were clear as to the law on the subject, he thought their wisest and most proper measure would be to enact a declaratory law respecting it. If the committee were of opinion, that the high authorities (the judges) on the other side of the question made the law doubtful, they might settle the law upon the subject in future, without any regard to what it had been in times past."* [See Fox's Speeches, vol. iv. p. 245, 262.] The bill passed as a declaratory law. Mr. Erskine, Mr. Sergeant Glynne, and Mr. Dunning, supported the bill on these grounds. Mr. Pitt, expressing "great diffidence at setting up his opinion against the practice of the judges," concurred with Mr. Fox. Even the attorney-general (Mr. McDonald,) although he endeavored, *ex debito officii*, to vindicate the living judges, for following the example of their immediate predecessors, supported the bill in this form. In the House of Peers, lord Camden recapitulated a series of cases from the time of Bracton down to modern times, and declared himself a friend to the bill, "not because it tended to alter the law of the land, but because it established it." He insisted that "the Jury did already possess, and had always possessed, a legal right to form their verdict on the whole case, law, fact and intention, how much soever this right might have been discountenanced by the judges."† Lord Lough-

* Dr. Bissett, a writer by no means too much disposed to favor the popular side, describes the character of these debates to the same effect. "Mr. Fox," he says, "introduced a bill, declaring the power of Juries to decide upon the law as well as the fact, in trials for libel. This bill was not debated as a party question, but as a subject of existing law, justice, and constitutional right."—Bissett's life of George III, vol. ii. p. 323.

† "Lord Camden denied that the practice of the judges was sanctioned by authority, or that, by the law of the land, juries were circumscribed within stricter limits in cases of libel, than in any other subject of jurisdiction. An inquiry into the conduct of lord Mansfield was proposed, together with an examination of the legal rights of juries, and motions

borough pursued a similar course of argument; "he considered the bill as a declaratory bill, the object of which was, not to make that law which was previously supposed to be of a different description, but to declare and explain what was understood to be at that instant the existing law of the land." [See Parl. Debates; see also Fox's Speeches, vol. iv. p. 269.] The bill passed in that form accordingly; and yet we are told, with a total suppression of these particulars, that the statute merely "affects" to be a declaratory law, and that it "enlarges" the original power of Juries. Misrepresentation cannot go much further.

But when this important principle could not be beaten down by open assault, attempts have been made to undermine it. Thus it is frequently intimated, most insidiously, that although the Jury have the power and the right, it may be expedient to forego the exercise of them. In the case of The King vs. the Dean of St. Asaph, Mr. Bearcroft said, "There is no law in this country that prevents a Jury, if they choose it, from finding a general verdict; I admit it; I rejoice in it; I admire and reverence the principle as the palladium of the constitution. But does it follow that because a Jury may do this, they must do it, that they ought to do it?" This insidious stuff is often heard in the present day. We answer the question without hesitation, that the Jury ought to do so in all cases in which their consciences are satisfied. It is a sacred trust confided to them for the protec-

were made in both Houses for this investigation, but were negatived.—Lord Mansfield left a paper with the clerk of the House, containing the unanimous opinion of the judges in favor of his doctrine. Lord Camden, on the other hand, pledged himself to prove, from law and precedent, that this doctrine, though approved by the judges, was not conformable to the law of England. He desired that a day might be fixed for discussing this question; but lord Mansfield, thus challenged to a contest of legal disquisition, either doubtful of victory, or deeming the combat imprudent, declined the invitation. The public was left with an impression, that lord Camden's doctrine, certainly more consistent with constitutional liberty, and with analogy to the general rights of Juries, to scrutinize intention, as well as to learn mere fact, was virtually admitted to be also conformable to law and precedent. If lord Mansfield could have proved the alleged exception in the case of libel, it was conceived that he would have adduced his proofs, in order to prevent future animadversion, as well as to justify his past jurisdiction. Men of ability and knowledge, who, without considering either precedented opinions or practice, merely argued from reason and conscience, could not discover why intention should not be taken into the juridical account, in estimating defamatory guilt, when intention was necessary to constitute guilt of every other species." —Bissett's George III. vol. ii. p. 21.

tion of men's fortunes, liberties, and lives; and Juries are, in our judgment, guilty of a gross and inexpiable dereliction of duty, when they surrender to others, however high in rank or exalted by ability, the exercise of those functions which, for the wisest purposes, were specially delegated to themselves. In the language of chief justice Vaughan before cited, they ought to see with their own eyes, and hear with their own ears; or, to use the words of Mr. Horne Tooke, in the action brought against him by Mr. Fox, in 1792, "any Jury that shall deliver a verdict against any defendant, without having well and truly tried the whole question at issue between the parties, is a perjured Jury."

It is time to bring this long article to a close? its importance has led us to a greater length than we anticipated, but not greater, we hope, than the subject deserves. We trust that we have satisfactorily established that the right we contend for in behalf of Juries does exist, and that it has existed immemorially and constitutionally, and that it is equally consonant to every sound principle of legal and of moral justice.

COLOURED MARRIAGES.

From the Charleston Mercury, October 29, 1823.

QUESTION—Can a free white man lawfully marry a free black or colored woman? Can a white woman lawfully marry a free black or colored man? Instances of the first sort have occurred; no instance of the second is known. It is important that the public mind should be turned to this subject, and that the legislature should act upon it *prospectively*, leaving the Courts of Law and Equity to pronounce upon all cases *now existing*, and which would, of course, be free from legislative interference. An act declaratory of what the law should hereafter be, can never prevent judicial decisions as to what it now is. This question has lately been discussed with much ability, as well upon principle as authority, in the Columbia Telescope. We readily extend as far as depends upon us, its publicity, premising only that the Constitutional Court has, in more instances than one, recognized contracts of *meum* and *tuum* between white persons and free persons of color, and has decided that the latter are entitled to the benefit of the Acts of Insolvency.

"The policy of the law," says Judge Bay, "allows these persons to contract and be contracted with, and to pursue their rights in a Court of

Justice. To allow them these privileges, without the benefit allowed to unfortunate *debtors*, would be placing them in a deplorable situation indeed; especially when it is recollected that their want of a competent knowledge of the *Law of Contracts* places them very much in the power of artful and designing men: for all which reasons, justice as well as humanity, requires that *the benefit of these Acts* (Insolvent Debtor and Prison Bounds Acts) should be extended to them."

It cannot be necessary to observe that the *contract of marriage*, so peculiar and important in its nature and effects could never have been intended to be included in the above decision. Let us, then consider the question as quite open, and proceed to give due weight to the learned and acute writer in the Columbia Telescope—

"The late law, prohibiting the introduction of free persons of color into our state, and Judge JOHNSON's unexpected and truly original opinion on the subject, has led me to think of cases that may happen with us, arising from our coloured population. Whether the extraneous matter which that Judge has thought fit to introduce, be the result of superior foresight, of an habitual love of paradox, or an unconquerable obliquity of thinking; whether the opportunity was a good one to make a dash at the police of Charleston and the freeholders' court, or to exhibit a heroic contempt of public opinion, by putting a construction on a well known phrase, which could enter into no one's brain but his own, I cannot tell. Whatever his opinion may be, whether sound or unsound in point of doctrine, the situation in which he delivered it, will and ought to protect his motives from public animadversion. We must not permit ourselves to distrust the honesty of intention of a judge of the Supreme Court, while acting in that capacity. Still, his published opinion in the late case is so strange, containing matter so irrelevant, and so verging towards the confines of sedition, that whatever credit we may allow to his motives, we cannot help looking aghast at his doctrines.

I hope whenever the following case occurs, it will be in a way to give no trouble to Judge JOHNSON on the bench; which every friend to the Judge would no doubt be glad to free him from.

In the case of Elkison vs. Delesseline, the only point before the court, was, will habeas corpus lie? Judge JOHNSON decided, of course in so plain a matter, that it would not. With this question, the constitutionality of the law of South Carolina, the prudence or imprudence, and the motives of our legislature, had nothing to do. It is, of this needless, volunteered part of the judge's opinion—of this disregard for

the feelings of his own state—of this unnecessary, ill-timed, and unwise abuse, that the public so justly complain; and to which alone my observations are meant to apply.

In another point of view, the Judge's opinions are greatly to be regretted. Every body knows that a suspicion, from political motives, has been industriously propagated that the Supreme Court of the United States has gradually been encroaching on state rights. A judge of that Court should be particularly, anxiously cautious, not to add weight to that suspicion. Has Judge JOHNSON been so? Has he not given force and currency to it?

A Slave can make no contract; a slave therefore cannot contract a marriage with a free person. Can a white man marry a coloured woman, or a white woman a coloured man? I know of no case that has actually occurred of this nature, but it is not unlikely to occur; and I therefore send you some observations on the question. Most of the references have been suggested to me by a friend. I shall cite the books and quotations on which I shall rely, and then the points which embrace all the parts of the question.

AUTHORITIES AND CASES.—Nuptiæ sive matrimonium est viri et mulieris justa conjunctio, individuam vitæ consuetudinem continens. (Inst. L. 1. tit. 9, § 1.) Vinnius, in his comment hereon, says, Principalis finis, sobolis procreatio. C'est à dire (says Pothier dig. L. 1. de ritu nuptuali) la communion de tous les droits, tous les avantages, tous les honneurs. Car la femme jouit de tous ceux qui sont dûs à son mari, à raison de son rang, ou de ses places.

La femme contracte envers son mari, l'obligation de le suivre partout où il jugera apropos d'établir sa residence ou sa demeure. (Pothier sur le contrat de Mari. Introd.)

Un contrat de mariage avec une personne qui a perdu l'état civil par une condemnation à une peine capital, est privée des effets civils. (Poth. ub. sub. part. 5, c 2, art. 3.)

In the commentary on the last French edition of Pothier, we find, Il ne peut être reçu (en France) aucun acte de mariage entre les blancs et les negresses, ni entre des negres et des blanches. Also, at page 82, of the same commentary, les qualités civiles devaient sans doute être d'un grand poids, lorsqu'il existait des distinctions de caste; le système alors admis devait les faire influer sur la validité du mariage.—If the woman was originally of servile condition, and was not raised by the marriage to an equal condition with her

husband, and if the children which she should bear were understood to have no claim to inherit, she was then called a concubine. (Rutherf. Inst. L. 1. c. xv. § 15.) This is also the left handed marriage of Germany, where the woman does not partake of the civil *status* of the man. (Cooper's Just. notes, p. 430.) The next in number among the legal prohibitions to marriage among the Romans, was offence against public decorum; another head was that of rank (status;) as if a senator should marry a manumitted slave, a stage player, or a person of lost reputation; or a governor of a province a female resident therein. (See the Ref. in p. 431 of that book.)

The state of marriage in the old English system of villenage, was not marriage, but concubinage; for the children of a free female, married to a villein, were villeins. (2 Bl. Com. Villenage.) The essential quality, of equality of status, was wanting; which constitutes the difference between legalized concubinage and marriage.

In the case of Cope vs. Burt, (1 Phillimore, 229.) Serjeant Lens says, "This is an important cause, as connected with great public interests, and the general interests of the community. It is a question of public policy and general reasoning, inasmuch as the institution of marriage is for the sake of the public as much as for the sake of individuals.—It is not the case here as in a common contract; the public is a third party interested in seeing and knowing who the parties are that are married." This doctrine is confirmed by the Judge of the high court of delegates, Sir John Nichols, who says, page 296, the public also may be concerned that the state and condition of the parties should be judicially ascertained.

In the case of Evans vs. Evans, (v. 2, of the Law Magazine,) Sir William Scott says, "Marriage is the most solemn engagement which one human being can contract with another. It is a contract formed with a view not only to the benefit of the parties themselves, but to the benefit of third parties, to the benefit of their common offspring, and to the moral order of civil society." And again, "If two parties have pledged themselves at the altar of God, to spend their lives together for purposes that reach much beyond themselves, it is a doctrine to which the morality of the law gives no countenance, that they may dissolve this bond of common tie."

Such are the sentiments of writers on the civil law, and foreign jurists, and decisions of the English courts as to the nature and essential properties of the marriage contract; which I apprehend are adopted as principles throughout the United States; every court acknowledging marriage to be a contract of public permission and regulation; to be controled in the principles that relate to it, by considerations of public policy and decorum.

I proceed to the law relating expressly to negroes and persons of colour in the United States. The mixed marriages of whites and Hindoos, I do not meddle with, because the English legislature has thought fit to regulate them by positive law; which is in conformity with the principles above laid down. Among the Hindoos themselves, a Sudra can only marry a Sudra, they being of a cast that has no status in society. A Chatriya cannot marry a Sudra, for he cannot communicate his own status to his wife. (Sir W. Jones' works, vol. 3, p. 120.)

Mr. McLane of Delaware, Mr. Barbour of Virginia, Mr. Archer of Virginia, and Mr. A. Smyth of Virginia, on the floor of Congress, in the debate on the Missouri question, December 1820, each stated as a matter of fact, (in which they were not contradicted,) that in no state of the union were coloured persons, descendants of negroes, permitted to contract marriage with white persons. In the argument of Mr. Hemphill of Pennsylvania, this is substantially admitted, as noticed by Mr. McLane.

Also, it may be safely asserted, that in no state of the union is a coloured person of African blood, admitted to a full participation of the rights of a white man. He cannot be a Legislator, Judge, Sheriff, Constable, Militia man, or Juror; in many states, (non slave holding) he cannot be a witness. In all and every state from Maine to New-Orleans, he is of a degraded caste; of an inferior rank, condition, or status in society. This feeling and the conduct in conformity to it, and the laws implying it, are universal throughout the United States. In most of the states, the distinction is made by means of the express words, "free white inhabitants;" where it is not so, the practice is the same, though the expression may seem ambiguous or inclusive, as in Pennsylvania; where no coloured man is taxed, no coloured man is permitted to vote, to serve in the militia, on juries, &c..— On a late attempt to establish a hose fire company of free

negroes and coloured people in Philadelphia, every other hose company gave notice, that they would dissolve their own institutions, if this were permitted. Such and so strong, are the practical prejudices against the negro race, in those states where the natural equality of man is so vauntingly preached up! On the 20th of January, 1820, as appears by the journals of the House of Representatives of Pennsylvania, p. 341, a motion was made by Messrs. Kirby and Robinson, to prohibit the migration or importation of free negroes into that commonwealth; and very lately, to prohibit the intermarriage of persons of colour with whites.

In the laws of Rhode Island, power is given to the Town Council, to bind out a free negro for two years, who shall keep a disorderly house; p. 611, 612. Other laws of a still more severe import in that state, against servants and slaves, are cited and referred to by Judge Smith, late of the senate, in his speech on the Missouri bill, December, 1820.

By a law of Massachusetts, of 1788, revised in 1798, and again in 1802, no African or negro (other than a subject of the Emperor of Morocco, or a certificated citizen of the United States,) shall abide in that commonwealth more than two months, under pain of being whipped, &c. as often as he shall return. By an act of Massachusetts, June 5, 1792; no person shall join in marriage, any white person with a negro, Indian, or mulatto, under a penalty of £50, and the said marriage shall be null and void.

A law of 1796 in that state, prohibits free coloured persons from wandering out of the bounds of the town or place to which they belong; from travelling without a pass; from selling any thing to any person whatever. I shall assert without fear of contradiction, that by the laws and practices of all the non-slave holding states without exception, a coloured person of African origin, is considered as an inferior being, permanently, irrevocably degraded as to his state or civil rank, and no where enjoying full participation of civil rights. By the laws of Virginia, for preventing "that abominable intermixture and spurious issue," arising from marriages between white and black, or white and mulatto persons, all such marriages are forbidden; the parties themselves are punished by fine and imprisonment; and all ministers and others are forbidden, under penalty of $250, to marry such persons. But the marriage itself is not declared

void.* (1. Rev. Code Virg. laws, 1819, p. 401, 424, 444.) Same prohibition, (North Carolina laws, p. 68.) In South Carolina, no coloured person can be a witness; no coloured person may on any provocation strike a white person. Persons of colour are not permitted to be taught writing. In Charleston they must disperse and go home at drum beat every night, and so in other towns, according to the various municipal regulations. In Charleston, free negroes and mulattoes are liable to registration, to capitation tax; by an act of last year, it is forbidden to import into South Carolina from any other state or place, any free coloured person.—They are not permitted to remain in port, though brought as ship servants in a foreign vessel. So that if a free white woman, native of South Carolina, with landed and other property here, were to bring home with her from another state, her free mulatto husband, he might be imprisoned or even sold. In South Carolina, a negro or mulatto, has no civil rights, and therefore, it is actionable to call a man a mulatto. (1 Bay's Reports, 171. 1 Nott and McCord's Reports, 184.) In the latter case, the court considers and calls them a "degraded class of people." I do not know whether a free negro can hold lands in this state; the better opinions seem to be, he cannot.

From the preceding quotations, it is manifest that the people of colour are, in every part of the United States, considered, not merely by the populace, but by the law, as a permanently degraded people; not participating as by right, of the civil privileges belonging to every white man, but enjoying what civil privileges they possess, as a gift and grant, as a matter of favour conceded by the law, and revocable by law.

That this class of people no where in the union, more especially in the southern states, can be considered as having of right any civil status whatever. They are *every where* subject to laws and restrictions that do not operate on the white population; and those restrictions may be remitted or extended according to temporary circumstances of expediency, at the pleasure of the whites.

That in South Carolina the permission given to a free coloured person to remain here, is granted reluctantly, and under a heavy tax; and their future introduction is prohibited by an express law.

* If the issue be spurious, the marriage must be void.

That in every civilized country, the laws of marriage are framed with an especial view to the public—to the community, as a party strongly interested in the marriage contract; and whose interest cannot be set aside or infringed by the contract between the individuals who marry.

That in many states of the union, by express law, and probably in all of them impliedly, according to the statements on the floor of Congress, the marriage between white persons and colored persons is considered *as an offence.*—That according to the general tenor of the law all over Europe relating to marriage, an equality and communicability of civil status or condition, is an essential concomitant and result of the marriage contract. With this our law seems to agree, according to Mr. Dulany, 1 Maryland Rep. Append. 562. "What denies the civil essence, and legally appropriated qualities of marriage, on which account it is an object of the law, must, to be consistent, deny the capacity to marry. Now it is a part of that essence and of those qualities, that the wife should have the status of the husband; but this she could not do if she continued subject to the disabilities of a person of color."

With these propositions in view, I proceed to consider the following questions—

1st. Is it an offence against public decorum for a black or mulatto person to marry a white, or a white to marry a black or mulatto?

2d. Does the want of civil status in the coloured party, and is the impossibility on the part of the white to communicate his or her civil status to the coloured person espoused, such an objection as will forbid the contract from taking place?

3d. Is the objection a legal one, cognizable at once in a court of law, or is it necessary to wait for an act of the legislature?

And first, is the intermarriage of blacks and whites an offence among us against public decorum? I think it is, for the following reasons:

(a) It is universally spoken of and so considered. I believe there is not a white person in the community who would hazard a defence of it. The feeling on this subject is universal. A white person so acting would be considered as degraded in society without a dissenting voice.

(b) Such a union is a sure means of propagating among

us personal deformity, more or less, as the offspring partakes of similitude to the black ancestor. There may be as much activity and animation, but the features, the complexion, and the corporeal differences constitute an inferiority in the person of such a progeny. Cretinage is a legal obstacle to marriage in the Pays de Valais. 3 Manc. trans. 266.

(c) I believe the inferiority of natural intellect among the blacks cannot be denied. In the northern and middle states they have had black teachers, black preachers, black physicians—they have have had access to all the means of improving their condition, and their inferiority remains manifest and undeniable. They are not superior in one thing to the slave of the south. They are not capable of much mental improvement, or of literary or scientific acquirement. The proof is, there is no instance of it here or elsewhere. It is therefore a clear breach of public expedience and decorum knowingly to propagate inferiority of mind as well as body.

(d) It is a breach of public decorum to propagate an offspring, who by the necessary result of the laws that act upon him, is considered so degraded that he cannot be permitted to live here, though of adult age unless under the inspection of a guardian responsible for his conduct—an offspring forbidden to receive common instruction—who can act when adult in no civil capacity—who is fit society for no white person—who dare not pay an evening visit but under the inspection of the police—whose conduct is in many instances a legal offence punishable by stripes, when the same conduct in a white person is not—who throughout the whole of the United States is by operation of law and from public feeling, an inferior and degraded person! Is it not a manifest breach of public expedience and decorum to enter into a contract which may fill our state with this degraded population? Can a contract thus offensively operating against public feeling and against the present and future interest of the state, be a valid contract? Is it permitted that individuals in pursuit of their own gratification may thus injure the future character of our national population? It is upon this point in particular I lay my finger, as unanswerable. In every civilized country the state is a party to the marriage contract of individuals, in respect of the interest the state has in the character of the future population of the country, which can only be kept up by the institution of marriage. When the necessary re-

sult therefore, of a marriage contract is a population degraded, in body, in mind, in public feeling, at home and abroad, such a contract is an offence against public decorum—contra bonos mores, and legally cognizable in that point of view.

Secondly, does the want of civil status invalidate the contract? I think it does for the following reasons—

(a) The universal difference between marriage and concubinage, is the want of inter-communication of civil rights and privileges—equality of status. It is not true as to persons of different status that consensus facit nuptias, or that contractus facit nuptias, or that both together constitute marriage.—They constitute concubinage not marriage. Concubinage is allowed in Germany; it has been sanctioned by the decrees of Popes; it is a state noticed by Du Cange and other ancient authors on the law of Europe, without animadversion. It does not mean promiscuous cohabitation, but the union of one man to a woman for life under regular contract, but without communication of civil status. Herein it differs from marriage; and this is the *only essential feature of dissimilarity*. To marriage therefore, by the universal consent of all Europe, belongs exclusively and essentially, equality of civil status. No such equality, no such intercommunication *can* take place in the marriage, as it is called, of a black and white person. Their contract therefore is not marriage; it can at best amount only to what was concubinage by mutual contract, under the civil law.

This communication of civil condition, comprises always what belongs to *every* free citizen or subject, and sometimes to more. Thus in England, the King marrying an alien commoner, she becomes queen. A duke marrying a native commoner, she becomes duchess by right of marriage; and so through all the gradations of title in that country. But as rank and title are there the voluntary gift of the crown, they descend, and are communicated according to the original tenure of the grant, or according to other legal limitations which are deemed expedient in cases of title. Hence a queen or a duchess marrying a commoner does not constitute her husband a king or a duke. These exceptions from a general rule, relating to an excepted and peculiar class of subjects, evidently form no objection to the rule itself; for it would militate against all the fundamental notions of feus and military tenures, if a woman, other than a queen regent, could confer them.

"*Cujas* observes, that the ancient laws allowed a man to espouse under the title of concubine persons esteemed unequal to him, on account of the want of some qualities requisite to sustain the honor of full marriage. Though concubinage was beneath marriage, both as to dignity and civil effect, yet was a concubine a reputable title very different from mistress among us. She might be accused of adultery as well as a wife. This kind of concubinage is in use in some countries in Germany, under the title of left handed marriage. *(morgengabic)*

"Concubine is also used for a real, legitimate wife, and only distinguished by no other circumstances but a disparity of condition or birth, between her and her husband. Du Cange says, that we may gather from several passages in the epistles of the Popes, that they anciently allowed of such concubines.

"In effect, the Roman laws did not allow a man to espouse whom he pleased. There was required a kind of parity or proportion, between the condition of the contracting parties. But a woman of inferior condition, who could not be espoused as a wife, might be kept as a concubine; and the laws allowed it, provided the man had no other wife." Rees' Ency. title Concubine.

George the first, having separated from his wife, the Electress of Hanover, in consequence of the discovered attachment between her and Count Koningsmark, entered into a contract of concubinage, *(a morgengabic* or left handed marriage) with the Duchess of Kendall. Agreeably to the German custom, at the performance of the ceremony, he presented her with his left hand. 2 Walp. mem. 459, 479.

The present king, George IV. while Prince of Wales, was married to Mrs. Fitzherbert, a Roman Catholic lady, by a Roman Catholic priest, according to the rites of the Roman Church. The ceremony was performed in the presence of the then Duke of Orleans. This fact was commonly spoken of, generally believed, and was openly asserted by John Horne Tooke in his place in the house of commons, without positive denial. This contract, although a marriage in every other respect, yet as the laws of the land forbade the communication of states, amounted to no more than a contract of concubinage. If Mrs. F. could have been Princess of Wales by it, the ceremony would have been in all respects and completely a *marriage* ceremony. Hence the

contract may be formal and complete—it may be accompanied with avowed and notorious cohabitations—the *concubitus* of the canon, and the *consensus* of the civil law may concur—but if it be not accompanied with a participation of civil status, it may be licensed or unlicenced concubinage, but it is not marriage.

In Germany the left handed wife may be punished for adultery.

Another objection, fatal as I think on the ground of civil status, is that coloured persons among us, are not legally persons, but property. A colored man is not the less a species of property, although he be not the property of any particular person. His status consists in being property; so regarded by the laws; and dependant on the differences which nature has ordained.

Hence a colored man though no slave, is not sui juris; he must have a guardian appointed; he must act through his guardian. The colored man cannot sue out habeas corpus, as a white person; his guardian cannot sue out homine replegiando; he can only have ravishment of ward. Hence also it follows, as I apprehend, the colored man cannot hold real property. I see no way of surmounting the legal objections to this privilege.

A fortiori, he cannot enter into the far more important contract of marriage; a contract wherein the married persons are mere instruments to promote state purposes with views far beyond the marriage of the individuals. Can a colored man thus be joint party with the state?

(c) Suppose a free white married to a negro; how is he to protect her person from outrage? She cannot be a witness. How can he be assured of his progeny; if his wife cannot complain of force with any effect? But among the most important objects of matrimony to the individual is this certainty, that his children are his own; and that he and his wife can be protected against all invasions of this assurance.

(d) Under such a marriage contract, the guardian of the colored woman and the husband may be two different persons.

(e) By our laws, she is liable to a capitation tax, for the privilege of remaining in the state. Marriage would not free her from this impost, nor from the consequences of it. Her person, therefore, is not like that of a white woman under the control of her husband.

(f) Suppose her husband pays a visit with his wife to a northern state; or a colored husband accompanies his wife to another state, can he legally return with her? Is he not amenable to the late law?

(g) Can such a wife have dower? For I apprehend she cannot hold lands. But granting she may have dower, then by legal possibility, half the lands of the state may be held by a negro widow!

With all these legal disabilities—with all these impediments to the marriage contract—with so many obstacles and impossibilities against the most important and essential privileges of the marriage union, it would be a *nudum pactum*—a contract without mutuality of consideration—and void.

We are driven, I apprehend, to Mr. Dulany's conclusion before cited, that "whatever denies the civil essence, and legally appointed qualities of marriage, on which account it is an object of the law, must to be consistent, deny the capacity to marry."

Thirdly, Is an act of the legislature necessary on this occasion? I think not, for the following reasons:

Laws are declaratory, or remedial, or cumulative. A declaratory law acknowledges the existing law. A remedial law provides a remedy for an evil, where none was provided before; a cumulative law affords an additional remedy for an existing evil; giving the option to use the new or the old one.

Thus, a law providing a punishment against bigamy, does not constitute that an offence which was no offence before. Bigamy is a marriage contract void as being inconsistent with former and still existing duties and obligations of the same nature. No court of law would refuse to declare such a double marriage void, if there were no act concerning it—nor would it be doubtful whether such a marriage were not an indictable offence at law, as being against public decorum and public morals. A legislative proceeding and penalty therefore, would only be cumulative.

Suppose a man from motives of revenge, to go out at night and maim and destroy his neighbor's horses or cattle; and the frequency of this offence, should induce the legislature to pass a law with a penalty—such a law would not create a new offence; the act perpetrated would amount to malicious mischief, and be indictable at common law, notwithstanding the penalty enacted by the legislature. To declare it a punishable offence, would only be a declaratory law, and

the penalty would be cumulative. Mr. Fox's libel act, was a law simply declaratory.

To enter into a contract of marriage with a female, who would still remain deprived of the advantages and protection which it is the especial purpose of the marriage contract to extend to her; to enter into a marriage contract, whereby the rising generation would be deteriorated and dishonored —to enter into such a contract, when the conditions essentially implied in the very essence and definition of marriage could not be fulfilled; voluntarily to degrade one's-self and one's offspring for the mere purpose of temporary gratification—is clearly against public decency and public morals. The so doing is an offence in itself; it cannot be made so by any declaratory act of the legislature. The improper conduct was pre-existing. A law declaring such a marriage void, would be a declaratory act, as it ought to be; and a punishment inflicted, in my opinion, should be considered as cumulative.

Hence, I conclude that such a marriage would be a fraudulent contract; a contract under which the essential conditions of marriage could not be fulfilled; and therefore in legal acceptation, a void contract, especially as a contract of concubinage is not acknowledged by our law. Such a marriage contract being plainly in direct opposition to the important interests of the state, and derogatory to the character of the rising generation, would [I think] amount to an indictable offence against public decorum and public morals.

T. C.

P. S.—As a translation of the French and Latin authorities relied upon in the commencement of the above argument, may be desired by some of our readers, we add it here:

1. "Nuptials or Matrimony, is the lawful union of a man and a woman, constituting an individuality of civil and moral existence."—Inst. L. 1 Fit. 9 and 1.

"That is," says Pothier, "a communion of *all* rights and privileges, *all* benefits, *all* honors; for a wife enjoys each of these to which her husband is entitled by virtue of his rank and station."

2. "The wife contracts with her husband the obligation to follow him wherever he may see fit to establish a temporary or permanent residence."—*Poth. on Marriage.*

3. "A contract of marriage with one who, by condemnation to capital punishment, has forfeited his civil status or

rank in society, is deprived *ipso facto* of all civil effects."—*Poth. ut Supra.*

4. In France, no marriage is allowed between a negro man and white woman, or a negro woman and white man.

The civil status must no doubt, have had great weight, when distinctions of *caste* existed; under such a system the validity of marriage must have greatly depended upon the *status* or civil qualities of the parties.

DEALINGS BETWEEN TRUSTEE AND CESTUI QUE TRUST.

We publish the subjoined Opinion and Order of Chancellor HARPER, because some of the points are new, and all of them are questions of interest to the community and the Profession.

REYNOLDS and WIFE and others, *versus* SCARBOROUGH and BREWER.

When the Ordinary under the act of 1824, on examination finds the value of real estate to be divided or sold, not to exceed $1000, he has jurisdiction of the matter, and if the estate when sold brings more, the jurisdiction is not affected.

If the order of sale by the Ordinary states it to be made "on due examination," the court of equity will presume that the proper witnesses had been examined to shew the value before the order was made, although that fact is not stated on the record.

When the husband applies to the ordinary for a partition or sale of real estate, of which his wife is one of the distributees, she must be made a party to the proceedings.

An administrator stands in such relation of confidence as respects the real estate of his intestate, that if he discovers a gold mine on the land before the sale made by the Ordinary, he cannot purchase at that sale, except he makes a full disclosure of the discovery to the distributees.

The fact that the discovery of the gold mine was made a few months after the purchase by the administrator, throws the burthen of proof on him, and he cannot protect himself by the denial of the discovery in his answer, from an injunction going against him to stay waste in working the mine until hearing.

A purchase under the administrator, in the case stated, must not only deny all the facts which would constitute actual fraud, but he must deny those from which fraud may be presumed, as the relation of the administrator to the estate, the inadequacy of price, and the subsequent discovery of the mine.

Notice of the circumstances, which would vitiate the vendor's title, must affect the vendee.

Equity well enjoining, not only a technical trustee, but one who is made so by construction of the court, from working a gold mine, when there is no remedy at law—there is no difference between restraining the open-

ing a new mine, and the working one already opened, in the state of machinery now used in this country.

When there is a difficulty in procuring a correct account of the product of a gold mine, the court will stay the working, rather than order such account.

The motion was for an injunction to restrain waste by working a gold mine. The land in which the mine is, was part of the estate of William Reeder, deceased. The land was sold for partition, by order of the Court of Ordinary for Chesterfield District, under the provisions of the Act of Assembly of 1824, on the application of the complainant, Zachariah Reynolds, who had married a daughter of the intestate, William Reeder, and purchased by the defendant, John Scarborough, who was the administrator of the said Reeder. Other land of the estate was also sold by direction of the Ordinary; the whole for an amount something upwards of one thousand dollars. Since his purchase, the defendant, Scarborough, has sold to the other defendant, Brewer, the land, reserving to himself one half of the mine. The defendant's title is impeached, first on the ground of want of jurisdiction in the Ordinary, and next on the ground of fraud in the purchase of Scarborough, either actual or implied. The conveyances to defendants are sought to be set aside, and an injunction is prayed, to prevent the alleged irreparable injury that will result from the working of the mine, until the rights of the parties are adjudicated. I am to consider whether such a case is made out by the bill and admitted by the answer, as prima facie, entitles the complainants to the relief sought; and if so, whether according to the rules of the court, an injunction ought to issue to restrain the waste complained of, until the final hearing.

By the act of 1824, the Ordinary is authorized to make division or sale of real estate, provided "the value of the said real estate, to be ascertained by the Judges of the said Courts of Ordinary respectively, upon the oath or oaths of a credible witness or witnesses, shall not exceed one thousand dollars in value." It is urged that the result of the sale of this estate shews it to have exceeded one thousand dollars in value. I cannot think there is any thing in this ground of objection. The Ordinary is made the judge of the value, upon the oaths of witnesses, and it cannot be thought that an accidental excess in the price for which the estate shall sell, will vitiate his judgment. It is objected that it does not appear from the transcript of the Ordinary's proceed-

ings, that a witness or witnesses were examined by him, as the law directs. The act prescribes the precise form of the order to be made; and in exact conformity to it, this order is expressed to be made "on due examination." I must take it for granted that the proper witnesses were examined. There is another irregularity in these proceedings however, on which I think it proper to remark. The order was made on the application of the husband of one of the daughters of William Reeder. The wife did not join in it, nor was any notice of it given to her. The act declares that the Ordinary shall have power to make sale or division of real estate, "on the application of any person or persons *interested therein*." Now to a certain extent, the husband is certainly interested in the wife's real estate. The act of 1791, to which that of 1824 has reference, provides that "any person who may be entitled to a distributive share of any estate real or personal, and shall have arrived to the age of twenty one years or be married," may apply for partition. Now construing the acts together, it may well be questioned whether the *interest* required in the person making the application, is not that of heir or distributee; and consequently whether it was not altogether irregular to order the sale on the application of the husband, in which the wife did not join. But however this may be, I am clearly of opinion that notice ought to have been given to the wife personally. It was her estate and inheritance, and not the husband's, and the act provides for summoning each party interested. Another statute (the act of limitations) authorizes femes coverts to appoint attornies and sue for their real estate, without joining their husbands. That the husband should thus be able to deprive the wife of her inheritance, without her consent and without her knowledge, is inconsistent with the policy of our law in other instances, which carefully guards the inheritance of the wife. If a suit had been brought in equity for partition, the wife must unquestionably have been a party.

But I shall decide the motion on the other ground of actual or implied fraud. The circumstances charged in the bill as constituting actual fraud are in general denied by the answer; so that the determination must rest principally on the relation of the parties, which is supposed to constitute a case of presumptive or implied fraud. The purchaser Scarborough was the administrator of the intestate Reeder. The

doctrine relied on, is that which incapacitates a trustee to purchase from his cestui que trust. I have felt some difficulty as to this question, and have taken considerable pains in looking over the cases. The rules on this subject are perhaps not very exactly defined. It is clear enough that a trustee to sell cannot purchase of himself at his own sale, and such purchase shall be absolutely void at the election of the cestui que trust. (Exparte Lacey, 6 Ves. 625. Morse vs. Royal, 12 Ves. 372.) But a trustee is not absolutely incapacitated to purchase of his cestui que trust, "provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee." (Coles vs. Trecothick, 9 Ves. 246.) The Chancellor adds, "I admit it is a difficult case to make out, wherever it is contended the exception prevails." The same rule is applied to other persons, quasi trustees, standing in such a relation of confidence as gives one party an advantage over the other, with respect to the subject of their dealing—to an attorney dealing with his client; (Gibson vs. Jeyes, 6 Ves. 276;) a steward taking a lease from his employer; (Harris vs. Tremenheere, 15 Ves. 40;) to an agent; (Lowther vs. Lowther, 13 Ves. 95;) "he who bargains in matter of advantage with a person placing confidence in him, is bound to shew that a reasonable use has been made of that confidence; a rule applying to trustees, attornies, and every one else." (Per Ld. Eldon, in Gibson vs. Jeyes, 6 Ves. 278.) The first question that presents itself is, whether an administrator is in such a situation of confidence, with respect to the real estate of his intestate, as renders him in purchasing subject to the rule I have adverted to. On account of the nature of certain property in our state, our court of appeals has held that an executor or administrator may enter upon real estate, employ slaves upon it, superintend and receive the issues and profits. This seems indeed absolutely necessary. Title deeds generally come into his hands, and were in the administrator's hands in this case.—In the case of M'Guire vs. M'Gowen, 4 Eq. R. 486, the late court of appeals was clearly of opinion that M'Gowen's situation of administrator and guardian *ad litem* to the minors, in the proceeding for partition, was enough to vitiate his

purchase; though it was confirmed, on the ground of his right to protect his personal interest by bidding. In general, as observed by the chancellor in Fox vs. M'Reth, 2 Br. C. C. 420, if a stranger, knowing of a mine on a man's land, of which the owner was ignorant, should purchase the land, without informing the owner, the purchase would be good—he was under no legal obligation to give the information. But suppose the fact to be established by proof, which is charged in this case, that in consequence of his connection with the estate as administrator, the party had obtained knowledge of a mine in the land, would he be at liberty to purchase without disclosing his knowledge? If he would not, it is clear that he does not stand in the relation of a stranger to the real estate. He is in a relation of confidence, affording him advantages in his dealings with respect to the estate, and in conformity to the doctrine on the subject, his purchase must be subject to the jealous supervision of this Court.

But to apply this scrutiny to the facts of this case, as they appear in the bill and answer. First, as respects the defendant Scarborough. Being administrator, he purchased the land, for what appeared to be a fair consideration; but in the course of a few months it was found that the land contained a gold mine; which fact, had it been known at the time of the sale, would have greatly enhanced its value.—This is the whole case as it at present appears. Does this case entitle the complainant to relief; the defendant denying that he came to the knowledge of the mine before the sale, and there being no evidence to the contrary? I am inclined to think so; though it is not perhaps necessary to give a definitive opinion on this point at present. A purchase by a trustee at his own sale is absolutely void; a purchase from his cestui que trust, or a purchase of a quasi trustee is void; unless upon investigation he can shew that there was "no fraud, no concealment, no advantage taken by the trustee of knowledge acquired by him in the character of trustee." The rule of the court, as is said by the Chancellor in Gibson vs. Jeyes, throws the *onus* on him.—In Morse vs. Royal, it was admitted in argument, that "it is incumbent on the trustee, if a suit is instituted during his life, to *prove* that the cestui que trust knew not only that he was selling to his trustee; but also what he was selling; and that he had all the information his trustee could give him." (12 Ves. 365.) "In the case of mines for instance,

the trustee must make out either that he had given all the information he had, to the cestui que trust, or that the cestui que trust had clearly renounced the right of objecting." (Pr. Ld. Eldon, in Coles vs. Trecothick, 9 Ves. 247.) I doubt if the denial of the answer will do, if there is evidence against the trustee. What is the evidence against the trustee in this case? The fact that immediately after his purchase, the mine was discovered. The reasoning of the cases seems to make this sort of evidence conclusive. "The cestuis que trust may, by a new contract, dismiss him from that character; but even then that transaction by which they dismiss him, must, according to the rules of this court, be watched with infinite and most guarded jealousy; and for this reason, that the law supposes him to have acquired all the knowledge a trustee may acquire, and which may be very useful to him; but the communication of which to the cestui que trust, the court can never be sure he has made, when entering into the new contract by which he is discharged." "Suppose a trustee buys an estate, and by the knowledge acquired in that character, discovers a valuable coal mine under it; and locking that up in his own breast, enters into a contract with the cestui que trust; if he chooses to deny it, how can the court try against that denial? The probability is, that a trustee who has once conceived such a purpose, will never disclose it, and the cestui que trust will be effectually defrauded." (Ex parte Lacey, 6 Ves. 626.) If by a change of circumstances, subsequently to the purchase, as by the introduction of a new staple of cultivation, or the general prosperity of the country causing property to appreciate, it should turn out that the trustee has made an adventitious advantage, that would afford no presumption against the fairness of his purchase. But the peculiarity of this case is, that the circumstance which constituted the additional value was in existence, tho' unknown at the time of the sale, and it furnishes the precise instance, in which the cases have supposed an unfair advantage might be made by the trustee without the possibility of detection. In reference to this circumstance the price was inadequate. Harris vs. Tremenheere was the case of a purchase of a lease by a steward from his employer, and the decision turned simply on the fact of his having paid an inadequate consideration. The case of the complainants is also strengthened by the circumstance that they

were infants, and that Mrs. Reynolds was no party to the proceedings before the Ordinary. The declaration of Scarborough, admitted by his answer to have been made at the sale, 'that he too was bidding for the benefit of the children,' is a circumstance not without its weight. It was exceedingly liable to be misunderstood, and to prejudice the sale.—In granting the present motion, however, I do not mean to express an opinion that this purchase must be ultimately declared bad. I mean to put it on the ground that the presumption is against it. From the relation in which he stood, the burden is thrown on the defendant of proving (so far as the matter is susceptible of proof) that his conduct was fair. He has no right to avail himself of the benefit of his purchase, until it has been subjected to the scrutiny of this court.

I have considered the motion only in reference to the defendant Scarborough. The defendant Brewer relies on his being a bona fide purchaser for valuable consideration, without notice; and he denies his having had notice of any fact which could impeach Scarborough's title. He means to deny all the facts charged, which would constitute actual fraud. It is apparent, however, that he knew all the circumstances that I have adverted to, which go to raise the presumption against Scarborough's title. He knew that Scarborough was administrator when he purchased; he knew the price he gave, for he was his security for the purchase money; and when he took his conveyance, he knew there was a gold mine on the land. Notice of the circumstances that vitiate his vendor's title, must affect him; and I think these are prima facie sufficient for that purpose.

It was argued that an injunction was not proper in this case, because the rule of the court is, that one in possession claiming under an adverse title, is not subject to an injunction. This is in general true, because one so in possession, if his title be not good, is committing trespass, and the remedy is at law. (See the cases collected in Chancellor De Saussure's note to Shubrick vs. Guerard, 2 Eq. R. 620.) So it is said an injunction will not be granted against one having the legal estate of inheritance; because such a one has a right to commit waste—unless he be a trustee, not liable to an action of waste, as observed 1 Mad. Ch. 115. This must apply equally to a technical trustee, and to one who is to be made a trustee by construction of this court, provided there be no remedy at law.

According to the view I have taken, the case depends on equitable principles alone, and the remedy must be in this court. The defendants have the legal title. This remedy must be either by giving an account, or by injunction. It is manifest that the injunction is the more safe and efficient remedy. If the defendants should not be disposed to account fairly, I do not know on what principles the account could be taken. If an issue should be ordered, I know not by what evidence the damages could be fixed. It seems the more necessary, as the defendants have failed to set out an account. In the case of Grey vs. The Duke of Northumberland, 13 Ves. 236; 17 Ves. 281, the question was, whether the lord of the Manor had a right to open mines within the copyholds of the manor, and an injunction was granted to restrain the opening of the mine, until the question should be determined. In that case a distinction was taken between restraining the opening of a mine, and stopping the working of one already open, on account of the irreparable mischief that might be done by stopping one already working—I suppose by the dilapidation and decay of machinery, shafts, &c. No such reason seems to exist against stopping a gold mine as they are worked in this country.

It is ordered that an injunction issue to restrain the defendants, John Scarborough and Burrell Brewer, their servants, agents, &c. from digging, or in any manner working or using any mine on the lands mentioned in the proceedings, or otherwise wasting the same, until the final hearing or the further order of this court.

WM. HARPER.

ADVERSE POSSESSION.

———ooo———

WHETHER a Tenant under any circumstances can claim to hold adversely to his landlord, and protect himself under the statute of limitations against his title, has been much doubted. The question has lately been very fully considered by Chancellor *Harper*, in an argument prepared by him before his promotion to the Equity Bench, in the case of Willison and Watkins, and by the Supreme Court of the United States, in their late decision of the same case. For the information of the profession, we publish the argument and opinion of that Court.

In Powe vs. Ellerbe, decided lately in the Court of Appeals, on an issue out of Chancery, Judge *Johnson* says that Chancellor *Harper's* argument in Watkins and Willison states the law correctly.

Chancellor HARPER's argument—

The fourth ground of error is the instruction of the Judge to the jury, that "under the law of South Carolina when a tenancy has been proved at any time to have existed, not only such tenancy must be abandoned, but the possession must be given up, before an adverse possession can be set up, or a possessory title, under the statute, can be acquired;" and consequently, as the defendant's ancestor had gone into possession as the tenant of Bourdeaux, which possession had been continued in his heirs to the present day, the defendant could not sustain his plea of the statute of limitations.

The statute requires five years possession to give title. The defendant below, and those under whom he claims, had been in possession more than thirty years before the bringing of the action. In the year 1789, Willison was in possession, and he was perhaps shewn to have had possession in the character of Bourdeaus' tenant up to 1792. From the latter year, there is no proof of any rent paid or acknowledgement of tenancy. More than twenty years before the bringing of the action, there was notice to the landlord, Bourdeaux, that the tenant Willison, claimed in his own right. In 1802, the widow of Willison denied the right of Ralph Spence Philips, after the act passed in his favor, and refused to give up possession on his demand; and afterwards defended the suits brought by him. The question is, was there an *adverse* possession of five years.

The English law is the law of South Carolina on this subject. No statute has altered it, and it is believed no judicial decisions have departed from it. An erroneous conclusion is thought to have been drawn from some dicta in the cases of *Anderson ads. Darby*, 1 *Nott & M'Cord*, 370, and *Wilson ads. Weathersby* reported in a note to the first case. There was no question made, in those cases, with respect to the statute of limitations; the whole question was whether a person who had taken possession as tenant, could avail himself of that possession, to put his landlord to the proof of his title; or if he had in fact acquired a better title, whether the landlord ought not to recover the possession. And it was so held, it is believed, correctly. If a tenant at the end of his term refuse to give up the possession, alleging that he

has acquired the title, the landlord will recover on the mere proof of the demise, nor will the tenant be permitted to set up an *adverse* title in himself. If he gives up the possession bona fide, and afterwards recovers it, he stands in the situation of any other defendant, and the landlord, plaintiff, who sues him, must prove his title. But an evasive pretext of giving up possession, and then seizing it again, will not do. This and nothing more is said in *Wilson* and *Weathersby*. But if at the end of the term, the tenant gives notice to the landlord that he claims for himself, and the landlord acquiesces in the claim, or neglects to vindicate his rights for a period long enough to allow the statute of limitations to run, it is imagined never to have been made a question before, whether the tenant's title would be perfected.

Willison was the tenant of Bourdeaux some time previous to 1792.—For what term, or on what terms, does not appear There does not appear to have been any payment of rent or recognition of the landlord's title, after that date. The law will presume that the tenancy was from year to year.

The positions are—

1st. That the possession was certainly adverse from the time that the landlord (or claimant of the land, Ralph Spence Philips) had notice that the tenant claimed in his own right.

2nd. That from the mere length of the possession, without paying rent or a recognition of the landlord's title, the jury ought to have been instructed to presume an adverse possession—or an ouster.

It is believed that under *these* circumstances, possession will always be considered adverse—where the party in possession claims in his own right, and does no act recognizing a right in another, his possession will be adverse to all who have notice of such claim, and whose rights are so far violated that they might sue. It is not always necessary that all these circumstances should concur; but it is believed that when they do concur, no case can be imagined where the possession will not be construed adverse.

If the party in possession does not claim in his own right, his possession will be construed to be the possession of him in whose right he claims. If it be in the right of the party whose title is afterwards sought to be enforced, it cannot of course be adverse. If in any other right, it will.

He must do no act recognizing a right in another. If a tenant after the expiration of his term, sets up a claim for him-

self, and even gives notice of it to his landlord, yet continues to pay rent, this recognition of the landlord's title will prevent his possession being adverse. If one goes into possession under a contract to purchase, the money not being paid, as long as the contract subsists, it is a recognition of the vendor's right, and the statute will not run; but if the money be paid, or the contract itself barred by the lapse of time or the statute of limitations, the possession will then be adverse.—A mortgager holds in the right of the mortgagee, and the mortgage is a recognition of his title; but when the debt is presumed satisfied from lapse of time, there is an end to the mortgagee's right in the land.

It is not generally necessary that the party whose rights are to be affected, should have notice; but in some cases it may be. If a party enter by bare permission, remain as a tenant at sufferance, paying no rent, the tenancy cannot be determined by the tenant, without notice to the landlord, whatever claim the tenant may set up with himself or to others. The law will not permit one to lose his rights, who has no means of knowing that they are usurped. If a tenant at will, paying rent, should refuse or neglect to pay for a long time, this might, and it is believed would, amount to notice of an adverse claim. The English authorities seem to be, that the statute runs in favor of such a tenant, or a tenant from year to year, as soon as he ceases to pay rent. (*Run. on eject.* 60, *Denn. ex dem. Warren* v. *Fearnside*, 1 *Wils.* 176.)

It is always necessary that the rights of the party to be affected by the statute, should be so far violated, as to put it in his power to vindicate them by proceeding at law. If it be not in the party's power to assert his rights by law, the law will not permit him to lose them; but the whole scope and purpose of the statute is, that if it be in his power, and he neglects it, he shall lose them. A tenant in possession for a term of years or for life, can gain no rights by the statute, during the continuance of his term, whatever claims he may set up, or whatever notice he may give to the landlord or remainder man, because they cannot sue; but says Lord Mansfield, in *Doe ex dem. Fisher and wife, and Taylor and wife vs. Prosser. Cowp.* 217—"if tenants per autre vie hold over for twenty years after the death of the cestui que vie, such holding over will in ejectment be a complete bar to the remainder man, because it is adverse to his title."

Stress was laid on particular expressions, in certain cases,

as, that "to make a possession adverse it must be hostile in its inception," in *Harrington* vs. *Wilkins*, 2 *M'Cord* 289; that "it must be against the will of the rightful owner, that where the possession was taken in right of the party claiming, there must have have been an ouster; that possession to be adverse must commence in a trespass;" though it is believed that not even a dictum can be found in favor of the last of these positions. In these instances it is plain that strained inferences have been drawn from loose expressions, not warranted by the context.

What is meant by possession being *hostile?* It can hardly refer to a disposition of the mind—personal hostility. If there is an usurpation of rights which belong to another, that is hostile enough. The possession of one claiming in his own right, is of course hostile to another, to whom the right belongs, or who claims the right. In the hundred cases of daily occurrence, where a squatter takes possession of an unoccupied tract of land, there is no other hostility than this—in no other sense, is it "against the will of the rightful owner," who knows nothing about it. In the cases of *Lyles and Lyles*, *State Reports*, *Equity*, 288, and in *Roberts and Roberts*, 2 *M'Cord*, 268, two of our Courts of ultimate resort have decided, that where a father made a parol gift of a tract of land to a son, and put him into possession, the son acquired a title by the statute. In what sense was the possession hostile here? It was acquired and held, during the time required for the statute to run, in pursuance of the will and by the act of the owner; and certainly was not a trespass, for the parol license to enter was good. In the instances before alluded to, of entering under an agreement to purchase, the money being paid, or the case of a parol sale, and purchase money paid, the parties being ignorant of the necessity of writing to convey—or of a conveyance accidentally defective, so as not to transfer the estate, but possession held long enough under it for the statute to run—or a parol gift of land to a stranger, and possession held in consequence, (for if the possession of a son may be adverse to a father in such case, a fortiori will that of a stranger be to his donor)—in which of these, was the possession hostile, or against the will of the rightful owner, in any other than the sense that we have imputed to the words? In which did the possession commence in a trespass? And with respect to which of them will any lawyer hold the law to be doubtful?

It is said in the books, that the possession of one joint tenant, tenant in common &c. is the possession of the other, and therefore the statute of limitations will not run in favor of one who retains the possession and receives the profits, without an *ouster* of his co-tenant. But the position is broader—in all cases whatever, there must be an *ouster*, or *disseisin* of the owner, to enable the statute to run. What then is an ouster? Turning out by the neck and shoulders? A personal trespass? In the case of the squatter, and the other instances I have enumerated above, there was a sufficient ouster. In general, the bare taking possession is ouster enough. But something more is necessary in the case of tenants, joint tenants, &c. What is an ouster here? In the case of Doe and Prosser, referred to above, Lord Mansfield says, "if, upon demand by the co-tenant of his moiety, the other denies to pay and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough." To continue in possession, and deny the co-tenant's title, (on his demand, with his knowledge,) is an ouster." So in Story vs. Lord Windsor, 2 Atk. 649, Lord Hardwicke after laying down the law that the statute will not run as between joint tenants, without *some* ouster, says, "a fine and non-claim by the tenant in possession, will bar his companion, for this has always been admitted to be evidence of an actual ouster." And why so? Because levying the fine is setting up an exclusive claim for himself, and the notoriety of the proceeding is presumed to give his co-tenant notice of the fact. In all these cases then if the party in exclusive possession claims in his own right, and the co-tenant has notice of the claim, it is ouster enough.

How is the case of an ordinary tenancy? The English authorities seem to be, that the mere holding over after a term of years, or for life, is a sufficient ouster; and there seems to be no reason why it should not be so considered. It is an usurpation of the right of the landlord or remainder man, of which the law must suppose them aware. If they take no means to vindicate their rights, it is their own folly and laches.

In the case of tenancy from year to year, I do not suppose, that in South Carolina, the possession of the tenant who holds over after the expiration of his year, can be considered adverse from that time; because a statute provides that

the lease shall be presumed to be renewed, if no notice to the contrary be given. But if due notice be given by the tenant, that he will not remain as tenant, but that he claims in his own right, under what imaginable view of the subject, can it be thought that his possession continues the possession of the landlord? Of course, no claim by the tenant or notice to the landlord, could make the possession adverse, till the term was expired, and the landlord might sue.

The whole scope and policy of the statute is, that one who will not vindicate his rights when he may, shall lose them. Its object is to quiet litigation. The right is presumed to be in the party who has had the possession, because those who were interested to deprive him of the possession, have acquiesced in it. The presumption from length of time, says Lord Erskine, in Hilleary vs. Waller, 12 Ves. 264, is, "that a man will naturally enjoy what belongs to him." *It is believed that no case can be put, where a man knows that another claims, and is in the enjoyment of what belongs to him, and neglects to pursue his claims at law, when there is nothing to prevent his doing so, that he will not be barred by the statute.*

But after a certain lapse of time, he will be presumed to know. It is the English law, and many cases might be cited to shew it, that the possession of one joint tenant is the possession of the other; and that the bare possession and receipt of the profits by one, is no ouster of his co-tenant.—But yet in the case of Doe and Prosser before referred to, Lord Mansfield left it to the jury to presume an ouster, from the mere possession and receipt of profits. The length of the possession in that case, was thirty-six years; not quite double the time required for the English statute to run. In this case, the possession without paying rent, (which must be equivalent to the exclusive receipt of profits in the case of joint tenancy,) was six times the period required by the statute of South Carolina.

The terms of the lease under which Willison entered, did not appear; the presumption is, that it was a tenancy from year to year. Within what time would the presumption of an adverse holding arise after the expiration of the term? There is no decision directly on the point in this state; but from analogy we should say, within one year from the time he ceased to pay rent. During that year, the landlord, if he had given no notice to quit, could not sue; for the law

presumes a renewal of the lease, and therefore the statute would not begin to run. He might give notice, however, before the end of that year, and sue at its conclusion. And if he neglects to do so, or to demand rent, or obtain some other recognition of his title, what can be more fair than the presumption that the tenant holds adversely. And if, during the whole period afterwards, required for the statute to run, there should be no demand of rent, or suit by the landlord, or recognition of his title by the tenant, can any presumption be more strained and improbable, than that he has continued to hold all that time in the landlord's right. It is not disputed that there may be circumstances in a case to shew that such was the fact; but we speak of a case in which all such circumstances are wanting.

However this may be, there must surely be *some* period at which the presumption of an adverse holding would arise. If the law be as laid down in the circuit court, that "when a tenancy has been proved at any time to have existed, not only such a tenancy must be abandoned, but *the possession must be given up*, before an adverse possession can be set up, or a possessory title under the statute can be acquired," then, if one or two centuries, instead of thirty years, had elapsed after he, who entered as tenant, had paid rent, or, done any act acknowledging the landlord's title, the statute could not avail him. We cannot believe that this will be the construction of a statute intended to quiet litigation.

If the law be as laid down, then, although the defendant below had proved explicitly, (as he attempted to do by circumstances,) that thirty years before the beginning of the action, his ancestor had purchased and paid for the land, but neglected to take a conveyance, or if the fact had been that he had taken a conveyance, but had lost it, and the defendant was unable to prove the existence and loss, still no title under the statute could be set up.

If the case had been, that in 1789 the defendant's ancestor had obtained a conveyance from a third person, who claimed the land, under what the tenant believed a paramount title, and had given notice to the landlord at the expiration of his term, that he claimed under such title; nay, though the landlord had acquiesced in such claim, and admitted it to be the better title, and had therefore forborne to sue, still neither the lapse of time, nor the statute of limitations would prevent his contesting such title now. This

certainly is not the law of any other state or country, where the English law obtains, and it is believed not to be the law of South Carolina.

SUPREME COURT OF THE UNITED STATES, JANUARY TERM, 1830.

THOMAS WILLISON, plaintiff in error, vs. ANDERSON WATKINS, defendant in error.

It is an undoubted principle of law, fully recognized by this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating that contract by which he claimed and held the possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time, or demand of possession.

The same principle applies to mortgagor and mortgagee, trustee and cestui que trust, and generally to all cases where one man obtains possession of real estate belonging to another by a recognition of his title.—

In no instance has the principle of law which protects the relations between landlord and tenant, been carried so far as in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time, that the act of limitations has run out four times before he has done any act to assert his right to the land.

When a tenant disclaims to hold under his lease, he becomes a trespasser, and his possession is adverse, and as open to the action of his landlord, as a possession acquired originally by wrong. The act is conclusive on the tenant. He cannot revoke his disclaimer and adverse claim, so as to protect himself during the unexpired time of the lease.—He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right.

If the tenant disclaims the tenure, claims the fee adversely in right of a third person, or in his own right, or attorns to another, his possession then becomes a tortious one, by the forfeiture of his right, and the landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment he disclaims the tenancy, and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and the tenant which can protect his

possession from this adversary suit; and at the same time recover on the ground of there being a tenure so strong as that he cannot set up his adversary possession.

A mortgagee, or direct purchaser from a tenant, or one who buys his right at a sheriff's sale, assumes his relation to the landlord, with all its legal consequences, and is as much estopped from denying the tenancy.

If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled, before we would give our sanction to such a doctrine; and this is not the case upon authorities.

The relation between tenants in common is, in principle, very similar to that between lessor and lessee. The possession of one is the possession of the other, while ever the tenure is acknowledged. But if one ousts the other, or denies the tenure, and receives the rents and profits to his exclusive use, his possession becomes adverse, and the act of limitations begins to run; so of a trustee; so of a mortgagee.

In relation to the limitations of actions for the recovery of real property, the court think it proper to apply the remarks of the learned judge who delivered the opinion of the court in the case of Bell *vs.* Morrison, 1 Peters, 360, and to say, the statute ought to recieve such a construction as will effectuate the beneficent objects which it intended to accomplish, the security of titles, and the quieting of possessions. That which has been given to it in the present case is, we think, conformable to its true spirit and intention, without impairing any principle heretofore established.

Error to the circuit court of the district of South Carolina.

An action of trespass to try titles was brought in the circuit court of South Carolina, on the 20th of April 1822, by the defendant in error, against the plaintiff in this court, for the recovery of six hundred acres of land situated on the Savannah river. The title claimed by the plaintiff below, and the evidence, are fully stated in the opinion of the court.

On the trial in the circuit court, the defendant proved that Samuel Willison, his father, had possession of the land in 1789, and cultivated it till the period of his death in 1802, from which time his widow and family possessed it until the death of his widow in 1815; and that from 1815 until this action was brought, the children retained possession by their tenants. That in the lifetime of Samuel Willison, Bordeaux, through whom the plaintiff claimed, was apprised that he claimed to hold the land by an adverse title. That the widow in 1802, on demand made, refused to give possession to Ralph S. Phillips who claimed the land, and set up a title in herself, and was sued as a trespasser. That in 1793, Bordeaux and Willison were in treaty for the sale of this land; Bordeaux wishing to sell and Willison to pur-

chase. The plaintiff then offered in evidence a power of attorney from Bordeaux to Willison, dated February, 1792, authorising him to take possession of the land, and sue trespassers; and that Willison was then a tenant of Bordeaux. The defendant having pleaded the statute of limitations (five years adverse possession giving a title under it) relied upon the foregoing facts. But the presiding Judge overruled the plea, and instructed the jury that, when a tenancy had been proved to have once existed, the tenancy must not only be abandoned, but possession given up, before an adverse possession can be alleged. To this decision the defendant excepted.

The defendant brought this writ of error.

In the argument of the cause, the counsel for the plaintiff in error presented for the consideration of the court other exceptions besides that upon which the judgment of the circuit court was reversed. The decision of the court is exclusively upon the law arising on that which is stated.

The case was argued by Mr. Blanding and Mr. M'Duffie for the plaintiff in error, and by Mr. Berrien, attorney general, for the defendant.

Mr. Justice Baldwin delivered the opinion of the Court.

This was an action of trespass to try titles, brought in 1822, in the Circuit Court of the United States, for the district of South Carolina, by Watkins against Willison, for a tract of land containing six hundred acres, on the Savannah river. This land was originally granted to James Parsons, who conveyed to Ralph Phillips, whose estate was confiscated by an act of Assembly of South Carolina, and vested in five commissioners appointed by the legislature of that state. The five commissioners acted in execution of the law, but before any conveyance was made of the land in question, one of them had died, and two of the others had ceased to act, or resigned in 1783. The two remaining commissioners, in 1788, conveyed this land to Daniel Bordeaux and R. Newman, who in the same year executed to the treasurer of the state, a bond and mortgage to secure the payment of the purchase money, which, pursuant to an act of assembly passed for that purpose in 1801, was transferred and delivered to Ralph S. Phillips, the son of Ralph Phillips, to be disposed of as he should think proper; and by the same law the confiscation act, so far as respected Ralph Phillips, was repealed. A suit was brought on this bond in the name of the

treasurer of the state in 1803, against Daniel Bordeaux, and prosecuted to final judgment against his administrators in 1817, when an execution issued, on which the land was sold and conveyed by deed, from the Sheriff to Anderson Watkins, the plaintiff in the circuit court, who claims by virtue of the sheriff's deed, and as standing in the relation of landlord to the defendant.

Samuel Willison, the father of the defendant, entered into possession of the premises in question in 1789, and cultivated them till his death in 1802; from which time his widow and children possessed them, till her death in 1815; since which time the children have retained possession by their tenants, till the commencement of this suit.

In 1802, Ralph S. Phillips, who was then the assignee of the bond and mortgage, made a demand of the possession from the widow, who refused to give it up, and set up a title in herself. He brought an action of trespass against her to try titles in January, 1803, in which he was nonsuited in November, 1805; and in March, 1808, he brought another action of the same nature against her, in which no proceedings were had after 1812, which by the law and practice of South Carolina, operates as a discontinuance of the action.

In 1792 Bordeaux, the mortgagor, executed to Willison a power of attorney authorizing him to take possession of the land, and sue trespassers. Willison was then a tenant of Bordeaux.

In 1793 they were in treaty for the sale of the land; Bordeaux wanting to sell, and Willison to purchase. But during the life time of Willison, Bordeaux was apprised that he claimed to hold the land by an adverse title. The defendant exhibited no title other than what is derived from the possession of his father and the family.

The first question which arose at the trial, was on the admission in evidence of the deed from the two commissioners to Bordeaux and Newman; the defendant alleging, that no title passed by it, because it was not signed by the other two commissioners. The circuit court overruled the objection; the deed was read, and this becomes the subject of the first error assigned in this court.

As the court have been unable to procure the confiscation act of South Carolina, we are unwilling to express any opinion on this exception without examining its provisions, which are very imperfectly set out in the record; and as the merits

of the case can be decided on another exception, we do not think it necessary to postpone our judgment.

The remaining exception is, that the circuit court erred in charging the jury, that the claim of the plaintiff was not barred by the act of limitations of South Carolina, which protects a possession of five years from an adverse title.

It appears from the record, that the defendant and his family have been in possession of this land for thirty-three years next before this suit was brought; but whether that possession has been adverse to the title of the plaintiff during the whole of that time, or such part of it as will bring him within the protection of this law, becomes a very important inquiry.

The plaintiff contended, at the trial, that, by becoming the tenant of Bordeaux, Willison the elder, and his heirs, so long as they remain in possession, are prevented from setting up any title in themselves, or denying that of Bordeaux, without first surrendering to him the possession, and then bringing their suit. That the possession of the tenant being the possession of the landlord, he could do no act by which it could become adverse, so that the statute of limitations would begin to run in his favour, or operate to bar his claim, by any lapse of time, however long.

The defendant, on the other hand, contended, that from the time of the disclaimer of the tenancy by Willison, and the setting up of a title adverse to Bordeaux and with his knowledge, his possession became adverse, and that he could avail himself of the act of limitations if no suit was brought within five years thereafter.

It is an undoubted principle of law fully recognised by this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself, or a third person, during the existence of the lease or tenancy. The principle of estoppel applies to the relation between them, and operates in its full force to prevent the tenant from violating that contract by which he obtained and holds possession. 7 Wheat. 535. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination, by the lapse of time, or demand of possession. The same principle applies to mortgagor and mortgagee, trustee

and cestui que trust, and generally to all cases where one man obtains possession of real estate belonging to another, by a recognition of his title. On all these subjects the law is too well settled to require illustration or reasoning, or to admit of a doubt. But we do not think, that in any of these relations, it has been adopted to the extent contended for in this case, which presents a disclaimer by a tenant with the knowledge of his landlord, and an unbroken possession afterwards for such a length of time that the act of limitations has run out four times before he has done any act to assert his right to the land. Few stronger cases than this can occur, and if the plaintiff can recover without any other evidence of title than a tenancy existing thirty years before suit brought, it must be conceded that no length of time, no disclaimer of tenancy by the tenant, and no implied acquiescence of the landlord, can protect a possession originally acquired under such a tenure.

If there is any case which could clearly illustrate the sound policy of acts of repose and quieting titles and possessions by the limitation of actions, it is in this. Here was no secret disclaimer, no undiscovered fraud; it was known to Bordeaux, and was notice to him that Willison meant to hold from that time by his own title and on adverse possession. This terminated the tenancy as to him, and from that time Bordeaux had a right to eject him as a trespasser. Adams on Eject. 118. Bull. N. P. 96. 6 Johns. Rep. 272.

Had there been a formal lease for a term not then expired, the lessee forfeited it by this act of hostility; had it been a lease at will from year to year, he was entitled to no notice to quit before an ejectment. The landlord's action would be as against a trespasser; as much so as if no relation had ever existed between them.

Having thus a right to consider the lessee as a wrongdoer, holding adversely, we think that under the circumstances of this case the lessor was bound so to do. It would be an anomalous possession, which as to the rights of one party was adverse, and as to the other fiduciary, if after a disclaimer with the knowledge of the landlord, and attornment to a third person, or setting up a title in himself, the tenant forfeits his possession and all the benefits of the lease he ought to be entitled to, such as result from his known adverse possession. No injury can be done the landlord unless by his own laches. If he sues within the period of the act of

limitations he must recover; if he suffers the time to pass without suit, it is but the common case of any other party who loses his right by negligence and loss of time.

As to the assertion of his claim, the possession is as adverse and as open to his action, as one acquired originally by wrong; and we cannot assent to the proposition that the possession shall assume such character as one party alone may choose to give it. The act is conclusive on the tenant. He cannot make his disclaimer and adverse claim, so as to protect himself during the unexpired term of the lease; he is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right.

It is on this principle alone that the plaintiff could claim to recover in this action. If there was between him and the defendant an existing tenancy at the time it was brought, he had no right of entry. The lessee cannot be a trespasser during the existence of the lease, and cannot be turned out till its termination. At the end of a definite term the lessor has his election to consider the lessee a trespasser and to enter on him by ejectment; but if he suffers him to remain in possession, he becomes a tenant at will, or from year to year, and in either case is entitled to a notice to quit before the lessor can eject him. The notice terminates the term, and thenceforth the lessee is a wrongdoer and holds at his peril. Woodfall's Land. and Ten. 218, 220. 2 Serg. and Rawle, 49.

If the tenant disclaims the tenure, claims the fee adversely in right of a third person or his own, or attorns to another, his possession then becomes a tortious one, by the forfeiture of his right. The landlord's right of entry is complete, and he may sue at any time within the period of limitation; but he must lay his demise of a day subsequent to the termination of the tenancy, for before that he had no right of entry. By bringing his ejectment, he also affirms the tenancy and goes for the forfeiture. It shall not be permitted to the landlord to thus admit that there is no tenure subsisting between him and defendant which can protect his possession from his adversary suit, and at the same time recover on the ground of there being a tenure so strong that he cannot set up his own adversary possession.

The plaintiff claims without showing any title in himself, or any right of possession, except what exists from the con-

sequences of a tenancy, the existence of which he denies in the most solemn manner, by asserting its termination before suit brought.

The principle here asserted is not new in this court. In the case of Blight's lessee vs. Rochester, 7 Wheat. 535, 549, the plaintiff's lessors claimed as heirs of John Dunlap; the defendant claimed by purchase from one Hunter, who professed to have purchased from Dunlap. The defendant acknowledged the title of Dunlap as the one under which he held. Dunlap had in fact no title; but the plaintiffs insisted that the defendant could not deny his title. The Chief Justice, in giving the opinion of the court, observes—"If he holds under an adversary title to Dunlap, his right to contest his title is admitted. If he claims under a sale from Dunlap, and Dunlap himself is compelled to aver that he does, then the plaintiffs themselves assert a title against this contract. Unless they show that it was conditional and that the condition is broken, they cannot, in the very act of disregarding it themselves, insist that it binds the defendant in good faith to acknowledge a title which has no real existence.

We are not aware that in applying this doctrine to the case now before the Court, we shall violate any settled principle of the common law.

If a different rule was established, the consequences would be very serious. A mortgagee, a direct purchaser from a tenant, or one who buys his right at a sheriff's sale, assumes his relations to the landlord with all their legal consequences, and they are as much estopped from denying the tenancy. If no length of time would protect a possession originally acquired under a lease, it would be productive of evils truly alarming, and we must be convinced beyond a doubt that the law is so settled before we could give our sanction to such a doctrine.

An examination of the authorities on this point, relieves our minds from all such apprehensions, by finding our opinion supported to its full extent by judicial decisions entitled to the highest respect, and which we may safely adopt as evidence of the common law.

The case of Hovenden vs. Lord Annesley was that of a tenant who had attorned to one claiming adversely to his lessor with his knowledge. In delivering his opinion, Lord Redesdale entered into a detailed view of the decisions on the application of the act of limitations to trusts of real and

personal estate in courts of law and chancery, and to fiduciary possessions generally. On the point directly before us he observes—"That the attornment will not affect the title of the lessor so long as he has a right to consider the person holding possession as his tenant. But as he has a right to punish the acts of his tenant in disavowing the tenure by proceeding to eject him, notwithstanding his lease; if he will not proceed for the forfeiture, he has no right to affect the rights of third persons on the ground that the possession was destroyed, and there must be a limitation to this as well as every other demand. The intention of the act of limitations being to quiet the possession of lands, it would be curious if a tenant for ninety-nine years, attorning to a person insisting he was entitled, and disavowing tenure to the knowledge of his former landlord, should protect the title of the original lessor for the term of ninety-nine years. That would, I think, be too strong to hold on the ground of the possession being in the lessor, after the tenure had been disavowed to the knowledge of the lessor."

The relation between tenants in common is, in principle, very similar to that between lessor and lessee; the possession of one is the possession of the other, while ever the tenure is acknowledged. Cowp. 217. But if one ousts the other, or denies the tenure, and receives the rents and profits to his exclusive use, his possession becomes adverse, and the act of limitations begins to run. 2 Scho. & Lef. 628, &c. and cases cited. 4 Serg. & Rawle, 570. The possession of a trustee is the possession of the cestui que trust, so long as the trust is acknowledged; but from the time of known disavowal it becomes adverse. So of a mortgagee, while he admits himself to be in as mortgagee, and therefore liable to redemption. 7 Johns. Cha. 114, &c. and cases cited. But if the right of redemption is not foreclosed within twenty years, the statute may be pleaded; and so in every case of an equitable title, not being the case of a trustee, whose possession is consistent with the title of the claimant. 7 Johns. Cha. 122.

After elaborately reviewing the English decisions on these and other analogous subjects, Chancellor Kent remarks, it is easy to perceive that the doctrines here laid down are the same that govern courts of law in analogous cases, and the statute of limitations receives the same construction and application at law and in equity. Kane vs. Bloodgood, 7

Johns. Cha. 90, 122. It is equally said that fraud as well as trust are not within the statute, and it is well settled that the statute does not run until the discovery of the fraud; for the title to avoid it does not arise until then; and pending the concealment of it, the statute ought not to run. But after the discovery of the fact imputed as fraud, the statute runs as in other cases; and he cites in support of this position, 1 Browne's Parliament. Cases, 455. 3 P. Wms. 143. 2 Scho. & Lef. 607, 628, 636, and the cases cited.

In the case of Hughes vs. Edwards, 9 Wheat. 490, 497, it was settled that the right of a mortgagor to redeem is barred after twenty years possession by the mortgagee after forfeiture, no interest having been paid in the mean time, and no circumstance appearing to account for the neglect. 7 Johns. Cha. 122. 2 Sch. & Lef. 636. The court in that case say, that in respect to the mortgagee, who is seeking to foreclose the equity of redemption, the general rule is, that where the mortgagor has been permitted to remain in possession, the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption; as payment of interest, a promise to pay, an acknowledgement by the mortgagor that the mortgage is still existing, or the like.

All these principles bear directly on the case now before us, they are well settled and unquestioned rules in all courts of law and equity, and necessarily lead to the same conclusion to which this court has arrived. The relations created by a lease are not more sacred than those of a trust or a mortgage. By setting up or attorning to a title adverse to his landlord, the tenant commits a fraud as much as by the breach of any other trust. Why then should not the statute protect him, as well as any other fraudulent trustee, from the time the fraud is discovered or known to the landlord? If he suffers the tenant to retain possession twenty years after a tenancy is disavowed, and cannot account for his delay in bringing his suit; why should he be exempted from the operation of the statute more than the mortgagor or the mortgagee? We can perceive no good reasons for allowing this peculiar and exclusive privilege to a lessor; we can find no rule of law or equity which makes it a matter of duty to do it, and have no hesitation in deciding that in this case the statute of limitations is a bar to the plaintiff's action.

In doing this we do not intend to dispute the principle of any case adjudged by the Supreme Court of South Carolina. Of those which have been cited in the argument there are none which in our opinion controvert any of the principles here laid down, or profess to be founded on any local usage, common law, or construction of the statute of limitations of that state. One has been much pressed upon us, as establishing a doctrine which would support the position of the plaintiff, which deserves some notice. In the case in 1 Nott and M'Cord, 374, the court decide, that where a defendant enters under a plaintiff, he shall not dispute his title while he remains in possession, and that he must first give up his possession, and bring his suit to try titles. To the correctness of this principle, we yield our assent, not as one professing to be peculiar to South Carolina, but as a rule of the common law applicable to the cases of fiduciary possession before noticed. It is laid down as a general rule, embracing in terms tenants in common, trustees, mortgagees and lessees, but disallowing none of the exceptions or limitations which qualify it and exclude from its operation all cases where the possession has become adverse, where the party entitled to it does not enter or sue within the time of the statute of limitations, or give any good reason for his delay; leaving the rule in full force wherever the suit is brought within the time prescribed by law. To this extent, and this only, the decision would reach. To carry it further would be giving a more universal application than the courts of South Carolina would seem to have intended, and further than we should be warranted by the rules of law. To extend it to cases of vendor and vendee would be in direct contradiction to the solemn decision in 7 Wheat. 525.

In relation to the limitation of actions for the recovery of real property, we think it proper to apply the remarks of the learned judge who delivered the opinion of this court in the case of Bell vs. Morrison, 1 Peters, 351, and to say that the statute ought to receive such a construction as will effectuate the beneficent objects which it intended to accomplish—the security of titles, and the quieting of possessions. That which has been given to it in the present case, is we think favourable to its true spirit and intention, without impairing any legal principle heretofore established.

It is therefore the opinion of the court that the plaintiff in error has sustained his fourth exception, and that the judg-

ment of the circuit court must be reversed. The cause is remanded to the circuit court with directions to award a venire de novo.

Mr. Justice *Johnson*—

Had I felt myself at liberty in the court below, to act upon my own impressions as to the general doctrine respecting the defence which a tenant might legally set up in ejectment brought against him by his landlord, I certainly should have left it to the jury to inquire, whether the possession of Willison ever was hostile to that of Bordeaux; a fact, the evidence to prove which was very trifling, as appears even in this bill of exceptions. But there were produced to me official reports of adjudged cases in that state, by the courts of the last resort, which appeared fully to establish that when once a tenancy was proved, the tenant could make no defence, but must restore possession, and then alone could he avail himself of a title derived from any source whatever, inconsistent with the relation of tenant. Now it ought not to be controverted, that, as to what are the laws of real estate in the respective states, the decisions of every other state in the union, or in the universe, are worth nothing against the decisions of the state where the land lies. On such a subject we have just as much right to repeal their statutes as to overrule their decisions.

I will repeat a few extracts from one of their decisions to show, that they will at least afford an apology for the opinion expressed in the bill of exceptions upon the law of South Carolina; for I placed it expressly on their decisions, not my own ideas of the general doctrine.

The case of Wilson vs. Weatherby, 1 Nott & M'Cord's Rep. 373, was an action to try title, just such as the present, and heard before *Cheves*, Justice, in July, 1815. The defendant offered to go into evidence to show a title in himself, to which it was objected, that as he had gone into possession under the plaintiff, he could not dispute his title. The objection was sustained, and a verdict given for the plaintiff. The cause was then carried up to the appellate court, and the judgment below sustained, that court unanimously agreeing the law to be as laid down by the judge who delivered the opinion, in these terms—" The evidence offered by the defendant was *of a title acquired by him after he went into possession under the plaintiff, and before he gave up posses-*

sion. If he was at any time the tenant of the plaintiff, he continues so all the time, *unless he had given up the possession.* The attempt to evade the rule of law by going out of possession a moment, and then returning into possession, did not change his situation at all, and especially as he left another person in possession, so that his possession was altogether unbroken. A distinct and bona fide abandonment of the possession at least was necessary to have put him in a situation to dispute the plaintiff's title. On the last ground, that the defendant was not at any time the tenant of the plaintiff, the defendant was not indeed a tenant under a lease rendering rent, but he nevertheless held under the plaintiff. This ground is founded on a misconception of the principle, which is not confined to the cases of tenants in the common acceptation of the term. These cases have only furnished examples of the application of the principle, which is, that wherever a defendant has entered into possession under the plaintiff, *he shall not be permitted, while he remains in possession*, to dispute the plaintiff's title. He has a right to purchase any title he pleases, but he is bound, *bona fide, to give up possession*, and to bring his action on his title, and recover by the strength of his own title."

This is the leading case upon this doctrine in that state, and it is fully settled there, that the wife, the executor, the heir or the purchaser at sheriff's sale, is identified in interest with the previous possessor; as also that a statutory title is acquired by possession, under which one subsequently going out of possession, may recover.

Understanding such to be the law of that state, I certainly did not hold myself bound or at liberty to inquire whether it accorded with the rules of decision in any other state. In principle, I am under the impression there is not much difference, or at least not more than that court was at large to disregard if they thought proper.

INTEREST ON EXECUTORS' ACCOUNTS.

In the case of Myers vs. Myers, decided in the Court of Appeals, at Columbia, in December, 1829, Judge *Nott* refers to the opinion of Chancellor *De Saussure*, in the case of Henderson vs. Executors of Laurens, in the following terms: "We are furnished with the case of Henderson vs. Laurens, decided in the former Court of Appeals, which was not known to this court, when the cases above referred to were decided, in which the question of compound interest was very fully considered; and it is gratifying to find that the investigation of the two courts has led to the same conclusion: and I shall now be satisfied with referring to that case, as expressing the views of the court."

As the case of Henderson vs. Laurens has never been published except in a newspaper, and is one which the regular course of reporting will not embrace, it is thought proper to give it a more permanent form, by inserting it in this Journal.

CHARLESTON DISTRICT.

Henderson vs. Executors of Laurens.

Compound Interest in its broadest sense, has been discountenanced in all ages and among all nations; and by whatever species of reasoning it may be defended in theory, it is wholly inapplicable to human affairs.

Before the case of Child vs. Gibson, (2 Atk. 603,) which was decided in 1743, in England executors were not obliged to pay interest on money unnecessarily retained in their hands. Since that case, Simple Interest has been charged, but not always to the extent of legal interest. Legal interest in that country is five per cent. yet the usual course of the court is to charge executors only four per cent.

Where money has been kept a long time and used in trade, five per cent. is charged in England to cover presumed gains, but not compounded.

Compound Interest has never been allowed except where there has been a violation of an express direction to accumulate, or where the executor or trustee has acted corruptly, putting the fund at hazard for his own immediate benefit.

The case of an annuity or of maintenance in nature of an annuity expressly granted by a husband to a wife—a parent to a child—or by one standing in *loco parentis*, ought perhaps to be regarded as principal sums on which interest is allowed in the discretion of the court.

Chancellor *De Saussure*—Having disposed of various other points made in this case, I come now to consider the claim

of Compound Interest, in a qualified sense, which is set up by the complainant. His solicitors have disclaimed the appellation of Compound Interest, as applicable to their demand, and have given it the name of annuity interest. The demand is, however, for *interest on the arrears of interest*, and such a claim constitutes what may properly be termed Compound Interest. Simple Interest is charged for detaining a principal sum—Compound Interest, is for detaining the interest of a debt, though there are a variety of modes of making the calculation, which may increase or diminish the amount. Compound Interest, in the broad sense in which I here use the terms, has been discountenanced in all ages, and among all nations; and by whatever species of reasoning it may be defended in theory, it is wholly inapplicable to human affairs. The doctrine of the Roman as well as English laws is, "that neither the law of benevolence, nor of public utility, will permit interest upon interest." I concur entirely in the excellent remarks of Chancellor Kent on this subject, in the case of the State of Connecticut vs. Jackson, 1 Johnson Chanc. Cases, 17, speaking of the rule of the civil law on the subject, this learned Chancellor says, "It appears to me that this provision of the law is not destitute of reason and sound policy. Interest upon interest promptly and incessantly accruing, would, as a general rule, become harsh and oppressive. Debt would accumulate with a rapidity beyond all ordinary calculation and endurance. Common business cannot sustain such overwhelming accumulation. It would tend also to influence the avarice, and harden the heart of the creditor. Some allowance must be made for the indolence of mankind, and the casualties and delāys incident to the best regulated industry, and the law is reasonable and humane, which gives to the debtor's infirmity or want of punctuality, some relief in the same infirmity in the creditor. If the one does not pay his interest to the uttermost farthing at the very day or moment it falls due, the other equally fails to demand it with punctuality. He can, however, demand it, and turn it into principal when he pleases, and we may safely leave this benefit to rest in his own vigilance, or his own indulgence."

In addition to this sound practical reasoning, I would remark that it is not true that Compound Interest can be regularly made, even by the most judicious employment of capital; and creditors cannot be permitted to take advantage

of their own laches to the ruin of their debtors, who have, perhaps, been tempted to spend on their families, those sums which would have been applied to the discharge of their debts, had such debts been demanded with a becoming vigilance.

The complainant's solicitors seem to admit the force of this reasoning, as applicable to cases in general; but contend, that the case of a trustee, who retains, or uses a trust fund for a great length of time, forms an exception to the general rule; and they further contend, that the defendant made himself a trustee for the complainant and his wife, under their marriage settlement by the letter which he wrote immediately on receiving information of the marriage of his niece to the complainant. The legal relation in which the defendant stands to the parties, is that of an administrator of one estate and an executor of another, and I cannot discover in any part of his conduct, a single act, which changes this relation. He was not a party to the marriage articles, made by the complainant, in 1795, nor to the marriage settlement executed in 1799. Nor was he ever made acquainted with the contents. His merely writing a friendly letter of congratulation, and stating therein, that he would be ready to do what depended on him, with respect to the fortune of his niece, cannot be construed so as to make him a party to the marriage settlement, or to affect him by any of the provisions thereof. His liability continued to be neither more nor less than that of an executor or administrator, bound to pay over and administer and account for the monies in his hands, when lawfully called upon, so to do, by those who had a right to receive it. In order to arrive at a satisfactory conclusion in the case before me, it will be necessary to consider somewhat at large, the doctrine in relation to the allowance of Simple or Compound Interest, against executors, administrators and trustees. Formerly, they were not obliged to pay interest on money, unnecessarily retained in their hands, (Child & Gibson, 2 Atk. 603,) but from the time of the decision of Child and Gibson, which was made in 1743, the uniform current of authorities is in favor of charging an executor, administrator or trustee, with *Simple Interest.* See 2d Bro. 430. 3d Bro. 73. Ib. 107, and 433. 1 Ves. jun. 294, and many others. In some cases, indeed, reliance is placed on the circumstance, that the money was employed in trade, (as in 1 Bro. 359,) while in others (as in Forbs vs.

Ross, 2 Bro. 430,) equal stress is laid on the circumstance, that the executor was directed to lend out the money, and yet keep it himself. Yet, in all these cases, Simple Interest is only charged. In England, the legal interest of money is five per cent. but it is the usual course of the court to charge executors and trustees, only four per cent. Where, however, money has been kept a long time, and has been used in trade, it is not unusual to allow the full interest of five per cent. in order to meet a presumed gain. The cases reported in 1 Bro. 384, 1 Ves. jr. 19, 4 Ves. jr. 620, and 11 Ves. 58, are of this character. In these cases, though the language of the Chancellors is very strong against an executor or trustees making any profit for himself out of the trust funds; yet, five per cent. only was allowed. It is true, that at a very early period, it became customary to allow interest on annuities, where they were given for the maintenance of a wife or a child, and in some other peculiar cases. But this has always been considered as in the discretion of the court. See 2d Atk. 211, 2 Ves. 170, 1. P. Wms. 541, 1 Sch. and Lef. 301. The same doctrine was maintained by this court, in the case reported in the 4th Equity Rep. 422. It is to be observed, however, that an annuity cannot properly be regarded as interest money. It is a principal sum, though it does not appear to have always been considered as a debt of such a nature as to draw interest. This appears to have been the state of the law in England, on the subject of interest, up to the case of Raphael and Boem, 11 Ves. 92. In that case, Compound Interest was allowed under very peculiar circumstances. An executor, who was a trader, was specially directed, by the will, not to keep the money in his hands, but to put it out, and suffer the interest to accumulate. In violation of these express directions, he converted the money to his own use, and loaned out large sums to his friends, by which he actually put the principal at hazard. Under these circumstances, he was charged with Compound Interest. But it will be seen, by reference to the same case in 13 Ves. 412 and 590, that it was decided on its own peculiar circumstances, and it is there expressly decided, to constitute an exception to the general rule. It has been stated, that the case of Dornford vs. Dornford, 12 Ves. 127, was decided in the same way, and on the same principles. But on looking into that case, (which is loosely reported) it does not appear that Compound Interest was allowed, and it

was expressly stated by the vice Chancellor, in 1 Mad. 302, that he had examined the Register's Book, and found that Compound Interest was not charged in that case. The same remark may be made in relation to the case in 4 Dow, 409, and of Ashburton and Thompson, 13 Ves. 412, and also in relation to the case of Neuton and Bennet, 1 Bro. 359, which have been supposed to be cases of Compound Interest; but in which it does not appear, that more than Simple Interest was charged. In these and other cases decided since that of Raphael and Boem, Compound Interest has been refused under circumstances much stranger than those on which the claim is set up in the case now before the court. In Tidd vs. Carpenter, 1 Mad's. Rep. 209, and in 1 Jacobs and Waltea's Rep. 566, Simple Interest only was allowed even in cases of greater negligences, if not of wilful violation of express direction to invest the funds. In Tibbs vs. Carpenter, that of Raphael and Boem was re-examined, and it was again expressly declared, that it was decided on its own peculiar circumstances, and it is said, emphatically, that in the allowance of Simple and Compound Interest, against an executor or trustee, the great distinction is between *negligence* and *corruption.*

From this view of the English cases, it manifestly appears that Compound Interest has never been allowed except where there has been a violation of an express direction to accumulate, or where the executor or trustee has acted corruptly, putting the fund at hazard, for his own immediate benefit. To meet the supposed profits in such cases, or to inflict merited punishment in corrupt conduct, Compound Interest may be charged, in the sound discretion of the court. The case of an annuity, or of maintenance in the nature of an annuity, expressly granted by a husband to his wife; by a parent to a child, or by one standing in loco parentis, ought perhaps to be strictly regarded as principal sums on which interest is allowed in the discretion of the court. On this principle, were the cases of Bowles and Drayton, 1 Eq. Rep. 490, and Henderson and Laurens, 2 Eq. Rep. 170, decided in this court. From this brief review, it is very manifest, that Compound Interest has never been allowed either in England or America in such a case as that now before the court. The case in 1 Ch. Ca. (Johns.) 620, was decided expressly on the ground that it was proved that the executor employed the trust money in his own business or trade.

by which *he put it at hazard*, and that he refused to give an account of the profits. It is unnecessary now to decide whether we would regard these circumstances as of themselves sufficient to justify the charge of Compound Interest; it is enough for our present purpose to say that there is no proof in this case that the defendant ever used the trust money, much less that he ever put the funds at hazard by employing it in trade; and if he had so, it has been proved that the profits of his business as a planter, have not exceeded five per cent. This case indeed, differs in all respects from one in which Compound Interest could be charged with any semblance of reason and justice. The funds has, it is true, remained a long time in the hands of the defendant, but this, at most, amounts only to negligence. In the case of Littlehules vs. Gascoyne, 3 Bro. 74, where an executor had money in his hands thirty years, Simple Interest only was charged. *The peculiar circumstances* in which Mr. Laurens was placed, not only fully exonerates him from any charge of corruption or breach of trust, but will go far to excuse his apparent negligence in not investing the funds up to November, 94. Complainants admit that Mr. Laurens is not chargeable with negligence. From the time of Mr. Henderson's marriage, which took place in England in '95, to the year 1801, though Mr. Laurens was liable to be daily called upon for this money in his hands, yet no power was actually sent out to any person here to receive it. At that period, differences arose as to what portion of the fund belonged to Miss Laurens, and what to the estate of her father; and also as to the liability of that estate to refund the advances made by Colonel Henry Laurens for the payment of his son's debts. These points could only have been decided in this court. But Mr. Laurens manifested his sincere desire to settle the demand by actually paying £3000 sterling, a short time before the decision of the Court, and by executing an agreement to give his bond, payable in one year, for any balance which might on investigation, be found to be due. After the decree in 1804, Mr. Laurens and his solicitor, Mr. Parker, were certainly of opinion that nothing, or very little, was due; and the complainant could not have reasonably expected to receive any further payments until the accounts should be made up before the master. If we except a few informal communications between the solicitors, nothing very serious appears to have been done by either party to

bring the matter to a close, until this bill was filed in 1820. Mr. Turnbull says she never applied for money at all, as he supposed it necessary previously to ascertain what was due; and he thinks after 1807, no application was made for money on this account. During the whole of the period, Mr. Laurens had been suffered to remain under the firm belief that nothing, or very little was due to complainant. The letter which Mr. Henderson wrote in 1812, as far as the same relates to this claim, merely states that he had drawn a bill on Mr. Laurens for a very large sum of money. That bill he certainly could not expect Mr. Laurens to accept while the accounts remained unsettled between them. Subsequently to this period, difficulties arose out of the war, and the serious doubt which was entertained by Mr. Laurens as to complainants' right to receive the money. The power of attorney sent out here, (and signed by complainant and his wife, as well as by the trustees under the marriage settlement) was revoked, and it was the opinion of the highly respectable counsel to whom Mr. Laurens applied for advice, that it would not be safe to make any payment to Mr. Henderson. The letters now produced and signed by the trustees, and dated in 1803, declaring that Mr. Henderson was authorized to receive the money, it is to be observed, was kept in his own possession, and was never shewn to Mr. Laurens. The first serious attempt made by complainant to bring Mr. Laurens to a settlement under the decree of 1804, was made when this bill was filed in 1820; and he now comes in and claims Compound Interest on the ground of Mr. Laurens' great negligence and breach of duty. Now it cannot escape observation, that if Mr. Laurens was guilty of negligence in not making up the accounts in 1804, Mr. Henderson was equally guilty in not pressing the business to a conclusion; and there is, moreover, this obvious difference between them, Mr. Laurens and his solicitor, *being under the impression, that nothing, or very little was due, had no notion to insist on a settlement*, while Mr. Henderson, (if he actually supposed that his claims were so large as he now states them to be,) had every motive to excite him to vigilance. From the earliest period after the decree, the uniform declarations of Mr. Parker and Mr. Laurens, that nothing was due, put the adverse party fully on his guard; and this court must consider any application short of a summons before the master and a rule for disobedience

as an acquiescence on the part of the complainants in the delay. In the language of Mr. Turnbull, "he has suffered the matter to rest."

Having thus expressed my opinion, that there is nothing in the nature of the debt, or the relation in which the parties stood towards each other, or in the conduct of Mr. Laurens to entitle the complainant to the extraordinary interest which he claims, I cannot think that the delay in the payment can give rise to any such claim. The delay in payment in this case, as it does it in all others, goes merely to increase the amount of interest to be recovered. If the complainant has suffered any inconvenience from that delay, he can only blame himself for it, since it was in his power, at any moment or period, to compel Mr. Laurens to account. In giving the complainant the usual interest of the country, he receives the compensation due to all other creditors for the detention of their debts; a compensation too, precisely such as he stipulated for himself when he expressly agreed to receive a bond, payable in one year, in discharge of any balance which might be found to be due. In every view of this subject, therefore, I am decidedly of opinion that there is no ground for the claim of interest on the arrears of interest, set up by the complainant in this case.

COMMERCIAL GUARANTY.

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COURT OF APPEALS—COLUMBIA, SPRING TERM, 1830.

SOLLEE & WARLEY vs. J. B. MEUGY.

A letter of credit written by A. in favor of B. to C. before C. and D. enter into partnership, cannot be sued upon and recovered by C. and D. against A. although they may have furnished to B. goods on the faith of A's. guaranty.

To charge A. under these circumstances his consent that C. and D. should accept the letter and furnish the goods, ought to be shewn.

A letter of credit undertaking to guaranty A. as far as $1000 or $1500, is not a continuing guaranty. So soon as goods are taken up to that amount, the liability cannot be extended to other and subsequent dealings. The payment of this sum is a discharge of the guarantor's liability.

In order to charge the guarantor, immediate notice of the acceptance of his guaranty should be given to him.

The statute of limitations runs from the acceptance of the guaranty.

Interest is allowed on money paid to or for his principal by a factor.

This was an action of assumpsit, tried before his honor Judge *Huger*, at Camden, Spring Term, 1830, and a verdict found for the plaintiff. The action was brought on an account, and upon the following letter—

"CAMDEN, 5th NOVEMBER, 1824.

Sir: Mr. John B. Matthieu wishing to alter his present mode of doing business, and make arrangements in Charleston, has requested of me to continue my assistance by *lending him my name.* I have therefore consented that he shall use it for the amount of from $1000 to $1500. He will in future carry on business on his own account, and make his own remittances. Yours,

"J. B. MEUGY."

Addressed to F. W. Sollee.

The other facts of the case are fully stated in the opinion of the Court of Appeals, delivered by Mr. Justice *O'Neall*, sitting in place of Judge *Nott.*

This case presents some questions of great importance to the mercantile community, and of the first impression in this state. But however important they may be, yet when examined, they are found to be well settled by repeated adjudications in England, New-York, and the Supreme Court of the United States.

I will consider the questions in the order in which the grounds present them in the motion for a new trial.

1st. Can a letter of credit addressed to F. W. Sollee before the existence of the firm of Sollee and Warley, support an action in their name?

It is an observation made every day in Courts, that the *allegata et probata* must correspond. Here, the allegation is that the defendant promised Sollee and Warley; and the evidence is, that he promised Sollee alone, before the existence of the firm. Such proof cannot sustain the case. A promise to one is not a promise to two. But it is said Sollee and Warley furnished the goods to Matthieu on the faith of the letter of credit written by the defendant to Sollee. This may be so, and yet it does not follow that therefore they can make the defendant liable. They ought to have known that he was only liable according to his undertaking. The letter was not such a paper as could be assigned or transferred by delivery from one to another. Before the defendant could have become answerable, he must have consented that his guaranty to Sollee should become a gua-

ranty to Sollee and Warley. For to every contract the assent of the party to be bound, is indispensable. He might have been willing to become liable to Sollee, but not to Sollee and Warley. The mode of doing business by the first, might have been different from that pursued by the firm. From Sollee, he might have expected better terms, more favor, and stricter attention to his interests, than the firm might have been willing to afford to him. But in another point of view, the letter of credit ought not in this action to be recovered. It may be, that Matthieu actually purchased from Sollee alone, the whole amount guaranteed by the defendant. If so, Sollee has either been paid it, and the guaranty thus discharged—or it is still due and unpaid, and may yet be set up against the defendant. Robbins vs. Bingham, 4 Johns. 476. Walsh and Buckman vs. Bailie, 10 Johns. 180. Penoyer vs. Watson, 16 Johns. 100. Myers vs. Edge, 7 T. R. 250. Grant vs. Naylor, 4 Cranch, 224.

2nd. Is the guaranty a continuing one, or is it limited to the amount of $ 1500, and did the payment of this sum by Matthieu in the course of his subsequent dealings, discharge the defendant even if he had been liable to the firm? The terms of the letter will answer the question! The defendant writes to Sollee that " Mr. J. B. Matthieu wishing to alter his present mode of doing business, and make arrangements in Charleston, has requested of me to continue my assistanee by lending him my name, I have therefore consented that he should use it for the amount of from one thousand to fifteen hundred dollars. He will in future carry on the business on his own account, and make his own remittances." The sum of from $1000 to $1500 was the extent of the liability which the defendant contemplated. So soon as a debt to that amount was contracted, he was liable that far, but beyond it he was not liable. When that debt was paid, he was discharged. Rogers vs. Warner, 8 Johns. 92. Cremer vs. Higginson, Cox's Digest, 350.

3rd. Was the defendant liable under the guaranty unless he had been explicitly notified of its acceptance within a reasonable time? It is well settled that he is not. It is the duty of the person giving credit on the guaranty to give immediate notice of its acceptance. The reason of this rule is perfectly obvious. If immediately apprised of his liability, the guarantor may guard against loss from the insolvency of his principal. But if he had not this notice, he might be called on to answer for the debt of an insolvent man, years

after he had supposed it paid. Take this case for example. On the 5th of Nov. 1824, the defendant wrote the letter of credit in favor of J. B. Matthieu. From the 1st of January, 1825, to the 12th August, 1828, Matthieu and the plaintiffs deal together for a large sum, and they receive from him on account of their dealings with him, payments to the amount of $ 10,000. At the end of this time, the defendant is notified of his liability under the letter of credit, and payment demanded. Under these circumstances ought he to pay? To say so would be monstrous injustice. If in a reasonable time he had been informed of his liability, he might have compelled Matthieu to pay. If the plaintiffs by their neglect have put him in this situation, they and not he ought to bear the consequences. Russel vs. Clark, 7 Cranch 69. Beckman vs. Hall, 7th Johns. 134. Stafford vs. Low, 16 Johns. 67. 3 Wheaton 148, note. M'Iver vs. Richardson, 1 Maule and Selwyn, 557.

4th. Is the guaranty barred by the statute of limitations? It is dated the 5th November, 1824, and the present action was commenced 21st July, 1829. More than four years elapsed between its date, or the commencement of the firm of Sollee and Warley, and the institution of this suit. It must have been accepted soon after its date—certainly before the 1st January, 1825. The statute had therefore run before the suit was brought, and the bar was complete.

5th. Ought the defendant to be charged with interest on his own account with the plaintiffs? It appears that the plaintiffs were factors, and had been in the habit of advancing money to and for the defendant. This money so paid to and for the defendant constitutes the greater portion of his account. Upon money paid, or had and received, the Courts of this state, have uniformly allowed interest. The verdict is therefore right in this respect. On the other four grounds, we think the defendant was improperly charged on the letter of credit in favor of J. B. Matthieu, with the sum of $1500, and interest thereon from the 23rd of August, 1828. A new trial is therefore ordered, unless the plaintiffs release the defendant from the payment of the sum of $ 1500, and interest thereon from the 23rd of August, 1828.

JOHN B. O'NEALL.

We concur—*David Johnson*, *C. J. Colcock*.

Blanding and *De Saussure*, for plaintiff.
M'Willie and *Hart*, for defendant.

TRIBUTE OF RESPECT

TO THE MEMORY OF JUDGE NOTT.

In the Court of Appeals, Spring Term, 1830.

ON BEHALF OF THE BAR OF COLUMBIA,

COL. BLANDING PRESENTED THE FOLLOWING *ADDRESS*—

THE intelligence of the death of the Honorable *Abraham Nott*, which has brought sadness and sorrow to the bosoms of all, cannot but affect with a deeper sense of loss, and keener feeling of regret, the members of that profession whose highest honors he had attained and merited. While all who knew him could estimate his general worth—his unblemished life—his admirable discharge of all social and domestic duties; by those alone whose duty and delight it was to know him in this hall, can his full value as a public officer, or the magnitude of the loss the State has sustained, be estimated. It is now twenty years since he was elected a Judge of the Court of Common Pleas. The estimate which the State put upon his services on that bench, after fourteen years experience of them, was distinctly manifested by the unexampled unanimity with which, upon the reorganization of the Courts in 1824, he was elevated to the bench of the Court of Appeals. How well he vindicated the high opinion of his fellow citizens, all who have labored with him in that Court, by his side or at the Bar, will bear willing testimony. As the president, to him was more immediately confided the despatch and superintendence of the current business of the court, the preservation of its order, the maintenance of its dignity, the control of the bar; in which various and delicate functions he not only exhibited the tact and energy necessary to perform the immense mass of business accumulated upon the court, but tempered it with that suavity and urbanity which, while it renders cooperation pleasant, makes it more efficient, as oil at once

smooths and accelerates the motion of machinery. His promptness of perception enabled him at a glance to separate the matter in hand from its incumbrances—to disentangle what was complex—to extricate what was embarrassed —to fix upon the true questions involved in a case upon its first being presented, and to strike a line of light through it, making an illuminated path of discussion, where, to a less clear and rapid mind, there seemed to be a mass of confusion and darkness. With the utmost rapidity of analysis, however, he was patient of the want of it in others; and if from a slower process of thought, or from previous arrangement, his own suggestions were not adopted by counsel, he listened with polite attention, and eventually acceded with candor, or differed with respect. There has been no instance of an unpleasant collision between him and any member of the bar. Though the duties of the Court have been so wearisome and arduous, though to its pressing and continued avocations he must have occasionally come with an exhausted body and over-labored mind—with an harrased temper, or a heavy heart—yet his high feeling of official duty, and habitually gentlemanlike manners, so regulated his demeanor towards the gentlemen of the bar, and so influenced theirs towards him, that no altercation calculated to leave a moment's irritation, has ever taken place. Assisted by the co-operation of his dignified associates, the Court of Appeals has not only established an exalted character for learning and ability, but has also secured to itself as a Court, and to the Judges individually, the confidence and kind feelings of the bar, and of the community, to an extent never surpassed by any judicial tribunal. Under the administration of this Court, thus respected and beloved, the fabric of our law was rising into a beautiful structure of just proportions, and consolidated strength, from which all the incongruous materials produced by that defective system of judicature, which had occasioned the establishment of this tribunal, were rejected, while all which was valuable was in a course of arrangement. A stable and connected system of decisions, was combining the common and statutory law into a regular code. How great a share he whose loss we deplore, took in this re-moulding of our legal system, and how much our country may lose by his having sunk under his labors, before that system has been perfected, his brethren can best estimate. The work may pass into able hands—but the

unity of design—the thorough understanding of each other's views, and the fixed habit of co-operation, cannot, with whatever of wisdom or worth his place may be supplied, fail to be so broken in upon, that new difficulties will be imposed upon the Court.

The most striking quality of his mind was a diamond-like clearness of perception, through which all objects appeared simple and uncolored, neither magnified nor diminished, but in the most exact truth. He was never for an instant perplexed with those doubtful and uncertain shadows which an imperfect vision throws upon the outlines of a subject. In his profoundest disquisitions, there was no appearance of effort or confusion, and even when he distinguished with the utmost niceness and subtlety through apparently conflicting principles or opposing analogies, there was no feeling of danger in following him. His path, though narrowed or deflected, was still bright and smooth—and if we were not always satisfied with the result attained, it was because we could not expect that less gifted minds would, in the ordinary administration of law, be able to pass through similar difficulties with equal success. In all his written opinions, there was the polish and elegant brevity, which indicate a well educated mind. His was richly stored with various learning, concocted and systematized by disciplined reflection, all of which was made subsidiary to his profession, coming into its service with such ease and grace, that it did not seem to be ornamental or extraordinary, but rather a natural and obvious part of the argument or authority. The discussion in his hands, even of the most weighty principles, always assumed an air of simplicity and ease. As he saw clearly, he expressed himself with precision. The style of his opinions is perfectly transparent—the reader sees the exact idea, and the most delicate connections of thought, without pause or effort, and attains the most subtle conclusions without a consciousness of intellectual labor.

His legal learning was much beyond that usually brought to the profession in America. If it never overflowed, it was always sufficient for the case in hand—and without any ostentation of knowledge or affectation of originality he rarely failed to bring new matter even to causes the most elaborately argued at the bar. His habits of thought were cautious and temperate. He was disposed to adhere to what was, rather than to seek a fancied good in a dangerous nov-

elty. In his own language, "Whenever we depart from a settled rule of common law, I feel as if I were walking *per ignes suppositos cineri doloso.* We cannot foresee to what it will lead—some unsuspected mischief lurking under a specious good, is apt to spring up to bear witness of an error which it is too late to correct. The common law is the result of wisdom and experience, and ought not to be departed from without great caution and deliberation."

His well-balanced and dispassionate mind was never disturbed by any irregularities of temper, or biassed by any eccentricities of system. He came to the case unimpassioned and uninfluenced. He sought for truth with a perfect singleness of purpose. Acutely sensible to all the charities of life as a man—as a judge, he had "no fear, favor or affection." The course of his inquiries in Court, was entirely apart from the relations of life—from the temper of the times—from the operation of any extraneous influence, so that his conclusions were always attained by the fair and candid exertions of a vigorous, learned and disciplined mind.

To the duties of his high station, he devoted himself with indefatigable assiduity. Much as the business of that Court demands, he was willing to give it more. He labored in it with a zest and buoyancy of spirit, which carried him far beyond what an ordinary sense of public duty might have exacted. He never paused, or rested, or remitted his labors, but night and day with untiring ardor, devoted himself to them, until his body, too frail to sustain the unrelaxed activity of his mind, sunk under it, and even after his physical strength was manifestly broken down, still he persisted in his exertions until he passed from the bench to the bed, from which he was carried to the tomb, a martyr to his official labours.

Whether we contemplate him as an officer, performing his public duties with zeal and ability—or as a dignitary, presiding over an august tribunal, or as an elegant and accomplished gentleman, or as a blameless, virtuous and exemplary man, we find abundant cause for sorrow, that he has been taken from us in the midst of his usefulness.

With the profoundest emotions, I move, on behalf of the members of the Bar, that this expression of respect for his memory, and sorrow for his death, be entered on the journals of the Court, and that the Clerk be ordered to furnish a copy to the family of *Judge Nott.* I am also requested to

state to the Court, that the members of the Bar have resolved to wear the usual symbol of mourning for thirty days, and to request the concurrence of the members of the Court.

To this, the Honorable DAVID JOHNSON, *on behalf of the Court, made the following reply—*

The Court in making the order necessary to carry into effect the motion submitted in the address in behalf of the bar, want language to express how deeply they feel the void which has been created on this Bench by the death of our venerable and much beloved elder brother, and claim to share largely in the sympathy which the occasion has excited —entertaining in common with the bar, the most exalted opinion, so well expressed in your address, of his learning, talents, virtue and wisdom—as members of the community, we deplore his loss as a public calamity. But to us he stood in a more endearing relation; as brethren and fellow laborers long associated in a common, and we hope not inglorious cause, the loss to us is irreparable. To you and the community at large he was known principally through the unbending forms of law, only rendered acceptable when genius has clothed them with reason and philosophy. But it was in the Council Chamber—in the communion of thought and labor that we were taught to appreciate the man, and to venerate the Judge. If entangled in metaphysical subtleties, his sagacity devised the means of extricating us from the labyrinth. If beclouded in the obscurity of legal intricacy and doubt, our chamber was lighted up by his genius and learning, and whilst he maintained the dignity and inflexibility of the Judge, virtue and humanity found an able and willing advocate. Such is the bereavement which we deplore.

In the work of reformatiou to which you have alluded, the profession do his memory no more than justice in believing that he contributed even more than a full share. His masterly hand was ever ready to supply deficiences or prune off the excrescencies which were calculated to mar the symmetry of our legal system, and without appreciating our own humble labours, we may venture to hope that the foundation is so deeply laid in truth and wisdom, that it will remain unshaken, whatever may be the modifications which time or

adventitious circumstances may make in the superstructure; and will remain to him an imperishable monument of fame; a fame worthy of the emulation of all who aspire to distinction in the profession. Let us then become rivals, without envy, in laboring to attain the height from which he descended to the tomb.

The members of the Court will cheerfully conform to the request of the bar, to unite with them in wearing crape on the left arm for thirty days, as a mark of respect for our deceased brother, and it is

Ordered, That the address on behalf of the members of the bar, together with this reply, be entered on the Journals of the Courts, and that the Clerk do tender to the family of the deceased a copy thereof.

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Biographical Sketch of Chancellor D'Aguesseau.

France has great reason to be proud of the rare combination of brilliant talents and extensive acquirements that has so frequently graced the annals of her tribunals. Of those accomplished jurists, none have occupied a higher place than the celebrated Chancellor D'Aguesseau, and few can ever aspire to the same level, whether we view the integrity and sagacity of the magistrate, or the purity and elegance of the man—his profound legal love, or his abundant attainments in various branches of science and literature. Even the most steril domains of law loose under his hand their unforbidding aspect. Whatever he touches is adorned with a profundity of thought and beauty of style, that renders what was only intended for the juris-consult, the delight also of the philosopher and orator. The biographies of such men are valuable, not merely as incentives to action, but as placing in a clearer day, those methods by which solid glory has been acquired and maintained. More especially are they valuable, when, as in the case of the great man we have cited, they demonstrate to us that, however nature may have gifted her favorites with genius not granted to all, that still much of their fame is due to those toilsome days and painful vigils, to which every one may, by a vigorous exertion of moral energy, become habituated.

Henry Francis D'Aguesseau was born of an ancient family, at Limoges, November 27th, 1668. Both his paternal and maternal ancestors were distinguished for their emi-

nence in the law. His father, Henry D'Aguesseau, a man possessed of talents and attainments only equalled by his virtues, was successively Intendant of Limousin, Bordeaux, Languedoc, Counsellor of State, &c. and seemed called by the unanimous voice of all France to succeed Boucherat as Chancellor, which undoubtedly he would have, but for the position of the King, as to certain court favorites, a relation of which is unnecessary here.

Antony D'Aguesseau, his grand-father, had been first President of the Parliament of Bordeaux. His mother was descended from the Talons, so celebrated at the French bar.

Young D'Aguesseau, under the careful superintendance of his learned father, received an education both varied and solid; though there is no reason to believe, as some authors* have asserted, that he was entirely formed by paternal instruction.

"My father," says D'Aguesseau† himself, "drew up for my education, a course of study, so natural, so simple, and at the same time so useful, that many of his friends borrowed it of him in order to bring up their children in the same manner; but not content with having traced the road, he often withdrew from his most important occupations, to judge himself of the fidelity with which I pursued it. It was then, that by the correctness of his discernment, by the delicacy of his taste, and still more, by his lively feeling of whatever is true and correct—of whatever can form the heart as well as the genius; he inspired me with a laudable ardour to follow, at least at a distance, a father who was willing to walk at my side, and once more become a child with his son, not to collect shells on the sea shore, as Scipio and Lælius, but to teach me to become a learned and reasonable man."

"The period of his frequent journeys was the most favorable for us.‡ He took us most always with him, and his carriage became a kind of class, where we had the happiness of toiling under the eyes of so great a master. We there observed a discipline almost as uniform as if we had been in the spot of our usual abode."

"After the travellers prayer, with which my mother always commenced her rout, we explained the Greek and

*Biog. Britt. Suppl. D'Aguesseau.
†Vie de son here, Ocuvres 15—388-9.
‡D'Aguesseau, his brother and sisters.

Latin authors, which, at that time were the subjects of our study. My father took pleasure in making us seize the meaning of the most difficult passages; and his reflections were more useful than the perusal of the text. We committed to memory a certain number of verses which excited in him, when we recited them, that kind of enthusiasm which he had naturally for poetry; often he obliged us even to turn French into Latin, to supply the place of the exercises that we could not make in travelling. To this succeeded the reading aloud of some book of history, or morality, or each of us read for himself, according to his taste; for one of the things he recommended to us the most, without absolutely exacting it, was that we should have some book of our choice to read after our usual studies, in order thus to accustom us to dispense with the assistance of a master, and to contract not only a habit, but a love of labor."

As D'Aguesseau was destined for the bar, his attention was, at a very early age, directed to those studies needed by a profound, and at the same time, accomplished advocate. In every thing that pertained to law, the father was an able instructor, and besides the ordinary routine, carefully formed him to methodical arrangement and correct style in composition. "I used to bring him," says the son, "papers *(projets)* which he had charged me to draw up, rather for my instruction than as a relief to himself. He would at first tell me, with his usual kindness, that he was well enough pleased with them; but when he reviewed them in detail, the penetration and solidity of his judgment stopped him instantly on even those places, that had not seemed to me susceptible of any difficulty. He dissected,* if I may thus speak, in such a manner, and made so exact an anatomy of them, that I was surprised and almost afflicted to see that nothing of my labor was left me; but after hearing his reasons, I could not but admire the profoundness of his genius, and grieve at the measure too limited of my own, which could not at first discover what appeared to me so plain when my father had shown it to me."†

In application and attainment D'Aguesseau well repaid the kind and assiduous devotion of his father, and at an early age acquired the reputation of an almost universal scholar. Originally his taste, it would appear, was for Belles Lettres,

*Decharnoit, properly, *stripped of the flesh.*
†Vie de son pere oeuv. 15. 374.

and particularly poetry, to which he retained a fondness in even his later days. He often amused himself in writing both French and Latin verses. Alluding to Belles Lettres, in his *instruction to his son*, he thus writes: "It seems to me in passing to this subject, that I feel the same emotion as a traveller who, after having been long satiated with the view of different realms where frequently he has even found the finest objects and more worthy of his curiosity, than in his birth-place, nevertheless tastes a secret pleasure at arriving in his country, and esteems himself happy that he can breathe once more his natal air."

"We love to behold again, the abodes of our infancy.—An ancient habitude makes us discover charms there, that we taste not elsewhere; and 'tis this I feel in once more entering my country, that is, the republic of letters, where I was born—where I have been brought up, and where I have passed the fairest years of my life."*

His fondness for the muses did not prevent him from pursuing his severer studies with ardor and system. He read history attentively; in studying law he made himself well acquainted also with its history and antiquities. To improve in speaking he devoted one entire year to the assiduous perusal of the ancient models of eloquence. Nor was he unmindful that besides storing the mind with knowledge, that mind itself requires a separate culture to enlarge and strengthen its vision and systematize its efforts. Logic he investigated in the pages of its great founder Aristotle, as well as the best modern treatises. To metaphysics he had always a peculiar fondness, feeling that this one science lay at the root of all other sciences, and that law becomes a collection of arbitrary enactments and decisions, unless based on first principles accurately traced out. In one of his letters, after enumerating many of the triumphs of metaphysics, he thus continues, "Will you compare with such great and useful discoveries as these, the discovery of the sattelites of Jupiter, or of Saturn, the art of finding the latitude or even the longitude, if astronomy can ever reach that point.

"I need not sail, and if I take the notion, or necessity obliges me to do so, I can leave the care of consulting the stars to a good pilot; but I cannot dispense with living

* Troisieme Instruction, oeuv. 15, 92.

like a reasonable being, and wretched is my lot if I do. This care is a personal matter, so intimately connected with me, that I cannot and ought not to repose on any other. How indeed shall I make choice of a good pilot in the navigation of this life, if I am ignorant of what he ought to believe in order to merit my confidence. If by chance I choose well I am only stupid; if I choose badly I am both stupid and unfortunate: I am not even allowed to remain in uncertainty. Not to adopt a course is to adopt; to hesitate is to choose; there is no matter in which it can be more truly said: *qui deliberant jam desciverant.* In this state, shall I reject the succour of metaphysics, and is there another science that I can put on a parallel with that which fixes my condition by knowing God, by knowing myself, the only objects which truly merit my attention, the solid foundations of every thing springing from reason, and even of what pertains to religion, to which these studies lead us by the hand and which strengthens, extends and perfects them?

"But metaphysics is imperfect; it does not resolve all our questions, or it does not reply as clearly as we desire. Who doubts? It is a man that questions and it is a man that replies. Is it then surprising that there is weakness and imperfection on both sides? but shall I renounce what is certain, because many things remain uncertain? and shall I voluntarily deprive myself of a light which offers itself to me with evidence because there are obscure truths to which it does not extend? This would be like a man dying of hunger, who should refuse two pounds of bread, because they will not give him twenty and who should say, like the heron of La Fontaine, "'tis not worth while to open the bill for such a small matter."* He was thoroughly acquainted with Latin, Greek, Hebrew and other Oriental languages; Italian, Spanish, Portuguese and English. In mathematics, for which he always maintained his taste, he was uncommonly skilled. Some of these branches of knowledge he might have studied or at least perfected in after life—we have no exact information on this point.

D'Aguesseau when nearly nineteen, commenced the study of jurisprudence regularly, but not without some repugnance, as he confesses: "I have found so many charms in philosophy," says he, "that I had much difficulty to enjoy

* Lettres, œuvres 16, 160—1. Vie de son pere, œuvres 15, 390.

the study of Roman Law. My father had the art of leading me gently and pleasantly to it, by elevating my views above positive law, in order to search in the laws those first principles drawn from the nature of man, and the well-being of society, which render Legal science as noble as useful."

In 1690, when little more than twenty-one, he came to the bar, and shortly after, through the influence of his father, was appointed one of the king's three advocate generals. Louis the 14th observed in giving him this important office, that, he knew the father was incapable of deceiving him, even with respect to his own son.

The first appearance of D'Aguesseau in court, was so brilliant that the famous jurist Denis Talon, observed "I would be glad to finish as that young man commences." Indeed it formed an era in the annals of judicial eloquence and filled another department, till then vacant, in the splendid literary reign of Louis the Great. In sacred oratory, the elegance of Flechier, the warmth and unction of Massillon, the strong reasoning of Bordaloue, and the vigor and sublimity of Bossuet, raised the French pulpit to a height that has not passed away and cannot pass away. The bar yet remained in its barbarism; the arguments of the advocates were valued in proportion to the weight of erudition appended to them; quotations were accumulated, classic and modern, sacred and profane, in prose and verse, till Law resembled a dowdy, who, judging only by the value of the material, thinks herself very fine if bedizened with jewelry, ribbons of every hue, and laces put on without taste, unsuited to her person or inappropriate to the occasion. In the *plaidoyers* (written arguments) of Patru, which still remain, are seen a knowledge of law and skill in the application of it, sometimes able reasoning and movements of passion, but none of his productions or those of his contemporaries exhibit rich matter, regularly well-selected; a simple methodic arrangement and a chaste and appropriate style.—They did not possess that fine taste, improved by well-directed labor, required for all great works of genius, in which, as in the marble temples of Greece, the beauty of the polish diminishes nothing of the strength of the material, and where, independent of the finish of the parts, we derive additional pleasure from the *ordonnance* of the whole. A young man of twenty produced an instantaneous and complete revolution. It was the first time

the French had seen a great lawyer and a great orator combined.

Brilliant success did not mislead D'Aguesseau. His good sense could not but tell him that to maintain reputation in a science so vast in its extent as law, so abstruse, continually presenting new subjects of discussion and new difficulties, a life of constant application was required. In the discourses which, as advocate-general he had to deliver at the opening of the courts, he constantly toils to show his colleagues the deep knowledge of law, of literature, of man himself, necessary to enable them to occupy their stations with dignity to themselves and justice to society. These exhibit nothing of the vague generalities of the usual holiday productions; but the earnestness of one zealously struggling (sometimes we might almost surmise with a desponding heart) to raise the intellectual and moral standing of his order to the lofty standard that his imagination painted to him. In his third discourse, he thus expresses himself as to the eloquence of the bar. "Eloquence is not a production of genius only, it is a work of the heart. It is there that is formed this intrepid love of truth—this ardent zeal for justice—this virtuous independence of which you are so zealous: these generous sentiments which elevate the soul and fill it with a noble pride and magnanimous confidence, and pushing your glory even beyond your eloquence, causes the world to admire in you the virtuous man, much more than the orator.

"Do not think, nevertheless, that it is sufficient to have joined nobleness and purity of motive to great natural talents; and know the wound the most profound, and perhaps the most incurable of your order, is the blind temerity with which aspirants engage in it without having made themselves worthy by a long, laborious preparation.

"What treasures of science—what a variety of erudition—what sagacity of discernment—what delicacy of taste must not be united to excel at the bar! Whoever shall dare to put boundaries to the science of the advocate, has never conceived a perfect idea of the vast extent of your profession."

"Let others study man piece-meal: the orator is not perfect, if, by means of a continual study of the purest morality, he does not know, if he does not penetrate, if he does possess man entire."

"Let Roman jurisprudence be for him a second philosophy; let him cast himself with ardour into the immense sea of canons; let him always have before his eyes the authority of the ordinances of our kings, and the wisdom of the oracles of the senate; let him devour the customs, discover the spirit of them, and conciliate their principles, so that every citizen of this great number of small states, that forms in a single one the diversity of laws and manners, may believe, in consulting him, that he was born in his country, and has studied only the usages of his province."

"Let history give him experience, and, if I may thus express myself, an anticipated old age; and after having raised this solid edifice of so many different materials, let him add all the ornaments of language, and all the magnificence of the art that is peculiar to his profession; let the ancient orators give him their *insinuation*, their abundance, their sublimity; let the historians communicate to him their simplicity, their order, their variety; let the poets inspire him with nobleness of invention, vivacity of images, boldness of expression, and especially those concealed numbers, that secret harmony of discourse, which, without the slavery and uniformity of poetry, frequently preserves all its sweetness and graces; let him join French politeness to the attic salt of the Greeks, and to the urbanity of the Romans; let us, as if he were transformed into the person of the ancient orators, recognize in him rather their genius and character, than their thoughts and expressions, so that the imitation, becoming a second nature, he may speak like Cicero, when Cicero imitates Demosthenes, or as Virgil, when by a noble but difficult larceny, he blushes not to enrich himself with the spoils of Homer."

"Here our imagination takes pleasure in forming the accomplishment of our wish, and to lose itself in a delightful dream which shows it an image of the perfection to which we aspire. Let us at last open our eyes, and let this agreeable phantom disappear that our desires had raised. What do we find in its place; and what a sad spectacle the truth offers to us!"

"The sciences neglected, laziness victorious over application, labor viewed as the portion of those who have no genius, and disdained by those who think they have it, ignorance insulting learning, science timid and trembling, is obliged to borrow the art, the secret of hiding herself.—

Those who commenced to elevate the glory of the bar, wished to have the appearance of knowing every thing: we glory in being ignorant of every thing. They often carried to excess their love of vast erudition; blushing to think, or speak themselves, they believed that the ancients had thought and spoken for them; they toiled more to translate them than to imitate them; and leaving nothing to the force of their genius, they placed all their confidence in the profundity of their learning. Thanks to the return of good taste, of which we have seen a few rays shining, the error and slavery of this learned affectation was felt. But the fear of this excess has made us fall into the opposite extreme. We regard with contempt the useful, the necessary succour of study and of science; we wish to owe all to our genius and nothing to our labor. And what is this genius of which we so vainly flatter ourselves, and which serves as a favorable veil for our indolence? It is a fire that glitters without consuming; it is a light that bursts forth during some moments, and which goes out itself for want of nourishment; it is an agreeable surface, but without profundity and without solidity; it is a lively imagination, the enemy of safe judgment, a prompt conception which blushes at waiting for the salutary counsels of reflection; a facility of speaking which seizes the first thoughts with avidity and never permits second ones to attain perfection and maturity. Like those trees whose steril beauty has driven from our gardens the useful ornament of fruitful trees; this agreeable delicacy, this happy lightness of a brisk and natural genius, which has become the only ornament of our age, has banished from it the force and solidity of profound and laborious genius; and good sense has not had a more dangerous and mortal enemy, than what the world honors with the deceptive name of a genius; (bel esprit.)

It is to this flattering idol that we sacrifice daily by the public profession of a vain glorious ignorance. We think we are depreciating the fecundity of our genius, if we lower it so far as to wish to reap for it on a foreign land. We neglect even to cultivate our own property; and the most fertile soil produces at last nothing but thorns, from the negligence of the husbandman who trusts to its natural fecundity."

"How different is this conduct from that of those great men whose famous name seems to have become the very name of eloquence!"

"They knew that the best talents have need to be formed by persevering labor and assiduous culture—that great talents easily become great defects, when they are given up and abandoned to themselves; and that whatever of excellence heaven has given birth to, soon degenerates, unless education, like a second mother, preserves the work which nature has confided to her, as soon as produced."

"To reckon as nothing the labors of childhood, and to commence their serious and genuine studies at the period when we finished them; to view youth, not as an age destined by nature for pleasure and for relaxation, but as a period that virtue consecrates to toil and application—to neglect the care of our possessions, our fortune, of health itself, and to make a worthy sacrifice, of that which mankind cherishes most, to the love of science and ardour of instruction—to become, for a while, invisible, to reduce ourselves to voluntary captivity, and to bury ourselves alive in deep retirement, the better to prepare in advance, arms always victorious.—This is what the Demosthenes' and Cicero's have done. Let us not be surprised at what they were; but let us at the same time cease to be surprised at what we are, when we throw a glance at the little we do to acquire the glory to which they attained."* A little farther on, in the same admirable discourse, he continues, "Happy is the useful distrust of the wisely timid orator, who, in the choice and division of his occupations, has perpetually before his eyes what he owes to his clients, to justice and to himself! Always surrounded with these rigorous censors, and filled with a holy respect for the tribunal in which he is to appear, he would desire, according to the wish of an ancient orator, that he might be allowed, not only to write with care, but to engrave laboriously the words which he is to pronounce. If, sometimes, he has not the liberty of measuring the style and the expression of his discourse, he always meditates the order and the thoughts, and frequently, indeed, this simple meditation, supplying the place of exact composition, and the justness of his thoughts producing that of words, the surprised auditor believes that the orator has toiled long to perfect an edifice, of which he has scarcely had time to trace the first plan. But far from permitting himself to be dazzled by the lucky success of extemporary eloquence, he

*Oeuvres 1, 36-9.

always betakes himself anew, with fresh ardour to the painful toil of composition. It is there that he scrupulously weighs, even the least expressions, in the scales of severe criticism; it is there that he *ventures* to retrench whatever does not present to the mind a lively and luminous image; that he developes whatever can appear obscure or equivocal to the half attentive listener; that he adds graces and ornaments, to clearness and purity of discourse; that in avoiding negligence, he shuns not less the equally dangerous shoal of affectation; and that handling a skilful file, he adds force to his discourse in proportion as he takes off useless words; imitating the address of those knowing sculptors, who, working on the most precious materials, increase the value, while they diminish them, and only form the most perfect master-pieces of their art, by the simple retrenchment of a rich superfluity."* These extracts may perchance be deemed misplaced in a biography, but similar sentiments are so often and so earnestly inculcated by the author, that they appear in a great degree necessary to a full understanding of his character. Indeed, so well do the thoughts thrown out in his various writings harmonize with themselves, and with what is known of the man, that we are there to look for his moral portrait, painted by himself, of which the fidelity can, at least, be recognized, when the lawyer is delineated. We know of no work that would be more truly useful for aspirants to the legal profession, than a translation of his orations; for while they point out the great qualities of the head and heart necessary to eminence, they give a practical illustration, in their manly and eloquent style, how necessary is the elegance of the scholar to an effective exhibition of the knowledge of the jurist.

In 1700, D'Aguesseau, by the recommendation of the first president, Harley, was advanced to the office of procurator-general, which he held for seventeen years with increasing reputation. It was, indeed, a place where he had a more ample field for the exhibition of his talents as well as of his virtues. He applied himself sedulously to introducing better order and a more strict discipline into the tribunals under the control of the parliament, and to ameliorating the proceedings in criminal matters. It is remarked, that while he was procurator-general, executions were exceedingly

*Oeuvr. 1, 43.

rare. "He regarded," says Thomas,* "the condemnation of a citizen as a public calamity. In questions of Domaine his profound researches and knowledge of the historical records of his country created general astonishment. But his zeal was in nothing more active and useful than in the improvement of the administration of the hospitals. He obtained many ordinances, by which abuses of those institutions were redressed, or their benefits extended. When once advised to repose more from his labors, "can I" replied he, "allow myself to take any rest when I know that my fellow-creatures are suffering."

The winter of 1709 was one of the most calamitous recorded in French history—Louis 14th was carrying on a most disastrous and expensive war against the combined talents of Prince Eugene and Marlborough; commerce was suspended, the treasury empty, credit destroyed, and the people desponding. For a century such intense cold had not been known in France or in the neighboring states; the olive trees, vines, wheat, and all trees planted within a few years were killed. Famine appeared, which could hardly have been much ameliorated had the finances of the kingdom been in a more prosperous condition, as most of the continent was labouring under the same calamity. To mitigate as much as possible the sufferings of the starving people, the Comptroller General, Des Marets formed a committee of the principal magistrates; D'Aguesseau who was one, was in fact the moving soul of all, and by his sagacity and foresight, much diminished the evil.† His ideas, however, with regard to forestalling, would hardly be considered as orthodox in our days;—all laws on the subject, in England have fallen into utter dissuetude. After this period D'Aguesseau was consulted on state matters of importance, and frequently charged with the preparation of memoirs for the king.

Notwithstanding his popularity and the favor in which he stood with the government, he seemed threatened with the deprivation of his honors near the close of the reign of Louis the fourteenth. The glory of that monarch had long set, and left not a reflection above the horizon to illumine his closing hours. His early love of renown and generous zeal for the encouragement of letters had degenerated into a som-

*Eloge de D'Aguesseau, note 8. †D'Argeau's Mem. 2, 192—6.

bre and drivelling bigotry. With the priest Le Tellier on one side, and the prostitute Maintenon on the other, he reconciled dissoluteness with devotion, atoning for the profligacy of his life by the purity of his faith! Urged on by his confessor, he had brought into France the famous bull Unigenitus, which excited discussions and quarrels that embittered his declining years. D'Aguesseau viewing this bull as an attack on the liberties of the Gallican Church, and the rights of the Crown opposed zealously its being enrolled. He was sent for to Court. Usually when he visited the King he bid his wife adieu; but that day he departed without seeing her, and she, on her side, avoided his presence, mutually fearing to excite each other's feelings.* In his audience with the King, he spoke his opinions respectfully, but frankly, and then returned serenely to Paris. What would have been the effect of his interview, it is impossible to surmise, as Louis 14 died a few days after. Alluding to this matter, the Papal Nuncio Quirini, while on a visit to D'Aguesseau, at Frêne, his country seat, observed: "'Tis here that arms are forged against Rome." "No," answered D'Aguesseau, "not arms, but bucklers." D'Aguesseau evinced an equal degree of courage when the implacable Jesuit, Le Tellier, was plotting on the decrepid monarch, in order to depose the independent and virtuous Cardinal de Noailles. The Chancellor Voisin himself had prepared an edict to accomplish this unprincipled project, but D'Aguesseau refused positively to lend his aid to such a proceeding.†

Amid the changes and promotions in office that occurred when the Duke of Orleans assumed the Regency, D'Aguesseau would have been almost certain of success had he solicited advancement, but he neither asked nor desired places. "God forbid," said he, "that I should ever occupy the post of a living man."‡ Two years after this, Chancellor Voisin died, 1717. The Regent sent for D'Aguesseau, and on his arrival, saluted him with the title of Chancellor; D'Aguesseau declined the name, and urged his incapacity for that important dignity. The Regent told him he would take his word for any thing else, and the new Chancellor was finally obliged to yield.* The Chancellor speedily experienced

*Thomas Eloge de D'Aguessau, note 10.
†Voltaire, Siecle de Louis XIV. Tome 2, 372, 1785.
‡Thomas, Eloge de D'Aguesseau, note 27.
*Thomas Eloge de D'Aguesseau, note 11.

that new honors were not without new troubles. Tempted by the specious schemes of the adventurer, Law, the Regent was anxious to put them into operation; but D'Aguesseau immediately perceiving the emptiness and injustice of an immense emission of paper, grounded on no real value, opposed them energetically. The Regent, finding it impossible to conquer the Chancellor's scruples, deprived him of his place, and exiled him to Frêne. On receiving this intelligence, he calmly said, "I was not deserving the honor the Regent did me by giving me the seals; but I merit still less the affront he puts upon me by taking them away." A contemporary author,* thus relates the matter.

"28th.—Paris. M. de la Vrillière went, at seven o'clock in the morning, to the Chancellor's, and demanded the seals, at the same time advising him, on the part of the Duke d'Orléans, to retire to his estate of Frêne, till further orders. The Chancellor was rather surprised; he enquired whether he might not see the Duke d'Orléans, or at least write to him; M. de la Vrillière replied, that as to seeing him, it was a thing not to be asked at present, but that, with respect to writing, he would undertake to be the bearer of a letter to him. The Chancellor went and wrote it, and read it to M. de la Vrillière, before he gave it him, saying: "Your name is very unlucky to Chancellors." The Chancellor went to communicate these tidings to his wife, who was lying in; he chose that she should hear it from him, rather than from another person, which might have rendered the matter still more unpleasant.

It appears that both of them received the intelligence with considerable firmness. The Chancellor will set out to-morrow, to retire to Frêne. M. de la Vrillière carried the seals to the Duke d'Orléans, who has given them to M. d'Argenson. The Duke de Noailles, on receiving a letter from the Chancellor, to inform him that M. de la Vrillière had demanded the seals of him, got into his carriage, and went to the Palais-Royal, and seeing the seals, which were on the duke d'Orléans' table, for M. d'Argenson had not yet arrived, enquired of the duke d'Orléans: "What does this mean? why are the seals here?" The duke d'Orléans replied: "I have sent to demand them of the Chancellor," —"And to whom do you give them, Monseigneur?" re-

*D'Angeaus Mem. 2—413.

joined the duke de Noailles.—"To M. d'Argenson," was the answer. The Duke de Noailles then said: "Monseigneur, I see clearly that the cabal obtains the ascendency; and as an attack is made on so estimable a man as the Chancellor, and my best friend, I plainly perceive, that I am attacked also, and that I cannot do better than resign my commission, (which is that of president of the council of finance.) I place it in your hands, Monseigneur." The Duke d'Orleans said to him: "Have you nothing to ask of me?" "No, Monseigneur," replied the duke. The Regent said: "I had intended a seat in the council of Regency for you." The Duke de Noailles answered: "I shall make little use of it;" and retired, upon seeing M. d'Argenson enter, who is also put at the head of the finances."

The splendid delusions so well known in the history of France, under the name of the System of Law, by which the national debt was to be paid off, and the country deluged with riches, were now successively and rapidly put into execution.—So certain were the people at large of the feasibility of the System that shares in it were eagerly sought and rose immediately to an enormous price. A recent author* thus describes the state of feeling at the period.

"In the mean time an universal frenzy had seized the nation. Peers, judges, cardinals, bishops, ladies, ministers, shopkeepers, footmen, all turned gamblers, and speculated from morning till night on the rise and fall of stock. A clerk in the bank, seeing the avidity of the speculators to buy paper, called out to the crowd pressing at the door, "Never fear, Gentlemen, all your money shall be taken." A physician going to visit a lady, muttered all the time he felt her pulse, "It falls, it falls; oh, good God! it falls!" The lady alarmed, started and ran to the bell; but the doctor, surprised in his turn, relieved her anxiety, by telling her he was only speaking of the stocks. Two men of letters, M. de la Mothe, and the Abbé Terrason, talking together of the madness that had infected the nation congratulated themselves that they were superior to the common delusion; but it so happened, that not long afterwards the two scholars met in the Rue Quincampoix, where they had both come to bargain for actions. As the shame was mutual, they rallied each other and pursued their course.

*Hist. of the principal states of Europe from the peace of Urrecht—London, 1826, p. 216, 20—2 vol.

"The Rue Quincampoix, where this traffic was carried on, became so continually thronged, that the houses situated in it were let at an extravagant rate. Houses for which eight hundred livres rent were usually paid, now yielded from six to sixteen thousand; and even a cobler who had a stall of planks placed against a garden, earned two hundred livres a day by letting chairs, and furnishing pens and paper. Nay, a hump-backed man was said to have made one hundred and fifty thousand livres in a few days by letting out his back as a writing desk to the brokers. All the avenues leading into the street were filled by break of day, and at night it was necessary to use force to drive away the crowd. This concourse in a narrow street becoming exceedingly inconvenient, an edict was issued, prohibiting all persons from buying and selling stock in the Rue Quincampoix. The traffic was some time afterwards transferred to the Place Vendome, the whole area of which was covered by tents, some filled with the stockholders, others destined for refreshments, and others again filled with gaming tables and lotteries, where inferior rogues imitated, on a small scale, the operations of the great state swindlers. All the evening the Place was filled with ladies and gentlemen of the highest rank, walking up and down; and this spot thus became at once the general market both of business and pleasure. At length the Chancellor, who had his court in the Place, complained that the noise was so great he could not hear the suitors. Mr. Law then bought the *Hotel de Soissons*, belonging to the Prince de Carignan, which was likewise situated in Place Vendome. In the magnificent gardens of this palace six hundred pavilions were disposed among the trees and fountains, and an ordinance was issued by the Government, prohibiting, under severe penalties, all buying and selling of stock except in one of these pavilions. Never were stock-jobbers so pleasantly accommodated!

"The immense rise in the price of actions was naturally attended with sudden revolutions of fortune; persons in the lowest stations of life were lifted by the expansion of the bubble to the highest, and their behaviour in their new position, gave occasion to many ridiculous occurrences. Mr. Law's coachman having made his fortune, asked his master's leave to quit his service; to which Mr. Law consented, with the condition, that he would provide another as good as himself. The man brought two of his former comrades;

and desiring Mr. Law to choose, said, that he himself would take the other to drive his own carriage. A Mdlle. Begond being one night at the opera, observed a lady enter magnificently dressed: she looked at her a short time, and then whispered her mother, "I am much mistaken if this fine lady is not Mary, our cook." The whisper spread through the theatre, till at length it reached the ears of the object of it, who, turning round to Mdlle. Begond, said, "It is true; I am Mary, your cook; I won a large sum of money in the Rue Quincampoix; I like fine clothes and fine jewels, and you see me drest in them; I have paid for every thing I have on; can every one else say as much?" The most absurd blunders were made by these new favorites of fortune. One of them who had ordered a coach, being asked what arms he wished to have on the carriage, answered, "Oh, the finest, by all means." A footman had become rich enough to buy a handsome carriage; but when it came to the door he got up behind instead of in the inside. A lady whose husband, a baker's son, had bought a vast quantity of fine plate, arranged it for supper in so strange a fashion, that the soup was served up in a basin for receiving church offering, and chalices were made to serve the office of salt-sellers. The rise of the stock was so rapid, that great fortunes were made, as it were, by accident. A person who was taken ill sent his servant to sell two hundred and fifty shares at 8000 livres each, but in the mean time the shares had risen to 10,000, and the servant gained 500,000 livres, which he put in his pocket. Many similar instances occurred of agents making a fortune at the expense of their employers.*

"While these things were happening among the creatures of the new system, it will excite no surprise to find the inventor of the machine, the discoverer of the new mine, the god of all this wealth, courted with a deference which amounted almost to worship. His anti-chamber was crowded from morning till night with ladies of the highest quality, all begging for a portion of the India stock. When the Regent wished to send a Duchess to Modena, to attend upon his daughter, some one in his presence said, "If you want a Duchess, you had better send to Mdme. Law's, for they are all there." Law himself was so surrounded by

*Hist. du Systeme.

these ladies, that when once admitted into his room, he found it almost impossible to get rid of them.* One lady who had in vain attempted to obtain an audience, drove to a house where he was at dinner, and called out, "Fire! Fire!" All the company ran from the house; but Law seeing the lady jump out of her carriage to meet him, made off in the opposite direction. Another lady told her coachman to overturn whenever he should see Law in the streets, and happening to see him first herself, she screamed out of the window, "overturn now! overturn now!" This lady was more successful: Law ran to her assistance, and she confessed her stratagem."

The delusive bubble, as predicted by D'Aguesseau, soon burst. All France was filled with bankruptcies, the government left surrounded by difficulties, and the whole constitution of society deranged. "A general uncertainty," says the work just cited, "was introduced into all transactions concerning property. The tradesman did not know what price to set on his goods; the merchant was not sure to what countries he might send his cargoes; the landed proprietor was uncertain of the value of his own fortune and that of his children. Men and women of all ranks, of the most sober habits and the most steady reputation, caught the habits and character of gamesters: to gain suddenly, to spend profusely, to neglect honest occupation, to forfeit solemn engagements, to forget the ties of blood and the duties of morality, in the dream of a prodigious fortune to be acquired without talent or labor, were no longer the peculiar features of men addicted to a particular vice, but the qualities of a great part of the nation. Ambition inspired all, from the prince to the footman; avarice and luxury walked hand in hand, misleading the people; and it was long before the greedy hopes and extravagant profusion created by the scheme of Law, were carried away by the tide of time."

Amid the universal distress, the first movement was to recall D'Aguesseau, and Law himself was sent by the Regent to solicit his return. As soon as he had resumed his office he occupied himself actively in reducing things to order. The malady was too extensive to admit of total cure; but he did much in restoring tranquillity and re-assuring the credit of the government. The works written by D'Aguesseau in his exile, show how perfectly he under-

*See a curious instance of this in Madame's Letters.—Fragmens, ii. 274.

stood the emptiness of Law's schemes, and exhibit a knowledge of political economy astonishing for that day.

We have seen how boldly D'Aguesseau had, while procurator-general, opposed the registration of the bull *Unigenitus;* yet, strange to say, he became one of its advocates when it was again urged by the Regent. This inconsistency exposed him to many cutting sarcasms. When one of the magistrates resisted the registration, D'Aguesseau enquired from whence he drew the maxims in support of his opinions.—"From the speeches of the deceased Chancellor D'Aguesseau," coolly answered the other. It is difficult to account for this change, which still it is but charity to suppose was dictated by some conscientious motive, in one whose integrity has been admitted by writers not all friendly to him.* He was not a character to be influenced by interest or fear. Throughout life he was regardless of money, and when the Regent afterwards threw out some rash threats against the parliament, D'Aguesseau instantly tendered his resignation. In our day it would, to be sure, be difficult to discern the utility of those anile quarrels about the bull Unigenitus, the constitution, tickets of confession, about molinism, jansenism and quietism, that even excited the giant intellects of Fenelon and Bossuet—quarrels more worthy of a conventicle of old women, than of the master spirits of the Augustan age of France. Perhaps the most we can now urge in their favor is, that all opposition under tyrannical governments keeps some sparks of liberty alive for better days, and that it is often dangerous to concede a principle trivial in its actual operation on account of the injury that may result from its extension.

D'Aguesseau's next step manifested how little regard he had for court favors. In 1722 the dissolute and arrogant Cardinal Dubois, being made prime minister, claimed precedence in the Council; the chancellor resisted and was exiled a second time to Frêne. The five years he now spent in retirement, surrounded by his family, he always called the fairest days of his life. We may well believe he spoke sincerely when we contrast his studious habits and simplicity of manners, with the general dissoluteness throughout the kingdom; in which the Regent lead the way —"He rose," says a recent historian, "at no very early hour, heavy with the fumes of wine of the night before;

*Particularly St. Simon and Duclos.

during the forenoon he gave audiences, and saw the ministers of the councils and the foreign ministers; at two or half past, the whole court were admitted to see him take his chocolate. After this, came the council, the opera, visits to the king, to his mother and daughter, the Dutchess of Berry. The evening always ended by a supper, sometimes with his mistresses, or a chosen party of courtezans; sometimes with the Dutchess of Berry, two or three ladies of the court and ten or twelve of the most profligate men in Paris. The guests of the Regent discussed all subjects, religious and political, the lapse of a lady, the faults of a minister, or the nature of the soul, with equal freedom. As the wine circulated the conversation became more noisy and more indecent; the Regent spared no one and was not spared."*

A part of D'Aguesseau's time at Frêne was devoted to the study of the Scriptures on which he wrote learned notes after comparing the text in different languages; another portion was occupied in maturing and reducing to writing his ideas on legislation; another portion he employed in instructing his children in Belles Lettres and law. These were his principal occupations. He wrote for his son an admirable course of study in jurisprudence and literature, remarkable for profundity of learning and soundness of views; this, as many of his other works, show an abundance and exactness of knowledge, possessed by those only who live in a library. For relaxation he either read mathematics or Belles Lettres, and occasionally cultivated his garden, spade in hand, or directed the improvement of his farm. Exile could deprive one like him of no pleasures, but leave him to the enjoyment of many. He never engaged in any of the ordinary amusements of the world; "in the age of the passions, his only passion was study." As he has said himself, the only recreation he required was a change of literary avocations—The variety with him in the change was abundant, particularly with the aid of so many languages.

Thus happily situated D'Aguesseau needed nothing of his country, and his private letters at this period show that he was discontented with those who busied themselves in trying to obtain his recall. But his country needed him and in 1727 the Regent reinstated him as chancellor. From

* Hist. of Europe, 2. 190. Lond. 1826.

this period D'Aguesseau withdrew himself entirely from politics, and indeed from all public avocations except those connected with law. He had employed much of his time while in retirement, in meditating reforms and improvements in the jurisprudence of his country, which he hoped now, with the aid of the government, to put in operation—Each province of France at that time had its own laws, and so very discordant were they that "what was held just on one side of a brook was considered unjust on the other side. On account of the multitude of laws the jurist often scarcely studied any, from the difficulty of knowing all." Most of the provinces followed the Roman Code, but entirely contrary decision had frequently taken place. Each of them had a huge mass of its own peculiar customs, the growth of different periods under different circumstances, which, in a more modern age, when intercourse and civilization had assimilated all France were, in many cases, repugnant to both justice and expediency. Hence a suitor often felt sure of gaining a cause in one part of the kingdom that he would loose in another, and much management was employed in selecting a tribunal favorable to his pretensions. The constitution of their courts were quite as varied: the forms of procedure in them, generally prolix, difficult and expensive. In Brittany it was necessary to pass through six degrees of jurisdiction to arrive at the parliament. To remedy the many evils incident to such a state of things, D'Aguesseau wished, without changing the groundwork of the law as it stood, to render it uniform throughout France, and to supply what was obviously deficient. He set forth his notions in several excellent memoirs written with great clearness and force. The reformations proposed by him extended to three principle points—1st. The law itself: that is to reform the ancient laws, to make new ones of them, and to unite them in one single body of legislation. 2nd. The forms of procedure: that is to render them uniform, less prolix, more simple and cheaper. 3rd. The conduct and discipline of the officers of justice: particularly to abolish the sale of offices, to diminish the number of officers, to subject the inferior ones to rigorous supervision, &c. D'Aguesseau well foresaw the difficulties of this great undertaking, and was desirous of proceeding slowly and cautiously. His idea was to codify the law in successive portions, viz. to take any one subject and reduce all existing regulations and customs

to one uniform law, in which, whatever experience had pointed out as defective or injurious, would be added or pruned off. Thus the country would have enjoyed the benefits of the improved code at every step of its progress. The works of D'Aguesseau abundantly show how thoroughly he was occupied in this important matter. The projects that he meditated were the object of numerous communications to the superior courts, of frequent conferences with a committee of magistrates and juris-consults over which he presided. He carried his precaution so far as to prepare memoirs for and against, on the observations which he received.*

The plan of D'Aguesseau was very far from promising a perfect code, as it aimed at nothing more than giving uniformity and efficacy to the existing laws. The age demanded more. In most countries laws have had their origin in barbarous times, and have been, of course, framed to meet the exigencies of the period. Besides positive institutions, customs naturally arise, either necessary to the full effect of those institutions, or tacitly adopted by universal consent to guard against inconveniences generally felt. Other regulations are added from time to time in order to meet the most pressing wants of society; but the general indisposition of mankind to swerve from established modes of thinking and the unforseen difficulties that experience proves often to result from change inclines most nations, even in a liberal and enlightened age, to remain under the thraldom of the oppressive and gloomy jurisprudence of their ignorant ancestors. And, indeed, it is far better to endure some evil, if mixed with any fair proportion of good, than by hurried legislation to jeopard the tenure of substantial blessings, and open the door to ills that may not depart at our bidding. But if laws are designed to promote the happiness of society, they should be constantly modified to suit the endless fluctuations of human affairs. Institutions proper for one age, cannot be furbished up for another totally dissimilar, by a few partial improvements more than the hut of an African king can be transformed into an European palace by adding a Corinthian portico or a sculptured frieze from the Parthenon. When, therefore, those successive modifications of law, required by the changes of society, have not been made, it eventually becomes, if not absolutely necessa-

*Pardessus discours sur les ouvrage de D'Aguesseau, oeuv. de D'Aguesseau, I, XLV. and see vol. 12, 513.

ry, at least more expedient to commence anew. No where was thorough codification more necessary than France, not only from the discrepancies before alluded to, but from the many radical defects in the laws themselves. We may only specify the want of jury trials, tortures, the excessive cruelty of punishments, the denying of councils to those accused, closed doors in trials of various kinds, &c. Nor was any period better suited to this great object, than that of D'Aguesseau, Domat, Pothier, and Montesquieu. We can, to be sure, conceive cases where codification would be impolitic. It requires much time—a rare combination of talents, learning and good sense—of patience and experience; and unless all these could be put into requisition, it would be dangerous to desert a tolerable system of laws, well understood, for a new one that might create much uncertainty and confusion. It was wisdom in the half civilized nations of Europe to follow the code of Justinian after the downfal of the Roman Empire, and it is wise in new states to adopt the jurisprudence of their parent country until they are in a situation to legislate with decided advantage. The question has been often asked, why D'Aguesseau never put his projected code into execution, and some writers, St. Simon among the rest, have insinuated that he was restrained by the fear of injuring the profits of the officers of the law by its excessive simplicity. The truth is, that France was rather a federative than a consolidated government. Long used to their own institutions, each province had conceived a kind of prejudice in favor of its own laws and customs nourished by long associations, and proudly looked back to them as the monuments of their ancient independence and individuality. The King had neither the right nor the power to subject all France to one code. It required time and prudence to obtain a consent which could not have been exacted.* The establishment of an uniform code became easy to Napoleon when the revolution had levelled the ancient rights of the crown, the nobility and the clergy, and the people were willing to return to any permanent state of things, in lieu of an anarchy that left life and property without guaranty. Though D'Aguesseau's scheme for codifying was not carried into effect, he introduced a number of ordinances which have established his fame as a laborious and enlight-

*See Pardessus. Discours sur les ouvrage de D'Aguesseau.

ened magistrate. They in fact form an epoch in the French jurisprudence, and still hold a distinguished place in the code Napoleon, the best proof of their merit.

He not only labored diligently to improve the jurisprudence of his country, but eagerly encouraged all that entered the same field. Two of the most useful French legal works owed much to his encouragement. Domats civil law was formed under his eye; and Pothier, during the compilation of his great work, *The civil law in its natural order*, constantly received the advice and encouragement of the chancellor.

The writings of D'Aguesseau shew a love of his vocation and a zeal for the discharge of his duties that he well exemplified in practice. On the death of his wife, to whom he was devotedly attached, it was feared that he would be unable to bear up against his loss; but he immediately resumed his duty with his wonted energy, observing, "I belong to the public, and it is not just that they should suffer by my domestic misfortunes."

His enemies sometimes accused him of slowness in the discharge of his duties. When one of his friends once reproached him for his procrastination, D'Aguesseau unmoved replied, "When I think that the decision of the chancellor is a law, I may well be permitted to doubt a long time." By great temperance and repose of mind he preserved his health to the age of eighty-two. In 1750, for the first time, he was obliged to suspend his labors on account of his infirmities, and with that conscientiousness that marked his whole conduct, immediately resigned his office which he felt he could no longer fulfil. The King, however, accorded him the honors attached to his former situation, with a pension of a hundred thousand francs. He died a short time after—February 9th, 1751. With the exception of a large library, he left very little fortune.

His wife had been interred in the common cemetry of the village of Auteuil, and agreeably to his own wish his remains were consigned to the same humble spot. The government erected a monument to him that was pulled to pieces during the frenzy of the Revolution, but which was afterwards restored as well as it could be by Buonaparte. More recently a statue of him has been placed in front of the Chamber of Deputies. He married in 1694 Anne Le Fevre D'Ormesson, by whom he had six children. Her family

is celebrated for its long succession of distinguished magistrates—M. de Coulange, said of her "that it was the first time he had seen the graces and virtue united."

Voltaire, in his "Catalogue Raisonnè, of the writers of the reign of Louis 14th," thus characterises D'Aguesseau: "The most learned magistrate that France ever had, possessing half of the languages of Europe besides the Latin, Greek and a little Hebrew; very well versed in history, profound in jurisprudence, and what is more rare, eloquent. He was the first at the bar that spoke at the same time with force and purity; the lawyers before him made phrases." Perhaps of all his contemporaries, St. Simon mentions him with the most asperity, yet confesses "a great deal of genius, of application, of penetration, of knowledge of all kinds; of gravity, of equity, of piety, of innocence of manners, constituted the basis of the character of D'Aguesseau."

As a man, few persons have more decidedly possessed those qualities that constitute true greatness than D'Aguesseau. Modest in prosperity and unbent in adversity, he preserved the same calmness and dignity amid all the vicissitudes of fortune. Great talents and great learning were united with an untiring zeal to make them equal to the utmost extent of every duty of life—His strict probity, his mildness and even playfulness of manner gained him esteem as well as affection in his various relations with society. He was a kind husband, a tender father, an affectionate friend, a benevolent citizen.

But it is impossible to well speak of any combination of qualities as constituting greatness without reference to some particular line of life, in which it can be brought into action—The bold daring of the soldier is unsuited to the minister of the gospel; the meekness of the minister as little becomes the soldier. The patience, the perseverance of D'Aguesseau, were qualities which eminently fitted him for the post of Chancellor, and more especially that perfect freedom from all passion and prejudice, the intrusion of which we fear on the seat of justice, when we see their existence in the man. Not less admirable was his profound sense of duty; so deeply was he impressed with the importance and responsibility of the different offices he held, that his whole soul appeared devoted to filling them well or to rendering himself more competent to them. He was a striking proof of the universality of genius; for the difficulties of all branches of know-

ledge seemed to vanish before him. Indeed it is almost impossible to credit the extent and exactness of his learning, did we not daily witness how much can be attained by talented men, with even ordinary industry, and call to mind also his long and laborious life. Not only did he allow himself no relaxation except change of study, but even during his journeys he read constantly in his carriage. His memory, which was always extraordinary, remained so unimpaired that in extreme old age he repeated from the classics long passages which he had not seen since his boyhood. On law civil, canon, and French, on divinity, mathematics and metaphysics he has written learnedly and well. Whether explaining the Pandects or combatting Cudworth, Newton, or Locke, he is equally at home. Often, when he had attained the loftiest summit of legal honors, and in the noontide of his fame, did he turn from the tetric and sombre technicalities of the law and cast a longing eye to the favorite studies of his younger days, like a pilgrim on a barren mountain beneath burning skies, gazing wistfully down on the smiling vallies he has left behind. Yet no work of his remains properly belonging to Belles Lettres, unless (what appears probable,) a Treatise on Eloquence, the credit of which another has taken to himself.*

Like Bacon, Selden, Hardwicke, Mansfield, Montesquieu and a host of others, his example shows how necessary are the attainments of the scholar to the full and lasting fame of the lawyer. His speeches while at the bar, are the finest models of law arguments; but they, at the same time, by their lucid order, fine illustrations and beauty of style, reveal riches not drawn from the mere stores of jurisprudence. Considering that without extensive literary attainments the lawyer will neither seize, as a philosopher, general principles, nor clothe the dry details of his profession so as to render them attractive, he constantly toiled to inculcate the necessity of study. Above all things he detested what are usually called geniuses, who with slender knowledge, a pleasant manner and a pestilent fluency gain a fleeting reputation during the freshness and vivacity of youth—men who think they have a right to neglect their talents in proportion as nature has been generous of them.

* The title of the book, is "Landie on Eloquence," 2nd edition. The first edition is disfigured with numberless faults.—M. Renouard has established the theft beyond doubt. See Cat. d'un Amateur, 2. 55.

It would be difficult to cite an author who always exhibits such clearness and force united with elegance. He seldom uses a rare or poetical word, and still more rarely an epithet for the purpose of giving a more musical flow to his periods. This simplicity at the first glance gives his writings an appearance of being entirely unstudied; but on a more attentive perusal the perfect finish of every period reveals the labor. One of the charms of his compositions, is the honesty and earnestness that breathes throughout them. Although he uses his erudition abundantly, it always harmonizes with the subject and seems to be demanded by it. Generally he wrote with excessive care, yet his *plaidoyers*, which were thrown off without correction, display the same perfection as his more labored efforts.

The best edition of his works is that of Paris, 1819, 16 vols. 8vo. to which may be added, the work on Eloquence before alluded to.

[*The works consulted for this sketch were principally D'Aguesseau's works: Paris*, 1819—*The notice affixed to them by M. Pardessus, Eloge de D'Aguesseau par Thomas; especially the notes, Biographie Universelle, Paris*, 1811; *Encycl. Brit. Suppl. Edinburgh*, 1824, *&c.*]

RICHLAND DISTRICT—IN EQUITY, FEB. TERM, 1818.

BEFORE CHANCELLOR JAMES.

SAMUEL SCOTT *vs.* THOMAS WOODSIDES.

———ooo———

Damages recoverable on Real Covenants, where a defective title has been perfected by the purchaser.

The following cases are published, as settling the doctrine both at Law and in Equity—that a purchaser of real estate, who discovers a defect in the vendors title and purchases up the outstanding conflicting claim, without notice to the vendor, is entitled to no more than his expense and trouble in perfecting his title, if at the time of the sale the vendor believed himself to be the legal owner of the estate. We are aware that since the decision of *Ward* vs. *Revel*, the Court of Appeals has narrowed down the jurisdiction of the Court of Law as to such defences; yet, according to the last opinion of that Court, (Dec. term, 1829, at Columbia,) in Morgan and Hext, a clear outstanding legal title, which would amount to a breach of warranty of seizin, and sustain an action of covenant, may still be the subject of a legal discount, and be available as a defence at law. In that case Judge Nott says, "The last ground, to wit: that there is an outstanding subsisting title in another person, is of a more definite character—that will be a good defence, if it can be sustained. It presents a simple isolated question of title, which is properly cognizable at law, and on that ground a new trial must be granted." Colcock and Johnson, Justices, concurred.

Complainant purchased from defendant a tract of land, for which, upon payment of a sum of money, he received the following written instrument:—"Received, July 12th, 1817, from Mr. Samuel Scott, $1717 50, in part payment for a tract of land containing three hundred and thirty-eight acres, more or less, at $7 per acre, which, when paid, I will make the said Samuel Scott good warranted titles to said land, it being the tract or plantation whereon I now live. The bill states that upon a re-survey there was a great deficiency in the number of acres mentioned in the above writing; that the sum paid was more than sufficient to pay for the number of acres actually contained in the tract, at the rate of seven dollars per acre; that complainant has applied to defendant to make him a good title according to agreement; that he refuses, and complainant prays specific performance. Defendant answers, admitting the contract

above set forth, and payment of the money mentioned therein.—He states that he purchased the land from Timothy Rives, as containing 338 acres; that it was surveyed by one Tucker, found by him to contain that quantity, and as such defendant sold it to complainant; that the portion of the tract, in which is the alleged deficiency, was a part of the purchase from Rives, and was always and generally considered to belong to this tract, which was known also to complainant; that complainant never gave him notice of the alleged deficiency, nor required him to perfect his title, until, as defendant believes, after complainant had procured a grant for the same; that he is willing to make a good title when the balance is paid, and to perfect his title by obtaining a grant, if complainant will withdraw his, or otherwise he is willing to defray all complainant's expenses in procuring his grant.

The evidence for defendant proves that the vacant land, which was the part deficient, was always thought in the neighborhood to be a part of the tract sold. Upon a resurvey, the deficiency was found to be 138 acres, for which complainant has a grant dated 4th August, 1817, subsequent to the date of the receipt above set forth, and no notice has been proved upon defendant of the above deficiency, nor requisition to perfect his title before the grant was obtained.

Although this case has been called a novel one, and is in fact so, yet we find in the books a quaint adage which is very applicable to it. In these, it is said that a party calling for the aid of the Court of Equity for a specific performance must come with clean hands, and it appears that if they be soiled by any act of unfairness, the Court will reject his application. The present case may be fairly tested by this rule :—Defendant was an illiterate man, who cannot write, and therefore could not pry much into either surveys or titles to land. He sold complainant a tract containing a certain number of acres; it was generally reputed to contain so many, and he himself had purchased it for that quantity. There was no unfairness on his part. But complainant went upon the land with his surveyor, and found a part reputed to be defendant's, vacant. What step then ought complainant to have taken as purchaser. He ought immediately to have given him notice of the discovery he had made, that he might have gone and perfected his title by obtaining a grant, or he might have taken the grant himself, and offered de-

fendant to comply with his agreement upon deducting his expenses. Had defendant refused, this Court would have granted its aid. We have no cases from England similar to the present, as it would be difficult to find vacant land there; yet we have a very good one in point from Tennessee, where, until lately, a surveyor had never stretched a chain. It was decided in the Supreme Court of Errors and Appeals there by Mr. Justice White—that "if a man, under the belief that he has a good title, sells land, and stipulates to convey, putting the vendee in possession, and he discovering a better title, purchases *with a view* to prejudice the vendor, Equity will view the purchase as made for the benefit of vendor, through the agency of his vendee, and will relieve vendor on paying the money and interest which vendee has advanced to purchase up the title. This Court ought not to sanction the doctrine, that a purchaser is authorized to pry into and discover defects in his own title, with a view to purchase an outstanding claim in another, and thus consider himself as evicted, when he might have enjoyed the land but for his own conduct, although complainant could not convey at the time stipulated, yet this Court will relieve against time, when the party has sustained no injury, or where it can be compensated and the Court decreed;" that complainant should pay the expenses of procuring the grant, &c. and the defendant to be perpetually enjoined—Searey vs. Kirkpatrick, 1 Cooke's Rep. 211. This case is strong in point throughout, as well as in the part I have cited; and as it was upon injunction where defendant is looked upon in the more favorable light, until complainant has made a clear case, the present case is stronger against complainant here; for as has been said, complainant must come with clean hands. The same principle was acted upon in a case in the Court of Appeals in Virginia—Hull vs. Cunningham's Executors, 1 Mun. 330. Where it is decided, that "if a purchaser do not by eviction, or otherwise, lose the land he expected to get, but make an entry for it as vacant, and obtain a patent, the measure of relief is compensation for his trouble and actual expenses in securing his title. Having elected to come into Equity, he cannot have vindictive damages." This case is also very similar in principle to the present, and was decided by a full bench unanimously: Wherefore upon these authorities, and upon the ground that there must be no unfairness in the applicant for specific performance, I

am of opinion that the measure of relief is compensation for his trouble and actual expenses in procuring the grant. It is therefore ordered, that defendant do make complainant a good title to the land sold, which was not vacant. That complainant keep his grant for that which he found vacant; that he pay the defendant the sum stipulated in his contract, except his expenses and what may be allowed for his trouble; that it be referred to the Commissioner to examine and approve the title, and to ascertain what complainant shall be allowed to deduct as aforesaid, and that complainant do pay the costs.

WM. D. JAMES.

COURT OF APPEALS—COLUMBIA, JAN. TERM. 1828.

HENRY WARD *vs.* STEPHEN REVIL.

This was an Action of Assumpsit on a note for the balance of the purchase money of a tract of land. The defence was, that the plaintiff was not the owner of part of the land sold.

It appeared in evidence, that a part of the land was within the reputed limits of an older grant, and part was said to be vacant; for which the defendant had taken out a grant in his own name, since the purchase. For the plaintiff it was insisted, and his Honor so charged the Jury, that the defendant could claim a deduction for no more than it had cost him, to perfect his title, which was the expense of his new grant. The Jury, however allowed him, as appeared by their verdict, a pro rata deduction for all the land not included in the plaintiff's grant, according to the surveyor's platt. And the plaintiff appealed and moved for a new trial, on the ground that the verdict was contrary to law.

Evans, for the motion, cited Win. *vs.* Exo'rs. of Jones, 1. Nott & McCord, 431.; Pitcher *vs.* Livingston, 4. Johns. 4, 6—21.

Levy and *Wilkins*, contra.

CURIA, per COLCOCK, J.—The practice of our Courts, under the discount law, has been to admit of such defences as the present, even where there has been no eviction, and we have even allowed an action to be brought to recover

the purchase money while the purchaser remained in the undisturbed possession of the land.

The discount law was intended to avoid the multiplicity of suits and to save the expenses of unnecessary litigation, and it is a species of Equity Jurisdiction, incorporated in the Common Law. It has been so considered, particularly in cases of this character. Viewing the law in this light, I am in favor of the motion; for what I ask is the damage sustained by the defendant, in consequence of the defective title? It is the expense which he has been at in perfecting it. What was the proper course of conduct to be pursued by him, when he found that the grant did not comprehend the whole of the land sold, as had been supposed? He should have informed the plaintiff of this, and called on him to perfect the title, or he should have given up the bargain. He came to the knowledge of the fact by being put into the possession of the plaintiff's titles. He could never have known it by any other means; and had the plaintiff not sold the land to him, he himself may have made the discovery and then he could have obtained a grant.

In the case of Scott and Woodsides, decided in the Court of Equity, by Chancellor James, and carried to the Court of Appeals, (as I am informed, and there abandoned,) this doctrine was maintained; and so in the case of Searey *vs.* Kirkpatrick, in 1 Cooke's Rep. 211; in which case a suit at law had been had on the covenant and a verdict recovered against the defendant; he then applied for relief and an injunction, and White, Justice, says: "If a man, under a belief that he has a good title to a tract of land sells, and either conveys, or stipulates to convey it, putting at the same time the vendee in possession, and he discovering a better title in some other person, purchases it with a view to prejudice the vendor, a Court of Equity will allow the purchase as made for the benefit of the vendor, and will relieve him from the obligation of his covenant by paying the money with interest, which the vendee has actually advanced in purchasing the preferable title." Now, if the parties, being both fairly before the Court, and the principle can be applied as well in this Court as in the Court of Equity, why put the party to the trouble and expense of going there. Why not consider it as an exception to a general rule arising out of the peculiar circumstances of the case? As we suffer the contract to split into parts, and allow a *pro rata*

compensation for that which is lost; it seems to follow as a matter of course, that when the part lost is materially better or worse, that a proper allowance must be made according to its value. The doctrine of the English law being wholly changed by our practice, we must adapt the principle to the cases as they vary; when the contract is rescinded there is no difficulty; the damages are fixed as is the case in the English Court; but when a partial loss is sustained and the contract not abandoned the true measure of damages is the value of the part lost, or that which the vendee pays for it. There is nothing to be apprehended in applying the Equity rule in such a case as this, for the vendee is safe; and if not, he may have redress hereafter. The motion is granted.

Johnson, J. concurred.

Nott, J. dissenting:—I differ in opinion with my brethren in this case. It is a well settled rule of law in England, and in this State, and I believe, in every other state in the Union—that for a breach of warranty of title to land, the purchaser is entitled to recover back, the value of the land of which he has been thus deprived. Whether the value of the land at the time of sale, or at time of eviction shall be the rule for the assessment of damages, is a question on which different opinions have been entertained. But that question has been considered as settled in this State, by the decision of our courts, ever since the case of Furman of and Elmore, 2 N. & M. 189, and now settled by the Act the Legislature of 1824, in conformity with that decision.

It is now said that a new rule is to be adopted where the vendee has cured the defect in his title, by procuring a grant to himself for the land not covered by the conveyance, or by purchasing up the title paramount. And for this principle several cases are relied on, which are referred to in the opinion of the Court. But it will be observed that all those are equity cases, and go upon the principle that the vendee in obtaining the paramount title has acted as trustee for the vendor, and therefore is entitled only to a remuneration for his expenses and trouble. It is therefore most clearly a purely equitable principle, which can not be acted upon in a Court of Law. How can the question be tried at Law? A Court of Law has no officer like the Master in Equity, to whom it can be referred to ascertain the amount of money which has been paid; the monies rendered, or the compensation to which the party is entitled.

Suppose that this Court, instead of granting a new trial, should have the plaintiff seek relief in a Court of Equity, and the Defendant in his answer should swear that he had informed the complainant of the defect in his title, and had called upon him to perfect it and that he had refused—would the Court of Equity afford him relief? I apprehend that it is at least doubtful. And the plaintiff may have given him such notice without being able to prove it, for he would not be required to take a witness of the fact.

But suppose that it may still be doubtful whether there may not be a better outstanding title, a Court of Equity might compel the plaintiff to indemnify the defendant against such possible event, or lay him under sueh other terms as would make him secure. But these are powers which can not be exercised by a Court of Law. It appears to me therefore, that it is introducing a rule which the Courts of Law can but imperfectly execute, while it is interposing a shield in behalf of a wrong doer, and leaving the injured party without any adequate protection. I am therefore opposed to the motion. NEW TRIAL GRANTED.

EDGEFIELD, SPRING TERM—1830.

BEFORE JUDGE GANTT.

JOHN WILLIAMSON *vs.* SUSANNA FARROW.

———ooo———

Computation of Time.

Where a public officer, such as a Sheriff, or Commissioner is authorized to sell lands, he is also authorized to convey, and the validity of the title does not depend on the return or report of sales and confirmation.

Where a return is required from a public officer, the want of it is a mere irregularity, which may at any time be supplied so as to conform to the fact.

In the construction of statutes in this State, the term *month* means a calendar month—So in judicial proceedings it has been always considered, and no instance occurs where it has received a different meaning in matters of contract.

A credit of *six months*, under the mortgage act, of 1791, therefore means six calendar and not lunar months.

When a re-sale is ordered to be made of mortgaged premises, in default of payment by the first purchaser, the day of the first sale will be excluded in computing the six months credit on it: so that where the

first sale was made on the 4th of June, on a credit of six months, the second sale can not take place till the 5th of December.

Wherever *a forfeiture* would be incurred by considering "the day of the date" or of "an act done" as *inclusive*, it shall be considered as exclusive.

Where it is doubtful whether the day of the first sale is intended to be included or excluded, if its inclusion would divest a right, it will be excluded.

In law there are no fractions of a day, unless it be to give effect to a right, which would be otherwise defeated—and the purchaser at sheriff's sale on a credit of six months, has the whole of the last day of six calendar months, excluding the day of sale, to make the payment.

If the sheriff re-sell on that *last day*, at the risk of the first purchase, he acts without authority and his title is void.

The general rule as to purchasers at sheriff's sales, is that where the defect in the proceedings is such as may be cured by *consent, acquiescence or amendment*, it does not vitiate the title.

But where it is a want of authority, or where the authority is absolutely void, the sale under it is also void.

When a mortgage is foreclosed at law, and a general order for a sale of the whole mortgaged estate is made, and under such order, a purchaser buys the whole at sheriff's sale, can a person who has purchased a part of the estate from the mortgager, and gone into possession of it, before judgment on the mortgage bond, but after suggestion for foreclosure filed, be permitted to question the sehriff's title as to the part so purchased by him?

This was an action of trespass to try titles to a house and lot in the Town of Hamburg, situated on what is called the Leigh tract of land. It appeared that this tract of land, containing three hundred and ninnty-eight acres, was devised by Walter Leigh, to whom it then belonged, to certain of his relations. On the 5th day of February, 1823, a bill was filed in the Court of Equity for Edgefield district, by Thomas Hix and others, being the said devisees of Walter Leigh, deceased, against Henry Shultz, who had purchased the interest in the said land of one of the said devisees, for the purpose of effecting partition. At February term, 1823, the Court of Equity ordered the said tract of land to be sold for division, and at a sale made by the Commissioner, in obedience to that order, on the 5th May, 1823, Henry Shultz became the purchaser at the price of $ 15,500, and gave his bond and security and a mortgage of the land, to secure the payment of the purchase money. The purchase money not being paid, the Commissioner in Equity instituted an action on the bond, recovered judgment, and after filing a suggestion and giving the usual notice, procured at March term, 1827, an order of foreclosure, in the following terms.

Commissioner in Equity vs. *Henry Shultz.*

The plaintiff in this case having filed his suggestion, setting forth the execution of a mortgage of land by defendant to plaintiff, to secure the payment of the bond sued upon, and having served a ten day rule on defendant, to show cause why suuh mortgaged estate should not be ordered to be sold; and the defendant consenting to the sale, on motion of Brooks and Wardlaw, ordered that if the defendant shall not on or before the first Monday of June next, pay to the plaintiff tho full amount of principal, interest, and costs due by him on that day, the Sheriff shall proceed to sell the premises described in the mortgage and suggestion, on a credit of six months as to the one moiety and twelve months on the residue, the titles to be signed but not delivered until the money be paid according to the terms of sale: And if the amount of purchase money be not paid when due, the Sheriff snall re-sell by virtue of the same levy on account of the former purchaser for cash."

William Thurmond, the sheriff, in obedience to this order, exposed the premises to sale on the 4th day, being the first Monday of June, 1827, and Henry Shultz became the purchaser at $ 55,000; and he not complying with the terms of sale, the mortgaged premises were re-sold by the Sheriff at his risk, by public outcry, on Tuesday the 4th December, 1827, and John Williamson, the plaintiff, became the purchaser at the price of $ 22,000, paid the purchase money, and received Sheriff's titles for the premises.

The defendant purchased the house and lot in dispute from Henry Shultz, after the date of the mortgage to the Commissioner, and claimed under him. The locus in quo, the trespass, and that the defendant claimed and *went into possession* under Shultz, subsequent to the date and recording of his mortgage, were admitted. On the trial of the case, the plaintiff introduced, or offered the following evidence. The record in the Court of Equity of Thomas Hix and others, against Henry Shultz, including all the necessary orders for the purpose of effecting a sale of the land. A mortgage of the premises from Henry Shultz, to the Commissioner in Equity, dated 5th May, 1823, and recorded 19th June, 1823. The record from the Court of Common Pleas in the case of the Commissioner in Equity against Henry Shultz, including the judgment, executions, suggestion for foreclosure, and order of sale of the mortgaged premi-

ses. The plaintiff then offered in evidence a return by Wm. Thurmond, the ex-sheriff, who sold the premises, signed on the day of trial in the following words: "In obedience to the order copied within, I did expose the mortgaged premises to sale, on 4th June, 1827, at which time they were knocked off to Henry Shultz, highest bidder, at the price of fifty-five thousand dollars; he not complying with the terms of sale, the mortgaged premises were re-sold at his risk, on 4th December, 1827, at which time they were knocked off to John Williamson, highest bidder, by agent, at the price of twenty-two thousand dollars, and titles have been made and delivered to said John Williamson. Sworn to, 12th April, 1830, before Judge Richardson, C. C. P.—Signed, Wm. Thurmond, S. E. D." The defendant objected to the return—that it was too late now to make it. The Court sustained the objection. The plaintiff then moved that Wm. Thurmond should be permitted now to make a return to the order of Court, foreclosing the mortgage suggested in the case of the Commissioner in Equity against Henry Shultz, by which he was directed to sell the lands described in said mortgage, which application was also rejected by the Court. The plaintiff then produced in evidence the Shériff's sales book, in which is stated the case of the Commissioner in Equity against Henry Shultz, in which is entered in the Sheriff's hand writing, in separate columns, the sale of "upper Hamburg, or what is called the Leigh tract, on 4th June, 1827, for $55,000 to H. Shultz." The plaintiff then offered in evidence the entry and memorandums made by Sheriff Thurmond, of the same case, contained in the Sheriff's execution book, in which the Sheriff, after stating the case, the amount to be collected, &c. made the following entries: "The land mortgaged for the payment of this debt, was sold on the 4th day of December, 1827, and was struck off to John Williamson, of Charleston, for twenty-two thousand dollars." Signed by "W. Thurmond." Thé plaintiff also offered in evidence the return of the Sheriff on the second fi. fa. in the same case, made in the following words:—"Dec. 5th, 1827—Received payment in full of this fi. fa., principal, interest and costs, by sale of the Leigh tract of land, on the 4th instant, December, 1827. W. Thurmond, S. E. D." The plaintiff also offered the former Sheriff and John W. Munday, as witnesses to prove that Henry Shultz had purchased at the first sale, on 4th

June, 1827, and had failed to comply with the terms of sale, and that the land was re-sold at his risk on 4th December, 1827, and that John Williamson became the purchaser.—The Court overruled all these entries and these two witnesses. The plaintiff then introduced and proved his Sheriff's, title, by a deed of Wm. Thurmond, Sheriff, to John Williamson, dated 4th December, 1827, for the Leigh tract of land, in which is recited the order of Court under which the sale was made. The former sale to H. Shultz, on 4th June, 1827, and his failure to comply with the terms of sale, and the re-sale to the said plaintiff, on the day of the date of said deed. The plaintiff here rested his cause, and the presiding Judge ordered a nonsuit, from which the plaintiff appeals for a new trial, on the following grounds:—

1. Because his Honor the presiding Judge erred in rejecting the return of Sheriff Thurmond, offered in evidence.

2. Because his Honor erred in refusing to permit the Sheriff to make a return at the trial *nunc pro tunc.*

3. Because he erred in considering the return aforesaid as indispensable to sustain the Sheriff's deed.

4. Because he erred in rejecting the entries on the Sheriff's books, and on the execution, the testimony of the former Sheriff and the testimony of Monday to prove the first sale, Shultz failing to comply with the terms of sale, and the re-sale.

5. Because, if the proper testimony had been received, the order for nonsuit would have been improper.

6. Because the order for nonsuit was contrary to law and evidence.

Bauskett & Wallace, plaintiff's attornies.

On the argument of the case in the Court of Appeals, at Columbia, in June 1830, the defendant submitted the following as the grounds on which he sustained the nonsuit.

1. That the title made out by the plaintiff was incomplete for want of a return by the Sheriff, and a confirmation of his proceedings under the order of sale: that it was too late to procure such a return at the time of trial, *nunc pro tunc*, and that the suppletory evidence, offered from the books and by parol, was inadmissible or insufficient.

2. That the defendant, being a purchaser in fee, from Mr. Shultz, and in possession previous to the judgment and forelosure at law, cannot be affected by the sale in question, to the plaintiff, under the foreclosure.

3. That the re-sale under the order could not have been made until the whole amount of the purchase money, at the first sale, became due: that is, until the expiration of twelve months from the 4th June, 1827; and if the Sheriff could legally re-sell at all, at the end of six months, he could only re-sell for so much of the purchase money as was then due, viz. one half of the debt, interest and costs, and not the whole premises, for the whole amount.

4. That the six months credit allowed by the order for one moiety of the purchase money, did not expire until 4th December, 1827, and that Mr. Shultz was entitled to the whole of that day, to comply with the terms of sale as to that moiety.

5. That the re-sale, on Tuesday the 4th of December, was illegal and void, inasmuch as the premises could not have been sold on Monday, when the credit, certainly, had not expired according to any view of the case.

6. That the last sale was not legally advertised, inasmuch as the default, on which it was to be made, had not occurred and might not occur, and an advertisement in anticipation was illegal.

Earle & Blanding, for defendant.

The case was very fully argued by Messrs. Bauskett and Wardlaw, for the plaintiff, and Messrs. Earle and Blanding, for the defendant.

O'Neal, Justice, sitting for the Honorable A. Nott, who was unable to attend from sickness, delivered the following opinion, in which Johnson, Justice, concurred.

If the decision of this case depended upon the grounds on which the nonsuit was ordered on the Circuit, the motion to set aside would have to be granted; for we do not think the purchaser was affected by any irregularity in the proceedings of the Sheriff after the re-sale; if the Sheriff's authority to sell, was at the time of the re-sale sufficient, the purchaser ought to be protected. It is however by no means certain that there was any irregularity after the re-sale. I incline to the opinion, that no return of the re-sale made by the Sheriff, or confirmation of it by the Court, was necessary—When a public officer, such as Sheriff, or Commissioner is authorized by a Court of Record to sell lands, he is also authorized to convey, and the validity of the title does not depend on the return, or report of the sale and confirmation.—See Young *vs.* Teague, decided at this place at

the sitting of the Appeal Court, last January. But if there was an irregularity in the proceedings of the Sheriff, in his not making a return on the rule under which he sold, the Court at the trial ought to have suffered the return to be made; for, at most, it was only a defect in form, and not in substance; and was therefore amendable. To sustain the nonsuit, other grounds have been presented to this Court, and as a majority of the Court think the Sheriff re-sold before the expiration of the time allowed to the purchaser, Henry Shultz, for the payment of the first moiety of the purchase money, and that the re-sale was void, and that the purchaser's title is therefore defective, it will not be necessary to express an opinion on any of the other various grounds, which have been argued.

The land was in the first instance sold on the first Monday in June, being the fourth day of the month, under an order of the Court of Common Pleas, to foreclose a mortgage, on a credit of six months for one moiety, and twelve months for the other moiety. The order directs the Sheriff, if the amount of the purchase money be not paid when due, to re-sell for cash. The Sheriff re-sold on Tuesday the 4th day of December, to the present plaintiff.

Arising out of these facts, three questions present themselves for consideration, viz:—

1st. What is meant by the term month; is it a calendar or lunar month?

2d. How is the time to be computed, inclusive or exclusive of the day of sale?

3d. Is the re-sale void?

The term month, in common parlance, is always understood to mean a calendar, and not a lunar month; in the construction of statutes: it has been held in this State to mean the same; Alston *vs.* Alston, 2nd Con. Rep. (Treadway) 604. In judicial proceedings, as far as usage can justify such a meaning, it has been uniformly so considered in matters of contract; I know of no instance in which it has received a different meaning—Indeed it may be said that the meaning of the term has become fixed by common understanding; and to adopt a different meaning now would be to unsettle all contracts, titles, and every judicial proceeding. The construction of the term, too, ought always to be according to the intention of the parties using it; if they intend it to mean a lunar and not a calendar month, then I

admit that their intention should govern, and according to it, it would be held to be a lunar month. For in the language of Justice Le Blanc, 1st Maule *vs.* Selwyn, 117, "In matters of contract, the question will ever be, what was the intention of the parties at the time they made use of the words?"

In the case before us, what did the parties mean by a credit of six months? It is obvious they meant six calender months; for the order directs another moiety to be paid in twelve months. Twelve months constitute the calender year; and when we speak of a credit of twelve months, we always mean, and are understood to speak of a credit for the whole calender year; it would then, on a fair construction, appear, that the credit of the six months, for the first moiety, was intended and understood to mean a credit of the first six calender months of the calender year, commencing on the 4th June. But the common understanding of the term, would be enough for me to say, that calendar and not lunar months, were meant and intended by the parties.

As a general rule I would lay it down, that in all matters of contracts, the terms months must always be understood to be calendar, unless the parties have expressly or obviously intended it to mean lunar. In this case, however, the meaning which I have given to the term months is sustained by another view. The act of the Legislature authorizing the Court of Common Pleas to foreclose mortgages, directs that the sale shall be made on a credit not exceeding twelve months; the order must therefore receive the same construction which the act itself would receive. The term months used in the act, would, I apprehend, admit of but one construction, viz. the calendar months—Alston *vs.* Alston, 2nd Con. Rep. (Treadway,) 604; Dowling *vs.* Faxall, 1st Ball & Beatty, 193.

2nd. In computing the time, is the day of sale to be included or excluded? Without entering into a consideration of the distinctions attempted to be drawn by the English Judges, between "from the day of the date," "the date," "making," or "an act done," it will be enough to say they were all examined, and their inconsistencies and uncertainty pointed out by Lord Mansfield in the case of Pugh *vs.* the Duke of Leeds, (Cowp. 717,) and the rule by him laid down, that the computation should be inclusive or exclusive, according to the context and subject matter, and so as to

effectuate the deeds of the parties, and not destroy them, is the rule of reason, and one which has ever since governed all subsequent cases. The intention of the parties from this rule must always regulate the computation; for the context and subject matter is one of the means by which the intention is collected; and to effectuate and not destroy the deed, is but giving effect to the intention manifested by the execution of it; and which, if governed by artificial distinctions, might be void. The case before us, tried by this rule, will, I think, bring us to the conclusion, that the day of the sale ought to be excluded. It was a sale on a credit of six months, and if payment was not made at the end of that time, a re-sale was to take place at the risk of the purchaser. The intention of the parties collected from the context and subject matter, and with a view to effect and not destroy the right of the purchaser, would manifestly lead us to the conclusion, that the day of sale was intended to be excluded; for until the purchase was made, no credit could be given, it was to the purchaser important that he should have all the time. What was his natural conclusion? It certainly was, that the credit begins after the sale, and as there are no fractions of a day, the day of sale must be excluded. To include the day of sale, would be to destroy the right of the purchaser; for believing that he might be entitled to exclude the day of sale, he might have been prepared to pay on the last moment of the 4th of December, the purchase money. Include the day of sale, the rights of the purchaser are unavoidably defeated; exclude it, the seller is only delayed twenty-four hours longer.

From the case of Pugh *vs.* the Duke of Leeds, and succeeding ones, the rule may be deduced, that wherever a forfeiture would be incurred by considering "the day of the date," or "an act done," as inclusive, then it shall be considered as exclusive—Lester *vs.* Greland, 15th Ves. Jr. 246; Dowling *vs.* Foxall, 1st Ball & Beatty, 193.

In the case of Dowling *vs.* Foxall, the Lord Chancellor Manners, says, "I apprehend that I am acting upon a principle well recognized by this Court, by rejecting that constitution, in a doubtful case, which would divest a right or work a forfeiture." To include the day of the sale in this case, would be both to divest a right, and work a forfeiture. The purchaser would lose his purchase, and incur a forfeiture of $33.000, the difference between the sale and re-sale.

Say then, that it is even doubtful whether the day of sale was intended to be included or excluded, and according to the rule, it ought to be excluded. If, however, it had manifestly appeared to be the intention of the parties to include the day of sale, I would not hesitate to give it that construction; for in all cases of contracts, the intention of the parties collected from the instrument itself, giving to its words the meaning which in common parlance, they usually receive, is the governing principle.—In other words, contracts are most commonly the law agreed upon by the parties.

What was meant by a credit of six months? Was it to commence on or after the day of sale? Most men, I apprehend, would not hesitate about answering, after it. This answer too is necessarily the legal one. In law there are no fractions of a day, unless it may be to give effect to a right which would be otherwise defeated. The Sheriff was allowed from 11, A. M. to 4, P. M. of the 4th of June, to effect the sale. He might have sold at the first or the last moment of the time. If he sold at the last moment, the official day expired, as the sale was finished, and the credit could not commence until after it. If he sold the first moment, it would result in the same thing; for until the close of his official day of sale, the day of credit would not begin. In this case no fraction of a day can be allowed, and therefore the credit did not commence until the first moment of the natural day after the sale. I say that no fraction of a day in this case can be allowed, because the seller had no right, which would otherwise be defeated. It is a mere question when money shall be due—the debt is not effected—the time of payment is perhaps postponed a few hours by the operation of this legal rule. Excluding the day of sale, and computing six calender months, the credit did not expire until Tuesday the 4th December. The purchaser was entitled to the whole of that day to make the payment—Salk. 578, 1st Saunders, 287, 4 T. R. 170. Hence the Sheriff re-sold before he was authorized so to do, by the order of the Court.

3rd. Is his re-sale void? That it is, cannot be questioned. The Sheriff, when acting without the pale of the authority conferred on him by law, is acting only as a private citizen, and the law gives no other, or higher sanction to his acts, than it would to those of any other. What power had the Sheriff to re-sell? None: the purchaser had all the day of

the 4th December to pay the money. If the Sheriff sold before the expiration of that day, he sold without authority. Is the purchaser at the re-sale effected by the Sheriff's want of authority? He certainly is. The order under which the Sheriff sold, is a part of the title. If it was violated in the re-sale being made before it directed it to be done, it follows that the purchase was not made under it, and that the title of the purchaser is not derived from it. If the Sheriff had sold under a judgment and execution, the purchaser would not have been effected by a mere irregularity; but if he had sold before execution, the purchaser would have acquired no estate. Why? Because, as yet, the Sheriff was not authorized to sell. If the judgment and execution were absolutely void, as in the case of Musgrove *vs.* Gordon, the purchaser would have acquired nothing by his purchase. In the cases put, the judgment and execution are part of, and indeed the predicate of the purchaser's title. If they, or either of them, have not been rendered or issued as its inception, or if they are void, it follows that he has no legal title. Here the order authorizing the re-sale, is part of the purchaser's title, and upon its adduction in evidence and proof of the re-sale, it appears that it took place before the day of payment had elapsed. The purchaser, therefore, fails to connect his title with that order. His deed from the Sheriff is, without the authority of the order, only the deed of one William Thurmond; it conveys, therefore, no legal right under the order of re-sale.

The general rule as to purchasers at Sheriff's sales is, where the defect in the proceedings is such an one as may be cured by consent, acquiescence, or amendment, it does not effect their title. But when it is a defect of substance as a want of authority from the Court, or where the authority is absolutely void, it vitiates and destroys the sale and title under it. Musgrove *vs.* Gordon, decided at the sitting of the Appeal Court, in Columbia, May term, 1829—Steel *vs.* Course, 4th Cranch, 403.

From these views it follows that the re-sale was made without authority, is void, and that the purchaser can derive no title from it.

The motion to set aside the nonsuit is therefore refused.

I concur, DAVID JOHNSON.

FORECLOSURE OF MORTGAGES AT LAW.

The Court of Appeals having given no opinion on the second ground submitted by the defendants to sustain the nonsuit; at the request of several members of the profession, we publish the argument of Mr. Blanding on that point.

The mortgage from Shultz to the Commissioner in Equity is dated on 5th May, 1828; the bond is of the same date —The declaration on the bond was filed 15th Feb. 1825—suggestion for foreclosure filed 22d Feb. 1825. Shultz sold a part of the estate to the defendant by deed dated 1st Feb. 1826, which was recorded 12th May, 1826, and *possession accompanied it.* Judgment was entered on the mortgage bond on the 27th June, 1826, as of the preceding April Term, when it was rendered. The order for sale of the mortgaged premises was made in the Spring Term, 1827, and the land was sold on the 4th Dec. 1827, when the plaintiff became the purchaser of the whole mortgaged premises, including what Shultz had sold to the defendant.

On these facts the question arises, whether the defendant under Shultz's deed can protect himself from a recovery at law against the plaintiff, under his purchase at Sheriff's sale, and this involves the question: Had the Court of Common Pleas jurisdiction of the subject of this suit, when it made the order of sale?

The case of Durand *vs.* Isaacks, decides that the proviso of the mortgage act, which declares that that act extends to no case when the mortgagor is *out of possession*, qualifies both clauses of it. The act, then, has no other meaning than that "*on obtaining* judgment by the mortgagee, the Court may order a sale, where there are *intervening creditors*, and the *mortgagor is in possession.*" All these three prerequisites: judgment by mortgagee, intervening judgments and actual possession by the mortgagor, must unite at the same point of time to give the Court jurisdiction; without their union the Court is as powerless as if the mortgage act had never been passed. See Wheeler *vs.* Powell, 6 Wheat. 127. Williams *vs.* Preston, 4 Wheat. 77. Head *vs.* Course, 4 Cranch, 403. Now let us enquire for whose benefit this proviso was introduced? Not for the mortgagee's, for it restrains his rights—not for the mortgagor's.

for he had no interest in the matter, except it was to charge what he had already sold, with the payment of his debts, and thus to be paid twice for his property. But it is for the benefit of the person in possession, who has already paid for the property, and has a right to be protected in equity from paying the mortgage till all the remaining estate is sold. He is amenable in no other forum—at law he cannot be made a party to the proceeding of legal foreclosure—There is no form, by which he can be made one—the act only speaks of the mortgagor, and pursues him in that forum only, when he is in possession. The alienee, for whose benefit the jurisdiction is excluded, and who cannot be a party, surely cannot have his rights affected by an order made in the case where that exclusion exists, and to which he is no party. In Durand and Isaacks, Judge Nott says, it would be nugatory to make an order for the sale of a man's property, who is no party before the Court. 4 McCord's Rep. 56. And this is said in reference to the very point now before the Court.

But it is said the alienation *pendente lite* is void, as the alienee took with notice—notice of what? Why, that the alienation, by the act of 1791, remitted the party to his orginal remedy in equity, although it did not destroy his lien—*notice*, that by that act, the court could have no power to order a sale till judgment, and then only in case the mortgagor remained in the legal possession of the property—remained *owner*. There is by law no restraint on the mortgagor's right to alien, but what is created by the act, and the act expressly preserves it by declaring that the Court shall have no *jurisdiction*, where the mortgagor has parted with the possession (has aliened) before the order of the sale is made. But the rule of Court permits a suggestion in anticipation of the judgment, and if this restrains the right of alienation, then it repeals the act, or at least adds a new and extended operation to it; and this will be converting a measure intended as a mere notice to the mortgagor, that an act intended to be done, will be done, when the Court shall have power to do it, into the present possession of that power, so as to restrain alienations which the act expressly allows. If it has this effect, then an existing creditor, by judgment cannot sell after the suggestion is filed: yet as it respects him, the only object of the foreclosure is to adjust the question of priority between him and

the judgment on the mortgage bond. Now, until such judgment be obtained there can be no such question made, and of course no proceedings ever be instituted to settle it.

But we are asked whether, when the Court has once got jurisdiction of the matter, that jurisdiction shall be ousted by a subsequent act of the defendant, the mortgagor? This proceeds on *a petitio principii:* the institution of the suit on the bond, or the filing of the suggestion is here supposed to confer this jurisdiction. Now it will hardly be affirmed, that instituting proceedings will give a Court jurisdiction of the matter, where the Court had it not before. It is then the pre-existence of some right, which has conferred it, and the suit is only the means of calling that jurisdiction into exercise. Now let us see what is the matter over which this jurisdiction is to be exercised here. It is the power to order a sale, which at common law the Court have not a right to order, and which entirely belonged to another jurisdiction. Did the execution of the bond and mortgage give that jurisdiction? If it did, then the Court were wrong in Durand and Isaacks, and Judge Gantt was right when he decided that the possession required by the proviso of the act was a possession at the time of the execution of the mortgage. Was it the institution of the suit at law on the mortgage bond? If so, then although there should be no intervening judgments, the sale could be ordered. Was it the filing the suggestion that gave jurisdiction? Then, if all the intervening judgments stated in it should be paid before the judgment on the bond was obtained, yet the Court would have jurisdiction; and more if the mortgagor should alien after suggestion filed, subject to the mortgage, and by such alienation should discharge the intervening judgments, still the Court would have jurisdiction. This all goes to prove, that there is no power in the Court to substitute itself in place of a Court of Equity, and order a sale of mortgaged property till all the prerequisites of the act are performed, and a mortgage, intervening judgments, judgment on the mortgage bond, and possession by the mortgagor concur. Before these unite, all the acts of the Court are mere common law proceeding, which are the means by which the prerequisites, are, some of them to be attained; but which are never consummated so as to confer the power to order the sale, until other prerequisites, not at all dependent on the proceedings in that particular case are performed or arise.

By a careful consideration of the act, we must come to this conclusion :—The Legislature never intended to substitute this for the known equity proceeding to foreclose, except where the land was mortgaged, and thereby subject to an equitable lien, and where judgment was obtained by the mortgagee on the bond secured by mortgage, whereby the land became subject to his legal lien. Having thus a legal and equitable lien on the estate, the act gives him power to call the intervening judgment creditors before the Court, and subject the whole estate to sale, composed both of the mortgagor's legal and equitable interest in it. Now, if the land is not subject both to the *legal* and *equitable* liens of the mortgagee, he cannot call for this proceeding, which deprives the intervening judgment creditors of their undoubted right to sell the equity of redemption, (legal estate of the morgagor) ; but if there has been an alienation before the mortgagee gets his judgment, then that judgment never created any legal lien on the land, and never could entitle him to this proceeding—a proceeding only instituted to give his younger legal lien priority to the elder legal lien of the intervening judgments, by giving it date with his mortgage, and therefore never to be instituted, where the younger legal lien has not attached on the lands, which can never be the case, where there is an alienation before judgment. And it may be here observed, that a suggestion filed, stating that there are intervening judgments, and an *expected* junior one, which may or may not attach, would seem to have little efficacy, if the latter should never attach, as it never can, where there is an alienation before judgment is had. It would not amount to more, than it would, if as soon as the mortgagee had got his mortgage, he should give express notice, that no one should buy the equity of redemption, because he intended to bring a suit on the bond, and if there should be intervening judgments, and he should get one also, he intended to move the Court for a sale of the mortgage premises. Such a notice could hardly deprive the mortgagor of the right of selling the equity of redemption, at any time before it was charged by the rendition of the judgment on the bond ; till such judgment is had, prior judgment creditors have an indubitable right to sell the equity of redemption. Suppose such sale made after suggestion filed, and before judgment on the mortgage bond, would the purchaser of such sale be rendered invalid by the suggestion ?

The true view of this point, is that until judgment obtained by the mortgagor, the whole proceeding is one *in personam rem*, and can never become a proceeding *in rem* till that judgment is obtained. Now no right of alienation is ever affected by a proceeding *in personam*, and the doctrine of *lis pendens* is confined exclusively to cases where the sale is made of the subject of the pending suit. Thus in a real action, if the defendant alienes *pendente lite*, the recovery will overreach the alienation. There the Court has jurisdiction of the whole matter *ab initio*. The recovery proves that the defendant had nothing to convey. Here the Court has power to order a sale only "*on judgment being obtained.*" Before that the mortgagor has a perfect right to sell the equity of redemption; and that sale can hardly be regarded as invalid, which the vendor had a perfect right to make. So a mortgagee files a bill in equity to foreclose, and the mortgagor pending the bill alienes, the alienee will be bound by the decree. But in that case, the parties are before a Court of unrestricted jurisdiction. Here the Court of Law at the time of alienation had no jurisdiction, and could have none until judgment obtained; but when it was obtained, the possession of the mortgagor was gone, and the Court never gained jurisdiction, being expressly excluded from it by the proviso of the act. *Lis pendens* never avoids an alienation, except where, at the time of the alienation, the jurisdiction of the Court embraces the subject of the suit; if the jurisdiction, or power of the Court to dispose of that subject, must arise from an occurrence which may or may not happen, the alienation at any time before it happens, is good. This doctrine holds in all cases, where tribunals of limited jurisdiction are invested by act, with specified powers only to be exercised on the concurrence of specified pre-requisites, all of which must happen before their jurisdiction attaches.

It is said that the defect imputed to the plaintiff's title, arises under the *proviso* of the mortgage act; and that when a proviso restricts the general import of the enacting clause, the party claiming a right under it must aver and prove the fact which brings him within it. That it forms an exception to the act, and the party claiming the benefit of it, must shew himself within the exception. This may be correct in general; but it is not so, when the proviso declares that the powers granted by the act shall not be exercised, but in

case of the existence of a particular fact—then that fact is a pre-requisite to the exercise of the power, and it makes no difference whether it be found in the enacting clause, or in a proviso to it. But this doctrine, admitted to the extent contended for, does not apply to parties not on the record. What! shall the alienee have his title avoided, because the mortgagor did not aver and prove when the order was made, that he had sold and was out of possession? This would make the validity of a title depend on the subsequent caprice of the grantor. The Court says, in Durand and Isaacs, "*the order can affect no one who is not a party to it.*"— When the alienee is called on, when for the first time his title is questioned, he does aver and prove, or rather the plaintiff here does it for him, that the mortgagor was not in possession, but that the legal estate and actual possession were in the defendant when the judgment was obtained and the order for sale made.

It is again said that the purchaser at Sheriff's sale could not know under what title the defendant was in possession; and as the order was general for a sale of the whole land, he may have rightfully concluded that he was in merely as Shultz's agent, and that his possession was Shultz's. In answering this view of the case, which is presented to support the Sheriff's title in preference to a subsisting elder title on record, it may be proper to consider the meaning of the words "*out of possession,*" in the proviso of the act. It either means out of actual or out of the legal possession. I suppose the legislature to mean, where the mortgagor has parted with the legal estate and actual possession, both. But the word *possession* is used to convey this complex idea—and why is it so used in preference to the words has *aliened*, or *sold*, or *conveyed*? Why, to meet what has occurred here. That by the public act of a change of actual possession, the purchaser under the order of sale, may be put on his guard, and inquire into the title before he purchases; that another is in possession, and the mortgagor out, is the fact which must decide whether the alienee can dispute the purchaser's title or not. Now, if this be correct, then it can make no difference, whether the whole or part has been sold, if as to that part, there is an exclusive possession, and exclusive title. Otherwise it comes to this, that the mortgagor may sell the whole, but never a part of the mortgaged premises, without depriving the alienee of

the benefit of the proviso of the act. In fact there is a stronger reason to protect the alienee of a part than of the whole of the estate. Mortgages often include vastly more property than will satisfy the debt, a purchaser of part knows that in equity alone there can be a foreclosure against him, and that then the remaining estate must be exhausted by the mortgagee, before the part he has purchased can be charged. But if he can never dispute the general order of sale, and shew that he is exempted from its operation, his rights depend on no rule but the will of the mortgagor—his fraud or his neglect in letting the order go for the whole estate, will divest a person of his rights, who is no party to the proceeding, and who, Judge Nott says, cannot be affected by it.

A purchaser at Sheriff's sale, is subject to the rights of others secured by the laws of the land. If he buys under an order of foreclosure in the Common Pleas, he knows he has purchased all the rights the mortgagor had, on the day the judgment was rendered against him, and no more. He is then required to look to the actual state of possession, and of the title as on record. This is imposing no heavy burthen on him, nor one from which other purchasers are exempt. Suppose the mortgagor had sold a part before he mortgaged, and that the order for sale was general of all the mortgaged premises, would the alienee be debarred from shewing that at the Sheriff's sale no interest passed to the purchaser, because the mortgagor had no right to the land when he mortgaged it? So, when the right to sell the equity of redemption existed, up to the time when the judgment bound it, and was only divested by the attaching of the legal lien, which alone gave the Court of Law power to make the order of sale, will it be said that the purchaser under that order, did not take the estate subject to an alienation, prior to the legal lien's attaching?

If in this case Farrow's rights are gone at law, then the question may arise, whether he may redeem in equity. If he can, what will be the decree there? Can the alienee require the purchaser, at sheriff's sale, to bring in the whole estate, and have it sold, and if the part remaining in the mortgagor's possession, is sufficient to pay the purchase money, will the Court exempt the part aliened from the charge? If it will, then the purchaser at sheriff's sale, gets nothing but a right to bring an action at law for land, which equity will convert into cash, and repay him the amount he has

paid. If equity will not make such decree, the rights of the alience are gone forever, by a proceeding to which he was no party.

UNION DISTRICT, AUGUST 1827.

OPINION OF CHANCELLOR DESAUSSURE,

IN THE CASE OF

ELIZABETH FARNANDIS *et al. vs.* WM. HENDERSON.

———000———

The effect of Religious Opinions on the Competency of Testimony.

A person who does not believe in future rewards and punishments, but that our evil deeds will all be punished in this world; and that we shall exist immortal in a future state, exempted from punishment for the deeds done in the body, is a competent witness.

This was a case in which the complainants, daughters of the late Col. John Henderson, filed their bill for the partition of land of their late father, lying in Union district, to which they claimed a right in common with their brother, William Henderson, the defendant in the suit, as joint heirs with him. The partition was resisted on the ground, that the father had made and duly executed his last will and testament; by which he had devised the land in question, to his said son, William Henderson. To this it was replied, that the said last will and testament was not duly executed so as to pass real estate.

Our law always required three subscribing witnesses to a will disposing of real estate, in order to give it effect. Two of the subscribing witnesses to the will in question, are admitted to be competent and credible, and have proved the will to have been duly executed. The third subscribing witness, Mr. Charles Jones, was objected to as incompetent on the alleged ground, that his religious tenets do not furnish the sanctions for his telling the truth, which the law requires; in as much as he does not believe in a future state of rewards and punishments, according to the deeds done in the body. 18 John. 105. 4 Day's Com. Rep. 51.

Witnesses were called who attested that these were the avowed principles and opinions of the witness objected to, as well at the time of signing the will as at this time. But being aware how easily the opinions of men may be misapprehended, or their principles misrepresented, I offered Mr. Jones permission to state his own creed on this point, if he should feel disposed to do so. He expressed perfect willingness, and stated (not on oath) that he believed in the being and attributes of God; that he believed in the government of the world, and of the affairs of man by the Supreme God; that he believed in Jesus Christ, and in the Holy Scriptures of the Old and New Testament; that he believed that God would punish the evil and reward the good actions of men; but that the whole of these rewards and punishments would take place in this world, and in this state of existence, until the justice of God be satisfied; *and not at all in a future state of existence, after the natural death of man.* That evil commenced in this life, will terminate in this life, and of course the punishment of it—that at the resurrection man will be raised to immortality, and the immortal will not be punished for the deeds of the mortal. Mr. Jones stated that he believed that every man was bound to speak the truth on all occasions, and that every deviation from truth would be punished by the justice of God, in this world; that he derives these opinions from the scriptures alone; and that he held them at the time of signing the will, as well as at this time: but he does not know whether the maker of the will, who called on him to subscribe the same was acquainted with his opinions.

The witnesses testified and indeed it was conceded that Mr. Jones, the person offered as the third subscribing witness to the will, and objected to, was a man of good moral character; steady in his habits, and of such uniform veracity, that they would give full credit to his assertions of fact at all times and on all occasions. It was stated that the Ordinary of the District, a judicious officer, had under these circumstances, rejected this person, as an incompetent witness to prove the will, on account of these opinions. It seems also that a preacher of some talents, and of unobjectionable private character, has taught the doctrines which this witness had adopted, and had made a number of proselytes:—so that the question has become one of public interest. The question of the competency of this person to be a witness,

has been fully and indeed ingeniously argued, and I am now to decide upon it. It is one of great importance to this citizen and to others who think as he does, as well as to the community at large. For if he and they are excluded from giving evidence in courts of justice, they would be a proscribed and degraded class; many of whose rights would be prostrated—They could not prove their books of account in Court as merchants; they could not support prosecutions for injuries and violences committed on their persons, out of sight of other witnesses: women entertaining these opinions might be exposed to lawless violations, in private, without protection—murders might be committed on other persons, with impunity, in the presence of persons of this excluded and degraded caste; and above all, the exclusion of these persons from being witnesses, might be the commencement of a system of exclusions and distinctions of classes among the citizens, entirely at variance with our liberal institutions and our republican government. These were the bane of the ancient republics, as well as of the modern republics of Italy, and engendered those hatreds and civil feuds which ruined them all. They deeply injured the Swiss republics. These evils ought to be avoided if possible. Still however the law must govern and guide every judge in his decisions. If the rule of law has been solemnly settled, and excludes such witnesses, the Court is bound to exclude them; and should the evils of the exclusion be so great as to require a legislative remedy, that will be undoubtedly applied—The *argumentum ab inconvenienti*, is always best addressed to that body.

Let us then examine what the law is on this point. It is necessary, however, to go somewhat deeper into this question, than what appears on the surface, and to look into the foundations of evidence in human society. It is clear that the object of all evidence is the attainment of truth; and human evidence is indispensable to the attainment of that end, because it is man who sees and observes the actions of man, and can testify of them. The business of life could not go on without it; and though wicked politicians have said that language was given to man to disguise his thoughts, sound Legislators have judged more wisely, that credit to the testimony of man, is indispensable for the purposes of justice, however it may be sometimes perverted by wickedness and self-interest, or abused by weakness and folly.—

All nations have resorted to human testimony as the evidence of truth; and the most important questions of life and death, of liberty and property, have been made to depend upon it. The sacred scriptures inspired by him who knew what was in the human heart, have declared, that out of the mouth of two or three witnesses, judgment shall be rendered between men. Such evidence mingles in every transaction, in contracts, and in all our daily communications with our race. On a journey, we receive and follow the instructions of perfect strangers without hesitation, though we know not whether they are wise or foolish—good or bad. We even rely upon the veracity of our most deadly enemies, when they propose a truce or suspension of arms.

Such being the universal rule founded on the absolute necessity of things, men submit to it; but endeavor to guard against the abuses to which the passions and vices, and the follies of their fellow-men may expose them. The rule of reason is, that all men in possession of their faculties are to be admitted and believed as witnesses; but caution suggests exceptions. A foolish or weak man may be admitted, but less credit will be given to his testimony, because of his imbecility. A bad man may be received to give evidence; but less reliance is placed on it, because of his disregard of virtue and its sanctions. But a man who is notoriously a violator of truth, will not be believed, even if he testify the truth; and if that notoriety be established by a legal conviction of a violation of truth in a Court of Justice, (technically called perjury,) he is entirely excluded from giving evidence as totally unworthy of credit. These are some of the precautions used by Legislators and Courts to guard against the abuses of human testimony. There are others also. Believing that men, acted upon by a strong bias, will too frequently depart from the truth, witnesses supposed to be under that bias, are excluded from giving testimony altogether. By the English rule, adopted by us, that supposed bias which excludes, is founded on the pecuniary interest. Whoever has the smallest pecuniary interest in a cause cannot be a witness in that cause. On the other hand, the nearest relations and connexions, except husband and wife, and the warmest friends, may be witnesses for each other The English rule is surely an imperfect one. Who does not know that thousands of honorable men, would give true testimony, though they had thousands of pounds de-

pending on that testimony? Who does not know that these very men, acting under the bias of strong family attachments, might be warped from the truth, without their even perceiving, or suspecting their departure from it, in favor of near and dear relatives. Men are the greatest sophists, even when they are honestly beguiling their own minds under the influence of the passions. Some nations have excluded very near relations, giving testimony in favor of each other, from a dread of the influence of these domestic attachments; and no Judge, of any experience, in our country, but must have seen and lamented the extent to which these attachments carry men in giving evidence. Yet the exclusion of relations would often shut out all the means of obtaining the truth—they are the most likely to be the witnesses of the transactions of each other. Thus we perceive, that it is a most difficult subject to frame a rule perfectly adapted to its object. The consequence has been, that, in modern times, the disposition of the Courts of Justice has been to narrow the ground of incompetency, and to leave the objections to operate on the credit of the witnesses, to be judged of from personal character, and from the intelligence and clearness of the testimony.

After saying who may not be witnesses, Legislators have provided what appeared to be the best means of securing the veracity of those who are admitted, by the sanctions which were believed to have the most influence on the human mind. That which has been generally considered as the sanction of the highest nature, has been an appeal to the Deity, for the truth of what the witness testifies. This is evidently founded on the supposition, that the witness believes in a God, and that he is the avenger of falsehood.—The English Law of Evidence, at one period, required witnesses to be sworn on the Holy Evangelists or Christian Scriptures. And Lord Coke certainly laid down the rule to be, that an Infidel could not be a witness—Co. Lit. 6 b. From this opinion, Lord Hale and the Judges of a later period, differed and pointed out its unsoundness. The subject, however, received the fullest illustration in the argument and decision in the great case of Omichund *vs.* Barker.—That cause was heard so late as the year 1744. Lord Chancellor Hardwick was desirous to have the question of evidence solemnly settled, and obtained the assistance of Lord Chief Justice Lee, Lord Chancellor Justice Willes, of

the Common Pleas, and Lord Chancellor Baron Parker.—It was argued before that able tribunal, by Sir Dudley Reder and Mr. Murray, (both subsequently Chief Justices,) and by other eminent counsel. The Judges and the Chancellor took time to consider, and delivered their opinions *seriatim*. The judgment of the Court was, that Gentoos, sworn according to their religious ceremonies, were competent witnesses, though they were not Christians, and acknowledged none of its peculiar doctrines. That case is best and most fully reported in 1 Atk. 21.—It is also reported, in Willes 538. The latter is short, and only valuable as giving Lord Chief Justice Willes' opinion more fully and accurately than it is reported in Atkins. These Judges examined with great learning the opinion of Lord Coke, and refuted it triumphantly. It is unnecessary to follow the whole course of their arguments, but I think it proper to refer to particular passages of some of their opinions, as illustrating the question now before us. The Lord Chancellor, in his judgment, states, (p. 48, 1 Atk.) that his object was to be certain, "*Whether these people* (Gentoos) *believed in the being of a God and his Providence.*" Being satisfied of that, he admitted them to be competent witnesses. He also states, that Bishop Sanderson laid down the proper rule *Juris juramentum est affirmatio religiosa;* and all that was necessary to an oath, is an appeal to the Supreme Being, as thinking him the avenger of falsehood and the rewarder of truth. This, Lord Hardwich adds, is not contradicted by a single writer known to him, but Lord Coke. In the report of Lord Chief Justice Willes' judgment, as stated in his own notes, there are some particulars which it is proper to notice. He refutes the narrow notion of Lord Coke, that an Infidel, or person who did not believe in the Christian Religion, could not be received as a witness; and states that (even according to Lord Coke) *Juramentum nihil aliud est quam deum in testem vocare*, and therefore nothing but a belief of a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take an oath. He then says, (p. 546,) the nature of an oath was not at all altered, by the dispensation of the New Testament, only as the promise of rewards and punishments in another world was then more clearly revealed, the obligation of an oath became much stronger. In p. 549, he says, that such Infidels (if any there be) who do not believe in a God, or

if they do, do not think he will punish them in *this world, or the next*, cannot be witnesses, because an oath cannot be any tie or obligation on them. In p. 550, he says, that if an Infidel, who believes in a God, or that he will reward and punish him in *this world*, but does not believe in a future state, be examined on oath, (as he thought he might,) yet he would not be entitled to the same degree of credit as a Christian witness, who believed that he should be punished in another world, as well as in this, if he did not state the truth.

Notwithstanding this great decision, the question has been since made at different times. Starkie, in his excellent treatise on Evidence lays it down, that before a witness is sworn, he may be asked whether he believes in the existence of a God, and in the obligation of an oath, and in the future state of rewards and punishments; and if he does not, he cannot be admitted to give evidence, for which he cites Peak's Ni. Pri. Rep. 11. He does not, however, distinguish, whether the state of *future* rewards and punishments is to be in this world, or the next, or in both.—In the ordinary sense of the word, it means in another world. In the case of Jackson *vs.* Gridley, New-York Rep. 18, p. 98, it was decided by Chief Justice Spencer, (who delivered the opinion of the whole Court,) that a person who does not believe in the existence of a God, nor in a future state of rewards and punishments, cannot be a witness in a Court of Justice. In delivering this judgment, Chief Justice Spencer states the established rule to be, that Infidels who do not believe in a God, or if they do, do not think that he will either reward or punish *them in the world to come*, cannot be witnesses in any case, because an oath cannot possibly be any tie or obligation on them. And he quotes Willes' Rep. as well as Atkin's—He says the New York Legislature have enacted a statute to the same effect. With great deference to that eminent jurist, Chief Justice Spencer, I think that he has laid down the rule more broadly than the decision actually made in the case which he cites; and we have seen that Chief Justice Willis expressly states his opinion to be, that a person who believes in a God, and rewards and punishments, *in this life*, is a competent witness, though not entitled to so much credit as a witness who contradicts him and believes in rewards and punishments in the world to come, as well as in this world. And Lord Ch. Hardwick,

expressly says, (p. 48, 1st. Atk.) "My intention was, to be satisfied whether those people believed in a God and his Providence;" and lower down he agrees with Bishop Sanderson, that all that is necessary to an oath, is an appeal to the Supreme Being, as the rewarder of truth and avenger of falsehood." In this case, before Chief Justice Spencer, the person offered as a witness disavowed the belief in a God altogether, and believed that men perished altogether like beasts. Since examining the case of Jackson *vs.* Gridley, 18 John. I am indebted to Mr. M'Cord, a learned Counsellor of our Bar, for pointing out to me some decisions reported in 2 Cowen's Reports, New-York, on this question. In the case of Butts *vs.* Swartout, 2 Cowen, 431, it was decided that one who believes in the existence of a God, is a competent witness. The marginal note goes further. But the opinions expressed by the person offered as a witness, as sworn to by another witness, were, "that he believed in the Deity, and in the doctrine of universal salvation." He was admitted to be sworn. In a note to this case, it is stated that there are many persons in the State of New-York, who deny any future punishment of the wicked *after this* life, and that the question as to their admissibility as witnesses, has been frequently agitated, but never distinctly brought before the Supreme Court. In one case before the Circuit Court—the People *vs.* Matteson—Judge Walworth delivered the opinion of the Court. It decided that the belief of rewards and punishments *in this life* is sufficient to admit a witness to be sworn. In a clear review of the subject, the Judge shows that the elementary writers have all been misled by Atkins, who, in his report of Omichund *vs.* Baker, ascribes to Chief Justice Willes an opinion which he did not entertain, as appears from his own report, of what his real opinion was. This error arose from the confidence reposed in the accuracy of Atkins, whose error was never corrected until the publication of Willes' reports fifty years after. He also cites a case from 15 Massa. Rep. 184, wherein it was decided that the infidelity of a witness, *as to a future state of existence* goes to his credibility and not to his competency. In short, that wherever you have a tie on the conscience, the witness is admissible.

In a note in 2 Cowen, pages 572, 3, 4, Judge Williams delivers a clear opinion, "That it is not necessary, in order to render a man a competent witness, that he should believe

any thing more than that there is a Supreme Being, and that he will reward and punish, *either in this* or another life."

In our own State, in the case of the State *vs.* Petty, two of the Judges (Colcock and Richardson) were of opinion that a man, "who did not believe in a state of future rewards and punishments, could not be a witness," which I understand had reference to a future state of existence.—Judges Johnson, Nott and Huger, reserved their opinions. 1 Harper's State Reports, p. 59. I owe and feel great deference for their judgments of the Courts of our own State. *Stare decisis* is a maxim of wisdom and of peace. If this had been the judgment of the Court I should have felt bound by it, however my private opinion might be different. It is evidently, however, not the opinion of the Court, but the opinion of two Judges, which are entitled to great respect, but does not establish the law.

I have considered this question much and anxiously, and I acknowledge that I have come to a different conclusion, with an entire conviction of my judgment. The object of testimony is the attainment of truth. It is the apprehension of obtaining falsehood instead of truth, which has induced human tribunals to require the highest sanction which can be obtained. An appeal to the God of Truth, in the manner deemed the most sacred and obligatory on his conscience, by the person offered as a witness, has been universally held to be the highest sanction. Jews and Gentiles, Europeans and Asiatics, antients and moderns, have resorted to and relied on this as the test of truth—the highest discovered by human wisdom.

In the case before us, the person offered as a witness, believes in a Supreme Being, a God who is the ruler of the Universe, and who is the avenger of falsehood: but in his creed *that* vengeance is poured out on the forsworn witness in this life, and not in another state of being. He believes the impious wretch can neither escape detection from the eye of omniscience, nor punishment from omnipotence.

It does appear to me that this is a sufficient sanction to guarantee the attainment of truth from a witness. It is said by very learned men, that the Mosaic dispensation did not look beyond rewards and punishments in this life, and even in our Saviour's time the Saducees did not believe in a future state. Yet oaths were required abundantly under that system, as well as under all the heathen systems; yet St.

Paul says, expressly, that life and immortality were brought to light by our Saviour. And surely the doubts of the great philosophers, during the brilliant periods of Greece and Rome, shew the necessity of such a revelation. There is yet another sanction drawn from human laws. Every witness knows that he gives evidence under penalties provided by human laws to punish willful falsehood in testimony. I would not, however, press this argument, because it might lead too far, and admit even those who deny wholly the existence of a God or Providence, or punishments in this or another world.

What has made a great impression on my mind, is that the objection is of vast extent, the limits of which I cannot perceive. It might exclude all those from being witnesses, who do not believe in the eternity of punishments. It may exclude Roman Catholics, who believe that punishments in another world may be avoided altogether by absolution, or diminished by masses and prayers. In short I know not where the objection would stop in its operation, and it would be more mischievous in this country than in any other, because the unbounded liberty of conscience, enjoyed by our citizens, leads to many aberrations from the standard of belief which others think correct. The business of the Court is not with opinions. The only question is, whether there is reasonable ground to believe, that we have such a tie on the conscience of the person offered as a witness, as may ensure his telling the truth. I think we have in the case I am considering, and feel bound to admit the witness as competent.

There is however another ground on which it is my duty to express an opinion. It was contended for the defendant, that the witness was entitled to be sworn, because the constitution of this State guaranteed liberty of conscience, which would be violated by excluding citizens from being witnesses on account of their religious opinions. The 1st Sec. of the 8th Art. of the Constitution, is that relied on. That section provides that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind, provided that the liberty of conscience thereby declared, shall not be so construed *as to exercise acts of licentiousness*, or justify practices inconsistent with the peace and safety of the State.

On the argument of the case, it was contended by the counsel, who opposed the admission of Mr. Jones as a competent witness, that the inquiry into his religious opinions did not contravene this article of the Constitution : that he might still enjoy his religious profession, and worship notwithstanding such exclusion, and that the exclusion would merely operate on his civil and not his religious rights. I have considered this subject with attention, and am not satisfied with this argument. If a man's religious opinions are made a ground to exclude him from the enjoyment of civil rights, then he does not enjoy the freedom of his religious profession and worship. His exclusion from being a witness in Courts of Justice is a serious injury to him ; it is also degrading to him and others who think with him. If men may be excluded for their religious opinions, from being witnesses, they may be excluded from being Jurors or Judges; and the Legislature might enact a law excluding such persons from holding any other office, or serving in the Legislature, or becoming teachers of schools, or professors of colleges. In my judgment this would be in the very teeth of the Constitution, and would violate the spirit of all our institutions. I do not know in what that state of things would differ from the galling restraints on the Irish Roman Catho ics, which have so long kept that beautiful country and that high spirited people, in a state of degradation and misery, of discontent and rebellion. It would seem to me to be a mockery to say to men, you may enjoy the freedom of your religious professions and worship; but if you differ from us in certain dogmas and points of belief, you shall be disqualified and deprived of the rights of a citizen, to which you would be entitled but for those differences of religious opinion. The proviso, in the 1st section of the 8th article of the Constitution, states the sole limitation to the freedom of religious professions and worship. The restriction is upon acts and practices and not upon opinions.

Now the belief of Mr. Jones, who is objected to as a witness, that there will not be rewards and punishments in another state of being for acts done in the world, is neither an act nor a practice—it is merely an opinion, a religious profession. He does believe in the punishment of evil deeds; but it is in this world under the superintending Providence of the omniscient God, who can never be deceived as to the import of human actions, or their motives. This, I think, gives a sufficient tie on his conscience.

I am aware that there is great force in the remarks of Chief Justice Spencer, in the last paragraph of the judgment of the Court in New-York, in the case of Jackson *vs.* Gredly, 18 Johns. 106. It amounts, however, only to this—That though every man has a right to indulge in his religious opinions, which is a concern between his conscience and his God, the tribunals have a right to interfere in the ascertainment of truth; and that these are bound to see that no man's rights are impaired, but through the medium of testimony entitled to credit; and no testimony is entitled to belief, unless delivered under the sanction of an oath, which comes home to the conscience of the witness, and creates a tie arising from this belief, that false swearing would expose him to punishment *in the life to come.* The real question, however, is, whether the belief of God and his Providence, and that he is the avenger of falsehood, though the vengeance is confined to punishment, *in this world*, does not give this tie, this hold on the concience which is sought for? In my judgment, it does, so far at least as to impose on the Court an obligation to forbear its interference with the civil rights of the man, which would be violated by excluding him from being a witness. It will be time enough to consider and decide when the case arises, whether a man, who is offered as a witness, should be rejected, because of his disbelief in God, in Providence, or in any rewards or punishments in this world, or in the world to come. In such a case there could be no tie or hold on the conscience, for there could be no conscience. When such an unhappy case arrives, it will be most solemnly considered. Upon the whole, I am of opinion, that on principle, as well as on the provisions of the Constitution, Mr. Jones is a competent witness; and the party interested in the will of Mr. John Henderson, is entitled to the benefit of his testimony. I feel strengthened in the view of the case by the growing liberality of the age, in the respect shewn to the tenderness of conscience, in the case of the Roman Catholic Priest, in New-York, who refused to give evidence in a criminal prosecution as to facts which came to his knowledge as a priest in the confession of the penitent. Mr. Clinton, the Mayor of New-York, in a learned and elegant argument, exempted him from the obligation of disclosing such confession. It being conceded that Mr. Jones was the third subscribing witness to the last will of Col. John Henderson, and corrobo-

rates their testimony as to the due execution of the said will so as to pass real estate, and there being a devise of the land in dispute to the defendant, Wm. Henderson, the complainants are not entitled to partition thereof, which they seek by their bill.

If it be desired, the Court will direct an issue *devisavit vel non.* But in that case it would feel itself bound to direct that all three of the witnesses should be examined.

I will make but one remark more, which is, that the rejection of the witness, by the ordinary, is not *res judicatæ.* The ecclesiastical Courts, of which that is the only remnant with us, never had jurisdiction of wills which effected real estate, though from wills commonly containing dispositions of personal as well as real estates, that office has been made the place of deposit and recording. The jurisdiction as to wills of real estate, belongs to the temporal Courts.

(Signed,)

HENRY WM. DESAUSSURE.

From this decree there was an appeal, and the following decision made therein.

The Court concur in opinion with the Chancellor in this case, and the decree is therefore affirmed.

ABRAHAM NOTT.
DAVID JOHNSON.

DENIZATION.

The act of 1799 (2 Faust's Col. 273) prescribes the terms on which an alien may become a denizen, so as to enable him to purchase and hold real property in this State. By examining the first clause of the act, it will be seen that this right is conferred only on the person who takes the oath of allegiance. It does not extend any right to the children of such person. At Common Law the issue of a denizen, born *before* denization, cannot inherit to him, but his issue born *after*, may. But in the second clause of the the act 1799, the Judge is authorized to give a certificate to a *family*, and then he is required to insert the name and age of each, together with their place of nativity and former residence, all which the head of the family is required to

declare on oath. Now it is very evident that the Legislature intended by this second clause to confer on the family some right, beyond what is granted to the head of it. The children were intended to take some benefit by this act, yet the law is entirely silent as to what it shall be. In fact, is it doubtful whether the act in this respect is not so badly framed and so entirely defective, that it confers no right on any but the person who takes the oath of allegiance, and leaves his children where they were at Common Law? Should this view of the act be correct, (and we are disposed to think it is,) it may be well that it should be amended, so that on denization of the parent, his minor children named in the certificate, would become denizens, and be declared capable not only of taking by purchase, *but also by descent.* His wife should also have the same privilege extended to her, so that on the death of her husband, who had become a denizen, she might succeed to a distributive share of his real as well as of his personal estate.

The following is believed to be sufficient to meet that object:—

A Bill, &c.

Be it enacted, &c. that where the head of any family shall be made a denizen in pursuance of an act of the Legislature, passed on the 18th day of December, 1799, entitled, "an act granting the rights and privileges of denizenship to alien friends residing or intending to remove within the limits of this State," all his children, who may be under the age of twenty-one years, and whose names shall be inserted in the certificate required by the second clause of the said act, shall thenceforth be deemed denizens, so as to enable them to purchase and hold real property in this State, and also to take real property in this State, by descent or distribution, according to the act of the Legislature, entitled, "an act for the abolition of the rights of primogeniture, and for the giving an equitable distribution of the real estate of intestates, and for other purposes therein mentioned;" and the acts of the Legislature in addition and amendment thereof; and where the wife shall be named in such certificate, although she may be an alien, she shall be capable of taking a distributive share of her husband's real estate, according to the provisions of the last recited acts.

We close this article with the form of a certificate of denization. The part in Italics, are only used when the certificate

is given to a family. It must be recollected, that the certificate is absolutely void and conveys no right of denizenship in case it is not recorded in the office of Secretary of State, at Charleston or Columbia, within sixty days from its date. No after-recording can make it valid.

FORM.

The State of South Carolina,

Before me,

one of the Judges of the Court of Common Pleas, of the said State, personally appeared A. B. who being duly sworn, made oath (*or affirmation*) that he is a native and former resident of , in Ireland, (or other country as the case may be,) and is a subject of the king of Great Britain, *that he is the head of a family, which consists of his wife, C. B., aged years, and two children, named E. B., aged years, and D. B. aged year, and that the place of nativity and former residence of the said C. B., E. B., and D. B. was in the town of , in Ireland.*) and the said A. B. further made oath, that he would, to the best of his abilities, preserve, protect, and defend the Constitution of this State, and of the United States.

(Signed) A. B.

I , one of the Judges of the Court of Common Pleas above named, do hereby certify that A. B. named in the above oath (*or affirmation*) did take and subscribe the same before me, that as appears by the said oath, he is a resident of , in the State of South Carolina, and was a native and former resident of in Ireland (*that the family of the said A. B., consists of his wife C. B., aged years, and two children named E. B., aged years, and D. B., aged years, and that the place of their nativity and former residence was in Ireland.*) And I further certify, that the said A. B. has become and is to be deemed a denizen, so as to enable him to purchase property real within this State, and in all other respects to entitle him to the like protection from the laws of this State, as citizens are entitled unto.

Witness my hand this day of 18

(Signed) *by the Judge.*

It may not be amiss to observe that denization gives no political rights. It has none of the attributes of naturaliza-

tion—The *denizen* can neither vote nor hold office—If he aspires to these he must conform to the laws of Congress concerning naturalization.

———000———

LIABILITY OF CORPORATORS.

Our Legislature are constantly passing acts for the formation of aggregate corporations; and it is evident that very few persons are acquainted with the extent of their liability when they become members of such companies. It may not, therefore, be unacceptable to the community, to present them, with the decision, in the case of Hume *vs.* Winyaw and Wando Canal Company. The case was decided by Chancellor *De Saussure*, in the Court of Equity, for Charleston District, in May term, 1826, and was affirmed by the Court of Appeals, in 1828. These decrees establish the following principles:—

Corporators who are named in the Act of Corporation as members, need not be joined in a suit in Equity to change the members individually, where it appears that before the time the contract was made, on which the suit is brought, they had ceased to be members; and a plea in abatement for such cause will be overruled.

A bill may be sustained against individual corporators, on a contract with the company for a discovery of funds to satisfy the contract; and if it appears that the funds were to be raised by future instalments, to be called for as the demands against the company required them, equity will regard the capital as consisting of the individual credit of the corporators, and subject them to contribute to the satisfaction of demands arising on contracts made while they were members.

When the funds of a corporation are not visible and tangible, but consist in the liability of the members to be assessed or rated, the Court will lend its aid in favor of a creditor of the company, to assist it in enforcing the payment of instalments required by the members, and will apply the fund so raised to discharge the debt. It is a *quasi* subrogation of the complainant to the rights of the company.

Between the individual members of a corporation, the power exists to prescribe the time and regulate the mode in which members may be admitted or withdrawn; and a member withdrawing according to the prescribed mode, is entirely absolved from all obligations to it. But as to subsequent, contracts and liabilities, creditors of the corporation, generally, it may be otherwise.

A by-law of a corporation declaring a forfeiture of stock for non-payment of an instalment due on it, is a penalty to enforce payment, of which the corporation may or may not avail itself. Till the defalcation occurs, the corporation has a right to regard him as a member, and he has no right to determine for them, that his act, without their knowledge, would amount to a withdrawal, resignation, or expulsion.

Being in arrears under such a by-law, if it released one corporator, would release all, and leave the creditor without remedy.

CIRCUIT DECREE.

This case is brought against the members of the company above named, in order to compel the payment of the bal-

ance due to the complainant, on a contract entered into by the company with the complainant, for work performed under the contract. The defendants, who have answered, admit the contract and the work done under it, and express their willingness to pay their respective proportions of the balance due for the work actually done. In relation to them therefore, nothing remains to be done, but to establish the proportions which they are respectively bound to pay under the contract, according to the work done at the stipulated price: a reference to the Commissioner will be necessary to settle that.

One of the defendants, Mr. William Matthews, has demurred to the bill and also filed an answer. The demurrer is however to be disposed of in the first instance, for the defendant is not allowed both to demur and answer and to have them taken up together. In fact, the answer overrules the demurrer. The demurrer was however argued, and it is on that the judgment of the Court is to be first given. The demurrer admits the facts stated in the bill; we must therefore look to the case made by the bill; the pleadings are well and clearly stated in the brief which accompanies and is attached to this decree as part of it. It will be perceived by this statement of the bill, that a company was formed for a particular purpose: that to accomplish that purpose a contract was made with the complainant; that he went on to execute that contract at great expense and trouble, until the company was paralyzed by the legislature choosing to withdraw from the company, when the work was necessarily suspended, or in fact terminated. Payments had been made by the State itself and by most members of the company, but there remains due to the complainant a balance for work actually done in pursuance of the contract. The grounds of demurrer of Mr. Wm. Matthews, are as follows:—

1st. That, according to the by-laws of the company, it was declared, that any member who should withdraw from the company, should forfeit to the corporation any assessment he had previously paid, and that by a neglect to pay, he should forfeit his share and cease to be a member of the corporation, and that before the time mentioned by the complainant, as the term at which his demand became due, the defendant withdrew from the company, and forfeited $1100 which he had before paid, as appears by complainant's

exhibit, and the remaining corporators became entitled to all the privileges and property appertaining to the company. And the defendant submits that he is released; also, that if he still be liable, he submits that all the other individuals named in the Act of Incorporation, should be parties, and he pleads in abatement.

2nd. The defendant also demurs for that by the complainant's own shewing, there is a corporate property belonging to the company, which should be first exhausted before he can apply for the extraordinary aid of the Court as against the members, and so he demurs in law.

Before we examine the particular grounds assigned for the demurrer we must consider, that "a demurrer confesses the matters of fact to be true as stated by the opposite party, with this qualification, that it only admits such facts as are well pleaded, and the facts alone without the conclusion of law." "The demurrer can only be for objections apparent upon the bill itself, either from the matter contained in it, or from defect in its frame." It therefore cannot state what does not appear on the face of the bill, otherwise it would be what Lord Hardwicke calls a speaking demurrer. (See Cooper's Eq. Pl. 111, and the cases there cited.) With these preliminary remarks we proceed to consider the grounds of demurrer assigned in this cause. And, first, as to the operation of the by-laws of the corporation, those which are relied upon by the defendent as the ground of demurrer, are as follows:—

11th Rule. "One month's notice shall be given to the members whenever an instalment shall be called for by the company; and, in case of the failure of the payment of any sum called for by the company, the defaulter shall pay the legal interest upon the amount of instalment for one year, at the end of which time if not paid, all the preceding payments shall be forfeited to the company; and also all right, title and interest which the holder or holders of such forfeited shares or share, shall or may be entitled to under the charter."

12th Rule. "No stockholder shall have a right to transfer his or her share or shares, who shall at the same time be indebted to the company, nor until such debt be paid, and such share or shares shall be held by the company as additional security for the debt; and no transfer shall be made but in Charleston, under the direction of the president."

It might perhaps be a question as to the force and effect of these by-laws in some particulars, even between the individual stockholders and the company; but at present we have nothing to do with that. The question is what effect can those by-laws have upon a stranger to the corporation, who has made a contract with the company? Can the by-laws of the company operate injuriously to the stranger contracting in any way, directly or indirectly? I apprehend not—it would be the most dangerous example in the world; each member might successively withdraw himself by refusing to pay the assessment imposed by the company, to meet its contracts; and if such retreat would operate as a discharge of the members from the contracts of the company the whole expense of a failing plan might be thrown on the innocent contractor, who had performed his contract faithfully. This is too monstrous to be borne. It would convert joint stock companies into a band of adventurers, who could speculate on the unwary; and if the scheme succeeded, reap the profits; if it failed, throw the loss on the contractors. The doctrine however is, I think, well settled, that the by-laws of a corporate body, can act only on the members, and not on strangers. See Black. Com. 476. 1 Hy's Black. Rep. 370. 6 Vinir's Abr. 310. 6 Mod. 124, Curson *vs.* The African Company. 1 Johns. Chan. Cases, Index 45. 19 Johns. Law Rep. 456. This case from 19 Johns. 456, Slee *vs.* Bloom, *et. al.* is a most important one. It was a decision of the Court of Errors, in New York, reversing the decision of the Chancellor, by a nearly unanimous vote. It establishes that a by-law authorising the stockholders, on paying 30 per cent. on their shares, to forfeit their stock, is void as against creditors. See to page, 485.

The ground of demurrer then is not sustainable. It is unnecessary to say that in this part of the ground of demurrer, a new fact is stated and relied upon by the defendant, to wit, that he, (the defendant, Mr. Matthews) before the time mentioned by the complainant, as the time on which his demand became due, *viz.* about the day of 182 , withdrew from the company and forfeited $ 1100, which he had before paid, &c. &c. The allegation of a new fact, not in the bill, that the defendant left the company before the contract, makes it a speaking demurrer, and therefore vicious. If it had been so and relied

on in the form of a plea or answer, after the demurrer was overruled, still it must have been proved, which has not been done, nor could it have been done when a most important date was in blank, and still remains so, as far as appears to the Court. The demurrer contains a new ground, to wit: that if the defendant be liable, all the other individuals named in the act of incorporation, should be parties; and this is pleaded in abatement. This blending of pleas, is, I think, calculated to produce confusion, and ought to be avoided. But, allow it to be considered as regularly pleaded, it does not strike me that it can operate as an abatement or suspension of this bill, for it does not demand that each individual should be liable for his own share of the debt, and also part of the shares of the other defaulting shareholders; but it demands merely that each should answer for his own proportion of the debt. It is unimportant then whether the other corporators are made parties or not. The next ground of demurrer is that by the complainant's showing there is a corporate property belonging to the company, which should be first exhausted before he can apply for the extraordinary aid of the Court against the members, and therefore he demurs in law. It is hardly necessary to repeat that this is an allegation in the demurrer in contradiction to the facts stated in the bill, which however the demurrer necessarily admits to be true. The bill charges that there never was any joint stock capital, that the amount to be raised in order to pay the contractor for the work, was to be raised by progressive assessments on the stockholders; and, that the work being suspended by the act of the stockholders, that which is done is utterly worthless and will not produce any price from which the contractor can be paid. The demurrer admits all this, and it would be a mere mockery to hold out any expectation that so much of the work done, as leaves the object unattained, can ever produce one cent. It might be sufficient, therefore, merely to say, that the demurrer must be overruled. But the argument on the demurrer was placed on a broader foundation: it was laid down as a position, that the individual members of a corporation are never liable, in their individual capacity, for acts or debts of the corporation, unless the act creating it makes them so, and that the liability of the individual on failure of the stock of the company, has never been decided. That the person contracting with a

corporation, trusts to the corporate fund and not to the individuals, who are constantly selling out and others purchasing in. On examining these questions there are certain difficulties. The statute of 1816, creating the private corporation in question, does not expressly enact that the corporators shall be liable in their individual capacity; on which Mr. Dunkin raised the presumption that the legislature did not intend to make them personally liable, or it would have enacted it as it has done in particular cases. I do not think great stress is to be laid on that, to establish evidence of intention on the part of the legislature. The absence of such a provision left the case subject to the operation of the law, whatever that might be. But the statute of 1816 gave great privileges to the company, with power to purchase lands and slaves, and take lands from the owners by valuation, which should be paid for; with all the powers, privileges and immunities granted to Santee and Cooper River Canal, with powers to contract debts, and to be sued and sue. It is not conceivable that the legislature intended to authorize a company to make contracts to a large extent with private citizens, and even to take their lands against their will, and when the scheme had failed to permit the individual members to withdraw from the company, and leave the corporate name an empty shell, without any joint stock to look to for compensation. I am quite sure the legislature had no such intention, and I am unwilling to apply strong terms to those who would desire to act such a part. I am not however to decide on a question of abstract morals, but to pronounce what is the law. The elementary writers do certainly state very distinctly, that the debts of a corporation, either to or from it, are totally extinguished by its dissolution, so that the members thereof cannot recover or be charged with them in their natural capacity. 1 Black. Com. 517, 18. For this law Mr. Justice Blackstone quotes 1 Levintz, 237, Edmunds *vs.* Brown. The writer of the text of the treatise of Equity (Mr. Barlow,) to which Mr. Fonblanque has attached his valuable notes, asserts the same doctrine, and quotes the same case from Levintz, and no other. 1 Fon. 297, in the text. If this be law, it would seem to be law against reason, and it must be recognized as law acting on its own strength. It cannot arise from any by-law of the corporation, which allows a member to separate himself and his interest from the company, or be excluded for

some misconduct. For it is expressly laid down by all the writers, that a by-law can operate only on members and not on a stranger. Their by-laws are for the government of themselves, and no trading company can make by-laws which may affect the king's prerogative, or the common profit of the people. 1 Black. 508, 9. 6 Mod. 124. See too 19 John. 456, above cited, and the very charter in question, (Sec. 2,) gives power to make by-laws for their own government and no more. The argument then that Mr. Matthews is released under the by-laws of the company from paying his proportion of the debt, is unfounded. Indeed Mr. Dunkin candidly acknowledged that the by-laws could not affect strangers; but he contended that his retreat from the company arising under their by-laws, by refusing to pay the assessment, obliged the company or the members to pay his quota of the debt.

That may be so among themselves; but it is no answer to the claim of the complainant, who is a stranger to the company. The exemption from liability contended for, must rest then simply on the ground that such is the general law. In opposition to the law, as laid down by the elementary writers, who cite and rely solely on the case from Levintz, there is a most solemn decision by the House of Lords, reversing the decree of the Court of Chancery on this very point. It is the case of Dr. Salmon *vs.* The Hamburg Company, reported in 1 Chan. Ca. 206–7. 23 Car. 2, and cited and stated distinctly by Mr. Viner, in the 6th vol. of his abridgment, 310–11. In this important cause the Chancellor dismissed the bill, on the ground, that in ordinary proceedings the Chancery could not relieve the plaintiff against the defendants, (members of the company,) because they being a company. The House of Lords decided that the dismission of the bill be reversed, and that the Chancery should issue its process to compel an answer, &c. or to take the bill *pro confesso*, and should proceed to examine what the complainant's just debt is, and should decree the said company to pay what was justly due, and upon non-payment of the money by the corporation, (after service of the decree,) then the Lord Chancellor should order and decree, that the Governor, Deputy Governor, and twenty-four assistants of the company, should proceed to make such assessment (or leviation as it is called) on every member of the said company, who is to be contributory, as shall be sufficient to satisfy the said sum

decreed to be due, and to collect and levy the same, and pay it over to the plaintiff; and on failure of such assessment, then and from thenceforth, every person of the said company shall be made liable to pay his proportion, and such process shall issue against such member refusing, or delaying to pay his proportion, as is usual against persons charged by decree of this Court, for any duty in their several capacities. This, then, is a decision of the highest tribunal, establishing the liability of the individual members of a corporation to pay a just debt, and I have found no counter-decision to diminish its authority; but I find it expressly referred to, and recognized as authority by the Court of Errors, in 19 John. 484. Mr. Foublauque, in his note, makes a quere, whether the company was a corporate company. In the statement by Viner, it is expressly called a corporation. Now, I cannot understand the distinction, between an existing company, which cannot or will not produce corporate funds, and of a company, some of the members of which attempted to withdraw themselves from it when in a falling state, and escape responsibility. Nor do I perceive any material difference between a corporation, formerly dissolved, or existing nominally without any efficiency; and all the members who have answered (but one) held themselves liable for their respective proportions, as the plain justice of the case is, that the company, and the members who were essentially the company, should pay the debt. I will venture to follow the course prescribed in the above case, and leave it then to the wisdom of the higher tribunal to decide, whether that be the law on this momentous question—a question becoming every day more interesting to the community, since incorporated companies are continually multiplying and increasing their contracts with the citizens. It will then be known, whether this fine and convenient invention of the Roman jurisprudence, to which the idea and the system of corporate bodies is traceable, is to be a public blessing or a snare, and a trap to the unwary. There were several other objections, which I will not wait to discuss, as they will doubtless be all brought to the view of the Court of Appeals. One, only, I shall notice.—It was urged, that if the individual members were to be made liable, then all should be made parties. To this, I answer, that as no more is claimed of each individual, than his own quota or proportion, it is not necessary, in relation to him, that all should be parties: that might be impossible, or unnecessary—some

may have emigrated—some died—some been insolvent, and some may have paid.

I am aware that great difficulties may occur under any decision which may be made, and that care must be taken to hold liable those, only, who were members at the time the contract was made which created the debt. But of one thing I am quite sure, that if inconvenience may arise on the one hand, great injustice must be done on the other. I make the decision, therefore, expressly, that the doctrine may be settled and modified as justice may require.

It is, therefore, ordered and decreed, that the demurrer of Mr. Matthews be overruled, and that his answer be received. That it be referred to the Master or Commissioner in Equity to examine and report when the contract was made between the company and the plaintiff, and how much is justly due to him after giving credits for the payments, and the company do lay before the said officer, a statement of their joint stock, applicable to pay the said debt, and take measures within six months to make the same productive by sale or otherwise, and that on failure thereof, in whole or in part, each individual member be held liable to pay his quota or proportion of the deficiency, and that on failing to pay his proportion, the process of the Court do issue to enforce the payments by each of his proportion of the deficiency, unless the money be raised within six months after the recording of this decree, by assessments made and collected by the company or its members; and that the said officer do enquire and report, whether Mr. Matthews has actually ceased to be a member of the said company, and at what time he so ceased.

(SIGNED,) HENRY W. DESAUSSURE.

APPEAL DECREE.

JOHNSON, J. All the defendants, except Mr. William Matthews, have acquiesced in the decree of the Circuit Court, and he has renewed here by way of appeal, the grounds of his defence below, and for the more convenient consideration of them, I shall class them under the following heads:—

1st. In abatement—because all the persons named in the act of incorporation are not made defendants.

2d. He demurs to the jurisdiction of the Court; and for cause, states, that from complainants own shewing, the corporation possessed visible property sufficient to satisfy his demand, and the contract being one over which the Law Courts had jurisdiction, he had an adequate remedy there, and was not, therefore entitled to the extraordinary aid of the Court of Chancery, and in any event he was not individually liable.

3d. The answer puts the complainant to the proof of the facts charged in the bill, and rests the defence upon the ground that the defendant had withdrawn himself from the corporation before the contract was entered into—at any rate before the work was completed, and had paid up all the assessments which had been made on him, whilst a member; and he contends, in the last resort, that he is only responsible for his proportion of the expenses incurred whilst he was a member.

The inconsistency and incongruity of these several grounds of defence has not escaped the observation of the Chancellor, and the Court concur with him fully in his animadversions on them. But as no question has been made here in relation to them, and as the inconvenience resulting from them will have passed away, when the points growing out of them shall have been decided by the opinion of this Court, it will not be necessary to remark further upon them.

1st. The foundation of the plea in abatement is, that four persons, (viz. David R. Williams, Hugh Rose, Frank Weston and John Gordon,) named in the act of incorporation, as members, are not parties to this bill. But the proceedings of the corporation abundantly show that all the shares were owned by the State, and the defendants named in the bill, at the time the contract was entered into with the complainant, and the work executed; and although it is not very clearly shewn, how, or at what time, they went out of the corporation, it is impossible they could then have been members, and it will be presumed that they went out upon the terms and in conformity with their bye-laws, and their right to do so will not be controverted by Mr. Matthews, as that is a right which he himself claims as the foundation of his defence to the merits. They could then have had no interest in this matter, and ought not to have been made parties.

2d. If we take for granted the facts assumed by the demurrer, that from the complainant's own shewing, the cor-

poration owned property enough to satisfy the complainant's demand, and that he had an adequate remedy at law, the legal conclusion is undoubtedly correct. But the assumption that the complainant states in his bill, either directly or by necessary implication, that the corporation owned any property, is not warranted. The only attempt to sustain it, is by a deduction from the fact, that the corporation employed complainant to excavate a canal, and that he did so in part, and hence it is concluded, that the canal belonged to the corporation, and that it is sufficient to pay this demand. But *non constat* that the corporation ever had any property in the soil, or if they had, that it had not reverted to the grantor by non-user or the dissolution of the corporation, (vide 1 Black. Com. 484,) or surrendered, or otherwise disposed of it, and the leading object of the bill is for a discovery whether there is any property or funds out of which the complainant's demand may be satisfied, and if this object had been obtained, and the result had proved what is assumed by the demurrer, that there was sufficient property, then there would have been an end to all further contests about it.

The discovery sought, was in itself a sufficient ground of equity jurisdiction; but there is yet another which I think equally strong, and grows out of the ground stated in the demurrer, that the individual corporators were not, in any Court, liable, in their natural capacities, for the debts of the corporation.

The object of this association, expressed in the act, was to open a canal navigation between Winyaw Bay and the Santee River, and between the Santee and Wando Rivers, which from its nature could not be accomplished without very heavy expenditures. No specific fund was set apart or assigned to these objects, either in the act or the organization of the corporation, and as the means of supplying it they entered into a resolution, noticed by the Chancellor, that it should be raised by assessments to be made on the individual members in proportion to the number of shares owned by each, according to the nature of their contracts and the exigencies of the work; and the complainant alleges that Mr. Matthews was $ 1000 in arrears to the corporation on account of these assessments, and he contends that this constituted a fund to which he was entitled in satisfaction of his demand.

That such a resolution, having the effect and operation of a bye-law, was obligatory on the individual members, and that the fund to be raised under it is liable to the debts of the corporation, are positions which will not be called in question. It is the substitution of the credit of the individual members for a common fund, and the creditors of the corporation must be allowed the benefit of it in some way or other. There is no Common Law process, of which I am aware, by which the complainant could compel the corporation to enforce this demand against Mr. Matthews, or if they had, to compel them to appropriate it to the satisfaction of his demand. As a corporation, no proceeding at Common Law can operate upon them in personam, and they have no common property upon which the process of the law Courts can act, and without the aid of the extraordinary power of the Court of Chancery, he would be without a remedy.

The extent and nature of the liabilities of the individual corporators, and the mode of relief, are, I think, very clearly indicated by the case of Dr. Salamon *vs.* The Hamburg Company, (1 Ca. in Ch. 206, Reported also in Kyd. on Corp'ns. 273,) referred to by the Chancellor; nor can I, upon the most careful examination of that case, find in it any thing which is at war with the principle contended for, and which appears to me to be well settled, (some dicta to the contrary, notwithstanding, 2 Vern. 396 note,) that individual corporators are not liable in their natural capacities, for the debts of the corporation. That corporation, like this, was without a visible tangible fund to which creditors might resort. Its funds consisted in the liability of the members to be assessed or rated, as occasion might require to meet the common burthen, and the relief granted was intended and calculated to compel and assist the corporation to enforce the liability of the individual members, and to realize this fund and apply it to the payment of their debts, or in other words, the Hamburg Company was in debt to Dr. Salmon, and the individual members of the company were bound to the company (not to him) to contribute their respective proportions to the payment of his debt, and the relief afforded acted upon them only through, and in reference to the rights of thec orporation.

In the case under consideration, the Winyaw and Wando Canal Company imposed an assessment on its members to an amount which it was supposed would cover the extent of

their liabilities, which Mr. Matthews, among others, has neglected or refused to pay, and the company have neglected to enforce. The mode of relief indicated by the case quoted, is to compel and assist the company to reduce this fund into possession, and to apply it to the payment of the complainant's demand, and is in effect a *quasi* subrogation of the complainant to the rights of the company.

3d. The answer of Mr. Matthews puts the defence upon the ground that he was not a member of the corporation at the time the contract was made, or that he had retired from it before the work was done, having paid all the assessments to which he was liable.

As between the individual members of the corporation they had unquestionably the power to prosecute the terms, and to regulate the mode in which members were to be admitted into, and resign or withdraw from it, and there is no doubt, that having resigned or withdrawn upon the terms prescribed, he was as completely absolved from his obligations, as a member, as if he had never belonged to it. Certainly, with respect to subsequent contracts, and in general from all liabilities; but I am not prepared to say, nor is it necessary here to decide, that a case may not exist in which even the retiring members would not be bound in respect to creditors.

So far then as the case depends on this question it is an issue of fact. The bill charges that Mr. Matthews was a member and in arrears to the common fund. His answer admits that he had been a member, but avers that he had withdrawn or resigned and paid up all arrears, and in proof of this fact he relies on the circumstance that he had neglected to pay the assessment made upon him by the corporation, which under the by-laws, he contends, disfranchised and operated to deprive him of all the rights and privileges, and exempting him from the liabilities of a member.

I concur with the Chancellor that this conclusion does not follow from the fact stated. The by-law in question was obviously intended to operate as a penalty to enforce the punctual payment of the assessments, which circumstances might require; of which the corporation might or might not avail itself, but until the defalcation was ascertained and the corporation had acted upon it, they had a right to regard him as a member. He might, there is no doubt, have withdrawn with their consent and perhaps without it; but he had no right to determine for the corporation, that

an act done by him of his own accord and for any thing that appears without their knowledge, constituted a withdrawal or resignation, or would induce the corporation to expel him.

The unreasonableness of such a conclusion is, I think, well illustrated by the Chancellor. The contract in question was doubtless entered into on the faith that all the defendants named in the bill were members of the corporation, and bound to contribute towards the expenditures to be incurred; and if Mr. Matthews' withholding the assessment made on him, *ipse facto* removed him from the corporation, every other member had the same right and for the same reasons, the State and General Hampton, Frederick Kohne, and Abraham Blanding are not members, as they are also in arrears; and the whole burthen would be thus thrown on the other individual members of the corporation, perhaps ruinous to them, and in that event to the complainant also. Such a consequence is so much at war with natural justice and common honesty, that a principle leading to it will never receive the sanction of a Court of Justice.

These circumstances then do not in themselves, prove that Mr. Matthews was not a member of the corporation, and the assessment on him would seem to authorise the inference that the corporation still considered him as a member; but the reference ordered by the Chancellor has left that matter open to further investigation, which will give him an opportunity of showing if he can, other and more satisfactory evidence of the fact.

On this reference the only question in which Mr. Matthews will have a separate interest will be, whether he had or had not ceased to be a member of the corporation, on the terms and conditions prescribed by their by-laws, and paid up all assessments to which he was liable. If this fact be found against him, then of course he stands in the same situation and in common with the other individuals, is bound by the assessments made to defray the debts of the corporation.

MOTION REFUSED.

Signed, **DAVID JOHNSON.**

I CONCUR—*Abram Nott.*

I cannot concur in this case: my reasons will be stated hereafter at length. *C. J. Colcock.*

No subsequent opinion has been delivered.

LANCASTER—SPRING TERM, 1830.

Howard *vs.* Williams.

1. A voluntary gift to a child is not necessarily void as to existing creditors, but will be supported, if there be abundant proof that the donor reserved an ample sufficiency to pay all his debts, and that the gift was *bona fide* and is free from all taint or suspicion of fraud.

2. That whether a sufficiency had been reserved, will be decided by the result on the winding up of the donor's affairs, except in those cases where it is clearly proved that the insufficiency, from extraordinary circumstances, which has destroyed or impaired the value of the property, or prevented it from being applied to the payment of the debts.

3. That a voluntary gift will always be supported against a subsequent creditor with notice.

4. That it will be supported against a subsequent creditor, without notice, if it be *bona fide* and free from all trick or contrivance to defeat creditors.

5. That the possession of the donor, if the donee be his child and reside with him, is not a badge of fraud, but is consistent with the gift, and may be considered as the possession of the donee.

This was an action of trespass, for taking and selling a mulatto girl named Harriet, the property of the plaintiff.

Julius Beckham proved that he knew the girl. The defendant, as sheriff of Lancaster, took her into his possession and sold her under executions against Wm. Beckham, and as his property; she was in the plaintiff's possession when he took her—he forbade both the taking and sale. She was the servant of Mrs. Howard, a daughter of Wm. Beckham. At the seizure and sale, the plaintiff and his wife lived in the house of Wm. Beckham; he owned Maria, the mother of Harriet. She (Harriet) always remained at the house of Wm. Beckham. Mr. or Mrs. Howard had not the exclusive services of the girl—she waited on Wm. Beckham's table.

Wm. Beckham proved the girl Harriet was born his; at her birth, in 1817 or 1818, he gave her to his daughter, now the plaintiff's wife, who was then 12 or 13 years of age. When the child was born, he called his daughter and told her that child was hers. He, from that time, considered her to be his daughters: she was so called by the family.—He paid taxes for her, and for negroes belonging to his mother, in his own name. The plaintiff's wife was his only child—she called others of his negroes hers. She, however,

took this girl and learnt her to sew. The plaintiff and his wife lived with him at the time of the seizure and sale. The girl was waiting about the house at that time. Col. Sims made the levy: he told him to take all he had—he made no objection to Harriet being embraced in the levy. In 1822, or 1823, he contracted the debt on which he confessed judgment to Robison. At the time he made the gift to his daughter, he owned between 15 and 20 negroes, and a tract of land, which he sold afterwards for $4000. He owed then $4000 for money borrowed, which he then had in hand. The debt which he then owed has since been paid. From 1817, to the sale of his property, he had been engaged in large speculations, buying and selling property. His property at last was sold by the sheriff, and left him largely in debt. He sold 16 negroes to Mr. Cunningham. Executions in the sheriff's office, older than that sale, had a lien upon them. He procured Jackey and Zadock Perry, to guarantee the sale to Mr. Cunningham. In consequence of which guaranty they are now bound to pay something, the residue of his property (including Harriet) not being enough, when sold by the sheriff, to pay the executions older than that sale. If this girl is recovered from the sheriff, his securities on that guaranty must of course pay it; and the contest, therefore, is between them and the plaintiff. The girl Harriet, was in his possession when they became his securities. He requested Jackey Perry to give in the names of the negroes in his possession to the sheriff, Col. Sims, for his levy. He did not tell him to except Harriet. He did not know that Jackey Perry knew that he had given Harriet to his daughter. He was his brother-in-law. It was notorious in his own family that she was his daughters.

The plaintiff here closed. The defendant called Mr. Crimenger, who proved that he was Mr. Wm. Beckham's nearest neighbor: he had, from her birth, the girl Harriet in his possession. Harriet was called Mrs. Howard's: so, also, were Peter and John, (two slaves, now acknowledged to be Wm. Beckham's.) She (Mrs. H.) was Beckham's only child. The defendant gave in evidence eighteen executions against Wm. Beckham; the names, amounts, and times of lodgment, will appear from the schedule annexed to the last page of this report.

Mr. M'Kenzie proved that he had the management of M'Daniel's execution. There was not enough from the

sale of Beckham's property to pay it off by 5 or 600 dollars. This execution being older than the sale of the negroes to Cunningham, Jackey and Zadock Perry, had to pay this balance. If this suit is decided against the sheriff, they must pay the recovery in addition.

Col. Peay proved that he was security for Beckham, to the Bank, for $9000. The debt was contracted in the spring of 1817. On the 26th of September, 1817, he indorsed his note (Beckham's) for the sum stated. It was reduced considerably by payments subsequently made.—After some time, perhaps, (in 1828,) Mr. Beckham applied to him to indorse a note for him to the Salisbury Bank, for $6000. Beckham only drew $4000. To make himself safe, for this and his previous indorsements, in 1817, he took from Beckham a confession for $6000. He received out of the sales of Beckham's property, $1300; and out of the sale of Harriet, and some other property, sold at the same time with her $53 42. In 1822, or 1823, Mr. Beckham contracted a large debt to Trapp's estate; this debt was paid out of the proceeds of the sale to Cunningham. The debt to Brown was contracted in 1822, 23, or 24.

Harriet sold for $302 50. The other property, sold at the same time, sold for $43 14. Of this sale, $282 32 was paid to M'Daniel's execution—the balance, as stated above, to Col Peay.

I instructed the Jury, on the authority of Madden *vs.* Day, that the possession of a parent, after a gift to his child, notwithstanding the child may be a minor and live with him is a badge of fraud. I also said to the Jury, that if a man is solvent, when he makes a gift; but still retains the possession of the chattel; and in the winding up of his affairs he should be found to be insolvent, that the gift would be regarded fraudulent even against subsequent creditors, without notice. On the present occasion, however, that was not necessary. The negro in dispute was sold, and part of the proceeds of her sale was applied to a debt existing at the gift. It was clear, therefore, in every point of view, the gift could not be supported. I directed the Jury on the law, and the facts to find for the defendant, which they accordingly did.

The plaintiff appeals and moves the appeal Court for a new trial, on the following grounds:—

1st. That his Honor, the presiding Judge, was mistaken

in the law, inasmuch as he charged the Jury that the possession of the father, the donor, was incompatible with the rights accruing from the gift to his child, the donor, who was a minor.

2nd. That he was mistaken in the law, inasmuch as he charged the Jury that the gift was fraudulent and void as to creditors, notwithstanding it was made at a time when the donor was solvent, and the debts which he then owed were paid off; because, at the general winding up of his affairs, twelve years after the gift and possession of the donee he proved to be insolvent.

3rd. Because the verdict was contrary to law and evidence.

JOHN B. O'NEAL.

Columbia, May 4th, 1830.

The case was argued by Blanding for the appellant, and Williams for the appellee; and the Court of Appeals, in June, 1830, delivered the following opinion, by Mr. Justice Evans, sitting for Judge Nott.

In this case two questions arise out of the charge of the presiding Judge, which it is necessary to consider.

1st. Is the possession of a parent, after a gift to a child, notwithstanding the child may be a minor and reside with him, a badge of fraud?

2nd. If a solvent man makes a voluntary gift to his child, and in winding up his affairs he should be found to be insolvent, is such a gift fraudulent against subsequent creditors, without notice?

On the first question I would remark, that in the case of Terry *vs.* Belcher, decided during the present term; this court held that the sellers remaining in possession was not in itself a fraud, but only evidence of fraud; which might be satisfactorily explained; and in the case of Reaves *vs.* Harris, that the delivery of possession, though a presumption, that the right of property had been transferred was satisfactorily explained, by showing that it was a part of this original contract, that the title was to remain in the seller until the price was paid.

Both these cases decided adversely to the claims of creditors, and are in conformity with the doctrine of Turner's case, and the opinion of Lord Mansfield, in 1 Burrow's 484: "That the purchasers not taking possession, but suffering the property to remain in the possession of the seller, is only evidence of fraud and may be explained. In the case of Cadogan *vs.* Kennet, Cowper, 434, the same learned

Judge says, "the question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick or contrivance to defraud creditors." If the possession of the seller be only *prima facie* evidence of fraud, can the possession of a donor be any thing more. It seems to me the principle is the same in both cases, viz: that possession is visible evidence of ownership and if unexplained, will be regarded as fraudulent in favour of creditors, who may be defrauded of their just rights, by this light of property held out to the world. But the question under consideration rests on higher grounds than these: in the case of the Exors. of Curry *vs.* Ellerbe, decided in the Constitution Court, S. T. 1820, Judge Colcock, in delivering the opinion of the Court, says, "There is a distinction to be made between cases where the donor and the donee live apart, and those where they necessarily live together. In the former it has been held ever since Twine's case, that where the possession continued in the donor *unexplained*, the gift would be deemed fraudulent. But in the case of a father and a child, who from their connection must live together, at least until the child comes of age, it would have the effect of destroying all gifts, to say that the possession must be considered that of the father." And in the same case, the Judge says, "the point was expressly decided in Kid *vs.* Mitchell and many others." To this I add, that I know of no case either English or American, in which a contrary doctrine has been held. There may be some dicta to the contrary, but no decided case. In the case of Smith *vs.* Littlefolm, 2 M'C. 362, the plaintiff was an infant and resided with her father.

In Jacks *vs.* Tunno, Chancellor Rutledge says—"that possession and payment of taxes cannot be considered as badges of fraud, for the donees were infants of tender years, and incapable of taking charge of the property. It is true, that in the case of Madden *vs.* Day, it would seem from the reasoning of Judge Nott, that he entertained a different opinion. "He says, the only circumstance which can be relied on, to repel the presumption of fraud arising from the donors retaining possession, is, that the possession of a parent of the property of his infant child, of whom he is the natural guardian, is not inconsistent with the nature of the claim set up by the child. But, if it may be evaded by so flimsey a pretence, as by conveying to one under his roof, and for whom he is bound to provide, the rule is of but little

value." In another part of the opinion, he says, "It is not my intention to dwell on this part of the case, as it is not called for on this occasion." And in another part, he says, "it was not necessary for a decision of the case, and that he should not express any decided opinion on the point." I take it, therefore, that the case of Madden *vs.* Day does not decide any principle adversely to the doctrine contained in this opinion; nor can any other inference be drawn, on this subject from that case, except that the Judge, who delivered the opinion of the Court, was inclined to come to a different conclusion, but expressly disclaims any intention of deciding the point. Nor do I consider the opinion of this Court, in the case of Wilder *ads.* Hudnal, in 4 M'Cord, as militating in the slightest degree against the opinion herein expressed. That, it must be remembered, was the case of a subsequent purchaser, and depends on different principles. It is not necessary for any practicable purpose, to discuss the question, whether the statutes of the 13th and 22nd Eliz. against fraudulent conveyances, are merely in affirmance of the Common Law, as Judge Nott and other distinguished jurists have supposed. It matters not from whence we have derived the wholesome doctrine of presumptive frauds. The rules are now well settled, and it would be an unprofitable discussion at this day, to enquire, whether we derive them from these statutes, or whether they have come to us from the romoter fountain of the Common Law. The consequences are the same. It is now well settled in England, that a voluntary conveyance of land is void against a subsequent purchaser, even with notice. I am satisfied that this is carrying the doctrine of presumptive fraud, beyond reasonable inference and common sense. How can any man be said to be defrauded, by what he knew existed before he purchased. This principle, the existence of which the wisest judges in England have regretted, has been wisely rejected in the case of Hudnal *vs.* Wilder; and subsequent purchasers of both real and personal property are put on the same footing, and both are protected against prior voluntary conveyances, when the purchasers have been deceived and defrauded by a concealment of the fact, that the seller had before conveyed the property to another person. This doctrine can hardly be supposed to depend on any legal inference, or presumption of fraud. The act of selling, with a concealment of the prior conveyance, is a palpable fraud in

itself. It is *suppressio veri*, and if men's intentions can be inferred from their acts, I think we may fairly conclude that the first conveyance was made with intent to effect, what was afterwards effected, to wit: to defraud a subsequent purchaser. This is the doctrine laid down in Hudnall *vs.* Wilder, and nothing more. I think, therefore, we may fairly conclude that there is no legal foundation for saying, "that the possession of a parent, after a gift to a child who resides with him, is a badge of fraud; but on the contrary, the possession in such case may be considered the possession of the donee, or, as is said in the case of Kid *vs.* Mitchell, the possession is consistent with the donee's title. The second ground to be considered, is, if a solvent man make a voluntary gift to his child, and in the winding up of his affairs he should be found insolvent, is such a gift void as a fraud upon subsequent creditors without notice.

I have already expressed incidentally my opinion of the effect of notice to a purchaser, and I can see no reason for a distinction between him who buys with notice, and him who trusts with notice. I shall therefore proceed to inquire how a creditor without notice would be effected by a gift under such circumstances. I cannot make up my mind to assent to the broad proposition laid down; I have always considered the law as well settled that the owner of property might *bona fide*, dispose of it at his pleasure, with this single restriction, that he must be just and pay his debts before he is generous. If a man makes a gift of all or the greater part of his estate to his children living with him, and goes on year to year contracting debts, the property in the mean time remaining in his possession, and the knowledge of the existence of the gift confined to his own family, and in the end becomes insolvent, in such case I think, a jury might fairly presume that he made the gift *mala fide*, and with a view to avoid the payment of future debts. But I am yet to learn, that by the laws of this State a gift of a small portion of man's estate to a child living with him, made when in prosperous circumstances, and when no fair inference can be drawn that he was looking to insolvency and providing for his family in anticipation of that event, will be regarded as fraudulent, because after a lapse of 10 or 15 years he becomes insolvent from the disastrous issue of subsequent speculations, from a decline in the value of property, or from accident or misfortune, merely because his

creditors may not have had notice of the gift. Secrecy, like possession, may be evidence of fraud; but if the transaction be *bona fide*, it is as capable of being satisfactorily explained as any other fact. The law does not require (and it is greatly to be regretted that it does not) that gifts of personal property should be reduced to writing or made public by recording, and until it does I shall feel myself bound, *dicere et non facere legen*, and to say if there was no fraudulent intent, such a gift is not void although the creditor might not know of its existence. In Iley *vs.* Niswanger, 1 M'Cord, C. R. 522, it is said, a subsequent creditor can come in only on the ground of fraud.

It is said, however, that this gift is void because some portion of the money arising from the sales of the negro, was applied to pay a debt subsisting at the time the gift was made. On this part of the case, the facts are somewhat obscure. It is said in the argument that Pray's debt was a subsisting debt, and about ten dollars of the money arising from the sale was applied to the payment of this debt. Col. Peay, in his evidence, says he was security for Beckham to the Bank of the State of South Carolina, in September, 1817, for $9000—that in 1823, he indorsed for him, to the Salisbury Bank, for $4000; and to secure himself against these liabilities, he took a confession of judgment for $6000 dollars. He says, a considerable portion of the debt to the Bank of the State of South-Carolina, was paid; but it does not appear how much of the $6000 remained unpaid, nor does it appear, how other debts were paid out the residue of Beckham's property, in preference to Peay's debt; but I presume it arose from his suffering subsequent creditors to get their debts into judgments, and executions first. There being doubts as to the facts connected with this part of the case, I shall lay down only the general principles by which it is to be governed. The general rule unquestionably is, that every voluntary conveyance is void against existing creditors. Lord Hardwick, in the case of Windham *vs.* Townsend, says, "that a man actually indebted at the time, and conveying voluntarily, always meant to defraud." But it must be recollected, that all the cases, Townsend *vs.* Windham, Russel *vs.* Hammond, and Fitzer *vs.* Fitzer, in which Lord Hardwick holds this language in cases where there was no other property out of which the existing debts could be satisfied. These were all cases in equity, where bills

had been filed to have satisfaction of the estate voluntarily settled. But it certainly never can be supposed, that this learned Judge meant to say, that a gift made by a father of the one-twentieth part of his property, and he indebted to a small amount at the time, shall be set aside, because a small amount of a subsisting debt remains unsatisfied after a lapse of ten years, and when the donor still has amply sufficient to pay this debt, which had become applicable to subsequent debts, by the negligence or indulgence of the creditor. I understand from the report, that M'Daniel's debt was contracted long after the gift, but was older in execution than Peay's debt, and therefore entitled to be first paid. The amount for which Harriet sold, was first applicable to the payment of M'Daniel's execution; and after the extinguishment of that case, there remained about ten dollars which was applied to Peay's debt, or the debt for which Peay had been Beckham's security. If, therefore, M'Daniel's debt had been for an amount of only ten dollars more, no part of the sale of Harriet would have been applied to pay a debt subsisting at the time of the gift, and then, I presume, the gift could not have been impeached on this ground. Now, as Judge Nott has said in another case, "it is a flimsy rule, the application of which depends on such a circumstance." I will illustrate my opinion of this question, by the following cases. A man in prosperous circumstances, worth $50,000, gives his son $5,000, to set him up in the world. Ten years afterwards the father becomes insolvent, and there is found among his debts, one of one hundred dollars, still due, which existed at the time of the gift; or to put another case—a man in a city, worth $50,000 in houses and merchandize, gives $5,000 to his son—ten years afterwards a fire, or a storm, destroys all his property, and reduces him to poverty in a single night, and among his debts is found one of small amount, which existed at the time the gift was made. In these, and similar cases, I apprehend no Court would hold, that the gift to the son should be set aside, and subsequent creditors let in to sweep the whole of the property given to the son, on the ground, as Chancellor Kent says in Meade *vs.* Livingston, of "equal apportionment and marshalling of assets." It seems to me, therefore, that the rule laid down in the cases before cited, and so earnestly insisted on by Chancellor Kent, in the case of Meade *vs.* Livingston, must be taken in reference to the

particular circumstances of those cases, viz. that the estate settled, constituted the bulk of the donor's estate, and that the general rule must be taken, with the exception laid down in the case of Kirkley *vs.* Blakeney, 2 Nott & M'Cord, 546.

"Where a man owes a sum of money, at the time of making a gift to his child, without consideration, the presumption of fraud can only be rebutted by showing very abundant property over and above the gift retained by the donor, for the purpose of paying his debts; and if, in the *ordinary* course of events, such property turns out to be inadequate to the discharge of the debts, the presumption of fraud remains, although the property reserved may have been deemed adequate for that purpose if so applied." The Judge adds, "the case must be an exceedingly fair one, not to be deemed fraudulent where a debt due prior to the gift remains unpaid." On the second trial of this case, the Jury found a second verdict for the plaintiff, upon full proof that the donor had reserved an ample sufficiency to pay all his debts, but had been prevented from doing so by the circumstance, that the principal part of the property reserved had been sacrificed at sheriff's sale for one-fiftieth of its value. I was the attorney of defendant, and acquiesced in this verdict, under the belief, that by the laws of this State such a gift was good, if free from all taint of fraudulent intent, and the donor had reserved an abundant sufficiency to pay his debt, although the property reserved might turn out ultimately inadequate by reason of some unforseen event, as by losses in trade, as in the case of Jacks *vs.* Tunno, 3 Equity Rep. 1; or by fire or storms, or by sacrifice of property at sheriff's sale; and I might add, as applicable to this case, where the pre-existing creditor stood by and suffered the subsequent creditors to sweep away the reserved property, by getting judgments and executions before him; I take the true rule to be, that the reserved property must be sufficient in the *ordinary* course of human events. In the case of Fetzer *vs.* Fetzer, 2 Atk. 511, Lord Hardwicke asked the counsel if there was "any instance in that Court where a conveyance from a husband to a wife, without any pecuniary consideration moving from the wife (and I take a gift to a child to depend on the same principle) had been held good against creditors." It may be, that in equity there is no such case; but in the case of Cadogan *vs.* Kennet, in Cowper's Reports, Lord Mansfield held, "that the circumstance

of a man being indebted at the time of his making a voluntary conveyance, is only an argument of fraud." "The question, in every case, is, whether the act done is *bona fide*, or whether it is a trick and contrivance to defeat creditors." In that case, Kennet, the defendant, was a creditor of Lord Montforts at the time the settlement was made, and yet the settlement was sustained.

It seems to me, therefore, that the following positions are supported by principle, and clearly deducible from the authorities:

1. That a voluntary gift to a child is not necessarily void, as to existing creditors, but will be supported if there be abundant proof that the donor reserved an ample sufficiency to pay all his debts, and that the gift was made *bona fide*, and is free from all taint or suspicion of fraud.

2. That whether a sufficiency had been reserved, will be decided by the result, on the winding up of the donor's affairs, except in those cases where it is clearly proved that the insufficiency has resulted from extraordinary circumstances which have destroyed or impaired its value, or prevented it from being applied to the payment of the debts, as in the case before stated.

3. That a voluntary gift will always be supported against a subsequent creditor with notice.

4. That it will be supported against a subsequent creditor without notice, if it be *bona fide* and free from all trick and contrivance to defeat creditors.

5. That the possession of the donor, if the donee be his child, and reside with him, is not a badge of fraud, but is consistent with the gift, and may be considered the possession of the donee.

If these positions be correct, and I entertain no doubt in relation to them, then the charge of the Circuit Judge on the law, was wrong, and a new trial is awarded.

We transfer from the *Foreign Quarterly Review* to our pages, a well written article *on Meyer's work on the spirit, origin, and progress of the Judicial Institutions of the principal countries of Europe.* It is taken from the number for January, 1829, and contains many just sentiments on codification, the qualifications and duties of legislators, and the constitution and proceedings of judicial tribunals. It was written with a view to the state of things in England; and the reader will, therefore, find some views which we would not consider perfectly orthodox on this side of the Atlantic: yet, on the whole it contains so much matter that is applicable to our own country, that we have laid it before our readers; few of whom have an opportunity of consulting the original or the English review of it.

Esprit, Origine et Progrès des Institutions Judiciaires des principaux pays de l'Europe. Par J. D. Meyer, Chevalier de l'Ordre royal du Lion Belgique, &c. &c. &c. 5 tom. 8vo. Paris et Amsterdam. 1823.

It is difficult for a literary journal to keep any thing like even measure with the progress of contemporary publication, unless by renouncing the ambitious character of original authorship, and condescending to revert to the humbler office from which we derive our institution. Without, however venturing to estimate the loss which would accrue to the world of science, from being all at once deprived of the lights so long afforded it by our brother-critics, we may at least be permitted to question whether a Review devoted to Foreign Literature, may not answer the purposes of utility better in adhering strictly to its professed object, than in aspiring to teach or to legislate; and if on any subject it is desirable for our readers to be informed of what is thought, and spoken, and written, at Paris, Berlin, or Vienna, rather than what *we* (reviewers) cogitate, or might feel inclined to utter as the result of our own meditations, it is on the great topics of national improvement and political science that they are assuredly most interested in demanding to be so instructed.

Under this impression, we lately noticed the work of M. Rey, as the estimate formed by an intelligent foreigner, (certainly not bigotted in favor of *any* existing institutions,) of the comparative merits of France and England in respect of their judicial establishments; and we shall now pursue the same course in the account which we propose to give

of a work, more extensive in subject, higher in point of celebrity, and anterior in date, to that of the "ancien magistrat de Grenoble," and one which we believe may be justly regarded as a text authority in the science of legislation.

Before we proceed to a survey of its contents, it may be necessary for the information of some of our readers, just to advert to the controversy, which has long subsisted among foreign jurists, between the partisans of (what is called) "Codification" and their adversaries;—a controversy into which we feel no disposition to enter, except only to remark that we consider ourselves, as Englishmen, no further concerned in it than as it may be question with some, whether the great work of reform in our own laws, now admitted on all hands to be conducted on a systematic plan, or to be still left (as has hitherto been the case) to the gradual operation of accident and necessity. It has long been a favorite maxim of our statemen and lawyers, "to leave," as they say, "well alone,"—to seek for no remedy till some partial evil has grown to such a height as absolutely to force itself on the notice of the physician, and even then to admit it only to the extent of the actual exigency. A more provident and philosophical spirit has begun to make itself manifest; and if in contributing our humble efforts to its encouragement, we resort to the works of foreign jurists as the vehicles of instruction, we shall pursue this course with the less reluctance, as the writers to whom we refer are, one and all, proud to acknowledge their obligations to an English prototype, to whom they bow with the reverence due to the founder of a new science, which is justly regarded as such in every country except that in which it originated. *Here* indeed we have still a few among our lakes and mountains, and some perhaps even in our courts of law, who affect to ridicule every thing that appears to militate against their interests or prejudices, and who think by a pun or a nickname to check the rapid progress of improvement in legislative science—ignorant of the revolution, which the lapse of a few years has made in the wants as well as the habits of society—that our insular position, though it saved us from the horrors of military invasion, has proved no bulwark against the introduction of new manners and new opinions, and that England is now no more the England of half a century since, than France is the France of Louis the Fif-

teenth and his mistresses. Whether for better or worse, a great and systematic change has begun and is still in progress. Our venerable friends, the Roger Dodsworths of the day,* may arrest it just as much as a fly can stop the course of a chariot wheel. Work, it must and will, in spite of them, to its completion; and a far wiser plan of conduct would be to watch, and now and then try to direct its movements, than to sit by and whine about the "bon vieil temps," which has passed by for ever.

M. Meyer having been often referred to, both by "codificators" and their opponents, as an authority in support of their rival doctrines, we think it will not be inexpedient if we have recourse to his own exposition of his principles, and of the design of his work, that our readers may be enabled to judge which party has most right to claim him as a champion on its side of the controversy. After observing, that of all the monuments of historical knowledge, the most important and interesting are those which are presented to us in the laws and judicial institutions of nations—that these constitute the purest source of the philosophy of history—but that the science of legislation is itself scarcely more ancient than that philosophy, and its application of even still more recent adoption—that from the time of the Emperor Adrian and his "perpetual edict," every thing known by the name of Code was no more than a mere digest or compilation, admitting but, at most, a few partial modifications from the hand of the legislator—and that several countries of Europe are still without any systematic provision in respect of laws, while others have been subjected to various experiments, resulting from the acknowledged incoherence of existing usages, and attended with various success in the operation of them,—he proceeds thus to state the question:—

"Is it more advantageous to possess systems of legislation, codes of law introduced simultaneously, or is it better to follow usage only? This is a question which might appear to admit of no doubt, and which is nevertheless a subject of controversy between the most learned authors. The par-

* "Yes, sleeper of ages, thou *shalt* be their chosen;
And deeply with thee will they sorrow, good men,
To think that all Europe has, since thou wert frozen
So alter'd, thou hardly wilt know it again."
Odes upon Cash, Corn, Catholics, &c.

tisans of systematic legislation have abundance of arguments in support of their opinion; they rely on the contrast which necessarily exists between the phenomena resulting from acts of occasional legislation, and those produced by usages, the origin of which is connected with a state of manners quite different from those of the present time; they allege that the laws ought to harmonize with existing circumstances, and that ancient customs cannot suit modern times; that a jurisprudence which has its basis in laws and usages exclusively appertaining to past ages, cannot march with the age, and that if it lags behind, we are exposed to see barbarous decisions in the midst of liberal institutions, and judgments tinctured with the innocence of other days, and marked by prejudices to which the present state of society is superior. On the other hand, those who are opposed to new systems of legislation, refer to the experience of ages and the small success of the greatest portion of new laws; they assert that it is impossible to impose on a people laws which are at variance with its manners; that a nation rejects such as are foreign to its actual mode of existence; that systematic laws are always insufficient, and cannot provide for all cases, while usages founded on the habits of those who practice them, provide for every kind which can occur; that the Roman laws, those of the ancient Germans, the customs of the provinces of France and the Netherlands, the common law of England, the principles most generally admitted in Germany, all derive their merit, and the duration of their obligatory force, from the single reason that they are the epitome of usages consigned to writing; that custom purifies itself by time, and that the dispositions of the Roman law, especially those of the *Digest*, have been in all ages acknowledged as written reason, solely because they were not made at once, but have been produced by the habits of an eminently wise people, and collected together in the works of jurisconsults who were fully sensible of the importance of their task.

"But is it necessary to admit this diversity of system in theoretical and practical jurisprudence? Perhaps the distinction exists less in reality than in the different points of view in which legislation is considered. If, on the other hand, it is true, that ancient usages cannot, without serious inconvenience, become the sole and exclusive basis of law, that the disparities resulting from it would be such as to

shock the understanding, and that laws ought to vary with the spirit of the times; if, on the other hand new systems of legislation have not fully answered the expectations of those who wished to have them adoped; if those nations on which they have been attempted to be imposed have rejected them, or have only waited the first favourable moment to return to their ancient usages, we think it would be easy to reconcile these different opinions, or rather to demonstrate that they are not so opposite as they appear."—*Introduction*, p. vii—xi.

The steps by which he attempts the task of reconcilement, are such as, in our judgment, to afford the advocates of neither the one nor the other opinion the triumph of a victory, while they are such also as to render the dispute worse than trifling, inasmuch as it tends to divert the attention of the combatants from the great principle of practical utility, which ought alone to guide and regulate their efforts. The ground taken by those who oppose systematic legislation, (M. Meyer means of course its *rational* opponents—there are others with whom it would be vain to argue,) is, that the necessary amendments of law are sufficiently indicated by the changes of time and of the corresponding habits of society, which prepare the way for, and force them into adoption. Let us pay all respect, says our author, to customs and usages—let us be tender even to prejudices, the result of long-cherished habit; but let us at the same time allow that the alteration of laws, even though left to be indicated by the progress of society, is not less the province of the legislator, whose duty it is to sanction the innovations of custom, by guarding against confusion, and to ensure order and regularity in the progress of abolition as well as of new enactment. This, he adds, is no other than the course pursued under Justinian in his Institutes, and in the compilations of the Code and Digest—the very examples on which the detractors of systems place their reliance; whilst they, in like manner, forget the intimate connection which exists between the separate branches of legislation, and that it is in vain to attempt the substantial reform of any without a perfect understanding of its dependencies upon the whole body of which it forms a part.

Every country possesses something of a system of legislation—even those in which laws and customs are least in unison, having been introduced in succession, and without

reference to any fixed principles. However different in their origin, they are bound together by habit, and made to amalgamate; and it is as much the duty of the legislature to watch over every partial alteration of such a system, as over those more general changes of the entire fabric which great political events sometimes bring about, and of which our own times have furnished us with so many examples.—Whether the object in contemplation be of great or small dimensions, utility is still the pole-star which ought to guide us; but the mischief is, that men are apt to overlook the importance of particular laws, which are often passed hastily and without combination or foresight; presenting points of contradiction to others which are still retained, or overturning in their execution the application of general principles till then regularly followed, and on which it is probable that the makers of the law never once reflected.

"Wherever, therefore, the detractors of theoretical legislation declaim against the abuse of systems which offer just and beautiful combinations in theory, but want the sanction of experience, they have but too much reason for their inculcations, when the projected systems are taken at random; but if it would be unpardonable to lose sight of the manners, usages, and peculiar circumstances of a nation, merely for the sake of supporting a consistent and well-combined theory, still less is it prudent to regard each object separately, without looking to the harmony which should subsist between the parts of one whole, without endeavoring to prevent the rubs which the introduction of any novelty whatever must always occasion, without avoiding the subtilties into which we necessarily fall in seeking to apply laws not proceeding from the same principle, and making institutions march in the same file with others of a wholly opposite tendency. Practice and habit finally reconcile things which are most dissimilar in appearance, and time makes the want of conformity, which might at first exist between such dispositions, be forgotten; but the just application of the theoretical science of legislation may tend to preserve harmony between the parts of the same system; it may effect by anticipation what experience can only give after a considerable lapse of time; it may prevent the inconveniences which habit alone is slow in moving. The whole question is reduced, therefore, to the knowledge of how much the legislator ought to allow to theory, and

how much to the usages of the nation for which his laws are destined.

"He who would give laws to a people, which should in process of time contribute to their prosperity, and prevent the inconveniences to which new laws and institutions, whether general or partial, must give rise, ought therefore to be well acquainted with the laws, usages, and habits of that people; but he must not confine himself to their present dispositions only; he must catch their spirit, and consequently inform himself thoroughly of their origin, the circumstance which produced them, the modifications they have undergone, the different stages of jurisprudence at which they have arrived; he should know the revolutions which the nation itself has passed through in its government, its customs, its relations during peace and war with its neighbors; he ought to look to the character of the sovereign and his councillors; to the state of internal peace which the people have enjoyed, or the troubles which have agitated them during such and such a reign; to the state of the finances, which may from their derangement excuse or necessitate measures otherwise imprudent, or by their flourishing condition authorize such as would be otherwise impracticable; the national resources; the commerce; in a word, he ought to study deeply the history of the people, in order to understand completely the changes which may have taken place in their legislation, with their causes as well as their effects; and it is in this sense that Montesquieu said '*qu'il faut èclairer les lois par l'histoire.*'

"To be enabled to profit by the experience of ages, in a matter so delicate as that on which the happiness of mankind in a great degree depends, we must not confine our inquiries solely to the country for which a new system of laws is destined; we must extend our observations to the legislative systems of other nations, and especially of such as in their situation, connections, wants and resources, present the greatest resemblance, to that to which we have devoted the results of our knowledge. It is by a sedulous study of the progress of their laws, and an attentive examination of them, that we succeed in collecting the results of the experience of all these nations on the different points of legislation.

"The labor which we demand is immense; the information required is almost boundless; the research, probably,

beyond the powers of any individual; but they are indispensable preliminaries to the undertaking of the most glorious task to which a man can devote himself, a task which the ancients reserved exclusively for their gods, or for those who were favored with their immediate inspirations. What recompense is not due to him who succeeds in establishing, by a good system of laws, the happiness of a whole nation? A happiness so much the more real, that it is connected with every action, even the most trifling, every social relation, every tie which attaches man to all that is most dear to him! But on the other hand, what a serious responsibility rests on him who abandons the welfare of a whole nation to chance, who runs the risk of poisoning the very well-spring of all their rights, of all their actions, of all their habits! A new system of laws is always an extremely dangerous experiment; it requires to be thoroughly examined and well combined, previously to placing the social body and individual citizens under its sway: there is no labour, no care that can be considered too great, with reference to an object of such importance: there is no prize too high for the deserts of him who ensures the great object of all society—the liberty, security, and tranquillity of every one of its members."—*Introduction*, p. xvii—xxiii.

We have indulged in some length of quotation; but the high character of the work renders it an object of no small importance that the opinions of its author on the general subject of legislation—a subject of such vital and pressing interest to ourselves—should be accurately known and well considered. His great maxim seems to be, that in all plans of reform, experience should be our guide, and utility our object. He adopts in its full force the doctrine of Montesquieu, who inculcates the intimate relation and mutual dependencies of law and history; and if he does not suffer himself to be cited as an authority in support of the dreams of theoretical and abstract perfection in the art of legislation, still less is he liable to be called in aid of those who maintain the inviolability of existing institutions, or the timid policy of half-measures, in the great work of amendment.

From discussing the general principles of legislation, M. Meyer goes on to estimate the relative importance of its several branches; and in this part of his introduction the observations he makes are no less deserving the attention of those who, though well-wishers to the cause of reform,

and zealous to promote its accomplishment, are alarmed by the magnitude of the object, and uncertain where or how to begin in so extensive a field of operation.

"Nevertheless," he observes, "all parts of legislation, though forming a complete whole, are not equally interesting in their consequences, nor equally dependent on historical association." "Generally speaking," he continues, "those laws to which the citizen is left free, whether he will or will not subject himself, call for the least immediate attention, such are the civil and commercial systems—those, for instance, which regulate succession in case of intestacy."

"Accordingly," he says, "we have seen frequent examples of nations adopting, in these respects, the entire institutions of foreign countries, with which they have nothing else in common;" and he instances "the reception (universal with the exception of England) of the Roman law among all the nations of Europe, the commercial laws of Rhodes, the customs of Oleron, and the usages of Catalonia, known by the name of *Consulatus Maris*." From this general remark are to be excepted those laws which affect the rights of *persons* only.

Next to civil laws, in the ascending scale of interest and importance, he places the penal—a position which he acknowledges may be taxed as paradoxical, but which he undertakes to defend upon principles both of theory and experience. Penal laws affect directly the interests of but a small number of individuals, and those (for the most part) of least weight and influence of the State. All men are free to keep out of their reach; and, notwithstanding the vast importance which has been assigned them in the writings of some whose zeal (let it be remembered that it is M. Meyer whose sentiments we are recording) "does more honor to their philanthropy than to their penetration"—notwithstanding the interests of humanity, the circumstances which often make us lose sight of the criminal in contemplating the unfortunate—notwithstanding the immediate influence of the state of society upon punishments, and of punishments upon morals—notwithstanding the undoubted right of every individual to the protection of the State of which he is a member—all which form abundance of motives for assigning to this branch of legislation a rank superior to that before treated of—yet experience teaches that neither is this essentially connected with history; "that its changes are

quite independent of the variations which nations undergo in their forms of government; that it has advanced or retrograded with the manners of the age, but has always been a stranger to the great revolutions of empires."

Of far more immediate importance to society at large than the actual dispositions of either the civil or the penal code, are the forms of *Procedure* necessary to the attainment of justice. Here it is that one at least of the parties in every litigation finds himself compelled by the act of his adversary, to submit his rights to the restriction of certain arbitrary rules, from which he cannot withdraw himself; and that without any fault or neglect of his own, and without any privilege or exemption in respect of wealth, station, or probity. Here every citizen of the State is alike interested in the attainment of a system calculated to afford security against the effects of unnecessary delay on the one hand, and of undue precipitation on the other: and here also we find experience come in aid of theory, it being seldom that a nation has undergone any considerable revolution in its political existence without its consequences being perceptible in the state of its laws of procedure; while history may be ransacked in vain to produce any instance of a people which, without the loss of its own national independence, has adopted those of a foreign country. And it is to this principle that our author ascribes the introduction of the canon law, as a general rule of procedure among the several nations of Europe which adopted the principle of the Roman civil law, without its forms, but which all equally acknowledged the authority of a clergy forming a separate power, and connected by one common interest, throughout Christendom.

But whatever may be the relative importance of the several branches of legislation already noticed, they all must yield, in point of vital interests and intimate connection with the whole frame of government, to the judicial establishments of a nation—"meaning, by its *judicial establishments*, those which the laws have instituted for the administration of justice—the measures taken to enable every citizen to exercise all his rights, and to exact all his dues." The form of the tribunals—the extent of their jurisdiction—their relations with constituted authorities as well as with private individuals—such are the weighty considerations which fall within the province of this head of inquiry. It is difficult to become thoroughly acquainted with these institu-

tions, unless we also examine the forms of procedure which fall within their immediate influence; and it is impossible to acquire a knowledge of these without that of the other branches of administration to which they are placed in constant relation. But they possess a still higher claim to our veneration, when we reflect how closely they are incorporated with the constitution and character of a people, insomuch that history records not a single example of any nation which, without actual subjugation, has ever adopted the entire judicial system of any other; and in whatever cases transplantation has been attempted, the exotic has either not taken root, or has soon totally degenerated—a result of experience, observes our author, which confirms the necessity of examining these institutions by the light of history—illustrating the failure attendant upon a contrary line of experiment by the recent example of the introduction into France of the English trial by jury, and by the more ancient one of the adoption of the French "ministéte public" by the Dukes of Burgundy for the administration of their dominions in the Low Countries, both which attempts resulted in the formation of institutions wholly dissimilar to those on which they were modelled.

"Nevertheless," he continues, (and here we must be pardoned another quotation, in consideration of the importance of a subject on which it is so desirable that there should be no misunderstanding,) "we are no believers in the impossibility of making a nation participate in the benefits of an institution established among its neighbors; but the attempt requires great caution and a perfect knowledge of every thing connected with the novelty sought to be introduced. To naturalize it in a foreign country, it is indispensable to be fully informed as to its real spirit, and the relations existing between the habits and the government of the nation possessed of the institution, as well as the laws which relate to it; it is equally indispensable to know exactly to what part of the system an institution is attached for which another is desired to be substituted, in order to modify the latter so as to retain its essence, and at the same time preserve the threads of ancient usages which continue to subsist, and unite them with the new forms desired to be substituted for the previous ones. It is only by taking these precautions that one can hope for any success in a projected innovation. As a gar-

dener ought to know the nature of the twig which he means to engraft, as well as of the tree on which it is to be grafted; to distinguish and preserve the tubes by which the sap circulates from the stock to the graft; and to carefully extirpate every thing which could obstruct or pervert this communication—a legislator who seeks to impart to one nation the benefit of the institutions of another, ought to be thoroughly acquainted with those he wishes to introduce, as well as those for which they are to be substituted; he ought to know what habits are favourable to this introduction, and what are opposed to it; he ought to encourage the first, and make the last be forgotten. The usages of a people are not the fit subjects of regulation; manners yield no obedience to written laws; but nothing is more easy to him who really deserves the name of legislator than to bring them quietly and imperceptibly to the wished-for point; to concede mildly such articles as are not essential to the proposed measure; to sacrifice some of the accessaries; to admit unimportant modifications; to carry the semblance of yielding to customs in externals, without giving up a jot of strict principle, without ever losing sight of the essential object; and in this manner to succeed in procuring the adoption of, and in naturalizing an institution which he could not have established without these precautions.

"Of what use would experience be in matters of legislation, if we are forced to abandon ourselves blindly to custom in what relates to the most interesting part of the laws, if it was previously admitted to be impossible to transmit from one age or from one country to another institutions calculated to improve its condition. The task of a legislator is extremely difficult, and if new laws are frequent, that frequency is probably a sign of the want of vocation of those who pretend to the title. The true legislator, anxious to give really useful and permanent laws, desirous of doing good, but aware of the difficulties opposed to him, who appreciates the danger of every experiment, and is fully sensible of the importance of his undertaking, is a rare character: he is slow in determining, he does not take up this or that institution by chance, he adopts no system beforehand, he belongs to no party; but he corrects system by experience, and arranges the results of experience according to theory. He will be very frequently tempted to give up his task, but never will he give up any thing to the circumstances of the

moment, never will he precipitate his labours, never will he dishonour them by base adulation; whatever may be the state of a nation, he will know that although its laws may be defective, it is better to retain them for any length of time, than to augment confusion, by substituting another system of legislation equally unsuitable, or entangling it by partial alterations."—p. xli—xlv.

The age in which we live, he proceeds to observe, is peculiarly interesting in this point of view. Ancient customs are every where subverted or shaken; their defects are no longer attempted to be concealed; and even in England, the country of all others most distinguished by attachment to habit, nobody any longer makes a mystery of entertaining these sentiments. "On crie tous les jours à la réforme, et on tente plus d'une innovation."

It is needless to follow our author any further in his introductory essay, after having so fully made known by our extracts the general scope of his reasoning; and it would be impossible, within the limits of a review, to present an analysis of the first and succeeding volumes, in which, after tracing the origin and progress of those existing institutions, which he subsequently examines more in detail, and deriving them from the ancient Germans—in opposition to some very ingenious writers, who have preferred seeking their source in the civil law of Rome,—he goes on to examine successively those of England, of France under the ancient monarchy, of the Netherlands, of Germany, and of France since the Revolution. It is impossible, we repeat, that any analysis can give a correct or useful view of the contents of such a work as this, which calls for, and demands, the undivided attention of all who are desirous of studying legislation as a science, and forming their opinions with reference to that subject, which is, of all others, most important to the happiness and welfare of man in his civil capacity, on the broad basis of philosophical experience; and contenting ourselves with earnestly recommending the diligent perusal of it (especially of the second, third and fourth volumes) to such as are so minded, we shall occupy the space now remaining to us with a brief abstract of the fifth and concluding volume, (being the third part of the treatise,) in which the author professes to give "the result of the principles to be deduced from the historical parts; to examine separately each of the institutions which strikes him in the

light of greatest utility; to attempt the development of its advantages and disadvantages; to discern the causes which have favoured or impeded its consequences, the daily habits and usages of the people, or the parts of the administrative organization to which they are attached, and by which consequently the introduction of any new measure ought to be modified. This third division," he adds, "which contains the application of the two former, partakes of the science of legislation; it is the part most essential, the true object of our labours: the historical division, and that in which history and jurisprudence are mingled, are only the proofs of those facts of which the results are here developed."

We now proceed to present our readers with a short summary of those results, following the order in which the author has marshalled them.

I. Of all moral sciences there is none of more extensive utility than that which teaches the relative duties of the sovereign and his people. Legislation in its widest sense, comprises all those relations. It regulates the limits of authority and obedience; prescribes the mode of administration, the functions of the magistrate, and the rights of the subject; the extent of the sacrifices necessary for the maintenance of order and of public tranquillity, the nature of the penalty required to enforce it. It ascertains the degrees of relationship, and the duties arising out of the marriage contract; establishes the rights of property, and provides the means of ensuring to society collectively, as well as to individuals, the free exercise of whatever is permitted. The excellence of any system of legislation depends on the degree of accuracy with which it defines the objects within its scope, and on its conformity with the habits and character of the people for whose use it is destined.

The task of the legislator is one of extreme difficulty, owing to the absence of any thing like mathematical precision in the principles of his science. Certain it is, that no system of laws, however perfect in itself, is a fit subject for transplantation to a soil not prepared for its reception; and in every case which can arise, it is a question of the greatest nicety and importance, whether to any, and if any to what, extent, the institutions of one nation can be safely and beneficially made the rule of conduct for another. The great danger is that of becoming disgusted with the failure of experiments, perhaps injudiciously attempted, and of too has-

tily arriving at the conclusion, that to form a good system of legislation is an achievement beyond the scope of human ability—a grievous error, and one which results only from having set out with an improper estimate of the difficulties to be surmounted.

"The legislator is not the slave of circumstances; he is able, and it is one of his most important functions, to model the form of the government and the habits of the nation after the prototype of his own formation; he may improve that which is bad, supply actual deficiencies, retrench what is superfluous, substitute a wise and well-understood economy for a necessary complicated redundancy of means; conceal what ought not be publicly exposed, and make public what is unseasonably enveloped in mystery; in short, bring every thing up to the idea of perfection which the human mind ought always to have before it. It is impossible to point out beforehand the exact road which he, who is desirous by a new system of laws to improve the situation of his fellow-citizens, ought to follow. When he finds himself called to these august functions, at one of those moments of trouble and agitation at which the most apparently solid foundations of empires are shaken; when principles which had never been before doubted are brought into question, and established notions overturned: or even at one of those later periods, when the dawn of tranquillity still leaves in vagueness and uncertainty the new relations to which the preceeding revolution has given birth—he may boldly proclaim his designs; he has less reason to be apprehensive of falling short of, than of exceeding, the bounds desired; and the spirit of innovation is a powerful spring at his disposal. If, on the other hand, legislation is attempted at a season of peace and tranquillity, the legislator can only introduce even the most useful changes with slowness and prudence; he must carefully conceal his progress, and study appearances to the utmost; he must beware of shocking existing interests; the *inertia* of tranquillity will be opposed to any bold attempt; he ought to be deeply impressed with the truth, that '*le bien est l'ennemi du mieux*;' he need have no fear of being carried beyond his mark, but he may not be able to reach it, and his task will be only so much the more difficult."—pp. 11, 12.

II. The first and most arduous duty of the legislator is accurately to define, and carefully to observe, the distinction

between the several branches of sovereign authority. The legislative, executive (or administrative), and judicial functions are each of separate origin, and perfectly distinct in their nature and objects, to confound which is to inflict on the community one of the greatest mischiefs it can sustain. The right of modifying the application of law may, indeed, be delegated by the legislator; but it is indispensible to the due exercise of this important privilege, that the competent authority be clearly designated, and its limits accurately defined. One of the most obvious examples in illustration of this axiom is to be found in the privilege of *pardon*—a branch of the royal prerogative, sufficient, in the opinion of Blackstone, of itself to constitute a principal advantage of monarchy over every other form of government; since in those, (as, for instance, democracies,) where no other authority is acknowledged than that of the magistrate by whom the laws are administered, the power of pardoning must either have no existence, or must centre in the person of the judge, and produce the very confusion which is so much deprecated.

Another matter, which we would ourselves suggest as deserving of very serious consideration, and falling expressly within the present division of our subject, is the power assumed and frequently exercised by our English judges, of framing and issuing general orders for the regulation of the forms of proceeding in their respective courts; extending in some instances so far as to involve questions of positive right, and which can scarcely be abridged, altered, or varied, in any important particular, without a direct encroachment on the province of the legislature. At the same time, the question, to what extent the principle of practical convenience may be admitted, in such cases, to prevail over theoretical consistency, is one certainly of extreme nicety, and which we are far from presuming to decide; but, at a period in the history of legislation, when that division of the legal system, which we may be allowed to designate *generically*, as "the Code of Procedure," has been elevated by the universal consent of jurists to a point of importance which, in ruder ages, it was seldom, and very imperfectly, understood as possessing, we feel that it is not enough, in order to justify the retention by judges of a branch of duty so widely different from, and inconsistent with, that which is their immediate and acknowledged province, to appeal to

the example of former times, and to say that, in regulating the forms of procedure of the courts over which they preside, they only follow in the steps of their predecessors, by exercising the privilege of modifying those rules which they perhaps introduced and sanctioned.

We add no more than for the purpose of summing up this important division of the subject, in the words of the author.

"If the legislator never concerns himself with regulations of a particular or limited nature; if the administrative authority never takes upon itself either to make general laws, to modify those in existence, or to regulate the rights of individuals; if the judge never pronounces any judgment except upon the case immediately before him; if he yields the obedience which he owes to the laws; if he examines the extrinsic validity of the allegations submitted to him, without pretending to the specific value of acts of authority, and without seeking to give effect to incompetent ordinances; the government will never experience those inconveniences which are the inseparable result of conflicting powers."—vol. v. p. 58.

III. In proceeding to enquire into the nature of law itself, with reference to the principles to be observed in its construction, the first which presents itself is the grand requisite that every system of law should be plain and intelligible to those whom it is intended to bind to the observance of it. Here, however, our author draws a distinction, which places him a little at variance with some of those most profoundly versed in the science of legislation, but which we think quite consonant to the dictates of practical good sense and experience. It is not, he observes, necessary that the law should be so minute in its details, or so obvious, in every particular, to the most ordinary capacity, as that without any previous knowledge or application, every individual may be enabled at once to comprehend all its dispositions and intendments. That which is really requisite is that the law should be intrinsically well adapted to the object in view—that it should comprise the general features of every case without descending to specific enumeration; and, above all, that the legislator should himself be at the pains of understanding the subject on which he is about to legislate. Law, it is rightly added, is not meant to supply the defects of gross ignorance or culpable inattention. Precision and brevity—a scrupulous regard to the constant use of the same words

in the same acceptation—an equally scrupulous avoidance of the use of pleonasm and synonymes, and of all vain repetitions, especially if accompanied with unmeaning variations in the expression; these are the observances which the citizen has a right to demand, and which, if sufficiently kept in view, are such as to leave him without a pretex tfor disobedience.

M. Meyer again differs from Bentham on the point of definition, which he regards as wholly beyond the scope of legislation, except where the act prescribed, or prohibited is one which depends on the mere will of the sovereign. On this subject, he holds to the doctrine that "omnis definitio in jure civili periculosa est; parum est enim ut subverti nequeat." Thus, he says, what end would it answer to preface a code of matrimonial institutions by declaring that marriage is the contract between man and wife, or that the intention of marriage is the procreation of children. No definition of the legislature can alter the moral nature of the institution. But put the case of homicide—unintentional or premeditated—justifiable or merely excusable—these are distinctions which the law itself creates, and which every body at once sees the necessity of accurately defining.

"Law is not a treatise on jurisprudence; its province is only to dictate what the subject ought to do or to abstain from doing; it was never designed to analyse the science, or to render it comprehensible to those who wish to study it; it lays down rules of conduct accessible and applicable to every individual; divisions, distinctions, and limitations, are not within its jurisdiction, at least, not unless they are prescribed by the legislature. In all cases when divisions depend upon the law, it is indispensable that they should be precisely indicated; but when they are traced by the hand of nature herself, when they arise from a pre-existing relation, which the legislator can neither change nor modify, the law has nothing to do with them."*

* "It seems that the Emperor Justinian, when he inserted new dispositions in the institutes, and gave them the force of law, set an example to future legislators of composing treatises of law endowed with obligatory qualities: yet the constitution which sanctioned these institutes, gives ground to imagine that his intention was never to attribute to them the character of positive law, but merely to compose an elementary treatise, destined for a basis of legal study, and clothed with the imperial approbation, necessary to its being received in the schools, according to the terms required by 1. Sect. 12 Cod. *de veteri jure enucleando.* In proof of which, the confirmation of the institutes is in fact addressed to the Students of Law."

IV. The next principle established is that which our author designates by the very intelligible compound phrase, *non-retro-activity*—a principle which, however simple and undeniable in point of justice, is not unfrequently attended with considerable difficulty in the execution. In its application, for instance, to contracts, the question of pre-existence must necessarily be often one of great nicety and refinement. The date of the contract may be easily ascertained to be prior to that of the new enactment; but it may be attended with many posterior consequences, and it is too much to say that the new law shall have no effect on the consequences, however remote, of a prior contract. Under this head also falls the consideration of all dispensing powers and privileges—and that of the interpretation of laws defective in point of precision or clearness;—with reference to which last class of possible cases, as well as to obviate a continual recurrence to the fountain head from which the law has emanated, the French code declares that the judge who shall refuse to decide on pretence that the law is hurtful, obscure, or imperfect, is guilty of a dereliction of duty, which requires him to supply by reasoning and analogy such omissions as he thinks himself to have discovered. This remarkable provision is not, indeed, intended to absolve the judge from the duty of pointing out to the legislature the nature of the difficulty he has experienced; on the contrary, we find no principle more strongly enforced than that of giving every facility to a free intercourse between the judicial and legislative branches of government, with regard (among others) to this very object. But, that the sovereign authority may not be exposed to incessant importunity on the subject of unfounded or frivolous objections, it seems indispensable, (in the words of our author,) "in the first place not to admit any necessity of interpreting laws except where the highest tribunals, whose decisions are unassailable by the ordinary methods, are at variance as to the meaning of the expressions which the legislator has made use of;" 2. "that the opposition should be reiterated; every body of persons, like every individual, is liable to error, and may have considered the same thing in a different point of view from that which led to the formation of the opposite opinion; a re-examination, deeper and more considerate than the first, and made with special attention to the arguments which formed the motives of the former

decision, may often lead a judge to retract an erroneous opinion, by giving him an insight into the true meaning of a mistaken law;" 3. "where a diversity of opinions has repeatedly manifested itself only between the same two individuals, or bodies of persons, (which may be the effect of obstinacy or prejudice,) it seems right that at least some third party should be consulted, to the end that the sovereign may not be compelled to have recourse to legislative interpretation, embracing the avowal of a defect in redaction, solely because two judges, or two tribunals, of different opinions, have obstinately persisted in retaining them. From all which it follows that, to create a necessity for an authroitative interpretation, there must be a diversity of opinion, repeatedly manifested, between several different judges or tribunals, whose judgments are unassailable by the ordinary methods of impeachment."—p. 88.

In other words, the imputed defect should be of such a nature as to be incapable of being set right on appeal to a superior tribunal; it should not be founded on a solitary instance of misapprehension, which might, in like manner, be rectified or explained upon a more mature and deliberate examination; nor should the legislative authority be resorted to as an umpire to decide between two conflicting judgments, until recourse has been had to a third judge or tribunal, and that aid proved ineffectual.

V. Not only must the law be general, and applicable only to future cases; it must also be *uniform* in its operation, and extend over the whole territory subject to the same government. Local circumstances may point, indeed, to some diversities in the general system, especially in a state which, like the Russian empire, embraces a vast assemblage of people of all climates and of every possible variety of character and origin. The theory of Montesquieu has been adduced in support of the principle of adaptation to these and the like external features of dissimilarity; but that theory may be pushed far beyond the bounds of practical utility; and the general reception of the Roman law, which serves as the foundation of every system in Europe, (our own island excepted,) is a standing proof of the futility of the doctrine so largely interpreted. M. Meyer appears to have found the true distinction, when he observes that, in exacting uniformity, it is not meant to exclude circumstantial differences, all that is required being, that the general princi-

ples should be the same, that the diversities be such only as are immediately and intimately connected with local circumstances, and that the law itself clearly indicates them.

On the great question of substituting a new and uniform system of legislation in the place of laws discordant or absurd in their origin, but rendered familiar, and perhaps venerable in the eyes of the people, by immemorial usage, we have already seen what are the principles which our author professes. Recurring to them in this place, he freely admits the dangers which the legislator may expect to encounter in the attempt, but adds, that the evil to be apprehended can be of no more than momentary continuance, and is, in most instances, the consequence only of unwise precipitation, on the part of the innovator.

"By acting with mildness and prudence, especially by making the nation acquainted with the means taken to ensure the excellence of the new institutions, by openly exposing them to the public, and by seizing the lucky moment, a new system of law may be introduced without opposition. We cannot hope to eradicate habits founded on long established usage, by rejecting all that is ancient and substituting new laws in its place; but it is by exhibiting to the eyes of the nation itself, the defects of existing institutions, by proposing improvements, by allowing and inviting every body of persons and every individual to communicate their ideas, by the most free and public discussion of them, and by adopting no new system until it is acknowledged to be preferable to the old, that we can render favourable to the proposed arrangements, the minds of those who are susceptible of being convinced. There are are always some individuals—and this is still more the case with corporations—who without yielding to this conviction, either from a spirit of contradiction, of opposition, or of ill-humor, or from a want of the activity necessary to examine that which is unknown to them, are obstinate against every innovation; they can never be brought to approve of any disposition whose recent date in a manner commands their reprobation; but a sovereign, anxious for the general weal, should wholly disregard their opinions, and the law should treat them with the greatest severity."—vol. v. p. 96—98.

"Le bien est l'ennemi du mieux"*—is a maxim which we find repeated in this and other works on legislation; and to

* The good is an enemy to the best.

no age or nation is it more immediately applicable than to our own: yet it is but a culpable indifference, a selfish apathy, which induces us to neglect the means of improvement. Besides, that which we pronounce good, because it is habitual, is often only endurable in a state of national repose and inaction; as soon as ever a change of external circumstances occurs to derange the machine of government, the evils of the system become apparent, when the want of opportunity renders the attempt to remove them impracticable.—Hence, public discontent, insurrection, and violent revolution—miseries, from the actual agency, or imminent peril of which we have escaped too recently to permit our adverting to them as the mere warnings of historical recollection. May our statesmen look to them rather as the signs of a tempest of which the ingredients are even yet lurking in some, perhaps unsuspected region of the political atmosphere!

It is very possible that an innovation may not be an improvement—that experience may render serviceable the results of even an erroneous theory—that we may have too late to acknowledge the superiority of an old usage over one which we have substituted in its place—that it may be wiser in short,

> "———— to bear the ills we have,
> Than fly to others that we know not of."

Such is the character of the reasoning usually opposed to projects of amelioration by those who want either the courage to overcome obstacles, or the perspicuity to discern between what it is meant to suppress, and what to substitute. It is true, that we cannot always calculate the consequences of a new regulation with infallible precision—that there is no such thing as mathematical proof in affairs of legislation—that we must rest satisfied with probability as opposed to experience. But to push this reasoning to the extent of condemning all endeavours at legislative improvement as merely experimental and visionary, is as false as it is mischievous, and calculated to mislead only the most weak and the most ignorant of mankind. The argument is undoubtedly of weight sufficient to teach moderation, caution, and a long and dispassionate calculation of probabilities, both favourable and adverse to the measure in question. But to reject it, however, deliberately approved of, merely on account of the danger of disturbing some settled usage, is at

least as irrational as it would be to adopt it, without examination, merely on account of its boldness and novelty.

If, however, this vague dread of innovation is the most open and inveterate among the foes to reform, the spirit of crude and imperfect legislation is hardly less inimical to solid improvement; and it requires the more to be watched and guarded against, as it not unfrequently assumes the insidious garb of friendship.

"It requires," says our author, "an exact knowledge of the whole system to which we wish to attach a particular law, as well as of that from which it is borrowed, in order to succeed in an undertaking so delicate, and which demands so great a degree of caution."

And he sums up his views on this part of the subject in language so remarkable for good sense and moderation, and so applicable to our own present circumstances, that we should hold ourselves inexcusable in using any words but his own as the interpreters of his sentiments.

"Every change in the law is in itself an evil; it is a movement in what ought to be the most stable; it is a shock which shakes the foundations of the social edifice, and its most solid compartments; it is an event which renders doubtful what had previously inspired the blindest confidence; and however good the new law may be, whatever may in the long run be its advantages, the first moments of its introduction are pregnant with serious inconveniences. Great precaution, therefore, ought to be used before a new law—much more a new system of laws, embracing all the interests most dear to us—is adopted; not that the evils attendant on the state of transition ought to restrain a sovereign who is sincerely anxious for the welfare of his subjects, and possesses the courage necessary to overcome real and imaginary obstacles; but it forms an additional motive not to risk too lightly the introduction of new regulations which have not yet obtained the sanction of experience; a bad law, or an unsuccessful experiment makes a second change necessary, in order to substitute for it a disposition more conformable to the proposed object."—pp. 106, 107.

VI. It is not enough to have established the principle of uniformity of law, without providing securities for the uniformity of its application to individual cases; and M. Meyer remarks that there is only one country in Europe where it has not been found necessary to adopt specific measures for

the purpose. Here the authority of the precedent, the restriction of the higher judicial offices to a small number of persons concentrated in the metropolis, and able to consult together on the occurrence of points of novelty and importance, are peculiarities of the system, which, to render available for the purpose of such security, requires all the blind respect that we habitually entertain for the authority of judicial decisions; added to which we are destitute of a body of written laws, while we possess a bench of judges, venerable in respect of learning and character, amply remunerated, irremovable, few in number, and brought into constant communication with one another by the very nature of the institutions which they are called upon to administer. Wherever any of these circumstances are wanting, recourse must be had to other means of attaining the same degree of security; and to avoid confounding the judicial with the legislative and ministerial functions, it is manifest that in the first alone must be lodged the power of controling and regulating its own operations.

VII. The *publicity* of all judicial proceedings constitutes the first and most obvious, as well as the most indispensable of securities, and that not only for the impartiality and diligence of the judge, but for the honor and integrity, the learning and assiduity, of the advocate, the attorney, and, in short, of all whose duty it is to assist in the administration of justice; and fully as this great principle has been recognized and established in the institutions of our own country, yet instances are not wanting in which even we appear to have forgotten it, so far at least as to render it expedient that we should be reminded that its importance is not confined to the period of the *actual hearing*, and adjudication of causes, but extends in a greater or less degree, to the whole course of preparatory proceedings. "Not only," observes our author, and we wish particularly to draw attention to the words he here uses, "not only ought the public to be admitted to the chamber where the tribunal holds its sittings, but in its presence ought all the operations to be performed which tend to inform the judge of the true state of the cause; the preliminary operations, the examinations, the interrogatories, the pleadings, finally, every thing which can enlighten the tribunal, ought to be open to the public, and so contrived that the public may know what is going on; and that every individual who has taken the trouble to follow the

steps of a trial may be enabled to form his own opinion of it, and of the conduct of the judge who tried it."—p. 131.

This is a subject which indeed, of all others, opens the way to, and affords room for, abundance of most salutary reflection; but it is one also which does not admit of being treated in a loose or cursory manner; and the best we can now do is to remark it as one deserving the most serious and elaborate consideration of the very learned persons composing the commissioners, now sitting for the purposes of legal reform—especially that which has the conduct of, and proceedings in, our common law actions for its immediate object.

VIII. "We have already explained," says our author in the ensuing section, "what we mean by *publicity of procedure*—not the mere formality of opening the doors of a court of justice—but the actual admission of the public to a direct and immediate acquaintance with all that is laid before the judge for his instruction as to the state of the cause. It necessarily comprises a system of verbal pleading intelligible to every understanding, a public reading of every written instrument, a public hearing of parties and witnesses, publicity of the reports made, if any are necessary—publicity, in short, of every thing that is destined to have any share in forming the judge's conviction." To this it follows, as an immediate consequence, that the judge be required to state, with equal publicity, the grounds upon which he forms his judgment, to cite the express law upon which it is founded, whenever the law, *being written*, is capable of being so dealt with, and to refer to the precedents by which he is guided whenever (as in the case of our own *unwritten law*) he is left to the exercise of his reason from the analogy of past decisions. A consequence of thus requiring from the judge a full and clear exposition of the *motives* of every judgment, may perhaps be the resignation of office by such as feel themselves incompetent for so arduous a task—a benefit in itself of no small advantage in countries where the judges are numerous or ill-selected. On the other hand, it affords, (when coupled with publicity) the best possible security against partiality or corruption, as well as against the encroachments of separate and conflicting judicatures—advantages which must far outweigh, in every just estimation, the casual mischief (sometimes objected to it) of furnishing a litigious or discontented party with the grounds of attacking the judgment by which he loses.

IX. Nevertheless, publicity, and the exposition of motives, however important their efficacy, are not of themselves sufficient to keep judges within the precise bounds of their duty. In cases, for instance, where the law happens to be at variance with rational habits or prejudices, publicity, so far from a restraint, may operate as an encouragement or temptation to the judge to disregard or transgress it. Hence that worst of judicial evils, the want of uniformity in decision; and hence, also, the obvious expedient of a supreme tribunal—a single court of appeal, or cassation*—so organized as to guarantee the wisdom and impartiality of its final decisions. The composition and organization of this high court are objects, undoubtedly, of the very first importance. Its judges should be persons entitled, in the most eminent degree, to the public esteem and confidence; to ensure which they should be carefully selected from among the most eminent practitioners at the bar, and perhaps not without having previously passed through some of the minor judicial offices.—Whenever that which *must* sooner or later come to pass, a revision of our own system of appellate jurisdiction shall be found incapable of being any longer postponed or averted, we trust that no obstinacy of national pride or prejudice will intervene to prevent our availing ourselves of the full benefit which may be derived from foreign examples. At present (and we believe we may appeal to no less an authority than that of Lord Redesdale in support of the assertion) we are miserably defective in point of security for the great principle of uniformity of decision.

X. The main point being established—that is, the necessity of a supreme court charged with the duty of superintending, regulating, and maintaining the uniformity of law

*It will be readily understood that we employ these expressions disjunctively; a court of appeal differing from a court of cassation, inasmuch as the one undertakes to decide, and finally dispose of, the entire case, both in law and in fact, upon which the inferior court has in the first instance to pronounce judgment; while the office of the other is to revise the previous decision, when complained of, in point of law only, and, if dissatisfied with the grounds of it, to remit the point to the court below for its correction. The necessity of one single and central court of appeal from every court of inferior jurisdiction throughout the country, is a point on which all writers on legislation so fully concur, that it may be thought a waste of argument even to advert to it. Nothing approaching to the great requisite of uniformity of decision can be attained upon any other system; though, even *with* it, absolute uniformity is still not to be secured, so long as the law to be administered is the *Lex non scripta*.

in its application, the next thing to be considered is, in what manner its intervention ought to be introduced and regulated. The first observation which occurs on this head is, (according to our author,) that it ought not to be rendered too easy of access.

"The *recours en cassation* is, from its very nature, an extraordinary means; it is a last remedy, which ought not to be granted with too much facility; it always presents a more or less serious inculpation of the judge who has pronounced the sentence appealed from, either as violating the forms which protect an innocent party, or as a false application of the law, the execution of which it ought to restrain; it must not, therefore, be allowed but at the last extremity, and it ought to be refused so long as the laws of civil or criminal procedure afford the ordinary means of rectification."

And again—"A regulating court has occcupations too important and too various to be taken up with the complaints, even though well founded, which any pleader might choose to prefer with the sole view of revenging himself upon his judge; because, the law having granted him the means of obtaining a revision of the sentence, there is no necessity for such a proceeding. The court itself, alone in the state, elevated above all other tribunals, charged with the duty of watching over and keeping them within the bounds of their respective jurisdictions, ought not to be invoked except in the event of a failure of the ordinary means of obtaining justice; it ought not to be prodigal of its intervention; it ought not to censure but with discernment, so as not to deaden the effect of its decisions, either upon the minds of the judges or upon public opinion; it ought to strike seldom, but surely, and with an equal degree of severity towards all classes of those who transgress the law; to be sparing of its decrees of cassation; even to pass lightly over mere irregularities and unimportant errors, which it may be enough barely to glance at, so as to reserve the full force of its authority, to be employed in counteraction of flagrant excesses in the exercise of inferior jurisdictions."—p. 183—185.

XI. After all, whatever securities the forms of a constitution may provide for the uniform administration of justice, nothing, short of absolute despotism could recognise the principle of interference to the extent of compelling an aggrieved party to seek the means prescribed for redress. It is, no doubt, morally true, that a man is often his own worst

adviser and enemy—yet it is not against himself that the law is instituted to afford him protection; and, if he prefers acquiescence in injury to the expenses and delays of justice, it would be the extreme of injustice to deny him the right of election. There are, however, cases in which the law may usefully interfere even without the previous requisition of the injured party; as where there is reason to apprehend that prejudice or oppression may operate as a preventive to the free course of justice.

"Though a judge be mistaken, though he give an unjust, or even an absurd judgment, if the parties make no complaint, it is a private misfortune, indifferent to the public at large; but if the life of an individual is at stake, if the frequency of a false application of the law, or of an omission of forms, or if the preference for ancient usages which has led to such frequency, threatens a revival of those usages; if the abuse or stretch of power of a tribunal is not denounced, because the parties interested dread the resentment of the tribunal, or because they approve its motives; if the whole body of society is consequently likely to suffer from the consequences of the judgment in question; in such case he, who represents the society, should vindicate its rights, and bring before the supreme tribunal that which ignorance, fear, or connivance would have kept back from it."—p. 196.

XII. XIII. XIV. From the broad line of separation between the judicial, and the legislative and administrative offices, being properly recognized and established, it will by no means follow that the first may not possess, over certain subjects, and under certain circumstances, a species of *voluntary jurisdiction*—as in cases of intestacy, the guardianship of infants, and persons of unsound mind, &c. &c.; and as also in those of contracts between individuals, even when competent, and, generally, of all legal acts and instruments; to the validity of which the intervention of some certain act of judicial authentication is, by the law of most nations, declared to be indispensably requisite—a distinct order of magistrates, under the denomination of *notaries*, being established in France and in other parts of the continent, for that express purpose. How far the adoption of a similar system might or might not be preferable to the statutory provisions by which alone we have ourselves hitherto attempted the prevention of fraud in matters of the above description, it is not for us in this place even to express an opinion; but it is

a subject which we think can hardly fail to attract the serious attention of the commissioners of inquiry into the law of Real Property, upon whose minds the strange inconsistencies and imperfections of our present system, arising less from any designed act of the legislature than from the perverseness of judicial interpretation, must necessarily force themselves at almost every stage of their investigation. We cannot only now stay to notice a problem of no little importance to which the recognition of notarial establishments has given rise among foreign jurists—namely, whether the functions of the notary ought to be limited to the mere ceremony of attestation, or whether they should embrace the power of refusing its sanction in cases of fraud or contravention—a question upon which the legislatures of different states have come to various conclusions, and as to which M. Meyer, after much discussion, pronounces in favor of restriction in the mere passive sense, with a saving only of the rights of third parties, and with the great protection of publicity, by means of *registration*, in all cases where these rights are in any danger of being affected or compromised.

XV. It is after all, however, but improperly that we class this division of subjects under the head of Judicial Institutions—the term *judicial*, in strictness, applying only to the distribution of justice among conflicting parties; in which sense alone it is to be taken when we speak of the exclusion of voluntary or spontaneous action from the judicial office. Even in this acceptation of the term some diversity of system has prevailed among different nations. By the law of Prussia, for instance, the judge is obliged to inform himself, in every case, of the positive truth or falsehood of the representations made him, without regard to admissions; while with us, he is restrained by the well-known principle which will not permit him to travel, as we say, out of the record, and thus places the mere abstract truth beyond the scope of his inquiries. Over every thing that exists, independently of the will of the parties, he has no control. He is bound by their mutual admissions; and, since it is another fixed principle of our law that no decision can affect the rights of *strangers*, the argument sometimes resorted to, from the risk of collusion between the *parties*, is void of foundation. It is no weak argument in support of our English practice, that the contrary doctrine involves an impossibility.

"Even if we wished to impose on the judge the obligation of ascertaining the truth of facts, independently of the allegations of the parties, it would be utterly impossible for him to do it. Where would be the end of judicial informations if they were not limited by the consent of parties? If the judge is at liberty to doubt the truth of a fact, of which no doubt is expressed before his tribunal; if he is to suspect collusion between persons who state facts, or opposing claims, where could he find the basis of that certainty on which his sentence must be grounded?"*

"One of two things must happen: either the exercise of the judicial authority must be limited to an inquiry into the only points in litigation between the parties; or all rules of certainty and moral conviction must be abandoned: certain it is, that legislators who have attempted to establish official inquiries, who have committed to judges the examination of a pretended absolute truth, have only thrown back the point of the inquiry: they have all ended in admitting as true, that which the parties interested have acknowledged to be so."—p. 248.

The argument, from the possible inattention or ignorance of parties, is not more conclusive than the preceding. How is the judge to determine whether an admission has crept in from negligence, or has been made designedly? If one man gains an advantage over another by greater caution or watchfulness, it is one to which he is morally entitled, and which he ought not to lose upon a mere speculative principle of abstract right. The judge possesses not even the means of ensuring the execution of his own orders, since they may be dispensed with by the party entitled to take advantage of them.

"In a word, it is by the free will of the party that a cause is commenced, prosecuted, or suspended, it is that which settles the points in discussion, which obliges the judge to pronounce precisely on any subject, and which acts on the sentence delivered; the judge is only occupied with the interests of the parties before him; and the latter are better acquainted with their own interests than any one else can

*In countries where the *vinculum* of marriage may be dissolved by a judicial decision, the facts argued by the parties are not received as the truth of the case, but the Judge is required to call for proof of all the facts, which constitute the criminality of one of the parties, as grounds of relief to the other. This is founded in public policy, and is the only exception to this rule of which we are aware.—*Ed.*

be; they only know what they have to do. If there are considerations of public interest to be brought forward, it would be to intrench on the judge's impartiality to make him the instrument, and the public ought to nominate a functionary, who may act as its organ."—p. 254.

XVI. XVII. From this last clause of exception we are led immediately to the institution of that class of functionaries which is known to foreign jurists under the designation of "Ministère public"—constituting in most countries a peculiar and separate branch of government; which whilst, among ourselves, it is represented by an attorney and solicitor-general, with a few other crown officers of eminent station and dignity, who combine, for the most part, with their public functions, the exercise of a private profession, exhibits in France, on the other hand, the spectacle of a vast crowd of individuals, of various degrees of rank, composing a body, wholly distinct in its organization, and pervading the entire system of the judicial establishment. Of an institution, comparatively recent in its origin among the continental governments, and little known, or imperfectly comprehended, by ourselves, it will not be amiss if we present our readers with a short sketch in the words of the author before us.

"From the moment that every citizen is absolutely independent as to the method of turning his rights and interests to the best advantage, and that the judge is deprived of all spontanëity, it is necessary that there should be a means of submitting to a judge's decision all that concerns society in general, without directly interesting an individual. If the property which forms the patrimony of the state is concerned—if it is necessary to support public order, threatened or injured by crimes more or less serious—if society is deranged by disturbances of minor importance—if it wishes to lend a helping hand to those whose weaknes calls for special protection—finally, if the public establishments which are connected with the whole society are endangered—it is equally the interest, the honor and the duty of the state not to remain an indifferent spectator; it may and ought to make itself a party, and watch over the maintenance as well as the application of the laws."

To which he adds—"Whenever therefore it happens that the whole body of society has certain rights to vindicate, it ought to have a representative before the judge, and this is

the origin of a new magistracy recognised by the constitutions of several countries, and designated by the name of *Ministère public.*"—p. 258.

The question as to the necessity of separating this class of functionaries from all others connected with the administration of justice, is nevertheless, one of great delicacy, and not perhaps to be disposed of altogether by the mere consideration of the inconveniences attached to the combination (as amongst ourselves) of private practice as advocates with the performance of the duties of office. Those inconveniences are indeed frequent and palpable; but the institution of a distinct order of magistrates, directly dependent on and amenable to the state, and acting, or at least having every opportunity to act, as spies on the conduct of the bar and the bench—an office for which, however invidious, the insularity of their position between both, together with the merely occasional nature of their peculiar vocations, may be expected pretty strongly to incline them—is a measure, the policy or expediency of which, admits of some hesitation, and does not appear to us to have been weighed by M. Meyer with the attention which it deserves. It does not tend to diminish the apprehensions which we should be disposed to entertain as to the consequences of the adoption of such a system, that M. Meyer has actually devoted one of his chapters to the subject of the "Dependency" of this office, which, he argues, ought to be absolute and unqualified in the character of subjection to one supreme magistrate. Uniformity in the administration of law, is the principle upon which this dangerous (or, at best, doubtful) subserviency is recommended or justified; nor are we disposed to deny this great advantage. But it must not be forgotten that France, which is the country where the system is allowed to have attained its greatest perfection, and where the members of the Ministère public, scattered through its different tribunals, are said to amount to an army of no less than 45,000 disciplined soldiers, all under the command of one general-in-chief, the Garde des Sceaux, is that also where (at present) the judicial office inspires the smallest degree of respect, and the character of advocate is treated with the least portion of public esteem and confidence. We question whether the great sovereign, conqueror, and legislator, whose name will remain through all ages incorporated with the institutions of that nation, would not, if questioned as to which of them he

had most pride in, on account of its high imperial policy, have referred to the "Ministère public" as the most successful effort of his creative, or, rather perhaps, his adoptive and perfective genius.

We have examined little more than half the contents of the volume; but our space does not admit of our pursuing the same course of minute analysis through the remainder. We must content ourselves with merely adverting to some of its principal topics.

Under the head of "Instruction prealable," after mentioning with due praise our institution of a grand jury, and comparing with it the "Mise en accusation" of the French code of procedure, M. Meyer discusses at some length the principle of proceding by interrogation of the party accused—a mode which, as practised by our neighbors on the continent, always forcibly strikes us as at variance with one of our most established maxims of criminal law—"Nemo tenetur accusare seipsum"—but which, if kept within the bounds here prescribed, would not only lead to no such violation of justice, (natural or conventional,) but tend most essentially to the benefit of the accused, who is necessarily the weaker party; and entitled to every fair advantage with which the law can support his feeble condition. Its only proper object, he contends, is to inform the party of the nature of the charge brought against him, and of the proofs in support of it—and thus to guard him against surprise and intimidation, at the same time that it serves to enlighten the judge's mind as to the actual circumstances of the case, and the line of defence which will probably be adopted. To this end, he adds, that (except in a very few cases) it ought to be conducted in public, with the utmost care not to invite or force confession, and with an understanding that it is not to be pressed, or renewed at different intervals, except at the request of the accused party. All argument in favor of interrogation, with a view to discovery by means of avowal, inevitably tends to the justification of torture.

From the acknowledged principle that imprisonment before trial is merely provisional and preventive, it follows that, wherever the purposes of prevention can be attained without actual coercion, imprisonment should be avoided.—The admission to bail ought consequently to be regarded as the rule, rather than the exception; and imprisonment should be resorted to only where it must be supposed that

the dread of conviction is superior to any other restraining motive, or where the condition of the party is such as to afford no means of security. Banishment for life, confiscation of property, and loss of reputation, united, will, in most instances, be found motives more than equivalent to the fear of standing a trial. It need hardly be added, that all severity of imprisonment, beyond mere coercion, is wholly inadmissible as applied to persons who must be presumed innocent till found guilty, or (which is still more indispensable) that all possible freedom of external communication must be allowed them, consistent with the prevention of evasion.

The dispute as to whether a single judge, or a plurality of judges is to be preferred in the administration of justice —a dispute which still divides the jurists of the continent, and on which Feuerbach decides in favor of plurality, against the more prevailing opinion, which is that, long since maintained by Bentham—is, we think, wisely left by M. Meyer in a state of ambiguity, or rather as fit to be governed in each particular instance, by the habits and circumstances of the country where it arises. In other respects M. Meyer seems to us to be somewhat too favourable to the actual state of England, in the view which he takes of the great question of judicial organization. The appointment of judges should, he thinks, remain with the sovereign; and in this we do not differ from him. That their independence should be secured by making them irremoveable, except by promotion, or by deprivation, the consequence of public trial and conviction, we also consider as a point not to be questioned. Whether or not they should be capable of promotion, and that too at the will of the sovereign, although a question sometimes much argued, and affording great scope for popular declamation, is one on which we have again no great difficulty in concurring with our author when he combats, as we think very successfully, the arguments against this honorable species of *amovibility*. But when he maintains the principle of upholding the dignity of the judicial office by restricting the number of tribunals and salarying the judges at a rate inversely proportioned to their paucity, we find it necessary to advert to another and far more fundamental principle—the accessibility of justice to every class of subjects—an accessibility, to which cheapness and proximity are indispensable requisites, and which is almost irreconcileable with a system which acknowledges only one

central focus for the diffusion of justice throughout an extensive and populous empire.

Chapters XXII. to XXV. inclusive, are devoted by M. Meyer to the consideration of the subject of *juries*, under the following distinct heads: *Sous le rapport Judiciaire—Sous le rapport politique—De la composition du Jury—Des attributions du Jury.*

In treating of the jury in its character of a judicial institution, he successfully combats the notion of subjecting the force of evidence to certain fixed rules, (after the mode of Bentham's celebrated scale,) which he justly considers as inconsistent with the very nature of human testimony, and as containing its refutation in the very maxim of one of its most distinguished continental assertors, Professor Glöbig, who says, "Ipsa probationum æstimatio non spectat ad disciplinam juris; a logices mutuata regulis, lucem præferens jurisperito, decisiones suas non ad cæcum arbitrium sed ad certam normam exacturo."—"Can logic then," asks M. Meyer, "be subjected to the pleasure of the sovereign, or should it be taught by the legislator? Are its precepts capable of receiving a legal sanction?"—p. 366, note.

The necessity of the judge who has to decide upon a question of fact himself seeing and confronting the witnesses, is urged with force and propriety. There can be no *appeal* (properly speaking) from any such decision. The same, or a different judge, may *rehear* the case as often as the law allows—but, even at the very last rehearing, it is upon the facts themselves, and not upon the validity or invalidity of any preceding judgment, that he has to pronounce; and this is a distinction which, however clear and obvious, is seldom duly attended to.

As no man can be required to assign *reasons* for his conviction as to a point of fact resting on evidence, it follows that the security supposed to be derived from the judge being required to state the grounds of his judgment (see before ch. viii.) must in this class of cases be wanting. Its place, however, may be amply supplied (over and above the great defence of *publicity*) by a rigid adherence to established forms of procedure, and by the concurrence of a number of equal and independent persons having participation in the judicial authority. Again, from the frequent impossibility of separating the law from the facts of a case, has arisen, among ourselves, the useful invention of special

verdicts, to an imperfect comprehension of the nature of which is to be mainly ascribed the comparative inutility of the jury system in France, and the little progress it has made in public opinion in that country. Hence also the necessity of a presiding judge to explain to the jury the law of every case, and the manner in which it may be brought to bear upon the points in evidence. To guard against encroachment in this part of the system, upon the proper province of the jury, must be admitted to be among the most arduous of legislative tasks. On the other hand, opinion frequently and strongly marked on the part of juries against any existing law or usage, ought to be well attended to, and will often be found the safest ground to proceed upon in the work of revision and alteration.

Of juries, considered in a *political* light, it is well observed, that the example of one honest jury-man protecting an innocent person from condemnation is far more extensively beneficial than that of a judge refusing to lend himself to the passing an unjust sentence. There is always a possibility that the judge may, on some future occasion, suffer himself to be corrupted—or that means may be found to remove him, if inconveniently inflexible. But the seeds of resistance sown by the jury-man will spring up and flourish in future juries. The great political end of the institution is, however, the admission which it affords to a direct participation in the administrative functions of government by the mass of the people—a benefit of incalculable importance.

The requisites which our author lays down for the *composition* of a jury, are, *first*, that it should be formed exclusively of natives—a position which he considers as necessarily flowing from the political considerations last noticed, and not contradicted by the privilege we assign to foreigners of trial by a jury, *de medietate linguæ*, an usage founded on false principles, and having its origin in times of barbarism: 2dly, that it should be restricted by some certain qualification in respect of property, as a security against utter ignorance and incapacity: 3dly, that it be chosen *purely by lot:* 4thly, that the number be neither too large nor too small for the convenient discharge of its duties, having regard to the objects of the institution—a rule which he considers as sufficiently observed by our venerated *Twelve:* 5thly, that the decision be unanimous—a condition which he considers as generally indispensable, notwithstanding the

contrary system adopted in France, as well as by other nations, in their respective modification of the institution; but which he purposes to limit, in criminal matters, so far as to allow of *acquittal* by a simple majority, and of power in the judge to summon a new jury after a certain period of irreconcileableness to a verdict of conviction: 6thly and lastly, the existence of a right of *challenging*, without assignment of motives, in like manner limited, however, to a certain number of instances.

In describing the functions which are properly attributable to a jury, the great question as to the utility of the institution in civil cases comes necessarily into discussion; and M. Meyer agrees with (we believe) the majority of modern jurists in excluding it from such cases, especially when of a merely private nature between individuals, unless for the purpose of assessing the quantum of damages. He argues still more strongly against the preliminary inquest in criminal cases, familiar to ourselves under the name of the grand jury, and adopted by the French (but with great differences) under that of "Jury d'accusation;" and it is difficult not to feel the full force of the objections which present themselves to the whole form and character of such an institution. At present, however, we can do no more than refer thus generally to the subject.

Our contracting limits in like manner preclude us from any further notice of the contents of the few remaining chapters than their titles afford; and from these it will be seen that they relate more to particular branches of the judicial establishment than to general principles affecting the whole machine—not that we mean to undervalue the high importance of the several heads referred to by them; each of which, on the contrary, deserves and demands a treatise far more extensive than the pages we are able to devote to the entire subject. They are the following:—*Tribunaux criminels et correctionnels—Tribunaux de commerce—Restriction de la preuve testimoniale—Serment Judiciaire.—Contrôle—Admission restreinte du Jury au civil—Execution des jugemens. Huissiers—Ordre des Avocats*—and, lastly, *De la conciliation*—which last, when considered in all its bearings, is a point in itself requiring the very fullest investigation, and which, with all our respect for M. Meyer, we think he has not treated with sufficient attention in devoting to it one of the shortest chapters in his volume, and deci-

ding against it (as a branch of judicial administration) upon grounds, which, however plausible, we cannot but hold inadequate to found the conclusions he builds on them.*

We have thus given a rapid and necessarily very imperfect sketch of the contents of this important volume; a sketch which, hasty as it is, may, we fear, prove tedious to the generality of our readers, but which, if it disposes any to seek an acquaintance with the first principles of the science of legislation, established (as it may now be considered to be) among the jurists of the continent, and as yet little comprehended among our own, will have fully answered the end we proposed to ourselves in attempting it. To recapitulate those first principles, so as to impress them more strongly on the minds of those who may be so inclined to receive them, it is, in the first place, essentially requisite that the several branches of government—the legislative, judicial, and administrative—should be kept perfectly distinct, and never allowed to encroach on each other's respective provinces. The laws themselves must be general, succinct, and clear—either imperative or prohibitive—never descending to particular cases—accessible to all—having no retro-active operation. They must be uniform, both in form and in application, throughout the extent of the country which is subject to them, or, in case of any local exceptions being admitted, they must be clearly defined, and their limits accurately distinguished. In order to maintain this uniformity, and to keep the courts of Justice within the bounds of their duty, recourse must be had to publicity—a great and important feature, not less on account of its judicial than of its political incidents—to the public expositions by the judge of the grounds on which his decision is founded, and to the establishment of one central court of appeal or cassation, in *dernier resort*, from every species of inferior tribunal. In respect to the conduct of causes, the judge must be merely passive—leaving the parties at perfect liberty on what to insist and what to abandon—deciding only on the facts, real or supposed, which are placed before him —having nothing to do with the mere abstract truth except as it happens to be presented to him—exercising no volun-

* Bentham considers the institution of a tribunal of conciliation to be recommendable only as an expedient for preventing the ruinous consequences of a defective system of procedure. "Amend your procedure," he says, "and there will no longer be any need of such an expedient."

tary or independent jurisdiction—and relinquishing to an inferior class of magistracy (the notariate) the duty of authenticating facts or instruments in the absence of any actual litigation. To defend the interests of society, taken collectively, a distinct order of public functionaries is now, universally on the continent, held to be necessary; hence the establishment of the *ministère public*, which, it is farther considered, must be kept in a state of dependance on one supreme head, himself the immediate instrument of the sovereign, and holding a station altogether separate and apart in the distribution of government offices. Amovibility at the will of the sovereign is the necessary incident to all this class of functionaries, as inamovibility, except by deprivation consequent on public trial before a competent tribunal, is that of the higher order of judges. The admissibility of private prosecutions, which under certain qualifications it seems fit to retain notwithstanding the existence of this public ministry, should be accompanied with an extreme degree of caution and strictness as to the forms of procedure, especially in all that concerns the preliminary measures, *(instruction préalable,)* the reasons for which are obvious, but must be here left to the reader with the reflection that "this is perhaps the most interesting subject of legislation, one upon which the greatest number of truths has been said, and the greatest number of abuses practised."—The composition of the judicial body, important as it is, must be placed altogether in the hands of the sovereign, who must be left absolutely free and unshackled in the exercise of this the gravest branch of the prerogative. The judge, once appointed, must be wholly independent; not so the tribunal itself, which ought to be wide in its extent of jurisdiction, and secured against the influence of that *esprit de corps* which mixes itself with all petty local establishments. No law can determine the comparative value of different degrees of human testimony. Every person endowed with the gift of ordinary understanding is capable of estimating the proofs which are laid before him. Hence the utility of juries, whose impartiality should be secured and maintained by being placed under the direction of a judge competent to the task of properly instructing them. The institution of a jury recommends itself not only as a means for securing impartial justice, but also as the surest method of silencing all complaints against the administaation of it

as a pledge for the safety of the subjects, and as a tie which unites them to their native soil and to the government under which they are placed.

"The very nature of the best of governments—a constitutional monarchy—points to the jury as the completion of a just division of power between the sovereign and his people. The people may and ought to have a share in every branch of authority; thus the legislative power is partaken by a national representation, the administrative by a municipal administration, and the judicial by a jury."...."And this last institution thus becomes an essential part of such a monarchy, is in fact almost incompatible with any other form of government, and possesses a political tendency which renders it the most intimate bond of union between the state and its citizens."*—p. 595.

From this view of the station and character of a jury, it seems to follow that it must be composed wholly of citizens of the state to which it belongs, and admits no participation of aliens; that it must be chosen out of an order of society so far elevated above the lowest as to prove a sufficient safeguard against ignorance and incapacity; besides that their daily occupations must be of a description not to suffer from the temporary interruption of their civic duties, which operates as an exclusion of day-labourers and manufacturers; and these are the only general grounds of exclusion which ought to be admitted.† The right of challenge flows from the same principle which prescribes the appointment by lot, and not at the nomination of any individual or class of society—the absolute necessity of inspiring confidence in the impartiality of decision. The number of which the jury is to be composed must moreover be fixed, so as to render the charge upon every individual the least burthensome that may be found consistent with this first principle; and the requisite of unanimity of decision appears to attach itself to the same foundation. We need not in this place again recur to the question (which demands a separate discussion) as to the utility of juries in civil cases, or as to that of the "jury of accusation." Both are points of the high-

* This institution is equally necessary in a republic, to protect the minority against the oppressions of the majority, and to guard the rights of the few against the sectional tyranny of the many.—*Ed.*

† This may do in Europe, but the necessity of this exclusion does not exist here. It would extend only to cases of mental or moral incapacity.—*Ed.*

est importance, but neither can be considered so settled as fit to be laid down, whether in the affimative or in the negative, among the fixed principles of legislation.

The humane and salutary division of crimes into those of a nature to attach infamy to the commission of them, and those which merely subject to correctional discipline, may be conveniently followed by a similar distinction between the tribunals and modes of procedure. Not so, however, with the courts and forms of proceeding instituted for the adjudication of civil rights. In these, if any distinction were admissible, it would be such as might accommodate itself to all the various wants and habits of different ranks of society. But to effect this purpose, if it were possible to be effected, would be to produce confusion and conflict of jurisdiction the most deplorable. The uniformity of legislation, so essential to the well-being of a community, must inevitably be sacrificed; and the very existence of a court of appeal, before which may be brought, in *dernier resort*, cases of each of the several descriptions for which different primary tribunals are assigned, is enough of itself to demonstrate the inutility of the division, and the impossibility of reducing it to any regular and consistent system. From these premises it is forcibly argued that, for the decision of civil cases, there ought to be no such thing as a court of special or limited jurisdiction.

On the other hand, to diminish the expense and frequency of litigation, we should diminish as far as possible the number of facts out of which litigation may spring. This may be done in part by providing that no contract shall be enforced without being reduced into writing, and that no written instrument shall be questioned without a direct charge of fraud or forgery; by allowing to every party the privilege of examining his adversary upon oath as to the truth of his allegations; by rejecting parol evidence when offered to supply the want of a written document; by denying to contracting parties the right of insisting on an intention different from the express words of the instrument to which they have affixed their signature; by refusing to receive in evidence any deeds or papers without being authenticated by the act of some proper officer or notary.

The execution of judgments must be again committed to another distinct class of officers—not to the judge, "for that would be to invest him with a *spontaneity* incompatible with

his functions"—not even to the members of the *ministère public*, who in so many cases are, and in almost every case may be made themselves parties to the cause at issue. The officers thus constituted are those who are known to the French law under the general designation of *huissiers*.

We now pass to another, and a very different class of judicial officers, (for such in fact they are, no less than any of the preceding, although too often considered rather in the light of independent practitioners, owing, beyond the mere outward forms of respect for the presiding magistrate, no prescribed or peculiar duty or obligation to the court in which they practise,) the order of advocates. With these the author concludes his summary, and we feel disposed to attend him to the close of his labors as we started with him almost at their outset; observing, however, that in his views as to the political expediency, or utility of the institution of a distinct order of advocates, he is again at variance with the doctrines taught in the school of Bentham, who condemns the separation of the office of Attorney and Counsel, as calculated only to increase delay and expense, and diminish wholesome responsibility.

"To incorporate the law with the manners of the nation, to inspire and keep up a true public spirit, to establish the intimate connexion which ought to subsist between the rights and the duties of citizens, to extend the most useful consequences of publicity, it is of the greatest importance that the profession of advocate should be exercised by honest, upright, and intelligent persons, fully sensible of the elevated nature of their functions, and actuated by attachment to the public welfare. The bar, whose studies and occupations resemble those of the magistracy, out of whose ranks the judicial order is to be supplied and furnished with subjects most worthy to fill the vacant places, ought to be entirely free and independent; the feeling of his own dignity alone can inspire the advocate with the spirit of decency and moderation which keeps him within the proper bounds of distinction between liberty and licentiousness; while the judge is indebted to him in those marks of attention, for which he is, in turn, to be repaid by the respect of the advocate. In order that this sentiment may be rendered effectual, it is necessary that the body of advocates, without being in any degree of dependance, should form themselves into an order, self-regulated and disciplined, having for its

sole object the maintenance of professional delicacy, and a strict adherence to the dictates of honor and plain dealing. At the head of this order, and as its most distinguished members, are naturally placed the magistrates of the *ministère public*, whose functions are only distinguished from those of the other advocates in that they speak in the name of the sovereign and the state. The organization of the bar, the influence which the publicity of procedure exercises over the citizens, the dependance of the advocate upon public estimation, renders the order of advocates the most powerful barrier against the abuses of government and all sorts of vexation, and constitutes it the proper organ of public opinion.

"In another point of view, also, the institution of an order of advocates is eminently useful to society. It is in vain that we would seek to invest the actual magistracy with the office of conciliation. Possessing no knowledge of the facts submitted to them, it is impossible that the intervention of judges can hold out much hope of success; their remonstrances are unheeded, and their intercession but an idle formality; even the judges themselves, at the commencement of legal proceedings cannot venture to recommend conciliatory measures, when as yet they know nothing of a cause; and they hazard the loss of impartiality, if unsuccessful in their earnest endeavors; while, if delayed until the close of the proceedings, the attempt becomes useless, and the judge can with difficulty conceal his opinion, which, once known, puts an end to all hope of accommodation.—Advocates alone can prevent incipient litigation, stifle it when on the point of breaking out, terminate affairs already pending, calm and mollify men's minds, and restore the harmony which has been interrupted by differences.

"Such are the principal consequences which we think we can deduce from experience, and from the facts which we have examined in the preceding books: there is a multitude of details into which we either could not enter, or considered ourselves dispensed from entering; we do not pretend to have exhausted a subject, which, from its very nature, is inexhaustible; we do not aspire to the honor, or rather the vain glory of establishing a perfect system; but we shall regard ourselves fortunate if our labors are of any utility to future legislators, to the science of legislation, and to the happiness of individuals, whether the governors or the governed."

Before we finally quit the subject of this important treatise, we wish to offer a few considerations which have occurred to us at different stages of our progress, and which we could not conveniently stop to notice in the course of the preceding analysis. It seems to be M. Meyer's leading principle, and one in which we cordially agree with him, that all plans of legal reform should rest on the basis of the established institutions of the country for which they are intended; and with reference especially to the great head of judicial organization, he would have us infer that many questions of legislation may be more suitably decided by a due application of that principle, than according to any measure of mere abstract expediency. But when the point in debate is whether or not any civilized nation ought to have a regular and intelligible system of written law for its guidance—which is all we understand by the vile phrase (for so we must call it) "codification,"—we must own that it appears to us to be one to which no such principle is in the least degree applicable. Of all the shadows about which men have so often and so fiercely contended, this bugbear of "codification" is one of the most airy and unsubstantial; and we very much suspect that its self-styled enemies will one day find themselves in the situation of that celebrated person who was astonished on being told that he had been actually writing prose all his life, without knowing it. Every statute—more especially every explaining, altering, amending, or consolidating statute—is a partial attempt at "codification." Mr. Preston's sealed draft of a bill is, probably, (for we speak with deference of so profound a mystery,) no less a code than Mr. Humphreys'. The late Bankrupt Act—the late body of Chancery Orders—Mr. Peel's Bills—all are specimens of the same description. The only real question is, whether the great business of legislation shall be allowed to proceed in the crude, hasty, and unconnected manner, in which it has hitherto, for the most part, been conducted, or whether a more systematic form and method—one more consonant to the improved character of the age, and to the advance which has been made in every other department of science—shall at length be adopted; and if one half of the alterations in law and practice which, we think it probable, will be recommended by the commission now sitting for inquiry into the state of the law of real property, are ever seriously attempted to be carried into effect by the legisla-

ture, we venture to predict that a complete revision of the system—in other words, "codification" on a very extended scale—will be resorted to, not as a matter of choice, but as a measure of inevitable necessity.

COMMANDITE, OR PARTNERSHIPS OF LIMITED RESPONSIBILITY.

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It will be seen that according to the decision in Hume *vs.* The Winyaw and Wando Canal Company, published in this number, that corporations are wholly unsuited to the prosecution of commercial business, and it is most evident, that joint stock companies should never be chartered by the Legislature, except for the purpose of effecting some work of great public utility, which is too extensive for the enterprise of a single individual. Where private interest alone is concerned and joint efforts are necessary to effect the object, those efforts should be directed under a personal responsibility, which will afford security to all, who deal with them. The common law has regarded that security, attainable only by having the liability of the partnership funds, and the personal and individual liability of *all the partners.* The extent of this rule, we think, has been unfavorable to commerce, and has prevented much capital from being vested in trade. There are many persons, who have surplus funds, which they would be willing to put into trade, with a prudent partner, but for the circumstance, that, however small their interest in a copartnership may be, their whole private fortunes are liable to satisfy the copartnership debts in case of misfortune. A medium between the utter irresponsibility claimed by corporators, and the unlimited liability of copartners is certainly desirable, provided it can be obtained without introducing fraud and ruinous speculations; in case those who credit such a concern can do it with security and with ordinary diligence, may be able to ascertain the extent of the security they have for the payment of their demands.—This, it is believed, can be obtained by the establishment of *copartnerships of limited responsibility,* or what the French call "*commandite.*" The plan has been adopted in other countries, and has been found to succeed. It forms a part of the Napoleon code, which appears to us to be a perfect model of legislation on this subject. Many of the American States have also adopted this species of copartnership. With the view of calling the public attention to the matter, we publish the following sketch of a proposed law on this subject. To those who are familiar with the French commercial code, we need not say, that many of the provisions of the subjoined bill are drawn from it, altered only so as to correspond with the judicial system of our own country. This part of the task was found no easy matter. The great difficulty of transferring to our own code, the valuable parts of the legal institutions of other countries, consists in rendering them accordant with our own system of laws; and preventing that distortion of its symmetry which usually attends such efforts. Whether our sketch has preserved what is valuable in the French *commandite,* without breaking in, too far, upon the *general copartnership* of our State,

whether it has been shaped so that it may form a part of our code without marring its symmetry, is submitted to the consideration of our legislators. In examining it, they must keep constantly in view the two objects to be attained—protection to the contributing partner from general liability; and security to the creditors of the concern, that they shall have satisfaction of their debts to the full extent of the funds and the personal liabilities they have trusted, so far as human laws can afford such protection and security in the ordinary course of their own administration. If the proposed law secures these objects, it is desirable—if not, it is either useless or worse. We believe, that under the revising hand of a wise and prudent Legislature, it can be so moulded as to obtain both objects; and under this conviction we submit to our country,

A Bill, authorising the establishment of Copartnerships of limited responsibility.

Sec. 1. Be it enacted by the Honorable the Senate and House of Representatives in General Assembly met, and by the authority of the same, That copartnerships of limited responsibility may be formed in this State between one or more partners jointly and severally responsible, and one or more other partners who merely contribute funds. The first shall be called *acting* partners, and the last *contributing* partners.

Sec. 2. The copartnership shall be conducted under a title which shall include the names of some of the acting partners. The name of a merely contributing partner shall not be used in the title of the copartnership; but to it shall always be subjoined the words "and partners."

Sec. 3. Where there shall be several acting partners, it shall be a general copartnership as to them, and a copartnership of limited responsibility as to the contributing partners.

Sec. 4. A contributing partner shall not be liable for losses any further than to the extent he shall have furnished, or engaged to furnish stock to the copartnership. But to entitle him to this privilege, the copartnership shall be constituted in the following manner: The articles of copartnership shall be in writing, shall be signed by each of the acting and contributing partners, or by some other person thereunto by him lawfully authorised in writing; shall be recorded in the office of mesne conveyance of the district or districts where the business of the copartnership is intended to be carried on. Those articles shall state the title of the copartnership, the names of all the partners, both acting and contributing, and their usual place of residence, the amount each contributed or has engaged to contribute to its capital, the day of its commencement and the time of its intended duration, the

nature of the business intended to be transacted, and the place or places where it is intended to be carried on, and an abstract of the above particulars shall be published in one or more Gazette published at , before the day on which the copartnership is to commence, and in case the said articles shall not be so drawn up in writing and signed, or shall not be so recorded, or the abstract thereof shall not be so published, the copartnership shall be a general one, and all the contributing partners shall be jointly and severally responsible with the acting partners.

Sec. 5. A copartnership of limited responsibility may be continued beyond the period limited for its expiration to some other fixed period, by a declaration in writing to that effect, signed, recorded, and published in the same manner as the original articles; otherwise the continued copartnership shall be a general one, all the partners being jointly and severally responsible.

Sec. 6. The acting partners shall keep regular books, and in the day book shall be daily entered in the order of dates all the transactions of the copartnership. It shall exhibit all the sales, purchases, debt, credits, drafts, orders, acceptances, endorsements, payments, and receipts of the copartnership. The books shall exhibit an annual statement of all the funds drawn out of the copartnership stock, by each of the partners, and a monthly statement of all the funds drawn out by each acting partner for the support of himself and family. On application to the Court of Common Pleas by an acting partner for the benefit of the act for the more effectual relief of insolvent debtors, the Court may require the production of the said books on a question arising where the books are necessary to its investigation; and on failure, to produce the same when so required, or on production, if it shall appear that the books have not been kept in the manner aforesaid, he shall be deprived of the benefit of the said act.

Sec. 7. Executions or judgments or decrees against the copartnership, may be enforced against the private estate, real and personal, of all the acting partners who were served with process in the case without a non suit.

Sec. 8. Every conveyance, assignment, mortgage, judgment, or other lien, made or given of or on the effects of the copartnership, shall be held to be fraudulent and void, where the same shall be made or given in contemplation of

a failure of the copartnership, and with a view of giving a preference in payment to one creditor over another creditor of the copartnership. And all debts due by the copartnership to a contributing partner of it, shall be postponed in payment, to all other debts owing by it, in case of its failure.

Sec. 9. The effects, real and personal, of the copartnership, shall not be subject to execution or attachment for the individual debts of the partners. But the stock of a partner shall be bound by execution as personal estate from the time a certified copy of the execution shall be lodged by the Sheriff or his deputy, with one of the acting partners at the house where the business has been usually carried on, or where no such partner can be there found, shall have been posted up at the door of the said house by the Sheriff or his deputy. And such stock may be sold under such execution, without levy, after due advertisement, or it may be attached for the individual debt of an absent partner.

Sec. 10. The purchaser under execution or attachment of the stock of a partner, shall become a partner in the copartnership, entitled to all the privileges and subject to all the responsibilities, thence arising, of the partner whose stock he has purchased.

Sec. 11. In case a contributing partner shall also be an acting partner, and his stock shall be sold under execution or attachment, he shall still remain an acting partner, entitled to such profit as may be secured to him as such, by the articles of copartnership, and the purchaser shall become a merely contributing partner.

Sec. 12. A merely contributing partner shall not transact any business of the copartnership, not even under a power of attorney, and if he shall in any way transact such business, he shall become an acting partner, and be jointly and severally liable with the other acting partners.

ATTACHMENT FOR CONTEMPT AGAINST SHERIFFS.

A attachment is, a process issued from a court of record, to punish any person concerned in or attendant on the administration of justice for mal-practice, misconduct, or neglect of duty; and to compel a performance of its orders, judgments, or decrees interlocutory or final.

The process of attachment may be divided into three classes:—1st. Civil; 2d. Criminal; and, a compound of the Civil and Criminal.

1st. Where it issues to compel a party to pay an award, a decree of a Court of Equity, or the security for the costs of a case, to pay the same, it is *a civil process.* Its object is exclusively for the payment of money, and is in lieu of an execution.

2d. Where it issues against a sheriff for mal-practice, such as refusing in the presence of the court to obey its orders, receiving a bribe, &c. it is *a criminal process.*

3d. In cases of neglect of duty of a sheriff, such as failing to collect, or pay over money when collected under an execution, it is partly a criminal, and partly a civil process. It is criminal in its form and effect, so far as it is desirable to punish the sheriff for his neglect. It is a civil process, so far as its effect is to redress the injury of the party who procures it to be issued, by compelling the sheriff to place him in as good a situation as he would have been in, had the sheriff done his duty.

The effect of an attachment (when issued) on the party arrested under it, is to bring him before the court to answer touching the supposed contempt. In the first class, it is *necessary* to exhibit interrogatories; in the second class, interrogatories *must*, and in the third class *may* be exhibited. Upon the party's answer to these interrogatories, depends his discharge or commitment.

If the party in the second class fails to purge the contempt, the court will punish him by fine and imprisonment, at its discretion. In the third class, the court requires the party attached, to put the party procuring it, in as good a situation as he would have been in had he done his duty.—This is the general condition upon which the contempt may be purged, and where the sheriff shows that by misfortune or inability he is unable to put the party procuring the attachment in as good a situation as he would have been in, had he done his duty, and he has returned the execution according to the truth, he may be discharged under the discretionary power of the court over all cases of contempt.

Under the insolvent debtor's act, the prisoner cannot be discharged until he purges the contempt; but as soon as the sheriff has done that, by returning the execution according to the truth, and filing his petition and schedule, he will alone be confined and retained under the civil part of the process of attachment; that is, until he pays the debt, interest and costs: and hence it becomes strictly and properly an attachment for the payment of money, and stands in place of an execution against the body of the sheriff, and in this point of view, he is embraced in that act; and if he complies with its provisions in every particular, he is entitled to his discharge under it.

COLUMBIA, JUNE, 1830.

Ex-parte WILLIAM THURMOND, late Sheriff of Edgefield District.

O'NEAL J. In this case, the only question necessary to be considered, at length, is whether a sheriff in confinement, under an attachment, for contempt, in not paying over money by him collected on executions, can be discharged on any other terms, than the payment of the debts, interests, and costs? In the solution of this question, will necessarily be considered the power of the Court to discharge, both under the discretionary power which it has over all cases of contempt, and also under the insolvent debtor's act.

An attachment may very well be defined to be a process, issued from a Court of Record, to punish any person concerned in, or attendant on the administration of justice, for misconduct, mal-practice, or neglect of duty; and to compel a performance of its orders, judgments, or decrees, interlocutory or final. The sheriff, as an officer of the Court, charged by law with the execution of all its process, is amenable to this summary mode of proceeding, for either mal-practice or neglect of duty; for mal-praatice, in the view of the Court, he might be forthwith attached; but for neglect of duty, the proceeding is, by rule to shew cause.

In England the Court rarely grants an attachment immediately, on his filing to shew cause, but more usually proceed by rules against him, to compel the performance of his duty, and "if he does not obey them, will increase the immensements till he does his duty." It is, however, clear, that an attachment may isssue, on his failing to make his return to the rule—2 Hardkins' Pleas of the Crown, chap. 22, sec. 4. In this State, the practice appears to be pretty uniform, that on his failing to make his return to the rule, or refusing to answer interrogatories, which the party suing out the rule may exhibit at its return, then the rule is made absolute, and the attachment issues, unless the sheriff will perform the duty required—1 Con. Rep. (Mill.) 152.

When the attachment is issued, what is the nature and effect of it? Is it a civil or criminal process? In some cases, I think it is a civil process, as where it issues to compel a party to a suit to pay an award, a decree of a Court of Equity, or a security for the costs of a case, to pay

the same in these cases, its object is exclusively for the payment of money, and it is in lieu of an execution—Cowp. Rep. 136, 1 T. R. 265; 4 T. R. 316–809; 7 T. R. 156; 3 Eg. Rep. 269.

In other cases, where it issues against a sheriff for malpractice, such as refusing in the presence of the Court, to carry its orders into effect, receiving a bribe, or oppressive conduct in the discharge of his duties, it is certainly a criminal process. In cases of neglect of duty, such as failing to collect, or pay over money when collected under execution, it is partly a criminal, and partly a civil process. It is both criminal in its form and in its effect, so far as it is desirable to punish the sheriff for his neglect; but so far as its effect is, to redress the injury of the party who procures it to be issued by compelling the sheriff to place him in as good a situation as he would have been in, had the sheriff done his duty, it is generally a civil process—State *vs.* Deliesline, 1 Con. Rep. (Mill.) 151; Daniel *vs.* Capert, Sheriff, M'Cord, 238.

The effect of an attachment, when issued on the party arrested under it, is to bring him before the Court to answer, touching the supposed contempt. In the first class, attachments for the payment of money, being in the nature of an execution, it is not necessary to exhibit interrogatories. In the second class, attachments for that practice, interrogatories must, and in the third class, attachments for the neglect of duty, may be exhibited. Upon the party's answer to these, depends his discharge or commitment. In the two last cases, the party attached may be recognised to appear and answer touching the contempt—2 Haw. P. C. 6th edition, note at the end of chapter 22nd, page 231.

If the party in the second class, fails to purge the contempt, the Court would punish him, by fine and imprisonment, at its discretion. In the third class, the rule formerly was to impose a fine, out of which the party procuring the attachment might, on application to the King, be remunerated for his loss. At present, it appears, that in all cases of this class, the Court requires the party attached to put the party procuring it in as good a situation as he would have been had he done his duty—1 Sell. Peace. 202; 2 Barn. & Ald. 192; 7 T. R. 239; Bacc. Shff. 81.

In flagrant cases, calling for an example, the Court might superadd fine and imprisoment. On the present occasion,

the party is in confinement, under the attachment, and no interrogatories have been exhibited to him to be answered. He stands, therefore, upon the footing of being committed, after having failed to purge the contempt—that is, he is to be imprisoned until he puts the party procuring the attachment, in as good a situation as he would have been had he done his duty. This is the general condition upon which the contempt may still be purged. In the English Rep. no case of a sheriff attached for non-payment of money, and moving to be discharged, on account of his inability to pay it, can be found. In 1 B. & P. 336, the King *vs.* Davis, an attorney was attached for not paying over money collected for his client; and the Court in that case held, that the attachment against him was a civil process, and he was entitled to be discharged under the Lord's act. The cases of attachment against the sheriff, found in the English books, are where the sheriff has either taken insufficient bail, or permitted the party to go at large without bail; and in these cases the Court have uniformly refused, where the plaintiff had sustained any delay or loss, to set aside the attachment, on any other terms than the payment of the whole debt and costs.—This, however, is the extent of the rule.

In the present case we are untrammelled by precedent, and the Court concludes that where the sheriff shews that by misfortune or inability, he is unable to put the party procuring the attachment, in as good a situation as he would have been in had he done his duty, and he has returned the execution according to the truth, he might be discharged under the discretionary power of the Court, over all cases of contempt. But if in this case the prisoner can be relieved under the insolvent debtor's act, the Court prefer to take that course. It furnishes a surer guide in meting out justice between the prisoner and all his creditors, and fixes a rule by which the discretion of the Court can always be regulated. It is also a legislative povision for the unfortunate; secured by high sanctions and great guards against fraud and perjury. Under the insolvent debtor's act, 2 Bred. Dig. Tit. 137, Sec. 44 & 45, p. 148, the prisoner until he purges the contempt, cannot be discharged; so soon however, as he has done that, by returning the execution, and filing his petition and schedule, he will alone be confined and retained under the civil part of the process of attachment; that is, until he pays the debt, interest and costs. As

to this, is he not entitled to the benefit of the insolvent debtor's act? The words of both the preamble and enacting clause are sufficiently broad to embrace him. The preamble speaks of the inefficacy of former laws, for the relief of poor, distressed and insolvent prisoners for debt; and to remedy this evil, it is enacted that "if any person or persons whatsoever, shall be hereafter sued, impleaded, or arrested for any debt, *duty*, demand, cause or thing whatsoever, (except for such matters, cause and things, as are hereinafter excepted,) and shall be minded to make surrender of all his, her, or their effects, towards satisfaction of the debts, wherewith he, she, or they stand charged, or in which he, she, or they shall be indebted to any person or persons whatsoever, it shall or may be lawful, &c." The only exceptions afterwards made in the act, Sec. 60, is if "A person or persons, sued, impleaded, or arrested, for damages recovered in any action for wilful maihen, or wilful and malicious trespass, or for damages recovered in any action for voluntary and permissive waste, or for damages done to the freehold." These exceptions shew the sense and intention of the Legislature to be, to relieve all other prisoners confined for any debt, duty, demand, cause, or thing whatsoever. This act, however, it must be considered relates altogether to imprisonment, the object of which is to compel one party to render to another his debt, duty, demand, cause, or thing, in a civil proceeding. It has no application to cases of a sentence imposing a punishment in a criminal matter.

Is the process of attachment issued to compel the sheriff to pay a debt, discharge a duty, or answer for a demand? It is unquestionable after the contempt is purged, that one or all of these is its only object, and hence it becomes strictly and properly, an attachment for the payment of money.—It then stands in place of an execution against the body of the sheriff, and in this point of view, he is embraced in the act. From these views I come to the conclusion, that when the sheriff returns an execution according to the truth, and offers to give up the whole of his estate, he has purged the contempt, he has done all he can do, beyond this, perpetual imprisonment would be the consequence. If then he complied with the provisions of the insolvent debtor's act, in every particular, he would, under, it be entitled to his discharge.

In the case before the Court, we are not informed wheth-

er the prisoner has or has not returned the executions.—This he must do, and upon doing so, would be entitled to his discharge under the insolvent debtor's act, had it not been, that the parties sueing out the attachments, claim the right to file a suggestion, charging the prisoner's schedule to be fraudulent. This they have an unquestionable right to do—and although they may have failed on the Circuit Court to make the application to be permitted to do so, yet this Court in a case of the first impression, which they may have been prevented from pursuing that course, by a belief that the prisoner could not be legally discharged, will still permit it to be done.

The prisoner has, however, already been in actual confinement more than three months. In doing justice to the parties sueing out that attachment, we must not do injustice to him.

Upon his returning truly the executions for his default, upon which the attachments were issued, and entering into a recognizance before the clerk of Edgefield, himself in the sum of $ 5000, and two good securities in the sum of $25,000 each, to appear at the next Court of General Sessions of the Peace and Common Pleas for Edgefield District, and answer all such interrogatories as shall then and there be propounded to him by the parties suing out the attachments, under the order of the Court; and not to depart from the said Court but by leave thereof, he may be enlarged from his confinement. The parties sueing out the attachments, have leave to file a suggestion charging the prisoners schedule to be fraudulent. The motion to reverse the decision of the Circuit Judge is neither granted nor denied, but the case is rendered to the Circuit for examination and trial.

We concur, *C. J. Colcock*, *David Johnson*.

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CHARLOTTE PRICE by her next friend, O. S. PRICE, *vs.* JOHN WHITE, BENJAMIN F. HUNT, WILLIAM BURGOYNE and THOMAS W. PRICE.

All marriage settlements, antinuptial or post nuptial, must be recorded in the Secretary of State's office within three months after their execution.

Any settlement of property by the husband on the wife after marriage, is a post nuptial settlement, and subject to the above rule.

A settlement on the wife, ordered by the Court of Chancery, must be executed by a formal deed and recorded within three months, or the property will be subject to the claims of the husband's creditors.

A deed of separation arranging the property between the husband and wife, upon their separation, held a marriage settlement, and must be recorded in pursuance of the statute. (Nott, justice, dissenting.)

Where the husband and wife lived apart, and the husband before acquiring possession of slaves coming to the wife, upon the death of her brother, settled the slaves upon trustees for the sole use of the wife, and they remained upwards of five years afterwards in the possession of the trustee, with the knowledge of the husband and the creditor, it was held that the possession was adverse to their claims, and the Court would not let in the claim of the husband's creditor, though the deed was not recorded. "No one could be defrauded by this arrangement; for no credit could have been given on the faith of this property."

Thomas W. Price married Charlotte Smith without any settlement. She was entitled to a legacy under her grand father, James Skirving's will, and the executors refused to pay the same, unless Price would make a settlement. Price assented to do so, and by a deed, bearing date 5th March, 1794, twenty-five negroes, the subject of the legacy, were

conveyed by Price in consideration of the marriage, to three trustees, (all since dead,) in trust for Price and wife, during their joint lives, and after the death of either, to the survivor, and after the death of the survivor, to the children of the marriage. This settlement was not recorded until 2d September in the same year.

Philip Smith, by his will, dated 17th January, 1796, gave as follows, viz:—"I give the sum of 1400 guineas to Gen. Pinckney, Nathaniel Russel, and John Lloyd, to be by them applied and laid out in the most advantageous manner, in purchasing land for my daughter Charlotte, to her heirs, lawfully begotten, to have and to hold the same, to them, the said trustees, and survivors and survivor of them, and the heirs and assigns of each survivor, upon the special trust and confidence, to and for the use, &c. following, that is to say—I trust they will permit my daughter Charlotte, and the heirs of her body, lawfully begotten, to have, after the land shall be bought and purchased in manner aforesaid for her, the free use, occupation, and enjoyment of the same lands, *and not subject to the debts of any body.* Also, I give to the said trustees, and the survivors, and so forth, the following negro slaves, (being 45 in number,) to have and to hold, &c. upon the special trust, and for no other—that is to say: In trust that they, my said trustees, and the survivor and survivors of them, and the heirs and assigns of such survivor, shall permit and suffer my said daughter Charlotte, and the heirs of her body, lawfully begotten, to have and enjoy the free use, benefits, labor, and profits arising from the said negroes herein last mentioned above, and of their future issue and increase, as herein above mentioned: In trust to and for the same uses, intents and purposes, and according to the true intent and meaning thereof, and not otherwise."

The testator also gave a great number of negroes to his son, Philip Skirving Smith, and after his death, to his children, with a limitation over, in case of no children, "to my daughter Mary and Charlotte, equally to be divided, or in case my said daughters shall be then dead, to and amongst their children as shall be then living." He then provides for the case of a daughter dying in the life time of Philip Skirving Smith, leaving children: and proceeds—"In case one of my daughters should be then dead, without

issue, then that all and the whole of the said slaves herein last above mentioned, with their issue and increase, shall go to my surviving daughter, to whom upon the contingency, uses and trusts, intents and purposes, herein before mentioned, limited, expressed, and declared of, for and concerning this my last will and testament."

In another part the testator gives to his two daughters, all the rest of his negroes, by the following words: "All the rest, &c. of my negroes, I give and devise to be equally divided, share and share alike, to the above mentioned trustees, and the survivor, &c. upon the special trust, and confidence herein after mentioned, that is to say, in trust, that they, the said trustees, and the survivors and survivor of them, and the heirs and assigns of such survivor, shall permit and suffer my said daughters, Mary and Charlotte, and heirs of their bodies, lawfully begotten, to have and enjoy the free use, benefits, and profits of the benefit and work of the said negro slaves, and their issue as herein before mentioned."

The testator devised his lands to the trustees first: to raise the portions 1000 guineas and 1400 guineas, for his daughters, remainder to his son for life, remainder to such of his son's children as he might appoint: in default of appointment, to all his son's children equally; in default of children, then to his son's heirs, or heir at law.

Of this will he appointed General Pinckney and the other trustees executors, who all renounced; and aministration *cum testamento annexo*, was granted to Benjamin Postell.

Price and wife filed their bill against Postell, as administrator, on 14th September, 1796—the cause came on and was adjourned until a further hearing. On the 20th September the case was argued and the Court referred it to the Master to prepare a settlement on Mrs. Price of such estate, and for such uses, intents and purposes as in the bill mentioned. On the 4th October, Gibbes the Master, made the following report: "I Report, that agreeably to the order of the Court, the said T. W. Price has had a settlement of the negroes of another of the plantations, mentioned in the said bill, drawn agreeably to the terms therein proposed, which is approved of both by the defendants and complainants Solicitors. I therefore recommend, that trustees

be named in those settlements, to support the trust, and that the said Thomas W. Price do execute the same." On the same day an order was entered in the following terms—The Court, after giving their reasons at length, ordered and decreed, "That William Price, Nathaniel Russel, Benjamin Postell, and John Blake, be named trustees in the said two settlements, and further, that the legacy of 1400 guineas, left by the said testator, Philip Smith, to buy land for his daughter, Mrs. Price, has been paid out of the proper fund for that purpose. That the complainants are entitled to a share of the present crop, in proportion to the number of working negroes to which they are entitled under the said testator's will; that upon the said Thomas W. Price executing the settlement reported by the Master as aforesaid, he shall be put in possession of such part of the estate as is bequeathed to the use of his wife, under her father's will.

The deeds mentioned in Mr. Gibbes (the Master's) report, were,

1st, Lease and release, bearing date 8th and 9th September, 1796, and executed by Price and his wife, to the trustees named by the Court. The release recites the will of Philip Smith: the bequest of 1400 guineas to his daughter Charlotte, under certain limitations, and that those limitations were void and the legacy vested absolutely in her. That an amicable suit had been instituted by Thomas W. Price and wife, against Benjamin Postell; that both in her bill and upon her examination in open court, she declared she did not wish any settlement of the land to be bought with the 1400 guineas. Yet Thomas W. Price, in the bill did voluntarily offer to make a settlement, on the trust and terms therein mentioned, and the Court did thereupon, with the consent of Thomas W. Price, direct the settlement to be made accordingly. That Benjamin Postell had paid to Price the 1400 guineas, on condition he should settle the plantation within mentioned, upon the following trust and terms: Price and wife, in consideration of the premises, and ten shillings conveyed to the trustees the Pon Pon plantation. The limitations of this deed were: 1, In trust for Price and wife, during their joint lives. 2, Remainder to the trustees to preserve contingent remainders. In case of Charlotte's dying in the life time of Thomas W. Price, then to Thomas W. Price, in fee, discharged of all trusts. 4, In

case of the death of Thomas W. Price, in the life time of his wife, then to Charlotte Price during her natural life. 5, Remainder to trustees during the life time of Charlotte Price to preserve contingent remainders, remainder after the death of Charlotte Price, to her children by Thomas W. Price in fee. In default of such issue, to such persons as T. W. Price may appoint. A power was reserved to the trustees to resign their trust; and for Price to sell the premises, on condition of his settling other estates or property, with the approbation of the trustees, of value equal to 1400 guineas to the same trust.

2d. Deed for settlement of negroes, dated 9th November, 1796, executed by Price and wife, to the same trustees.—The same recital as in former deed, and that although Mrs. Price, both in the bill and upon her examination in open court, had declared that she was not willing to have any settlement of the negroes bequeathed to her, yet the court held Mr. Price to his offer. The limitations in this deed were 1st, To T. W. Price and wife, during their joint lives, not subject to his or her debts. 2dly, To T. W. Price, for life, after the death of Charlotte Price, not subject to his debts. 3dly, To Charlotte Price for life, after the death of Thomas W. Price. 4thly, To the children of Charlotte Price, after the death of the survivor. 5thly, In case of failure of issue, to the survivors, with a power reserved to Price to sell on condition of settling other property of equal value. These deeds were recorded on 7th July, 1797, being eight months after the execution of them.

The plantation in Stono was afterwards sold by Price, of which his wife renounced her dower; and by deed, dated 26th June, 1805, reciting the provisions of the deed of lease and release, and the subsequent state of the Pon Pon plantation, Price conveyed to William Price, Nathaniel Russel, and John Blake, a plantation on Stono, to the same uses and trusts, and subject to the same proviso.

A separation afterwards took place, and while they lived separate, Philip Skirving Smith died, intestate, unmarried, and without issue, and Mrs. Price became entitled to a moiety of the negro slaves, limited over by Philip Smith's will to his daughters; and became also entitled, under the Act of Assembly, to all the intestate's estate, real and personal, as his only sister of the whole blood.

Administration of Philip Skirving Smith's estate was granted to Col. Skirving; and after his death to Price. The friends of his wife interfered, and to avoid a Bill in Equity, he came to terms with them; and by deed, bearing date 31st December, 1812, between Price of the first part, and Mrs. Price of the second part, and Thomas R. Smith of the third part, it was agreed that they should live separate, and that the estate fallen to her by her brother's death, should be divided, that is to say: The Chyhau plantation, and one third of the negroes, being 51 in number, should be conveyed to her sole and separate use; one third of the negroes should be conveyed to Price during his life, and after his death to his children, and the residue to Price absolutely.

The Ashepoo plantation, 1000 acres in Georgia, 500 acres in the Great Swamp, 200 acres called the Cross Roads, and a plantation in Togadoo called Bedon's, were to be conveyed to Price in fee simple. The Horse-shoe plantation was to be conveyed to a trustee to the use of Price during his life, and after his death, to such of his children as he might appoint.

This deed was recorded the third of August, 1813.

On the 4th May, 1813, Price conveyed the Chyhau plantation and 51 negroes to a trustee, for the use of his wife, agreeably to the deed of separation—but this conveyance was never recorded.

By another deed of the same date, the other lands included in the deed of separation, were conveyed to Price.

It since appeared, that in one of these plantations, called Bedon's, Mrs. Price had only a life estate, and that the fee simple was in her children, under a deed of Philip S. Smith, in his life time.

Charlotte Price took possession of Chyhau and the negroes, conveyed to her use, and was possessed of them about five years, after which Price took possession again, and paid her an annuity of $2000 instead.

In October, 1824, Price was admitted to the benefit of the insolvent debtor's act, and assigned all his right, title, and claim to the foregoing real and personal estate. The defendants, John White, Benjamin F. Hunt, and William Burgoyne, were appointed assignees. John White being a principal creditor, offered to sell under his execution, and

the bill was filed to restrain him and the defendants from selling any part of the lands or negroes included in the foregoing deeds. The bill charged that White had notice of the deeds; that he had sold a great number of negroes for Price, and prayed an investigation of his accounts.

The complainant, Mrs. Price, claimed the Stono plantation under her father's will, and also under a deed of the Pon Pon plantation, from Price to Postell, prior to the decree of the Court, in October, 1796, and never recorded; and insisted on having the settlements of 1796 reformed; and prayed the separation might be enforced and executed in all its parts.

An injunction was granted, and William Cattell was appointed receiver, and directed to pay Mrs. Price, during the suits, $2000 a year.

The answer of White stated, that he was the factor of Philip S. Smith, and continued to do the business of Price after he administered on the estate. That he had had no connexion or concern in business with Price, before that time, for many years.

That he knew Price was separated from his wife, and was told by him that he had relinquished the Chyhau plantation and negroes to her. But he knew nothing of the particulars. That from the year 1817, the crops of Chyhau were sent to him for sale, and after that time he regularly paid Mrs. Price $2000 a year by her husband's directions. That he had no notice whatever of the deed of separation, and so far from Price informing him of it, he actually gave him a bill of sale, by way of mortgage, of 100 negroes, part of which were the same which were settled on Mrs. Price and her children, by the deed of separation. That Price assured him the property was all his own, and under this impression by persuasion and plausible representations, drew him in to make large advances, and in his absence prevailed on his partner to accommodate him, far beyond what he had ever intended. Much money was advanced to him to pay off Philip Smith's debts, and much to build a house on Bedon's or Togadoo. That on 15th May, 1819, Price confessed judgment to him, on a bond, in the penalty of $60,000, which bond and judgment were taken to secure advances then made, as well as further advances, and endorsements

of Price's notes to come, as well as those on which he was then liable. That there was due to him at the time of his answer $ 43,107 88. That in August, 1823, he insisted that Price should provide another indorser on his notes in bank, and then for the first time was made acquainted, by Price, with the deeds and settlements mentioned in the bill—all except the deed under which Mrs. Price claims the Pon Pon plantation, prior to the decree of October, 1796, which he never heard of until the bill was filed. Defendant insisted, that none of the deeds or settlements were valid, as they were not recorded as the law directs marriage settements to be recorded: and that he was entitled to the benefit of the power, contained in the settlement, of selling the Stono plantation, or securing to complainant 1400 guineas; and that all the property contained in Price's schedule, was liable to his creditors, except the Bedon or Togadoo plantation.

The Receiver's accounts showed that Mrs. Price had regularly received $2000 a year, since the bill was filed: And that there was a deficiency to pay plantation expenses.

The cause was heard before his Honor, Chancellor De-Saussure, 26th January, 1827.

The plaintiffs produced the deeds on which they claimed, and gave evidence as to the deed of separation being the result of a compromise between Price and his wife's friends. And the defendant, Mr. White, gave evidence as to his debt, and the assurances of Price, on which he had trusted him; and in confirmation of his answer. As to want of notice, Mr. Teasdale testified as to Price's giving him repeatedly the strongest assurances that all his property was bound for his debts, and should be forthcoming if ever it became necessary; and that Price gave him, in 1812 or 1813, a bill of sale, as a mortgage, of 100 negroes, being partly the same that are settled by the deed of separation: but this deed was left in Price's hands in 1823, and disappeared.

His Honor, Chancellor DeSaussure, by his decree, declared the settlement, dated 5th March, 1794, to be void as to creditors, for want of recording. But sustained the settlement of 1796, as made in pursuance of a decree, and therefore not required to be recorded. And declared the complainant, Mrs. Price, to be entitled to all the negroes be-

queathed by her father to her; and to all the negroes which she became entitled to, on the death of her brother, Philip Skirving, under the limitations of the will of her father, to her sole and separate use—not liable to her husband's debts; and declared the complainant entitled to all the property settled by the deed of separation.

De Saussure, *Chancellor*—The first question relates to twenty-five slaves (and their issue,) which were purchased for Mrs. Price, during her minority, with a sum of money bequeathed to her by the will of her grand father, Dr. James Skirving. His executors refused to consent to the legacy, or to deliver the slaves so purchased until a settlement should be made. This was acquiesced in by T. W. Price, the husband, who conveyed the same by deed bearing date the 5th of March, 1794, to certain Trustees, in trust, for the joint use of the husband and wife during their joint lives, then to the use of the survivor for life, and after the death of the survivor, to the use of the children of the marriage. This deed was recorded on the 2d Sept. 1794, being later than the time limited by the statute, for recording marriage deeds.

That Statute declares marriage settlements void, which are not recorded within three months from the execution thereof.

It was urged for the complainant that the statute does not apply to cases of settlements made after marriage. The statute is not explicit as to what marriage settlements were intended. But in the construction thereof, the Courts have decided that it does apply to settlements after marriage as well as to those before marriage. Doubtless on the principle, that the less favored, post-nuptial settlements, (which are not allowed to be valid in all cases, as against creditors, even when duly recorded,) could not be intended to be exempted from the obligation of being recorded, and thus put on a footing of anti-nuptial settlements. Whatever were the reasons, however, I consider the point settled by the decisions. The settlement then, as to the slaves before mentioned, cannot be held to be valid as a settlement. It was, however, urged that the negroes in question, were conveyed, and held in trust, for the benefit of Mrs. Price, by consent of the husband, who could not have reduced the

slaves into possession, without he had so consented, and that he and his creditors claiming under him cannot set up the fact of its not being recorded in due time, to defeat the rights of Mrs. Price, as that was a fraud on her which ought not to prejudice her. To this it is answered, that it was not the duty of the husband but of the trustee to record the deed; but that however strong the argument might be against the husband, it does not apply to his creditors.—They stand upon their legal rights; and do not as was argued, stand merely in the shoes of their debtor, Mr. Price. It was farther argued, that allowing the fact of not recording the post nuptial deed does not avoid it as a settlement, the parties were remitted to their original rights, and that the property in question should be considered as held by the executors or trustees, before the consent to the legacy, and before the possession had been delivered to the husband. This is a very ingenious view of the subject, and has great force when applied to another state of things, as will be hereafter shown. But not in the question as to the twenty-five slaves. The effect of it so applied, would be to defeat the statute altogether. In point of fact then, the possession was in the husband by the consent of the executor who had previously held the slaves in the ordinary way, and not for the separate use of Mrs. Price; and that the possession could have been qualified by the requisition of a settlement, which last was not done in time. So far, therefore, as regard these twenty five slaves and their issue, I am of the opinion, that they are liable to the creditors of Mr. Thos. Wm. Price, the husband, unless some other ground be relied upon and sustained on a further view of the whole case.

The next question relates to the property comprized in the will of Mrs. Price's father, Mr. Phillip Smith, in which she had an interest. And first, with respect to the slaves bequeathed in trust for her. Upon examination of the last will of Mr. Phillip Smith, it will be seen that the possessions under it were in trust, and substantially for her separate use and were not to be subject to the debts of any person; which must mean the debts of any person to which they might possibly become liable without such restriction, such as her husband. This Will made a settlement. The testator had a right to make it, and it was and is obligatory.—

Any attempt to change or vary the interest thus given and thus limited in contravention of the will of the father, was void, no further settlement was requisite, and if one was attempted in Court or out of Court, and has become invalid and void, for want of recording or from any other cause, that cannot shake the pre-existing right given by the father as limited by the will. So far, therefore, as regards these slaves, bequeathed to the trustees for Mrs. Price, by her father, the right remains unimpaired in her. It will be remembered, however, that when a husband is permitted to have the possession of the separate estate of the wife during the coverture, the account to which he may be entitled cannot be carried back further than one year preceding the husband's death.

The next question relates to the slaves bequeathed by Philip Smith to his son Philip S. Smith, for life, with limitation to his daughters and their issue. The son died intestate, and without wife or child. By a decision made by this Court, (3d D'g. Rep. 165,) it was settled that the limitation over to the two daughters, of whom Mrs. Price was one, was good and valid, and that they were entitled to equal moities of those slaves, which decree was carried in to effect. By recurrence to the will of Mr. Philip Smith, it will be seen that it provides the same uses and trusts, and expresses the same intents and purposes, as to these slaves, as with respect to the other slaves bequeathed directly to trustees for the daughters. The same reasoning applies to these slaves as to those bequeathed to trustees directly for Mrs. Price in the first instance of which we have already spoken and decided.

The next question relates to the slaves acquired by Philip S. Smith himself, during his life. He died intestate.—Mrs. Price was the only sister of the whole blood, (there was no brother,) and was entitled to these slaves. Col. Skirving, the administrator of Philip S. Smith, having permitted the possession to go to the husband, the marital rights attached and they became his property and liable to his debts unless secured by some effectual settlement or other instrument. The instrument relied on in this case, was a deed of 31st Dec. 1812, which operated as a deed of separation between Mr. Price and his wife; and an agreement through a trustee, that the slaves to which Mrs. Price

was entitled on the death of her brother, intestate, should be divided into three parts, one third to Mrs. Price, separately, one third to Mr. Price, and one-third for the children. This deed was recorded 3d of August, 1813, and followed up by the deed of the 4th May, 1813, to give effect to the former, but never recorded. In my judgment, the marital rights have attached before these deeds, and these slaves will be liable to the debts of the husband upon the same principles, as apply to the twenty five slaves, first above mentioned.

We come now to consider the questions which relate to the lands. These consist of three distinct classes.

First, The lands devised by the father, to Philip S. Smith, with limitations to his heirs at law. Secondly, The land purchased with the sum of fourteen hundred guineas, bequeathed by Philip S. Smith, the father, to be laid out in land for the benefit of his daughter, Mrs. Price. Thirdly, A tract of three hundred acres of land, called Bedon's, which Philip S. Smith conveyed to trustees for the sole and separate use of Mrs. Price for life, and then to her children, whom he names, free from the control and debts of her husband.

As to the first. Philip S. Smith dying intestate, without wife or child, Mrs. Price, his only sister of the whole blood, became entitled to the inheritance of the lands as his heir at law, if the limitations of the will were to the heir at law of the son, P. S. Smith, or jointly with her sister of the half blood, Mrs. Jones, if the limitations were to the heirs at law of the testator. This last has not been made a question in this cause, nor is Mrs. Jones a party to this suit.

We will then consider Mrs. Price as inheriting all the lands devised to her brother, as his heir at law; of that inheritance she could not be divested by any act of her husband. Nothing could divest her, but her voluntary renunciation of her inheritance, or the decree of a competent Court made in a case in which she was a voluntary party, properly made so, and for her benefit. The not recording any settlement made with or without the sanction of a competent Court, could not affect her right to the inheritance, as in cases of personal estates. For the not recording the settlement has no other effect than to nullify the settlement. It is as if no settlement had been made. That, as to personal property lets in the martial rights, which gives

the absolute estate to the husband, unless as above stated, such personal estate, was guarded by the will of the donor, and was effectually settled by it, which certainly requires no recording. As to the real estate of the wife, comprised in a settlement which is not recorded in due time, such neglect to record lets in the martial rights of the husband, such as they were, as if no settlement had been made, and that amounts only to a life estate. The inheritance then, remains untouched, and Mrs. Price is entitled to these lands. The second question as to the land, relates to a tract purchased with the fourteen hundred guineas, bequeathed by Philip S. Smith, to purchase land for his daughter, Mrs. Price. All the reasoning applicable to the first question in relation to the land, applies also to this. Whether included in the settlement or not, the ultimate inheritance remains in Mrs. Price, unless other considerations interpose. The only question which can arise, grows out of the fact, that the fourteen hundred guineas were laid out in the purchase of the Pon Pon lands, under a decree of the Court on a settlement proposed and reported by the Master and accepted but not recorded. By the terms of that settlement, Mr. Price was at liberty to sell that land, provided he settled fourteen hundred guineas in other lands. Mr. Price did sell the land, and it has been sold subsequently to several persons in succession, and is now held by the last purchaser for valuable consideration. It would be most mischievous to disturb these sales and the purchases. Their purchase and the possession ought to protect them; nor is there any inducement to strain so immoderately to protect the wife—for it is conceded by the Counsel for the defendants, in his able argument, that Mrs. Price is entitled to fourteen hundred guineas in the after purchased lands on Stono. She must have the benefit of that.

Another question, if question it can be called, relates to the 800 acres of land conveyed by Philip S: Smith to trustees, for the use of Mrs. Price, for her separate use for life, and at her death, to her children. There can be no doubt as to her right to that estate. In the discussion which has been had, it has been argued, that settlements made under the authority, and by the decrees of the Court of Equity, are rendered void, if not recorded in the time prescribed by the statute. From the views which I have taken of this

case, it does not appear to me that such a construction would affect this case. But I am desirous that I should not be understood as acquiescing in this doctrine. It is very questionable, to say the least of it. The statute evidently looked to settlements made by the parties themselves; to deeds in pais. The object in requiring such deeds to be recorded within a limited time is publicity, to prevent false credits. That object is obtained by the decree of the Court ordering a settlement. Such decree is notice to all the world. Indeed, it is carried much farther, for even lis pendens, is notice to the world and those who deal in relation to the sudject in controversy, do it at their risk, and take the consequences. In pronouncing that settlements under decrees are not acted upon by the statute, it is not under the vain pretence that Courts can dispense with statutes, but it is a Judical decision, that the statute was not intended to have, and has not, any application to settlements under decrees of Courts. The decree is substantially the settlement, and if the parties never acted under the decree and never executed deeds, it appears to me the decree would operate as a settlement. This is a question of construction, and does not go so far as the doctrine of the Courts in relation to another statute. I mean that for recording mortgages. That provides distinctly that the first recorded mortgage shall prevail; there is no qualification. But the Courts have decided, that if the mortgagee who holds the first recorded mortgage, knew when he took it, that there was a prior mortgage, though not recorded, he should not be permitted to avail himself of the benefit of the statute, because he had actually the knowledge of the fact, which the recording prescribed was intended to give him.

With respect to the deed of 1813, which was never recorded, it was conceded in argument, and justly so, that whatever might be the fate of the property under it, on other grounds, there is one of great importance, which is perhaps conclusive, and in truth it is so in my judgment. It is, that the possession went under that deed, and has been uninterruptedly held for more than five years by Mrs. Price, as her separate property, on an absolute and continued separation from her husband, with his consent, he not having reduced that property into possession.

I believe that I have touched on all the principal points

of the case. Many of the letters and other papers are explanatory of the history of the case. But I could not attach weight to the declarations and constrictions of Mr. Thomas W. Price in favor of his wife's claims, after he had become hostile to Mr. White, who had rendered him most essential services, and long sustained him in his embarrassments. I am sensible that the views which I have taken are too briefly stated—considering the magnitude and difficulty of the questions in this case. It is ordered and decreed, that the rights of the parties be established according to the principles and decisions above stated and made on each particular point—and that a reference be had before the Master, to report what may be necessary to give effect to this decree.

From this decree the defendants appealed, except to so much as respects the settlement of 1794, for the following reasons:

1. That the will of Philip Smith gave Charlotte Price an absolute estate, which vested in her husband, and that as to this point the decree of 1796 was conclusive.

2. That the settlements of 1796, and especially the deed of the negroes, were marriage settlements, within the terms of the Act of Assembly, and therefore void as to creditors without notice, for not being recorded within three months.

3. Because the deed of separation is also a marriage contract, to which the wife had no claim, except on the consideration of marriage and the duties and obligations which the relation of husband and wife imposes.

4. Because Mrs. Price could in no event have a greater interest in the Stono plantation, than what is given by the deed of 1805; and the assignees and creditors are entitled to the benefits of the power reserved to Thomas W. Price of exonerating the estate by the payment of 1400 guineas, or the settlement of an estate of that value.

5. Because the wife has no Equity against creditors after the husband has obtained possession of the estate; and if she has married without a settlement, or her friends have omitted to record it, the Court will not take the estate from creditors to give to her.

Petigru for Appellant.—The first question which is raised by complainant is as to the interest which complainant takes under the will of Philip Smith.

The defendant resists this question, 1st, because it is res judicata, under the decree of the Court of Nov. 1796.

The bill and answers have been lost, but the decree of the Court, and a deed prepared under it, and approved by the Master and confirmed by the Court, furnish abundant evidence that the precise question was adjudged.

2d. If the decree is not conclusive and the question is now open, the judgment of the Court must now conform to that decree.

The terms used in the will of Philip Smith creates a fee conditional at common law as to the lands, and the same terms dispose of the negroes, and necessarily gives an absolute estate in them. The reservation that the property should not be liable for any debts, was inconsistant with the result desired, and could not exist with it. The liability to debts is inseperable from the right of property. Fearn, 101.

The statute of uses was intended to suppress the frauds incident to secret trusts, and although they have in some degree been secured by the decisions of the Court, yet it is under such limitations and restrictions as to guard against the mischief. Gilbert on uses 74—139. 1 Atk. 591. 2 Black. Com. 327.

It may be said, that the statute of uses is applicable to lands only. Trust of personal property was probably unknown before the statute; but the same legal consequences growing out of the intention of the parties must be given to trusts of personaly. Co. Lit. 290, b. Note 249, p. 5.

The Courts will not suffer the legal rights of the husband to be defeated by implication in favor of the wife. It is only in those cases where the intention of the donor gives the separate estate to the wife, that it will be carried into effect. Roper 163. Clancey's Reports 41-7.

A chattel in trust, held in trust for the wife, is the same as if the estate was made directly to her, unles it is expressed to be for her sole and separate use, but this must not be taken by intendment, but must be explicit. 2 Atk. 207. 3 Term 620.

This is the rule at law, and it is a maxim without excep-

tion, that Equity follows the Law. Co. Lit. 290. b. Note 249. p. 14. The limitation over of a personal chattel was unknown, and the introduction of trustees was a substitute for it. It is absurd to say, that if property be given to A. for the use of B. that the estate in it is not in B. 2 Term 26.

The second question, as to the effect of not recording the deeds.

All the writers on this subject speak of anti and post-nuptial settlements, and there is no discrimination in the act, they are both covered by the term marriage settlements. 1 Swanston 106. Atherley 155. Reeves 174-8. Roper 8. If a marriage be had, and a settlement be made, and a portion paid, this is a good marriage settlement. 2 Ves. 304.

Marriage settlements are divided into anti-nuptial and post-nuptial; and this division is recognized by the Act of 1792, which, in the proviso of the Act, makes a particular provision for such marriage settlements as are made before marriage; and also by the deliberate opinion of the late Constitutional Court, in the case of Lubbock *vs.* Cheney, 1 Nott & M'Cord, 444, in which it is laid down by the Court. "The preamble of the Act of 1795, speaks in general terms, 'marriage contracts;' and the first enacting clause says, *all and every* marriage settlement now existing: nor is there any thing to be found in any of the enacting clauses of either Act, which points to a distinction between settlements made before and those made after marriage: *All, then are comprehended in the enacting clauses.*"

But if post-nuptial settlements are within the enacting clauses of the Act, it will follow, that settlements made in pursuance of a decree, enforcing what is called a wife's equity, must submit to the same rule, for the Court of Equity could not dispense with, nor abrogate a law of the land, and order a settlement which the law says must be recorded to be made and to stand good: and respect for the character of those Judges, obliges us to conclude that when they directed a settlement, they intended a lawful settlement, and did not mean to overrule the law, nor take away from creditors the benefits and security which the law provides for them in requiring such settlements to be recorded within three months; neither did they mean to give their decree an extraordinary operation, and make it stand in place of a conveyance, for the plain words in which

they have spoken, import the contrary, and there is no authory for the position taken for the first time in this case, that a decree is notice to all the world.

T. W. Price became entitled to this estate in virtue of his marital rights, and the motive to a settlement was, that the fortune came to him in virtue of his marriage, so that in any view, the settlement must be regarded as having been done in consideration of his marriage. If a fortune accrue to the wife, and the provision already made is inadequate, a further provision for her shall be made; and this is another instance of a post settlement made in consideration of the marriage. Clancy, 188. All the motives which apply to the publicity of anti, apply equally to post, settlements.

The third question is, whether there was a necessity for recording a deed made under the decree of the Court?

The decrees of the Court of Equity are not notice except as to parties. Sugden on Ven. 556. A lis pendens is notice, but no one is bound to take notice of the decree—It is not notice. Under the lis pendens the purchaser takes the place of the party. 3 Atk. 392.

Equity acts upon the person and not upon the thing. It is otherwise at law: there it operates upon the thing. Equity, by acting upon the person, can compel a conveyance; but when that conveyance is made, it is regarded as the act of the party, and as such is subject to all the regulations imposed by law. Co. Lit. 290. b. Note 249 2 Sch. & Lef. 371. 1 Do. 67. Recording marriage settlements is one of them. Ordering titles to be made by the Master is an usurpation peculiar to our own Courts.

It is said that the property is bound by the decree; but that is not the law as is well illustrated by the cases in 8 Vesey, 195. 10 Do. 90. Could the Court say by their decree, that the settlement should bind creditors, although not recorded? Certainly not; and yet this is in effect, what is claimed.

T. Ford, contra.—It is not true, that the Court of Chancery acts only on the person and conscience of the party. It acts sometimes in rem. And the decrees of the Court of Equity are put upon the same footing with judgments at law. 3 P. W. 117. 1 Vern. Self vs. Maddock. 2 Maddock 354. 1 Johns. C. Repts. 577-8.

The Act of 1784 expressly recognizes the operation of the decrees of Chancery on real estates, and the case of Telfair vs. Telfair, proceeds upon that notice, and that the decree of that Court should stand for titles. 1 Brev. 204, Act 1784. 2 Des. Rep. 276, Telfair vs. Telfair. It is said, that the execution of titles by the Master, under a decree of the Court, or on sale made by him is improper. Mr. F. had been at this bar for forty years, he found the practice so when he came to the bar, and if it be an usurpation, it was consecrated by time, and constituted the law of the Court.

It is said by the Attorney General, that the deeds executed under the decree of 1796, is a marriage settlement. Settlement is a generic term, marriage settlement is specific; a settlement may be made other than on the consideration of marriage, and a settlement may be made by will; this is not virtually a marriage settlement. Those settlements made before or at the the time of marriage, or after, in consideration of the marriage only, are strictly marriage settlements. The rights which accrue to the wife after marriage, are technically called her equity, and although the Court will compel a settlement before they will let in the husband's possession—this is a settlement of her equity, and not a marriage settlement.

1st. The whole of Mrs. Price's estate fell to her after the marriage.

2d. It was incumbered with a trust.

3d. The husband could not at law recover the possession. His remedy was alone in equity, and that Court would only give him relief on his making an adequate settlement. The consequence is, that he takes under the terms of the decree of the Court, and such is the nature of the wife's equity, that it so fastens on her equity the estate, that it is inseparable from it. Philips vs. Bridges, 3 Ves. 127. 9 Ves. 17. 5 Do. 170. Clancy, 188.

The counsel for the motion, to save Mr. Ford the necessity of arguing the questions relative to the claim of Mrs. Price to the lands, conceded, that by the death of Price the husband, the fee remained in the wife, and they disclaimed any claims upon either of the tracts of land.

Mr. Ford.—Mrs. Price took possession of the negroes by

her trustees under the deed of separation of 1812, and remained in the exclusive possession of them for more than five years. If they did go into possession of the husband afterwards, it was upon a hire of $2000 per annum, and his possession must be regarded as the possession of the wife. During a part of this period White was the factor of the trust estate and he must have known that she held to her own use.

The settlement of 1796, is preserved by the deed of separation of 1812, and it must be construed as a part of it. The legal estate was in Smith, the trustee, and consequently the statute of limitations would have barred even Price himself, and necessarily his assignees. Again, this deed of separation is not within the purview of the Registry Act.

So far from being a marriage settlement, it operates as a divorce or separation of the husband and wife. Besides, the literal reading of the Act only subjects the property to the payment of the debts of the person or wife on whom the settlement is made. 2 Brev. 45. And strange as it may seem, a similar act has received that as a judicial construction. 5 Cranch, 154, 164. The possession of a husband, executor, &c. is not such a reduction into possession as will conclude the wife's equity. 3 M'Cord, 52. Price's possession was as administrator of her father. His own assignment, or an assignment by operation of law, would not divest the wife of her equity. His assignees could not therefore be in a better situation than himself. He was bound by the deed of settlement, though not recorded, and so are they. Clancy 271, 134, 252. 4 Ves. 90. Roberts 291. 11 Pr. Will 458.

A mere equitable interest cannot be taken in execution on fi. fa. at the suit of a creditor. Cooper 432, 706. 8 Term 521. 8 East 366. Price's interest was purely equitable—he could only have come at it in equity, and he would have been compelled to make a more favorable settlement. If an estate accrue to the wife during coveture, and the Court decree a settlement of the wife's equity, it is secured from the creditors of the husband. Clancy, 196 211-2 189. The husband cannot change or assign his wife's equity, even for a valuable consideration, or in payment of his debts, without an adequate settlement on her. 4 Bro. C. C. 135. 5 Johnson C. R. 464. Kenny vs. Udall, 6 Johnson C. R. 25, 178. 8 Wheat. 239. And when the husband has got the

possession by improper means, the Court will decree him a trustee to the use of the wife, and the Court will protect a settlement made under its own (Clancy 38-9-40. 2 P. W. 316. Roberts on Tr. 281-2. 2 Atk. 561.) authority; and if the husband make such a settlement of the wife's equity as the Court would impose, it will be good against his creditors. Clancy 491-2. Price, the husband, obtained the possession of the property on the faith and assurance that he would make the settlement required. The Court itself ordered it; and it would be unjust that this should operate to exclude the wife.

King, same side.—The books do not furnish any description of what shall constitute a marriage settlement. Roper, Husb. & Wife 306. 4 East. 59. 18 Ves. 100. 17 Ves. 271. Ambler 182.

The law recognizes two sets of marriage settlements—those made before or after; but they must be on the consideration of the marriage, to constitute them marriage settlements, and that consideration renders the deed valid, even against creditors. A mere voluntary settlement to the use of wife and children is void as to creditors, and cannot therefore be regarded as marriage settlements. 4 Cruise 383. Tit. 32, ch. 22, p. 42. Ball & Beatty 49. 2 Des. Rep. 204. It follows that deeds of the latter description do not come within the purview of the registry Acts, as marriage settlements. 1 Des. Rep. 401, 305, 437. 2 do. 254. 4 do. 227. Harp. Eq. Rep. 190. In all the cases of post marriage settlements, it will be seen that they refer to a portion or some other good consideration and not a mere voluntary settlement. 2 Ves. 304, 315. But suppose that a stranger, as the father, covenants with the husband to pay money, or do any thing else in consideration that the husband would settle an estate of which he was possessed, to the use of the wife and children. Is this a marriage settlement? Certainly not. It is a purchase for a valuable consideration. So, if as in this case, the husband, in consideration that the executor or trustee will deliver up to the husband the estate held in trust for the wife, he would make a settlement on the wife. This is not a settlement in consideration of marriage, but in consideration of the surrender of the trust estate.—But was it ever yet heard of that a settlement made under the decree of the Court, was a marriage settlement?

The Court of Equity will, if the situation of the wife require it, give the wife a third, half, or even the whole of her equity, in exclusion of the assignees of a bankrupt. Mad. 376, 362. 2 Vern. 96. 1 Atk. 192. 1 Cox, 153. 3 Mer. 236. If the husband, therefore, voluntarily do that which equity would have compelled, and which would have bound his creditors, will the Court say that she is in a worse situation? 1 Des. Rep. 113, 567. A settlement made by the husband for the use of his wife and children, although not recorded, was held good against creditors even without notice. Hudnal vs. Teasdale, 1 M'Cord 227-8. A marriage settlement, though not recorded, is good against creditors with notice. 2 M'Cord, 152, Givens vs. Bradford. Decree Book, 1327, May vs. Simons, 168. 12 Ves. 67.

The statute does not vest the use in personal chattels. It follows then, that the legal estate was in the trustees, and the liens of Price's creditors could not attach upon it. The answer of a co-defendant, a privy in estate is evidence.—9 Wheat. 739, 831-2.

The answer of Price states, that Mrs. Price was neither party, nor was she examined in the case decided by the decree of 1796, (2 Sch. & Lef. 484. 8 Ves. 164.) and was not therefore bound by it.

She is not bound by the recitals in the deed of settlement and separation—a recital proves nothing. 2 Johns. C. R. 210-1. Co. Lit. 352. b. 3 Ca. in Ch. It is admitted for argument, that the rule is, that a decree is not notice to a purchaser; but it has been no where determined that a creditor stands in the situation of a purchaser. It is said that decrees are upon the same footing as judgments at law: and every one knows that judgments at law bind lands, even in the hands of a purchaser, without notice. Sugden 557. It may be said, that this is no decree, because it was not enrolled, and therefore not notice. The enrollment of decrees has never been in use in our Courts as a general practice. The Courts of Equity act in rem; and if so, the decree of 1796 fixes the rights of the parties, and is notice to creditors. 4 John. C. R. 619, 633, 609, 614-5. 1 M'Cord C. R. 517.

In anticipation of any argument which may be raised on the deeds of 1812 and 1813, on the ground that they are void, as tending to the deprivation of husband and wife. The

laws of England are opposed to this conclusion, and there is no question that those contracts have always been enforced and allowed in this State. The distinction is, that Equity will not enforce contracts of this sort between the husband and wife, except through the agency of trustees. 1 Mad. 383-7-8. 3 Meriv. 268.

While the defendant has sold a part of the negroes secured by the settlement of 1813, and according to the rule in Equity, complainant has a right to claim an indemnity from him. 2 Mad. 148-9. 2 Bay 89.

Hunt, in reply.—1st. Is the deed of 1796 a marriage settlement? If so, then it is void for want of recording. If it was not, then recording was unnecessary.

The rule in Equity is, that if the husband can get at the wife's fortune without the aid of the Court, the Court will not interfere, and the intervention of trustees makes no difference. 1 Mad. 172. 2 John. C. Rep. 206. The distinction between executed trusts and those that are not, consists in the nature of the trust. If any thing requires the active agency of the trustees the use is not executed, and the legal estate remains in him; but he is a mere passive agent, the law executes the trust eo instanter, and the rule is the same as to real and personal estate. Burgess vs. Wheat, 1 Eden Rep. 195, 223, 249, 36. 1 Ves. & B. 187. 5 Mad. Rep. 232. 1 Jac. & Walker, 559. 1 Vern. 7 cited, 2 Atk. 421.

2d. Is the limitation over in Philip Smith's will void or not?

This depends on two circumstances; 1st, whether the exemption for the payment of debts, and the limitation of, to the heirs of the body, is too remote. The restriction with regard to the liability for debts is inconsistent with the right of property, and therefore cannot stand with the bequest of property in the thing.

3d. Does the decree of 1796 bind the estate as to creditors?

It is admitted that lis pendens is notice to purchasers, but it is denied that decrees are so, or that they bind the estate. Equity acts only in personam, and not in rem. The proceedings in rem, are an usurpation; but admitting that usage has sanctioned it, the right to proceed in personal is not taken away. They did proceed in this case in that way,

and the proceedings must be governed by the appropriate rules. Yearnly vs. Yearnly. 3 Ch. Rep. 48. 2 Ball & Beatty 169. 1 Ch. Ca. 152. 1 Ves. 496. 19 Ves. 583. Prec. in Ch. 279.

4th. The deed of 1796, made under the decree, is then the act of Price. It is a marriage settlement, and ought to have been recorded. The considerations recited are, that of marriage and a fortune accruing. If it is not a marriage settlement, then it is without consideration and therefore void.

5th. As to the deed of separation of 1812. Price was in debt at the time of the execution of this deed, and unless it had marriage for a consideration, which would make recording necessary, then it was voluntarily and void. If separation was the consideration, it is void as being against marriage. At law, if the setler remain in possession of chattles sold so long as to hold himself out as the owner, and gain credit on them, creditors' rights attach. It is a legal fraud. Price remained in the exclusive possession of the slaves given to the children, and according to this rule are liable for debts. The negroes in possession of Mrs. Price are in no better situation. The husband and wife cannot separate their identity—they remain one in law, notwithstanding the deed of separation, and her possession was his. How were creditors to know that they were separately entitled under the deed. But the husband Price resumed the actual possession, and paid an annuity. How were creditors to know this?

Curia per Colcock, J. In reviewing the decree of the Chancellor, in this case, it will not be necessary to make any previous statement of the facts, for they are sufficiently stated in the decree and brief. But I will only refer to such of them as may be necessary to the argument. The case depends in a great measure on the construction of the act of 1785, requiring marriage settlements to be recorded within three months of the time of their execution; I shall therefore in the first place state the views of the Court on that point.

On the one hand it is contended that the act embraces only such deeds as are founded on the consideration of marriage, that is, either made before marriage but in contemplation of it, or after marriage in consequence of articles entered into, or a bond given to make the settlement.

On the other hand, it is said the act embraces all settlements, whether made on the marriage, as a direct consideration, or at any subsequent period of time by a husband on his wife, *either of her property, possessed before marriage*, or of his property or a part, or the whole of both. And I am free to confess that I have had great difficulty in coming to a conclusion on the subject, and that I have considered it as one of first importance to the community.

On the marriage of a woman, her property becomes her husbands. But the law does allow a separate interest to be created. Inasmuch, however, as even in such cases the property usually remains in the possession of the husband, and of course under his control, it is impossible that the community can distinguish between that which belongs to the husband, and that which is the separate property of the wife unless there be some public place of record in which the deed which creates such interest should be found. To effect this purpose, then, was certainly the great object of the Legislature in passing the recording acts. The term used, seems to have been intended as a general one, and is comprehensive enough *to embrace both kinds of settlement*; and although I have not been able to find any thing in any of the books like a definition of a marriage settlement, I think it is clear that they seem to favour the distinction which is contended for by the complainants' counsel. Mr. Atherly, in treating on the subject of settlements, does speak of some made after marriage, as "Marriage Settlements," but it is only of those which have been so made in consequence of articles previously entered into. And when he pursues the subject and comes to speak of other settlements made after marriage, he uses the terms post nuptial settlement, as if in contradistinction to marriage settlement, *eo nomine*. We are then to look to the mischief which the legislature intended to guard against, and see if it does not or may not exist as well in regard to the one kind of marriage settlement, as to the other, (pursuing the distinction made in the argument,) and I think but little observation is necessary to shew that it is as important to the interest of the community, that settlements made after marriage, though arising out of the connexion, should be recorded, as those made before, and in which it may be said marriage is the direct consideration. All property which comes to the husband during the cover-

ture, from whatever source or at whatever time, may be considered as much the property of the husband, as that which he acquires on his marriage by his wife, and if this could be secretly conveyed to a wife, a deception might be as well practiced as it may be by a secret conveyance of that which she may have before marriage. But it is replied that the rights of creditors were already sufficiently protected by the statute of Elizabeth, and the common law in such cases, and therefore it was not intended that the act should embrace them: for if a man who is in debt settles his property on his wife, it may be avoided—and if he be not in debt, no injury is done. This is certainly a strong view of the subject, and would be conclusive if it covered the whole ground. But it is obvious that a settlement, such as those we are now considering, may be made of a wife's equity, which the creditors could not touch; but if the deed be not recorded, a further indulgence, or even a further credit might be given on the faith of the property, and so too in the case of a man who is not in debt at the time of making the settlement. He might obtain a credit on the faith of the property which is seen in his possession, which might be prejudicial to the rights of others; and indeed it has been questioned whether under any circumstances, such settlements were not injurious to the interest not only of the community, but of the parties themselves, by encouraging indolence and luxury in the husband, and exciting expectations or hopes in the creditors, which are for the most part disappointed.

Upon the whole, I am satisfied that *post nuptial settlements are within the mischief* which the Legislature intended to guard against, by the recording act, and *therefore to be considered as embraced within its provisions;* and this construction of the act would put an end to the claims of the complainant, but for some peculiar circumstances which have been relied on by her counsel, in the very elaborate argument which he has made; anticipating the possibility of such a construction as we have given to the act, he contends, as to the first deed of the 5th March, 1794, that if the deed is void, the parties are to be considered as standing in their original rights, and the 25 negroes mentioned in the deed and purchased with the money left by her grand father, must be considered as held by the executor, her grand un-

cle, in trust for her; but this is at war with both the facts of the case, and the law arising on them. They were not held in *trust* for her, and were delivered to the husband on the impression that the deed would secure them to her.—Once they were reduced to possession, they were absolutely the property of the husband, and as to them, therefore, we concur with the Chancellor that they must go to the creditors.

This argument was also urged as to the property left to the complainant by the will of her grandfather. That, it is clear, was given to trustees for her use—but by the decision of a competent tribunal, it was decided that she took an absolute estate in the personal property, which vested in the husband, who by the decree of that Court, was ordered to make a settlement. I say was ordered to do so; for this is putting it in the strongest light, for the complainant; and even then I think the deed must be recorded.—

The Chancellor, however, seems to put the claim of the complainant under the deed of 1812, on two other grounds, on which we think it may be supported—the first of which I shall now take notice of, but the latter will be remarked on hereafter. He says the Court had no right to interfere with the will of the father, as the property was settled on her by that will, by being placed in the hands of trustees, to be held for her benefit. I have before said that this was the decision of a competent tribunal, and therefore we could not now disturb it; but if it were now open for consideration, we should give the same construction to the will.—And I cannot doubt that although the Court may have refused to interfere, yet that as all the parties were before them, and the trustees consenting and relinquishing their trust, the Court had power to order the settlement. But on this point it was urged by the complainants' Solicitor, that as to the deeds made by order of the Court of Equity it is not necessary that they should be recorded for the decree of the Court, was notice to all the world. The same view of the subject is taken by the Chancellor in his decree. No direct authority has been produced to support this position, and the cases to which we have been referred, do shew very satisfactorily, that the decrees of the Court of Equity, are considered in the distribution of assets, as equal to a judgment at law. But they go no further. The case from

4th Johnson C. R. 634, of Brown and Thomson, is to this point, and the great case as it is called, of Morris and the Bank of England, establishes no more. In a contest between some creditors who had obtained judgments at law, Sir Joseph Jekyll, the Master of the Rolls, directed that the decree creditors, as being prior in time should be first paid.

The case of Coit, adm'r. vs. Owen, Ex'or. 2 Des. Rep. 456, determines no more *than that a decree formerly made, cannot be revised by a subsequent decision;* and it lets in some creditors to be paid out of a fund subject to their debts. The case of Woodrop vs. the ex'or. of Price, 3 Des. Rep. decides no other matter than that the decrees of the Court of Equity, are put on the same footing as judgments at law.

But if the power of the Court of Equity, when acting directly on the property, be admitted in the fullest extent, it cannot apply to this case; nor could this decree by any possibility, operate *practically* as a notice. For the Court did not act on the property except through the husband.—*They ordered him to make a settlement of a certain portion of the property.* Now suppose one should go to the records of the Court to obtain information. He would find an order by the Court, that Mr. Price should settle so many negroes and so much land on his wife, but that would not enable him to determine *what negroes or what land was settled*, he would still have to go further and would naturally *be led to the recording offices.* I am not aware of any case decided either in the Court of Equity or Law in this State, *where any thing short of direct notice has been considered as equivalent to recording;* and I am one of those who think the Courts went too far *even in admitting that;* for my experience has satisfied me that it leads to perjury, besides being a departure from the positive requisitions of a legislative act, which it must be admitted is at all times dangerous, and invariably produces litigation. Wherever a settlement is made by a Court of Equity, I think it should make a part of the order, that the deed be immediately recorded, for it certainly is an interference intended for the benefit of the wife, and therefore should be completed by the officers of the Court.

The Court however, coneur with the Chancellor on the last ground, on which he rests the complainants right to the

negroes intended to be conveyed by the deed of 1812, and contained in the schedule annexed to that deed, *as they passed directly into the hands of the trustee with the consent of the husband*, and before he had reduced them to possession and remained in his possession for upwards of five years; and as this was known to the principal creditor, who was the factor for both husband and wife, such possession is considered as being adverse to the claims of both husband and creditors, and consequently vests the property in her. No one could be defrauded by this arrangement, for no credit could have been given on the faith of this property. The decree is therefore *affirmed* in this particular, but must be in other respects *so reformed*, as to accord with the views which are herein expressed, of the rights of the respective parties. And as the counsel for the defendants have abandoned all claim to the *real estate*, it is only necessary to say, that the Decree of the Chancellor *as to that, be affirmed*. As some of the conveyances disposed of her estate and interest, particularly the deed of the 4th May, 1813, whereby she conveyed her lands to a trustee for the purpose of conveying them to her husband, Thomas W. Price, it is proper that all such deeds made by her should be cancelled, that they may not embarrass her title at law. It is therefore by the consent of all parties, Ordered and decreed that all such deeds, and especially the deed of the 4th May, 1813, be cancelled.

After the delivery of this opinion, it was contended that the claim to the Toogadoo Plantation must be excepted, as standing on different grounds from that to the other lands, and the counsel on both sides submitted their arguments in writing, which being duly considered, the Court are unanimously of opinion from a review of the origin and all the circumstances relative to the Toogadoo Plantation, that it is the rightful inheritance in fee simple of the complainant Charlotte Price, and that consequently she is entitled to the immediate possession.

Nott, J. I concur in the opinion which has been delivered in this case, in relation to the deeds of 1794 and 1796. I consider those as marriage settlements, or contracts within the meaning of the act of 1784, *and therefore void for the want of recording. I differ in opinion with regard to the*

deed of separation, I think that directly the reverse of a marriage settlement, and did not therefore come within the provisions of that act. Besides the wife had the separate and exclusive possession and enjoyment of the property, of which Mr. White had notice, as he was her factor.—The children may be considered as standing in a different situation. The property given to them continued in possession of the father. He continued to receive the rents and profits of the land, and the services of the negroes, to use and enjoy the property, and to exercise every act of ownership over it, as if he had the sole and exclusive right. It might therefore very well be considered as fraudulent against creditors.

With regard to the Toogadoo Plantation, it cannot, in any point of view be considered as a marriage settlement. It was an actual purchase, or exchange by the trustees for the use of the wife. It was not necessary, therefore, that it should have been recorded in the office of the Secretary of State. It was sufficient that it was recorded in the office of the Register of Mesne Conveyance, where all deeds of that sort are required to be recorded. I do not think that we have any thing to do with any other deeds, and particularly where other persons are concerned. I am opposed, therefore, to interfering with them by cancelling, or in any other manner. I am also further of opinion, that it does not belong to this Court to determine in what order the debts shall be paid. There is no such question involved in the case, it was one, therefore, in which we ought not to express any opinion.

It was Ordered, Decreed and Adjudged, that the injunction heretofore granted in this case, be dissolved. And the order for the appointment of a receiver, be discharged. That the negroes in the hands of the receiver or any of the parties to this suit, which are hereby declared liable to the creditors of Thomas W. Price, be sold by the Master of this Court for approved indorsed notes at ninety days, and that he do pay over the proceeds to the assignees, Mr. Hunt, Dr. Burgoyne and Mr. White, to be by them distributed according to the provisions of the Insolvent debtors' act.—And the said assignees shall collect and reduce to money the other property assigned to them, and apply the same as

above. And it is further ordered, that Mr. Cattel, the receiver in this case appointed, do forthwith deliver to the said assignees the funds in his hands, and the crop and other property and account before the Master for the sums received by him. That the expenses of management be first paid and satisfied, out of the said funds, and next, the allowance of $2000 per annum to Mrs. Price, the same to be paid and allowed to her, for the year ending 31st October, 1828. And that the Master do ascertain, in case of difficulty, how many and what negroes are intended to be secured to the sole and separate use of Mrs. Price, by the deed of 31st Dec. 1812, and how many and what negroes which are subject to the creditors of T. W. Price came to the hands of the receiver, or any of the parties to this suit, and that they account for them accordingly,—if not produced to be sold when required, or be attached for disobedience. And that the assignees do deliver to Mrs. Charlotte Price, the plantation called Toogadoo, which it is decreed is the property of the said Charlotte Price, as well as the rest of the land; and lastly that the costs be paid out of the funds in the hands of the assignees.

Decree modified.

TRUST ESTATES.

IN CHANCERY—JAN. 1829.

JAMES H. BOGGS, WILLIAM OLIVER, and WALLACE & M'FIE, *vs.* HARRIET REID, and D. RUMPH, and GEORGE BUTLER.

The duty of a trustee is to hold and employ the property for the benefit of the *cestuique trust;* but he is not authorised to encumber it with debts.

Persons who deal with him must do it upon his individual credit, and not upon the credit of the trust estate.

Having the management of the estate, necessarily implies a power to provide for its maintenance and support. He is authorised, therefore, to pay the doctors' bills, and taxes—to purchase plantation tools, and the necessary supplies for the slaves, &c. and to reimburse himself out of the proceeds of the crops.

The trustee reimbursing himself, is a matter between him and the *cestu-*

ique trust alone, the creditors having nothing to do with it. They are the creditors of the trustee and not of the estate.

The trustee himself is not authorised to pledge the capital, but must keep the expenditures within the income.

If the estate is unproductive, and in danger of consuming itself, he must apply to the Court for advice, and may, under its direction, convert it into other property, or make such other arrangements as may remedy the evil.

There are cases when the Court will permit a part of the property to be sold to save the rest.

Cases of urgent necessity may exist where there may not be time to apply to the Court, in which a trustee may and must act upon his own responsibilty, in which he will be indemnified out of the trust estate; as in case of the burning of a house, destruction of a crop by deluge, and the like. It is only in such cases, that the estate will be allowed to be encumbered, and the Court will judge of the necessity.

The grounds on which the cases heretofore decided were founded, do not distinctly appear.

The cases of Cater vs. Eveleigh, James vs. Mayrant, and Montgomery and Eveleigh, commented on.

The Court may allow the creditor the same privilege of being remunerated out of the income, as would be allowed to the trustee, for necessary disbursements.

Where by a marriage agreement, an estate, real and personal, was conveyed to trustees in trust, to permit the husband and wife to receive the profits during their joint lives, and if the wife survived, "in trust that they should assign, transfer and pay over, all the said property to the wife absolutely," at the death of the husband, the wife surviving, the trust estate terminates, and the income in the hands of the widow will not be subjected to supplies furnished during the life time of the husband, though the income during his life time, might have been so subjected, if application had been made to the Court.

Income in the possession of the husband, at his death, more than necessary for the current expenses of the family and plantation, might be subjected to reimbursements for necessary supplies.

The bill stated in this case, that on the 13th of November, 1821, John Reid and Harriet Hart, being about to intermarry, entered into a marriage contract, by which the property of said Harriet, consisting of lands and negroes, and other personal property, specified in said deed, was conveyed to D. Rumph and G. Butler, subject to certain trusts, &c.—That the said marriage was afterwards solemnized. That the property went in consequence into the possession of John Reid, who superintended and managed the same, and made all contracts in relation thereto; and purchased such articles as were necessary for the estate and the cestuique trust; and employed overseers and sold the crops; either by virtue of the authority given in the deed, or by the di-

rection of Rumph and Butler, the trustees; or that he acted as agent of the trustees. That being possessed, &c. he purchased of the complainant Boggs, same mules for the estate, and gave his note therefor, on the 9th October, 1826, for $225. That he took possession of the mules and carried them to the plantation, where they have been used and where they still remained. The bill further stated, that Reid employed the complainant, William Oliver, as overseer on the trust estate, and gave his note for the wages, on the 1st of January, 1826, for $ 165, for the services of the year 1825. The the note not being paid, he sued Reid, and recovered a judgment at law; but no satisfaction had been made; and complainant was put to costs, &c.—That Reid had no other plantation than the trust property; and that he departed this life sometime in the year 1828, *insolvent*, and that no means of payment remained, *except from* the trust property, for the benefit of which the debt was contracted.

The complainants, Wallace & M'Fie, stated that John Reid being in possession of, and managing said estate, purchased sundry articles for the estate, and for the cestuique trusts, in the year 1825 and 1826, which were carried to the estate, and there used. That on the 7th of March, 1826, Reid closed the account of the year 1825, and gave a draft on his factor for said estate, for $ 173 76, which was not paid, but protested and returned. That thereupon complainants charged the same to the account of John Reid, and that this account, and also the articles subsequently purchased for said estate, and that of cestuique trusts, amounted, on 1st January 1827, to $ 215 73, for which Reid gave his note; on which suit was brought, and judgment obtained, but the execution was returned *nulla bona.*

The bill charged, that as the marriage settlement secured the property to Reid and wife, during their joint lives, and as these debts were contracted during their joint lives, the trust property was peculiarly liable to pay them. That independant of the general charge, that Reid died insolvent—that there were many executions returned nulla bona against him; and that he was taken by virtue of a capias ad satisfaciendum by some plaintiff, and that he assigned all he possessed, which was not sufficient to satisfy the claims entitled to distribution. That they applied to said Reid and to

defendants for payment, without success. The bill prayed discovery of all the facts; and that defendants might pay the debts, interest and costs, out of the estate or otherwise; and if necessary, that they should account before the Commissioner for that purpose; and asked for general relief and subpœna.

The answer of Mrs. Reid admitted the deed and the marriage, and that Mrs. Reid and husband took possession of the property, and received the proceeds; that John Reid was the established and only manager, and sold the crops, until about two years before his death, being arrested on a ca. sa. he assigned his property, and also his interest in the trust estate, to R. P. M'Cord, who took possession and sold the crops for the benefit of the judgment creditors, amongst whom were most of the complainants, and submitted whether any demand could be made upon the trust estate, until it was ascertained to what extent this fund was liable, in discharge of complainants' debts.

The answer admitted, that J. Reid purchased the mules for the trust estate, and gave his note, that they were used for the said estate. That Oliver did oversee, and that the note was given for his wages, &c. She could not say for what purpose Wallace & M'Fie's account was created. The articles appeared not to be such as were for the estate. That it appeared that a large portion were ordinary family supplies, and some for which this Court cannot hold the trust estate liable. When the Court shall have settled the principles upon which her estate was liable for debts created by her last husband, she was willing that such portions of this account as the Commissioner might think came within these principles, might be paid. The answer submited, that if the estate was made liable for these debts the primary object of the settlement might be defeated. She understood there were many debts, enough to consume almost the whole estate, &c. and prayed to be dismissed with costs, &c.

Preston, for the defendant, contended that the trust estate was not liable at all. *Chappell*, for the complainant.

DeSaussure, Chancellor.—This case involves a question which is too frequently occurring before the Court.—The decisions have been numerous, and almost every case has some peculiar or diversified circumstances, so that hardly any two of them are exactly alike.

The precise facts are stated in a few paragraphs. A widow lady, named Harriet Hart, being about to intermarry with Mr. John Reid, and being possessed of a good real and personal estate in her own right, a marriage contract or settlement was entered into between them, with the usual intervention of trustees, by which her property was conveyed to George Butler and David Rumph, *in trust*, that they would permit the said John and Harriet to receive and enjoy the profits and proceeds of the above mentioned property, (except three slaves, who are named) during the joint lives of the said John and Harriet: And if the said Harriet should survive the said John, *in trust*, that they [the said trustees] should assign, transfer, and pay over, all the said property, and the issue of the negroes, to the said Harriet, absolutely, and unconditionally. But in case John Reid survived his wife, and there was no issue of the marriage, then the estate to go to said John Reid absolutely. If there should be issue surviving said Reid, then to such issue.

The marriage took effect; and Mr. John Reid died on the day of ; in the year 1828. There was no issue of the marriage; so that Mrs. Reid is entitled to the whole estate, transferred to her unconditionally and absolutely.

During the coverture, Mr. John Reid was in possession of the estate, and received and applied the rents and profits as he pleased. He contracted debts with various persons; among them, with James H. Boggs, one of the complainants, from whom he purchased certain mules, for which he gave his own note of hand, for two hundred and twenty-five dollars, on the 9th day of October, 1826, payable on the 1st December following. This note has no reference to the trust estate; but it is charged in the bill, and admitted in the answer, that these mules, for which the note was given, were purchased for the benefit of the plantation, and were placed thereon by John Reid, and have never been removed. John Reid also employed Mr. Oliver, another of the complainants, as an overseer on the plantation, for the year 1825, and gave him his note of hand on 1st January, 1826, for one hundred and sixty dollars, expressed to be for his services as overseer, during the year 1825.

It was conceded by the answer, that Oliver was so employed, and performed the service.

John Reid also contracted another account with Wallace & M'Fie, commencing in Jan. 1825, and ending in March, 1826. The charges were against John Reid in his own name, and without any reference to the trust estate. A draft was taken by Wallace & M'Fie, from John Reid, on Conner & Wilson, for the then amount of the account, which was returned protested. This account, amounting to two hundred and fifteen dollars seventy-three cents, (including some charges on protest and notice,) consisted of articles, such as are commonly used and consumed in a respectable family, and for use on a cotton plantation, except about twenty dollars for spirits and wine, &c. These are the claims now before the Court, on which it is stated in the proceedings, judgments have been obtained at law. But that they have not been, and cannot be satisfied, as John Reid died in the year 1828, insolvent, leaving no property of his own. It is further stated, that several executions having been returned nulla bona, John Reid had been arrested under a ca. sa.; and that he had sworn out of goal, and assigned all his property, and his interest in his wife's property, to Mr. Russell P. M'Cord, for the benefit of creditors; and that he received the rents and profits of the trust estate for two years, and applied them as he thought right; but these complainants have not received payment from him or any other source. The complainants, therefore, seek payment of the trust estate.

In the argument of this cause, the counsel for the complainants contended, that the doctrine of marriage settlements, and trusts for the benefit of families, is mischievous to creditors and to the community, and dangerous to the peace of families; and that it ought to be discouraged, and the estates made liable as far as possible. The Court has little to do with the policy of the laws. Its duty is to administer them, as it finds them established. The doctrine and the practice of marriage settlements, have been in use in this country from its first settlement, and it is not for the Court to discourage them. It is for the Legislature to decide on the policy: and that has been done by statutes prescribing that marriage settlements shall be recorded within limited periods, in order to give them validity; and when so recorded, are good and effectual, according to their respective provisions. These acts have given them a perfect-

ly legal sanction, in addition to the force and effect which they had from the long established use of them prior to the recording statutes. Nor is the policy so questionable, as it is supposed to be. The protection of families, and care of their comfortable subsistence and proper education, is as much a measure of sound policy, as the payment of creditors. In most civilized countries, the estate of the wife, is more fully protected by the general law, than they are in England or in America, by special contracts and marriage settlements. And there is no injustice in it. Surely the woman about to marry and to rear a family, useful to the community, has a just right to say, I have property which I wish protected for the benefit of that family. She owes no debts, (for if she does they must first be paid,) and in conveying her own property to trustees, for the benefit of herself and children, she does no more than exercise a right of control over her property, common to all proprietors; nor have creditors of her husband a right to complain; for unless she married him, they could not have the shadow of claim on her property. And if she marries on condition that her property shall be protected, her husband's creditors have no reason to complain, provided they are put on their guard, and are not led to give credit to the husband on false grounds. This is guarded against, by our statutes which require marriage settlements to be recorded within limited short periods.

The first question then in this cause is, was the settlement in question recorded, within the time limited by law, which is three months. The copy of the settlement furnished me, bears date the 13th November, 1821. It was marked on the back, "*proven 30th January*, 1822." But the certificate of the proper officer, that the copy, is a true copy from the records, does not state when it was recorded.—This was a serious dilemma in the way; for the entry of "*proven January*, 1822," on the copy settlement, does not establish that the original deed was then deposited to be recorded, or was actually recorded. The probate is often made before magistrates out of the office; and the deposit or the recording, may not occur till long after; sometimes never. In the absence of the regular proof, I caused the book of records to be searched; and the search has resulted in the disclosure of the most extraordinary carelessness in

the office, at the time in question; for it appears that from the 16th November, 1821, to the 22d January, 1822, the time of recording a great number of deeds, comprised in thirty pages, has not been mentioned. Before and after these periods, the time is mentioned when every deed is recorded; and as the marriage settlement we are considering, is recorded in the intermediate space of time, between those two dates, it appears to have been recorded within the three months, prescribed by law; and is valid and effectual to its purposes.

The next question is, whether the complainants are entitled to relief, under the provisions of the deed? We have seen that the trustees were bound to permit John Reid and Harriet his wife, to receive and enjoy the profits and proceeds of the above mentioned property (except three slaves) during their joint lives; and if Harriet Reid survived her husband, then the trustees were to assign, transfer and pay over to her, all the property and the issue of the slaves, absolutely and unconditionally. The deed then, placed the *income only* of the estate, at the disposal of the husband and wife, during the coverture. Of this provision all persons were apprized in the manner prescribed by law, by the recording; so that they might deal with the parties accordingly, if they chose to deal at all. So far as we have gone then, it is obvious, that the Court could not subject the body of the trust estate, to the claims of the creditors.

Bnt another question is made, which must now be considered. It is argued for the complainants, that the several articles furnished, were for the benefit of the trust estate, which ought therefore to be subject to the payment. And it is urged that the Court has already decided in several cases, that the trust estate should be subjected. This is certainly true. In the case of Cater vs. Eveleigh, the Court decreed the estate to be liable for a saw gin, procured by the husband, father of the family, for the trust estate. In another case, respecting the trust estate of Eveleigh, 1 M'Cord's Chan. Rep. 267: again, the Court subjected the estate for supplies of corn, furnished for the subsistence of the slaves. And in other cases trust estates have been subjected to the payment of the wages of overseers employed to manage these estates. In all these cases the Court has gone on the principle that these were es-

sential to the well being of the trust estate. The slaves might perish if not supplied with corn or clothing; the cotton might lay useless without the machinery to prepare it for market; and this is strong ground, on which to place the subject. Yet it is dangeours; for it is difficult to assign the precise limits to this responsibility. It may be abused to the destruction of the body and substance of the estate itself, by the extravagance or mismanagement of the husband. I acknowledge that I feel great difficulty on the subject; and should be much gratified and relieved, if, on an appeal in this case, some general rules could be laid down for my government in such cases. One thing, however, is clear, that if the husband is allowed to expend all the income on other objects, and to leave such demands as are founded on real supplies for the manifest benefit and reasonable improvement of the trust estate, entirely unpaid, until his death, and then these creditors are allowed to come for payment on the body of the estate itself, all the purposes of protection, intended to be given to such estates would be defeated. I see no remedy against this evil, but to examine strictly into the nature of the supplies to the estate, to ascertain whether they were indispensible to the estate itself, and not merely for the usufructuaries personally.—And also to require that even such creditors should use all proper diligence to obtain payment out of the income of the estate, from year to year, as such indispensible supplies were furnished.

To apply these views to the present. There is no doubt that the mules supplied to the trust estate were a durable benefit, perhaps as much so as a saw gin; for they last as long, and are extensively useful. It seems the mules were sold by Mr. Boggs to Mr. Reid, in the autumn of 1826; and he gave his note on 9th October, 1826, for two hundred and twenty-five dollars, payable on the first day of December following. The mules were placed on the plantation of the trust, and worked on it, and now remain thereon, and the present cestuique use, or rather absolute owner, has the benefit of them. I think this case comes clearly within the principles of the decided cases; and the mules must be paid for; especially as the creditor seems to have pursued his remedy with proper diligence, and endeavored to get payment, without success. It was ingeniously argued, that

this would be giving a lien on the mules, which the parties did not contract for. It struck me at first with some force. But on reflection, I am satisfied, it has not the weight ascribed to it. The question is, not whether Mr. Boggs has a lien on the mules—for that he certainly has not—but it is, whether the creditor, having supplied the trust estate with an article essential to its improvement, and which still remains beneficial to the present owner, is not entitled to be paid out of the trust estate, on the same footing with other creditors, standing on the same ground?

The next claim was that of the overseer for wages, for superintending the estate. This kind of claim has been repeatedly sustained by the Court; and as there has been no laches, but reasonable diligence used without success to obtain payment, during the life of Mr. Reid, it appears to me, to be just that the overseer should be paid by the present possessor of the estate, who was entitled to the income jointly with her husband, during the coverture.

The next claim is that of Wallace & M'Fie, for the payment of an account for articles furnished to Mr. Reid; in the years 1825, and part of 1826. On examining that account, it appears that nearly three fourths of the amount are for cotton bagging, negro cloth, &c. for the indispensible use of the estate. These appear to me to come within the principles, which have been recognized by the Court in its decisions heretofore made, on this anomalous and embarrassing subject. The remaining articles for general family consumption, do not come within the principles, and cannot be allowed.

It was properly argued for the defendant, that before she could be called upon for payment, she was entitled to have the crops of the time that the estate was held by an assignee, applied to the payment of the claims now made on her, unless otherwise legally applied. It will therefore be necessary to order a reference, that the Commissioner may enquire and report, if there be any part of the proceeds of those crops remaining, properly applicable to pay these demands. The assignee will doubtless produce the accounts of the receipts and expenditures, without putting the parties to the expense and delay of making him a party.—Should that fund be insufficient, then the deficiency must be made up by the defendant.

After a good deal of reflection, however, I am satisfied that the complainants have no right to touch the capital of the estate. The deed of settlement gave only the *income of the estate* to the husband and wife, during the coverture. That deed was recorded according to law, as a notice to all the world, of what interests the parties had in the estate. In giving credit, therefore, they could look only to the income; and to the income they must resort for payment.—Nor will the Court permit the whole of the present income to be taken from the defendant. She must be allowed a reasonable proportion for her maintenance out of it, and the remainder applied to the payment of the demands of the complainants.

On looking into the decisions in this State, on this subject, I find that this arrangement, which I propose to make, is not a new course. For in the case of Bethune and others vs. Beresford and wife and others, (1st Des. Rep. 174,) the Court, after deciding that the income of the settled estate was liable, to a certain extent, to the claims of the creditors, then suing, determined that the wife, from whom the estate was derived, should have a subsistence out of the income, and made a provision accordingly.

It is therefore ordered and decreed, that it be referred to the Commissioner to examine and report, the amount of the debts due to the respective complainants, according to the principles laid down in this decree. Also, that he further enquire and report, what was the amount of the income of the estate whilst it was in the hands of the assignee of John Reid, and what application has been made thereof; and whether any, and what sum remains applicable to the debts due the complainants.

And he is further directed, in case it be necessary to resort to the income of the estate in the hands of the defendant, to examine and report, what is the average amount of that income, and what proportion thereof would be a proper allowance for the support of the defendant, until the debts due the complainants should be paid out of the remaining part of the income.

From this decree both parties appealed. The complainants on the ground that the estate should be made liable, and sold for the purpose of satisfying their claims. The de-

fendants on the ground that the estate became absolute in Mrs. Reid, upon the death of her husband, and was not liable for debts incurred for the benefit of the particular estate.

Preston, for the defendant. It is conceded that a trust estate is liable for debts created by it. Credit is indispensable to its existence. The wants of the estate must be supplied, and in the absence of any other mode this must be resorted to. But this concession must not be extended further than the terms import. The tenant of a term, cannot charge the estate in the hands of the remainderman, for expenses incurred in rendering it useful or convenient to himself. Reid was tenant for life, and these all the proceedings show, are his own proper debts, and it never was thought that the trust estate except so far as he had an interest in it, was to come in aid of his liability. That estate is passed away, and can they pursue it in the hands of the present owner?

If she had sold or transferred it to another, could the creditors follow it? This is not a legal claim, it is founded in a supposed equity, which is raised when one has contributed to the improvement and preservation of the estate. If, then, we regard John Reid as the proper agent for the estate, yet these debts were contracted by the tenant for life, with a view to increase his own income. They are not, therefore necessary to the remainderman. Tenant for life, without impeachment, is bound to keep the premises in repair. 2 Atk. 283, Partretch vs. Powley. Tenant for life is bound to keep down the interest and to share with the remainderman a part of the principal. 1 Atk. 467; 1 Ves. 234. Reid purchased mules and they are found on the premises. If Mrs. R. has intermeddled with them, she may be liable as ex. de son tort, and not by this bill. A fire engine or cider press erected by tenant for life, goes to his ex'or. Dudly vs. Ward, P. W. 113. As to what debts the tenant for life may charge the remainderman. 1 Brown, 206, Jones vs. Morgan.

Chappell, contra, cited Cater vs. Eveleigh, 4 Des. R. 19; James vs. Mayrant, Do. 591; Montgomery vs. Eveleigh, 1 M'Cord's Ch. R. 267.

CURIA *per* NOTT, J. I concur in opinion with the Chancellor, that there is nothing in this case to excite our prejudices against the claim of the defendant. I am not aware of any system of ethics that forbids a woman from securing her own property for her own use, even against the creditors of a profligate or imprudent husband. It is enough that she is ordained to take him for better and for worse, and ought at least to be permitted to secure her property against the last alternative. But as is well remarked by the Chancellor, we are not required to decide upon the policy of the law, but to administer it according to its provisions. I also concur in opinion with the Chancellor, that this is an embarrassing question. But I am inclined to think that the embarrassment arises more from some loose decisions of our Courts, which we are now perhaps bound to respect, than from any intrinsic difficulty in the subject itself.

The duty of a trustee is to hold and employ the property for the benefit of the cestuique trust. Persons, therefore, who deal with him, must do it upon his individual credit and not upon the credit of the trust estate. Having the management of the estate, necessarily implies a power to provide for its maintenance and support. He is authorized therefore, to pay the Doctors' bills and taxes, to purchase plantation tools, and the necessary supplies for the slaves, &c. and to reimburse himself out of the proceeds of the crop. But that is a matter with him and the cestuique trusts, with which the creditors have nothing to do. They are the creditors of the trustee and not of the estate. And even the trustee himself is not authorized to pledge the capital, but must keep the expenditures within the income of the estate. If the estate is unproductive, and in danger of consuming itself, he must apply to the Court for advice, and may, under its direction, convert it into other property, or make such other arrangements as may remedy the evil; and there may be cases where the Court will permit a part to be sold for the preservation of the rest; and indeed, cases of urgent necessity may exist, when there may not be time to apply to the Court, in which a trustee may and must act upon his own responsibility, in which he will be indemnified out of the trust estate; such for instance as the burning of a house, the destruction of a crop by a deluge, and the like. And it is only in cases of that description, of the necessity of

which the Court will judge that he will be permitted to incumber the estate.

The duties of a trustee, therefore, are few and simple, and may be embraced in the few observations which have been made.

Our Courts, however, have gone one step farther, and in a few instances have subjected the trust estate to the payment of the debts of a creditor contracted with the trustee or his agent upon the faith of, or for the use of the trust estate. But the principles upon which those cases are founded, and the extent to which they were intended to be carried, do not very distinctly appear. And it belongs to this Court now to establish some principle and to give definition to the rules by which similar cases are in future to be governed. The first case, I believe, is that of Cater and Eveleigh, 4 Des. Rep. 19. In that case, Mr. Eveleigh, the agent of the trustees, had procured cotton gins for the use of the estate, and given his note for the purchase money. Mr. Cater the creditor, sued upon the note, and recovered a judgment upon which he sued out a ca. sa. and took the body of the defendant. He took the benefit of the insolvent debtors' act, and not having any thing to surrender, the debt remained unpaid. The defendant then applied to the Court of Equity, to be paid out of the trust estate, which was decreed by that Court. But I presume the Court meant out of the proceeds of the estate only, that is to say, that the trustee should first pay this debt out of the income, before he should pay over the balance to the cestuique trust; or in other words, that that debt should constitute the first charge on the funds in his hands, but not that he should break in upon the capital for that purpose. If that had been the intention, an order for a sale of the property for that object must have been obtained. The same observations will apply to the case of James vs. Mayrant, Do. 551. Though that Decree seems to be founded in part upon the peculiar circumstances of the case, which furnish no inference applicable to any other. The case of Montgomery and Eveleigh, 1 M'Cord's Ch. 267, is also one depending in a great measure on its own circumstances; and like the others it is only the income and not the capital of the estate which is made liable. And that liability is founded as much on the ground of fraud in the cestuique trust, as on the other

ground that the debt was contracted for the necessary supplies of the plantation. The Court might perhaps in either of those cases have directed a part of the estate to be sold to pay the debt, but it would not have done so without an enquiry into the necessity of the measure, and whether the estate would be benefited thereby. So that neither of those cases furnish any further or other inference than that the Court may allow the creditor the same privilege of being remunerated out of the income of the estate, as would be allowed to the trustee for necessary disbursements. Now to apply the principles of those cases, as I understand them, to the case under consideration; I think the trustees would have been authorized to apply the income of the estate to the necessary repairs and supplies of the plantation, such as work horses, plantation tools and provisions, as well as to the support of the family, and that the Court might, under the authority of the foregoing cases direct the application of the funds to those objects. The trustees could not give to Mr. Reid other or greater powers than they themselves possessed. It was his duty, therefore, to keep up the repairs, to provide all the necessary implements of husbandry and supplies for the plantation, so that the estate should not be wasted, or its value impaired. Whatever else was made after fulfilling the objects of the trust, would have been his own, to be disposed of as he thought proper. But he had no authority to incumber the estate beyond the income, nor to subject it to the payment of his debts.

With regard to the debts now sought to be recovered, I think they come within the authority of the cases referred to, and if Mr. Reid were now alive, perhaps the Court might under the authority of those cases subject the proceeds of the crops in his hands to the payment of them.—But the trust estate has terminated by his death, and I do not think they can be made a charge on the estate itself.—I can see no distinction between a charge on the estate itself, and one on the income in the hands of Mrs. Reid.—If there was remaining in the hands of Mr. Reid at the time of his death, of the income of the estate more than sufficient to meet the current expenses of the family and plantation it may be made subject to the payment of those debts as constituting a part of the trust estate. But further than

that, I do not think we are authorized to go. The case of Bethune and Cook vs. Beresford and wife, does not support the Chancellor in subjecting the income of the widow's estate, to the payment of these debts. In that case, Beresford was still living and entitled exclusively to the income of the estate. The Court made his interest alone liable to the payment of the debts, and that only after a reasonable allowance for the support of the family. 1 Des. Rep. 174.—The decree in this case goes to subject the estate of the wife to the payment of the debts of the husband, and constitutes her a trustee of her own estate, for the benefit of his creditors. The extent of such a principle can not be foreseen. If once admitted it may be extended to the entire destruction of a marriage settlement.

The complainants' debts were undoubtedly contracted for the credit of Mr. Reid and his notes were taken for the purchase money. It can hardly be supposed that there are any funds in the hands of the trustees for the payment of them, for all the interest of Mr. Reid in the estate has been assigned, as appears by the decree for the payment of his debts. If, however, the complainants think it worth the trouble and expense, an inquiry may be made into the subject.

It is therefore Ordered and Decreed, that the Decree of the Chancellor be so reformed as to correspond with the principles herein laid down, and that it be referred to the Commissioners to enquire whether there remained in the hands of the said John Reid at the time of his death, any and how much of the income of the estate subject to the payment of complainants' demands, and that he report thereon to the next Court of Equity for Orangeburgh District. And that the fund be first applied to the payment of the costs of this suit, and if sufficient for that purpose that the complainants' pay the costs. *Decree modified.*

TRUSTS—WHEN EXECUTED.

IN CHANCERY,—FEB. 1829.

EX PARTE, JOHN GADSDEN,

JOHN GADSDEN, Trustee, vs. Miss CAPPEDEVILLE.

C. conveyed real estate to T. his heirs and assigns forever, in trust, first to raise annually therefrom, the sum of $800 per annum, to be paid to C. during his life, and after his death, in trust to permit E. P. the wife of J. P. "and present and future issue by her said husband J. P. to hold and enjoy the premises to their sole use and behoof; or in trust to sell the same or any part thereof, and to apply the proceeds to the use of the said E. P. and *her children* and *have and share alike*, to them, their heirs and assigns forever," freed from the debts and control of the husband, J. P.—*Held* that the legal estate in fee remained in the trustee after the death of C. and of the husband J. P. (it not being the case of an executed trust,) and that E. P. and her children living at the death of C. were entitled to the benefit of the trusts as tenants in common.

When *issue* is used as a word of limitation or of purchase.

The trustee agreed with defendant to convey, and on a bill filed to compel performance, after the death of C, and J. P. the Court held the trustee the proper person to convey.

The idea "that though the legal estate were executed in fee in the trustees, yet when the objects of the trust were accomplished, the fee might shift and become executed in the cestuique use, does not seem to be warranted by any authority."

According to the objects of the trust and the terms of the conveyance, trustees have been construed to take only a chattel interest, as in the case of a devise to executors for or until the payment of debts, or a life estate; but if the fee be once vested in the trustees, the inheritance remains in them, unless, perhaps, a shifting use should be created by the terms of the deed or will.

The rule seems to be, "that if the gift to the trustee be general, without words of limitation or inheritance, he will be construed to take a chattel interest, a life estate, or a fee, as the purposes of the trust appear to require; but if it be to him and his heirs, (provided any estate at all is executed in the trustee,) it imports a fee; but these words may be restrained by other circumstances in the deed or will, which shew that the donor or devisor contemplated that the estate should be executed in some subsequent taker or after some event, or which are inconsistent with the notion of the fees continuing in the trustee.

Trustees take a chattel interest only where the interest is uncertain.

A devise to trustees and their heirs, carries a fee.

So, of real and personal estate to trustees, *their executors, administrators, and assigns.*

So devise to trustees and their heirs, to the separate use of a feme covert during life, after her death to first and other sons. Held a fee in the trustees.

The case of Jones vs. Say & Sile, (1 Eq. Ca. Abr. 483, Viner's Ab. 262, Fearne Con. Rem. 52,) commented on and questioned.

The power to sell, relates to the whole estate, and to satisfy that power, the whole estate must remain in the trustee.

There cannot be a partial execution of a use. The estate is one, and must be executed either in the trustee or the cestuique use.

The bill in the case of Gadsden, Trustee, vs. Cappedeville, was filed to compel the defendant to accept specific performance of a contract for the sale and conveyance of a lot of land in Charleston. The defendant in her answer expressed her willingness to perform, provided the complainant could make her a good title. This depended on the question, whether the legal title of the lot remained in Gadsden, as trustee, or whether it was executed in the cestuique trust. The petition was for the substitution of a trustee. These were the facts.

Jean Baptiste Collas, by deed, bearing date the 31st of January, 1800, conveyed to William Trenholm, along with other property, the lot of land in question, in trust, "first to raise annually thereout and therefrom, the sum of eight hundred dollars, to be paid to me in half yearly payments, yearly and every year, during the time of my natural life, and from and after my decease, then in trust to permit and suffer Elizabeth Pepin, the wife of the said Joseph Pepin, and her present and future issue by her said husband, to hold and enjoy the said premises, to their sole use and behoof; or in trust to sell the same or any part thereof, and to apply the proceeds of such sale to the use of the said Elizabeth Pepin and her children, and have and share alike, to them, their heirs and assigns forever, freed and discharged from the present and future debts or the control of the said Joseph Pepin, in any way or manner whatsoever."—"To have and to hold the said lot of land, &c. unto the said William Trenholm, *his heirs and assigns*, forever, to, for and upon the several and respective uses, intnts, trusts and purposes, hereinbefore mentioned, set forth and declared." The donor, Jean Baptiste Collas, died some time after the execution of the deed; the husband, Joseph Pepin, is since dead, leaving his wife Elizabeth, and several children, now surviving.

HARPER, *Chancellor*.—The first question was, as to the estate that Elizabeth Pepin and her children took in the

premises, after the death of the donor, Collas. The gift is to her and her present and future issue by her said husband. If these words had stood alone, I should have thought that the word issue was one of limitation, and that they created a fee simple, conditional. For though in Wild's case 6. R. 17, it is said, that a gift to one and his issue or children, who has issue or children living (as Elizabeth Pepin had in this case,) creates a joint tenancy, yet Lord Hardwicke observes in the case of Lumpley and Blower, 3 Atk. 397, "that was before it was fully settled that the word issue was as proper a word of limitation as heirs of the body." Still, however, the word issue may be explained to be a word of purchase; and it is fully so in this case, by the direction which follows—to divide the money in the event of a sale of the premises, between the mother and her children, "*have and share alike*, to them, their *heirs and assigns*." I have no doubt, therefore, that Elizabeth Pepin and her children, living at the death of Collas, took a fee, jointly or rather in common.

The principal question however, was, whether the legal estate in the premises is now executed in Elizabeth Pepin and her children, or whether it still subsists in the trustee. If it still subsists in the trustee the conveyance must be made through him.

It was not doubted, and could not be, that the legal estate remained in the trustee during the life of the grantor, Collas, and during the coverture of Elizabeth Pepin; at least as to her interest in the premises. This was necessary for affecting the objects of the trust; the managing of the estate, so as to receive a specific sum, to be paid over to the grantor annually, and to secure the separate use to a feme covert, free from the debts or controul of the husband.

An impression seemed to be entertained in the argument of the case, that though the legal estate were executed in fee, in the trustees, yet when the objects of the trust were accomplished, the fee might shift and become executed in the cestuique use. This idea does not seem to be warranted by any authority. According to the objects of the trust and the terms of the conveyance, trustees have been construed to take only a chattel interest—as in the case of a devise to executors for, or until, the payment of debts; Co. Lit. 42, a. Matthew Manning's case, 6 Rep. 96; Hilchins vs. Hilchins, 2 Vern. 403; and Carter vs. Bar-

nardiston, 1 Pr. Wms, 505; or a life estate, as in some of the cases which will be hereafter referred to. But if the fee be once vested in the trustees, the inheritance remains in them; unless perhaps a shifting use should be created, by the terms of the deed or will.

It is agreed that some legal estate was executed in the trustees, in this instance, and the question is, what that estate was. It is supposed to have been for the life of Collas and the coverture of Elizabeth Pepin, which would also have been a life estate, determinable. Co. Lit. 42, a. I am of opinion that the fee was executed in the trustee and remains in him.

It is to be observed that the conveyance is to the trustee, *his heirs and assigns*, which would seem to import a fee. The cases on the subject are numerous and various. So far as I can deduce any rule from them, it seems to be to the following effect: that if the gift to the trustee be general, without words of limitation or inheritance, he will be construed to take a chattel interest, a life estate, or a fee, as the purposes of the trust appear to require.* But if it be to him and his heirs, (provided any estate at all is executed in the trustee,) this imports a fee: though these words may be restrained by other circumstances in the deed or will, which shew that the donor or devisor contemplated that the estate should be executed in some subsequent taker, or after some event, or which are inconsistent with the notion of the fees continuing in the trustee. Thus, there may be a devise to a trustee and his heirs, expressly during the life of A. or for the separate use of a feme covert during life, with a direct devise of the legal estate in remainder. What I mean to express, will be best illustrated by reference to the cases.

In Wright vs. Pearson, Amb. 360, the devise was to trustees and *their heirs*, to raise money for legacies and subject thereto, to a nephew for life, with remainder, &c. It was contended that this gave the trustees only a chattel interest. The Lord Keeper says, "the cases do not apply to the present. Trustees take a chattel interest, only where the in-

* Can our act of 1824, dispensing with words of perpetuity in *devises*, have any bearing in this State, on the estate which is conveyed to the trustee? "Every gift of land by devise shall be construed a gift in fee simple." Must not this law operate on all the devises of legal estates whether to a trustee or to any other. See 4 M'Cord's Rep. 442.—*The Editors.*

terest is uncertain. Here, the limitation is to them and their heirs, therefore they take a fee." In Bagshaw and Spencer, 2 Atk. 578 ; 1 Ves. 144, Lord Hardwicke says, "the devise is to trustees and their heirs, which carries the whole fee in law."

In Gibson vs. Rogers, Amb. 94, reported as Gibson vs. Montfort, 1 Ves, 485, the devise was of real and personal estate, to trustees, *their executors, administrators, and assigns*, in trust to pay legacies and annuities out of the personal estate, and the rents and profits of the real estate, and after payment of these, the testator devised the residue. The Chancellor held that the words executors and administrators applied to the personal estate and "assigns," to the real and carried the fee. He decides, moreover, that the devise for payment out of the rents and profits, involves the power of selling, and therefore necessarily implies a fee.

In Chapman vs. Blisset, Ca. Temp. Talbot, 145, the devise was to trustees, their heirs, executors and administrators, to pay an annuity to the testator's son for life, and after his death, testator devised one moiety of the estate to the children of the son, and the other moiety to the children of a grandson. There was a provision for a fortune for the son's wife, and direction to pay an annuity to the grandson till 15, and an apprentice fee. It was held that the fee was executed in the trustees. The argument of the Chancellor does not seem to rely merely on the limitation to *heirs*, but is not inconsistent with the cases before quoted. He says, "Where particular things are to be done by the trustees, as in this case the several payments that are to be made to the several persons, it is necessary that the estate should remain in them, so long at least as those purposes require." No authority has been cited to warrant the doctrine that in case of such a general limitation to trustees as the present case is, that they should have but a particular interest, and then that interest to determine." In a note in the case, p. 150, the authorities are referred to, to shew that trustees have a fee without words of limitation, when the purposes of the trust require it and the intention of the testator cannot be otherwise effectuated.

In Venables vs. Morris, 7 T. R. 342, 434, an estate was limited to husband for life; remainder, *during his life*, to trustees and their heirs, for preserving contingent remain-

ders; remainder to the wife for life; remainder to trustees and their heirs, (not during her life,) for preserving contingent remainders; remainder, &c. The wife survived.—Here there was ground to contend, that the trustees were only intended to support contingent remainders during the life of the wife, yet the Judges certified that the fee was executed in them.

In Harton vs. Harton, 7 T. R. 648, the devise was to trustees *and their heirs*, to the separate use of a feme covert during life; after her death, to first and other sons, &c. Held a fee executed in trustees.

Several of the cases cited seem hardly reconcilable with the case of Jones vs. Say & Sele, 1 Eq. Ca. Ab. 383, said to better reported, 8 Vern. Ab. 262, and quoted, Fearne's Con. Rem. 52. In that case, testatrix devised estates to trustees, *and their heirs*, in trust, to buy legacies and annuities, and the surplus of rents and profits to the separate use of a married daughter for life; and after the daughter's death, to stand seized of the premises to the use of the heirs of the body of the daughter, &c. It was held that the estate subsisted in the trustees during the life of the daughter, and that the use was executed in the heirs of her body on her death. On this case, Lord Kenyon remarks, in Harton and Harton, "that it is a case by itself," and indeed, seems to overrule it. And Mr. Butler, in his note to Ferne 54, (a) observes—"In practice certainly no reliance can be placed on it, as an authority for confining the estate of trustees, under such a devise, to the life of the tenant for life." The case of Shapland vs. Smith, 1 Br. C. C. seems to me to come nearer than any other to supporting Jones vs. Say & Sele. There the devise was to trustees, (generally) in trust that they, *and their heirs and assigns*, should, after deducting taxes, &c. pay the surplus to C. S. and his assigns, during life; and from and after his decease, to the *use and behoof* of the heirs male of the body of the said C. S. The question chiefly made in the case was, whether the use was executed in C. S. during his life, and consequently whether he took an estate tail, under the rule in Shelly's case. Chief Baron Eyre was of opinion that the estate was executed in the C. S. but the Chancellor differed from that opinion, and held that the estate was in the trustees for the life of C. S. that the remainder was legally executed in his

heirs male, and consequently, that the legal estate could not unite with the equitable to make an estate tail. This case may have been decided under an impression that the devise to trustees was indefinite, *(not to heirs,)* or that the devise to the *use and behoof* of the heirs male of C. S. expresses an intention that the use should be executed in them.

In Sylvester vs. Wilson, 2 T. R. 444, the devise was to trustees *and their heirs ;* but expressly, *during the life* of testator's son, *to* apply profits, &c. and immediately from and after his decease, testator devised the said premises ; expressing the intention that the estate should be executed in the heirs of the body.

But there are cases of devises and conveyances to trustees and *their heirs*, not expressed to be for the life of the cestuique trust, for life, where that construction has been put on the words, from circumstaces in the will or conveyance, shewing that intention in the donor or devisor. As in Doe vs. Hicks, 7 T. R. 429, where testator devised to J. C. for life, remainder to trustees and *their heirs*, to preserve contingent remainders ; remainder to first and other sons ; and in default of such issue, to A. C. for life, remainder to the said trustees and *their heirs*, to preserve, &c. with several other life estates, and like remainders to the trustees.—Lord Kenyon thought, from the whole of the will, that the intention of the testator was to give to the trustees and their heirs only during the lives of the several tenants for life. If they took the whole fee by the first devise, all the subsequent remainders to them were absolutely nugatory. He observes that in Verleables and Morris, "it was absolutely necessary that the fee should be in the trustees; for the tenant for life, (the wife) had a power of appointment, and if in exercising that power, she had introduced any contingent remainders, they might all have been defeated, if the uses were not executed in the trustees. On the same principle, therefore, that it was necessary in that case, that the trustees should have the legal estate, to answer the intention of the parties, I think it is not necessary in this case, that they should take the legal estate for a longer term than during the lives of the tenants for life ; since this construction will best answer the intention of this testator.

So in Curtis vs. Price, 12 Ves. 89, which was decided

principally on the authority of Doe & Hicks. That was a case of conveyance to trustees and *their heirs*, in trust for husband for life, then for the wife for life, if she should continue unmarried; but if she should marry, to pay her an annuity and provide for the education of her children; and after the death of the husband and wife, to the said trustees, executors, &c. *for a term of one hundred years*, to raise portions for younger children. In this case the gift to the trustees and their heirs, was construed to be during the life of the wife. The Master of Rolls decided on two grounds; first, that there was a purpose to be answered in giving the trustees an estate for the life of the wife, (to pay the annuity and educate children, in the event of her marriage,) and none to be answered by giving them a larger estate; and secondly, that giving the trustees a term, after the death of the husband and wife, was incompatible with the supposition of their having before taken a fee. I would observe on the first ground, that from the whole current of authorities, it does not appear that it would have been sufficient alone, to restrict the estate of the trustees. It is not enough that the purposes of the trust have been satisfied during a particular estate, or that no object is to be effected by giving them a larger estate: if the gift be to them, and their heirs, there must be something positive to restrict them to a particular estate, or inconsistent with the notion of their taking a fee, as in the two last cited cases.

The case of Doe, exdem. White, vs. Simpson, 5 East. 162, was one of a devise to trustees, and the survivor of them, and *the executors and administrators* of such survivor. There the trustees were construed to take an estate for the life of two annuitants, and a further term, until the sum of £800 should be raised.

In this case the conveyance was to the trustee and his heirs; the estate certainly subsisted in the trustees during the life of Collas and the coverture of Mrs. Pepin, and there is nothing to restrict the estate of the trustees or incompatible with their taking a fee. I have not hitherto adverted to the authority given to the trustee to sell. Even if the conveyance had not been to the trustee and *his heirs*, this would have put the matter out of doubt. It occurred to me at first, that if, on the other grounds, the trustee appeared to have only a particular estate, this might be a mere power annex-

ed to his estate, and gone when the estate terminated. But a very little examination was sufficient to show the fallacy of this impression. In Gibson vs. Rogers, Lord Hardwicke thought the possibility that the executors might be under the necessity of selling the estate, sufficient to imply a fee in them. The trustees must have as large an estate as they are to convey. In Keene vs. Deardon, 8 East. 248, an estate was conveyed to trustees and their heirs, in trust to sell, with the consent of the parties conveying, and vest the proceeds in other lands, to be settled in the manner specified; and until such sale, the rents and profits to be received by the party entitled if no such conveyance had been made. As the trustees were only to sell, with the consent of the grantors; and as, until sale affected, the party previously entitled was to receive the rents and profits, it was was contended that this amounted to nothing more than a bare power to sell; and as no sale was ever made, that the title continued unchanged. It was clearly held, however, that the fee was executed in the trustees. Mr. Sugden, in his Treatise on Powers, 112, remarks on the position contended for in the case of Keene & Deardon, that it was "a doctrine utterly subversive of all received notions on this branch of the law of real property." He cites an Irish case to the same effect as Keene & Deardon. A recovery was suffered, and the uses declared to trustees, or the survivor of them, and his heirs, in trust to sell or mortgage the whole or any part of the estates, for payment of debts, with the consent of the tenant in tail during his life, or without such consent, after his death; to pay the surplus to the tenant in tail, his executors or administrators—*subject to such power of altering or mortgaging the estates, or such of them as should remain unsold, to ensure to the use of the tenant in tail, his heirs and assigns.* It was held that the legal estate vested in the trustees.

It was suggested in the cause, that as the trust was for a married woman and her children, as tenants in common, the estate might remain in the trustee, so far as the share of the feme covert was concerned, and the interests of the children, be executed in them. The grounds on which I have decided the cause, make an answer to that suggestion. The whole fee was conveyed to the trustees, and the estate remained in them, at all events, during the life of Collas, and

there is nothing to divert it afterwards. The power to sell, relates to the whole estate, and to satisfy that, the whole must remain in them. I am of opinion, however, that in no case could there be such a partial execution of a use. The estate is one, and must be executed either in the trustee or the cestuique trust. As observed by Lord Hardwich in Gibson vs. Rogers, this Court will not make fractions, and consider them as trustees for only part of the inheritance.

An order has been already made, on the petition, for the substitution of a trustee. It is further ordered and decreed, that upon the complainant, John Gadsden's executing to the defendant a sufficient conveyance, in fee simple, of the lot of land in question, the defendant accept such conveyance, and pay to the complainant the purchase money stipulated.

From this decree an appeal was taken to the Court of Appeals, and upon argument the Chancellor's decree was confirmed. *Decree confirmed.*

REGISTRY ACTS.

No proposition will be more universally assented to than that the laws which regulate our titles to property, should be clear, and free from uncertainty and ambiguity. The ignorance of our citizens of the Recording Laws of this State, has been one of the most fruitful sources of litigation, and has involved many honest men and their families in utter ruin. Every year some marriage contract, some deed or mortgage is set aside, because the law on this subject is so difficult to be understood, that few are able to ascertain, even with a copy of the Acts before them, what conveyances the law requires to be recorded, in what office, or in what time. To remedy this evil, belongs to the Legislature, and it is strange that it has been so long overlooked by that intelligent body. We have been recently led to consider this subject, and to compare the various Acts. We found the system (if system it can be called, which has no single principle running through the whole,) even more inperfect than we had anticipated. We believe we cannot render a more essential service to the community, than to attempt a

review of the several Acts of the Legislature constituting our Registry Law, and to submit to the consideration of those whose business it is to remedy the evil, the outline of an Act, by which it is attempted to reduce the different kinds of conveyances which are, or ought to be required to be recorded, under the operation of a few general, but uniform principles. In order to make the system more perpect, we have inserted a clause, requiring gifts of personal property to be in writing, and recorded. These gifts have always been, and still continue to be, the most fruitful source of fraud and litigation known to our Courts. Parents are often prompted, by the best feelings of our nature, to make gifts to their infant children. There is scarcely a family where the children do not claim some part of their parent's property. If the parent continues prosperous, and his estate descends to his children, these gifts are never heard of again; but if adversity comes, and creditors insist on the payment of their debts, these gifts are interposed to save some remnant of the estate, and some "old family chronicle," or perhaps the donor himself, is produced to prove that that property which had always been in his possession, and on the faith of which he had gained credit, and contracted debts, did not belong to him, but had many years before been given to one of his children. These gifts have been much favored by juries. The creditor is regarded as some unfeeling Shyloch, claiming the whole penalty of his bond. We have known but few cases in which his claims for justice have been supported.

That our scheme may be the better understood, we propose, in the first place, to present our views of the law as it now stands, and then to submit our remedy for the evils of the system.

Conveyances of Land.

By the 45th section of the Act of 1785, commonly called the County Court Act, all conveyances of land are required to be recorded in the Clerk's office in the county where the land lies, within six months, if the grantor resides within the State; within twelve months, if he resides in any of the United States, and if he resides without the United States, within two years, from the date. If the conveyance be not recorded within the time prescribed by the Act, then it shall be good only as between the parties, and shall be incapable of

barring the rights of persons claiming as creditors, or under subsequent purchases, recorded according to the Act. Few questions have arisen on the construction of this Act. Its provisions are, in general, just, and its phraseology such as leaves but little doubt of its meaning. We have adopted most of its requisites as the leading features of the Act, which we propose to submit to the consideration of the public.

Mortgages of Real Estate.

These are required to be recorded within six months, but this is rather an inferrence than a positive enactment.—There is no Act by which mortgages, *eo nomine*, are required to be recorded within that time, but they are presumed to be embraced within the general words, "conveyances of land," in the section of the County Court Act, before referred to. The Act of 1791, provides, that where there are several mortgages, they shall be paid in the order in which they are recorded agreeably to law.

Conveyances of Personal Property.

It will scarcely be credited, that in the State of South Carolina, where the most valuable and productive species of our property—I mean our slaves—is regarded as a chattel interest, we have no law requiring conveyances of personal property to be recorded, except an old Act passed in 1698, Pub. Laws, page 3. By this Act it is provided that, "That sale or mortgage of negroes, goods or chattels, which shall be first recorded in the Secretary's office, in Charleston, shall be taken, deemed, adjudged and allowed of, and held to be the first *mortgage*, and good, firm, and subtantial and lawful, in all Courts of Judicature in South Carolina, any former or other sale or mortgage for the same negroes, goods, and chattels, not recorded in the said office notwithstanding."

From the wording of this Act, it seems extremely doubtful, whether any precedence is gained by recording any conveyance, except a mortgage. But apart from this, the place of recording is so remote from the great body of our citizens—and they are in general so ignorant of its requisites, that but few have ever availed themselves of its benefits, if indeed, any benefit commensurate with the trouble, could arise from it.

Marriage Settlements.

The policy of this equity innovation on the common law doctrine of the unity of husband and wife, may be well questioned. But we do not now propose to discuss the question, how far the independence of the wife arising out of her separate property, secured by marriage settlements, is compatible with the harmony of the connubial state. So long as these settlements are allowed, they are entitled to the protection, and should be governed by laws as clear and certain in their construction as is compatible with the imperfect state of language. We think we hazard nothing in the assertion, that the Acts relative to registering of marriage settlements, bear on the face of them evident marks of great negligence, in their construction. The only Acts we have on this subject, are those of 1785, 1792 and 1823. That part of the Act of 1785, which relates to settlements made after the passage of that Act, is in the following words: "All (marriage contracts, deeds and settlements,) that shall hereafter be entered into for securing any part of the estate, real and personal, in this State, of any person or persons whomsoever, shall, within three months after the execution thereof, be duly proven, and in like manner to be recorded, excepting such as shall be recorded or lodged in the said office.

"And in case any person or persons, *entered in without the limits of this State, which shall be recorded, or lodged to be recorded in the said office, within twelve months from the date thereof;* whomsoever interested in such marriage deed, contract or settlement, shall neglect or refuse to record, or lodge the same in the manner, or within the times beforementioned, and in the office aforesaid, to be recorded, then the same in respect to creditors, shall be deemed, and is hereby declared to be fraudulent; and all and every part of the estate, thereby intended to be secured to such person or persons, shall be subject and liable to the payment and satisfaction of the debts due and owing by such person or persons, in as full and ample a manner, to all intents and purposes whatsoever, as if no such deed, contract, or settlement had been ever made or executed." It is impossible to read this clause without being struck with its utter unintelligibility. In the case of Lubbock vs. Cheney, 1 Nott & M'Cord, 444, Judge Colcock says, "it is admitted that there are words un-

intelligible, in the second section of the Act." It is true, the Act requires marriage contracts, deeds and settlements, to be recorded in the office of the Secretary of State, within three months; and it is also true, that in default of recording such contracts, deeds and settlements, are fraudulent, in respect to creditors. But it is by no means clear, whether every description of creditors can avoid a settlement unrecorded. In the case of Lubbock vs. Cheney, and also in the case of Wilson vs. Wilson, et al. 1 Eq. Rep. 401, the settlements were declared void, because not recorded; but the Court intimate no distinction between subsisting and subsequent creditors. It would, however, seem to us that the words, "shall be subject and liable to the payment and satisfaction of the debts due and owing by such person, &c." would let in only subsisting creditors, if the present participle "owing," is to receive a similar construction to that given to the analogous word "leaving." But we intimate this opinion with much hesitancy, and candidly admit, we have no authority for it in any of the reported cases. If there be, however, any foundation for this distinction, the question for the time, was put to rest by the second section of the Act of 1792, (1 Faust, 212.) The proviso of that section is in these words—"*Provided*, That where any marriage settlement shall be made previous to marriage, nothing herein contained shall be construed to make the property settled thereby, liable in default of a schedule or not being duly recorded, to the payment of any debts contracted by any husband, previous to such marriage, but only to such debts and contracts as shall have been made by the said husband, *subsequent to the marriage taking place*." This placed the matter on the right footing, and left no uncertainty as to what creditors could avoid the unrecorded settlement. It was good without recording against all creditors, except the subsequent ones of the husband.

But the Act of 1823 has rendered it doubtful, whether the proviso of the Act of 1792 is not wholly superceded. By the Act of 1823, it is declared—"That no marriage settlement shall be valid, until recorded in the office of the Secretary of State, and in the office of the Register of Mesne Conveyances of the district where the parties reside: *Provided*, That the parties shall have three months to record the same; and if not recorded within three

months, the same shall be null and void." This Act is of such recent date, that we are not aware of any judicial interpretation of it. When, however, it comes to be expounded, we apprehend it will present many difficulties. If "null and void," then it is not good between the parties, unless on the authority of the case of Bradford vs. Givens, 2 M'Cord's Reports, 152, the Court decide, that notice shall be a substitute for recording. We are not informed of any case in which it has been decided, that any rights could arise out of an instrument which the Legislature has declared "null and void." The Act of 1785 speaks of settlements, *deeds and contracts*; the Act of 1823, only of *settlements*. If there be, and it seems to us there is a distinction between some of these, is there any propriety in making a difference between them, either in the place of recording, or in the consequence of not recording? We have thus presented as concisely as practicable, our views of the existing law, and have endeavored to point out some of its most obvious defects. We now submit our remedy. In doing this, we take leave to say, that it is but an outline, intended to call public attention to a very important subject.

We are not so presumptuous as to suppose we can foresee its application, to the thousands of difficult and perplexing cases, which are constantly arising out of the multifarious transactions of mankind. It is as far beyond the reach of the human mind to foresee all the results of any important alteration in a municipal regulation, as to foretell the effects of a suspension or alteration of a law of nature.

A Bill concerning marriage settlements, parol gifts, and the recording of bills of sale, deeds and mortgages.

1. Be it enacted, That every conveyance or mortgage of land shall be recorded or left to be recorded in the office of Register of Mesne Conveyances of the district where the land lies, within six months from the execution thereof, except where the grantor or mortgagor resides, without the limits of the State, in which case twelve months shall be allowed for recording.

2. Every bill of sale or deed of gift, or mortgage of any personal property, shall be recorded or left to be recorded in the office of the Register of Mesne Conveyances of the district in which the seller, donor, or mortgagor may reside,

within six months from the execution thereof, and in case the seller, donor, or mortgagor shall not be an inhabitant of this state, but the property sold, given or mortgaged, shall be within the state, then the recording shall be in the office of the Secretary of State, and within twelve months from the execution.

3. Every marriage contract, deed or settlement, shall be recorded or left to be recorded in the office of the Secretary of State, and in the office of the Register of Mesne Conveyances of the district where the party, whose property is settled, resided at the execution of such contract, deed or settlement, within six months from the execution thereof, except where the party resides without the limits of this State, in which case the recording shall be within twelve months, and in the office of the Secretary of State, and also in the Register's office of the district where the property settled, is situated.

4. In case any deed or other conveyance of land, or bill of sale, or deed of gift of personal property or mortgage of real or personal estate, or mortgage, or contract, deed or settlement, shall not be recorded or left to be recorded within the times prescribed by this act, the same shall be utterly void, against all persons claiming as subsequent purchasers, creditors or mortgagees, even with notice of such unrecorded conveyance, bill of sale, deed of gift, mortgage or marriage contract, deed or settlement, except in those cases wherein the grantee or mortgagee of the land, or the purchaser or donee or mortgagee of personal property, or the trustees under any marriage settlement, deed or contract, their heirs, executors, administrators, and assigns, shall be in the actual possession of the land or personal property, at the time the right or title of such persons claiming as subsequent creditors, purchasers or mortgagees accrued.

5. Where a marriage settlement shall be decreed by the Court of Equity, and the same shall not be executed in consequence of the death of the party required to make it, or of his not being found to be served with process requiring him to perform such decree, or being arrested, of his refusing to execute such settlement, the said decree, with a particular description of the property ordered to be settled, certified by the Register or Commissioner in Equity, may be recorded in the offices of Secretary of State, and of

Mesne Conveyances of the district where the said decree has been pronounced, within six months from the said death, return of non est inventus, or refusal to execute, whichever may first happen, and such decree, so recorded, shall have the same effect as the settlement decreed would have, if duly executed and recorded.

6. A marriage contract, deed or settlement, as against subsequent purchasers, creditors, and mortgagees, shall have effect only as to such estate or property, as shall be therein, or in a schedule thereunto annexed, described, specified, and particularized, and such schedule shall be executed by the parties therein interested, at the time of executing the said marriage contract, deed or settlement, and be subscribed by the same witnesses who subscribed the said marriage contract, deed or settlement.

7. Every deed by the husband, constituting his wife a free dealer or sole trader, shall be deemed and taken to be a marriage settlement, so far as his or her property may be affected thereby.

8. It shall not hereafter be necessary to the validity of a substitution of trustees to a marriage settlement to record the same in any office, except of the Court wherein the substitution has been ordered.

9. And whereas the Act of the Legislature ratified on the 20th Dec! 1823, requiring marriage settlements to be recorded in the office of the Register of Mesne Conveyances of the district, where the parties reside, within three months, has not been generally known and many fair settlements have not been so recorded, and are therefore liable to be avoided, to the great injury of the wife, and parties interested therein, to remedy which evil,

Be it enacted, &c. That marriage settlements, executed since the said 20th Dec. 1823, and not so recorded, shall be regarded as valid between the parties themselves, and as against the debts of the husband contracted before the marriage; and where any such settlement has already been recorded, or within six months from the ratification of this Act, shall be recorded in the offices of Secretary of State and of the Register of Mesne Conveyances of the district where the party whose property is settled, resided at the time of executing such settlement, the same shall be valid against the debts, sales, and mortgages of the husband, which shall be

contracted, made or executed, after the ratification of this Act, any thing in the said Act ratified the 20th Dec. 1823, to the contrary notwithstanding.

10. No parol gift of any chattel shall be valid against subsequent creditors or purchasers, or mortgagees, except where the donee shall live separate and apart from the donor, and actual possession shall, at the time of the gift, be delivered to, and remain and continue in the donee, his or her executors, administrators or assigns.

It will be perceived, that our scheme for amending the law, presents the following features:

1. The place and the time of recording are as uniform as practicable. The object of recording is to perpetuate the evidence of title, and to prevent fraudulent, secret conveyances. In the first, the owner alone is interested. It is believed, that no further legal provisions are necessary for him. Offices are established for the recording of his deeds. If he does so, and by accident the original is lost, a certified copy is evidence of his title. If he does not, and thereby his title is jeopardized, it is his own fault, and laws are not made to protect men against the consequences of their own folly or neglegence. But when the right of innocent persons are involved, the subject becomes one of vast and abiding importance. To enable creditors and purchasers to know who are the real owners of property, it becomes necessary to impose penalties on those who do not record their deeds. Every temptation to fraud should be taken away, and every impediment to its perpetration should be interposed. It is believed that no means have been devised, so likely to produce these results, as the establishment of offices, wherein all transfers of property are required to be recorded. It has been said, that he who meditates fraud, seeks concealment; but when concealment is made to defeat his end, he is cut off from the most effectual means of attaining his object. By the existing law, conveyances of land are required to be recorded, and if not recorded, are void as to creditors and subsequent purchasers. No such provision exists as to personal property. Hence the well known fact, that frauds in relation to personal property, are a hundred fold more numerous than those which relate to land. Our scheme, therefore, proposes to put the recording

of conveyances of real and personal estate on the same footing. Where the seller, donor or mortgagor resides in one district, and the purchaser, donee, or mortgagee resides in another, we had some difficulty in deciding where the conveyance ought to be recorded. But as the object of recording is to give notice that he who was once the owner, is no longer so, we thought this end attainable only by requiring the recording to be in the district where the former owner resided.

2. That the omission to record, shall avoid the conveyance, only in favor of subsequent creditors, purchasers and mortgagees. The object of recording is, to prevent fraud, by giving notice. This notice can never be important to precedent creditors, purchasers, or mortgagees: it is believed their rights are already sufficiently protected. There can be no reason for avoiding conveyances, not recorded in favour of those who cannot be defrauded by the omission; Nor should the omission to record a deed of gift, effect its validity as to existing creditors. It is well settled law, that every voluntary conveyance is void, so far as such creditors are interested whether recorded or not. They cannot be defrauded by the omission.

3. The only evidence of notice which shall dispense with the recording, is the actual possession of the property conveyed. Actual possession is regarded in all cases as presumptive evidence of title. It is sufficient to maintain trespass or trover. That which is prima facia evidence of title, it would seem to us, should be sufficient evidence of ownership to all the world, and therefore equivalent to recording. But in the scheme submitted, we have made this the only substitute for recording. The security which the registering of transfers of property is calculated to give to all persons interested, has been, we fear, much impaired by the doctrine laid down in the case of Tart vs. Crawford, 1 M'Cord, 265, viz: That explicit notice to a subsequent purchaser, for valuable consideration, (and the reason will apply equally to a creditor,) will dispense with the recording. This decision is at variance with the construction of similar statutes in England, and is calculated to open a door to the admission of all the uncertainties of parol evidence, and thereby to lessen the security of a recorded title. What is explicit notice? In the answer to this question, no two judges or

lawyers will agree. The consequence is, that a title may be good or bad, according to the meaning which a judge or a jury may affix to a word. Believing as we do, that every thing is uncertain which depends on parol evidence, and that titles to property should be rendered as certain as possible, we have excluded from our scheme every other notice of an unrecorded conveyance, except possession and actual occupancy. These are facts seldom liable to misconstruction, and as well calculated to give notice of the transfer of property as recording itself.

Since the decision in *Price vs. White and others*, reported in this number, we have thought it necessary to add a provision to meet the contingency which may frequently occur, where the death or obstinacy of a party decreed to execute a marriage settlement, may defeat the rights of the wife, and subject the settled estate to the payment of the husband's debts. This we have done in the 5th section of our proposed bill.

To remove all doubts as to the effect of deeds constituting sole traders, we have inserted the 6th section. Our object is, to place them on the same footing with other marriage settlements, and to require a particular specification of the property to be protected by them. Without this they may be the instruments of gross fraud.

We see no reason for requiring the substitution of trustees in marriage settlements to be recorded. The rights of creditors, purchasers, and mortgagees alone, are regarded in every system of registration. These are protected sufficiently by requiring the marriage settlement to be recorded, and the change of trustees is a mere private arrangement for the convenience of the parties interested, and can in no wise affect the rights of creditors or purchasers. To require, therefore, such substitution to be recorded, is only giving trouble without any necessity for it.

The ninth section of our proposed Act, is intended to be declaratory, so far as the parties to the settlement, or the existing creditors of the husband are concerned. This is necessary to avoid the doubts which may arise on the construction of the terms of the Act of 1823, where it declares, that "*if not recorded within three months, the same shall be null and void,*" without saying as against whom it shall be so "*null and void.*" We presume these words would be construed

in reference to the Act of 1792, and be good between the parties, and as against the existing creditors of the husband; but as this might be doubtful, we have thought it prudent to propose this declaratory clause. The other part of this section is intended to remedy the evil which frequently occurs from introducing into a bill, an important change of the law, having no connection with the title of it.

In framing the bill which we have presented, we have studied conformity to the existing laws of the State. The desire to depart as little as possible from the course of proceeding known to our people as the established mode of trasfering and securing property, has induced us to continue the Secretary of State's as a recording office for marriage settlements. Yet we have some doubts as to the propriety of its being so continued. It is at least questionable, whether this requisition of double recording does not create more evils than it prevents—whether more *boda fide* settlements may not be defeated by it, than *bona fide* creditors defrauded for want of it? If this should be thought to be the case, by those whose duty it will be maturely to consider and to render perfect this bill, before it becomes a law, they will have nothing to do but strike out, "office of Secretary of State," wherever the words occur, and thus relieve us from the expense and trouble of double recording. This should be done, unless some valuable end can be attained by retaining it. If one office is to be suppressed, the uniformity of the system requires that it should be that of the Secretary of State, and the retension of the district offiee in its place will greatly lessen the trouble of recording.

LIABILITY OF THE HUSBAND FOR THE DEBTS OF THE WIFE.

The English common law, which is undoubtedly the great fountain of civil liberty, in its early period, had little regard for any but the rights of males; and with the single exception of the provision of dower, entirely overlooked the rights of females, or rather seems to have rendered

them entirely dependent on the other sex. The principle of that law was an entire identity of the husband and wife; so much so that her civil existence was wholly merged in that of her husband. Another striking feature of extreme severity, founded in feudal policy, was that the female line was excluded by the male from succession to real estate. Women were permitted to take by descent from their ancestors only when there was a total failure of male descendants. They were rather tolerated as heirs to prevent an escheat, than favored objects of the law. Connected with these barbarous principles of our ancestors, was another, introduced by the Clergy of the Church of Rome, which appropriated all the goods of a deceased person to pious uses, for the good of his soul. These principles of barbarism and clerical fraud, swept from every daughter, at the death of her father, all his real and personal estate, and left to his widow only a life estate in one third of his lands. When a woman married, her situation was not bettered, for by the old common law, she became the servant of her husband, who had the right to correct her as a slave, and whatever personal estate had been given to her (not by the law, for it gave her nothing,) by a friend or a relation, whatever her own industry had accumulated, all became her husband's by the act of marriage, or at least so much of it as his diligence reduced into possession. Some of these harsh features of the common law have been softened down, and by our Acts of the Legislature, their exclusion from an equal participation in the property of their deceased parents, has been abolished. But still, the marital right, as it is called, attaches on all the wife's chattels, with the same cruelty as in the earlier days of the common law, which even now is in this particular most regardless of female rights. This principle, that the husband was the purchaser of all his wife's chattels, which, during marriage, he could reduce into possession, was likely to act hardly on her creditors—and the English Judges, to avoid the evil, devised a remedy; but instead of seizing on the right principle, and declaring that any matrimonial transfer of the wife's property to the exclusion of her creditors, would be a fraud, and that such property would be still liable to the debts contracted *dum sola*, although reduced into the possession of the husband, they adopted a different rule, founded on a metaphysical subtlety.

They held that the husband took his wife as a part of his legal person, and they regarded this legal union as leading to most of the consequences of a physical one, and particularly, that he was thus subject to all her personal liabilities. It was held, he took her *cum onore*, and a part of this *onus* or burthen was, that although she had no estate, yet her person might be taken in satisfaction of her debts; and that person being a part of her husband, she could not be sent to goal without him. If one half went there the other must go too. That therefore, during the marriage, whatever debts of the wife were recovered against them, he must satisfy by the surrender of his double person, which he would only relieve by paying the debt; and therefore, the husband, without having any property which ever belonged to his wife, must pay all her debts. His liability to pay her debts was thus rested on the unity of their persons, and not on the plain principle of equity, that the rights of existing creditors should neither be defeated nor enlarged by the marriage the of debtor. Another absurd doctrine followed this metaphysical technicality. When the unity of person on which the husband's liability depended ceased with the death of either of them, he and his estate were released from the payment of all her debts. Whatever fortune he may have obtained in marriage by her, he or his heirs might, after the dissolution of the marriage, enjoy and put her unsatisfied creditors at defiance; for he was regarded as being the purchaser of all her estate for the highest consideration known to the law. This consideration was no other than the great favor he bestowed on her by becoming her husband, and the equivalent he gave for becoming the owner of all her personal estate was, that he had consented to be her master.

Thus was a fiction of law followed out into all its absurd consequences, which sometimes oppressed the husband to favor creditors; at others, defrauded creditors to protect the unjust acquisitions of the husband, and in no instance was favorable to the wife, but generally oppressed her; as was particularly the case, when she survived her husband, and was left liable to be encarcerated for her debts, while the creditors of her husband, or his donees or heirs, took all the personal estate she ever owned. One would hardly suppose that all these absurdities were sanctioned by the laws of S.

Carolina at this day. Yet that is the case, as will appear from a late decided case, in our Court of Appeals, which we report as follows:

IN CHANCERY—FEB. 1830.

JOHN M. WITHERSPOON, et ux. vs. DANIEL DUBOSE.

The bill stated, that Effy Way, on the 29th Jan. 1818, executed a penal bond in the sum of $827 64, to Thomas Witherspoon and Mary his wife, who was administratrix of Mary Dick, conditional for the payment of $413 82, on or before the first of Oct. next after the date of the bond, with interest from date. That the complainant, Mrs. Witherspoon was one of the distributees of the estate of William Dick, and Thomas Witherspoon (who had survived his wife Mary,) assigned the said bond to them, [the complainants] as part of their distributive share of Dick's estate. That the said Effy Way, after the execution of the said bond, and without having paid any part thereof, intermarried with Daniel Dubose, the defendant, and soon after died, before any action was brought against the said Daniel and Effy, to recover the amount due on the said bond. That the said Effy, at the time of her marriage with the said Daniel, was possessed of considerable personal property, more than sufficient to pay and satisfy all the debts due and owing by the said Effy, and to which personal estate the said Daniel, by virtue of his marriage, became entitled, and now owns, possesses, and enjoys. That the complainants were advised that they had no remedy at Law against the said Daniel, but that in Equity and good conscience he was bound to apply the estate received in the marriage with his wife to pay her debts, although he may not have been sued in her life time. The bill prayed for an account of the estate received on the marriage, and that the said Daniel may be decreed to satisfy the said bond as far as the said funds will extend, and for other relief.

The answer of the defendant Dubose says, that he knows nothing personally of the bond and transactions referred to in the bill; he has only heard of them from complainants and those representing their claims. He admits that complainants have reeently (within three years) intermarried. Admits that he, defendant, did marry the former Mrs. Effy

Way, on the 4th March, 1819, and that she died on the 15th November, 1820—admits that he received some property with her, but says he has paid many of her debts already; says he has not administered, and has no assets of hers; that he never heard of this bond till Dec. 1823, or Jan. 1824, when he received a letter dated 27th Dec. 1823, from T. Witherspoon the obligee, and with whom he had occasionally associated, in which letter the said T. Witherspoon admits he had not previously communicated any thing of its existence. Says his wife never spoke to him of any such debt, on the contrary, she and her brother had previous to defendant's marriage, enumerated all the debts she then owed. (as they said) omitting to say any thing of this one, and thereby induced him to consent that his said intended wife should give part of her property to her children by a former marriage, and that the property so given has been delivered up, some of it by her before the marriage, and the balance by him since her death, and before he had heard of the existence of this debt.

At the hearing of the cause the bond was admitted, and it was admitted that the defendant Dubose received in marriage sufficient to pay the debt to the defendant, and that the letter of the 27th Dec. was the first demand by Witherspoon on the defendant.

Desaussure Chancellor.—There is but one question in this case, which is, whether the husband who has survived his wife, is liable for her debts contracted before he married her, to the extent of the estate he received with her.

The rule, as I have understood it ever since I came to the bar (which is above forty-five years,) is, that a husband is not liable for the debts of his deceased wife, contracted before he married her, unless suit was brought against him, and judgment obtained during the coverture, even though he may have received in marriage, and continues to enjoy an estate more than sufficint to pay all her debts. The rule is abundantly proved by the decided cases cited. Some fault has been found with this rule as operating unjustly against the creditors of the deceased wife. If the rule were subject to censure, it would nevertheless prevail, as Judges sit to administer the law, and not to make it. But there are some considerations which weaken, if they do not entirely re-

move any censure to which the rule may be supposed liable. The first consideration is, that the liabilities of the husband to his wife's debts grow out of the marriage, and when that connexion is dissolved, the liability should die with it unless he has specially assumed the debt, or judgment has been obtained against him during the coverture. As to the objection that it is hard on creditors that the estate of the deceased wife received by the husband should be exempt in his hands from her debts, it is to be remembered, that it is an equivalent for the liability of the husband to the creditors of his wife, though he may have received nothing in marriage with her, provided he is sued and made liable during the coverture. He becomes the owner of all her personal estate, and part of her real, in consideration of his liability to her debts, provided the creditor pursues his remedy during the liability, to wit, during the coverture.

I do not perceive any special circumstances in this case, to take it out of the general rule aforesaid. On the contrary, the circumstances are favorable to the defendant; for in his answer, which is uncontradicted by any evidence, he states, that knowing nothing of this debt, he voluntarily relinquished part of the property he had acquired by his wife, and that he has no assets from her.

It is therefore ordered and decreed, that the bill be dismissed.

From this decree the complainants appealed.

Curia *per* Johnson J. The Court concur in the view which the Chancellor has taken of this cause. The rule established in the case of the Earl of Thormond vs. the Earl of Suffolk, 1 Pr. Wm. 469, is that if a woman contract debts dum sola, and afterwards marry, the husband is liable during coverture, but if the wife die, the liability of the husband ceases, although he receive a fortune with her, unless judgment had been obtained against him in her life time; for then it became his debt—and in Heard et ux. vs. Stamford, 3 Pr. Wm. 411, Lord Talbot says that it is so clear, that he was unable to see how any thing but an act of Parliament could alter the law. Our own Court of Chancery adopted the same rule in the case of Buckner vs. Smith, 4 Eq. Rep. 371, and although that was a Circuit decision, it has received the approbation of the Bar and the Bench.

It is impossible, perhaps, to reconcile the case of Moon vs. Herndon, reported under the title of Moon vs. Henderson, 4 Des. Rep. 461, to this rule; but however it may have been violated in the application of the circumstances, it is very clear from the note of the reporter, who was one of the members of the Court, that the rule was intended to be preserved. It professed to be a case of peculiar circumstances which are not stated. My own knowledge of the parties enable me to state certainly that the defendant's wife, the executrix of Andrew Lee, was also one of his children. It may be, that by the terms of the will, she was entitled in common with other children, to a portion of the estate, and committed a devastavit only to the extent of her interest in it, and the husband claimed a dividend of what remained of the property bequeathed. If that was the case, the amount of the devastavit was properly chargeable to her as so much of her dividend, and the other legatees were entitled to the remainder. See Phelon vs. Houseal, 2 M'Cord Ch. Rep. 432. *Motion dismissed.*"

In considering this case we intend to cast no censure on the judges who decided it. They could not do otherwise. Yet no one can doubt the whole doctrine is an absurd one. That the husband should be compelled by law to pay his wife's debts, when she was destitute of all property when he married her, is unjust to him, and the rule directly discourages marriages; for who will marry a woman in debt and without property, when, by doing so, he must inevitably ruin himself. Yet a woman in this situation, of all others, most needs a protector. The man who marries her, must be influenced by the best motives, yet the law punishes him for it, by the forfeiture of at least a part of his estate.—Again, on what principle of morals or equity is it, that when the husband gets a large fortune by his wife, who dies in a few months or even days after marriage, he is permitted by the law to hold all this property, and leave her creditors without the possibility of ever receiving a cent of their just demands, for which they gave credit on the faith of this very property, that now enriches him at their expense? The Chancellor's decree in the case reported above, adopts the reasoning of Lord Chancellor Parker, in the case of Thurmond vs. the Earl of Suffolk, in 1 P. Wm. 469, who says "that the

husband runs the hazard of being liable to the debts much beyond the personal estate of his wife, and in recompense for this hazard he is entitled to the whole of her personal estate, although exceeding her debts, and discharged therefrom." We believe this reasoning not to be very sound: to us it is quite unsatisfactory. A man who marries a wife in debt and without property, runs this *hazard* as the law now stands, and can receive no recompense, for his wife has no property to make it. So the man who marries and gets a fortune of great amount and has no debts of his wife to pay, runs no hazard, and needs no recompense, and if the argument is good for any thing, should not have the fortune.—The argument, then, is this, that one man shall take a large fortune by his wife, and be freed from paying her debts after her decease, because another man has been unjustly compelled to pay all his wife's debts, when she had no fortune. What compensation is it to the creditors of the wife of the former for the loss of their debts, when the funds on which they credited are amply sufficient to pay them, that the creditors of the wife of the latter have been permitted unjustly to compel him to pay them what he never owed, and to pay which he never received any funds. This is making the iniquities of one rule of law the reason for adopting another equally unrighteous. The right course is to abolish both rules, and to declare that the husband shall in all cases, pay the debts of his wife to the extent of the property he got by her in marriage, and no further, and this whether suit be brought against him during coverture or after her death; or in case he dies first, against his personal representatives.

In considering this subject, we have supposed that it is the legal identity of husband and wife, and not the fortune he obtains by her, which subjects him to pay her debts recovered in her life time. In this opinion we are supported by authority, (see Reeves Dom. Rel. 69.) Now if this be the principle, what effect has been produced on it by our act, which exempts females from imprisonment on final process? The husband is charged because the wife cannot be sent to gaol without him. He pays only to relieve himself from this incarceration. But he cannot be incarcerated on the common law principles, that he must go to gaol with his wife, because now she cannot be sent there. We submit these views without expressing any opinion on them.

We have placed this matter before the public, and conclude by noticing the observations of Lord Chancellor Talbot in the case of *Heard vs. Stamford*, delivered in 1735 nearly one century ago, in which he expresses pretty strongly his conviction of the unreasonableness of the whole of this doctrine, and considers the inconvenience of it as a good reason for the legislature's altering it. Yet such is the apathy of legislators, so slow is the progress of legal reform, that to this day, both in England and America, this absurd doctrine of the common law, is suffered to hold a place in all our codes. The Judges find it fastened on them, and they cannot cast it off. The Legislature alone is competent to remove the evil; with them we leave the matter.

Rehearings and Bills of Review.—When granted.

IN CHANCERY.

ISAAC CARR and WIFE vs. JOHN F. GREEN, Ex'or. JAMES GREEN and BENJ. GREEN.

On a bill of revivor to carry into effect a final decree of the Court of Equity, which has been affirmed in the Court of Appeals, the defendant cannot be permitted to bring into review the merits of the case.

The Court will not grant a rehearing or bill of review, when a case has been heard and decided upon its merits by the Court of Appeals, upon any other ground than newly discovered evidence since the trial.

The Court of Chancery cannot grant a bill of review of any matter which has ben heard and decided in the Court of Appeals.

Matters settled or which might have been put in issue in the original cause, shall never be drawn into examination upon a bill of review.

The Chancellor sometimes refuses to enforce an order made sub silentio, the parties agreeing, and the objection not laid before the Court.

This was a bill of revivor to give effect to a decree heretofore delivered in the Circuit Court, and afterwards affirmed by the late Court of Appeals in Equity, against James Green. The present defendants were the heirs and devisees of Jas. Green, deceased. The questions growing out of the will of Wm. Wilson, had produced cases in law and equity, and the two late Courts of Appeals in Law and Equity, differed in opinions as to the construction of the will.) See Carr vs. Porter, 1 M'Cord's Ch. R. 60.) And upon the formation of the present Court of Appeals, that Court adopted

the decision of the law Court. This case had been decided by the Equity Court of Appeals, and of course in variance with the opinion of the new Court of Appeals. The question before the Chancellor was, whether he would grant a rehearing or bill of review.

De Saussure, *Chancellor*, (before whom the case came,) refused to grant relief, on the ground that he could not revise or reverse a decree made by the late Court of Appeals. It was final and conclusive on the parties and their rights.—The Court could not reverse a decree of a Court of competent authority, or refuse to carry it into effect on a bill of revivor. Cooper's Eq. Plead. 99 ; 1 Ves. sen. 245. The Court in general only enforces the decree without varying it. Though the Court in some cases has considered the directions given to the master, and corrected mistakes in such directions, and in one case for specific performance of an agreement, (1 Ves. 218,) Lord Hardwicke refuses to enforce a decretal order, made in a Master's report for the purchase of land for a charity, as against the statute of mort main. He says the order was made sub silentio the parties agreeing, and the objections not laid before the Court. No new ground was now taken. The same points were made in the case heretofore.

From this decree the defendants appealed by way of petition to the Court of Appeals, for a rehearing. As this is rather a novel proceeding in this country, we publish the petition.

"To the Honorable the Judges of the Court of Appeals, the petition of John F. Green executor of James Green deceased, and Benjamin Green, respectfully sheweth, That a bill was filed by the present complainants against James Green deceased, the object of which was to obtain possession of a plantation in Georgetown District, (claimed by them under the will of William Wilson,) and to have an account of the mesne profits. The defendants demurred, because there was plain and adequate remedy at law, and because the validity of the title to a freehold, was matter peculiarly proper for the determination of a Court of Law.

The Chancellor overruled the demurrer and without hearing argument on the merits, decreed for the complainants, ordering the defendant to deliver up the plantation, and to

account for the rents and profits. This decree was confirmed by the former Appeal Court in Equity. The defendant, James Green, departed this life without complying with the terms of the decree. In December, 1824, the Court of Appeals in Equity, was abolished and all its power transferred to the new Court of Appeals established at that period by act of the Legislature. The original suit was afterwards revived against the executors and heirs at law of James Green deceased. But previous to the hearing of the bill of revivor, the new Court of Appeals had determined in a case depending on the construction of the same clause of William Wilson's will, and to which complainants were parties, that the complainants were not entitled to recover. (Carr vs. Porter, 1 M'Cord's Ch. R. 60.) A decree has been recently pronounced by which the former decree and all the orders against James Green deceased stand revived against his executor and heir at law.

Your petitioners submit that the decree originally pronounced in the case, is erroneous in the following particulars, viz:

First, Because the complainants had plain and adequate remedy at law.

Secondly, Because if the Court of Equity had jurisdiction, they cannot in the construction of William Wilson's will, under which, as your petitioner would have contended, Thomas Wilson, (from whom defendant's ancestor purchased,) took an estate in fee simple.

Whereupon your petitioners pray that your Honours representing the former Court of Appeals, will be pleased to vouchsafe a rehearing of the cause: your petitioners submitting to pay such costs as the Court shall award in case their complaint shall be found groundless. And your petitioners will ever pray, &c.

BENTHAM & DUNKIN, *Def'ts. Sol'rs.*

We certify that we have perused the foregoing petition, and are of opinion that a rehearing ought to be granted as thereby prayed for.

J. L. PETIGRU.
B. F. DUNKIN.

M. KING, Esq.

SIR,—Be pleased to take notice that the petition in the within stated cause, will be presented to their Honours the

Judges of the Court of Appeals, at their next meeting in Charleston, or as soon thereafter, as counsel can be heard: and that a motion will then and there be made, that the prayer of the said petition be granted: which motion will be grounded upon the said petition, and upon the pleadings, proofs, and other proceedings heretofore had in the said cause, both in its original and revived character.

BENTHAM & DUNKIN, *Def'ts. Sol'rs.*

Dunkin & Petigru, for the application.
King, contra.

CURIA *per* NOTT, J. This case presents two questions for the consideration of this Court.

1st. Whether, on a bill of revivor, to carry into effect a final decree of the Court of Equity which has been affirmed in the Court of Appeals, the defendant can be permitted to bring into review the merits of the case which has been once considered and determined?

2dly. Whether the Court will grant a re-hearing or bill of review, where a case has been heard and decided upon its merits by the Court of Appeals upon any other ground than newly discovered evidence, since the trial?

I speak of a rehearing and bill of review, without regard to the technical distinction between them, as in point of principle, there can be no difference in this case.

The first point has not been much insisted on by the counsel—I presume from an impression that it furnished but little hope of success. And I concur with them in opinion, that any argument which could have been used in all probability would have been unavailing. On that subject, therefore, I shall be satisfied with observing, that the Court concur in opinion with the Chancellor for the reasons given in the decree.

The second, if it were now a new question, might, perhaps, have been one of more difficulty. But when we look back upon the decision of the Court of Appeals, and in the numerous cases in which the question has been considered and decided, we do not feel authorized to sustain this motion. The late Court of Appeals in Equity, was established in the year 1808, and it appears that this question arose shortly after the establishment of the Court. The first case, however, which I find reported in which the question is

directly decided, is the case of James Burns vs. the executors of Poaug. 3 Des. 610, which was decided in the year 1813. In that case it is said—The Court has had occasion to consider these applications for re-hearing, and it has formed an opinion, that it is not at liberty, under its present organization, after a full and final decree, to open cases for re-hearing. It would appear from these observations, that such applications had been frequent, and had been well considered, and that the Court availed itself of that occasion to announce its final determination. In the year 1818, the case of Perkins and Wife vs. Lang and others, 1 M'C. Ch. R. 31, occurred. That was an application for a bill of review. The Judges again remarked that—"The Act of 1808 declares that the decrees of the Court of Appeals shall be final and conclusive, and it would be manifestly contrary to its intention to allow bills of review for error, appearing on the face of them." But as that application was founded on a suggestion of newly discovered matter, since the decree, of which the party could not have had the benefit in the first instance, making, as the Judges observe, a new case, the application was granted on that ground. The next case, which is entitled, ex parte John R. Murrell, (*Ib.*) was a petition by Mr. Green, his solicitor, for a rehearing; all that appears on the minutes of the Court, is an order upon the docket, by the presiding Chancellor, (De Saussure.) The petition was neither granted nor refused; but Mr. Green left to pursue his own course, by bill of review in the Circuit Court. A bill was filed in the Circuit Court of Georgetown, which was dismissed by Chancellor Thompson, because no new matter had been discovered since the rendition of the decree in the former case. From that decree there was an appeal, and the decree simply affirmed by the Court of Appeals. The last case, which was one of the last acts of that Court in December, 1824, was Blair and al. vs. R. G. Farr and al. in which the entry on the docket is refused, because it was not to ask a review of the case on newly discovered evidence, but to alter the decree on the evidence which had been before the Court and decided on. It appears, therefore, that the question has been well considered by the former Court of Appeals, and that the decisions have been uniformly made from its first establishment in the year 1808, to its final extinguishment in the year 1824. After such a

series of decisions, we must consider the practice and the law as finally and conclusively settled. It appears to me also, that this practice is conformable with the practice of all the Courts in England and the United States, the organization of which has any analogy to ours. The case of Browder vs. McArthur, 7 Wheaton, 58, had been remitted to the Court below to carry into effect, a decree of the Supreme Court. And upon an appeal the counsel moved for a re-hearing upon the merits. The Court denied the motion, being of opinion that it was too late to grant a re-hearing in a cause, after it had been remitted to the Court below to carry into effect the decree of that Court. In Virginia it has been held that the Supreme Court of Chancery cannot grant a bill of review of any matter which has been heard and decided in the Court of Appeals, 1 Hen. & Mum. 13, McCall vs. Graham & Beal. And in the case of Ludlow vs. McCartney, 4 Viner 414, it is said matters already settled, or which might have been put in issue in the original cause, shall never be drawn into examination upon a bill of review. And it appears that in England the House of Lords will not allow a bill of review, or re-hearing, after a cause has been heard and decided by them, B—— vs. Marquis Donegal 3d Dow. Rep. 157. Bampfield vs. Topham, 8th Cole's Parliamentary Cases.

If, therefore, we are to be governed by the decisions of our own Courts, or by the authority of analagous cases from abroad, we are bound to refuse this motion. If we resort to principle, we shall be led to the same conclusion. A decision of the highest tribunal of the country must necessarily constitute the law of the case decided, whatever subsequent decisions may take place. It is a rule, founded on public policy, and intended to prevent the endless litigation which would otherwise necessarily ensue.

If we listen to the application in this case, we shall open a door for a similar application in every case which has been decided since the establishment of that Court. It is indeed extremely inconsistent that the disposition of property under the same will, should depend upon the Court in which the cause might happen to be tried; but it was the result of the then unfortunate organization of our Courts, and the evil was no greater than the conflicting decisions in many other cases, depending on the same principles, many of

which are known to exist, and which was one of the causes that led to the present organization of the Judiciary. But it is an evil that had better be borne than to introduce a greater, and we must console ourselves with the reflection that it no longer exists.

I am of opinion that the motion must be refused, and that the decree of the Chancellor must be affirmed.

Rehearing refused.

THE EFFECT OF FOREIGN DIVORCES ON SOUTH CAROLINA MARRIAGES.

We believe that South Carolina is the only country, among civilized nations, where at the present time, marriage is regarded as perfectly indissoluble. In other countries, the contract, although not capable of being dissolved by the consent of the parties themselves, may be annulled for proper cause by Judicial decrees, Legislative acts, or Ecclesiastical dispensations. In England, where marriage is said to be indissoluble, Parliament may sever the vinculum of matrimony, and private acts are often passed for that purpose. But in South Carolina the Legislature has uniformly refused to grant divorces for any cause. This is proceeding on principle. Our Legislature has no Judicial power. It is the creature of the people, authorized to *make*, and not to *administer* laws. To declare a marriage vacated for the misconduct of either of the parties, is a Judicial, and not a Legislative act, and so regarding it, our General Assembly has frequently refused to grant divorces, and in some cases, where the alleged causes were the most aggravated that could be imagined. This refusal, too, has taken place, with a perfect understanding that no judicial remedy existed. For, by the laws of the State, no Court has power to entertain a suit from divorce—all that Chancery can do, is to provide for the wife a maintenance out of the husband's property, where he has abandoned her, or by cruelty, or other means, forced her from him. Her person may be

protected from his abuse. But the Courts cannot touch the bond of marriage, nor even decree a separation a *mensa et thoro*. The Legislature might, no doubt, confer such authority on our Courts, but it has hitherto declined to do so: and we think with great credit to itself and advantage to the State. The indurance of partial suffering, from incompatibility of tempers, or vicious habits, among married people, is an evil vastly less, in our opinion, than that which arises in other countries, from the facility with which divorces are granted. That restless temper, which seeks for change, will never be contented, where the means of its gratification are provided. It must be restrained by law, or by public opinion; and as experience proves that the latter has but little influence over at least a considerable part of the community, the former must provide the necessary restraints. Such our law has provided, when it declares that marriage is perfectly indissoluble by any earthly tribunal. In this particular we occupy an elevated stand in morals, not to be found in any other community. With us, the contract, on whose unchangeable and continued existence during the lives of the parties, so much of the happiness, the peace, order, and morality of society depends, is regarded as so sacred, that when once formed, the act of *God* alone can dissolve it.

This sacred character of marriage, to which we attach so much importance, cannot be entirely secured, unless we hold all foreign divorces of Carolina marriages void. Some of our sister States grant them for the most trivial cause. A residence of a few months gives foreigners a domicil among them, that confers jurisdiction on their Courts, and a default of appearance to a pretended charge, is received as evidence of its truth, and the grounds of dissolving the bonds of matrimony. Should it once be settled as the law of this State, that a Tennessee or Rhode Island divorce will dissolve a South Carolina marriage here as well as there, we shall, no doubt, see our unhappy matches untied, and new ones formed, with almost as much dispatch as the same process is effected in some of our sister States. The only restraint we shall be under that they are not, will be found in the expense and trouble, which attends a few months sojourn in a sister State. It may be said, that such divorces may be avoided on principles acknowledged even in those

countries where the contract is not regarded as entirely indissoluble. That a divorce obtained *in fraudem legis* would be considered as void even in States, where less sanctity attaches to marriage than in South Carolina; and that the adoption of that principle here, is a sufficient protection of our system. But it is very evident that this protection is a very inadequate one. The question, whether the foreign divorce be fraudulent or not, will in most cases involve a mass of complicated facts, capable of being unravelled only by the parties to the fraud, who are interested to support their evasion of our system of marriage. The prospect of arriving at the truth will thus be a most distant one—and the distinction between foreign divorces, bona fide obtained, after an honest change of domicil, and those obtained in fraud of our law, in practice will hardly be found to exist, and if the first are regarded as valid, the last will rarely ever be avoided. We have no hesitation in believing, that true policy requires that there should be no distinction between them, and that every divorce of parties to a South Carolina marriage by a foreign tribunal, should be regarded as obsolutely void whenever attempted to be enforced in this State. And we shall attempt to shew that such is the law of the land.

It is true, that by the laws of most countries, a foreign marriage solemnized expressly with the view to avoid a compliance with the forms and requisites of those laws, and therefore in *fraudem legis*, is regarded as valid. This is the case in England with the Gretna Green marriages, which are mere evasions of the English marriage acts. Yet a very different rule is adopted in that country as respects foreign divorces. They are unquestionably invalid, when obtained in fraud of the law of the country where the marriage was solemnized. Now it is very evident that there is no difference in the acts themselves, which create this difference in their consequences. In both cases the foreign tribunal has the same power over the matter on which they have decreed; yet in the one case the act is supported, and in the other it is rejected. The tribunals in Scotland declare a marriage, and in England it is enforced; but the tribunals in Scotland declare a divorce, and in England it is regarded as a nullity. What is the principle on which this difference depends? Why it proceeds on this, that

their own interest or own convenience requires it. When an English Court, or British Parliament recognizes as valid the marriage by the Blacksmith at Gretna Green, and when the same Court or Parliament refuses to recognize the validity of a divorce of English subjects, pronounced by the Consistorial Court of Scotland, they neither act from a principle of courtesy to the Blacksmith nor want of respect for the Constitutional Judge, nor for the country which they represent, but because, in case of marriage, the parties cannot be restored to their original situation, because other persons may come into being, who may be affected by the sentence of nullity, and in short, because it comports with their policy and their interest to support, rather than destroy these irregular marriages, they do so: and for the same reason, namely, that they think the least evil will result from declaring these divorces void, they do avoid them. This view of the subject may remove some of the obloquy which has been cast on the English Courts for their supposed inconsistence in legalizing Scotch marriages in fraud of their laws, and repudiating Scotch divorces of English marriages, even when bona fide obtained.

We recur to the question, whether a bona fide divorce from the *vinculum* of a South Carolina marriage, pronounced by a foreign tribunal, can be regarded in this State as dissolving what our laws have pronounced an indissoluble contract? Or in other words, whether a foreign tribunal can pronounce a decree efficiently binding on us, which our own tribunals, under similar circumstances, could not pronounce? To meet the question fairly, let us suppose a case. Two of our native citizens intermarry in this State. They then remove to Tennessee, with the bona fide intention of settling there, and do there fix their permanent domicil. A cause of divorce then arises; and they obtain it by the decree of a Tennessee tribunal having jurisdiction of the matter. The husband then returns to South Carolina, and living his first wife, here marries another woman. Is he guilty of bigamy? This is putting the strongest possible case, and the most favorable for the support of the legality of the divorce, and we are disposed to answer in the affirmative. He is guilty. We can hardly call that an indissoluble contract, after conceding to a foreign tribunal the power, under any circumstances, to dissolve it, so as to make

that dissolution obligatory on us. But we do not place much stress on this, which some may regard as merely verbal. We depend on higher principles. It must be granted on all hands, that no foreign government has the right, or can exercise the power to enforce the decrees of its judicial tribunals within our limits, so long as we are independent of that power. If we give sanction to such decrees here, they must derive their force from our consent. This consent when granted, is called, "sanction by the comity of nations," and imports that it is freely given. In most cases it is universally accorded, and properly so. We give effect to agreements according to the lex loci contractus, because, as one of the great family of nations, it is our interest to do so. We expect a reciprocation of the courtesy and it is conceded to us. It thence becomes a law of each individual community, and thus a branch of international law, binding on all, and no civilized tribunal will evade or neglect to enforce it. So in the forms and solemnities for transferring personal property, the *lex loci* prevails. But when the question arises, whether our Courts shall enforce an immoral contract, because it was legal in the country of its inception? or whether we shall suffer our real estate to pass by a foreign will without witnesses, because no witnesses are required to a will of real estate, where this was made? What do our Courts say? Why that this is extending the comity quite too far, and that our own interests require, that we should withhold this extension of foreign authority over our property or our welfare. This is in perfect accordance with the settled rules of international law. *Huberus*, in his chapter *de conflictu legum*, (which may be found well translated in a note to 3 Dal. Rep. 370,) says—"By the courtesy of nations, whatever laws are carried into execution within the limits of one government, are considered as having the same effect every where, *so far as they do not occasion a prejudice to the rights of other governments or their citizens.*" And again, "a sentence pronounced in any place by those who have jurisdiction, has equal effect every where; *still, however, under this exception, that no evident danger or inconvenience result from it to the other commonwealth.*" Who are to decide when this limitation to the comity of nations is to be applied? Surely the State by whose courtesy the principle itself is to

have effect, if it operates at all. South Carolina declares its marriages indissoluble. Her citizens, however, by removing, find a country where they can get clear of this obligation. Let them remain there and enjoy their liberty. But when they return here, shall they be permitted to say to this State, "out of comity to Tennessee, extend the favor to us of regarding the *indissoluble* contract formed under your law as dissolved, because in Tennessee it is so." This we should hardly call courtesy to Tennessee, but to our citizens. But if it were otherwise, we have a right to say, it is attended with evident danger to our system of marriage, it is inconvenient to us, that the indissoluble nature of this contract should be broken in upon, and we cannot concede the favor. Are there any precedents, any usage of nations, which require us to make this concession? We think not. No other State now regards this contract as absolutely indissoluble, and a precedent drawn from a country, where it is regarded as revocable, would not bind us, even if it gave sanction to foreign divorces of its own citizens. The nearest approach to our laws on this subject, is the law of divorce in England, and as far as their decisions go, they sustain our view of this matter. In the case of *Lolly*, tried at *Lancaster*, in England, in 1812, the twelve Judges were consulted, and decided unanimously, "that a marriage solemnized in England is indissoluble by any sentence either at home or abroad, or by any authority, except by an act of the Legislature." The case was this. *Lolly* had been married in England, and after sufficient residence to gain a domicil to the parties in Scotland, and thereby a jurisdiction to the Scotch Courts, they were regularly divorced. He afterwards returned to England, living his former wife, married another woman, and was indicted for *bigamy*. He was convicted, and in accordance with the above opinion of the twelve Judges, sentence was passed on him. No question was raised in the case, whether the Scotch divorce had been procured in *fraudem legis*, but the decision went on the broad principle, that whatever contract one State declares *indissoluble*, another cannot *avoid*. A more difficult question may arise in some of our sister States, on an application for a divorce from a South Carolina marriage. By the lex loci contractus, this marriage can be dissolved by no human power. Will a foreign tribunal attempt to dissolve

it? Can it do so, without violating the principles of comity by which all foreign contracts are construed? It would be difficult to bring the case within the exceptions of *Huberus*, by shewing that evident danger or inconvenience would result, by conceding in their tribunals to our marriages, these original indissoluble qualities. But we must leave this to the decision of the tribunals of our sister States, to whom we concede the same right to decide, when the exception shall be enforced, as we reserve to our own. And in exercising that right, we must decide, if we act prudently, that when they shall dissolve our marriages, their decrees shall not be enforced within our limits.

This view of the subject, if correct, will settle many other questions that may arise; such as the right of the children of the second marriage abroad, to take in this State by descent from their father; the right of the first wife to dower in her husband's lands here, or her distributive share of his estate, &c. All these questions will be settled, when our Judges, following those of England, shall declare, *that a marriage solemnized in South Carolina, is indissoluble by the sentence of any earthly tribunal, foreign or domestic.* And we have every confidence, that when the question comes before them such will be their judgment.

THE LAW OF MARRIAGE.

We are led to the publication of the case below, of Dalrymple vs. Dalrymple, by our preceding observations on divorces. The Law of Marriage in this State is the canon law, which is of force in Scotland. There is no abler commentary on the subject, than the judgment of Sir Wm. Scott in the case last mentioned, which has been reported in Great Britain in a separate volume, and in the 2d volume of the Consistory Reports of Mr. Haggard, of Doctors Commons, from whose work we now extract it. Those works being extremely rare in this State, has induced us to the republication.

DALRYMPLE VS. DALRYMPLE.

Marriage by contract, without religious celebration, according to the law of Scotland, held to be valid in England

Distinction as to the state of one of the parties, being an English officer on service in that country, not sustained.

This was a case of restitution of conjugal rights, brought by the wife against the husband, in which the chief point in discussion was, the validity of a *Scotch Marriage, per verba de præsenti*, and without religious celebration: one of the parties being an *English* gentleman, not otherwise resident in *Scotland*, than as quartered with his regiment in that country.

JUDGMENT.

Sir *William Scott*.—The facts of this case which I shall enter upon without preface, are these: Mr. *John William Henry Dalrymple* is the son of a Scotch noble family; I find no direct evidence which fixes his birth in England, but he is proved to have been brought up from very early years in this country. At the age of nineteen, being a cornet in his Majesty's dragoon guards, he went with his regiment to Scotland in the latter end of March or beginning of April 1804, and was quartered in and near Edinburgh during his residence in that country. Shortly after his arrival, he became acquainted with Miss *Johanna Gordon*, the daughter of a gentleman in a respectable condition of life. What her age was does not directly appear, she being

described as of the age of twenty one years *and upwards:* she was however young enough to excite a passion in his breast, and it appears that she made him a return of her affections: he visited frequently at her father's house in Edinburgh, and at his seat in the country, at a place called Braid. A paper without date, marked No. 1, is produced by her: it contains a mutual *promise* of marriage, and is superscribed, "a sacreed promise." A second paper, No. 2, produced by her, dated May 28, 1804, contains a mutual *declaration* and *acknowledgment* of a marriage. A third paper, No. 10, produced by her, dated July 11, 1804, contains a renewed declaration of marriage made by him, and accompanied by a promise of acknowledging her the moment he has it in his power; and an engagement on her part, that nothing but the greatest necessity shall compel her to publish this marriage. These two latter papers were enclosed in an envelope, inscribed "*Sacreed Promises and Engagements*," and all the three papers are admitted or proved in the cause, to be of the hand writing of the parties, whose writing they purport to be.

It appears that Mr. Dalrymple had strong reasons for supposing that his father and family would disapprove of this conneixon, and to a degree that might seriously affect his fortunes; he, therefore in his letters to Miss Gordon, repeatedly enjoined this obligation of the strictest secrecy; and she observed it, even to the extent of making no communication of their mutual engagements to her father's family; though the attachment, and the intercourse founded upon it, did not pass unobserved by one of her sisters, and also by the servants, who suspected that there were secret ties, and that they *were* either already, or soon *would be* married. He wrote many letters to her, which are exhibited in the cause, expressive of the warmest and most devoted passion, and of unalterable fidelity to his engagements, in almost all of them applying the terms of husband and wife to himself and her. It appears that they were in the habit of having clandestine nocturnal interviews, both at Edinburgh and Braid, to which frequent allusions are made in these letters. One of the most remarkable of these nocturnal interviews, passed on the 6th of July, at Edinburgh, where she was left alone with two or three servants, having declined to accompany her father and family (much to her

father's dissatisfaction,) to his country house at Braid.—There is proof enough to establish the fact, in my opinion, that he remained with her the whole of that night. He continued to write letters of a passionate and even conjugal import, and to pay nocturnal and clandestine visits during the whole of his stay in Scotland; but there was no cohabitation of a more visible kind, nor any habit and repute, as far as appears, but what existed in the surmises of the servants and of the sister. His stay in that country was shortened by his father, who came down, alarmed, as it should seem, by the report of what was going on, and removed him to England on or about the 21st of July.

The correspondence appears to have slackened, though the language continued equally ardent, if I judge only from the number exhibited of the letters written after his return; though it is possible, and indeed very probable there may be many more which are not exhibited. No letters of Miss Gordon's addressed to him, are produced; he has not produced them and she has not called for their production. In England he continued till 1805, when he sailed for Malta: his last letter, written to her on the eve of his departure, reinforces his injunctions of secrecy, and conjures her to withhold all credit from reports, that might reach her, of any transfer of his affections to another: it likewise points out a channel for their future correspondence, through the instrumentality of Sir Rupert George, the first Commissioner of the Board of Transports. He continued abroad till May, 1808, with the exception of a month or two in the autumn of 1806, when he returned for a purpose unconnected with this history, unknown to his father, and, as it appears, to this lady. It is upon this occasion, that the alteration of his affection first discloses itself in conversations with a Mr. Hawkins, a friend of his family, to whom he gives some account of the connexion which he had formed with Miss Gordon, in Scotland, complains of the consequences of it, in being tormented with letters from her, which he was resolved never to read in future; and having reason to fear she would write others to his father, he requested Mr. Hawkins to use all means of intercepting any letters which she might write either to the one or the other.

Mr. Hawkins executed this commission by intercepting

many letters so addressed; though, in consequence of her extreme importunity, he forwarded two or three, as he believes of those addressed to Mr. Dalrymple; and he at length wrote to her himself, about the end of 1806, or beginning of 1807, and strongly urged her to desist from troubling General Dalrymple with letters. This led to a correspondence between her and Mr. Hawkins; and it was not till the death of Mr. Dalrymple's father, (which happened in the spring of the year 1807,) that she then asserted her marriage rights, and furnished him with copies of these important papers, which she denominates, according to the style of the law of Scotland, her "Marriage Lines."—She took no steps to enforce her rights by any process of law. Upon the unlooked for return of Mr. Dalrymple, in the latter end of May, 1808, he immediately visited Mr. Hawkins, who communicated what had passed by letter between himself and Miss Gordon; and suffered him, though not without reluctance, to possess himself of two of her letters, which Mr. Dalrymple has exhibited. Mr. Hawkins however dismissed him with the most anxious advice to adhere to the connexion he had formed; and by no means to attempt to involve any other female in the misery that must attend any new matrimonial connexion. Within a very few days afterwards, Mr. Dalrymple marries Miss *Laura Manners*, in the most formal and regular manner. Miss Gordon who had before heard some reports of no very definite nature, instantly, upon hearing authentic news of this event, takes measures for enforcing her rights; and being informed that he is amenable only to this jurisdiction, she immediately applies for its aid, to enforce the performance of what she considers as a *marriage contract.*

The cause has proceeded regularly on both sides, and has been instructed with a large mass of evidence, much of it replete with legal erudition, for which the Court has to acknowledge great obligations to the gentlemen who have been examined in Scotland.* It has also been argued with great industry and ability by the counsel on both sides, and now stands for final judgment. Being entertained in an *English* Court, it must be adjudicated according to the princi-

* It has been deemed proper that this information with the evidence, should accompany the report of this case: it has therefore been printed in the Appendix.—[Omited here.—*Editors.*]

ples of English law, applicable to such a case. But the only principle applicable to such a case by the law of England, is, that the validity of Miss Gordon's marriage rights, must be tried by reference to the law of the country, where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland.

I am not aware that the case so brought here is exposed to any serious disadvantage, beyond that which it must unavoidably sustain in the inferior qualifications of the person who has to decide upon it, to the talents of the eminent men, to whose judgment it would have been submitted, in its more natural forum. The law learning of Scotland, has been copiously transmitted; the facts of the case are examinable on principles common to the law of both countries and indeed to all systems of law. It is described as an advantage lost, that Miss Manners, the lady of the second marriage, is not here made a party to the suit; she might have been so in point of form, if she had chosen to intervene; in substance she *is;* for her marriage is distinctly pleaded and proved, and is as much therefore under the eye, and under the attention, and under the protection of the Court, as if she were formally a party to the question respecting the validity of this marriage, which is in effect to decide upon the validity of her own. For I take it to be a position beyond the reach of all argument and contradiction, that if the Scotch marriage be legally good, the second or English marriage must be legally bad. Another advantage intimated to be lost, is this, that the native forum would have compelled the production of her letters to him, for the purpose of seeing whether any thing in them favored his interpretation of the transaction. Surely, according to any mode of proceeding, there can be no need of a compulsory process, to extract them from the person in whose possession they must be, if they exist at all. If they contain such matter as would favor such an interpretation, he must be eager to produce them, for they would constitute his defence; not being produced, the necessary conclusion is, either that they do not exist, or that they contain nothing which he could use with any advantage for such a purpose. The considerations that apply to the indiscretions of youth, to

the habits of a military profession, and to the ignorance of the law of Scotland, arising from a foreign birth and education, are common to both, and I might say, to all systems of law. They are circumstances, which are not to be left entirely out of the consideration of the Court, in weighing the evidence for the establishment of the facts, but have no powerful effect upon the legal nature of the transaction when established.

The law which in both countries allows the minor to marry, attributes to him in a way which cannot be legally averred against, upon the mere ground of youth and inexperience, a competent discretion to dispose of himself in marriage; he is arrived at years of discretion, *quoad hoc*, whatever he may be with respect to other transactions of life, and he cannot be heard to plead the indiscretion of minority. Still less can the habits of a particular profession, exonerate a man from the general obligations of law. And with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance, upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge and sense of the obligation, which the law would impose upon him by virtue of that engagement. According to the judgment of all the learned gentlemen who have been examined, the law of Scotland binds Mr. Dalrymple, though a minor, a soldier, and a foreigner, as effectively as it would do, if he had been an adult, living in a civil capacity, and with an established domicil in that country.

The marriage, which is pleaded to be constituted, by virtue of some or all of the facts, of which I have just given the outline, and to which I shall have occasion more particularly to advert in the course of my judgment, has been in the argument described as a *clandestine* and *irregular* marriage. It is certainly a *private* transaction between the individuals, but it does not of course follow that it is to be considered as a clandestine transaction, in any ignominious meaning of the word; for it may be, that the law of the

country, in which the transaction took place, may contemplate private marriages, with as much countenance and favor, as it does the most public. It depends likewise, entirely upon the law of the country, whether it is justly to be styled an irregular marriage. In some countries one only form of contracting marriage is acknowledged, as in our own, with the exception of particular indulgences to persons of certain religious persuasions; saving those exceptions, all marriages not celebrated according to the prescribed form, are mere nullities; there is and can be no such thing in this country as an irregular marriage. In some other countries, all modes of exchanging consent being equally legal all marriages are, on that account equally regular. In other countries, a form is recommended and sanctioned, but with a toleration and acknowledgment of other more private modes of effecting the same purpose, though under some discountenance of the law, on account of the non-conformity to the order that is established. What is the law of Scotland upon this point?

Marriage, being a contract, is of course *concensual* (as is much insisted on, I observe, by some of the learned advocates,) for it is of the essence of all contracts, to be constituted by the consent of the parties. *Consensus non concubitus facit matrimonium*,* the maxim of the Roman civil law, is in truth, the maxim of all law upon the subject; for the *concubitus* may take place, for the mere gratification of present appetite, without a view to any thing further; but a marriage must be something more; it must be an agreement of the parties looking to the *consortium vitæ*†; an agreement indeed of parties capable of the *concubitus*, for though the concubitus itself will not constitute marriage, yet it is so far one of the essential duties, for which the parties stipulate, that the incapacity of either party to

* D. lib. 50, tit. 17, l. 30, de Reg. Juris. D. lib. 35, tit. 1. l. 15. Huber, de Nuptiis, p. 23, lib. 24, tit. 2, de Divortiis. Voet. lib. 23, tit. 2. s. 2. Vinnius, lib. 1 tit. 9. s. 1. Cujac. in D. de Rit. Nup. v. 1 p. 800, in Cod. lib. 5. tit. 1. de Spons. et Arrhis. Taylor's Civil Law, p. 301. Puffendorf b. 6 c. 1 s. 14. Wood's Instit. book 1. chap. 1. 27 qu. 2 c. 1 Matrimonium. 27 qu. 2. c. Sufficiat. 27. qu. 2 c. 5. Cum initiatur. 27 qu. 2 c. 6. Conjuges. C. 25. Extra, de Spons. et Matrim. Huber, Eunom. Rom. ad lib. 23. Pand Vind. s. 1. Hoppii, commen. ad Ins. lib. 1 tit. 10. Wood s Instit. book 1 .chap. 2. Ayl. parerg, 362.

† D. lib. 23. tit. 2. l. 1. Instit. lib. 1 tit. 9 s. 1.

satisfy, that duty nullifies the contract.* Marriage in its origin, is a contract of natural law; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind: It is the parent not the child of civil society, "*Principium urbis et quasi seminarium Reipublicæ.*"† In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious as well as a natural and civil contract; for it is a great mistake to suppose that, because it is the one, therefore it may not likewise be the other. Heaven itself is made a party to the contract, and the consent of the individuals pledged to each other, is ratified and consecrated by a vow to God. It was natural enough that such a contract should, under the religious system which prevailed in Europe, fall under ecclesiastical notice and cognizance, with respect both to its theological and its legal constitution; though it is not unworthy of remark, that amidst the manifold ritual provisions, made by the Divine Lawgiver of the Jews for various offices and transactions of life, there is no ceremony prescribed for the celebration of marriage. In the Christian church marriage was elevated in a later age to the dignity of a sacrament, in consequence of its divine institution, and of some expressions of high and mysterious import respecting it, contained in the sacred writings. The law of the Church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man,) although, in conformity to the prevailing theological opinion, it reverenced marriage as a sacrament, still so far respected its natural and civil origin, as to consider, that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest; it had even in that state the character of a sacrament‡; for it is a misapprehension to suppose,

* C. 2 et 3. Extra. de Spons. et Matrim. Vinnius, lib. 1 tit. 9. s. 1.—Burn's Eccles. Law, v. 2 p. 500. Ayl. Par. 226.

† Cic. de Off. 1 17.

‡ Sanchez, lib. 2. disp. 6. s. 2. et lib. 2. disp. 10. s. 2.—Father Paul, p. 737.—Pallavicini, lib. 23. chap. 8.—Pothier, tit. 3. p. 290—27. qu. 2. c. 10. omne.

that this intervention was required as matter of necessity, even for that purpose, before the Council of Trent. It appears from the histories of that council, as well as from many other authorities, that this was the state of the earlier law, till that council passed its decree for the reformation of marriage. The consent of two parties* expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name *Sponsalia per verba de præsenti*, improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage, and therefore, *Brower* justly observes, *jus pontificium nimis laxo significatu, imo etymologiâ invitâipsas nuptias sponsalia appellavit.*† The expression, however, was constantly used in succeeding times to signify *clandestine* marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly, to mere engagements for a *future marriage*, which were termed *sponsalia per verba de futuro*, a distinction of *sponsalia* not at all known to the Roman civil law.‡ Different rules, relative to their respective effects in point of legal consequence, applied to these three cases—of regular marriages—of irregular marriages, and of mere promises or engagements. In the regular marriage every thing was presumed to be complete and consummated both in substance and in ceremony. In the irregular marriage every thing was presumed to be complete and consummated in substance but not in ceremony; and the§ ceremony was enjoined to be undergone as a matter of order. In the promise or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony. Mutual‖ consent would release the parties from their engagement; and one party, without the consent of the other, might contract a valid marriage, regularly or irregularly, with another person; but if the parties who had exchanged the promise had carnal¶ intercourse with each other, the effect of that carnal intercourse was to interpose

* C. 25. et C. 31. Extra de Spons. et Matrim.—C. 3. Extra. de Sponsa Duorum.—Swinburn, sect. 4. s. 2, 3, 4. et sect. 18. s. 1.—Brower, lib. 1. cap. 2. s. 8, 9. et cap. 22. s. 12. et cap. 27. s. 21.

† L. 1. c. 1. n. 6. ‡ Swinburn, Sect. 3. §. 3.

§ Swinburn, Sect. 17. §. 1. ‖ C. 2. Extra. de Spons. et Matrim.

¶ C. 30. et 31. Extra. de Spons. et Matrim.—C. 3. Extra. de Sponsa duorum.—Brower, lib. 1. cap. 22.—Swinburn, Sect. 17. s. 11.

a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection. I spare myself the trouble of citing from the text books of the Canon Law, the passages that support these assertions. Several of them have been cited in the course of this discussion, and they all lie open to obvious reference in *Brower* and *Swinburn*, and other books that profess to treat upon these subjects. The reason of these rules is manifest enough. In proceedings under the Canon Law, though it is usual to plead consummation, it is not necessary to prove it, because it is always to be presumed in parties not shewn to be disabled by original infirmity of body. In the case of a marriage *per verba de præsenti*, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed as naturally following the acceptance of that relation, unless controverted in like manner. But a promise *per verba de futuro* looked to a future time; the marriage which it contemplated might perhaps never take place. It was* defeasible in various ways; and, therefore, consummation was not to be presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted: it must be a† promise *cum copula* that implied a present acceptance, and created a valid contract founded upon it.

Such was the state of the Canon Law, the known basis of the matrimonial law of Europe. At the Reformation, this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin; and on that account, as well as of the religious forms that were prescribed for its regular celebration, an *holy* estate, *holy matrimony*, but it likewise retained those rules of the Canon Law which had their foundation not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognizance of matrimonial causes, enforced these rules, and amongst others, that rule which held an irregular marriage,

* Swinburn, Sect. 18. p. 1, et Sect. 4. p. 2.
† Swinburn, Sect. 17. p. 11.

constituted *per verba de præsenti, not followed by any consummation shewn*, valid to the full extent of voiding a subsequent regular marriage contracted with another person.* A statute† passed in the reign of Henry VIII. proves the fact by reciting, that "Many persons after long continuance in matrimony, without any allegation of either of the parties, or any other at their marriage, why the same matrimony should not be good, just, and lawful, and after the same matrimony solemnized, and *consummate by carnal knowledge*, have by an unjust law of the Bishop of Rome, upon pretence of a former contract made, and *not consummate by carnal copulation*, been divorced and separate," and then enacts, "that marriages solemnized in the face of the Church, and consummate with bodily knowledge, shall be deemed good, notwithstanding any pre-contract of matrimony, *not consummate with bodily knowledge*, which either or both the parties shall have made." But this statute was afterwards repealed, as having produced horrible mischiefs, which are enumerated in very declamatory language, in the preamble of the statute; 2 Edw. VI.; and Swinburn, speaking the prevailing opinion of his time, applauds the repeal, as worthily and in good reason enacted. The same doctrine is recognized, by the temporal Courts, as the existing rule of the matrimonial law of this country, in Bunting's case, 4 Coke, 29.—"John Bunting, father of the plaintiff, and Agnes Adenshall, contracted marriage, *per verba de præsenti*, and afterwards, on the 10th of Dec. 1555, the said Agnes took to husband Thomas Twede; and afterwards on the 9th of July, Bunting libelled against her in the Court of Audience, *et decret. fuit quod prædict. Agnes subiret matrimonium cum præfato Bunting et insuper pronunciatum fuit dictum matrimonium fore nullum.*" Though the common law certainly had scruples in applying the civil‡ rights of dower, and community of goods, and legitimacy in the cases of these looser species of marriage. In the later case of Collins and Jesson, 3 Anne, it was said by Holt, Chief Justice, and agreed to by the whole Bench, that "if a contract be *per verba de præsenti*, it amounts to an actual mar-

* Brower, 1. 22. 12. † 32 Hen. 8. cap. 38. sec. 2.

‡ Swinburn, sect. 1. s. 2. and sect. 17. s. 29.—Tract. de Repub. Ang. p. 103.—Perkins, tit. Feoffments. fol. 40. p. 38. Ed. 3. 12.—1 Roll. Abridg. 341. and 357.—Moor, 169.

riage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God, as if it had been in *facie ecclesiæ*." "But a contract *per verba de futuro*, which do not intimate an actual marriage, but refer to a future act, is releasable." 2 Salk. 437. Mod. 155. In Wigmore's case, 2 Salk. 438, the same judge said, "a contract *per verba de præsenti*, is a marriage; so is a contract *de futuro*; if the contract be executed, and he take her, 'tis a marriage, and they cannot punish for fornication." In the Ecclesiastical Court the stream ran uniformly in that course. One of the most remarkable is that furnished by the diligence of Dr. Swabey, on account of its striking resemblance to the present case: I mean the case of Lord Fitzmaurice, son of Earl Kerry, coram Deleg. in 1732. There were in that case, as in the present, three engagements in writing: the first was dated June 23, 1724, and contained these words, "We swear we will marry one another." The second, dated July 11, 1724, was to this effect: "I take you for my wife and swear never to marry any other woman." This last contract was repeated in December of the same year. It was argued there, as here, that the iteration of the declaration proved that the parties did not depend upon their first declaration, and was in effect a disclaimer of it. But the Court, composed of a full Commission, paid no regard to the objection, and found for the marriage, and an application for a commission of review, founded upon new matter alleged was refused by the Chancellor. Things continued upon this footing till the Marriage Act, 26 G. 2. c. 33. described by Mr. Justice Blackstone,* "an innovation on our laws and constitution," swept away the whole subject of irregular marriages, together with all the learning belonging to it, by establishing the necessity of resorting to a public and regular form, without which the relation of husband and wife could not be contracted.

It is not for me to attempt to trace the descent of the matrimonial law of Scotland since the time of the Reformation. The thing is in itself, highly probable, and we have the authority of Craig† for asserting that the Canon Law is its basis there, as it is every where else in Europe, "*totam hanc questionem pendere a jure pontificio*," though it is like-

* Book 1. chap. 15. s. 3. † Craig, lib. 2. dieg. 18 s. 17.

ly enough that in Craig's time, who wrote not long after the Reformation, the consistorial law might be very unsettled, as Mr. Cay in his deposition describes it to have been. It is, however, admitted by that learned gentleman, that it settled upon its former foundations, for he expressly says, that *the Canon Law in these matters is a part of the law of the land; that the Courts and Lawyers reverence the decretals, and other books of the more ancient Canon Law;* and I observe that in the depositions of most of the learned witnesses, and indeed in all the *factums* that I have seen upon these subjects, they are referred to as authorities. Several regulations, both ecclesiastical and civil, canons and statutes, have prescribed modes of celebrating marriages. Mr. Cathcart, in particular, refers to them in his deposition. Some of these appear to have been made in times of great ferment, during the conflict between the Episcopal and Presbyterian parties, and are therefore, I presume, of transitory and questionable authority. Mr. Cathcart infers that the whole of the Scotch statutes hold solemnization by a clergyman, or, as he expresses it, some one assuming the functions of a clergyman as *necessary*. It rather appears difficult to understand this consistently with the fact, that other marriages have *always* been held legal and valid. What the form of solemnization by a clergyman is, I have not been accurately informed; prescribed ritual forms are not, I believe, admitted by the church of Scotland for any office whatever. Whether the clergyman merely receives the declaration as a witness, or pronounces the parties, by virtue of his spiritual authority, to be man and wife, as in our form, does not distinctly appear. I observe that Mr. Gillies says in his deposition, "that to make marriage valid, it is not necessary that it should be celebrated in *facie ecclesiæ*, but *rebus integris* it can only be constituted by a consent adhibited in the presence of a clergyman, or *in some mode equivalent to an actual celebration*." So Lord Braxfield in a loose note, which is introduced, is made to say, "private consent is not the consent the law looks to; it must be before a priest, or *something equivalent*." Now what are these equivalents? and how to be provided? Are they to be carved out by the private fancy and judgment of the individuals? If so, though equivalent, they can hardly be deemed the regular forms, and yet ap-

pear to stand on a footing of equal authority. I observe, likewise, that a marriage before a magistrate is alluded to in some passages, as nearly equal to that before a minister, though certainly not a marriage in *facie ecclesiæ*, in any proper sense of that expression.

Sir Ilay Campbell states, in an opinion of his given to the English Chancery* in a case furnished to me by Dr. Stoddart, "that marriages irregularly performed without the intervention of a clergyman, are censureable, and formerly the parties were liable to be fined or rebuked in the face of the Church, but this for a long time has not been practised." The regulations, therefore, whatever they may be are not penally enforced; and it does not appear that they are enforced by any sense of reputation or of obligation imposed by general practice. The advocates, who describe the modes of marriage by the terms *regular* and *irregular*, seem as far as I can collect, to attribute no very distinctive preference to the one over the other; at any rate the distinction between them is not very strongly marked in the existing usage of that country. Many of the marriages which take place between persons in higher classes of society, are contracted in such irregular forms, if so to be denominated. They appear to create no scandal; to give no offence. The parties are not reprobated by public opinion, nor is legal censure actually applied. But taking it, that the distinction between the regular and irregular marriages was much stronger than I am enabled, by the present evidence to suppose, the question still remains to be examined how far actual consummation is required, by the law of Scotland, in marriages which are so to be deemed irregular.

The libel is drawn in a form not calculated to extract, simply and directly, a distinct statement of what the law of Scotland may be upon this point; for it collects together all the points of which the party conceives she can avail herself, consummation included, as matters of fact and matters of law, and then alleges, that, by the law of Scotland, this aggregate constitutes a marriage; without providing for a possible case in which she might establish some of these matters and fail in establishing others, *e. g.* if she failed in proof of a *copula*, and succeeded in establishing a solemn compact. If the law had been more distinctly understood

* Lib. Reg. A. 1780. f. 552.

here, at the commencement of this suit, the libel would probably have been drawn with more accommodation to the possible state of facts that might ultimately call for the proper specific rule of law. The advocates of Scotland have, to a great degree, supplied the want of that distinctness in the libel, by bringing forward the distinctions in their answers, and applying what they conceive to be the law, applicable to the possible case, that may result from the evidence; most of them have stated what they conceive to be the law, first, in the case of a promise *de futuro;* secondly, of a promise *cum copula;* thirdly, of a solemn declaration or acknowledgment of marriage; and fourthly, of such a declaration accompanied by a *copula.* It may be convenient to consider, first, whether the present case is a case of promise, or of present declaration and acknowledgment. It will be convenient to do so in two respects: The first convenience attending it is, that the fact itself is determinable enough upon the face of written existing instruments. It is not to be gathered from the loose recollections of loose verbal declarations, not guarded either in the expressions of those who made them, or in the memory of those who attest them. The second convenience resulting from this is, that a large portion of the inquiry into the other points of the case may, in a great degree, be rendered superfluous; for if these papers contain mere promises, then have I to consider only the law of promises, as referable to cases accompanied or unaccompanied by a *copula*, leaving out entirely the law that respects acknowledgment and declaration. On the other hand, if they are to be considered as acknowledgments, then the law of promises may be dismissed, except perhaps sometimes to be introduced incidentally for purposes of occasional illustration.

Whether they are to be considered as promises or declarations must be determined upon the contents of the instruments themselves, on such a view as the plain meaning of the words imports, and upon the information of their technical meaning as communicated by the Scotch lawyers; for it is possible that they may be subject to a technical construction different from their obvious meaning. This is the case in the marriage settlements in Scotland. The words of the *stipulatio sponsalitia*, are present declaratory words; the parties mutually accept each other, but the en-

gagements they enter into are always technically considered to be mere promises *de futuro*. Those who are conversant in the books of the Canon Law, will recollect the extremely nice distinctions which that law and its commentators have made between expressions of a very similar import in their obvious meaning, as constituting contracts *de præsenti* or only promises *de futuro*.

The first paper is without date, and is merely a *promise*. Mr. Dalrymple promises to marry Miss Gordon *as soon as it is in his power*, and she promises the same; it is subscribed by both their names—is endorsed "A sacreed promise," and is left in her possession. It is pleaded to be the first that was executed by them, and it is highly reasonable to presume that it was so, for no person, I think, would be content to accept such a paper as this, after having received the papers which follow, marked 2, and 10. The paper marked No. 2, is dated on the 28th of May, 1804, and contains these words, "I hereby *declare Johanna Gordon* is my lawful wife; and I hereby *acknowledge John William Henry Dalrymple* as my lawful husband." I see no great difference between the expression *declare* and *acknowledge*; the words properly enough belong to the parties by whom they are respectively used, and are perhaps not improperly adopted to the decorums of such a transaction between the sexes. No. 10. is a reiterated declaration on the part of Mr. Dalrymple, accompanied with a promise "that he will acknowledge Miss Gordon as his lawful wife the moment he has it in his power." She makes no repeated declaration, but promises that "nothing but the greatest necessity, (necessity which ———— situation alone can justify,) shall ever force her to declare the marriage." It is signed by him, and by her, describing herself *J. Gordon, now J. Dalrymple*, and it is dated July 11, 1804. Both the papers are inclosed in an envelope, on which is inscribed "Sacreed promises and engagements." There *are* promises and engagements that would satisfy these terms, independent of the words which contain the declaration of the marriage.—At the same time it is to be observed, that the words "promises and engagements," are not improperly applied to the marriage vow itself, which is prospective in its duties, which engages for the performance of future offices between the parties till death shall part them, and to which, in the words

of our liturgy, *it plights their troth*, or in more modern language, pledges their good faith for that future performance. I feel some hesitation in acceding to the remark that the paper marked No. 2. is at all weakened or thrown loose by the mere engagement of secrecy, which seems to be the principal if not the sole object of the latter paper, though Mr. Dalrymple has thrown in a renewed declaration of his marriage; that reiterated declaration, though accompanied with a promise of secrecy, cannot, upon any view of the case, be considered as a disclaimer of the former. An engagement of secrecy is perfectly consistent with the most valid, and even with the most regular marriages. It frequently exists even in them from prudential reasons; from the same motives it almost always does in private or clandestine marriages. It is only an evidence against the existence of a marriage, when no such prudential reasons can be assigned for it, and where every thing, arising from the very nature of marriage calls for its publication.

Such is the nature of these exhibits; first, a promise; secondly, that promise merged in the direct acknowledgment of the accomplished fact; thirdly, a renewed admission of the fact on his side, with a mutual engagement for secrecy, till the proper time for disclosure should arrive.

In these papers, as set up by Miss Gordon, resides the *constitution*, as some of the gentlemen who have been examined, call it, or as others of them term it, the *evidences* of the marriage; for it is matter of dispute between these learned persons, whether such papers, when free from all possible impeachment, are *constituents* or merely *evidences* of marriage. It appears to be a distinction not very material in its effects; because, if it is to be considered that such papers, so qualified, are only to be treated as *evidences*, yet if free from all possible impeachments, on the grounds on which the law allows them, as evidences to be impeached, they make full faith of the marriage, they sustain it as effectually, as if, according to other ideas, they directly constituted it; they have then become *præsumptiones juris et de jure*, which establish the same conclusion, although in another way.

But these papers must be taken in conjunction with the letters which may control or confirm them. What is the effect of the letters? In almost all of them Mr. Dalrymple addresses Miss Gordon as his wife, and describes himself as

her husband. In the first letter he insists upon it, that she shall draw upon him for any money she may stand in need of, "for it is her right," and "in accepting of it she will prove her acknowledgment of it." *Her* sister he calls *his* sister. This letter appears by the post mark to have been written before No. 2, and therefore has been said to be entirely premature, and to give an interpretation to subsequent expressions of the like kind. But, *non constat* that it might not be written long after the undated promise by which the parties entered into a solemn engagement to marry. Verbal declarations similar in their imports to the contents of No. 2, might have passed, for it can hardly be conceived that such a paper could have passed without some preliminary verbal declarations to the same effect. People do not write in that manner till after they have talked together in the same style. The post mark on the letter No. 4, is May the 30th, and this letter refers to what passed on the night after the paper No. 2, bears date; in it he says, "You are my wife, to retract is impossible and ever shall be; I have proved my legal right to protect you, which I have most fully established: nothing in this world shall break those ties." The letter, No. 5, has these expressions: "Remember you are mine: that God Almighty may preserve my wife is the prayer of her husband." No. 6. "It grieves me to suffer you five minutes from your husband; nothing can change my sentiments, independent even of those sacred ties which unite us. Nothing ever can or should (if 'twere possible) annul them.—Put that confidence in me which your duty requires.—That God may ever preserve my wife, and inspire her with the purest love for her husband, is the first wish of her adoring ———." No. 8. "I have received letters from town which say that Lord Stair has heard of our marriage." No. 12. "Whatever money you may want, draw on me for it without scruple." No. 13, dated May 29, 1805. "Situated as you are, nothing could strengthen the ties which unite us, therefore wish it not to be mentioned that you are my wife till it can be done without injury to ourselves. I insist upon a paper acknowledging yourself as my wife." No. 14, dated June 10, 1805. "Forward to me the paper I requested in my last and acknowledge yourself my wife—that as we are not immortal I may leave you, in trust of a friend, the small re-

mains of what was once a tolerable fortune; you can't refuse on any legal grounds; do, my dearest wife, forward it." In No. 15, dated June 28, 1805, he says, "I would not give up the title of your sisters brother for any consideration. Don't deny yourself what you require, as I should not wish my wife to appear in any thing not consistent with her rank; I will arrange before my departure, money matters, so as to give you every opportunity of gratifying your taste, or any other fancy." In the letter marked 14, he asks her permission to go abroad on account of the distress of his affairs. "Will you allow me to endeavor by a short absence to rectify these things? In asking your consent, I humbly conjure you dearest love, to pardon me.—I solemnly assure you I will not be absent from you very long."—In another part of this letter he points out the period of four months as the probable duration of his absence.

Now it is impossible to say that the exhibits, No. 2 and 10, are at all weakened by the strong conjugal expressions contained in these letters. Taken together they, in their plain and obvious meaning, import a recognition of an existing marriage. What is their technical meaning? That information we must obtain from the learned persons who have been examined. Mr. Erskine, Mr. Hamilton, Mr. Cragie, Mr. Hume, and Mr. Ramsay, are all clearly of opinion that they are "*present declarations.*" Mr. Cay is equally clear that they "are contracts *de præsenti.*" Sir Ilay Campbell describes them as "*very explicit mutual declarations of marriage* between the parties." Mr. Clerk says that No. 2, is evidence of a very high nature to prove that "a marriage *had been* contracted by the parties; it is *a full and explicit declaration* of a contract *de præsenti.*" "No. 10," he says, "imports little more than No. 2; it is *important evidence* to the *same effect.*" Mr. Cathcart and Mr. Gillies who hold a *copula* in all cases necessary, do not distinctly say under which class of cases the present falls.

Upon this view I think myself entitled to lay aside, at least for the present, the rules of the law that apply to promises. The main enquiry will thus be limited to two questions, whether, by the law of Scotland, a present declaration *constitutes* or *evidences* a marriage *without a copula*; and secondly, whether, if it does not, the present evidence supplies sufficient proof that such a requisite has been complied with.

The determination of the first question must be taken from the authorities of that country, deciding for myself and for the parties entrusted to my care, as well as I can, upon their preponderance where they disagree, and feeling that hesitation of judgment which ought to accompany any opinion of mine upon points, which divide the opinions of persons so much better instructed, in all the learning which applies to them.

The authorities to which I shall have occasion to refer are of three classes; first, the opinions of learned professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight; and thirdly, the certified adjudication of the tribunals of Scotland upon thees subjects. I need not say that the last class stands highest in point of authority; where private opinions, whether in books or writing, incline on one side, and public decisions on the other, it will be the undoubted duty of the Court, which has to wiegh them, *stare decisis*.

Before I enter upon this examination I will premise an observation, from which I deduce a rule that ought, in some degree, to conduct my judgment; the observation I mean, is this, that the Canon Law, as I before have described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. And whether that law remains entire, or has been varied, I take it to be a safe conclusion, that, in all instances where it is not proved that the law of Scotland has resiled from it, the fair presumption is, that it continues the same. Shew the variation, and the Court must follow it; but if none is shewn, then must the Court lean upon the doctrine of the ancient general law; for I do not find that Scotland set out upon any original plan of deserting the ancient matrimonial law of Europe, and of forming an entire new code upon principles hitherto unknown in the Christian world. It becomes of importance, therefore, to consider what is the ancient general law upon this subject, and, on this point it is not necessary for me to restate, that by the ancient general law of Europe, a contract *per verba de præsenti*, or a promise *per verba de futuro cum copulâ*, constituted a valid marriage without the intervention of a priest, till the time of the Council of Trent, the decrees of which Council were never received as of authority in Scotland.

It appears from the case of Younger, cited by Sir Thomas Craig,* that in his time, the practice upon a contract *de præsenti*, was the same in Scotland as it continued to be in England, till the period of the Marriage Act, viz. to compel the reluctant party to a public celebration as matter of order. This was soon discontinued in Scotland on account of the apparent incongruity of compelling a man to marry against his will, but with a solemn profession of love and affection to the party who compelled him. But though they discarded the process of compulsion for some such reason as this, which is stated by Mr. Hume, they might still consistently retain the principle, that a present consent constituted a valid marriage. Whether it was retained, is the question I have to examine, assuming first (as I have done) that if the contrary is not shewn, it must so be presumed.

The evidence of opinions on this point, taken in this and similar cases, and under similar authority, stands thus:— Mr. Erskine, Mr. Cragie, Mr. Hamilton, Mr. Hume, and Mr. Ramsay, who have been examined upon the question at present before the Court, are all clear and decided in their opinions, that a declaration *per verba de præsenti*, without a *copula* does, by the law of Scotland, constitute a valid marriage. I will not enter into an examination of their authorities where they agree—*Oportet discentem credere*, though, where authorities differ, it is a rule which cannot be universally applied. Still less shall I presume to discuss their reasonings, except in a few instances, where, however desirous to follow, I find a real inability to accompany them to their conclusions. To the authorities above stated, I must add the opinions of the learned persons examined upon the case of Beamish and Beamish; a case which came before this Court upon a similar question of a Scotch marriage of an Englishman with a Scotch woman in the year 1788, and in which the Court of Arches to which it was appealed, upon the informations of law obtained from the learned advocates of Scotland, pronounced for the validity of the marriage. Mr. John Millar, Professor of Law at Glasgow, there said, "that, by the law of Scotland, the ceremony of being married by a clergyman was not necessary to constitute a valid marriage. The deliberate consent of

*Lib. 2. dieg. 18. s. 19.

parties, entering into an agreement to take one another for husband and wife, was sufficient to constitute a legal marriage, as valid in every respect as that which is celebrated in the presence of a clergyman. Consent must be expressed or understood to be given *per verba de præsenti;* for consent *de futuro*, that is, a promise of marriage, does not constitute actual marriage. By the Scotch law, the deliberate consent of parties constitutes marriage." Mr. John Orr, in his deposition, said "By the laws of Scotland a solemn acknowledgment of a marriage having happened between the parties, whether verbally or in writing, is sufficient to constitute a marriage, whether expressed in *verbis de præsenti*, or in an acknowledgment that the marriage took place at a former period. A promise followed by a *copula* would constitute a valid marriage; and a written instrument containing not a consent *de præsenti*, but only stating that the parties were married at a certain time, or even a solemn verbal acknowledgment to this effect, although no actual marriage had taken place, is sufficient to constitute a marriage by the law of Scotland." Mr. Hume said, "Marriage is constituted by consent of parties to take or stand to each other in the relation of husband and wife. The mode or form of consent is not material, but it must be *de præsenti*." Mr. Erskine and Mr. Robertson agreed in saying, "that a deliberate acknowledgment of the parties that they were married, though not containing a contract *per verba de præsenti*, is sufficient evidence of a marriage without the necessity of proving the actual celebration." Mr. Clerk, Mr. Gillies, and Mr. Cathcart, who are examined in the present case on the part of Mr. Dalrymple, are equally clear in their opinions on the other side of the question. Mr. Cay inclines to think a *copula* necessary, although well aware that a different opinion prevails among lawyers on this point."

Sir Ilay Campbell's opinion upon this important point, which the Court was particularly eager to learn, is through some inaccuracy of the examiner, transmitted in such a manner as to leave it rather a matter of question, which of the two opinions he favors; for in the former part of the deposition he is made to say, that "by the general principles of the law of Scotland, marriage is *perfected* by the mutual consent of parties accepting each other as husband and wife."

In words so express and unqualified, pointing to nothing beyond the mutual acceptance of the parties, as *perfecting* a marriage without reference to any future act as necessary to be done, I thought I had received a judgment of high authority in favor of the ancient rule, that consent without a *concubitus* constitutes a marriage: but in a latter part of the deposition, he lays it down, that this acknowledgment *per verba de præsenti* must be attended with personal intercourse, prior or subsequent; if so, it throws a doubt upon the precise meaning of the former position, which had declared a marriage perfected by mere mutual acceptance. "Without such intercourse," Sir Ilay Campbell says, "they would resolve into mere *stipulatio sponsalitia*, where the words are *de præsenti*, but the effect future." And here I have to lament the difficulty I find in following so highly respectable a guide to the conclusion, on account of a distinction that strongly impresses itself upon my apprehension. In the *stipulatio sponsalitia* the words *de præsenti* are qualified by the future words that follow, and which imply something more is to be done—a public marriage to take place; but in the case supposed of a clear present declaration, no such qualifying expressions occur—nothing pointing to future acts as the fulfilment of a present engagement. I find the greater difficulty in ascertaining the decided judgment of this very eminent person, from considering an opinion of his given into the English Court of Chancery,* upon a requisition from that Court, and on which that Court acted in the case of the Scotch marriage. In that case, the case of the marriage of Thomas Thomasson, and Catharine Grierson, the opinion dated August 18th, 1781, and remaining on record in Chancery, states a present contract to be sufficient to validate a marriage, without any mention of a *copula*, antecedent or subsequent; the known accuracy of his judgment would never have allowed him to omit this, if it had been considered by him at that time a necessary ingredient in the validity. I might, perhaps, without much impropriety, be permitted to add another legal opinion of equal authority—the opinion of a person whose death is justly lamented as one of the greatest misfortunes that have recently visited that country.—I need not mention the name of the Lord

*Lib. Reg. A. 1780. F. 552.

President Blair, upon whose deliberate advice and judgment this present suit has been asserted in argument, and without contradiction, to have been brought into this Court.

Upon this state of opinions, what is the duty of the Court? How am I to decide between conflicting authorities? For to decide I am bound. Far removed from me be the presumption of weighing their comparative credit; it is not for me to construct a scale of personal weight amongst living authorities, with most of whom I am acquainted no otherwise than by the degree of eminence which situation, and office, and public practice, and reputation, may have conferred upon them. In such a case I am under the necessity of quitting the proper legal rule of estimating *pondere, non numero;* I am compelled to attend a little to the numerical majority (though I admit this to be a sort of *rusticicum judicium,*) and finding that much the greater number of learned persons recognize a rule consonant to that which, in ancient times, governed the subject universally, I think I am not qualified to say, that as far as the weight of opinion goes, it is proved that the law of Scotland has innovated upon the ancient general rule of the marriage law of Europe. It appears to me, that the common mode of expression used in Scotland, which is constantly recurring, is no insignificant proof of the contrary doctrine. It is always expressed—Promise *cum copulâ*, the *copula* is in the ordinary phrase, a constant adjunct to the promise—never to the *contract de præsenti*, strongly marking the known distinction betwen the two cases, that the latter by itself worked its own effect, and that the other would be of no avail, unless accompanied with its constant and express associate.

I come now to the text authorities of the Scotch writers: The first to whom I shall refer is* Craig. It does not appear to me, that he is of great authority either one way or the other: he admits generally that the question of marriage is not *hujus instituti propria, sed judicis ecclesiastici*, and the case of Younger, which he cites from the Court of Commissaries, is a case not of a declaration *de præsenti*, but of a promise *cum copulâ;* unless, therefore, it is previously established, that promise *cum copulâ* converts itself in all respects, and in all its bearings, into a contract *de præsenti* without a *copulâ*, (which certainly it does in the Canon

* Cragii jus feudale, lib. 2. dieg. 18. § 17 & 19.

Law, and is so recognized in the majority of the opinions upon the law of Scotland,) it is no direct authority; and the conclusion is still more weakened by observing, that, in that case, a judicial sentence of the Commissaries had been actually obtained, and that the point determined by the common law was a mere question of succession upon legitimation, which may depend upon many considerations extrinsic to the original validity of the marriage.

A more pertinent authority, and of higher consideration is Lord Stair, an ancestor I presume, of one of the present parties—a person whose learned labors have at all times engaged the reverence of Scotch jurisprudence. He treats of this very question, stating it as a question, and determines it thus ;* "It is not every consent to the married state that makes matrimony, but consent *de præsenti*, not a promise *de futuro matrimonio*." The marriage consists not in "the promise but in the present consent, whereby they accept each other as husband and wife, whether by words expressly, or tacitly by martial cohabitation, or acknowledgment, or by natural commixtion where there hath been a promise preceding, for therein is presumed a conjugal consent *de præsenti*, but the consent must specially relate to that conjunction of bodies as being then in the consenter's capacity, otherwise it is void." I shall decline entering into the distinctions and refinements which have attempted to convert the obviously plain meaning of this passage into one of a very different import. It does appear to me to establish the opinion of this very learned person to be, that without a commixtion of bodies immediately following, (though in all cases to be looked to as possible, and at some time or other to take place,) a present valid marriage is constituted by a contract *de præsenti*.

Sir George Mackinsie,† Lord Advocate under King Charles and James the Second, whose authority carries with it a fair proportion of weight, says, "consent *de præsenti* is that in which marriage doth consist. Consent *de futuro* is a promise; this is not marriage, for either party may *Resile rebus integris*;" manifestly intimating that this could not be done under the consent *de præsenti*.

* Stair's Institut. lib. 1. tit. 4. § 6.

† Mackinsie, Institut. book 1. tit. 6. § 3.

Another authority of more modern date, but entitled to the greatest respect, is Mr. Erskine, a writer of institutional law; by him it is expressly laid down* that "marriage consists in the present consent, whether that be by words expressly, or tacitly, by marital cohabitation, or by acknowledgment. Marriage may without doubt be *perfected* by the consent of parties declared by writing, provided the writing be so conceived as to import a present consent." Nothing upon the direct meaning of these words can be more clear than that he held bodily conjunction not necessary in a present contract. The very note of the anonymous editor, to whom, as an anonymous editor no authority can be allowed, whatever may be the weight that really belongs to it, admits this; for he says, "From the later decisions of the Court, there is reason to doubt, if it can now be held as law, that the private declarations of parties, even in writing, are *per se* equivalent to actual celebration of marriage;" admitting, by that mode of expression, that such was the doctrine of the text and of the times when it was composed. Mr. Clerk says; "he considers the doctrine to be incorrect," thereby likewise admitting it to be the doctrine contained in these words.

I am not enabled to say how far Mr. Hutcheson's book can be considered as a work of authority. It, however, carries with it most respectable credentials, if it be true, what has been asserted in the argument, that it has been sanctioned by the approbation of several of the Judges of Scotland, and particularly of Sir Ilay Campbell, who refers to it in his deposition as a book of credit, and under whose patronage it is published, and to whose perusal it is said to have been submitted previously to its publication. His statement of the law of Scotland is full and explicit in favor of the doctrine, that private mutual declarations require no bodily consummation to constitute a marriage. He says that the ancient principle to this effect has been happily retained in the law of Scotland, speaking with similar feelings of attachment to it, which are observable in our Swinburn, when he talks of the repealing Statute of Edward VI. as being worthily and for good reasons enacted, though a regard to domestic security has induced us to extinguish it entirely in this part of the island by the legislative provi-

* B. 1. tit. 6. § 5.

sions of later times. Mr. Hutcheson mentions it as a fact, that in the case of M'Adam against Walker, none of the Judges, who dissented from the judgment, disputed that doctrine of the law. His testimony to such a fact is equivalent to that of any person of unimpeached credit—even to that of Lord Stair or Mr. Erskine; he has asserted it in the face of his profession and the public, and at the hazard of being contradicted, if he has stated it untruly, by the united voice of the whole bench and bar of his country.

In support of the opposite opinion, no ancient writer of authority has been cited. The only writer named, is of very modern date, Lord Kaimes, a man of an ingenious and inquisitive turn of mind, and of elegant attainments, but whose disposition, as he admits, did not lead him to err on the side of excessive deference to authority and establishment. The very title of his book is sufficient to excite caution; "Elucidations respecting the law of Scotland," may seem to imply rather proposed improvements than expositions of the existing law. He says, in his preface, that "he brings into the work the sceptical spirit, wishing and hoping to excite it in others, and confesses that he had perhaps indulged it too much." But supposing that it is liable to no objection of this kind, the whole of his chapter on these subjects, so far as this question is concerned, relates entirely to the effect of a promise *de futuro cum copulâ*, which has no application to the present case, unless it is assumed, that this amounts to the same thing identically in law, to all intents and purposes, as a contract *de præsenti*. I must add that his extreme inaccuracy, in what he ventures to state with respect both to the ancient Canon Law and to the modern English Law, tends not a little to shake the credit of his representations of all law whatever. In this chapter, he asserts that by the present law of England, a mutual promise of marriage *de futuro* is a good foundation to compel a refractory party to complete the marriage, by process in the Spiritual Court. I mean no disrespect to the memory of that ingenious person, when I say, that it is an extraordinary fact that it should have been a secret to any man of legal education in any part of this island, that the law of England has been directly the reverse for more than half a century.

No other reference to any known writer of eminence is

produced; it is easy therefore, to strike the balance upon this class of authorities; they are all in one scale, a very ponderous mass on one side, and totally unresisted on the other.

I come, thirdly, to the last and highest class of authorities, that of cases decided in the Scotch tribunals. Many of these have been alluded to in the learned expositions which have been quoted but such of them (and they are not few in number) as apply to the cases of promises *de futuro cum copulâ* I dismiss for the present, observing only, that if a promise of this kind be equivalent to a contract *de præsenti nudis finibus*, the result of those cases appears to me strongly to incline to the conclusion deduced from the two former classes of authority.

With regard to decided cases, I must observe generally, that very few are to be found, in any administration of law in any country, upon acknowledged and settled rules. Such rules are not controverted by litigation, they are therefore not evidenced by direct decision; they are found in the maxims and rules of books of text-law. It would be difficult, for instance, to find an English case in which it was directly decided, that the heirs takes the real, and the executor the personal estate; yet though nothing can be more certain, it is only incidentally, and *obiter*, that such a matter can force itself upon any recorded observation of a Court; equally difficult would it be to find a litigated case in the Canon Law, establishing the doctrine, that a contract *per verba de præsenti* is a present marriage, though none is deeply radicated in that law.

The case of Cochrane versus Edmonston, before the Court of Sessions in the year 1804, was a case of contract *de præsenti*, and of this I shall take the account given by Mr. Clerk. The Court there held, "that a written acknowledgment *de præsenti* was sufficient to constitute a marriage. The interlocutor of the Lord Ordinary, which the Court adhered to, rests upon the consent of parties to constitute a marriage *de præsenti* without referring to the *copula*." Mr. Clerk says, "he cannot suppose the Court overlooked the very material circumstance of the *copula*," which did exist in that case, and which he says "would have been sufficient with a bare promise to bind the man to marriage." I find great difficulty in acceding to this obser-

vation, particularly when it is stated that the Court adhered to the interlocutor, which expressed the directly contrary doctrine, and even if it had not so done, it appears to me to be an inaccuracy too striking to attribute to that Court, that they should have declared consent *de præsenti* sufficient, without express mention of the *copula*, if they had thought it a necessary ingredient in the validity of the marriage. What Mr. Clerk says of his disposition to advise an appeal in particular cases, is not necessary to be noticed in the present consideration, which regards only actual decisions, and not private opinions, however respectable. He admits expressly, that on the evidence of the report, he thinks it at least highly probable, that some such doctrine as that held by Mr. Erskine, was laid down in that case by the Judges.

The next case which I shall mention, is that of Taylor and Kello, which occurred in 1786. This was an action of declarator of marriage instituted by Patrick Taylor against Agnes Kello, and was grounded on a written acknowledgment in the following words: "I hereby declare you, Patrick Taylor, in Birkenshaw, my just and lawful husband, and remain your affectionate wife, Agnes Kello." Kello delivered this written declaration to Taylor, and received from him another *mutatis mutandis* in the same terms, which she afterwards destroyed. There was no sufficient evidence to support the concubitus, but the Report states that the Court in its decision held this to be out of the question. The Commissaries "found the mutual obligations relevant to infer marriage between the parties, and found them married persons accordingly." This sentence was affirmed by the Court of Session, though that Court was much divided upon the occasion, some of the Judges considering the declaration as merely intended to signify a willingness to enter into a regular marriage; but a majority of the Court thought, in conformity to the judgment of the Commissioners, that the marriage was sufficiently established. This sentence was reversed by the House of Lords, but upon the express grounds that neither of the parties understood the papers respectively signed by them to contain a final agreement to consider themselves as married persons; on the contrary it was agreed that the writing was to be delivered up whenever it was demanded: The whole subsequent conduct of the parties proving this sort of agreement.

It appears then that this was not considered by the House of Lords an *irrevocable* contract, such as that of marriages is in its own nature, from which the parties cannot resile even by joint consent, much less on the demand of one party only. This case, I think, goes strongly to affirm the doctrine, that an irrevocable contract *de præsenti*, does of itself constitute a legally valid marriage. Mr. Cathcart admits, in his deposition, that this sentence of the Commissaries, confirmed by the Court of Sessions, would have been a decision in favor of the doctrine, that a contract *de præcenti* constitutes a marriage, if it had not been reversed by the House of Lords. But as it was clearly reversed upon other grounds, the authority of the two Courts stands entire in favor of the doctrine. Mr. Gillies thinks the reversal hostile to the doctrine, but he has not favored the Court with the grounds on which he entertains this opinion. Mr. Clerk contents himself with saying, that the doctrine is not recognized: most assuredly it is not disclaimed; on the contrary the presumption is, that if the contract had been considered irrevocable the House of Lords would have attributed to it a very different effect.

In the case of Inglis against Robertson, which was decided in the same year, the Commissaries sustained a marriage upon a contract *de præsenti*, and this sentence was affirmed by the Court of Session upon appeal, and afterwards by the House of Lords. The accounts vary with respet to the proof of *concubitus* in this case, which renders it doubtful whether the decision was grounded on the acknowledgment only, or referred likewise to the *copula*. If it had no such reference, then it is a case directly in point: but if it had, it certainly cannot be insisted upon as authority upon the present question.

The case of Ritchie and Wallace, which was before the Court of Sessions in 1792, is not reported in any of the books, but is quoted by Mr. Hamilton, who was of counsel in the cause. It was the case of a written declaration of an existing marriage, but accompanied with a promise that it should be celebrated in the Church at some future and convenient time. This very circumstance of a provision for a future public celebration might of itself have raised the question, in the minds of some Judges, whether these acknowledgments could be considered as relating to a mat-

rimonial contract already formed and perfected in the contemplation of the parties themselves; and this is sufficient to account for the diversity of the opinion of the Judges upon the case, without resorting to any supposed difference of opinion on the general principle of law now controverted. The woman was pregnant by the man when she received this written declaration from him, but, as I understand the case, nothing rested in judgment upon this fact; for Mr. Hamilton says, the woman founded on the written acknowledgment as a declaration *de præsenti* constituting a marriage, which conclusion of law was controverted by the man; but the Court by a majority of six Judges to three, found the acknowledgment libelled, relevant to infer the marriage.

The case of M'Adam against Walker (13th of November, 1806,) which underwent very full discussion, is by all parties admitted to be a direct decision upon the point, though it was certainly attended with some difference of opinion amongst the Judges by whom it was decided. In that case Elizabeth Walker had cohabited with Mr. M'Adam, and borne him two daughters. In the presence of several of his servants, whom he had called into the room for the purpose of witnessing the transaction, he desire Elizabeth Walker to stand up and give him her hand; and she having done so, he said, "This is my lawful wife, and these my lawful children." On the same day, without having been alone with Walker during the interval, he put a period to his existence. The Court held the children to be legitimate. It appears clearly that, in this case, there had been a *copula* antecedent, though none could have taken place subsequent to the declaration: It could not therefore have been upon the ground of want of *copula* that Sir Ilay Campbell, who holds a prior *copula* as good as a subsequent one, joined the minority in resisting that judgment. It is stated by Mr. Hutcheson, as a matter of fact, that "none of the Judges disputed the law," but there were other grounds of dissent arising out of the circumstances of the case, unconnected with the legal question. "The Judges entertained doubts of the sanity of Mr. M'Adam at the time of the marriage; they considered also, that when he made the declaration he had formed the resolution of suicide, and therefore did not mean to live with the woman as his wife."

It is said that this decision of the Court of Sessions is appealed from, and therefore cannot be held conclusive upon the point. At any rate it expresses the judgment of that Court upon the principle, and the appeal, whatever the ground of it may be, does not shake the respect which I owe to that authority whilst it exists unshaken.

I might here call in aid the numerous cases where promise *cum copulâ* has been admitted to constitute a marriage, if the rule of the Canon Law transfused into the law of Scotland, be sound, that *copula* converts a promise *de futuro* into a contract *de præsenti*. If it does not, if *copula* is required in a contract *de præsenti*, what intelligible difference is there between the two—between a promise *de futuro* and a contract *de præsenti?* None whatever. They stand exactly upon the same footing. A proposition, I will venture to say, never heard of in the world, except where positive regulation has so placed them till these recent controversies respecting the state of the marriage law of Scotland.

I might also advert to the marriages at Gretna Green, where the Blacksmith supplies the place of the priest or the magistrate. The validity of these marriages has been affirmed in England upon the certificates of Scotch law, without reference to any act of consummation, for such I think was clearly the exposition of the law as contained in the opinion of Sir Ilay Campbell, upon which the English Court of Chancery founded its decision in the case of Grierson and Grierson.

What are the cases which have been produced in contradiction to this doctrine? As far as I can judge, none—except cases similar to those which have been already stated, where the superior Court has overruled the decisions of the Court below, and pronounced against the marriage upon grounds which leave the principle perfectly untouched.—The case of M'Lauchlan contra Dobson, in December, 1796, was a case of contract *per verba de præsenti* where there was no *copula*, in which the Commissaries declared for the validity of the marriage, and the interlocutor was altered by the Court of Session. But upon what grounds was that sentence reversed? Mr. Hutcheson states, that "the Court did not think there was sufficient evidence of a real *de præsenti* matrimonial consent." Mr. Hume says, "the con-

duct of the parties had been variable and contradictory;" and Sir Hay Campbell says, "there were circumstances tending to shew that the parties did not truly mean to live together." The dicta of Lord Justice Clerk M'Queen have been quoted and much relied upon; but I must observe, that they come before the Court in a way that does not entitle them to much judicial weight: they are stated by Mr. Clerk to be found in notes of the handwriting of Mr. Henry Erskine, who is not himself examined for the purpose of authenticating them, although interrogatories are addressed to other persons with respect to other legal authorities, for which they are much less answerable. They are taken very briefly, without any context, nor is it stated in what manner, whether in the form of discussion or decision, they fell from that learned Judge. He is, however, made to say, "The case of M'Lauchlan against Dobson is new, but the law is old and settled. Two facts admitted, *hinc inde*, no celebration, no *concubitus*, nor promise of marriage followed by *copula*; contract as to land not binding till regularly executed, unless where *res non sunt integræ*." This proposition that "contract as to land not binding till regularly executed," proves little because it may refer to rules that are confined to agreements respecting that species of property, and even with regard to that species of property the contract may be sufficiently executed by the signing of articles or deeds, though there is no entry upon the land. "A promise without *copula locus pœnitentiæ*—even verbal consent *de præsenti* admits *pœnitentiæ*," that is the matter to be proved. "Form of contracts contains express obligation to celebrate; till that done either party may resile." The reason is that these same forms contain words which qualify the present engagement by giving them a mere promissory effect. "Private consent is not the *consensus* the law looks to. It must be before a priest or something equivalent; they must take the oath of God to each other;" this may be done in private to each other, as it actually was done in the case of Lord Fitzmaurice; "a present consent not followed by any thing, may be mutually given up, but if so, it cannot be a marriage. To be sure if the propositions contained in these dicta are correct, if it be true that a contract *de præsenti* may be mutually given up, then certainly it cannot constitute a marriage;

but that is the very question which is now to be determined upon the comparative weight of authorities; I admit the authority of Lord Braxfield, deliberately and directly applied to any proposition to which his mind was addressed, to be entitled to the highest respect; but I have already adverted to the loose manner in which these dicta are attributable to him, and it is certainly a pretty strong circumstance against giving full effect to these dicta so introduced, without context and without authentication, that Lord Braxfield, as Lord Ordinary, refused the Bill of Advocation in the case of Taylor and Keello complaining of the sentence of the Consistorial Court, which found "mutual obligations relevent to infer a marriage."

The other case that has been mentioned, is that of McInnes against More, which came before the House of Lords upon appeal in the year 1782. The facts therein were, that the man, at the woman's desire, had signed the acknowledgment not for the purpose of making a marriage, but merely as a color to serve another and different purpose mutually concerted between them, namely, that of preventing the disgrace arising from the pregnancy of the woman. The Commissaries and Court of Session had found the facts relevant to infer a marriage, but the House of Lords, considering the transaction as a mere blind upon the world, and that no alteration of the *status personarum* was ever intended by the parties themselves, reversed the sentence, and pronounced against the marriage.

I am not aware of any other decided cases which have been produced against the proposition, that a contract *de præsenti* (be it in the way of declaration or acknowledgment) constitutes, or if you will, evidences a marriage. It strikes me, upon viewing these cases, that such of them as are decided in the affirmative, have been adjudged directly upon this principle, and that where they have been otherwise determined, it turns out that they have rested upon specialties, upon circumstances which take them out of the common principle, and produce a determination that they do not come within it. If they do not go directly to the extent of affirming the principle, they at least imply a recognition of it, a sort of tacit assent and submission to its authority, an acknowledgment of its being so deeply intrenched in the law, as not to be assailable in any general

and direct mode of attack. The exceptions prove the rule to a certain degree. It was proved in all those cases where there was a judgment apparently contradictory, that in truth they were not real matrimonial contracts *de præsenti.* The effect was not attributed to them, because they were not considered as such contracts. I cannot but think, that when case upon case came before the House of Lords in which that principle was constantly brought before their eyes, they would have reprobated it as vicious if they had deemed it so, instead of resorting to circumstances to prove that the principle could not be applied to them. I may, without impropriety, add, that the Lord Chancellors of England have always, as I am credibly informed, in stating their understanding of Scotch law upon such subjects to the House of Lords, particularly Lord Thurlow, been anxious to hold out that law to be strictly conformable to the canonical principles, and have scrupulously guarded the expressions of the public judgments of the House, against the possible imputation of admitting any contrary doctrine.

Upon the whole view of the evidence applying to this point, looking first to the rule of the general matrimonial law of Europe, to the principle which I venture to assume, that such continues to be the rule of the Scotch matrimonial law, where it is not shewn that that law has actually resiled from it, to the opinions of eminent professors of that law, to the authority of text writers, and to the still higher authority of decided cases (even without calling in aid all those cases which apply a similar rule to a promise *cum copulâ*) I think that being compelled to pronounce a judgment upon this point, I am bound to say, that I entertain as confident an opinion as it becomes me to do, that the rule of the law of Scotland remains unshaken; that the contract *de præsenti* does not require consummation in order to become "very matrimony;" that it does, *ipso facto, et ipso jure*, constitute the relation of man and wife. There are learned and ingenious persons in that country, who appear to think this rule too lax, and to wish to bring it somewhat nearer to the rule which England has adopted; but on the best judgment which I can form upon the subject, it is an attempt against the general stream of the law, which seems to run in a direction totally different, and is not to be diverted from its course by efforts so applied. If it be fit that

the law of Scotland should receive an alteration, of which that country itself is the best judge, it is fit that it should receive that alteration in a different mode than that of mere interpretation.

When I speak of a contract, I mean of course one that is attended with such qualifications as the law of Scotland requires for such a contract, and which in truth appear to me to be very little more than what all law requires for all contracts of every description, and without which an apparent contract upon any subject is, in truth, no contract at all; for having been led, by the manner in which these qualifications are sometimes described, to suppose at first, that they were of a peculiar and characteristic nature, I really cannot, upon consideration, discover in them any thing more than the ordinary qualifications requisite in all contracts.—It is said that the marriage contract must not be extorted by force or fraud. Is it not the general law of contracts, that they are vitiated by proof of either? In the present case, menace and terror are pleaded in Mr. Dalrymple's allegation as to the execution of the first contract No. 2, for as to the promise No 1, he admits that it was given merely at the entreaties and instigation of the lady, (an admission not very consistent with the suggestion of the terror afterwards applied,) but he asserts that he executed this contract, "being absent from his regiment without leave, alone with her, and unknown to her father, and urged by threats of calling him in." What was to be the effect of calling in the father, which produced so powerful an impression of terror in his mind, he does not explain; still less does he attempt to prove the fact, for he has not read the only evidence that could apply to it, the sworn answers of the lady to this statement of a transaction passing secretly between themselves, and in which answers it is positively denied. This averment of menace and terror is perfectly inconsistent with every thing that follows; with the reiterated declaration contained in No. 10, and with the letters which he continued to write in the same style for a year afterwards.—Could the paper No. 10, have been executed by a man smarting under the atrocious injury of having been compelled by menaces to execute one of the like import? Could these letters, breathing sentiments of unalterable fondness have been addressed to the person by whom he had been so treated?

Nothing can be apparently more unfounded than this suggestion of menace and terror. It is said that it must be a deliberate contract. It is, I presume, implied in all contracts, that the parties have taken that time for consideration which they thought necessary, be that time more or less, for no where is there assigned a particular *tempus deliberandi* for the marriage contract, any more than for any other contract.

It is said that it must be *serious*, so surely must be all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever; at the same time it is to be presumed, that serious expressions, applied to contracts of so serious a nature as the disposal of a man or woman for life, have a serious import. It is not to be presumed a priori, that a man is sporting with such dangerous play things as marriage engagements. Again it is said that the *animus contrahentium* must be regarded: Is that peculiar to the marriage contract? It is in the intention of the parties that the substance of every species of contract subsists, and what is beyond or adverse to their intent does not belong to the contract. But then that intention is to be collected (primarily at least,) from the words in which it is expressed; and in some systems of law as in our own, it is pretty exclusively so to be collected. You are not to travel out of the intention expressed by the words, to substitute an intention totally different and possibly inconsistent with the words. By the matrimonial law of Scotland, a latitude is allowed, which to us (if we had any right to exercise a judgment on the institutions of other countries with which they are well satisfied,) might appear somewhat hazardous, of substituting another serious intention than that which the words express, to be proved by evidence extrinsic, and totally, as we phrase it, *dehors* the instrument. This latitude is indulged in Scotland to a very great degree indeed, according to Mr. Erskine. In all other countries a solemn marriage in *facie Ecclesiæ facit fidem;* the parties are concluded to mean seriously, and deliberately, and intentionally, what they have avowed in the presence of God and man, under all the sanctions of religion and of law: Not so in Scotland, where all this may pass, as Mr. Erskine relates, and yet the parties are at liberty to

shew, that by virtue of a private understanding between themselves, all this is mere imposition and mockery, without being entitled to any effect whatever.

But be the law so, still it lies upon the party, who impeaches the intention expressed by the words, to answer two demands which the law, I conceive, must be presumed to make upon him; first he must assign and prove some other intention; and secondly, he must also prove that the intention so alleged by him, was fully understood by the other party to the contract, at the time it was entered into: For surely it cannot be represented as the law of any civilized country, that in such a transaction a man shall use serious words, expressive of serious intentions, and shall yet be afterwards at liberty to aver a private intention, reserved in his own breast, to avoid a contract which was differently understood by the party with whom he contracted. I presume, therefore, that what is said by Mr. Craigie can have no such meaning, "that if there is reason to conclude, from the expressions used, that both or *either* of the parties did not understand that they were truly man and wife, it would enter into the question whether married or not," because this would open a door to frauds, which the justice and humanity, and policy of all law must be anxious to keep shut. In the present case no other *animus* is set up and endeavored to be substituted, but the *animus* of avoiding danger, on which I have already observed. The assignment of that intent does almost necessarily exclude any other, and indeed no other is assigned; and as to any plea that it was differently understood by Miss Gordon, the other party in this cause, no such is offered, much less is any proof to that effect produced, unless it can be extracted from the letters.

Do they qualify the express contracts, and shew a different intention or understanding? It has been argued that they contain some expressions which point to apprehensions, entertained by Miss Gordon, that Mr. Dalrymple would resile from the obligations of the contract, and others that are intended to calm those apprehensions by promises of eternal fidelity, both which it is said are inconsistent with the supposition that they had knowingly constituted themselves husband and wife, and created obligations *de præsenti*, from which neither of them could resile.

In the first place, is there this real inconsistence? Do the

records of this Court furnish no such instance as that of the desertion of a wife by her husband? And is such an occurrence so entirely out of all reasonable apprehension in a case like the present? Here is a young gentleman, a soldier, likely to be removed into a country in which very different ideas of marriage prevail, amongst friends who would discountenance this connexion, and amongst numerous objects which might divert his affections, and induce him to repent of the step he had taken in a season of very early youth, and in a fit of transient fondness: That a wife left in that country exposed to the chances of a change in his affections—to the effect of a long separation—to the disapprobation of his friends—to the impressions likely to be made by other objects upon a young and unsettled mind, should anticipate some degree of danger is surely not unnatural; equally natural is it, that he should endeavor to remove them by these renewed professions of constancy.—But supposing that Miss Gordon really did entertain doubts with respect to the validity of her marriage, what could be the effect of such doubts? Surely not to annul the marriage if it were otherwise unimpeached. We are, at this moment, enquiring with all the assistance of the learned professors of law in that country, amongst whom there is great discordance of opinion, what is the effect of such contracts. That private persons, compelled to the necessity of a secret marriage, might entertain doubts whether they had satisfied the demands of the law which has been rendered so doubtful, will not affect the real sufficiency of the measures they had taken. Mr. Dalrymple might himself entertain honest doubts upon this point; but if he felt no doubt of his own meaning if it was his intention to bind himself so *far as by law he could*, that is enough to sustain the contract; for it is not his uninformed opinion of law, but his real intention that is to be regarded. A *public* marriage was impracticable; he does all that he can to effect a marriage, which was *clandestine*, not only at the time, but which was intended so to continue. The language is clear and unambiguous in the expression of intent. No other intention is assigned; and it is not such expressions as these, arising naturally out of the feelings which must accompany such a transaction, that can at all effect its validity.

The same observations apply to the expressions contained

in the later letters written to Mr. Hawkins. In one of them she says, "my idea is, that he is not aware how binding his engagements are with me," and possibly he might not. Still if he meant at the time to contract *so far by law as he could*, no doubts which accompanied the transaction, and still less any which followed it can at all alter its real nature and effect. Miss Gordon had likewise her later hours of doubt, and even of despondency, "you will never see me Mrs. Dalrymple," she says in the spring of 1807, to her sister; and when it is considered what difficulties she had to encounter, at what an immense distance she then stood from the legal establishment of her claims, having lost her hold upon his affections, it cannot be matter of great surprise, if in the view of a prospect so remote and cloudy, some expression of dismay and even of despair, should occasionally betray the discomposure of her mind. As to what she observes upon the alternative suggested by some friend, of a large sum of money in lieu of her rights (a proposition which she indignantly rejects) it seems to point rather to a corrupt purchase of her silence, than to any idea existing in her mind, of a claim of damages, by way of a legal *solamen*, for the breach of a mere promissory contract.

The declarations, therefore, not being impeached by any of those disqualifications by which, in the law of Scotland, a contradictor is permitted to redargue and overcome the presumption arising from the production of such instruments, they become, in this stage of the matter, *præsumptiones juris et de jure* that found an instant conclusion of marriage, if I am right in the position that carnal copulation is not absolutely required to its completion. The fact that these papers were left in her single possession is insignificant, for it has well been observed by Dr. Burnaby, that it is not mutuality of possession, but mutuality of intention, that is requisite. It is much more natural that they should be left in the possession of the lady, she being the party whose safety is the more special object of protection, but there is no proof here, that Mr. Dalrymple himself is not possessed of a similar document. He anxiously requested to have one, and the non-production of it by him, furnishes no conclusive proof that he did not obtain his request. If he did not, it may have been an act of imprudence, that he confided the proofs of his marriage entirely

to the honor of the lady; but if he did, it is perfectly clear that she has not betrayed the trust.

But I will now suppose that this principal position is wrong: that it is either extracted from erroneous authorities, or erroneously extracted from authorities that are correct. I will proceed then to enquire what proof there is of carnal copulation having taken place between the parties; and, upon this point, I shall content myself with such evidence as the general law requires for establishing such a fact: for I find no reference to any authority to prove that the law of Scotland is more rigid in its demand, where the fact is to be established in support of a marriage, than for any other purpose. It may have happened that the fact of carnal copulation has been established by a pregnancy, or some other evidence of as satisfactory a kind, in the few cases which have been transmitted to us, but I find no such exclusive rule as that which has been ingeniously contended for by Dr. Edwards; and I take it as an incontrovertible position, that the circumstances which would be sufficient to prove intercourse in any other case, would be equally sufficient in this case. I do not charge myself in so doing, with going farther than the Scotch Courts would do, and would be bound to do, attending to the established rules of evidence.

In the first place I think it is most strongly to be inferred from the paper, No. 2, that some intercourse of a conjugal nature passed between these parties. Miss Gordon therein says, "I hereby promise that nothing but the greatest necessity, (necessity which ——— situation alone can justify) shall ever force me to declare this marriage." Now what other possible explanation can be given of this passage, or how can it be otherwise understood than as referring to the consequences which might follow from such an intercourse? I confess that I find myself at a loss to know how the blank can be otherwise filled up than by a supposition of consequences which would speak for themselves, and compel a disclosure.

I observe that Mr. Dalrymple denies, in his allegation, that any intercourse took place *after* the date of the written declarations, which leaves it still open to the possibility of intercourse *before* that time, though he certainly was not called upon to negative a preceding intercourse, in consequence of any assertion in the libel which he was bound to

combat. It will, I think, be proper to consider the state of mind and conduct of the parties relative to each other at this time. Preliminary verbal declarations of mutual attachment must at least have passed (as I have already observed) before the promise contained in No. 1, was written, at whatever time that paper was written. In the first letter, which bears the post-mark of the 27th of May, whether relying on this paper if it then existed, or on declarations which had verbally passed between them, he thinks himself entitled to address her as his wife in the most endearing terms. On the following day, the 28th, the instrument which has been produced is signed, by which they mutually acknowledge each other as husband and wife. Letters continued to pass between them daily, and sometimes more than once in a day, expressive of the most ardent and eager affection on his part, which can leave no room for the slightest doubt that he was, at that time, most devotedly attached to her person, and desirous of the pleasures connected with the enjoyment of it, in some way or other; for to what other motive can be ascribed such a series and style of letters from a young man, written voluntarily, without any appearance of idle pleasantry, and with every character of a sincere pursuit, whether honorable or otherwise. What was the state of mind and conduct of the lady during this period of time? It is not to be presumed, from the contents of his letters, that she was either indifferent or repulsive.

The imputation indeed, which has been thrown upon her, is of a very different kind, that she was an acute and active female, who with a knowledge of the law of the country, which Mr. Dalrymple did not possess, was endeavoring, *quâcunque viâ datâ*, to engage him in marriage. To this marriage she has inflexibly cohered, and now stands upon it before this Court; so that whatever might be the real state of her affections towards this gentleman, (which can be known only by herself,) this at least must be granted, that she was most sincerely desirous of this marriage connexion, which marriage connexion, both of them perfectly well knew, could not be publicly and regularly obtained.—Taking then into consideration these dispositions of the parties, *his* desire to obtain the enjoyment of her person on the one hand, and *her* solicitude to obtain a marriage on the

other, which after the delivery of such instruments she knew might at all events be effectually and honorably obtained by the mere surrender of her person, which is the probable consequence? In this part of the island the same circumstances would not induce the probability of a private surrender, because a public ceremony being here indispensibly required, no young woman, acting with a regard to virtue, and character, and common prudence, would surrender her person in a way which would not only not constitute a marriage, but would, in all probability, defeat all expectation of such an event.

In Scotland the case is very different, because, in that country, if there are circumstances which require the marriage to be kept secret, the woman, after such private declarations past, carries her virgin honors to the private nuptial bed, with as much purity of mind and of person, with as little violation of delicacy, and with as little loss of reputation, as if the matter was graced with all the sanctities of religion. It is in vain to talk of criminality, and of grossness, and of gross ideas. In such a case there are no other ideas excited than such as belong to matrimonial intercourse. It is the "bed undefiled" according to the notions of that country: it is the actual ceremony as well as the substance of the marriage: it is the conversion of the lover into the husband: *transit in matrimonium*, if it was not *matrimonium* before. A most forcible presumption therefore arises that parties so situated would, for the purpose of a secret marriage, resort to such a mode of effecting it, if opportunities offered; it must almost, I think, be presumed, that Mr. Dalrymple was in that state of incapacity to enter into such a contract, which Lord Stair alludes to, if he took no advantage of such opportunities; for nothing but the want of opportunity can repel such a presumption.

Now how does the evidence stand with respect to the opportunity of effecting such a purpose? The connexion lasted during the whole of Mr. Dalrymple's stay in Scotland, and was carried on, not only by letters couched in the most passionate terms, but as admitted (and indeed it could not be denied), by nocturnal private visits, frequently repeated, both at Edinburgh, and at Braid, the country seat of Mr. Gordon, in the neighborhood of that city. Upon this part of the case six witnesses have been examined, who

lived as servants in the family of Mr. Gordon. Grizell Lyall, whose principal business it was to attend on Miss Charlotte Gordon, one of the sisters, but who occasionally waited on Miss Gordon, says, "that Captain Dalrymple used to visit in Mr. Gordon's family in the spring of 1804; that before the family left Edinburgh she admitted Captain Dalrymple into the house by the front door, by the special order of Miss Gordon, in the evenings; that Miss Gordon's direction to her were, that when she rung her bell once, to come up to her in her bed-room, or the dressing-room off it, when she got orders to open the street door to let in Captain Dalrymple; or when she (Miss Gordon) rung her bell twice, that she should thereupon, without coming up to her, open the street door for the same purpose; that agreeably to these directions she frequently let Captain Dalrymple into the house about nine, ten or eleven o'clock at night, without his ever ringing the bell, or using the knocker; that the first time he came in this way, she shewed him up stairs to the dressing-room off the young ladies' bed-room, where Miss Gordon then was, but that afterwards upon her opening the door, he went straight up stairs, without speaking, or being shewed up; but how long he continued up stairs she does not know, as she never saw him go out of the house; that the dressing-room above alluded to, was on the floor above the drawing-room, and adjoining to the bed-room, where the three young ladies slept, and next to the ladies' bed-chamber was another room, in which there was a bedstead, with a bed and blankets, but no curtains or sheets to the bed, and it was considered as a lumber room, the key of which was kept by Miss Gordon." She says that she recollects, and it is a fact in which she is confirmed by another witness, Robertson, "that the family removed from Edinburgh to Braid that year, 1804, on the evening before a King's Fast," (the King's Fast day for that year was on the 7th of June,) "and on a Wednesday as she thinks, as the Fast Days are generally held on Thursday; that at this time Miss Charlotte was at Forth Berwick, on a visit to Lady Dalrymple; that Mr. Gordon and Miss Mary went to Braid in the evening, but Miss Gordon remained in town, as she Lyall also did, and Mr. Robertson the butler, and one or two more of the servants."

It appears from the testimony of other witnesses, that Mr.

Gordon her father, appeared much dissatisfied that this lady did not accompany himself and her sister to Braid, but chose to stay in town upon that occasion. There are passages in Mr. Dalrymple's letters which point to the necessity of her continuance in town, as affording more convenient opportunities for their meeting. Lyall states, that she recollects admitting Captain Dalrymple that evening, as she thinks, sometime between ten and twelve o'clock, and he went up stairs to Miss Gordon without speaking; that on the next morning she went up as usual to Miss Gordon's bed-room about nine o'clock, and informed her of the hour; and having immediately gone down stairs, Miss Gordon rung her bell some time after, and on the deponent going up to her, she met her, either at the bed-room door or at the top of the stairs, and desired her to look if the street door was locked or unlocked; and the deponent having examined, informed her that it was unlocked, and immediately after went into the dressing-room, and, after being a very short time in it, she heard the street door shut with more than ordinary force, which having attracted her notice, she opened the window of the dressing-room which is to the street, and on looking out she observed Captain Dalrymple walking eastwards from Mr. Gordon's house; that from this she suspected that Captain Dalrymple was the person who had gone out of the house just before; that nobody could have come in by the said door without being admitted by some person within, as the door did not open from without, and she heard of no person having been let into the house on this occasion; that having gone down stairs after this, Mr. Robertson, the butler, observed to her, *that there had been company up stairs last night;* but she did not mention to him any thing of her having let in Captain Dalrymple the night before, or of her suspicions of his having just before gone out of the house, at least she is not certain, but she recollects that he desired to remember the particular day on which this happened." Now from this account given by Lyall, the counsel have attempted to raise a doubt, whether it was Mr. Dalrymple who went out, for it is said that he would have cautiously avoided making a noise for fear of exciting attention. But the account Lyall gives is exactly confirmed by Robertson, who deposes, "that on the 7th of June, which was the King's Fast, as he was employed about

ten o'clock in the morning in laying up some china in his pantry, which is immediately off the lobby, he observed Captain Dalrymple come down stairs, and passing through the lobby to the front door, unlock it, and go out and shut the door after him." Some observations have been made with respect to Robertson's conduct, and he has been called a forward witness, because he made a memorandum of this circumstance at the time it occurred; but I think his conduct by no means unnatural. Here was a circumstance of mysterious intercourse that attracted the attention of several of the servants, and it is not at all surprising that this man, who held a superior situation amongst them in Mr. Gordon's family, and who appears to be an intelligent, well educated, and observing person, as many of the lower order of persons in that country are, should think it right, in the zeal he felt for the honor of his master's family, to make a record of such an occurrence. In so doing, I do not think that he has done any thing more than is consistent with the character of a very honest and understanding servant, who might foresee that such a record might, one day or other have its use. The witness Lyall goes on to say, that Miss Gordon and herself went to Braid that day (being the King's Fast) before dinner, and that on that evening, or a night or two after, she was desired by Miss Gordon to open the window of the breakfasting parlour to let Captain Dalrymple in, and she did so accordingly, and found Captain Dalrymple at the outside of the window when she came to open it, and this she thinks might be between ten and twelve o'clock, and she shewed him up stairs, when they were met by Miss Gordon at the door of her bed-chamber, when they two went into said chamber, and she returned down stairs; that she does not know how long Captain Dalrymple remained there with Miss Gordon, or when he went away;" she states that "Miss Charlotte returned from her visit at North Berwick a few days after Miss Gordon and the deponent went to Braid; that at Braid Miss Gordon and Miss Charlotte slept in one room, and Miss Mary in another; that within Miss Gordon and Miss Charlotte's bedchamber there was a dressing-room, the key of which Miss Gordon kept; and she recollects one day getting the key of it from Miss Gordon to bring her a muff and tippit out

of it, and upon going in she was surprised, to find in it a feather bed lying upon the floor, without either blankets or sheets upon it, so far as she recollects: that it struck her the more, as she had frequently been in that room before without seeing any bed in it; and as Miss Gordon kept the key, she imagined she must have put it there herself; that she found this bed had been taken from the bed-chamber in which Miss Mary slept, it being a double bedded room; that when she observed the said bed in the dressing room, it was during the time that Captain Dalrymple was paying his evening visits at Braid; that upon none of the occasions that she let Captain Dalrymple into Braid House did she see him leave it, nor did she know when he departed."—Three other witnesses, Robertson and the two gardeners, have been examined upon this part of the case, and they all prove that Mr. Dalrymple was seen going into the house in the night, or coming out of it in the morning.

It is proved likewise that Porteous, one of the servants, was alarmed very much, that the window of the room where he kept his plate was found open in the morning, and that it must have been opened by somebody on the inside: It is proved that nothing was missing, not an article of plate was touched, and that Mr. Dalrymple was seen by the two gardeners very early in the morning, coming away from the house, and in the vicinity of the house, going towards Edinburgh; and as to what was suggested that he might have been in the out-houses all night, I think it is not a very natural presumption, that a gentleman who was privately and habitually admitted into the house at such late hours as eleven or twelve o'clock at night, would have been ejected afterwards for the purpose of having so uncomfortable a situation for repose, as the gentlemen suppose, in some of the stables or hovels, belonging to the house.—There is another witness of the name of Brown, Mr. Dalrymple's own servant, whose evidence is strongly corroborative of the nature of those visits. This man is produced as a witness by Mr. Dalrymple himself, and he states that he was in the habit of privately conveying notes from his master to Miss Gordon, which were to be concealed from her father.—He says to the second interrogatory, "that he often accompanied his master to Mr. Gordon's house at Edinburgh, but he cannot set forth the days upon which it

was he so attended him there, except that it was between the 10th of May, and the 18th of July 1804," subsequently therefore to the execution of the last paper. This witness further states "that *on the night of the* 18th *of July*, which was the last time Mr. Dalrymple was in or near Edinburgh in the said year 1804, he, by the orders of his master, waited with the curricle at the house of Charles Gordon, Esq. till about twelve o'clock, when Mr. Dalrymple came out of the said house, and got into the curricle, and rode away therein about a mile on the road towards Edinburgh, and then desired him to stop, and having told him to go and put up his horses in Edinburgh, and to meet him again on the same spot at six o'clock the next morning with the curricle, Mr. Dalrymple then got out, and walked back towards the said Mr. Gordon's house, and on the next morning at six o'clock he met his master at the appointed spot, and brought him in his said curricle to Haddington, from whence he went in a chase to the house of a Mr. Nisbet, in the neighborhood of that town, where Mr. Dalrymple's father was then staying; that *he does believe that* Mr. Dalrymple *did, on the night of the said* 18*th of* July, *go back to and remain in the said* Mr. Gordon's country-house:" and I think it is impossible for any body who has seen this man's evidence, and the evidence of the other witnesses, not to suppose that he did go there, and did take his repose for the night in that house. Now it is said, and truly said, in this case, that the witness Lyall, upon her cross examination, says, "she does not think that they could have been in bed together, so far as she could judge;" what means she took to form her judgment does not appear; the view taken by her might be very cursory: she is an unmarried woman, and might be mistaken with respect to appearances, or the appearances might be calculated for the purposes of deception, in a connection which was intended to be, to a great degree, secret and clandestine. But the question is not what inference Lyall draws, but what inference the court ought to draw from the fact proved by her evidence, that Mr. Dalrymple passed the whole of the night in Miss Gordon's room under all the circumstances described, with passions, motives, and opportunities all concurring between persons connected by ties of so sacred a nature.

Lady Johnstone, one of her sisters, has been relied upon

as a strong witness to negative any sexual intercourse; and I confess it does appear to me rather an extraordinary thing, that that lady's observations and surmises should have stopped short where they did, considering the circumstances which might naturally have led her to observe more and to suspect more: she certainly was kept in the dark, or at least in a twilight state. It rather appears from the letters, that there were some quarrels and disagreements between Mr. Dalrymple and the gentleman who afterwards married this lady, and who was then paying his addresses to her; how far that might occasion concealment from her I cannot say. The father, for reasons of propriety and delicacy respecting himself and family, was to be kept in ignorance, and therefore it might be proper that only half a revelation should be made to the sister. She certainly states that upon her return to Braid, in the middle of June, she slept with her sister, and never missed her from her bed, and never heard any noise in the sister's dressing-room which led her to suppose that Mr. Dalrymple was there. I am far from saying that this evidence of Lady Johnstone's is without weight: In truth, it is the strongest adverse evidence that is produced on this point: But she admits, "that from what she had herself observed, she had no doubt but that Mr. Dalrymple had made his addresses to her sister in the way of marriage; that when the deponent used to ask her said sister about it, she used to laugh it off:" From which it appears that Miss Gordon did not communicate freely with her upon the subject. She says, "that never till after the proceedings in this cause had commenced had she heard that they had exchanged written acknowledgements of there being lawful husband and wife, and had consummated their marriage; but, on the contrary, always, till very lately, conceived that they had merely entered into a written promise with each other, so as to have a tie upon each other, that neither of them should marry another person without the consent of the other of them." That is the interpretation this lady gives to the paper No. 10, though that paper purports a great deal more, and she says, "that although she did suspect that Mr. Dalrymple had at some time or times been in her sister's dressing-room, yet she never did imagine that they had consummated a marriage between them." But since it is clearly proved by

the other witnesses that Mr. Dalrymple was in the habit of going privately to Miss Gordon's bed-room at night, and going out clandestinely in the morning. I cannot think that the ignorance of this witness respecting a circumstance with regard to which she was to be kept in ignorance, can at all invalidate the facts spoken to by the other witnesses, or the conclusion that ought to be deduced from them.

With respect to the letters written at such a time as this, I am not disposed to scan with severe criticism the love-letters of a very young gentlemen, but they certainly abound with expressions which, connected with all the circumstances I have adverted to, cannot be interpreted otherwise than as referring to such an intercourse. I exclude all grossness, because, considered as a conjugal intercourse, it carries with it no mixture of grossness but what may be pardonable in a very young man, alluding to the raptures of his honey-moon, when addressing the partner of his stolen pleasures. I will state some passages, however, which appear to point at circumstances of this nature:—"My dearest sweet wife—You are, I dare say, happy at Queen's Ferry, while your poor husband is in this most horrible place, tired to death, thinking only on what he felt last night, for the height of human happiness was his." It is said that this has reference only to the happiness which he enjoyed in her society, for an expression immediately follows, in which he extols the happiness of being in the society of the person beloved: and it may be so, but it must mean society in a qualified sense of the word, *private* and *clandestine* society; society which commenced at the hour of midnight, and which he did not quit till an early hour (and then secretly) in the morning. That *society* is meant only in the tamest sense of the word, is an interpretation which I think cannot very well be given to such expressions as these, used upon such an occasion. In the letter marked No. 6, he says, "put off the journey to Braid, if possible, till next week, as the town suits so much better for all parties. I must consult L. on that point to-morrow, as I well know how apropos plans come into her pretty head; there appears to me only one difficulty, which is where to meet, as there is only one room, but we must obviate that if possible." In the next letter, No. 7, he says, "but I will be with you at

eleven to-morrow night; meet me as usual. P. S. Arrange every thing with L. about the other room."

There are several other expressions contained in these letters which manifestly point to the fact of sexual intercourse passing between them. These I am unwilling to dwell upon with any particular detail of observation, because they have been already stated in the arguments of counsel, and are of a nature that does not incline me to repeat them without absolute necessity; I refer to the letters themselves, particularly to No. 4, and No. 6. But it is said, here are passages in these letters which show that no such intercourse could have passed between them; one in particular in No. 4, is much dwelt upon, in which he says, "have you forgiven me for what I attempted last night; believe me the thought of your cutting me has made me very unhappy." From which it is inferred that he had made an attempt to consummate his marriage, and had been repulsed. Now this expression is certainly very capable of other interpretations: It might allude to an attempt made by him to repeat his pleasures improperly, or at a time when personal or other circumstances might have rendered it unseasonable. In the very same letter he exacts it as *a right*. He says, "you will pardon it; although it is my right, yet I make a determination not too often to exert it; what a night shall I pass without any of those heavenly comforts I so sweetly experienced yesterday."

In a correspondence of this kind, passing between parties of this description, and alluding to very private transactions, some degree of obscurity must be expected. Here is a young man heated with passion, writing every day, and frequently twice in a day, making allusions to what passed in secrecy between himself and the lady of his affections; surely it cannot be matter of astonishment, that many passages are to be found difficult of exact interpretation, and which it is impossible for any but the parties themselves fully to explain. What attempt was made does not appear; this I think does most distinctly appear, that he did at this time insist upon his rights, and upon enjoying those privileges which he considered to be legally his own. Wherever these obscure and ill-understood expressions occur, they must be received with such explanations as will render them consistent with the main body and substance of the

whole case. Another passage in the letter No. 5, which is dated on the 30th of May, has been relied upon as shewing that Mr. Dalrymple did not consider himself married at that time. In that letter he says, "I am truly wretched, I know not what I write, how can you use me so? but *(on Sunday, on my soul*)* you shall, you must become my wife, it is my right," and therefore it is argued that she had not yet become his wife. The only interpretation I can assign to this passage, which appears to have been written when he was in a state of great agitation, is, that on Sunday she was to submit to what he had described as the rights of a husband. It is not to be understood that a public marriage was to be executed between them on that day, because it is clear, from the whole course and nature of the transaction, that no such ceremony was ever intended: It appears from all the facts of the case, that it was to be a private marriage, that it was so to continue, and therefore no celebration could have been intended to take place on that approaching Sunday.

In a case so important to the parties, and relating to transactions of a nature so secret, I have ventured to exercise a right not possessed by the advocates, of looking into the sworn answers of the parties upon this point: and I find Miss Gordon swears positively that intercourse frequently passed between them subsequently to the written declaration or acknowledgment of marriage. Mr. Dalrymple swears as confidently that it did not so take place, but he admits that it did on some one night of the month of May prior to the signature of the paper marked No. 1; the date of which, however, he does not assign, any more than he does that of the night in which this intercourse did take place. Now consider the effects of this admission. It certainly does often happen that men are sated by enjoyment; that they relinquish with indifference upon possession, pleasures which they have eagerly pursued: But it is a thing quite incredible that a man, so sated and cloyed, should afterwards bind himself by voluntary engagements, to the very same party who had worn out his attachment. Not less inconsistent is this supposition with the other actual evidence in the case, for all these letters, breathing all these ardors, are of a subsequent date, and prove that these sentiments clung to his

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heart as closely and as warmly as ever during the whole continuance of his residence in Scotland. I ask if it is to be understood, that with such feelings he would relinquish the pleasures which he had been admitted to enjoy, and which he appears to value so highly, or that she would deny him those pleasures for the consolidation of her marriage, which she had allowed him, according to his own account, gratuitously and without any such inducement.

On this part of the case I feel firm. It is not a point of foreign law on which it becomes me to be diffident; it is a matter of fact examinable upon common principles; and I think I should act in opposition to all moral probabilities, to all natural operations of human passions and actions, and to all the fair result of the evidence, if I did not hold that consummation was fully proved. If this is proved, then is there, according to the common consent of all legal speculation on the subject, an end of all doubt in the case, unless something has since occurred to deprive the party of the benefit of a judicial declaration of her marriage.

What has happened that can have such an effect? Certainly the mere fact of a second marriage, however regular can have no such effect. The first marriage, if it be a marriage upheld by the law of the country, can have no competitor in any second marriage, which can by legal possibility take place; for there can be no second marriage of living parties in any country which disallows polygamy. There may be a ceremony, but there can be no second marriage—it is a mere nullity.

It is said that, by the law of Scotland, if the wife of the first private marriage chooses to lie by, and to suffer another woman to be trepanned into a marriage with her husband, she may be barred *personali exceptione* from asserting her own marriage. Certainly no such principle ever found its way into the law of England; no connivance would affect the validity of her own marriage; even an active concurrence, on her part, in seducing an innocent woman into a fraudulent marriage with her own husband, though it might possibly subject her to punishment for a criminal conspiracy, would have no such effect. But it is proper, that I should attend to the rule of the law of Scotland upon this subject. There is no proof, I think, upon the exhibition of Scotch law, which has been furnished to the Court, that

such a principle was ever admitted authoritatively; for though in the gross case of Campbell *versus* Cochran, in the year 1747, the Court of Session did hold this doctrine, yet it was afterwards retracted and abandoned, on the part of the second wife, before the House of Lords, which, most assuredly, it would not have been, if any hope had been entertained of upholding it as the genuine law of Scotland, because the second wife could never have been advised to consent to the admission of evidence, which very nearly overthrew the rights of her own marriage. Under the correct application of the principles of that law, I conceive the doctrine of a *medium impedimentum* to be no other than this, that on the *factum* of a marriage, questioned upon the ground of the want of a serious purpose, and mutual understanding between the parties, or indeed on any other ground; it is a most important circumstance, in opposition to the real existence of such serious purpose and understanding, or of the existence of a marriage, that the wife did not assert her rights, when called upon so to do, but suffered them to be transferred to another woman, without any reclamation on her part. This doctrine of the effect of a mid-impediment in such a case, is consonant to reason and justice, and to the fair representations of Scotch law given by the learned advocates, particularly by Mr. Cay, in his answer to the third additional interrogatory, and Mr. Hamilton, in his answer to the first further additional interrogatory; but surely no conduct on the part of the wife, however criminal in this respect, can have the effect of shaking *ab initio* an undoubted marriage.

Suppose, however, the law to be otherwise, how is it applicable to the conduct of the party in the present case? Here is a marriage, which at the earnest request of this gentleman, and on account of his most important interests (in which interests her own were as seriously involved) was not only to be secret at the time of contracting, but was to remain a profound secret till he should think proper to make a disclosure; it is a marriage in which she has stood firm in every way consistent with that obligation of secrecy, not only during the whole of his stay in Scotland, but ever since, even up to the present moment. She corresponded with him as her husband till he left England, not disclosing her marriage even to her own family on account of his in-

junctions of secrecy. Just before he quitted this country, he renewed in his letters those injunctions, but pointed out to her a mode of communicating with him by letter, through the assistance of Sir Rupert George, the first Commissioner of the Transport Board. In the same letter, written on the eve of his departure for the Continent, he cautions her against giving any belief "to a variety of reports which might be circulated about him during his absence, for if she did, they would make her eternally miserable. I shall not explain," he says "to what I am alluding, but I know things have been said, and the moment I am gone will be repeated, which have no foundation whatever, and are only meant for the ruin of us both: once more, therefore, I entreat you, if you value your peace or happiness, believe no report about me whatever."

No doubt, I think, can be entertained, that the reports to which he, in this mysterious language, adverts, must respect some matrimonial connections, which had become the subjects of public gossip, and might reach her ear. Nothing, however, less than certain knowledge was to satisfy her, according to his own injunction, and nothing could, I think, be more calculated to lull all suspicion asleep on her part.

It appears, however, that it had not that complete effect, for Mr. Hawkins says, that upon the return of Mr. Dalrymple, in the month of August, 1806, when he came to England privately without the knowledge of his father, or of this lady, he then, for the first time "communicated to him many circumstances respecting a connection, he stated he had had, with a Miss Johanna Gordon at Edinburg, and expressed his fears that she would be writing and troubling his father, upon that subject, as well as tormenting him the said John William Henry Dalrymple with letters, to avoid which, he begged him not to forward any of her letters to him who was then about to go to the Continent, and in order to enable him to know her hand writing, and to distinguish her letters from any others, he then cut off the superscription from one of her letters to him, which he then gave to the deponent for that purpose, and at the same time swore, that if he did forward any of her letters, he never would read them; and he also desired and entreated him to prevent any of Miss Gordon's letters from falling into the hands of General Dalrymple, and that he

went off again to the continent in the month of September." Mr. Hawkins further says, "that he did find means to prevent several of Miss Gordon's letters addressed to General Dalrymple, from being received by him, but having found considerable risque and difficulty therein, and in order to put a stop to her writing any more letters to General Dalrymple, he the deponent did himself write and address a letter to her at Edinburgh, wherein he stated that the letters, which she had sent to General Dalrymple, had fallen into his hands to peruse or to answer, as the General was himself precluded from taking any notice of letters from the precarious state he was in, or to that effect, and urged the propriety of her desisting from sending any more letters to General Dalrymple; and the deponent having, in his said letter, mentioned that he was in the confidence of, and in correspondence with Mr. Dalrymple; she soon afterwards commenced a correspondence with him respecting Mr. Dalrymple, and also sent many letters, addressed to Mr. Dalrymple, to him, in order to get them forwarded; but the deponent having been particularly desired by Mr. Dalrymple not to forward any such letters to him, did not send all, but thinks he did send one or two, in consequence of her continued importunities;" he says, "that it was some time in the latter end of the year 1806, or the beginning of the year 1807, that the correspondence was between Miss Gordon and himself first commenced; and that after the death of General Dalrymple, which he believes happened in or about the spring of the year 1807, she, in her correspondence with him, expressly asserted and declared to him her marriage with Mr. Dalrymple."

It appears then that Miss Gordon knew nothing of Mr. Hawkins, except from the account he had given of himself, that he was the confidential agent of Mr. Dalrymple, and therefore she might naturally have felt some hesitation about laying the whole of her case before him, especially as General Dalrymple was alive, till whose death the marriage was to remain a profound secret; but upon that event taking place, which happened at no great distance of time, Miss Gordon instantly asserted to Mr. Hawkins her marriage with Mr. Dalrymple, and he, wishing to be furnished with the particulars, wrote to her for the purpose of obtaining them, which she thereupon communicated, and at the same

time sent him a copy of the original papers, which, in the language of the law of Scotland, she called her *marriage lines*.—She mentioned likewise some bills which had been left unpaid by her asserted husband, upon which he wrote to Mr. Dalrymple, and he says, "that he has no doubt Mr. Dalrymple received the letters, because he replied thereto from Berlin or Vienna, and caused the bills to be regularly discharged." He says, "that in the latter end of May, in the year 1808, Mr. Dalrymple returned again to England."—I ought to have mentioned that it appears clearly, that Miss Gordon had been sending letters to Mr. Hawkins, expressive of her uneasiness on account of the reports which had prevailed of a marriage about to be entered into by Mr. Dalrymple. She says, in a letter to Mr. Hawkins, "I shall have no hesitation in putting my papers into the hands of a man of business, and establishing my rights, as it is a very unpleasant thing to hear different reports every day, the last one is, that Mr. Dalrymple had ordered a new carriage on his marriage with a nobleman's daughter."

This description cannot apply to the marriage which has since taken place with Miss Manners, but is merely some vague report which it seems had got into common discourse and circulation. On the 9th of May, she writes to know whether any accounts had been received from Mr. Dalrymple, and says, "Any real friend of Mr. Dalrymple's ought to caution him against forming any new engagement;" and she protests most strongly against his entering into a matrimonial connection with another woman.—In the end of that very month of May, Mr. Dalrymple came home, having been at different places on the continent; he went down to Mr. Hawkins' house at Findon, where having met him, they conversed together upon Mr. Dalrymple's affairs, and particularly upon his marriage with Miss Gordon, and on that occasion, Mr. Hawkins having at this time no doubt left upon his mind of the marriage, and fearing from the manner and conduct of Mr. Dalrymple, that he had it in contemplation to marry Miss Manners, the sister of the Duchess of St. Alban's, he cautioned him in the most anxious manner against taking such a step, and in the strongest language which he was able to express, described the mischiefs which would result from such a measure, both to himself and the lady, and the difficulties in which their respective

families might be involved, owing to Mr. Dalrymple's previous marriage.

Mr. Hawkins thought, at the time, that those admonitions had had the good effect of deterring him from the intention of marrying Miss Manners, though he mentions a circumstance which bears a very different complexion, viz. that Mr. Dalrymple took from him, almost by force, some of Miss Gordon's letters, and particularly those annexed to the allegation. He says, "that Mr. Dalrymple took them under pretence of shewing them to Lord Stair, and seemed by his manner and expressions to consider that he had thereby possessed himself of the means of shewing that Johanna Dalrymple was not his wife." It was about the end of the month of May, that Mr. Hawkins and Mr. Dalrymple held this conversation at Findon, and upon the 2d of the following month, Mr. Dalrymple was married to Miss Manners, before it was possible that Miss Gordon could know the fact of his arrival in England. Upon her knowledge of the marriage, she immediately proceeds to call in the aid of the law.—I profess I do not see what a woman could with propriety have done more to establish her marriage rights; Mr. Dalrymple was all the time abroad, and the place of his residence perfectly unknown to her; no process could operate upon him from the Courts, either of Scotland or England, nor was he amenable in any manner whatever to the laws of either country.

She did all she could do under the obligations of secrecy, which he had imposed upon her, by entering her private protest against his forming any new connection; she appears to me to have satisfied the whole demands of that duty, which such circumstances imposed upon her; and I must say, that if an innocent lady has been betrayed into a marriage, which conveys to her neither the character nor rights of a wife, I cannot, upon any evidence which has been produced, think that the conduct of Miss Gordon is chargeable, either legally or morally, with having contributed to so disastrous an event.

Little now remains for me, but to pronounce the formal sentence of the Court, and it is impossible to conceal from my own observation the distress which that sentence may eventually inflict upon one, or perhaps more individuals; but the Court must discharge its public duty, however pain-

ful to the feelings of others, and possibly to its own; and I think I discharge that duty in pronouncing, that Miss Gordon is the legal wife of John William Henry Dalrymple Esq. and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this Court that he has so done, by the first Session of the next Term.*

Limitations and Reversions of Personal Property.

Allen Powell vs. Fred. E. Brown.

A limitation over in a personal chattel in this state, may be created by deed, otherwise than by conveyances to uses.

Where grantor by deed conveyed to N. P. certain negroes to her and her issue forever, with remainder over on her dying without issue *to his surviving heirs*, and she dies leaving no issue alive. *Held*, that N. P. takes an absolute estate; and that if the limitation was not too remote, no one could take as the surviving heirs of the grantor, the grantor himself being alive at the death of N. P.

The grantor himself cannot take under a limitation over to *his heirs* contained in his own deed.

There can be no reverter where the grantor or testator shewed his intention to part with the whole fee and the court will lay hold of any slight circumstances to give effect to that intention.

A devise for a day or an hour, with a void limitation over, passes the whole term.

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* From this decree an appeal was alleged and prosecuted to the Court of Arches. In the course of those proceedings an intervention was given for Laura Dalrymple—described as wife of John William Henry Dalrymple Esq. the Appellant in the cause. On the 3d Session of Mich. Term, viz. 18th ,of November 1811, an allegation was asserted on her behalf, and the Judge assigned to hear, on the admission thereof, on the by-day. On that day, viz. 4th of December, her Proctor prayed the assignation to be continued, which was opposed, and the Judge concluded the cause, and assigned the same for sentence on the next court day. On the first Sess. Hil. Ter. viz. January, 1812, her Proctor alleged the cause to have been repealed: and the appeal was accordingly prosecuted to the High Court of Delegates, where the grievance complained of was, "that the Judge of the Court of Arches had rejected the prayer of the said Laura Dalrymple, for *time* to be allowed for the admission of an allegation on her behalf." Time was allowed by the Court of Delegates—And the cause being there retained, her allegation was given in, and opposed, and ultimately rejected. The cause was afterwards heard upon the merits; and on the 19th of January, 1814, the sentence of the Consistory Court was affirmed.

If it appear that it was the intention of the grantor to part with the whole term, the court will lay hold of any slight circumstances to give effect to that intention in order to prevent the reverter.

A difference is taken between a devise to one for life expressly, and if he die without issue remainder over and a devise to one indeffinitely, and if he die without issue remainder over. In the *first* it may sometimes go to the personal representative, but in the last the whole vests in the devisee.

CURIA *per* JOHNSON J. The questions which were discussed on the argument of this case were, 1st. whether a remainder in a personal chattel can be limited over by deed. 2d. Whether admitting that it might, this limitation over was not too remote and void?

The argument against the motion on the first of these questions proceed upon the assumption that by the English common Law, a remainder in a personal chattel could not be limited over, except by way of executory trust or a conveyance to uses, and some of the cases cited would seem to favor this conclusion.

The case of Cooper vs. Cooper, said to have been decided in the Constitutional Court in 1807 or 1808, in which it is said that a limitation over of negroes in a deed was on that ground declared to be void, is relied on as authority; and I remember to have heard an opinion said to have been delivered by the late Mr. Justice Wilds, spoken of in terms of high commendation; but there is no printed report of that case, nor have I been able to obtain a view of the manuscript, and however highly I may be disposed to appreciate the opinion of the Court, and particularly that of the very able judge who is said to have pronounced that opinion, I cannot be persuaded to regard one so circumstanced as authoritative on this Court, and the more so as I believe it to be opposed to the current of public opinion and the spirit of the decided cases which has been handed down to us.

In the case of Dott vs. Cunningham, 1 Bay 447, the first book of reports published in the state, the question would necessarily have presented itself and would have been conclusive against the judgment of the Court, and although it was not made as the counsel remarks, it proves very satisfactorily that the understanding at that day was that the question was settled, for it is scarcely to be supposed that a point so important, and which is assumed to be so familiar, would have been overlooked both by the Counsel and the Court.

The same remark applies to the cases of Stockton vs. Martin, 2 Bay, 471.—Tucker vs. Stevens, 4 Des. Rep. 532, and Milledge vs. Lamar, 4 Des. Rep. 617, in all of which it seems to have been taken for granted. And it is a little remarkable, that although the case of Cooper vs. Cooper, was decided about twenty years ago, there is no one instance in which it has been acted upon. I take it therefore as settled, whatever may have been the rule in England, that here a limitation, even in a personal chattel, may be created by deed otherwise than by a conveyance to uses.

The argument on the second proposition has assumed a variety of forms, some of which it will be necessary to notice. And first it is said, that the gift of the negroes in dispute to Nancy Powell in the habendum of the deed is conclusive of the interest which she took in them, and being to her and her issue forever, is not controuled by the subsequent limitation over, on her dying without issue, and the case of Porter, ads. Ingram 1 Harp. Rep. 492 is relied on as authority.

In that case there was an entire inconsistency in the premises and the habendum of the deed—they could not stand together, and on the principle that the first deed should prevail, it was held that the premises controled the habendum, and that she took the interest indicated by them. But there is no such inconsistency here. Supposing for the sake of the argument, that the limitation over could take effect, the interest vested in Nancy Powell must be determined by her death before the limitation could operate.

2d. The idea that the defendant can take in any event under the limitatation over to his heirs contained in his own deed is preposterous, and the only ground upon which the plaintiff can be devested or the defendant entitled, is that the negroes reverted to the defendant the grantor on the death of Nancy Powell without issue.

All the books agree that a grant to a man and the heirs of his body is a limited fee, and that on the death of the grantee without heirs of his body the land reverts to the grantor. (Fearne 381, note (1,) Butler's Ed.) The case of Jones, vs. Postell and Porter, 1 Harp. Rep. is an instance of this, and that a devise for a day or an hour with a void limitation over passes the whole term, as was said by the Master of the Rolls in Forth vs. Chapman, 1. P. W. 666.

And if it appear that it was the intention of the grantor to part with the whole term, the Court will lay hold of any slight circumstances to give effect to that intention, in order to prevent the reverter—and a difference is taken between a devise to one for life expressly, and if he die without issue remainder over, and a devise to one indefinitely, and if he die without issue remainder over.

In the first case it is said the estate may in some cases perhaps return to the executor or personal representatives of the testator, but in the last the whole vests in the devisor; and the reason given is that in the first case the possibility of a reverter was left open, and in the last the intention of the testator to part with the whole estate was manifest. Fearne 487.

Here supposing the limitation over in other respects good—and the defendant the grantor living, and there was therefore no one capable of taking under the description of *his surviving heirs*, the limitation over to them manifest his intention to part with the whole interest in the negroes, and according to the rule there can be no reverter, of course the whole interest vested in the first taker.

The defendants motion is therefore refused, and leave is given to the plaintiff to enter up judgement on the special verdict. *Judgment for Plaintiff.*

In *Sylvester* ads. *Young* and wife, decided at Columbia, May term, 1830, the court says, "It is not perfectly clear that when a devise is to one for life, and the limitation over too remote, that the tenant for life takes an absolute estate. In some cases it would have this effect, but in others, Fearne 478, seems to think it might not. It is not necessary, however, to look for argument for a case not before the court. It appears to me that if the limitation over at the testators death was good, any subsequent event defeating it cannot enlarge the life estate. For the sake of illustrating this idea, let us suppose that A. bequeaths a slave to B. for life, remainder to C. and before the death of B. C. dies; to whom would the remainder go? Would it enlarge the life estate? It would not It is a vested interest in C. and would go to his executor or administrator. If A. be-

queath a slave to B. for life and if C. should be alive at the death of B. then remainder to him, and C. should die before B. would B. be entitled to hold the slave absolutely? It is obvious he would not. The contingency on which C's rights were to vest, has not happened, and therefore he takes nothing by the bequest; but B's estate is not therefore enlarged, because by possibility C. might have taken. If the bequest had been to B. and his issue, then the limitation over being too remote, an absolute estate would vest in the first taker—because the testator has parted with his entire interest and manifested his intention that it should go in the line of the first taker, and as the limitation over is against the policy of the law, it is the nearest approach to the intention of the testator, which, in law, we can make to say that the first taker shall take absolutely. In the case before us the testator has expressly limited the estate to his widow for life, and at her death has bequeathed freedom to his slaves, so that it is manifest he did not intend them in any event to be hers for any longer period than her life, or that after her death they should go to her descendants claiming through her. The remainder if it can be so called, is to strangers to her blood, and if they cannot take, there is no connexion between them and her, which on their failure to take will enlarge her estate. At the death of the testator and for twelve years after, if his widow had died, the slaves would have been emancipated, and so long as this event was possible and lawful, it will not be pretended that she had any greater estate than for her life. The happening of an event which destroyed the contingent remainder before it vested, could not alter her estate so as either to increase or diminish it.

4th. The widow not being entitled to hold the slaves absolutely, and their emancipation being defeated by the act of 1820, what becomes of them? Do they revert to the estate of the testator? I apprehend they do. It is the same thing as if the testator after giving a life estate had failed to dispose of the remainder. In that case they revert to the executors or administrators for the benefit of the testators residuary legatees or distributees.—Brown vs. Geiger, 4 M'Cord, 427, 428.

In another point of view however, they must be regarded as in the possession of the executors for the benefit of residuary legatees or distributees as the case may be.

The assent of the executors evidenced by a deed executed according to the provisions of the act of 1800, was before 1820, necessary to confer freedom on the slaves. Hence the right of property in remainder still remained in them, notwithstanding the widow had the possession for life. The right of property being in them, and the intended application of the remainder being defeated by operation of the act of 1820, they (or more properly speaking as the executors are now all dead, the administrators with the will annexed of Wm. Wright deceased,) as trustees for the residuary legatees or distributees, are entitled to the possession of the slaves for the purpose of distribution."

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HUBERUS DE CONFLICTU LEGUM.

In this confederacy of twenty-four states, each governed by its own local laws, there must be much variety in their legislative enactments and judicial decisions. The common law is the source of all their legal decisions, except in the state of Louisiana, where their laws are derived from the civil code. Yet in the process of only a few years, with twenty-four legislatures at work, annually reforming, amending and accommodating the law to the supposed peculiar situation of each state, and twenty-four independent judicial tribunals constantly giving their construction of the common law, there are no two states which have the same code, but great varieties have already made their appearance in the legal institutions of the different states. While this process is still going on, and while the diverging lines are still extending, and their departure from each other enlarging, the intercourse between the citizens of the several states is increasing, their contracts are multiplying and those relations forming which render this conflict of our various codes more perplexing. Under such circumstances we have thought it would be acceptable to our readers to republish the chapter of Huberus, *de conflictu legum.* The profession have access to the translation in 3 Dallas Rep. 370, but the general reader has not the same advantage. The reporter is only found on the shelf of the lawyer.

Huberus, 2 *Vol. B.* 1. *Tit.* 3 *pa.* 26.—"It often happens that contracts entered into in one place, take effect in different governments, or are judicially decided upon in other places, than those in which they were entered into.

It is also well known, that when the Roman Empire was destroyed, the Christian world was divided into many nations, not united under any common head, nor connected by any uniformity of regulations.

It is not wonderful that we do not find any thing upon this subject in the Roman law; when the government of the Roman people, was extended over a great part of the habitable globe, the frequent conflict and contrariety of laws could not occur; the rule was one and the same.

However the fundamental rules by which this question ought to be decided, appear to be derived from the Roman law, although the inquiry itself appears to belong rather to the law of nations, than to the civil law; as what different nations observe between themselves, it is obvious forms the law of nations.

In order to render this very intricate business plain and clear, we will lay down three maxims, which, being fully established, as it appears to us they may easily be, the deduction of the consequences, necessary to an entire understanding of the subject, will be of no great difficulty.

They are these:—1st. The laws of every empire have force within the limits of that government, and are obligatory upon all who are within its bounds.

2d. All persons within the limits of a government are considered as subjects, whether their residence is permanent or temporary.

3d. By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens.

It appears, therefore, upon this occasion, that we ought to consult not the civil law only, but what is to be inferred from the mutual convenience, and the tacit consent of different people, because as the laws of one people cannot have any force or effect directly with another people, so, on the other hand, nothing would be more inconvenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of law, which is the reason of the third maxim, of which heretofore no doubt appears to have been entertained.

With respect to the second maxim, some have thought otherwise, who deny that foreigners are subject to the law of the place.

I acknowledge there are exceptions to the rule, which I

will notice hereafter; but this position we hold as most certain, that whoever live within the bounds of a government, are to be accounted its subjects. This is evident from considering the nature of a republic, and the universal custom among all nations, of controlling all those by their laws, who live among them, exemplified, as Grotius mentions, 2. *c. u. n.* 5. in the instance of personal arrest practised every where.

Whoever makes a contract in any particular place, is subjected to the laws of the place as a temporary citizen.

Nor indeed are they supported or justified by any reason, in compelling foreigners to abide by the decisions of the law where they happened to be, except on the general principle that the jurisdiction of a government is considered as competent to the control of all those, who are within its limits.

From these considerations the following position arises. All business and transactions in court, and out of court, whether testamentary or other conveyances, or acts, which are regularly done according the law of any particular place, are valid even where a different law prevails, and where, had they been so transacted, they would not have been valid. On the contrary, transactions and acts which are executed, contrary to the laws of a country, as they are void at first, never can be good and valid, and this applies, not only with respect to those who have their residence in the place of the contract; but those, who were there only occasionally; under this exception only, that if the rulers of another people would be affected by any peculiar inconvenience of an important nature, by giving this effect to transactions performed in another country, according to the laws of the place they are in, such particular place is not bound to give effect to those proceedings, or to consider them as valid within their jurisdiction. It is worth while to exemplify the principle by examples and instances.

In Holland a last will and testament may be made before a notary, and two witnesses; in Friezeland it is of no effect unless established and witnessed by seven witnesses.

A Batavian makes a will in Holland according to the law of the place, under which the goods, situated and found in Friezeland are demanded; ought the Judges of Friezeland to grant the demand founded upon the will made in Holland?

The laws of Holland cannot bind the people of Friezeland, therefore to decide according to the first maxim, the will would not be good in Friezeland; but by the third maxim its validity is supported, and by that judgment is given in its favor. But a Frizian makes a journey into Holland, and there executes a will according to the law of the place, contrary to the law of Friezeland, and returns and dies there: Is the will good? It is good according to the second maxim; because while he was in Holland, though but for a temporary purpose, he was bound by the law of the place, and an act good, where done, ought to prevail every where, according to the third maxim, and that without any distinction between moveable and immoveable estate, and so the law is practised. On the other hand, the Frizian makes his will in his own country, before a notary, with two witnesses, it is carried into Holland, and demand made of the goods found there: It will not be granted, because not made in a valid manner at first, being made contrary to the laws of the place. It would be the same thing if the Batavian, was to make such a will in Friezeland, although in Holland it would have been good; for it is true, that such a deed would not be good in its commencement, for the reasons just stated.

What we have said with respect to wills applies equally to conveyances to take effect during the life of the grantor; provided a contract is made according to the law of the place, in which it is entered into, throughout, in court, and out of court, even in those places where such a mode of contracting is not allowed, it will be supported. For example: In a certain place particular kinds of merchandize are prohibited, if sold there the contract is void—but if the same merchandize were sold elsewhere, in a place, where there was not any prohibition, and a suit is brought in a place where they were prohibited, the purchaser will be condemned and the suit maintained, because the contract was good in its origin, where made. But if the merchandize sold in another place, where they were prohibited, were delivered, the purchaser would not be condemned, because it would be contrary to the law and convenience of the government where they were sold, and an action would not be countenanced wherever instituted, even to compel the delivery; for, if on the delivery being made, the pur-

chaser would not pay the price, he would be bound, if at all, not by the contract, but that having got the goods of another, it would be unreasonable that he should enrich himself at the expence and loss of another.

The rule is equally applicable to adjuged cases. A sentence pronounced in any place, or a pardon granted by those who had jurisdiction, has equal effect every where. Nor is it lawful for the magistrates of another commonwealth, to prosecute, or suffer to be prosecuted, a second time, one who has been absolved or pardoned, although without a sufficient reason. Still however under this exception, that no evident danger or inconvenience result from it to the other commonwealth, as an instance within our own memory may exemplify. Titius having struck a man on the head, on the borders (*within the limits*) of Friezeland, who the following night discharged a great deal of blood at the nose, and, after having supped and drank heartily died. Titius escaped into Transylvania. Being apprehended there as it appears voluntarily, he was tried and acquitted, upon the suggestion that the man did not die of the wound. This sentence was sent into Friezeland, and he applied for a discharge from the prosecution as having been acquitted. Although the manner of trial was not very exceptionable, yet the court of Friezeland was much disgusted at the idea of excusing the delinquent, and giving effect to the foreign proceedings, although demanded by the Transylvanians; because the flight into the neighboring government, and the pretended process appeared too evidently calculated to elude the jurisdiction of Friezeland; which is the exception under the third maxim. The same principle is observed in judgments respecting civil matters as is evident from the following example within our memory. A citizen of Harlem made a contract with one in Groningen and submitted himself to the Judges of Groningen. Being cited by virtue of this submission, and not appearing he was condemned, as contumacious. Execution of the sentence being demanded, it was doubted whether it ought to be granted in a Frizian court. The reason of doubting was, that by force of the submission, if he was not found in the foreign territory, they could not proceed against him as contumacious, as we shall see elsewhere; nor without prejudice to our jurisdiction and also of our citizens, could effect be given to such sentences.

However, it was allowed at that time, certain magistrates concurring, that it should not be permitted to the Frizians to examine by what principle the sentence passed at Groningen could be justified, but only whether it was valid according to the law of the place. Others were governed by the following reason, that the magistrate at Harlem on request had granted a citation which he ought rather not to have done, and the Amsterdam magistrate denies the execution of the sentence passed against the absent, being cited to the court of Friezeland by an edict founded on the terms of the submission and condemned without being heard, and that such proceedings ought not to effect any one. With this opinion I concur, on account of the restriction contained in the third axiom.

Again: It has been made a question, whether if a contract is entered into at any supposed place, abroad, and an action is commenced with us, and the rule was different here, and there, either in allowing or denying the action, which law is to govern? For instance. A Frizian becomes a debtor in Holland on account of merchandize sold there, and is sued in Friezeland after the expiration of two years; the act of limitation is pleaded which bars such actions with us after a lapse of two years; the creditor replies that in Holland, where the contract was made, such prescription and limitation do not exist; and therefore is not to be urged against him in this case. But it was otherwise decided once between justice Bleckenfeldt against G. Y. and again between John Jenollin against N. B. both before the great holidays in 1680. For the same reason, if a debtor resident in Friezeland executed an instrument in Holland before a magistrate which may there entitle him to an execution, but not by common right, no execution can issue here, but the merits of the original demand must be examined. The reason is, that acts of limitation, and modes of execution, do not belong to the essence of the contract, but to the time and manner of bringing suits, which is a distinct thing, and therefore, it is established upon the best ground, that in entering a judgment, the law of the place where it is rendered, is to govern, although it respects a contract made elsewhere—Sandius B. 1. Tit. 12. Def. 5. where he says, that in the execution of a sentence given abroad, the law of

the place, in which the execution is asked, is to govern, not the law of the place, where the judgment was given.

The contract of matrimony is also regulated by the same rules. If it is regular and valid in that place where it was contracted and celebrated, it is binding every where under the same exception of not doing prejudice to others—to which exception may be added, if incest should be permitted any where, or marriage in the second degree, which indeed is scarcely supposable.

In Friezeland matrimony is, when a man and woman agree to marry and voluntarily take each other for man and wife, although no ceremony is performed at church.

In Holland, matrimony cannot be contracted in that manner. The Frizians, however, without doubt, enjoy among the Hollanders the rights of married people, in the particulars of dower, jointure, the rights of children to inherit the property of their parents, &c.

In like manner if a Brabanter, who should marry under a dispensation from the Pope within the prohibited degrees, should remove here, the marriage would be considered as valid: yet if a Frizian marries the daughter of his brother in Brabant, and celebrates the nuptials there, returning here he would not be acknowledged as a married man, because, in this way our law might be eluded by bad examples, and this induces me to make an observation upon this point. It often happens, that young people desirous of forming improper connexions, and to sanction their illicit intercourse with the ceremony of marriage, go into East Friezeland, or other places, in which the consent of curators or guardians is not necessary to marriage, according to the Roman laws. There they celebrate marriage and presently return to their country—I think, that this is a manifest fraud or evasion of our law, and therefore that the magistrates here, are not obliged by the law of nations to acknowledge such marriages or to hold them as valid; especially with respect to those, who transgress and evade their own laws knowingly and intentionally. Moreover, not only, the contract of marriage itself, properly and regularly celebrated in one place, is good in all places, but the rights and incidents which attend it where celebrated, attend it elsewhere. In Holland married people have a communion of all their goods, unless it be otherwise expressly covenanted

by them; this will be the effect, as to goods situated in Friezeland, although there marriage only occasions a common risque of profit and loss, not of the goods themselves; therefore the Frizians remain after the marriage each one, both husband and wife, separate owners of their goods situated in Holland. When however, the married couple remove from the one state or province to the other, whatever is afterwards acquired or falls to either, is not in common, but held by distinct right, and what was before made common between them, will be either in common or otherwise as they direct; as Sandius lays it down who tells us, B. 2. de is tit. 5. def. 10. there was a dispute among the learned doctors whether immoveable goods, situated in another country, were to be affected and regulated by the rules as we have laid it down.

The reason of the doubt was, that the laws of one commonwealth, cannot affect the integral parts, the territory of another commonwealth; to this two answers may be given. First, That it cannot be done by the immediate force and operation of a foreign law, but with the concurring consent of the supreme power in the other government, which gives an effect to foreign laws exercised upon property within its own jurisdiction, without any prejudice being received to its sovereignty or the rights of its citizens, regarding the mutual convenience of the two nations or governments, which is the foundation of all these rules. The other answer is, that it is not so much by force of law, as by the consent of the parties reciprocally communicating their rights to each other, by which means a change, or modification of property may arise, not less from matrimony than any other contract.

The place, however, where the contract is entered into, is not to be exclusively considered; if the parties had in contemplation another place at the time of the contract, the laws of the latter, will be preferred in the construction of the contract.

Every one is considered as having contracted in that place, in which he bound himself to pay or perform any thing, *b.* 21. *de. O. & A.* and the place where matrimony is contracted is not so much the place where the ceremony is performed, as where they expect and intend to live and settle. It happens daily, that men in Friezeland, natives or sojourners, marry wives in Holland, which they immediately bring

into Friezeland. And if at the time of the marriage, they intended immediately to settle in Friezeland, there will not in such case be a community of goods. Although they make no special marriage contract, not the law of Holland, but of Friezeland, will govern: the latter, not the former, is the place of their contract.

There is a further application of the restriction so often mentioned. The effects of a contract entered into at any place, will be allowed according to the law of that place, in other countries, if no inconvenience results therefrom to the citizens of that country, with respect to the law which they demand, and the sovereignty of the latter place, is not bound, nor indeed can it so far extend the law of another territory. For example, the oldest, and first *hypothecation (mortgage)* of a moveable, is to be preferred even against a third possessor, by the law of Cæsar, and in Friezeland, not among the *Batavians;* therefore if any one upon such an *hypothecation* proceeds to demand the article from a third person, he shall not be heard, but his suit rejected; because the right of the third person to that chattel, shall not be taken away, by the law of another jurisdiction or territory. Let us enlarge this rule to the following extent:

If the law of the place in another government is contrary to the law of our state, in which also a contract is made, inconsistent with a contract celebrated and made in another place, it is reasonable in such case, that we should observe our own law, rather than a foreign law. For example:

In Holland, matrimony is contracted with this agreement, that the wife shall not be responsible for the debts contracted by the husband only; although this is a private contract, it is said to be valid in Holland, to the prejudice of the creditors, with whom the husband shall afterwards contract debts, but in Friezeland such a kind of contract would not be binding unless published, nor would ignorance of the necessity of making it public, be an excuse according to the law of Cæsar and equity. The husband contracts debts in Friezeland, and the wife is sued as jointly responsible, and liable for one half of the debt: She pleads her marriage contract—the creditors reply that this contract is contrary to the laws of Friezeland, because not published—and this is the rule with us, where the marriage was contracted here; as I lately gave my opinion when consulted upon the point. But

those who contracted in Holland, and in whose favor the debts were contracted their, were non-suited, nothwithstanding there suit was brought in Friezeland, because, as far as respected them, the law of the place, where the marriage was contracted, not the laws of the two countries, came into consideration.

From the rules laid down in the beginning, the following axiom may be deduced. Personal rights or disabilties obtained, or communicated, by the laws of any particular place, are of a nature which accompany, the person whereever he goes, with this effect, that in all places, he either enjoys the immunities or exemptions, or is subject to the disabilities imposed by the law of the country where, they at any time happen to be, on characters of that description.

Therefore, those who with us are under tutors or curators, as young men, prodigals, married women, are every where reputed, as persons subject to curators, and whatever the law of any place considers as the right or disabilities of persons of that description, they may suffer, exercise and enjoy; hence, he who is excused the consequences of crimes, or contracts on account of his want of age, in Friezeland, cannot make binding contracts in Holland, and one declared, prodigal here, contracting elsewhere, will not be bound. Again in some provinces, one above the age of twenty-one years, may convey his real estate; such a person may do the same in those places where twenty-five is the period of full age; because whatever the laws or judicial proceedings in any place, decide as to their subjects, other people allow to have the same effect with them, unless a prejudice or inconvenience, would result to them or their laws.

There are persons who understand these personal rights to the following extent, that whoever, in a certain place, is of full age, or a minor, a child, or put out of the control of the father, will enjoy the same rights and be subject to the same disabilities, as in the place where he became such a character, or was so reputed; and whether the same thing would, or would not, have happened in his own country, still that the same consequence necessarily follows. It appears to me, that this is laying down the rule too broad, and would subject us to a burthensome inconvenience by the laws of our neighbors. An example will make the thing plain: A child not emancipated or exempted from the

power of his father, and who has not ceased to be one of his family, cannot make a will in *Friezeland*. He goes into *Holland*, and there makes a will—is it valid? I think it valid in *Holland*, by the first and second rules, that the laws regulate as to all those within its limits, nor is it reasonable, that the people there, respecting a business done there, neglecting their own laws, should judge according to the laws of other people, but that will would not be valid in *Friezeland*, by the third rule, because by that means nothing would be more easy than to elude our laws, and our citizens might elude them every day. But in other places out of *Friezeland*, the will would be valid even where by their laws a child while one of the father's family could not make a will, because there the reason would not apply, that their citizen had gone to *Holland* to elude their law *in fraudem legis*.

The example I have given respects an act prohibited at home on account of a personal disability. We will give another act allowed at home, but prohibited abroad, where done;—some time since decided in our supreme court—*Rudolph Monsema* aged 17 years and 14 days, was born, and lived at *Groningen*, after that he went abroad to learn the business of a druggist, he made a will, which he might have made in *Friezeland*, but at *Goningen*, says *D. Nauta* the reporter, it is not lawful for an infant to make a will under 20, or in the time of his last illness, or for more than half his patrimony. The young man died of that sickness leaving his father his heir, and leaving nothing to his mothers relations, who contended that the will was void as made against the law of the place. The heirs insisted that a personal quality accompanies the person every where, and, as he could have made this will at home, he could make it abroad. But it was decided against the will, although there was no intention to avoid the law, but the judgment was not universally approved *Nauta* himself dissenting. *M. S.* 134. *An.* 1643. *d.* 27. *Oct.*

The foundation of all this doctrine we have said, and we insist upon it, is the subjection that men owe to the laws of every country within which they are at any time; from whence it follows, that an act valid or void, in its beginning, and were it first takes place, must be the same elsewhere.

But this observation does not apply equally to immoveable property, since it is considered not as depending altogether upon the disposition of every master or owner of a family—but the commonwealth affixes certain rights as resulting from real property, and is interested in its disposal; nor could a nation without a great inconvenience suffer its real property to be conveyed with these incident rights, by the laws of another country, and contrary to its own laws—therefore a *Frizian* having fields and houses in the province of *Groningen*, cannot make a will disposing of them, because it is prohibited there to make a will of real estate; the *Frizian* law not affecting lands which constitute integral parts of a foreign territory.

But this does not contradict the rule, that we have before laid down, that if a will is made according to the ceremonies of the place, where the testator resides, it will be good with respect to his property in another country, if a will could be made there, because the diversity of laws in that respect, does not affect the soil, but directs the manner of making the will, which, being righthly done, may pass real estate in another country, so far as may not interfere with any incidents, connected with the ownership of real property in the country where it is situated. This rule takes place in common conveyances—things annexed to the freehold in *Friezeland*, sold in *Holland*, in a manner prohibited in *Friezeland*, but allowed in *Holland*, are well sold—corn growing in *Friezeland* is sold in *Holland* according to the Lasts, as it is called, the sales are void, because it is prohibited in *Friezeland*, whether prohibited in *Holland* or not, because it is annexed to the freehold, and is a part of it.

The same rule held with regard to the succession to an intestate estate. If the deceased was the father of a family, whose property was in different provinces, as far as respects the real estate, it would descend according to the laws of the place where situated; but with respect to the personal property, it would go according to the law of the place where the intestate lived, and of which he was an inhabitant—for which see *Sandium lib.* 4. *Decis. Tit.* 8. *Def.* 7.

These observations are of a nature that require more full explanation, seeing there are not wanting writers, who think

otherwise in some particulars, who you will see respectfully spoken of by Sardius in his reports of causes; to which add Rodenbergius treatise of laws, in the title of the Marriage Contract."

A Digested Index of the Acts of Assembly from 1813 *to* 1830 *inclusive.*

There is no digest of the acts of our legislature since Brevard's, and that comes down no later than 1813. The acts since that time have never been printed, except as they have been published at the close of the session of the legislature at which they were past. It has thus become very difficult to find any legislative enactment without running through the acts themselves. To remedy this evil, we have prepared a digested index of the Acts of Assembly from 1813 to 1830 inclusive.

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BOND DEBT.

DAVID RICE Guardian of JOSEPH and MAHALA SMYLY and DAVID ULMER *vs.* JOHN CANNON, and others.

In marshalling the assets of a deceased administrator, a balance due to a distributee of the estate, ranks as a bond debt.

An order made by the court not obligatory on the rights of one not a party to the proceeding.

The case made by the motion as it is understood is briefly this. John Smyly died in 1806 and administration of his estate was granted to Ephram Cannon, jun. who received and retained in his hands on account of Joseph and Mahala Smyly, the wards of the plaintiff Rice, and distributees of that estate, $4093. Eph. Cannon the adm'r. died in 1818, without accounting for that amount, and administration of his estate was granted to Henry Ulmer and his widow Eleanor Cannon. In 1822 a proceeding in chancery was instituted which eventuated in an order that certain negroes belonging to the estate of Eph. Cannon should be sold and the proceeds distributed amongst his heirs. These negroes produced $1250 and that sum was now in the hands of the commissioner of the court. In the report of the commissioner made upon a reference of this cause he comes to the conclusion that the estate of Eph. Cannon is "insolvent to a large amount." The leading object of this bill was to arrest this fund and to appropriate it to the payment of the sum due to the plaintiff's wards.

Samuel Cannon, one of the defendants, claims to be reimbursed out of it a sum of money which he had paid as the surity of Eph. Cannon on a simple contract debt, and the sole question arising out of the chancellor's decree and the grounds of the motion, was whether the plaintiff's demand above stated, was entitled to rank as a bond debt in marshaling the assets of the estate, and therefore entitled to precedence over the claim of Samuel Conner.

The case was brought up on appeal from the decree of Chancellor Desaussure.

Bauskett and *Dunlap*, for the appeal. *Johnston*, contra.

CURIA, *per* JOHNSON, J.—It is difficult to conceive of any solid foundation for the distinction which the Legislature has thought proper to make in the distribution of an insolvent estate amongst the various classes of creditors, or in what its equity and justice consists, except when actual liens have been created and the necessary expenses of administration. But a rule has been established and that is imperative—a bond debt is entitled to take precedence of a simple contract debt. The demand of the defendant Samuel Cannon confessedly falls within the last; and if the complainant's fall within the first, that of necessity must be preferred.

The case of M'Dowal and Caldwell, 2 M'Cord's Chan. Rep. 56, is decisive of this question. That was a bill against the ex'ors. of the guardian for an account of estates of his wards, and it was held that in marshalling the assets of his estate the balance due to the wards ranked as a bond debt; on the principle, that on the breach of the condition of his guardianship bond the penalty became a debt by specialty and stood as a security for what might be found to be due. Its analogy to the case under consideration is so striking as to render it almost identical. On the grant of administration of the estate of John Smyly to Eph. Cannon, he entered into a penal bond conditioned for the faithful discharge of his duty and although that bond is not now the subject of suit, it is the substratum of the complainants claim to this fund, and gives rank and character to it, and it must therefore be preferred to the demand of Samuel Cannon.

It appears, however, that in the proceeding in chancery before referred to, that an order had been obtained that Samuel Cannon's demands should be paid out of this fund, and that the administrator had drawn an order in his favor on the commissioner of the court directing him to pay it, which it was contended was pro tanto an appropriation of the fund which the court would not control—and the defendants, the distributees of the estate of Eph. Cannon, also further contend that the order for partition before referred to, was an appropriation of the residue of the fund, and that the plaintiffs ought to be left to their remedy against the surities to the administration bond.

The commissioner has reported and in the absence of proof to the contrary it will be taken for granted that the estate of Eph. Cannon is insolvent. It follows that what-

ever may be the state of things now, the complainant was in the due course of administration entitled to this fund. He was no party to the proceeding in chancery, nor was the interest of his wards represented by any one. They could not therefore be concluded either by the order to pay the amount due to Samuel Cannon or the order for distribution, nor did the order drawn by the admistrator in favor of Samuel Cannon vary the rights of the parties; for the fund is still in the possession of the court, and the question now is, whether the court have the power to order it to be paid to the plaintiff.

One of the objects of chancery jurisdiction is to prevent circuity and multiplicity of actions, and one of the most efficient means is to order rightful and proper disposition of the funds in its possession and it is the common practice to do it. If Samuel Cannon had actually received the amount due to him and the remainder had been distributed amongst the heirs of Eph. Cannon in pursuance of the orders of court, ex equo et bono, they were not entitled to retain it; and according to well established principles the complainant might in the event of every other remedy failing, have recovered it back as money paid in fraud or by mistake. If the complainant had recovered of the surities of the administration, they on the same principle would be entitled to recover it from the defendants. The parties are now all before the court and their rights fully understood, and it is seen that in the end, the plaintiff will be entiled to the fund. It saves therefore the delay and expence in pursuing the circuitous course which this part of the defence indicates.

It is therefore ordered and decreed that the deeree of the circuit court be reformed according to the principles of this opinion. *Decree reformed.*

LIABILITY OF ESTATES FOR CONTRACTS OF EXECUTORS.

In the 3d. No. of this Journal we published the decision of the Court of Appeals in Boggs and Reid, in relation to the liability of trust estates. That case become the leading case in relation to the power of a trustee to contract debts for the trust estate. It has been most correctly decided that he cannot bind the estate. He contracts on his individual responsibility, looking to the income of the estate for reimbursement. We now publish the case below, to prevent any mistake as to the generality of the rule. It applies as well to executors and administrators as to any other trustee.

WILLIAM C. GUERRY *vs.* WILLIAM MAYRANT, Jr. et al.

Though the executor or administrator is the legal owner of the personal estate of his testator or intestate, still he is bound to take care of it (in equity) for the benefit of the creditors, legatees or distributees.

He must take as much care of the estate as a prudent man would take of his own.

Though much is left to his discretion by it, the expenditures for current expenses should not (unless in cases of unavoidable necessity) exceed the current income.

Persons dealing with the executor or administrator can have no right to look to the estate for remuneration, unless in some extraordinary case.

Wherever the trustee or executor would be entitled to be reimbursed for advances made by him, his creditor may, if the trustee or executor be insolvent, take his place and claim to be paid by the estate.

This is the only exception the court is prepared to make to the general rule.

This was a bill filed by the complainant as administrator de bonis non with the will annexed of Legrand Guerry, dec'd. for marshalling the debts chargeable against the estate and for a partition. The bill charged that Legrand Guerry died on in 1810 or 1811, leaving a will in force by which he disposed of his property—that he gave thereby a specific legacy to his widow, which she had received, and

gave the residue of his estate both real and personal to his children, to be equally divided between them with limitations, which appear in the copy of the will exhibited. He left three children—the complainant William C. Guerry, Legrand Guerry and Sarah Guerry, since intermarried with Noah Laney. He appointed as executors, James Guerry, jr. Gabriel Capers and William Capers, of whom Gabriel Capers alone qualified and managed the estate. The bill stated that Legrand Guerry left a large estate unincumbered, as it was believed, except by one considerable debt, which was not paid by the executor, and that a part of the estate was afterwards sold by the sheriff to satisfy it—that the estate remained in his possession for several years and was greatly mismanaged by him. That the executor about the year 1827 or 1828 removed out of the State of South Carolina, abandoning the estate and leaving it scattered in different parts of the country—that he made no settlement thereof—and that Wm. Capers the other surviving executor, refusing to qualify under the will and settle the estate, complainant applied to the ordinary and obtained letters of administration and that the affairs of the estate were in a very deranged state. Several suits in equity were commenced against the said G. Capers for the purpose of charging the estate, upon the ground of supplies furnished and the like, for its benefit—that there were other claimants, among whom, were Wm. Mayrant and others, who threaten to sue—that the complainant was likely to be greatly harassed by suits and the estate wasted in litigation. The bill prays that the equitable debts of the estate might be marshalled—that the creditors be enjoined from proceeding, and that they be ordered to appear and make proof of their claims. That Gabriel Capers be compelled to account as executor, and that a writ of partition issue to divide the estate, &c. The answer of Wm. Mayrant sets up a claim for rent of land and negro hire. He alleges that he rented land to G. Capers the executor, on which the slaves of estate were employed in rice planting, and that he hired him a negro driver. In February term 1829, an order was passed that publication should be made for all persons having demands against the estate of Legrand Guerry to appear before the commissioner of the court and establish their demands before him by the succeeding court.

The claims were various against the estate, but they were all contracted by the executor who all the time had sufficient funds in his hands from the income. Douglass' claim was on judgments obtained against the executor. Moore's for mules sold to the executor for the estate, for which the executor gave his own note, and sold them afterwards. They were used on the plantation of the estate. Mr. Mayrant's claim was for a years rent of a rice plantation, hired by the executor, on which the slaves of the estate were worked. The estate had lands which might have been cultivated. It was contended that the executor had the right to exercise that discretion, the lands being in a different district from where the slaves were—they being on the sea coast and the lands in Sumter district. Cumming's account was for medical services rendered to the slaves of the estate.

Chancellor Desaussure, before whom the cause was tried, rejected all the claims but that of Mayrant's and Douglass', which he allowed.

From this decree the case was brought up to this court.

Haynesworth, for complainant.

Mayrant and *Desaussure*, contra.

Curia, *per* O'Neall, J.—In this case I propose to discuss the single question, how far the testator's estate in the hands of the complainant, is liable for the debts contracted by Gabriel Capers the executor.

By operation of law all the personal estate of the testator is vested in his executor. This legal right would at law necessarily subject it to his entire control and disposition. Before the act of 1824, he could even sell it without the order of the ordinary. But in equity he is the trustee for the legatees. In that character he is bound so to manage the estate, that his cestuique trust shall sustain no injury from his neglect. As a general rule, I would say, that he should take as much care of it as a prudent man would of his own. This general rule still leaves a great deal to the discretion of the executor in the management of an estate committed to his care. That discretion, however, is not entirely arbitrary, for it may be fairly deduced as a consequence of the general rule already laid down, that the expenditures for current expenses should not (unless in cases of unavoidable necessity) exceed the current income. This inference from a general principle has by repeated adjudications of

this court, been established as a fixed rule by which executors and trustees should regulate their trusts. M'Dowell vs. Caldwell, 2 Mc. C. C. 43. Teague vs. Dendy, Ib. 207. Boggs vs. Reid, (see 3d No. Law Journal,) Smith and Brown vs. Killingsworth. The income being the fund for expenses, in its disposition the executor ought to exercise a sound and honest discretion. If his disbursements from it have been made prudently, they will always be supported. If made extravagantly or for purposes not necessary, they would be disallowed. These rules relate to the account between the trustee and the cestuique trust. They necessarily suppose that he has either paid out their funds or substituted his own credit in lieu of them. Persons dealing with the executor can therefore have no right to look to the estate for remuneration, unless in some extraordinary case, and which I shall have occasion more particularly to designate hereafter. In Boggs vs. Reid, the great and learned judge who delivered the opinion in that case, distinctly affirms this position and says, "they are the creditors of the trustee and not of the estate." In Smith and Brown vs. Killingsworth, another equally able and learned judge, says "the general rule that a trustee cannot bind the cestuique trust or create a burthen on the trust estate is so familiar as almost to have become an axiom." In addition to what has already been said, and to these decisive authorities, a few words will demonstrate both the reason and justice of the rule, *that in general the creditor of a trustee has no right to resort to the trust estate for payment of his debt.* In both law and equity every contract to be binding must be between parties able to contract and actually contracting on a good consideration. As between the trustee and his creditor all these essential parts of a contract do exist; but between the cestuique trusts and the creditor, none of them can be found. They are not only not parties, but are frequently legally incapable from infancy or coverture to become so. Between them there is no actual privity of contract, nor is there any legal or implied privity; for their funds for the purchase of the thing contracted to be bought, is in the hands of the trustee. When he buys it and puts it to their use, they have paid him for it, and hence no implication can be raised that they agree, in consideration of receiving the thing bought, to pay the creditor of the trustee

for it. This however, it may be said, is more technical reasoning than the application of equal justice which is said to be equity. If it is technical reasoning, it is reasoning based upon the principles of the law, which I am called upon to administer and not my own notions of abstract justice. I am, however, perfectly willing to test the rule on principles of equal justice. The trustee has the right to receive, and if necessary, to expend the income. If the creditor looks beyond the trustee, when he makes the contract, it is to this fund alone he looks for payment. He knows that at the end of the year it will be in the trustee's hands; if he does not take the necessary steps to procure payment it is his own fault and there is no injustice done him. But if the trustee were allowed to bind the trust estate, the effect might be ruinous to the cestique trusts, and in thus seeking to do justice to the careful and prudent man of business we might carry irremediable injury and ruin into the very cradles of infancy. With such a security before him a creditor might be willing to extend credit to the trustee from year to year until the whole capital of the trust would not more than pay it. In the mean time the trustee has received and squandered the income, and insolvency presents to his cestuique trusts, not even the consolation of hope. The effect of the rule when applied, will prevent these consequences, and afford security to the creditor. If the trustee is not punctual and prudent he will be compelled to pay as he buys. If he is, the creditor will hardly give him the opportunity to loose his good character, by tempting him with indulgence to speculate on the funds of another. The annual bill will generally faithfully wait on the punctual trustee.

I have said that an extraordinary case may exist where the creditor might be permitted to be paid out of the trust estate. It is necessary now to designate that case as well as we can. As a general guide, it may be laid down, that whenever the trustee, for advances made out of his own funds, for the trust estate, would be entitled to be reimbursed, that his creditor may, if he (the trustee) is insolvent, take his place and claim to be paid out of the estate. This constitutes however, the only exception which we are prepared to allow to the general rule already laid down.

The case before us shews the necessity of rigidly adhering to the rule, and allowing no other exception, than the

one which I have stated, to be made. The executor Gabriel Capers had the management of the estate consisting of a valuable tract of land in Sumter District, and a gang of seventy negroes from 1810 to 1827. During this time, the family of the testator to be provided for by his executor, consisted of three children. From his returns he appears to have received an income over and above his payments, $4,831 53, exclusive of interest. Notwithstanding this fund was in his hands, he contracted and left unpaid the debts to Humphries, Douglass and Mayrant, amounting exclusive of interest to $1749 82. He is insolvent and has abandoned his trust and left the state. The creditors now seek to make the income of the estate, realized since he abandoned his trust, liable for their debts. In common justice have they any claim to such relief? The cestuique trusts have already lost by the mismanagement of their trustee upwards of $4000. Is nearly a half more to be added to that loss? And for what? Is it merely because their trustee was imprudent, or unfaithful, and they were minors incapable of guarding against the consequences of his bad conduct, while the creditors were more careful, prudent and vigilant, of their own interests? The answer never can be, that under these circumstances the infant shall loose and the creditor gain. If loss must fall any where, let it fall on the heads of those who might have guarded against it, but who neglected to do so.

It is, however, contended that the decree of the court of equity in favor of Humphries and Douglass, makes the estate in the hands of the complainant liable for the payment of their debts. The decree is in the usual form, that the executor Gabriel Capers, do out of the estate of the testator pay these debts. This is a judgment against the fund properly applicable to payment of them—that fund was in the hands of the executor, and hence he alone is liable under the decree. It may be enforced against him. But if he were now, in the possession of the whole estate, and the complainants in that case were proceeding to enforce the decree by an execution against and a sale under it of the testator's estate, I apprehend the cestuique trusts would on an application by bill shewing that the debts were contracted by the executor, and that the income in his hands was sufficient to pay them, be entitled to an injunction. Here the creditors be-

come the actors, they come in under a bill to marshall the debts and undertake to set up their debts as a charge against the estate now out of Capers's hands. Before they could be allowed to charge it, they must shew that Capers had not in his hands of the income enough to pay the debts, and that they were necessarily contracted for the benefit of the estate. This cannot be done, and it follows that the estate cannot be so charged.

The debt due to Mr. Mayrant it is contended, rests upon a still higher ground—It is said the estate had the benefit of this contract; and therefore ought to pay it. But it is worthy of remark, that whatever was the income derived from the use of Mr. Mayrant's plantation and driver, the cestuique trusts did not receive it. It was received by Capers, and he ought to have paid the debt. Like all the rest of his contracts it should have been paid out of the current income. I am however, by no means satisfied, that the rent and hire of Mr. Mayrant's plantation and driver were necessary for the estate. In relation to that part of the case, I am very much disposed to concur with the complainant, and say it was a mere speculation of the executor and not an act required to be done by any paramount necessity. But the observations made on the other parts of the case, dispose of Mr. Mayrant's debt, without resorting to this:

So much of the Chancellor's decree as charges the income of the estate since it was abandoned by Capers, with the payment of the debts to Humphries, Douglass and Mayrant, is clearly erroneous. It is therefore ordered and decreed that the decree of the Chancellor in these respects be reversed.

Decree modified.

WHAT TRUSTS ARE BARRED BY THE STATUTE OF LIMITATIONS.

WYATT W. STARKE and Wife vs. JOHN M. STARKE Executor of JOHN W. STARKE deceased.

A trust which is not within the statute of limitations, must be a technical and continuing trust, which is not at all cognizable at law, but falls within the proper, peculiar and exclusive jurisdiction of the Court of Equity.

So long as such a trust continues, there can be no adverse right, for the trustee holds both the legal estate and the possession, in right of his cestuique trust.

But if the trustee does an act, which he intends, and which is understood by his cestuique trust, to be a discharge of his trust, from that time the statute will commence to operate.

Upon marriage the husband's receipt for the amount of his wife's choses in action, though she be a minor at the time, is good, and will discharge the guardian from any further account.

If the husband receives the property and believing that he has in some way received an equivalent for the profits, he may decline an account and discharge the trustee.

After such time the statute of limitations will commence to run.

If the cestuique trust was ignorant of his rights or there was fraud on the part of the trustee, the statute will not commence to run before the discovery of the right or the fraud.

To give the wife the benefit of the saving clause in the statute of limitations, the cause of action must have accrued during coverture.

The statute of limitations does not regard coverture and infancy as equal disabilities.

DESAUSSURE, *Chancellor*.—The object of the bill is to have an account of the profits of land and the hire and labor of slaves; and a discovery of the personal property of the estate of Robert Blakeley.

The facts were as follow.—Robert Blakeley died in January, 1804, intestate, leaving a widow Catharine and one child, Jeanette Amelia Blakeley, then an infant of a few months old, and also leaving real and personal estate. The widow Catharine, administered and made an appraisement of the personal estate of Robert Blakeley on the 16th of July, 1804. The amount was $4004 62 5. Of this sum $3700 was for the slaves. The appraisement for the other property was therefore only $304 62.

In the course of the year 1804, the widow married John W. Starke, who possessed himself of the estate of Robert Blakeley and on the 30th of January, 1808, he gave a bond with two surities in the sum of $3000 for the faithful administration (in right of his wife) of the personal estate of Robert Blakeley.

The property remained in the hands of J. W. Starke from his marriage in December, 1804, to the year 1819. He received the rents and profits of the estate but made no returns to the ordinary's office.

Miss Blakeley was entitled to two-thirds of the estate left by her father and the widow to one-third. She was brought up and educated by her step father and had an expensive education at female academies for which J. W. Starke paid.

Jeanette Amelia Blakeley intermarried with the complainant Wyatt W. Starke, in January 1819, [illegible] of the slaves was delivered up to the complainants. It does not appear by any evidence whether J. W. Starke [illegible] ed with the complainants for the rents and profits of the estate.

Mr. Wyatt W. Starke signed a paper of which the following is a copy:

"John W. Starke having expressed a desire in common with his wife Catharine Starke, to be exonerated from responsibility as respects the hire and use of the negroes belonging to Amelia Blakeley, heiress of Robert Blakeley, I do hereby in consideration thereof, promise and agree never to institute any suit or make any claim whatsoever against the said J. W. Starke or his heirs, on account of the use or hire of the said negroes.

(Signed,) "WYATT W. STARKE."

There was no date to this paper and it was alleged that it was executed before his marriage with Miss Blakeley, she being named Amelia Blakeley in the writing; from which the inference has been drawn, that the paper was signed before the marriage took place.

If that had been proved satisfactorily, it would have been sufficient to have shewn the nullity of the instrument, as Mr. Wyatt W. Starke would in that case have had no authority or interest in the estate. We cannot however believe without further proof, that the paper was signed before the

marriage, because the administrator would have known that Mr. Wyatt W. Starke had nothing to do with the estate and had no authority to act; and the latter would never have done an act in relation to an estate in which he had no concern. It would have been an unbecoming act in both parties and not seemly in gentlemen of such respectable characters. In the absence of direct evidence of the fact I must presume that the parties acted correctly as became their characters.

There was a great deal of parol evidence in this cause which was taken at great length. It is on my notes which I connect with this decree and forms part of it. I shall refer to it in this discussion.

It was proved that Mr. J. W. Starke got part of his property with his wife, (who had been the widow Blakeley,) but he had some negroes of his own; and purchased a few and some land (cheap,) after his marriage; and he died rich; his lands were worth four or five thousand dollars; and he left thirty or forty slaves.

Miss Blakeley lived with her step-father, J. W. Starke, who was kind to her, and brought her up in good style. He sent her to Salem for education, and some witnesses proved, also, to Charleston. She was married to Mr. Wyatt W. Starke in 1819, when she was about 16 years old. She lived in the family for a year after. The division of the slaves was made voluntarily and satisfactorily between the parties. They had largely increased during the time Mr. J. W. Starke had charge of them, more than doubled. Mr. J. W. Starke conveyed by deed of the day of January, 1819, to Wyatt W. Starke and his wife Amelia Starke, and their heirs, a tract of land (which appears to have been his, J. W. Starke's) for which Mr. Wyatt W. Starke afterwards got $ 1200.

The consideration expressed on the face of the deed, was one dollar.

This cause was most elaborately and learnedly argued by the counsel and many authorities cited to establish the points relied upon.

It was argued by the complainants that they were entitled to an account of the rents and profits of the real and personal estate of their father; which had never been rendered to them or to the ordinary.

The defences set up, were that Mr. Wyatt W. Starke had given a written paper as above stated, which amounted to a discharge, and that there was sufficient evidence that though no formal account had taken place, there was such a settlement or payment as must have done justice between the parties and been satisfactory to them. And that at all events the statute of limitations or a sufficient lapse of time, had occurred to bar the claim to an account.

On the first ground it was conceeded by complainant that the paper was signed by Mr. Wyatt W. Starke; but it was contended that it was not binding, as no legal or proper consideration was expressed and none proved. That the court was jealous of such settlements with young heirs, and would not sanction them when made without an account rendered and duly examined.

It was also contended that even admitting the paper relied upon as a release or discharge to have been fairly and properly obtained, yet it is not operative against the rights and interests of the wife; because it was a relinquishment which the husband had no authority to make; she also being entitled to a settlement thereof which is now insisted on.

There is no doubt that the court is as it ought to be, very jealous and watchful of such transactions between parties so situated. The decided cases cited by the bar prove this to a great extent; yet it is not a blind jealousy. The court has never gone so far as to declare that all settlements are void. If so, it would never enquire into the circumstances. It does however enquire into the circumstances and decides according to them. In the case we are considering, the intestate, Robert Blakeley, left a personal estate of twelve slaves as appears by the appraisement; two of whom were very aged, and all the rest called boys and girls in that document. The widow was entitled to one third and the daughter to two-thirds. Excluding the two old slaves there remained very few workers. Miss Blakeley was supported and educated at considerable expense. After the marriage of the daughter to Wyatt W. Starke, they lived in the family for a year. Soon after the marriage, Mr. J. W. Starke conveyed a valuable tract of land worth $1200 to Mr. and Mrs. Wyatt W. Starke without price; for the consideration is stated in the deed to be one dollar. The conveyance to them both shews that it was not a purchase by Mr. Wyatt

W. Starke. The negroes had been well taken care of and a greater number were delivered to Mr. Starke for his wife's share than the whole number at the death of the intestate. The witnesses prove that the number divided were between 20 and 30. All these circumstances shew fairness in the management, and lead the mind very strongly to the belief that there was fairness in the settlement.

In the decided cases cited and relied on, there are always circumstances shewing unfairness or at least loss and damage to the party complainant. Upon the whole, there does not appear to be sufficient ground to induce the court to interpose with a strong hand, and to declare a paper deliberately signed by a gentleman of mature age, bred to business and of great intelligence, to be a void act: more especially after the death of one of the parties.

This view of the subject applies to and supports the two first grounds of the defence.

With respect to the husbands competency to give a discharge or release of his wife's right in the choses in action, to wit, to the rents and profits and hire of the property, there is considerable difficulty.

The court directs settlements of the wife's property where the husband must come into this court to get the property, otherwise it does not interfere. Here the husband made a settlement himself with the administrator; and upon what was then a satisfactory arrangement, relinquished the right to the choses in action; for a disclaimer and relinquishment of remedy, is a relinquishment of the right.

That a husband has a right to assign his wife's choses in action during the coverture, is I think too well settled to be shaken, when done fairly and on proper consideration. It is too late after a division of the bulk of the estate and no marriage settlement made or asked for, and many years have elapsed, and the administrator is dead, to endeavour to get rid of a settlement and discharge by setting up an equity of the wife in a mere inferior interest derived out of the estate which has been received without a settlement.

In my opinion, the circumstances do not shew any unfairness, and that the relinquishment was on proper consideration is not doubtful, when we recollect the circumstances above stated which must have led to the signing the paper in question.

If there had been any circumstances which indicated unfairness, and any injustice resulting from it, the whole of this reasoning would be inapplicable and the court would without scruple have opened the transaction, set aside the relinquishmant or discharge, and ordered an account.

The next point for consideration is whether the statute of limitations and lapse of time would bar the demand.

It is the established doctrine of the court that executors and administrators of an estate are trustees for those interested therein; and it is also settled that the statute of limitations does not as such run against the just claims of persons so interested. It does not however follow, that great lapse of time, neglect to pursue the remedy, an acquiescence in a settlement until the death of a party who might have been able to render an account, may not operate as a bar to the demand. All these circumstances concur in this case. The paper given or set up as a relinquishment of right, though without date, must from the facts in the case have been given soon after the marriage in 1819. It is most probable when the slaves of the estate were divided, and when the conveyance of the land was made, (January, 1819,) this relinquishment of right has been acquiesced in till the bill filed in May of the year 1829. Subsequent to the death of the person who made the settlement, and who might if called upon in his life time, have been able to shew the justice of the settlement. I conclude, therefore, that it would be improper to set aside the paper of relinquishment signed by Mr. Wyatt W. Starke and to order an account.

I am sensible that there are real difficulties in this case and that some of the decided cases cited by the counsel for the complainants go very far towards supporting their claim to an account. But it does appear to me that there is one pervading principle running through the whole of them.

There must be some unfairness in the transaction, or some injury, loss, or injustice sustained, to induce the court to interfere and exercise its extraordinary power to set aside a parties own instrument, voluntarily entered into without any proof of fraud or imposition practised to induce it. It ought to be remarked that Mr. Starke himself drew the paper. The property was largely increased by the management of the administrators.

It is ordered and decreed that the bill be dismissed—but without costs.

From this decree the complainants appealed.

Gregg and Desaussure for the appeal, cited Stackhouse vs. Bamston, 10 Ves. 464, as to the statute of limitations. The bill was filed within five years after Jeanette Amelia attained twenty one. The release was signed after the marriage. It was a release of her equitable estate without her knowledge, without consideration and without an account. As to the want of consideration, 1 Phillimore 424. 2 P. W. 203. 2 Sch. and Lef. 500. Reeve's Dom. Rel. 129. Hatch vs. Hatch 292. 9 Ves. 292. Duke of Hamilton vs. Mahun, 1 P. Wms. 118. 2 Atk. 15–34. 2 Ves. Sen. 514. Beam's Pleas in Equity 226. Can the husband assign the wife's choses in action without valuable consideration. 2 Atk. 206. 417. 4 Ves. 392. 8 Ves. 511. 4 Ves. 19. Henry vs. Udal 5 J. C. C. 464. Clancey 123. 494. Prec. in Chan. 412. 1 Jac. and Walk. 472. 10 Ves. 466. Ang. on limitations, 134. 1 M'Cord, C. R. 313. 176. 3 J. C. R. 216. 7 Do. 111. Plow. 375.

M'Call and Clarke contra, cited 1 Phill. 482. 2 M'Cord's R. 218. 4 M'Cord 326. Co. Litt. 282. Reeve's Dom. Rel. 5. Roper's Hus. and Wife 218. 9 Ves. 100. 107. 2 Ves. 280. 92. 3 Brown's Ch. R. 633. 13 Ves. 148. 1 Fonb. 201. Newland on Con. 404. 3 P. W. 189. 2 Cranch, 180. 1 Harper, Eq. R. 180. 2 Mad. Ch. 243. 353.

CURIA, *per* O'NEALL, J.—The only question necessary to be considered in this case, is whether the complainants' claim for an account of the hire of their slaves is barred by the statute of limitations?

A trust which is not within the statute of limitations, must in the language of Chancellor Kent, "be a technical and *continuing* trust, which is not at all cognizable at law, but falls within the proper, peculiar and exclusive jurisdiction" of the court of equity. Kane vs. Bloodgood, 7 J. C. R. 111. So long as this trust continues there cannot be any adverse right or possession—for the trustee holds both the legal estate, and the possession, not for himself but for his cestuique trust. While therefore the trust continues, the statute of limitations cannot effect it; but if the trustee does an act which he intends, and which is understood by his cestuique trust to be a discharge of his trust, then the statute will from that time commence to run: and this was so decided by this court at our last session in Charleston, in the case of

Moore vs. Porcher. According to Chancellor Kent's definition of such a trust as will not be effected by the statute of limitations, the case put will be found to want one very essential character. It is no longer a continuing trust. Indeed it is no longer a trust in any sense of the word; for a trust is to hold for the use of another. But here the trustee has ceased so to hold: he indeed holds for himself. In this respect the case is very analogous to a very common and familiar one at law, that of landlord and tenant. So long as this relationship exists, the tenant cannot acquire an adverse title by possession. But so soon as he is divested of his character as tenant by the consent of his landlord, as by purchase from him, or by going out of possession, and again acquiring it, or by actual notice to his landlord that he has ceased to hold as tenant, and holds for himself—he may acquire a title by possession, for he then holds for himself, and in his own right, and not for and in the right of another, and this is what I understand by adverse possession. Simons vs. Parsons, decided January term, 1830, at this place.

It is supposed, however, that the rule which I have stated cannot apply to this case; for it is alledged that the defendants testator, as trustee for Mrs. Starke, could not discharge his trust otherwise than by coming to a regular account and paying the balance found in his hands. This position is based upon the notion that the hire in arrear, was the wife's equitable chose in action, which the court of equity would order to be settled on her, and that therefore no act of the husband short of an actual receipt of the fund could actually or constructively discharge the trustee from a future account. There is no doubt of the rule, that where the husband or his assignee have to seek the aid of the court of equity, to render the wife's chose in action available, that it will generally decree a settlement; and that there is as little doubt where either receive it and render it available that the court of equity, cannot interfere. Upon marriage, the husband has the right to receive the personal property of the wife; and his receipt of the amount of his wife's choses in action, even although she be a minor, is good and valid, and will discharge her guardian from any further account. Edwards vs. Higgins, 2 M'Cord's C. R. 16. If he thinks proper to receive the property, and believing that he has in some way, received an equivalent for its hire, he

may decline an account, and discharge the trustee. For it will not be denied, that the complainant, Starke, might (if he had thought proper so to do) have claimed from his uncle, the testator, an account of the hire of his wife's slaves, and on receiving payment, he could have returned the money to him; and if this had been done, it could not be pretended that either he or his wife, could ever have demanded any further account. The course which the complainants alledge was pursued, was exactly equivalent to this. For he received the slaves of his wife and such of the property as the testator thought proper to give him, and believing either that he was fully indemnified for the hire, or that it would be hard or unjust to claim an account, he promised not to do so. This was a gift by the husband to the trustee, of his liability to account. Standing by itself, it could not perhaps be sustained as a promise not to demand an account, unless plenary proof had been furnished of a consideration to sustain it. But it is in evidence, that at that time the trustee did an act, intended and understood to be by the cestuique trust entitled to receive a discharge of the trust. It is in this point of view alone, that I attach any importance to the paper executed by Wyatt W. Starke.

The statute of limitations is founded upon the presumtion, that after the time allowed by it for an action to be brought, that the evidences of settlement and payment have been lost, and this lapse of time stands in the place of proof, and operates as a positive bar, even against our belief of non-payment. If it was necessary therefore, in the case before us, it would be our duty, in speaking of a matter to which the bar of the statute applies, to presume in favor of the defendant, that an actual account, and payment in money or property had been made, at the time the trust was terminated.

In January, 1819, when the testator delivered over the slaves to his cestuique trust, his trust terminated, and the statute then commenced its operation. If it was pretended, that a fraud had been committed by the trustee, or that his cestuique trusts were ignorant of their rights, the statute would not commence to run until a discovery of the fraud; or until they were informed of their rights. But there is no pretence of this kind in the case; and indeed the paper executed by Wyatt W. Starke, shows that he was well

aware of his wife's rights, and that he chose to end the relation of trustee and cestuique trust without asserting them. In four years after January, 1819, the right of the complainant, Starke, to demand any further account, was barred; and I am very much inclined to think, that in a case brought by himself and wife, the coverture of his wife would not be any answer to the plea of the statute of limitations. The saving in favor of femes covert, in the statute, is for the protection of the wife, and not the husband; and in that view, it is, that she is authorized to constitute an attorney to sue either in her own name, or in the name of her husband himself. But it is not necessary so to decide in this case. For unless the wife was entitled to five years, after attaining to full age, the bar is complete against her as well as the husband. By the act of 1712, 2 Brev. Dig. Tit. 110, Sec. 14, p. 23, it is provided, that if any person or persons, "at the time of any such cause of action given or accrued, shall be beyond the seas, or feme covert, or imprisoned, shall be at liberty to bring their action at any time within four years after the ratification of this act, or at any time within five years after such cause of action given or accrued, and at no time after." To entitle the complainants to the benefit of this saving, it is necessary to shew that the cause of action accrued during coverture. It is however unquestionable, that the right to demand an account of the hire of the slaves, accrued to Miss Blakely at the end of every year after the death of her father. The cause of action therefore existed before coverture, and she cannot claim the benefit of this saving. In Tredwell & wife, vs. Collins, 1st Con. Rep. (Tredway's Ed.) 202, the cause of action accrued to the feme plaintiff while sole, and during infancy, and it was held that she was bound in four years, after attaining to full age; and that she was not entitled to sue within five years from her coverture, notwithstanding it appeared that she had been married during infancy.

It is true that in Stowell vs. Zouch, Plowden, 375, it is said "that if one had three or four of the defects, and impediments, as if a woman who has present right, or when the positive right falls in is covert, within age, not of whole mind, and in prison, and one or two, or three of these defects are removed, as if the husband dies, and she

is of full age and let out of prison, the five years appointed to her by the statute, shall not commence, until the last defect or impediment is removed; and when she is void of all the impediments or defects, then the five years shall commence." On looking back into the report of that case, at page 362, the clause of the statute, to which this argument of the Judges alludes, will be found to provide, "that all women covert, not parties to the fine, and every person, within age, in prison or out of the realm, and not of whole mind at the time of the fine levied and ingrossed, and by the act before excepted, having any right or title or cause of action, to the lands, shall take their actions on lawful entry according to their right and title, within five years, after they come and be of full age of twenty one years, out of prison, discovert, &c." from which it appears, that the statute there referred to, and upon which the argument is founded, contemplates the giving of five years, after the removing of all disabilities which may exist at the accrual of the cause of action. The conclusion of the Judges in this argument is nothing more than that the party may rely upon the disability last removed, and claim the five years from that time. All the disabilities must exist at the moment the cause of action accrues. If only one existed, and that is removed, the statute would commence to run, and a subsequent disability accruing, would not prevent it from running out, as appears from the same authority. So that even according to this case, coverture, after the cause of action accrued, could not be joined to infancy, to extend the term allowed by the statute. But our acts of limitations, are not identical in their provision with the statute referred to in Plowden. The act of 1788, 2d Brev. Dig. Tit. 110, Sec 23, p. 25, allows to infants four years, after attaining to full age, to prosecute any personal action. The act of 1712, does not except femes covert until after discoverture, but merely gives them the right to sue at any time within five years after the cause of action accrued. The acts of limitations do not therefore regard coverture and infancy as equal disabilities. Indeed, coverture is not a disability, for the act of 1712, does not treat it as such, in permitting the rights of a feme covert to be barred while it exists: and by another provision, the right and power to sue, is given to her. It may admit of a grave question,

whether the disability of infancy is not merged in the coverture, and whether an infant feme covert could have any longer term than five years after the accrual of her cause of action. In all events, the party could only have the right to claim the protection of one or the other, and not rely upon both as cumulative disabilities.

In the case before us, the complainants must rely on the infancy of Mrs. Starke. She was of full age in July or October, 1823. Take the last period as the true time, and she would be barred in October, 1827, three months before the testator's death, and nearly a year and eight months before the filing of this bill.

It is therefore ordered and decreed, that the Chancellor's decree be affirmed. *Decree affirmed.*

TRIAL OF THE FRENCH MINISTERS.

We have endeavoured for some months past, to procure a report of this trial that we could fully rely on. We have at last been compelled to take it from *Galignani's Messenger.* We are not certain that we have the whole evidence, but what we have, is so interesting, and communicates so much information in relation to the late Revolution in France, that we are sure it must be acceptably received by our readers. The Speeches delivered on this occasion, are excellent specimens of the French Bar; a bar of whom we know but too little in this country. Whatever the English may think, and notwithstanding the great advantages of the English language over that of France, we do not hesitate to say, that with the exception of Mr, Brougham, we have heard better speaking in France than in England. Tobesure, we have heard some very wretched. So we have in both countries. Fully as bad as any we ever heard in America; with every fault except that of Grammar.

Nothing, however can be more wretched and rediculous to the eyes and ears of an Englishman or an American, than the sudden rush to the

tribune, a low reading desk, precisely similar to that of the *Readers* desk below our Speaker's seat, and situated in the same way as to the Speaker, and the hurried schoolboy manner in which many speakers in the French Chamber hurry over a few sentences of epigramatic turn which it would seem they had prepared for the purposes of producing a sort of momentary convulsion, to enable them to escape to their seats before they are discovered. What renders this habit the more ridiculous, is the great contrast which is seen in the Chamber of Deputies every day—for this sharp shooting is often immediately succeeded by a fine, full, flowing voice; noble and dignified action, vehement and energetic utterance; prompted alone by the feelings of the moment or the dignity of the occasion, and quite equal to any thing we have seen or heard any where.

At ten o'clock this morning, (15 Dec. 1830.) the important trial of the ex-Ministers commenced before the Court of Peers. The morning was cold and snowy, consequently unfavorable to the congregation of any considerable crowd in the streets. Numbers had, however, assembled before eight o'clock in the neighbourhood of the Odeon and Luxembourg, but the great mass of persons visible were National Guards of all legions and grades. They lined every avenue, their bayonets glittered among the gardens of the Luxembourg, and the whole palace was in a state of siege. The court-yard was entirely occupied by the civil and military authorities, who, with excellent arrangements, secured prompt ingress for the privileged few who had obtained tickets of admission to the interior.

At nine o'clock, the whole area of the Chamber of Peers was filled by spectators. The Peers did not take their seats before ten o'clock.

The principal advocates of the Paris and provincial bar were in attendance.

On the right of the place allotted to the French bar, and on the spot usually filled by the clerk of the House of Peers, was a commodious box enclosed for the prisoners, with four chairs provided for their accommodation, and a desk and stools for their counsel; the accusing Managers had a similar box, on the other side of the bar division.

About one third of the space on the floor was railed off for the use of the members of the Chamber of Deputies, who were in full attendance. All the small boxes behind the seats of the Peers were filled by those privileged from the different Embassis, and the foreigners of rank who had tickets.

The public had the semicircular gallary, nearly two thirds of which were railed off for the journalists—the remainder was filled by those who had tickets, so that in point of fact, for unprivileged strangers, there were found only four places.

The ministers of the King sat, as usual, in the front bench upon the floor. The Peers wore their full uniform, and among the spectators, officers of the Court, and journalists, the greater number were in the uniform of the National Guard. For the first time in the Chamber of Peers, members had their seats marked, as is the custom on nights of important business in the British House of Commons.

The building was completely filled, but the distribution of places was so mechanically correct, that not the slightest confusion prevailed.

A few minutes after ten o'clock, and before the President took his seat, the prisoners were conducted into the Chamber by four soldiers, of the municiple guards, preceded by Colonel Festamel, the Commandant of the prison of Luxembourg;—they immediately sat upon the chairs provided for them. They were dressed in black, except Polignac and Peyronnet, who wore brown coats and coloured waistcoats. They entered the Court uncovered, and bowed upon entering. Some Gentleman of the bar cordially shook hands with Count Peyronnet. They were not, however, seated more than a minute, when, upon some intimation, Col. Festamel withdrew them across the floor, and through the same door of their entrance. As they were retiring in front of the box allotted to the deputies, a number conversed for an instant with Count Peyronnet, and warmly shook him by the hand.

The prisoners, with the exception of Peyronnet, (who maintained a firm and cheerful demeanor) were very pale and wan. Chantelauze appeared like a man on the threshold of the tomb. The fortitude which had conducted Polignac to his elevation, appeared now to have entirely de-

serted him; he looked around him with evident anxiety, but his eye seemed not to meet a sympathizing glance. He is a man of gentlemanly appearance, and his silvery hair gave a sorrowful hue to his aspect. Polignac is 50 years of age; Peyronnet 52; Chantelauze 43; and Guernon de Ranville 43.

At half past ten o'clock precisely, Colonel Festamel reconducted his prisoners to the bar; they were now followed by the whole corps of their Counsel; of the latter, Martignac took the lead. He did not wear the professional costume of the defenders of the other prisoners, but wore his Court dress as Deputy.

As soon as the prisoners were seated, a number of witnesses were introduced on the floor at the right of the Court. The President then entered, and all the Peers took their seats in great pomp and order. The prisoners looked steadfastly at their Judges as they passed—Peyronnet, who is a tall figure, with his arms crossed, and apparently at perfect ease—Polignac followed them attentively with his eye, but no familiar recognition on the part of the Peers to the prisoner was observed during this ceremony. Polignac, however at times conferred with some of the gentlemen of the bar deputation, who were next his elbow.

Silence being proclaimed, the President asked the prisoners in succession, beginning with Prince Polignac, their names, ages and professions, as follows. The answers were given (except from Peyronnet, who maintained the utmost self possession and *naivete)* in a plaintive tone, in particular by Polignac, who was at times scarcely audible. The tone of Chantelauze was that of a man entirely subdued by physical indisposition.

The Court of Peers was then called over by the proper officers, and the Peers answered to their names. The Commissioners of the Chamber of Deputies, charged with the impeachment of the Ministers of Charles X. were in full Court dress. As the business commenced, all the prisoners were furnished with paper, pens and ink, of which they commenced to make immediate use, with the exception of Chantelauze, who was evidently too weak for any personal exertion.

The answers to the President's questions to the prisoners, were as follows:—

The PRESIDENT, to the Prince Polignac, Monsieur Le Prince, what is your name, rank, age, and place of nativity? My name is Jules Amand Marie Prince de Polignac, Peer of France.

Your age, sir? Fifty years.

Your domicile? The reply of the prisoner was given by a sign of his hand, pointing to the adjoining prison where he had been so lately domiciled.

Your profession? I have none.

The PRESIDENT then put the same interrogatories to Count de Peyronnet who replied:

M. DE PEYRONNET, Mr. President, before I answer, I wish to say, that I have already prefaced my interrogatories elsewhere by a protestation which must be recorded by the Commissioners of the Chamber of Deputies. I wish here to record on your proces verbal, a similar process. My name is Count de Peyronnet, Peer of France, my age 53 years. My former residence and protest are correctly given in the previous process.

The PRESIDENT—The Greffier (officer of the court) will take a note of that declaration.

The same questions being repeated to M. Guernon de Ranville, and M. de Chantelauze, the former said he was a Deputy for the Maine and Loire, aged 43 years, born at Rouen; and that he wished to have his protest recorded before the Court in the same terms as that of Count de Peyronnet. M. de Chantelauze gave his age as before (43 years,) was born at Caen, formerly Minister of Public Instruction, and then residing at the Ministry. He protested likewise.

Prince POLIGNAC—then rose and said—"I also wish to record my protestation before the Commissioners, and to have it here recorded."

This conjoint protestation was against the Competency of the Court to question their acts by command of the King in Council.

The Peers being all called over, and some other forms complied with, the President rose and said, "The defenders of the prisoners know the terms of the article 211 of the Criminal Code of Instruction. I desire they will bear in mind to conform to them during the trial."

The GREFFIER then read the record of the proceedings of the Chamber of Deputies on the 29th of September, and

of the Chamber of Peers on the 28th of November, relative to the process against the accused.

The PRESIDENT.—"Accused—you are charged with having signed the ordinances of the 25th of July. You will now hear this accusation read according to the forms prescribed by the law, and you will answer afterwards the questions which it is my duty to put to you separately."

The prisoners Polignac and Peyronnet inclined their heads in assent to this intimation.

The act of accusation was then read in due form, and in the manner in which we have already published it. It charged the Ministers with conspiring, through the means of the memorable ordinances of July, to overthrow the charter and liberties of the French people.

M. BERENGER, the Reporter of the Commission of Accusation of the Chamber of Deputies, then rose and addressed the Court. He said that the resolution and act of accusation which they had just caused to be read against the Ex-Ministers of Charles X. it was for them now to proceed upon. As the organ of the Commissioners, he said he demanded justice for the violation, by these Ex-Ministers of the law of France; the attempt to overthrow by an act of arbitrary power her institutions; and for the blood of her citizens so daringly and unlawfully shed. In making this appeal in behalf of the people of France, he begged to assure the Court of Peers, that the good citizens of Paris, who had suffered so much in their struggle, sought for justice only, and that justice in strict conformity with the law, the jurisdiction of which they had re-established. He had to accuse the ex-Ministers of violating the electoral laws, under the form and pretext of a dissolution of the Chamber of Deputies, and to demand justice against the perpetrators of these crimes. The nation demands, and has a right to demand this act of justice when I prove to you these crimes. It was, he knew, necessary that the tribunal which had to adjudge such a cause should be independent, that its free deliberations should be secured, and its judgment above all suspicion of being induced by fear or bias. Of this important cause they would so judge as to acquit their consciences with satisfaction to themselves, and then he had no doubt they would secure the according voice of their country, and of Europe, which now kept its

eye upon their solemn proceeding. He concluded by a strong appeal to the Court—to govern its feelings during the progress of this trial, so as to secure the permanent ascendancy of the laws, the liberties of the people, and the punishment of those who should be convicted of crimes which shook, as these did, the basis of society.

The witnesses who had previously entered the court, and among whom were M. Casimir Perrier, M. Lafitte, and other eminent members of Parliament, were here commanded by the voice of the Greffier to retire.

The President to the Prince Polignac—You see, sir, the necessity which is now imposed upon you of repelling, in the best manner you can, this most serious charge. You are called upon to do so, to clear up your own conscience, if you can, and also to acquit the consciencies of your peers.

Upon your entrance, on the 8th of August, into the Ministry, had you been for any time previously acquainted with the intentions of King Charles X. respecting your appointment? No.

Did you, when called upon, aid or form that Ministry? I had a list of persons submitted to the king, who chose those who were agreeable to his wishes.

Was the formation of that ministry preceeded by several, or by any conferences, and was M. de Chabrol's retirement discussed? I know of none of these conferences. The selection was made by the king as I have already mentioned, and the retirement of M. de Chabrol was the consequence, I believe, of differences respecting the person to be named President of the Council.

What was the nature of these differences? I can say nothing of the particulars which confidentially transpired in the councils of the king.

What is the meaning of your distinction? Justice requires from you the fullest explanations; it is your duty to give them, both for yourself and your colleagues? I cannot disclose the secrets of the counsel. I have no means of furnishing the particulars which transpired therein.

Who dictated the answer to the address of the Chamber of Deputies? I am ignorant about it.

Was there not, I ask you, some opposition in the council respecting it? It necessarily gave rise to some observations and discussions.

Several questions were then put to M. de Polignac almost similar to those we have already published in the depositions before the Commissioners. The prisoner still denies that an intention existed to dissolve the Chamber at the time of its prorogation, but admitted that when the dissolution did take place, it was with the view to get a better Chamber.

Were not the secrets of the electoral votes violated by order? No; I believe not.

A note being here handed to Polignac at his desire, which it was intimated implicated him upon his long consideration upon the ordinances, the Prince said: I see nothing in this note to justify your suspicion. I see nothing to show that we did not wish to repose upon the forms and principles of the constitution; and in a report which I addressed to the King on the 7th of the same month, I proved the necessity of resting upon the Charter—Where, I ask, is the proof that we wished deliberately to violate the Charter? I see none in this note. (Handing it back to the officer of the Court.)

M. de Peyronnet here rose, evidently to address the Court, but he was checked, and informed by the President that he could only be heared in his turn, when he should be fully heard.

M. de Martignac, (Council for the defence) rose and requested that no interlocutory remarks should be made in this stage of the trial, or indeed until the proper time came when the accused could go fully into their defence. The thread of the interrogatories should not be broken. (Hear.)

You have said, that up to the moment of publication, no part of the public was apprised of your intention respecting the ordinances? I believe none.

Precautions were taken to arrange the local command after their publication? Yes.

Were not the proper precautions taken? No.

M. de Polignac was then asked if he had ever made a communication to the King relative to the effect produced by the ordinances, but he declined to answer. He denied having given orders to break the presses of the journals, or to arrest certain Deputies, and even that he had given any order to the troops to use force. The next interrogatory was:

But if you had given no order, there is a great difficulty in believing you could be ignorant that such orders were given, and if so, what were the motives of your non-interference? Who gave orders to the police for the illegal proceedings? Their officers I suppose.

Did you not give the orders, or hear them given to distribute fifty rounds of ball cartridges to the troops? No; I had nothing to do with those matters. They were necessarily in the hands of the Marshal in command, who had declared Paris in a state of siege. The whole military power was necessarily vested in him.

Then it is not true you were a party to any of these military orders, or that you ever said to an officer in command, "you will fire every where where you can and you wish to fire? I never said so.

Did you ever render any account to the late King of what passed on the Tuesday? No, for I had no official correspondence upon the subject, and could not therefore make official communications to him relative to it.

Did you not know that the combat was then every where raging? No, I did not.

Nor of the number of persons then killed? No,

Nor that the shops were shut, and the armourers plundered? Nothing of the kind.

Nor of the fire at the Exchange? No.

Were you not soon apprised of the re-assemblage of the Deputies at the house of M. Casimir Perrier and of their resolution? Of none of it.

Nor of the formal protest drawn up in their name by M. M. Guizot, Dupin, Villemain, &c.? I knew of none of these details until after my arrest.

You repeat, you had no official communication with the King on Tuesday? None officially, but verbally.

What communication had you with your colleagues? We had a Council on Tuesday evening.

Who was it proposed to place Paris in a state of siege? I cannot tell that.

Was there any opposition? The proposal to place Paris in a state of siege was adopted.

What reason induced its adoption? The motives will be assigned in the defence.

Was the placing Paris in a state of siege spoken of in the Council? No.

At what hour on Wednesday were you at St. Cloud? Eight, or half past eight, in the morning.

Were you informed as to the state of Paris? No.

Did you propose to the King to sign the ordinance placing Paris in a state of siege? Yes.

At what o'clock did you return to Paris? At eleven o'clock.

Did you inform the Marshal of the placing Paris in a state of siege? Yes.

Were the Civil Authorities informed of it? It must have been so.

Was it with the Council that the Marshal put himself in relation? With me and with the Council.

At what o'clock on Wednesday did you leave the hotel of the Minister of Foreign Affairs? About 2 o'clock.

What induced you to leave the hotel? The crowds were numerous.

Did you make your determination known to the other Ministers? There were one or two of them with me at the time.

Were you informed of the resistance made by the inhabitants? The information was not brought to me.

Then you did not inform the King of what had taken place? I could not do so, as I did not know it till late in the day—towards eleven o'clock. I wrote that the movements continued, but I had no positive information to communicate.

Did you communicate with the other Ministers? Yes.

Did you communicate with the Marshal? I asked him what had passed and what he thought of it.

At what hour did you part with the Deputies at head quarters? In the morning.

Did the Marshal give you an account of the proceeding of the Deputies? He made several observations to me on the subject. When I knew that the Deputies were with him, I caused it to be intimated to the Marshal that I could not see them. He told me the conditions they insisted on were the withdrawal of the ordinances. I answered that I could not take that upon me, but that I would communicate with the King. I then sent an officer to the Deputies, to say that I would see them; but when I knew the conditions on which I had already made my answer, I did not think it my duty to see them.

Did you take the necessary measures for publishing this ordinance? In quality of keeper of the Seals, it was my duty to send it to the competent authorities.

Had the Council any sitting after Paris was placed in a state of siege? There was no meeting of Council after the evening of the 27th.

Did you do nothing to stop the effusion of blood? The placing Paris in a state of siege placed all power in the hands of the Marshal. I could have wished to stop the effusion of blood; but I repeat, that I could do nothing to prevent it.

Were you acquainted with the proceedings of the Deputies in regard to M. de Polignac? He told me of it afterwards.

Did you make the King acquainted with what was passing at Paris? No; but I think the Marshal did.

At what o'clock did you re-join your colleagues on Thursday morning? I cannot say precisely.

What did you resolve on with them? We resolved to proceed immediately to St. Cloud, to require the re-call of the ordinances.

Did you not issue orders to arrest several persons, amongst whom were some of the Deputies? Such orders appear, indeed to have been given, though not by me, and were revoked an hour after.

However, it is not probable that the Marshal would have taken such a measure of his own accord? I do not know who gave him the orders in question.

After the departure of the Deputies, were you not informed that the troops were declaring for the people; and did you not then say that the troops of the line ought to be fired at? I do not remember having said any thing to that purpose.

In the course of the evening did you not assemble your colleagues, in order to deliberate on what was to be done the next day, which was Thursday? No Council met since that moment.

Did you take every measure necessary to prevent the effusion of blood? No measure could be taken for we continued to hope that the disorders would cease.

Was the Court Royal ordered to the Tuilleries in consequence of your directions? Yes.

Do you know if any money was given to the troops? On Monday they received none; but I heard that those who were in Paris received some money on Wednesday.

In virtue of what ordinance was that money distributed? In virtue of an ordinance emanating from the Minister of the Finances.

Where and by whom, were the orders given to dissolve the camp of St. Omar? By the King, during the night between Wednesday and Thursday.

The PRESIDENT to M. de Peyronnet—Were you acquainted with the measures which proceeded your accession to the Ministry? No.

Did you hold any conference with your colleagues relative to the measures which were to be ultimately taken concerning the elections? I attended one conferrence previous to my accession to the Ministry.

Was there not a scheme formed to effect an entire change in the system of elections? I believe that in the proceedings there are most evident proofs of the contrary. The only report to the King on the subject, is one dated the 14th of April, and which announces on the part of the Government the formal intention of maintaining the Charter. This report was made a few days before I became Minister.

What motives determined the King to appear in person to the electors by the Proclamation which proceeded the election? I do not feel it my duty to investigate the intentions of the King. However, it is probable that his motives were the same as those which prompted Louis XVIII. in 1820.

Was the Proclamation issued by the Council? Yes.

Who drew it up? I am bound to name no one.

Why was it signed by the Prince de Polignac and not by yourself? Because it was thought more proper at the moment.

Were not many illegal measures taken to influence the elections? I took no measure of the kind you allude to: on the contrary I always opposed them. I shall avail myself of the present opportunity to beg the Court to allow my defender to read the only circular which I wrote at the moment of the elections.

M. Hennequin, defender of M. de Peyronnet then read

the circular, in which the Minister gave orders to the Prefects to take every measure necessary, in order that the electors might vote freely and in perfect security.

M. de Peyronnet—I shall also beg leave to enter into some details, in order to bring to light the sincerity of my conduct at that period. Of the Presidents of the electoral colleges, three were chosen in this Court, and now attend the present trial; they thought proper to consult me on the speeches they were to make on the opening of the Colleges, and I hope that they will not refuse to do me justice by making known my answer to their demand.

Were no threats made use of against any public functionary who would venture to oppose the intentions of the Government? I can affirm positively that no menace was made use of by me, in my relations with the public functionaries.

Were no circulars addressed to the electors? I have been informed that several Prefects did address circulars to the electors of their departments, but they acted on this occasion without my orders.

Did not many violent disorders take place at Montauban at the moment of the elections, and what measures did you adopt to repress them? On being informed that disorders had arisen at Montauban and at Figeac, I transmitted immediate orders for the punishment of those who had disturbed the public tranquility. I am truly sorry that the orders in question have not been found, and I have already expressed my regret on that point to the Commisson of Chamber of Peers.

As soon as the ordinances were published, did you inform all the authorities placed under your orders, of that publication? I did not think that any rigorous measure would become necessary. The reports which were made to the Ministry, only served to delude it by false and fatal security.

Were you acquainted with the troubles which took place in Paris on the Monday evening? On my way home, I saw a few groups, and heard several persons utter different vociferations.

To whom was the report on the seizure of the printing press addressed? [Here the President sent the report to M. de Peyronnet, that he might read it. The latter, after

examining it, replied.] The documents reply to the question; I shall therefore beg leave to make no answer.

Who issued the orders to disperse the groups? I do not know.

At what period were the measures in regard to the ordinances concerted? The measures were resolved on when the result of the elections was known.

Were there not journals which published articles having this for their object? It is true there were journals which advocated the principles I had professed all my life; but I can affirm, that at this period the only journal which contained any articles of mine, incessantly combatted all *coups d'etat*.

Which of the Ministers opposed the publication of the ordinance? When this question was first put to me by the Commissioners of the Chamber of Deputies, I kept the silence imposed on me by duty, in regard to all that passed in the King's Council. On the other hand, it was necessary to speak in favor of a colleague as unfortunate as myself, and also my friend. The Commissioners saw my reluctance: they triumphed over it. I told the truth. I do not regard it, but I must add, that at this moment, silence is my duty.

As the circumstances under which you acted no longer exist, it appears to me that you should now feel yourself at liberty to speak out? The oath I have taken is absolute, and not conditional. I cannot think that misfortunes have absolved me of it.

You are one of those who opposed the ordinances? I cannot answer that question.

Had you any share in the preparation of the report to the King? Yes.

Who was the author of that report? I cannot answer that question.

Who was the author of the ordinances as to the elections? It was I.

Was not the illegality of these ordinances discussed?—Even if I durst speak of what passed in the Council, I could not answer that question.

Who prepared the ordinances which named M. de Ragusa to the command of the first military division? I have but an imperfect knowledge of that ordinance, which was not in my province.

Do you know if any summons was made to the people? I do not.

Do you know that there was a meeting of Deputies at Paris? I knew it afterwards.

Did you assist at the Council which had for its object the putting Paris in a state of seige? Yes.

Was that resolution definitive or conditional? As far as I can recollect, a note was addressed to the Council, announcing that the troubles had been appeased. It was then useless to recur to such a measure, if next day the troubles had entirely ceased. That is at least what I always understood.

Did you take the necessary measures for making yourself acquainted with what was passing in Paris? I repeat that the ordinance placing Paris in a state of seige united the whole power in a single hand. After that period I had no means of action, and no communication with the authorities intrusted with the execution. In returning from St. Cloud on Tuesday, I went to the Tuilleries, where I expected to find my colleagues. Not finding them, however, in their usual place of meeting, I learned by a man, whom I met at the Tuilleries, that they were assembled at headquarters. I went there and found that the putting Paris in a state of siege was already resolved on. I had then no means of communicating with the Prefect of Police, who had already been driven from his hotel.

At what o'clock did you meet your colleagues? I cannot specify the hour.

What deliberations took place at this council? There was no council, for there was not an instant when the seven Ministers could not assemble.

He then, in his further evidence, denied any knowledge of an order to arrest certain Deputies, and described that he had no part in the measure for placing Paris in a state of siege, and that he did all he could to prevent the measures which were impending; he declined, however, to state the especial points upon which those differences arose.

The President to M. De Chantelauze.

Have you any knowledge of the orders relative to the Ordinances, and from whom they emanated? This is a subject upon which I respectfully state I must hold silence.

Was not your entrance into office dependent on the in-

dispensable condition of M. Peyronnet's entrance? Yes, it was. I avow that all my efforts were directed to the support of the King's measures, and the electoral votes, but I deprived no man of his situation, and I used no threats for that purpose.

Who was the author of the ordinance relative to the press? I cannot answer that question.

Did you not hear of the protestation of the members, and of its insertion in the journals? I had no cognizance of this circumstance until informed of it by the Procureur du Roi.

Did you not take measures against the assemblage of the people? No, it was not my province to do so.

You knew Paris to be in a state of siege? Yes.

Who caused that measure? The order of circumstances.

The business of the day was then closing with M. Guernon de Ranville's examination. The neighborhood of the Luxembourg was perfectly tranquil.

Polignac rallied a good deal while answering his interrogatories. He held in his hand the printed book of the depositions, published by the House of Peers, and the President interrogated him from the original manuscript from which this publication was made.

COURT OF PEERS.

Francois Mauguin, aged 45, *Deputy from the Cote-d' Or, residing No.* 6, *Rue du Gros Chenet.*

At the time of the elections at Paris, which preceded the Ordonnances of July, my intention was to go to a watering place, which the state of my health had long rendered necessary. I had even ordered post-horses to set out on the 19th July, the day of the elections, immediately after having given my vote. At the moment I voted, M. Vassal was in the chair, at the bureau of the college. I acquainted him with my projected journey, and my intention of being back a few days after the opening of the Chambers.—He answered me that I did wrong in going away, because a *coup d'etat* was preparing, and he related to me the plan of it, which was, in effect, that of the Ordonnances, assuring me that he heard it from one of his friends, acquainted with public affairs. This friend had mentioned the 25th or 26th of July, as being that of the publication of the Ordon-

nances. Notwithstanding this advice, I persisted in my resolution to depart. Towards half-past eleven, the horses had been put to, and I was ascending the coach, when two persons on whose information I could rely, came up and requested me not to go, stating that to a certainty the projected *coup d'etat* would be issued. The details they gave me determined me to remain, and I passed the following days till Monday 26th, at my countryhouse, near St. Germain. I was there on the afternoon of that day, when, having been informed by a person who had arrived from Paris, of the Ordonnances published in the morning, and of the agitation they had excited in Paris, I thought proper to return thither immediately. It was nine o'clock when I reached my house, and I had scarcely arrived, when a person of a very royalist opinion called upon me, and advised me to return to the country, telling me that it was in contemplation, even that evening, to arrest a great number of Deputies. It has not been in my power since to ascertain whether this news was true. On Wednesday we were told again that several arrestations were to take place. This measure appeared to us probable, but no indication was given to announce a resolution on this subject. However this might be, having learnt on Tuesday, that a meeting was held at M. Casimir Perier's, I repaired thither at two o'clock. On my arrival, I saw much agitation about the guard-house, which had been established on the previous day, at the Hotel of M. de Polignac. There was a great crowd in the Rue Neuve de Luxembourg. The gate of M. Casimir Perier's house was shut. I knocked, and the porter only opened it on giving my name. When I entered he told me that a numerous group, unarmed, having assembled before the gate and shouted,—"Vive les Deputes," as they were entering, the Gendarmerie had arrived from both sides of the street, and made a double charge upon the group with their sabres, and that in this charge two young men had been killed, and eighteen or twenty wounded. This fact was confirmed to me, on coming out, by several persons who were in the street. Some days after, I received a visit from a young man, who assured me that his brother was killed at that moment. This young man told me he was a law student, but I do not recollect his name. On Wednesday we met again, but at M. Audry de Puyraveau's. After

having spoken of the events and the chances of the battle which was fighting, a proposition was made to go to St. Cloud. But we thought we should not be received, and resolved to apply to the Duke de Raguse. (The remainder of the Hon. Deputy's evidence was confined to a detail of the mission to the Duke de Raguse, similar in all respects to the account given by his colleagues, already [hereafter] described.

M. George-Francois-Pierre, Baron de Glandeves, aged 72, Peer of France.

On the morning of Wednesday, the Marshal informed me that the Ministers, not finding themselves safe in their own houses, were about to go to the Tuileries, and told me to prepare apartments for them. Shortly after they arrived at head-quarters, with the exception of Messrs. Peyronnet and Capelle; the former, it was said, was at St. Cloud. In about an hour or two after the arrival of the Ministers, five of the Deputies came to the Tuileries, and addressing themselves to me, said they wished to speak to the Marshal. I conducted them to him myself, in order to occasion them the least possible inconvenience, and I showed so much the more zeal in doing this, as I felt great satisfaction from the mission on which they were come, their object with which they had made me acquainted in accosting me, being to enter into the measures necessary for effecting a pacification.—After having introduced them to the Marshal, I waited for their departure in an adjoining room, where I experienced a keen feeling of sorrow on learning from Count Lobau, when taking leave, that they had failed in attaining their purpose. I know not from whence the refusal came, but the Count assured me, on being questioned as to his reception, of his perfect satisfaction with the Marshal, as well as with the disposition he had manifested. I owe it to justice not to fail in affirming on the present occasion, that the Duke de Raguse expressed to me in strong terms the despair he felt in consequence of the frightful position in which circumstances had placed him. He sought every means of bringing about a pacification, *to obtain which he would have sacrificed his existence;* such were his own words. Among other means, he had called together the Prefect of the Seine, and the Mayors and their substitutes in full costume, hoping that through them he might be enabled to put an end to the

firing. Unfortunately it was impossible to dispatch the letters for this purpose on Wednesday evening; it was only at a very early hour on Thursday morning, that persons could be found bold enough, and for a considerable recompense, to expose themselves to the danger of passing the barricades. Some of the letters were brought back, others reached their destination, for three or four of the Mayors or their substitutes came in full costume to head quarters, notwithstanding the dangers of the moment. Events now pressed onwards so rapidly, that the best measures became useless. But however extreme the difficulty of approaching head-quarters, Messrs. de Semonville and d'Argout, braving every danger, succeeded in arriving. I spoke for a few moments with them. After quitting them, I heard M. de Semonville talking loudly to M. de Polignac, and demanding that he should immediately summon the Chambers to assemble. The Ministers having withdrawn into their Cabinet, M. de Semonville continued to converse with the Marshal, till the moment when I caused him to be informed that the carriage which I had ordered for him from the King's stables was ready. Nearly at the same instant M. de Peyronnet came to ask me for the means of going speedily to St. Cloud. I know not if this determination proceeded from the demand of M. de Semonville and the Marshal, who entered the cabinet occupied by the Ministers after having spoken to the former. They set off shortly after for St. Cloud, and I have no knowledge of what else took place with regard to them.

M. Louis de Komierouski, aged 44, *ex-Aide-de-Camp to the Duke de Raguse.*

On Monday, the 26th July, I was on service with the Marshal at St. Cloud. Whilst at breakfast, a Lieutenant of the Guards having informed me of the publication of the Ordonnances in the *Moniteur*, I instantly went to communicate it to the Marshal, whose first word in reply to me was, that it was not possible. He appeared to me to be entirely occupied with the news when I again saw him after breakfast. About half-past 11 o'clock, the Marshal set off for Paris, and I did not again see him till the evening, when I went for orders, which were issued rather late, the King having been at Rambouillet. On Tuesday morning, the Marshal had ordered his carriage for the purpose of going

to the country, when I observed to him that there had been some disturbances at Paris the previous evening, and that it would be necessary at least to make known to me where he was to be found, if any thing should happen. This remark determined the Marshal to remain at St. Cloud, and shortly after he received orders to wait on the King after mass.—On leaving his Majesty, about half-past 11, he ordered his carriage, and we instantly set out for Paris. We alighted at the residence of Prince de Polignac, where the Marshal remained a short time; after which we went to the *Etat-Major*, and the Marshal occupied himself in giving orders. M. de Lavillate, who soon after arrived, announced that a mob of 800 persons were directing their steps towards Bagatelle, to carry off the Duke of Bordeaux; upon which, the Marshal directed me to go immediately to the Ecole Militaire, in order to obtain 150 lancers, and to proceed to Bagatelle with directions, if we came in contact with the people, to act only with the flat of the sabre and the shaft of the lance. When I arrived at Bagatelle, I found no one there: the Duke of Bourdeaux had gone to St. Cloud, whither I proceeded, and from thence returned to Paris. I was sent on Wednesday to the Prefect of Police, to engage him, on the part of the Marshal, to issue proclamations to the people, and he assured me that it would be done immediately. In the course of the morning I accompanied the Marshal to M. de Polignac's, at whose house were several Ministers; and it was in returning from thence that the Marshal intimated to me that the city was declared in a state of siege. The ministers were not long in arriving at the Tuileries, where I again saw them at the *Etat-Major*, and they were frequently in the same room with the Marshal. I know that the orders given by the Marshal to the commander of the troops were, not to fire upon the people, until they themselves should have received fifty shots.—About four o'clock on Wednesday, I was sent by the Marshal to St. Cloud, with despatches for the King, and was ordered to make the greatest haste, which I did. The Marshal had moreover recommended me to inform his Majesty myself of what I had seen at Paris. When introduced to the Cabinet of the King, I put into his hands the Marshal's dispatch, and gave him a verbal account of the state of affairs, telling him that a prompt determination was

essential. I also informed him that it was not the population alone of Paris, but the entire population of the country that had risen, and that I had myself been rendered capable of offering an opinion, seeing that in traversing the village of Passy, I had been fired at, not by the common people, but by those of a more elevated class. The King said that he would read the dispatch, and I withdrew to await his orders; but, as some time elapsed without their being communicated to me, I begged the Duke de Duras to go in to his Majesty. He, however, replied, that agreeably to etiquette, *it was impossible for him to do so until after the expiration of twenty minutes!* I was at length called in to the cabinet, when his Majesty charged me only to tell the Marshal TO BE FIRM, AND TO ASSEMBLE HIS FORCES ON THE PLACE DU CARROUSEL, AND THE PLACE LOUIS XV. AND TO ACT WITH MASSES. HE EVEN REPEATED TWICE THE LAST WORD. The Duchess of Berry and the Dauphin were in the cabinet at the time, but they said nothing. I returned, bringing this reply to the Marshal, but I did not see M. de Polignac, and I am ignorant of his sending any dispatch to the King. What I am certain of is, that he gave me none. I have no knowledge of any order being given on the Wednesday or Thursday to arrest several persons; but I was employed by the Marshal, early on the Thursday morning, to go and say to M. de Foucauld that the order for the arrests was annulled. I acquitted myself of that commission, but without knowing by whom the order had been given, or who the persons were it concerned.

Gilbert Joseph Gaspard, Comte de Chabrol Volvic, aged 57, late Prefect of the Seine.

This witness details minutely the steps which he took during Monday, Tuesday, and Wednesday. He states that he knew nothing of the Ordonnances until Monday morning; having received his summons as Deputy only the night before. On each of these three days witness saw the Minister of the Interior, but received no orders from him—it did not appear to witness that M. de Peyronnet had the direction of affairs—on Wednesday morning he expressed astonishment at not having seen the Prefect of Police, or received any report from him. Witness asked for a guard to secure the Hotel de Ville from surprise. M. de Peyronnet took a note of it. Witness then describes the taking of

the Hotel de Ville; the first attack was about eleven, when some National Guards in uniform occupied the post from which the Guard of the Hotel had been driven by the people, they were, themselves, however, obliged to give way to the crowd, who forced the doors, planted the tricoored flag, and sounded the tocsin. Witness then retired from the building to one of the dependences. The troops arrived on hearing the tocsin, and the fighting continued from 12 o'clock until ten at night. About eleven the troops evacuated the Hotel de Ville of which they had regained possession, and left the people absolute masters of it. On the same night witness received the Ordonnance declaring Paris in a state of siege, and finding on Thursday morning that a Provisional Government was being established, and that the measures he had taken for the security of the treasury chests *(caisses)* of the city were sufficient, finally retired.

M. Joseph Rocher, aged 35, Conseiller a la Cour de Cassation.

This witness, who was Secretary in Chief of the Department of Justice at the time of M. de Labourdonnaye's retirement, states that he was sent for by M. de Polignac to give his opinion respecting M. Guernon de Ranville. He told the Prince that M. Guernon was a man of great abilities and of perfectly constitutional opinions. M. de Polignac then desired witness to inform M. Guernon de Ranville that the King had fixed on him as Minister of Public Instruction, which he did, and received the following answer, which he produces:—

"Lyons, Nov. 14, 1829.

"I have read, three times, my dear friend, your letter of the 11th, and if you were not so urgent, I should like to wait 3 hours to tranquillise the agitation into which the unexpected proposition of which you speak, has thrown me; but you require an immediate answer, and I must give it. My acceptance cannot be doubtful. Devoted to the Sovereign, to whom I have consecrated all my existence, I shall not shrink from any service which he may impose on me; I would sacrifice my life for him. I cannot refuse to compromise my reputation for him, and that is precisely the situation *(hypothese)* in which I should find myself if I were called into the Administration."

"I have already told you, and I repeat from the very bottom of my heart, (and it is no ridiculous affectation of modesty that I believe myself a tolerably good *Procureur-General*, but do not find in my knowledge of men and things, I do not find in my mental powers, the extent of capacity necessary to constitute a good Minister; In fact, I have not that knowledge of the world, that ease of manner which is so necessary in certain situations, the closet is more calculated for me than the drawing-room, and I feel that I should be not a little out of place at Court. Brought up in the lap of the Revolution, my education, like that of many men of my age, has been neglected, and nothing can supply the deficiency."

"In a word, the conviction of my incompetence, alarms me so much, that I cannot familiarise myself with the idea of the enormous burthen of a portfolio. Thence, my dear friend, I am led to conclude, that, if I were called to the high mission of which you speak, I should soon lose the reputation for talent, which some forensic successes have obtained for me."

"Impart these confessions, entreat that they be well weighed, and if possible, turn away the cup of bitterness from me. Whatever may be the decision, you may answer for my devotion. The doctrines of the present ministry are mine, no *re-action* or *violence*, but no more *concessions;* in two words, '*justice* and *firmness*' is my motto, and the Charter my political gospel.

"The reproach of being hostile to religion and the Clergy is amusing enough, at the very moment when the journals of the faction are accusing me of being a *Jesuit* and a *congregationist;* you will own that this is being unfortunate *(jouer de malheur);* you have truly said, I have not the happiness of being a devotee; I shall become so no doubt, and that is one of my hopes, for the times when illusions will disappear, but I am firm to the religion of my ancestors; and I even consider it certain that it is impossible to be a good Royalist without believing in God, and I think no one will dispute my being a Royalist.

"All that is absurd and only deserving of contempt.—Farewell, my dear friend, I need not tell you how much I esteem you.

"GUERNON RANVILLE."

The witness, in explanation of that part of the letter in which M. Guernon says the doctrines of the Ministry are his, remarks, that, judging from all he has known of him, both before and after he was Minister, he has no doubt that it must be understood as meaning that he coincided in the opinions of the moderate party in the Ministry, the preponderance of which appeared secured by the retreat of M. de Labourdonnaye, and that he always heard him express himself decidedly hostile to any extra-legal measure, and can only account for his adhesion to the Ordonnances by a mistaken sentiment of honor which forbade him shrinking from the danger he had himself signalized, and though the measures to which he acceded were contrary to his opinion.

Jacques de Puybusque, aged 34, *Captain on the Staff.*

This witness details what he knows of the operations of Monday and Tuesday. The only order given on Monday by M. de Polignac was to occupy the Place Vendome with 500 men, which was given so late that it was but imperfectly executed. About 4 o'clock on Tuesday, witness was sent to the barracks, Rue de la Pepiniere, to desire the 1st regiment to march to the Boulevard, adjoining the Hotel of M. de Polignac; he saw no commotion on his way thither. On arriving at head-quarters, about a quarter before seven, witness heard of the combat having commenced in the Rue du Coq, and was informed by M. de Varaigne, Lieutenant-Colonel, that the people had endeavored to take his cabriolet to assist in making a barricade at the corner of the Rue de l'Echeile. Witness was directed by the Marshal to take 30 men, and destroy this barricade. In the way, he met a detachment of lancers, who had been turned back by the barricadors. Finding that they had not charged their pieces, he made them do so, and proceeded to clear a way for them by destroying the barricade. They were immediately attacked with bricks and stones, particularly from a house in the Rue des Pyramides, whence several shots were also fired upon the troops. The grenadiers, without waiting for orders, returned the fire, and killed three individuals in the house. Witness then forced an entrance, and found that the house had been regularly stored with bricks and stones for the purpose of annoying the troops. While witness was thus employed, he was assailed by several individuals, some of whom he was obliged to take

into custody. One man, who was pointed out to witness as having been particularly active in procuring bricks, complained of witness forcing his way into the house, on which witness replied, that he had a right to do so, the town being in a state of siege, a circumstance which had been communicated to witness at head-quarters by Colonel d'Audre, in answer to an observation made by him of their having been a proclamation made to the people. Witness states that he is not personally aware of the people having been summoned to disperse by the civil authorities, though he has been told by an eye-witness that they were so summoned, at the corner of the Rue de Coq; but he says that his troops only used their arms because they were attacked. He then gives an account of his having been sent to the Bastille to learn what was going on there, and of his having been fired on, both in going and returning from a coffee-house on the Quay, and another at the corner of the Place de Greve.—At the Bastille he was informed by the Colonel of Curassiers that some arms and two tri-colored flags had been captured from two bodies of insurgents, who had directed their course towards the Place de la Bastille.

Joseph Long-Duplan, aged 40, Lieutenant of the 3d Regiment of Infantry of the Guards.

At night fall on Tuesday, the 27th, witness was ordered to patrol near the Palais Royal, with a party of twenty-one men; his directions were to act with prudence, but if necessary, to repel force by force. Witness met with numerous groups of people, who complied with the directions given them by witness to retire, and no force was used. In returning by the Rue de Rohan, a number of large stones were thrown from the houses, and a grenadier wounded in the ear. Witness then, in order to frighten those who were throwing stones, ordered the detachment to fire, but to level their pieces above the windows. All the next day, witness was in the neighborhood of the Hotel de Ville.

M. Camille Gaillard, aged 35, Juge d'Instruction du Tribunal de Premiere Instance de la Seine.

This witness, in answer to questions put to him, states, that he had not been placed in contact with the ex-Ministers, except on one occasion, when he went to produce to M. Montbel the letters attributed to M. M. Colomb and d'Efflat, which were the subject of some legal proceedings,

and that he knew nothing of the intentions of Ministers relative to the late events. He particularly denies the truth of the report of his having signed any orders to arrest any individuals whatever, or that any application was made to him to do so. Had such an application been made to him, he was too well aware of the laws and Charter to have complied with it. He does not believe that any such application was made to any Juge d'Instruction, because each has his particular department, and it was to him alone, that the Procureur du Roi, Billot, had been in the habit of applying in proceedings regarding political offences, and those relating to the press. He refers the Committee to the military officers to know whether they might not have been applied to for the purpose, after Paris was declared in a state of siege.

M. Jean-Francois-Cyr Bellot, aged 41, *formerly Procureur du Roi at the same Tribunal.*

This witness, in answer to the questions put to him, states that his only connection with the ex-Ministers was such as necessarily resulted from his situation, and that he knew nothing of the Ordinances, except from the *Moniteur*. He confirms the statements of the Ministers, that there was no intention of re-establishing the *Cours Prevotales*, and attributes the reports to that effect, which appeared in the Journals, after the events of July, to the same source and motive as those which stated Messrs. Seguin and De Belleyme (two of the Presidents of the Tribunals) to have been arrested and confined at Vincennes. He then states that he was not called upon to take any part in the execution of the Ordonnances, but that he should not have refused to do any thing within the ordinary compass of his functions. He says that though he saw M. de Peyronnet on Monday, and M. Chantelauze on Monday and Tuesday, it was in the ordinary course of his office, and nothing passed respecting the Ordonnances, except a question of form as to the mode of their application in Corsica. That on Wednesday, he endeavoured to see M. de Chantelauze, to tell him of all the magistrates having retired, and that the whole course of justice was interrupted, and to take his instructions on the subject, but being unable to do so, could only confer with his private Secretary.

Q. Have you any knowledge of judicial mandates being

directed against a certain number of persons presumed to be hostile to the Ordonnances? A. I might content myself with replying, that I am not bound to give any information respecting any thing I may have done or become acquainted with in the exercise of my functions. But, as under existing circumstances, a refusal to answer might be falsely interpreted in a manner unfavourable to the Ministers, whose accusation is called for, I will answer your question. I learnt from the Journals that, as is always the case when a government is violently overthrown, there were individuals who actuated either by the wish of rendering that government odious, or of arrogating a species of merit from having been the objects of a threatend proscription, have expressed themselves in a manner, which probably gave rise to the question addressed to it. I declare, on my honor, and on the oath which I have taken, that no proceedings were ordered against either Peers, Deputies, or any other person bearing a public character, with reference to the occurrences of July, or for political causes. No judicial mandate could be decreed in Paris, except on my application, or at any rate could only be entrusted for execution to the officers of police, by me, or by my orders. If I had made any such applications, or given any such orders, I should have done so because I thought it my duty, and those who know my principles and character, are well aware that I am not a man to deny it, far from it, I would take all the responsibility on myself.

Q. Were any such mandates issued for political causes against any individuals not invested with a public character? A. No such mandates were either at that or any other period of my being in office issued, except for ordinary offences, and in political cases exclusively for offences relating to the press. Q. Do you know whether any such mandates were issued at this period against the writers in the Journals? A. Determined to reply only by the consideration mentioned in the beginning of my last answer. I will admit that mandates were in fact issued against the Journalists, but it was for causes entirely independent of the general events, and solely on account of the articles which appeared in the Journals of the day, and precisely in the same instances as would have been the case at an ordinary time. Q. How many mandates were issued? A. I think between

fifty and sixty. Q. Were they delivered on your requisition? A. Yes, on my collective requisition. Q. What Juge d'Instruction issued them? A. A motive of delicacy, which will easily be appreciated, forbids me to reply. Q. Can you tell us the names of the persons against whom these mandates were issued? A. I can only tell you that they were responsible proprietors (*Gerans*) of the Journals, or individuals who had signed articles.—Q. What became of these mandates? A. They had been sent as usual to the Prefecture of Police to be executed, and were returned to me when, in consequence of the general events, it was found that they were useless and could not be carried into effect.

Q. Were not these mandates destroyed because they were not directed solely against the Journalists? A. To avoid the distressing interpretation to which I alluded in the commencement of my deposition, and faithful always to strict truth, I will state that, finding the affair could not have any result, I agreed with M. le Juge d'Instruction to return him the mandates on receiving the requisition which I had given. I will add, in order to remove all pretence for the interpretation implied by the question (although my word of honor ought to be sufficient) that the number of mandates, which I now recollect positively to have been 45, correspond exactly with that of the names signed to an article in the *National*, on which I founded my proceedings, adding to them that of the Printer. Q. Did you not receive instructions from one of the Ministers relative to these proceedings? A. I recollect having spoken with M. le Garde des Sceaux on the subject of the article in the *National*, which I have mentioned; but, before that, my opinion that there were grounds for proceeding was formed, and my resolution consequently was taken. Q. Did you not refer to M. de Polignac on the subject, and receive some instructions from him? A. That question is substantially replied to in one of my preceding answers. Those who knew the independence of character with which I have always performed my functions, are aware that I would never have received and followed instructions which did not emanate from the Minister in whose Department I held my situation, and which were in conformity with my personal opinions. Having made a deposition in confor-

mity with the oath which you have exacted from me, it is my duty to declare that, as I cannot recognise the powers which the Chamber of Deputies has arrogated to itself, I have only appeared before you in submission to the threat of compulsion *(contrainte)* held out by the summons which I received.

M. Victor Donatien Musset, aged 58, *Head of the Office of Military Justice in the War Department.*

This witness deposes to the fact of having been applied to about 10 or 11 o'clock on the morning of Wednesday, 28th July, by M. Champagny, Under Secretary at War, for information respecting the mode of establishing Courts Martial in a city declared in a state of siege, and also respecting the actual composition of the Courts Martial permanently established at Paris.—Witness was obliged to send for some documents to refer to on the subject, and in the mean time several names were selected from the Army List as proper to form part of the Court Martial, if established. Before the documents in question arrived, M. de Champagny was sent for to the Tuilleries, and they separated, witness having been cautioned by him not to mention any thing concerning the city being in a state of siege. The establishment of *Cours Prevotales* was not alluded to in this interview.

M. Jean Baptiste Greppo, aged 34, *a Clerk in the Savings' Bank.*

This witness states that about two o'clock on Tuesday, the 27th, he was in the balcony of M. Letourneur, at the corner of the Rue de Rohan, in the Rue St. Honore, and saw the troops behave with great brutality to the citizens, and particularly an officer of the Gendarmerie, who killed with his sabre a helpless old man who had been thrown down and trampled under foot by the horses. This excited general indignation; and a few minutes afterwards, firing commenced on both sides of the Rue St. Honnore, but witness was too far to observe whether any warnings to disperse *(sommations)* were previously given.

M. Joseph Joly, aged 37, *Wine Merchant.*

This witness deposed to the manner in which hostilities commenced on the 27th. He states that the Gendarmerie charged on the people, and maltreated all the prisoners, whom they took to the Corps de Garde; that one man, in

particular, was thrown down in the guard house by a Gendarme, who killed him by treading on him with the heels of his boots, and striking him with the butt end of his musket. The 3d Regiment of the Garde Royale fired on the people without provocation. Witness saw a Field Officer of the Gendarmerie under his window directing a young officer of a regiment of the line to fire on the people; the latter replied, that he had no orders; on which the former showed him a written paper. The officer made a negative gesture, and dropt the point of his sword. Witness saw the officers distributing money to the troops, and the Commissary of Police, Mazug, perpetually passing in front of the detachments, and appearing to give directions to the troops.

M. Jacques Martin Lizoire, aged 48, *Artiste Cirier.*

The deposition of this witness was in conformity with a printed paper, signed by him, and entitled "Petition to the Deputies," which is annexed to the proceedings. It relates to an application made to him to supply inflammable projectiles to be used against Paris during the Three Days. The witness also stated that he was ignorant of the names of any of the persons referred to in his petition, except the Dauphin. (1.)

M. François Sauvos, Editor of the Moniteur.

At five o'clock in the evening of the 25th July, I received instructions to go to the house of the keeper of the Seals at eleven o'clock precisely. From him I received orders to insert in the *Moniteur* of the 26th the Report to the King on the Press, and the Ordonnances dated the 25th. M. de Montbel, who happened to be with the Keeper of the Seals when I received the documents, remarked that I was greatly moved, after having glanced over the Ordonnances and perceived their tendency. I replied that it would have been very extraordinary had my emotion not been great. On which M. de Montbel exclaimed, "Well!" and I rejoined, "Sir, I have only one word to say: God save the King! God protect France!" Messrs. de Montbel and Chantelauze both replied at the same instant: "We sincerely hope so." On my preparing to withdraw, these gen-

(1.) This witness was examined by the Committee of the Chamber of Deputies, but not by that of the Chamber of Peers.

tlemen appeared desirous that I should explain my meaning more fully, and I addressed them in the following words: "Gentlemen, I am now 57 years old, I witnessed the scenes of the Revolution, and I retire from your presence inspired with a profound terror of new disorders."

M. Auguste Gaspard Baudesson de Richebourg, aged 47, Commissary of the Bourse.

Some days before the publication of the Ordonnances, the report of an immediate *coup d'etat* was spread at the Bourse; but the opinion was far from general, and the distribution of the *lettres-closes*, both to Peers and Deputies, had the effect of leading many persons to a different conclusion. What principally supported the rumour of a *coup d'etat* was the great number of operations effected by M. Ouvrard to produce a fall in the stocks within two or three months. I had occasion to speak to M. de Montbel of these operations, and of the opinion entertained, that they were the result of communications made to M. Ouvrard by M. de Polignac, relative to the anticipated *coup d'etat*. He replied that it was absolutely false, and that M. de Polignac had not seen M. Ouvrard for more than two months. I ought to remark that previous to the appearance of the Ordonnances, it was said at the Bourse that the operations of those persons who possessed the intimacy of M. de Peyronnet tended to a rise, whilst those supposed to be in relation with M. d'Haussez were strugling for a fall. In the frequent conferences to which my functions led me with M. de Montbel, I once intimated to him, as a means of maintaining the *Cours en Liquidation*, the necessity of inducing the Syndicate of Receivers-General and M. Rothchild, to operate simultaneously; when he answered me by saying, that this would be to substitue error for truth, and was altogether unsuitable for an honorable Government. I afterwards related this conversation to M. de Polignac, who replied—"We are fully aware that M. de Montbel is a conscientious man, and it is for that reason we are desirous of keeping him with us." Permit me to add, that in all the relations I have had with M. de Polignac, he always appeared to me wholly unacquainted with the speculations at the Bourse.—In the evening of the 26th July, having rendered an account to M. de Polignac, of the fall that had taken place, he said he was certain that the funds would rise, and that,

had he any disposable capital, he would not hesitate to employ it in the purchase of *rentes*.

M. Albert Louis Felix Eugene de Mauroy, aged 40, *Retired Officer of Engineers.*

This witness also deposes to the mode of the commencement of hostilities. He mentions a Serjeant of the 3d regiment of the Garde Royale, remarkable for his red hair and whiskers as being the first man who, without any provocation, fired on the people. His example was immediately followed by his troop, and several individuals, amongst whom was a woman, were killed. Witness then put himself at the head of about forty journeymen printers, and armed with stones, stood the charge of a troop of Lancers, one of whom fired a pistol at witness. At the same moment, two companies of the 5th regiment of the line, entered the Place du Palais Royal, witness addressed several of the officers, entreating them not to fire on the people; many replied that they would not, and in fact no hostile measures were, as far as witness saw, taken by these two companies. Witness saw no Commissary of Police, or Peace Officer, and did not see or hear any legal or other proclamation *(sommation)* made to the people.

Pierre-Antoine Plougoulin, aged 34, *avocat.*

This witness was examined on the same points, but stated that he had no personal knowledge of the facts, having only received his information from individuals to whom he had applied, in consequence of being employed to write an historical account of the events.

Jacques Nicolas Leroux, aged 59, *formerly Inspector of the Public Works.*

This witness details the scenes at which he was present, about seven o'clock on Tuesday evening, on the Boulevard de la Madeline, and between that point and the rue Neuve des Petits Champs. The only important circumstance mentioned by him, is that none of the charges made by the gendarmerie in his presence were preceded by any summons to the people to disperse. Witness on the next day commanded jointly with M. Marchal, the attack on the Barracks of the Cuirassiers.

M. Jean Batiste Marchal, aged 59, *formerly a Cavalry Officer.*

This witness describes the manner in which the people

were driven out of the Palais Royal, at the point of the bayonet, on Tuesday, at half past one. A similar course was pursued in the rue St. Honore, from 2 till 4; but up to that time witness heard no shot fired. He confirms the testimony of the preceding witness, as to the occurrences of Wednesday, and as to the people not being summoned to disperse. Witness left his house on Wednesday morning, unarmed, and on his private affairs, and was only induced to head the insurgents by finding himself in the midst of unarmed and inoffensive groups who were fired on without provocation.

Theodore de Mazug, aged 47; formerly Commissary of Police for the quarter of the Tuileries.

This witness deposes that he was ordered by the Prefect of Police to go to the coach offices on Monday to seize any Journals which might be sent in defiance of the Ordonnances, and that on Tuesday he was sent to the Hotel of the Prince de Polignac, where he remained from one or two o'clock, until eight in the evening, only going occasionally to head-quarters (Place Vendome.) That on Wednesday the Duke de Raguse applied to him to get a proclamation printed, which he endeavoured to do, but without success; this was printed during the night at Sevres, and distributed by means of prisoners taken the night before, who were released on that condition. Witness received no other orders, and particularly received no instructions to summon the people to disperse before force was employed.

Pascal France Durios, aged 35, formerly Commissary of Police.

The only important part of the deposition of this witness is his statement that, though no specific orders were given him to summon the people to disperse, he considers it part of the general duty of a Commissary of Police to do so without orders, and that he should have done so if he had found himself where it was necessary. The declaration of Paris being in a state of siege was not notified to him.

Jacques Antoine Deroste, aged 43, formerly Commissary of Police.

This witness was employed to seize the presses of *Le Temps* newspaper, and was afterwards at the Corps de Garde of the Bourse when it was taken by the people. On Wednesday morning he was officially called on to take cog-

nizance of two dead bodies, one of which was that of an individual shot by the Garde Royale at a moment when no one was in the street, and the other that of a person killed in the Rue de Richelieu, without having taken any part in the disorders. In other respects his deposition confirms those of the preceding witnesses.

Charles Lange, aged 37, formerly Commissary of Police.

This witness gives some details on the commencement of hostilities in the Quarter of the Hotel de Ville, but they do not establish any fact of importance to the case.

Pierre Alard, aged 39, formerly Commissary of Police.

This witness gives similar details relative to the Quarter of the Chatelet and the Prefecture de Police.

Pierre Modeste Courteille, aged 43, formerly Commissary of Police.

This witness details the attack made on the Hotel of Prince de Polignac on Monday night, in which the populace broke the windows, and retired saying, that they would go to the Faubourg St. Antoine, for re-inforcement, and return to burn the Hotel. Witness informed the Prefect of Police of this, but received no particular instructions.

Victor Boniface, aged 36, formerly Commissary of Police.

This witness received, on Tuesday morning, a written order from the Prefect of Police to clear the Palais Royal Gardens, which he did. About three o'clock, he found the Gensdarmerie charging the people in the Place du Palais Royal, with drawn swords; and witness was applied to by M. Reisch, the commander, to give orders to disperse the people, saying that his troops had been attacked with stones, and that a shot had already been fired from a window (witness did not hear this shot.) Witness replied, that as he had not been applied to before the people were cut down with sabres, it was now too late for him to summon them to disperse, or to take any other step. Witness, however, stationed himself, with a detachment of the line, near the house from which the shot was said to have been fired; nothing of the sort occurred while witness was there, and the troops of the line were perfectly well received by the people. Witness then went to the Prefect of Police for instructions, but was told by him that he must act as he thought best; he even intimated that he had no longer any orders to give, and spoke of Paris being declared in a state

of *siege*, but witness is not certain whether he mentioned that as a measure already taken, or about to be taken. On leaving the Prefecture, witness heard the discharge of musketry for the first time, and was told that it had been ordered by the officer commanding the guard of honor at the Palais Royal. That evening, several officers on duty near the Palais Royal, said that they did not want commissioners of police, as the state of siege enabled them to act without. The witness then produced to the committee a certificate, signed by four individuals, present when the circumstances alluded to took place, who state, in confirmation of his deposition, that though M. Reisch seized him by the collar, and commanded him to order the troops to fire, he positively refused to do so, and that the firing, which was thus retarded more than an hour, would have been prevented entirely if a Captain of the Garde Royale, commanding the guard posted inside the Palace, had not declared that Paris being in a state of siege, they had nothing to do with the civil authority, and taken on himself to summon the people to disperse, and direct a platoon fire.

Godefroy Eleonore Delaporte, aged 50, *Linen Draper.*

The son of this witness was killed by the Garde Royale, at the window of his own house, in the Rue St. Honore, about half past six on Tuesday. No shot had been fired or stone thrown from the house. The deposition is not otherwise important.

Jean Baptiste Pelloy, aged 38, *Jeweller.*

This deposition is merely confirmatory of the manner in which the attack was commenced on Tuesday by the Garde Royale.

Antoine Laurent Arnous, aged 65, *Second Chief of the Office of military Justice in the War Department.*

This witness went with M. Musset to M. de Champagny, and confirms his deposition, adding, that having produced the law of 11. Frimaire, An. VI. as applicable to the subject, it was read by an individual present. (Who this individual was is not stated.)

Jean Pierre Henri Feret, aged 53, *Bookseller.*

This deposition merely contains minute details of the circumstances preceding the first shot fired by the Garde Royale. They are in accordance with those already given, particularly as to the fact of the people being without arms.

Nicholas Delangle, aged 33, *Alexandre Mesnier, aged* 22, *Booksellers.*

These depositions merely relate to the occurrences in the Place de la Bourse, on Tuesday night, but they contain no new facts.

Francois Victorien Letourneur, aged 37, *Linen-draper and Silk Mercer.*

This witness describes the occurrences in the Place du Palais Royal, on Tuesday afternoon. He charges all the acts of aggression on the Gendarmes, and states that an officer of the Garde Royale, three times begged the people to disperse, and retired in tears, at being obliged to fire on them. He adds, that the people did not appear irritated against the Gendarmerie after the first charge, that they even assisted one who had fallen to remount his horse, and that it was not until after the second charge that any stones were thrown.

Jean Marie Antoine Defrance, aged 59, *Lieut. General.*

This witness merely says that he knows nothing of the circumstances.

Alexander Marie Petit, aged 48, *late Mayor of the 2d Arrondissement.*

This deposition contains a minute account of what the witness saw and did during the three days. The only circumstances which bear at all on the merits of the case, are that on Wednesday the witness applied to the Prince de Polignac for information and instructions as to the re-establishment of the National Guard, and was immediately referred by him to the Duke de Raguse. That on Thursday he received a circular from the Duke de Raguse, requesting him and all the mayors to go to him in their official costume; witness did so, but only one other mayor (M. Hutteau) attended. They saw the Prince de Polignac, who said he was going to take the King's orders, and begged witness and M. Hutteau to wait the result. The marshal then informed them that he could not authorise them to announce the re-organization of the National Guard: but that he had applied for the repeal of the Ordonnances, and was in hopes it would be granted, of which they might inform the people. Witness and M Hutteau accordingly proceeded to the Rue Rivoli and Place Vendome, and succeeded in calming the agitation of the people assembled

there; in returning to the Tuileries they found the combat continuing in the direction of the Rue de Richelieu, and were informed by the Marshal that he had suspended the fire, but the people were continuing it. While witness was endeavoring to put an end to the contest in the neighbourhood of the Rue de Richelieu, the Louvre was taken, and the Marshal obliged to retreat. During the time witness was so employed, he saw several soldiers of the guard distributing, as extensively as possible, to the people, proclamations signed by the Duke de Raguse, of which the following is a copy:—

"PROCLAMATION.

"Marshal Duke de Raguse, Governor of Paris, Major-General of the Royal Guard, Commandant of the city of Paris, now in a state of siege.

"*Parisians!*—The events of yesterday occasioned the shedding of many tears—there has been but too much blood spilt. For the sake of humanity, I consent to suspend hostilities in the hope that all good citizens will retire to their houses and resume their affairs. I earnestly conjure them to do so.

"THE MARSHAL DUKE DE RAGUSE.

"Head-Quarters, Paris, 29th July, 1830."

Nicholas Puinier Quatremere, aged 42, *late Commissary of Police.*

This witness deposes to no fact of importance, except that he called the attention of General Comte de Wall to the necessity of summoning the people to disperse, by asking him whether, in the event of his having to do so, he had not better be on horseback to be more conspicuous?—The General replied that he would speak to the Marshal on the subject. Witness, however, did not receive any orders, nor was he present at any of the engagements.

Jean Bouin, aged 69, *Porter at the Hotel of the Minister of Public Instruction.*

Deposes that he knows nothing of any papers being deposited with him, or elsewhere, by M. Guernon de Ranville, or any of his family or suite.

Francois Joseph Bosche, aged 36, *Clerk to a Solicitor.*

The deposition of this witness proves that an individual who was heard about eleven o'clock on the morning of the 27th, crying "Vive l'Empereur," was driven out of the

Palais Royal, and witness, under the idea that his life might be in danger, insisted on his being received into the Corps de Garde at the Bank. This individual acknowledged that he was an Agent of the Police.

Jean Georges Perusset, aged 36, *Merchant.*

This witness details the circumstances of the commencement of hostilities in the Place du Palais Royal, on Tuesday. The only new fact mentioned by him is, that the Gendarmes charged with sheathed swords, until an officer of the staff came up and spoke to the captain and the commander of the post, and that immediately after his departure they charged with drawn swords.

Georges Mouton, Comte de Lobau, aged 60, *Deputy of La Meurthe.*

This witness merely confirms the evidence of M. Lafitte, concerning the deputation to the Duke de Raguse on Wednesday; and adds, that the overtures made to the Provisional Government at the Hotel de Ville the next day, led to no result, on account of the individual charged with them having no written authority.

Jacques Jean Marie Francois de Tromelin, aged 57 *Lieutenant General.*

This witness being at St. Cloud on Thursday, was told by the Duke of Mortemari, then nominated President of the Council, that he wished the Tribunals to be assembled the next day, and the National Guards to be re-organised as rapidly as possible, which instructions he repeated to witness the next day. Witness saw the Prince de Polignac on Wednesday morning at the Tuileries, and thought that he appeared not at all aware of the serious nature of the events in progress, but looked on them merely as analogous to the disturbances in the Rue St. Denis, in 1827. The witness adds that, in all his conversations with the Duke de Raguse, the latter expressed his deep affliction at what had occured, and at the situation in which he found himself placed.

Jean Louis Joseph Briere, aged 34, *Bookseller.*

The deposition of this witness refers to the commencent of the firing in the Rue St. Honore, which he fixes at two o'clock on Tuesday, the 27th.

Jean Baptiste Joseph Duboise, aged 34, *Sous-Intendant Militaire Adjoint.*

This witness proves that M. de Champagny, to whose

service he was attached, knew nothing of the Ordonnances until the appearance of the *Moniteur*, on Monday, at which time he was ill at Fleury. Witness also states that, up to Wednesday morning, he heard of no preparations for the organization of Courts Martial; and that on Thursday morning, witness accompanied M. de Champagny to the Tuileries, where they had been advised to take up their abode.

Robert-Maric, Lecrosnier, aged 40, *Chef de Division at the Prefecture of Police.*

This witness only deposes to having been in the closet of the Prefect on Tuesday morning, when it was debated whether all the presses belonging to the printing offices in which the journals had been printed, should be seized, or only those which had been actually used in printing them. Witness supported the latter opinion, which was adopted. The same evening witness received from the Prefect, in the presence of the procureur du Roi, 45 mandates of arrest, issued against those who had signed the protest of the journalists. Witness, on going down stairs told the Procureur it would be impossible to execute them, and they remained in witnesses portfolio for a few days, when he returned them to the procureur at his request.

Francois Anthoine, Baron de St. Joseph, aged 43, *Colonel and ex-Sous-Aide-Majeur of the Garde Royale.*

Witness states that no orders relative to the execution of the Ordonnances were given to the guard on the 25th, or the morning of the 26th July. From that period, not being on duty, he had no personal knowledge of what orders were given. Witness explains the orders given on the 20th to the guards for their guidance, in case of a sudden call *(ordre pour le cas d'alerte)* by stating that Colonel d'Alvymare had pointed out to him that the old orders were not applicable to the present situation of the troops, in consequence of the barracks in the Rue de Clichy, formerly occupied by the guards, being then allotted to the troops of the line. M. de Choiseul mentioned this to the Marshal, and also that the old order made no provision for the case of the King being at St. Cloud, in consequence of which the new order was issued, and inscribed in the register in the usual way.

Jean-Baptiste-Marie Thouret, aged 43, *late Commissary of Police.*

This witness states, that the only order he received from the Prefect during the late events, was on Monday, and related to holding the proper force in readiness, to effect any seizures that might be necessary the next day, in consequence of a violation of the Ordonnances.

Benjamin-Jean-Amedee Jauge, aged 43, *Banker.*

This witness deposes, that either on Wednesday or Thursday, he saw several articles taken from the cartridge-box of a soldier, in the 5th regiment of the line, one of which he still has, and which only consists of powder rolled up in paper, without any ball.

Pierre Galleton, aged 55, *late Commissary of Police.*

The deposition of this witness contains details of various events at the Bourse and the Place de Chatelet, but they present no new feature. He states that he was not in a position to summon any of the groups to disperse, as none of the detachments of gendarmerie, with whom he happened to be, fired while he was with them, in addition to which he had not his official scarf.

Jean-Francoise Cyr Billot, aged 41, *late procureur du Roi at the Tribunal de Premiere Instance of Paris.*

This deposition contains nothing more than the deposition of the same witness before the committee of the Chamber of Deputies, inserted in the *Messenger* of Saturday, except that at 4 o'clock on Tuesday, the Prefect of Police told him, he (the Prefect) was discharged from a great responsibility by the Gendarmerie being placed under the command of the Duke de Raguse, as Governor of Paris, but said nothing respecting Paris being in a state of siege.

Augustin-Joseph Ducastel, aged 35, *Dealer in Sponges.*

This witness speaks favourably of the conduct of the post of Gendarmes at the Halle aux Drapes, and states that so far from firing first, they did not discharge a shot until several men had been wounded by the people with the weapons they had taken from the gunsmith's shops in the Rue St. Honore. Witness saw no civil officer interfere in any manner.

Jacques-Louis Barbe, aged 32, *Proprietor.*

This witness says, that at the place mentioned by the

last witness, he heard an officer of the Garde Royale three times summon the people in the name of the law to disperse, and that though the pieces were presented, the moment the people began to disperse, the officer ordered them to be recovered, and no firing took place until a later period. Witness saw no Commissary of Police summon the people to disperse.

Alphonse-Carpentier, aged 23, *Avocat Stagiare.*

This witness knew nothing of what passed, except that one day he saw a dead body carried past his door.

Alexis Guigue, aged 33, *Porter at the Hotel of the Minister for Foreign Affairs.*

Witness merely states, that he has heard (without knowing the fact) that a man among the group, assembled before M. Casimir Perier's door, was wounded with a sabre, but that no one was brought into the Hotel wounded, except a man brought there with five or six others, who were in arms, by the Garde Royal, on Tuesday night, and another on Thursday, who had been wounded in the Rue Caumartin, and died as he was entering the Hotel.

Victor Graffon, aged 36, *another Porter at the same Hotel,*

States that no one was brought there wounded on Tuesday morning, except a Gendarme, who had hurt his knee by a fall from his horse.

Pierre-Nicolas Ragez, aged 42, *Porter at the Hotel of M. Casimir Perier*

This witness only deposes as to the fact of a crowd of young students, assembled at the door of the Hotel, on Tuesday, having been charged upon by the Gendarmes, and some of them slightly hurt.

Alexis Noel-Clair de Quevauvilliers, aged 42, *Avocat.*

On Wednesday morning, I, in company with a neighbour, M. Wurtz, called on the Mayor of the 10th Arrondissement, to re-organize the National Guards for the protection of the persons and property of the Arrondissement. On his stating that he could not take it on himself, I replied that it was not the moment for deliberation, but for action, and that the organization would take place even in spite of him, as many of the citizens were already armed. He then advised us to see the Governor of Paris which we agreed to do, but (as we told him) only for the purpose of receiving the pass-word, to prevent our patrols being fired on by

those of the Garde Royale. I then with the approbation of the Committee of Defence, which we had organised under the superintendence of M. Chardel, proceeded to the Marshal, with Messrs. Hutteau and Wurtz. He told us that the National Guards could not be organized while the City was in rebellion; that Paris was in a state of siege; that we should not have the pass-word; and that every one found in arms he would be fired on. We told him that at least such a determination ought to be made known to the citizens; he replied that every thing necessary would be done, but that it was not possible to post up any proclamation. At this moment I perceived M. de Polignac. It was about half past eleven. The Marshal told us to retire, as the cannon would soon begin to fire. This conversation determined me, as soon as I had reported what had passed to the Committee to go home, and assume my arms and uniform; after which I went to the Mayoralty, and actively employed myself with my fellow citizens in organising the National Guard. In the evening I learnt that, about a quarter of an hour after we had quitted the Mayoralty, a detachment of the Garde Royale and Swiss Guards had presented themselves there, and demanded to have the National Guards given up to them. There was only one there at the time, whom the Mayor took under his protection, and no harm was done him.

Charles de Tryon, Colonel of the Staff, aged 56.

This witness not having received any orders during the Three Days, cannot depose to any fact of importance.

Louis Chabert de Praille, aged 39, *Captain of Artillery, on half pay.*

This witness merely confirms the pacific intentions and conduct of the 5th regiment of the Line, and deposes to having been told by the Officer commanding the Gendarmerie in the Place du Palais Royal, about half past five on Tuesday, that the officer of the Line had refused to order the troops to fire, alleging as a reason, the absence of a Commissary of Police, and his determination not to place himself in a situation similar to that of the Rue St. Denis, in 1827, but, added the officer of Gendarmerie, "the Royal Guard has already fired three times." Witness asked what arms the people had, and the Officer pointed to the stones with which the ground was covered, and with which sev-

eral Gendarmes had been overthrown. He also showed witness the remains of a barracade which had been commenced three times. The witness, in reply to specific questions, stated that the Officer did not inform him that the troops had been fired on, and that he (the witness) had no knowledge of any summonses having been made to the people by the civil authority.

Louis Andre Lecompte, aged 42, *formerly a Solicitor at Joigny.*

This witness details the circumstances of his having been deprived of his situation in July, 1822, by M. de Peyronnet, without any alleged motive, but really on account of having been suspected of being concerned in a conspiracy against the Bourbons, of which he had been acquitted by the Cour Royale. Witness then states that on the 27th July, 1830, he endeavoured to dissuade the Officer commanding the Gendarmerie in the Place du Palais Royale from continuing to fire on the people, but received no reply, except a threat of being cut down if he did not retire. On Wednesday he was fired on in the Rue d'Antin by 150 troops of the line! On Thursday he was named Secretary of the Municipal Commission, and in that capacity took cognizance of the propositions of Charles X. and of the Ordonnances revoking those of the 25th, and appointing a new Ministry, at the head of which was the Duke of Mortemart.

Third Day.

The general appearance of the Court and neighbourhood was precisely similar to that of the preceding days. It is only just to remark, the greatest facilities which were afforded to the public press in the arrangements made to enable them to hear and report the proceedings. The gallery appropriated to the Journalists immediately faced the accused and witnesses, and was so arranged as to afford a front of twenty-two places, provided with a desk and writing materials.

At a quarter past ten, the accused were introduced in the usual order. M. Guernon de Ranville, before he took possession of his place, continued a few minutes in conversation with M. Cauchy, Secretaire Archiviste of the Chamber. Amongst the audience we observed MM. Cormenin,

Dupin aine, Isambert and Grouchy, Deputies, and M. Dequevarvilliers, advocate, in the uniform of Lieutenant-Colonel of the National Guard. After the names of the Peers were called over,

M. Hennequin (Counsel for M. de Peyronnet) demanded permission to address the Court. [Movement of curiosity and attention.]

M. Hennequin.—A Clerk in the Ministry of the Interior came to me yesterday, and informed me that he had had in his hands the report of the Prefect of Montauban, and that he had read there the orders given by the Minister of the Interior, to disavow and punish the originators of the disturbances which took place at the elections. We desire that the Clerk may be summoned.

M. le President.—He shall be summoned before the Court.

M. Hennequin.—I have another observation to make: the visit of M. Mangin to M. Peyronnet on Sunday evening is a fact, the truth of which we are desirous of establishing, by the testimony of MM. Lajor and St. Martin, who saw M. Mangin in the *saloon* of M. de Peyronnet on that evening.

M. le President.—They shall be summoned and examined.

EXAMINATION OF WITNESSES CONTINUED.

M. Jacques Laffitte, President of the Council of Ministers, aged 63.

Q. You formed part of the deputation, which on Wednesday the 28th of July, waited upon the Duke de Raguse. As great interest attaches to that interview, the Court requests that you will detail every thing which passed at it.

Witness.—On Wednesday evening, the 28th of July, I was at a meeting of deputies at the house of M. Audry de Puyraveau. It was there agreed that a Deputation of five Members should proceed to the Duke de Raguse, to endeavour to stop the effusion of blood. The deputation was composed of Marshal Gerard, Count Lobau, M. Casimir Perier, M. Mauguin, and myself. It was arranged that I should be the organ of the deputation to the Duke. Having arrived at the Etat Major, about half past two, we were introduced by M. de Glandeves with great readiness, and experienced every attention and civility. We entered the

appartments of the Marshal; I addressed him, and in clear and energetic terms represented the frightful situation of the capital, and the danger to which, not only Paris, but even the Throne would be exposed if these calamities were prolonged. The Marshal replied with kindness, and appeared deeply afflicted at his situation, but he had also a decided feeling of what he considered his duty, that is to say, he thought himself obliged to obey the orders he had received. A discussion arose between us on this point. He declared that he had positive orders, from the execution of which he could not dispense himself; that his honor as a soldier was pledged; and that obedience to authority was the only means of putting a stop to the firing. Nevertheless, he begged us, in his turn, to use our influence in inducing the people to submit. We replied that our influence with the mass of the people did not extend so far, that the people would resist, and that there was no chance of prevailing with them unless the Ministers were discharged, and the Ordonnances revoked. The Marshal then displayed sentiments, which appeared to me honorable in the highest degree; he then urged the difficulties of his situation, the duties by which he was bound, and he promised to communicate our propositions to the king with the least possible delay, and said that he wished they might be acceded to with all his heart, but he did not conceal from us *that he hoped nothing from this step.* (Witness laid great stress on these words.) While we were conversing, a note was given to the Marshal, and it was after reading it that he asked us whether we had any repugnance to see M. de Polignac. I stated that we had not, and he left us for a few minutes. On his return, he said it was useless for us to see M. de Polignac. In retiring, we traversed the apartments, which were crowded with officers, and I ought to state, that if, on our arrival, their countenances expressed joy, they were clouded by a deep sentiment of sorrow, on hearing from one of us that we had but little to hope from the step we had taken. I should also state that a difference of opinion exists in the Deputation, as to whether the Marshal promised to send us word as soon as he heard from the King. I and two of my colleagues think he did, but the other two have no recollection of his having done so. As we were descending the staircase, M. de Laroche-

jaquelin called us back, saying, that M. de Polignac was most anxious to see us. We told him there must be some mistake, but he repeated that he was certain M. de Polignac desired earnestly to see us, and retired to announce us, but in a few moments returned, and informed us that, in fact, M. de Polignac, having heard from the Marshal the particulars of our visit, it was now useless for us to see him.

M. de Martignac.—I think it absolutely necessary to call the attention of the Court to the circumstance of M. de Polignac having at first had the intention of seeing the Deputies, and of his having ordered M. de Larochejaquelin to wait for them on the staircase. This fact, stated by M. de Polignac, is confirmed by the deposition you have just heard; but the witness also says that when the Marshal returned to the deputation, after he had seen M. de Polignac, he manifested his regret that their propositions could not be accepted. I should wish this point to be perfectly cleared up.

Witness—When the Marshal told us that he had no hopes of our mission having a favourable result, it is evident that he was not referring in any manner to M. de Polignac, who had not then been mentioned. His opinion evidently referred to some one other than M. de Polignac. I will add, that when the Marshal returned to us, after having seen M. de Polignac, neither the tenor of his conversation, nor the expression of his countenance, were in any respect changed, and that there is no ground to suppose that he conceived any fresh obstacles to have arisen from any thing that passed in his interview with the Minister. (The conclusion of this deposition, which was given with clearness and deliberation, gave rise to a marked movement of satisfaction in the assembly.)

M. Casimir Pierre Perier, aged 52, President of the Chamber of Deputies.

This witness merely confirmed the deposition of M. Laffitte as to what passed at the interview of the deputation with the Duke of Raguse. At the conclusion of this examination, he was, in consideration of his official functions, allowed to retire.

M. Achille Francois Nicolas de Guise, aged 39, late Aide-de-Camp of the Duke de Raguse.

Q. On what day was the Duke de Raguse invested with

the military command of Paris? A. On the morning of Tuesday the 27th, I received a letter from him, desiring me to repair to the Etat Major. I went immediately, and found the Marshal there; it was then between 12 and 1 o'clock. He told me that the King had sent for him that morning, and ordered him to repair to Paris to take the command of the troops, informing him at the same time, that some disturbances had taken place the night before, but adding that tranquility had been restored, and that he (the Marshal) might return to St. Cloud in the evening.—(Sensation in the assembly.) Q. Do you think the Marshal was before aware that he was to be invested with the command? A. I am convinced that he was entirely ignorant of it; I saw him on the Monday, and it was on his arrival in Paris, on that evening that he read the Ordonnances for the first time in the *Moniteur*, which he had been unable to see at St. Cloud. He left me to go to the Institute, and thence to return to St. Cloud. Q. What orders had been given to the troops? A. When I arrived at the Etat Major on Tuesday, none had been given. I will add that the troops had not even been ordered to remain in their quarters, which occasioned them to arrive very late at the various points to which they were afterwards ordered to repair. Q. Did the Marshal, on his arrival at Paris, see M. de Polignac? A. I do not know, personally, but I have heard from my colleagues that he did. Q. Do you know whether the Marshal directed any Proclamations to be made to the People? A. On Tuesday, the 27th, I heard him repeat several times, that the troops were not to fire until they had been fired upon; and added, "*You understand a fusillade is 50 shots at least.*" The order given by the Chief-d'Etat-Major to the Chiefs-des-Colonnes says, in so many words, that the troops were not to fire until after they were fired upon. Q. Did not the Marshal write several letters to the King? A. On Tuesday evening I was directed by the Marshal, to write a letter to the King from his dictation, announcing that the crowds were dispersed and that tranquility was entirely restored.—(A laugh.) I was sent by the Marshal, about eleven o'clock at night, to inform M. de Polignac that the crowds were dispersed, and that the troops were going to retire to their quarters. It was after my return that I wrote the letter to the King.—

(Marked Sensation in the Assembly; M. de Polignac whispered to his Counsel.) Q. did not the Marshal write other letters to the King? A. About eight o'clock in the evening of Wednesday, the 28th, he wrote a second letter to the King, in which he communicated to him the progress of events. This letter was entrusted to a gendarme, and accidentally lost; the Marshal being informed of it, immediately dictated another to me, in which he said that the assemblages had assumed a more threatening aspect—that it was no longer a riot, but a revolution; that it was of urgent importance to adopt measures of pacification; that the honor of the Crown might still be preserved, but that the next day it would be too late. The same day, at half past three, the Marshal wrote a third letter to the King, in which he said that the troops *could not be forced in their positions*, but that the situation of affairs was becoming more and more serious. It was at this moment that the Deputies arrived at the Tuileries. After their departure, the Marshal returned, and made me finish the letter which was taken to St. Cloud by one of my colleagues, (M. Komierouski.) Q. What day was the declaration of Paris being in a siege ordered? A. On Wednesday, a little before or after the first letter addressed to the King was sent off, a young man, a stranger to me came from the Prefect of Police to ask the Marshal whether it was true that Paris was declared in a state of siege, the Marshal, who had been questioned on the same subject by several other persons, sent me about ten o'clock to M. de Polignac to know what it meant, (sensation,) and to remind him that there were legal forms to be observed in adopting such a measure. M. de Polignac told me that in fact the Ordonnance declaring Paris in a state of siege was signed, and that he had sent for the Marshal to come and take it. I returned with the Marshal, who, on leaving M. de Polignac, handed me the Ordonnance. Q. What steps were taken by the Marshal to restore tranquility? A. On Thursday he convoked the Mayors of Paris. Only four came to the Tuileries; after having ordered a suspension of the firing on the part of the troops, he begged them to induce the people to cease firing also. One of them did in fact advance into the Rue de Rohan, and was received with cries of "Vive le Roi, Vive la Charte." A Proclamation to the same effect was also drawn up, and

several persons who had been taken prisoners were set at liberty for the purpose of distributing it to the people. Q. Did the Ministers assembled at the Tuileries hold any Council there? A. I do not know, but I can assert that I often saw the Marshal with the Ministers. (Visible sensation.)

M. Persil.—I will ask the witness whether he knows positively to whom the Marshal had to give reports of the events? A. I do not.

M. Persil.—It is, however, certain that the witness has said that on Tuesday, the Marshal, before he even wrote to the King sent him to M. de Polignac to announce that tranquility was restored. Does the witness positively know whether M. de Polignac gave the Marshal any other order when he gave him the Ordonnances declaring Paris in a state of siege? A. I have no means of knowing, the Marshall only said these words to me—"I have just received the Ordonnance declaring Paris in a state of siege."

M. Persil.—With whom was the Marshal to hold communication after the city was declared in a state of siege, was it with M. de Polignac, or with the King? A. I cannot answer that question positively; all I can say, is, that the Ministers were all assembled at the Tuileries, and that I often saw the Marshal with them.

M. Persil.—What was the Marshal doing with them? Was he communicating the reports which he received as to the state of Paris? A. I could only give you my personal opinion on that point, which would be of no weight. We officers remained in a different apartment from that in which were the Marshal and the Ministers. Nevertheless, I repeat that I saw them very often together. I will add, that in the course of Wednesday, a proclamation was drawn up by one of the Ministers, and communicated to another Minister who was present. I was ordered to get it printed at the Imprimerie Royale; but I pointed out that it was impossible for me to do so; and it was given to the young man from the Prefecture of Police, who came backwards and forwards several times during the day. He was directed to get it printed and distributed.

M. Persil.—All these facts are important, and I will ask the witness, whether from all he saw, he is led to conclude that the Marshal reported what passed to M. de Polignac, or to the Ministers assembled at the Tuileries? (Sensation.

M. Hennequin—(Instantly rising.)—It appears to me that such a question tends evidently to introduce into the debates questions relating to the defence, and forms part of a deeply erroneous system. The witness can only give evidence as to facts. To ask them their opinion on the character of these facts, or on the consequences to be drawn from them, is to run the risk of involving the court in important, involuntary errors; it is to vitiate the principle of debate; therefore, when the witness said that he could merely express a personal opinion, which says nothing, he spoke the truth; I submit these observations to the court, with the conviction that the Commissioner himself, with whose high knowledge we are perfectly acquainted, will not insist further.

M. Persil.—I refer entirely to the wisdom of the Court to decide on the propriety of the question addressed to the witness, but I thought it both useful and legal to put it, because it hangs on a point of much importance, and may contribute to make us acquainted with the truth, which we are all anxious to arrive at. In a word, I regret it, and abandon it entirely to the wisdom of the Court, passing on to another question.

President—The question having been put by the Commissioner, I cannot refrain from addressing it to the witness, leaving the Chamber the task of appreciating the nature of the reply.

Witness—I must naturally suppose that when the Marshal was with the Ministers, they spoke together of what was taking place in Paris. (Sensation.)

A Peer—Did not the witness, as well as the Duke de Raguse, think of writing immediately to the King? It was to the King that he rendered account? A. I do not know.

M. de Martignac.—It is important that this point should be cleared up. M. de Polignac declared that the Duke de Raguse communicated directly with the King; that he gave him an account of what was going forward; and that he received his orders. It is generally known that when a person employed in an administration has an account to render, it is addressed to the head of his department; and thus, on an ordinary occasion, the Duke de Raguse would have communicated with M. de Polignac, as Minister of War. But the situation of things was no longer the same, in con-

sequence of the city being declared in a state of siege, and I maintain that it was to the King he rendered an account. No doubt can exist on this point, for the witness wrote two letters by the direction of the Marshal, in which he rendered a direct account of events to his Majesty, and even of the step taken by the Deputies. Q. Did not the Marshal also address letters to M. de Polignac? A. None. But I must observe, that I do not see why he should have written to M. de Polignac, seeing that the latter was near him, and that they were in continual communication. (Sensation.) Q. M. de Polignac might even have given him some explanation on all these circumstances. It is not doubted that the Ministers assembled at the Etat-Major; but what did they do there? Did they talk of passing events? Did they direct the conduct of the Marshal?

M. de Polignac (rising)—I have already given every possible explanation on this point. With regard to the Marshal, we had all that intimacy with him which exists between persons anxious to know passing events from him who directs them, and who was in the same apartment with themselves. (Sensation.) But I declare that the Ministers did nothing but collect the information, sometimes correct, at other times incorrect, brought by a variety of persons. They had not either with the King or the Marshal, any official correspondence, or any of the relations that subsist between a superior and an inferior. If such a correspondence had taken place, some trace of it would necessarily remain and have been found; none has, however, been any where discovered. The Marshal did not address a single report to me, and I transmitted nothing—I had nothing to transmit to the King. It is true that I twice wrote to his majesty, when I sent him some information as to the events then taking place; but it was simply in the form of intelligence, and in order to give him some knowledge of what was going on.—(Sensation.)

President (to the witness)—Where was the money taken from that was distributed to the soldiers as a gratification? A. From the Treasury. A hundred soldiers were employed in that service; they left their muskets and each of them carried bags of 1000 fr.—(Great sensation.)—Q. In virtue of what order did the Minister of Finances draw that money? A. I know not. The order was given during the night, and the distribution made the following morning.

Louis de Komierouski, aged 44, *native of Poland, ex-Aide-de-Camp of the Duke de Raguse, residing rue St. Florentin, No.* 5.

(A general movement of interest and curiosity was evinced on the entrance of this witness: he was low in stature, his meagre but striking features exhibiting great vivacity, and his accent denoting his foreign origin.)—At the moment the President addressed the first question, witness besought the indulgence of the Court, on account of the difficulty he experienced in expressing himself in French. Q. You were with the Duke de Raguse during the events of July: inform the Court of all you know relative to what forms the object of the accusation? A. On Monday, the 26th of July, I was on service at St. Cloud, with the Marshal: while breakfasting, a Lieutenant of the Guards having apprised me of the Ordonnances in the *Moniteur*, I immediately informed the Marshal of it, whose first word in reply was, that it was not possible. After breakfast, when I again saw him, he appeared to me deeply occupied with the news: about half past eleven he set off for Paris, and I did not again see him till the evening, when receiving orders, which took place somewhat late, the King having been at Rambouillet. On Tuesday morning the Marshal ordered his carriage, to go to the country, when I intimated to him that late on the preceding evening some disturbance had taken place at Paris, and that it would be at least necessary he should inform me where he would be found. This observation determined him to remain at St. Cloud, and he shortly received orders to wait on the King, after mass, on returning from which audience, about half past 11, he ordered his carriage and we instantly started for Paris. We alighted at M. de Polignac's, where the Marshal remained a few minutes: he then went to head-quarters, and occupied himself in giving orders. M. Lavillatte arrived shortly after, to announce that about 800 persons were directing their steps towards Bagatelle, in order to carry off the Duke de Bordeaux. The Marshal instantly sent me to the Ecole Militaire, to take a hundred and fifty lancers, and to proceed to Bagatelle, with orders that, should I fall in with the multitude, to act only with the flat of the sabre and the staff of the lance. On arriving at Bagatelle, I found no one there; the Duke de Bordeaux was gone to St. Cloud, whither I

proceeded, and from whence I returned to Paris. On Wednesday morning I was sent to the Prefect of Police, to engage him, on the part of the Marshal, to issue Proclamations to the people, who replied that it should be done. In the course of the morning I went with the Marshal to M. de Polignac's where there were several of the Ministers, and it was in returning from thence that the Marshal informed me of the city being in a state of siege. The Ministers were not long in coming to the Tuileries, where I again saw them, as they were frequently in the same room with the Marshal. I know that the orders given by the Marshal to the commanders of columns were not to fire upon the people until there had been fifty shots fired by them. About four o'clock on Wednesday I was sent by the Marshal to St. Cloud, with a despatch for the King; I had orders to make the greatest haste, which I did, as must have been observed by the fatigue I suffered on my arrival. The Marshal had moreover recommended me to inform the King myself of what I had seen of the actual state of Paris. I therefore told his Majesty that the entire population had risen, a fact I was perfectly competent to attest, seeing that in passing through Chaillot several shots were fired at me, not by the lower classes, but by persons of a more elevated rank. The King replied that he would read the dispatch, and I withdrew to await his orders; as they however were long in arriving, I begged the Duke de Duras to go to his Majesty, to speak to him of the serious aspect of affairs; but he replied that, agreeably to etiquette, it was impossible to enter the cabinet of the King.—(Laughter.) After a lapse of 20 minutes I was at length called into the closet, when the King, who gave me no written despatch, told me only to say to the Marshal to continue firm; to unite his forces in the Place du Carrousel and the Place Louis XV., and to act with masses.—(Murmurs.)—He even repeated the last word twice.—(Murmurs renewed.)—I returned with this answer to the Marshal, I did not then see M. Polignac, and I did not know that he had sent any dispatch to the King; what I know is, that he gave me none. I had no knowledge of an order given on Wednesday or Thursday, to arrest several individuals; but, I was desired by the Marshal, very early on Wednesday, to go and tell M. Foucauld that the orders for arrest had been annulled. I acquitted myself of

this mission, but without knowing by whom the order had been given; or to whom it related. In my written deposition, I stated that this last fact took place on Wednesday; I was deceived; but this ought not to be considered surprising; I was constantly on horseback during the three days, and, it may be supposed that it was difficult for me to recal every circumstance.

Q. You were not the bearer of any other letter than that of which you have spoken? A. Of no other. Q. What were the arrests you have spoken of; were they numerous? A. I know nothing on that subject. Q. Have you any knowledge of an order for distributing money to the troops? Do you know by whom that order was given? A. Towards midnight, on Wednesday, a dispatch from the King was brought to the Etat-Major, it contained an order to distribute money to the troops.

The President—M. de Polignac, you hear what the witness declares; you had no money at the Etat-Major; it is only from the Treasury that a sum adequate to the distribution commanded, could have been obtained; upon what order was it delivered?

M. de Polignac—I can give no explanation on this head; all that I can say is, that neither order, nor money passed through my hands; it was only on Thursday, about seven o'clock in the morning, that money was distributed. I have always believed that these sums did not exceed seven or eight thousand francs. I do not know for what cause this money was drawn, nor to what order it was delivered. Q. Can any one of the parties accused give the Court any information on this point. (The accused, by gestures replied in the negative.)

President—It appears that no Minister has any knowledge of the particulars of this fact.

M. Peyronnet—The result of this discussion appears to be, what I did not know—that the order for the distribution of money did not reach the Etat-Major until night. On Thursday morning, I was walking with M. Glandeves, on the place of the Carrousel. There I acquired the only idea I had of the distribution of money to the troops. I saw a squadron of lancers, to whom an order of the day was being read. From the circumstances in which we were placed, I was curious to know what the order addressed to the

troops could be. The King expressed his satisfaction at their conduct.—(Violent murmurs.) He announced that money should be distributed to them, and that he would grant them special rewards.—(Renewed murmurs.)

The President, to M. de Polignac—M. de Montbel was at the same place as yourself; is it by his order or by the order of the Duke de Raguse, that this money was distributed? A. The order did not arrive until midnight, as the witness has just stated, we were at the Etat-Major, but we were not assembled in the same chamber; we were, in some degree, isolated from each other, and we only met together when the two Peers of France arrived at the Etat-Major. There was no order from me; no trace has been found of such, which would have been easy, if an order had existed; nothing of this kind can have been discovered at the Hotel of the Minister of Finance. I have learnt with much surprise that the sums distributed to the troops amounted to three or four hundred thousand francs.

M. Seguier—Three hundred and ten thousand francs.

M. de Polignac—I must repeat that I feel unfeigned astonishment, for at first, as I have said, I thought it merely seven or eight thousand francs; I know nothing else, and it is difficult for me to imagine a distribution so considerable as to amount to the sum mentioned; the actual time of this distribution seems to me to have exceeded the space (half an hour) which elapsed between the reading of the order of the day and the renewed movement of the troops.

M. Martignac—Two important circumstances appear here, springing out of this disposition. The Duke de Raguse had charged the Prefect of Police to make a proclamation to the people, he had then some communications and a correspondence with the Prefect of Police; on the other side, communication with the King was so direct, that the King ordered the Marshal to make a distribution.—(The whole assembly gave audible proof of satisfaction at the manner in which M. Komierouski had delivered his testimony.)

Viscount Faucauld, aged 59, *ex-Colonel of Gendarmerie.*

This witness, interrogated as to the part he took in the military events of the three days, declares that he thought his presence was required at Paris during the time of the elections, for, said he, I remembered the events which sig-

nalized those of 1827.—(the tumults in the Rue St. Denis.) Still I was re-assured by the tranquility of the elections, and I did not hesitate to repair to my own arrondissement, I was far from foreseeing the Ordonnances. Being returned, on the 25th July, I went to St. Cloud, where I heard nothing said of them; the same evening, I went to see M. Peyronnet; I accompanied my wife to the *reception*, which that Minister gave on that evening; there were a great many visitors. On the following day, Monday the 26th, informed of the Ordonnances, I ran to the Prefecture of Police; I could not see the Prefect until half past one; he did not seem to me to be very uneasy at the result of the Ordonnances; I was less tranquil, for I forsaw they would give us plenty of work *(besogne,)*—(general and prolonged laughter; M. de Polignac himself joining in the hilarity of the assembly.)

President—I must remind the audience that all signs of approbation or disapprobation are positively forbidden; I must beg that the respect due to the Court may not be forgotten.

M. Faucauld—I ought to have said embarrassment.—(Half suppressed laughter in every part of the Chamber.) The witness then commenced a very long and unintelligable narrative of all the events that were personal to him; he strove especially to enforce the maxim of military obedience, touching the body of Gendarmes, which he represented as being in a *particular situation*: it is impossible to follow M. Faucauld in his long and desultory discourse, his language, prolex and incorrect, seemed several times to excite the impatience of the Court. We give the summary of that part of his deposition, which preceded the questions put to him by the President, evidently with a view to bring his narrative, which threatened to be interminable, to a close.

Witness said he was desirous of remaining in Paris during the elections of the Grand College; for he did not wish again to expose himself to the reproaches of the Royal Court of Paris, which had expressed its regret that, in the month of November, 1827, the disorders had not been prevented, and the armed force so placed as to avoid the necessity of using violence. By order of General Wall, he furnished a hundred Gendarmes, who were to protect the

Chancellerie and the Hotel of the Minister of Foreign Affairs. He had no knowledge of the first disturbance previous to receiving the news of the *kind of riot* which had taken place on the Monday at the Palais Royal, between the gendarmerie and the idlers assembled in front of the shop of the Marquis de Chabannes. On Tuesday he went at half-past 11 o'clock to the Prefect of Police, who was quite at his ease, and in bed. The state of Paris, and the necessity of stopping the progress of the tumults, prevented a review of gendarmerie, which the witness was to have made; from that time he placed the gendarmerie at the disposal of the constituted authorities, and contented himself with occasionally visiting the guard-houses of his troops. He affirmed that he never drew his sabre from the sheath, and he attested the same thing of the orderly-man and trumpeter who followed him. It was in one of these excursions that he received a violent blow from a stone, thrown, he said *point blanc* (à bout portant)—(suppressed laughter,)—and which struck him on the head at the moment he was going to the Rue Neuve des Petits Champs. (The witness here entered into another disquisition upon the doctrine of passive obedience, and the peculiar responsibility attached to the gendarmerie; from the latter, however he considered himself completely relieved by having placed his corps at the disposal of the commander of the military force.)

The *President*.—Did you receive orders from the Duke de Raguse, on Wednesday? A. He handed me an order of arrest, in which, I believe, six persons were included. I caused some officers to copy it, and was afterwards informed that there were seven or eight persons included in it. The Duke de Raguse was at that time invested with the command of the troops of the division, and all the public force, and I was bound to obey him unreservedly. I should not have acted in the same way on the previous evening; I should have used the right of discussion which the officers of my corps possess; but at this moment, in virtue of the power of the Marshal, the extent of his authority, and the elevation of his rank, I considered any representation as unbecoming. Q. At what o'clock did he give you that order? A. About mid-day, as far as I can trust to my memory—before the Deputies came to head-quarters. Q.

do you know the names of the persons you were employed to arrest? A. On my former deposition, I vainly endeavoured to recollect more than those of Messrs. Eusebe de Salverte, Laffitte, and Lafayette; however, on reading the procedure, and having since learned that these gentlemen came from the house of M. Audry de Puyraveau, I perfectly recolloct that that name belonged to one of the persons to be arrested. Q. Do you know whether that order had been concerted with the Ministers who were at head-quarters? A. I think I have already replied to that question, in stating that the great authority with which the Marshal was invested, did not permit me to make any observation. I repeat, that on Tuesday I would have entered into a discussion as to the order, but on Wednesday I neither could nor ought. Q. How was the order withdrawn from your hands? A. Immediately on receiving the order, I saw how many difficulties there were to its execution: a secretary of the Etat-Major took the almanack of 25,000 addresses, and wrote those of the persons designated. I then set off with an adjutant-major, trumpetor, and orderly, and went to the Hotel of the Keeper of the Seals, where several officers set about making the necessary copies. I was returning to the Duke de Raguse, when I met an aide-de-camp of the Marshal, who informed me that the Duke had revoked the order, and that he was come to withdraw it. This relieved me from a great weight.—(Laughter.) He must have seen that I restored it to him with great eagerness. Q. Do you know positively whether the gendarmerie or other bodies of troops, whose operations came within your knowledge, made the proclamations required by the law? Reply briefly. A. I received no report. I can affirm that I never spoke of any rigorous act, and that my orders never prescribed any thing of the kind; I always employed conciliatory measures, for——in short, what I can say, is, that I can only answer for my own actions, and that I have no exact knowledge of those of others. Q. How was the guard-house at the Bourse forced? A. I replied on a former occasion to that question. I was asked how the guard-house at the Bourse had been forced. I reply that I learn it from you; for in war such a thing sometimes happens, when one is forced to yield and to withdraw before a superior force. I am unwilling to pass sentence on

the gendarmes who were there, and would judge of their conduct only after hearing their justification. I know that the guard-house was formed of planks, raised on wooden blocks, and was capable of being easily upset. Q. On Wednesday night and Thursday morning—let us not go back—did you learn any important facts relative to the conduct of the gendarmerie? A. The orderlies could only reach me in plain clothes, and by this means I succeeded in establishing a kind of correspondence with the commanders of the barracks.

M. de Persil.—On Wednesday, when the Duke de Raguse gave you the order of arrest of which you have just spoken, had you the means of knowing if the order had been prepared beforehand, or was it written before you? A. It was not written before me; I know not if it had been previously arranged; it was handed to me quite prepared.

M. Persil.—It is of the highest importance to know with whom this act of arrest originated. Is it the deed of M. de Raguse, of M. de Polignac, or of the Ministry? You have heard M. de Polignac deny all participation in these acts of arrest. The other accused persons have done the same; we are therefore, led to believe, that M. de Raguse is the sole author of the act of accusation, for, on Wednesday the 28th, there were but two authorities, M. de Polignac, or, rather the Ministry, and M. de Raguse. We have here two aids-de camp of M. de Raguse, I demand that they may be questioned as to this fact.

The *President* then called the next witness, M. de Guise, ex-aide-de-camp of Marshal Duke de Raguse.—At the moment this witness advanced at the summons of the President, M. de Komierowiski, aide-de-camp to the Duke de Raguse, darted precipitately into the middle of the assembly, and exclaimed—"M. de Raguse is not the author of the deed of arrest; in default of proof, to demonstrate this I have, in evidence, his eagerness to have it revoked; he said to me, in a tone which I cannot forget, send in search of Col. Foucauld, to withdraw an order I gave him a few minutes back—send one, two, or three officers—go yourself, if it be necessary."—(Sensation.)

M. *de Guise* was then examined by the President.—Do you think the Marshal was the author of the Deed of Arrest? A. I have been for a long time connected with the

Marshal, I have passed the greater portion of my life with him, but I never heard him mention the names of Messrs. Eusebe Salverte, and Audry de Puyraveau.

M. d'Angosse to Col. Foucauld—Q. In what hand-writing was the order? A. I fancied I recognised in the body of the document the same hand-writing as that of the signature.

M. d'Angosse to M. Guise—Who was the person who wrote what the Marshal dictated? A. I alone; he never dictated any order like that here spoken of.

M. de Martignac—It has been said that the order appeared to be in the same hand-writing as the signature.

President—That was the answer of Colonel Foucauld.

M. Persil to M. Foucauld—Was the Order in many or few words? A. It contained a line and a half, or two lines of writing without the names, it was nearly in these words, "M. le Marechal de France, Commandant Militaire, de Paris, donne l'ordre d'arreter." (The Commander-in-chief of Paris, Marshal of France, gives an order to arrest.)

M. Komierouski here advanced towards the witness with great vivacity, and asked—By whom had you this order decyphered?—[This singular proceeding produced an evident feeling of astonishment in the assembly, not, however, unfavourable to the intruder.]—A. I read, near to the bottom, the words "Duke de Raguse;" and in reading the rest, I fancied I perceived a resemblance to the hand writing of the signature; the real motive for my conjecture, as I glanced over the order which indeed, was very badly written, was that it was confidential, and that owing to the sameness in the hand writing, I could not think it had been written by any other than the Marshal himself.

M. Komierouski—You must be very clever, for the Marshal's writing is so bad that it is next to an impossibility to read it; in fact, it is illegible.—(Great laughter.)

M. Hennequin—Q. The witness has said that he took his daughter to M. Peyronnet's *soiree* on Sunday, the 25th. Was he at the Hotel of the Minister when M. Mangin arrived there? A. I did not stay at M. Peyronnet's that evening; it was my wife, not my daughter, that I accompanied there.

M. Hennequin.—Q. In your dealings with the Prefect of Police, did you hear that he was informed of the Ordon-

nances in any other way than by the *Moniteur*? A. I *guessed* that, for the appearance of M. Mangin, made me think that he knew of the Ordonnances before they appeared.

M. Hennequin.—Q. Then, on using your best recollection, you find only the suspicion, and no positive knowledge of the fact? A. I have always thought, and I still think, that he had only been informed of them the evening before by official confidence; for, without that, it would seem surprising that he had not informed the Chief of the Gendarmerie of Paris.

In all the conversation which followed the examination in chief of Foucauld, Komerowski displayed an open vicacity, and an eagerness to explain and elicit the facts, which were remarked with approbation by the assembly. The laughter which followed his remark respecting the bad writing of the Duke de Raguse was loud and general, the accused all joining in it.

M. Arago Secretary of the Institute.—This witness referred to his former deposition (inserted in the *Messenger* of the 4th inst.) for the particulars of his becoming acquainted with the Marshal Duke de Raguse. He added that the Marshal had, in conversation with him, long before the Ordonnances, alluded to the appointment of the Ministry of the 8th August, as one of the most unfortunate events of his life. The witness then detailed the facts of his visit to the Marshal at the Etat-Major, accompanied by his son, as previously given in his written deposition already published. The witness stated that on arriving at the Etat-Major, he was favourably received, and remarked that the authority presiding there, was not entirely military, as he found in the apartments many persons belonging to the Office for Foreign Affairs, and even some of the Journalists mingled with the officers. On preparing to withdraw, he stated that he desired M. Delarue to acquaint the Marshal that he would return the following day to renew the conference, if it were not too late, that is to say, if the whole of the troops had not joined the people. The impression made by this sentence, continued M. Arago, convinced me at once that there was until that time no apprehension of any such result. I then explained myself more fully, and mentioned several quarters of the town, where, about twelve o'clock, I saw numerous groups of

soldiers fraternising with the armed citizens. M. Delarue thought that this circumstance might have some effect upon the Prince de Polignac, and after urging me to make him acquainted with it, I felt I could not hold a direct communication with any one of the Ministers, as I had pointed out their immediate dismissal, and M. Delarue then went to deliver my message to the Marshal, who communicated it to M. de Polignac. It was, however, far from producing the expected effect, for M. Delarue returned, and with an air of deep affliction, said; "We are lost. Our Prime Minister, not acquainted with the character of his countrymen, when they repeated to him your account that the soldiery were going over to the side of the people, he replied, well then, they must also fire upon the troops." (This produced an evident effect upon the accused, as well as upon the whole Court.) From this moment, I was convinced, that notwithstanding the martial law, the Marshal was merely a nominal Commandant, and I withdrew. I have here related all that passed; but there exists between the evidence I now give, and my written deposition, a difference which requires explanation. I understood that it was the Marshal who spoke to the Prince, and received his answer; but M. Dalarue has since informed me by a letter, that it was himself who spoke to the Prince and heard the words in reply which I have repeated.

The *President* informed the Court that M. Delarue was not in France, or he would have been called as a witness.

M. Persil—The witness has said that he found several Clerks of the Office of Foreign Affairs at the Etat Major? A. That was correct. Q. Will he state the names of these Clerks? A. M. de Flavigny.

M. Persil—Then I will ask M. de Polignac how it happened that the Clerks of his office were found with him at the Tuileries when he declared that he was no longer Minister, and no longer interfered in public affairs.

The *Prince de Polignac*—M. de Flavigny certainly did come to the Tuileries to receive my orders relative to the papers which were at the Hotel of the Ministry as he was the only clerk that I had left there, having told all the others that there attendance was necessary. This was the only time he came to the Tuileries.

The *President* to the witness—Did M. Flavigny remain

any length of time at the Tuileries? Were there not other persons with him from the same office? A. I only knew M. de Flavigny, but they pointed out to me another person as being the private Secretary of M. de Polignac. M. de Flavigny remained two hours.

The *Prince de Polignac*—Then I cannot tell what he was about.

M. de Martignac—I am not going to question the witness, I wish merely to submit an observation to the Court. Nothing can be more painful—nothing can be more severe than the accusation contained in the deposition you have just heard. An infliction we must all deplore oppressed the capital; the streets of Paris for three whole days ran with blood. The Prince de Polignac is labouring under an accusation of the most distressing character. Hitherto not a single witness has been able to state, from his own personal knowledge, a single fact which can connect the Prince de Polignac with the bloody scenes that have caused him as much affliction as any other human being; and now for the first time comes forward a witness to accuse him of uttering words indicative of inhuman cruelty, which it is impossible to contradict or explain, because the accuser himself did not hear them, but was told them by another person who is in a foreign country. I recommend this observation to the conscientious consideration of the Judges.

Lerdente, Concierge at the Tuileries, was called, but his evidence was wholly unimportant. The Court retired for a quarter of an hour on resuming—

The *President*, to M. Arrago. Is the letter of which you have spoken, addressed by M. Delarue to yourself? A. No; to M. Guise.

The *President* desired M. Guise to go and bring the letter.

M. Lemercier to M. Arrago—Did any other person hear the expression you have stated? A. I cannot say, probably my son, who was with me, might have heard them.

M. de Glandeve, Governor of the Tuileries, deposed that the Duke de Raguse took the command of the Palace on the Tuesday, and, thereupon, his authority was at an end, and that he had no personal knowledge of any of the facts relating to the impeachment.

The *President*—Suppose the Ministers had offered any resistance to the wishes of M. de Somonville and M. d'Ar-

gout, would you not have been of opinion that they should be arrested, and would you not have concurred in enforcing such a measure? A. I had no troops under my command, and yet if the Marshal had thought of any such measure, I should have assented, and done all in my power; and (turning towards the accused, added in under tone) I should have felt, I was doing my duty as a true Frenchman, and a faithful servant of my King. Q. Did the witness render any account to the King of what had passed under his observation? Had you been able to form any opinion whether the resolutions come to emanated from himself or were suggested by the Ministers? A. I saw the King on Friday, and was with him but a few minutes; our conversation was confined to the events of Paris.

M. Galle, Bronzist, Rue de Richelieu, repeated, nearly verbatim, his former written deposition.

M. de Martignac. After having recited to the Marshal all that had happened, and added that it was necessary to acquaint the King, did you not receive from the Marshal the following answer: "It will be useless, as M. de Polignac has already informed him?" A. This answer certainly was given me.

M. Wurtz, Bookseller, stated that on the 20th, he went with M. Hutteau, Mayor of the 10th Arrondissement, to the Duke of Ragusa, to obtain his authority to arm the National Guards: that the Duke answered that Paris was in a state of siege; and, as long as the people were not reduced to order, no concessions could be granted. Besides, the National Guard having been disbanded, if it were suffered to be re-embodied, ill-disposed persons might be so introduced into it, and the safety of the troops might be endangered. The Marshal added, "Before you are out of the Tuileries, you will hear the roaring of the cannon." Conducted back by two Aids-de-Camp, the witness and M. Hutteau strongly urged the bad consequences that might arise from not allowing the re-organization the National Guard. Struck by the force of their reasoning, one of the officers returned to the Marshal, and in a few minutes after M. Hutteau was recalled in to the Duke, who then told him that he had consulted the Ministers, who were of the same opinion with himself.

The *President*, addressing the Assembly, said, "The

Court will believe that I could not leave neglected to summon a witness so important as M. Hutteau; but he has not been found, and is, it is believed, travelling in Italy.

Lieut. Gen. Trometin—(On the name of this witness being called, a movement of curiosity was visible in the Chamber.) Having heard on Wednesday, the 28th, that the Duke de Raguse had been named Commander-in-Chief of Paris, I went to the Tuileries, and I found him deeply affected by the serious aspect of events, and which he was so much better able to appreciate, as I related to him all I had been myself a witness to in traversing the streets. "See," said he, "what a fatality weighs upon me; if I succeed, my countrymen will never forgive me for the rigorous measures that I am compelled to adopt, if I fail, they, for whom I sacrifice myself will pay me with ingratitude." While the Marshal spoke to me in the Salon de Service, I perceived Prince Polignac; I expressed my uneasiness to him at the tumults, but he strove to give me confidence, assuring me that this affair would not be more serious than that of the rue St. Denis, M. de Polignac added in conclusion, "A display of military force will be sufficient to effect a return to order."

M. Bayeux, Avocat-General a la Cour Royale.

This witness, whose written deposition we have already published, gave an exact repetition of it with little variation, the length of this deposition, which throws no new light on the proceedings, and the greater importance of some of the testimony which followed, induce us to refer the reader to his previous deposition. (See *Messenger* of 4th instant.)

M. Mercer, employed in the Droits Reunis.—This witness not having been heard in the previous examination, only made a deposition for general information, without taking the usual oath. On the 29th July, I went, in the morning, to Petit Montrouge, with some of my comrades. We saw a man on horseback, coming from the direction of Orleans, and, supposing he was the bearer of an express, we stopped and searched him: he was the bearer of a portfolio, fastened with a lock. I proposed his giving up the portfolio to the Provisional Government, but the persons present demanded that it should be opened, which was immediately done. We found a packet addressed to the Post-Master-

General, in which was enclosed a letter to the Minister of the Interior, by the Prefect of the Loiret, dated Tuesday, at midnight. The nature of its contents was nearly this:—"Agreeably to your orders, I have given the Swiss troops, garrisoned in this city, directions to set out immediately for Paris, and I can assure you, that in half an hour, these troops will be in march for the capital. I cannot dissemble with you, that on the 28th, we had serious troubles here, sufficient to require the display of a great military force. On the departure of the regiment, I shall remain with only 40 gendarmes, and I cannot answer for the maintainance of tranquility in consequence." The Prefect of the Loiret concluded the dispatch, by requesting to call to Orleans a regiment of Swiss. I afterwards sent this dispatch to the 12th arrondissement, and was informed that, on the following day, it was sent to the Provisional Government.

M. de Peyronnet rose, and addressed the Court—These facts are entirely unknown to me. Since the witness has retained the substance of the letter so completely, I beg he will state whether it appeared to be a report made spontaneously by the Prefect of the Loiret, or in answer to a despatch addressed to him by me? A. If my memory does not deceive me, it appeared to bear the character of an answer to an order previously received; and I believe I may add, that it began with these words—"According to the orders you have given me."

M. de Peyronnet.—It is, however, most certain that I never wrote to the Prefect of the Loiret, any thing that could have called for such an answer; and it will be easy to verify what I have advanced, for if such a correspondence existed, some traces of it must be found in the office of the Minister of the Interior; and, if followed by the fatality which so unfortunately for me, occurred to the documents upon the disturbances at Montauban, and those papers have also disappeared both from the Ministry and the Prefecture, the persons employed in the transmitting or receiving them may surely still be met with. If, by any means, it can be proved that I wrote to the Prefect of the Loiret to send up the Swiss regiment, I will submit to all the censure of the Court.—(This sentence delivered with a strong appearance of sincerity, produced a visible sensation in the Assembly.) I am the more warranted in speak-

ing with this confidence, as this is the first time I ever heard that there was a Swiss regiment at Orleans. Those who are acquainted with the routine of the War Office, must know that I who was Minister of the Interior, a Minister of only 70 days standing, could not be informed where the regiments were stationed. I repeat, I did not write, but it is possible that the Prefect of the Loiret, having become informed of the order given by the Minister of War, to send up the Swiss regiment, thought it right to acquaint the Minister of the Interior with it.

M. de Champagny was here called up again, and examined by the President.—Q. In point of fact, was this order given by the Minister of War? A. No order that the Swiss troops at Orleans should be sent to Paris, was given by the Minister at War; the only orders of this nature that were given, were those relative to the return of the troops from Luneville and St. Omer. It is probable that the order spoken of was given in direct course by the Major-General, either to the Commanding Officer of the Department, or, in his absence, to the Colonel of the regiment.

Here it was announced that M. de Guise had returned with the letter of M. Delarue, of which he had spoken in his deposition.

M. Guise handed to the Court a fragment of a letter, which he states he received from M. Delarue. It had neither signature or post mark. The witness explained this latter circumstance, by stating that he received it in a packet with other letters. The passage of this letter read by M. Guise, states that it was to M. Delarue himself, and not to any third person, that M. de Polignac said, "if the troops of the line have gone over to the people, they must fire on the troops of the line." And the letter further stated that if he (M. Delarue) were called on to make a deposition, he should do it in the same words made use of by M. Arago.

M. Komeirouski was called, and having looked at the letter stated it to be in the hand writing of M. Delarue.

M. de Martignac.—It is a general rule in criminal cases, that when only one witness affirms a circumstance which the accused denies, that circumstance cannot even be a question for the decision of the Judges. Should M. Delarue himself come forward, and say what you have heard,

the formal denial of the accused would be sufficient to counterbalance the effect of the testimony; but here independently of general principles, the Court has also to consider what reliance can be placed on a mere fragment of a letter unsigned, the end of which only is presented, and the handwriting of which is disputed. When the law requires that a witness should be called on to deliver his testimony in open Court, it is that the Judges may mark the expression of his features, and even the tone of his voice. It often happens that a witness thus exposed to examination, and liable to contradiction from the accused and the Counsel, has been induced to retract a part, or the whole, of his written deposition, though, also made in the presence of a Judge, and under the sanction of an oath; and it is in case of such paramount importance as the present, that the wish is shown to deprive us of these just advantages. I therefore repeat, that this fragment of a letter cannot be admitted as a basis upon which any conclusion can be founded.

The *President*.—The Court will decide upon the extent of credit due to this document.

M. Komierouski, with energy—I declare upon my honor that this letter is in the hand writing of M. Delarue.

Count de Remon—(Formerly attached to the Ministry of the Interior)—declared that he had seen in the margin of the Report from the Prefect of the Department of the Tarn and Garonne, respecting the disturbances at Montauban, a minute in the hand writing of M. de Peyronnet, in these terms—"Why have not the ringleaders of these disturbances been arrested in conformity with my orders?" A similar minute was also written on the margin of the Report of the Prefect of the Maine and Loire, on the occurrences at Angers, and it was in pursuance of these minutes, that the letters to these Prefects were written.

M. Lepelletier de Bois Raimond stated that he had learnt from the public Journals, the disturbance at Montauban arising out of the elections, and that a Chief-de-Bureau, of the Minister of the Interior, who told him that M. de Peyronnet had written a very severe letter on that subject, to the Prefect of Tarn, and Garonne.

M. Lajard, Member of the Institute, affirmed, that on Sunday, the 25th, at ten o'clock in the evening, being with several other persons, at the Hotel of M. de Peyronnet, he

saw M. Mangin, Prefect of Police, arrive there; and also saw them converse together for some time, in a recess formed by one of the windows.

The three last witnesses, called at the request of M. de Peyronnet, were heard merely for the information of the Court, and without making oath.

Count Lobau, Lieutenant-General, one of the five Deputies, who presented themselves on the 28th at the Tuileries.—Questioned as to his profession; the witness replied, *a soldier*—(a murmur of approbation in the galleries.)—This witness repeated the particulars already given by his colleagues, M. M. Lafitte and Casimir Perier, relative to their interview with the Marshal.

M. Horace Almain, Wine-Merchant, saw the Gendarmerie charge on the 27th, without warning, a crowd assembled in the Rue Neuvre du Luxembourg; one of these men had his ear cut off, witness also saw the troops fire repeatedly in Rue Caumartin.

M. Arago, jun. examined.—You were with your father on the 28th when he went to the Etat-Major of the Duke de Raguse; do you recollect to have heard M. Delarue say, that at the time he informed M. de Polignac that the troops of the Line were going over to the side of the people, the latter replied, "Well then fire on the troops of the line?" A. M. Delarue related the phrase, exactly as you have expressed it.

M. de Martignac.—The Court will allow me to dwell on a subject, the imputation of which weighs greviously on the heart of the accused, and, I hope it will not deem it wrong that I should remark, that there are not two witnesses on the point, but merely two echoes of an absent individual.

M. de Polignac.—I declare that I have no recollection whatever of this point; and I will *just* ask the Court *(un peu)* if it is on words in the air, or hearsays, more or less understood, more or less exactly reported, that they are to found the most serious accusations; if they were to be admitted, who would be safe; there is not an indvidual whom I have known, against whom I could not direct an accusation. I will go further, I would give him the choice of the crime of which I should accuse him.

M. le Marquis de Semonville, Grand Referendaire of the

Chamber of Peers, aged 70.—On the name of this witness being called, a feeling of attention and curiosity was manifested throughout the assembly. He came forward leaning on a staff, and walking with difficulty, owing to an attack of gout; in other respects, his age appeared to sit lightly on him; his voice was firm and sonorious, and his manner animated and energetic.—A chair was brought for him, but he only lent on the back of it, and commenced his evidence in the following terms:—The Court has been made aware by my written deposition, and still more by its knowledge of my occupations and connections with itself, that it was only from the *Moniteur* that I became acquainted with the Ordonnances. The Court knows the melancholy occupations in which I employed myself on Tuesday and Wednesday in order to collect together in the small number of our colleagues in Paris, which was not more than from 16 to 18.—On Wednesday evening, as I was walking with my neighbour, M. D'Argout, in the gardens of the Luxembourg, we talked over the disasters of the day, and deplored our inability to remedy them; we did not shut our eyes to the fact, that amidst the momentary calm which reigned in Paris, both parties were preparing for the attack and the defence, we anticipated disasters even more serious for the next day; we then resolved to meet at day break, to endeavour to avert the threatened evil, and to make our zeal compensate for the feebleness of our powers. M. d'Argout was punctual; it was a rendezvous of honor: before five o'clock he was with me. Being informed that the Ministers were assembled at the Etat-Major in the Tulieries, I entrusted the care of the establishment confided to me to three of those around me, and immediately started with M. d'Argout. It is my duty to say that, during my absence, which was for 17 hours, this establishment was entered by the armed populace, and that, thanks to the care of the persons whom I had left in charge of it, and to the good feeling of the people of Paris, not the slightest damage was done to any part of it; this is a fact which I feel it my duty to communicate here. The distance which my colleague and myself had to traverse, was not long, but it was difficult. On our arrival at the Etat-Major, we found the Marshal in evident despair, and we were received by him as deliverers. My first step was, to

ask him where the Ministers were; he replied that they were in an adjoining chamber, and I can even affirm that he told me they were assembled in Council, 'I asked to speak to M. de Polignac; the Marshal entered the room to call him, and a moment afterwards, M. de Polignac came out, and accosted me with perfect calmness, and with that *politesse*, which you so well knew him to possess.—(A laugh.)—I allowed myself to reply to him with a violence almost insulting. I should repent having done so, now that he is in misfortune, could it be supposed that I addressed myself to him personally, and not alone to the high authority with which he was invested. I urged warmly the revocation of the Ordonnances, and the dissolution of the Ministry. The high tone of my voice brought several General Officers and other Ministers into the room where we were; then the discussion, or, I may say, the dispute became general. The Officers were requested to retire, and M. Stainslas de Girardin was the only one who remained. M. de Glandeves came in and out occasionally. It would be impossible for me to give an exact account of what was then said; we were very warm, and interrupted each other constantly; every one followed the course of his own ideas. I could not even hear the replies of M. de Polignac; all I can say is, that he remained calm, and only sheltered himself behind the authority of the King; that is the only impression I retain of what passed at the time. The other Ministers did not appear to participate in this confidence, but they kept silence. At a later period at St. Cloud, I found several there of my opinion; but in the conference of which I am now speaking, they were afraid to show it, and appeared under the influance of a superior power. M. de Polignac begged to retire, to consider the subject; still, however, alleging the necessity of referring to the King. When M. de Polignac had left the room, and M. de d'Argout and myself remained alone with the Marshal, we endeavoured to take advantage of his emotion to induce him to put an end to the scenes of blood which were afflicting the capital, the Marshal always replied by referring to the rigorous severity of the orders which he received, and which had succeeded each other every minute all the morning. Twice while we remained with him, he was applied to, to authorise firing with canister shot *(mitraille)* in repulsing the dangerous at-

tacks which were being made, and twice we saw him a prey to a convulsive emotion of horror.—We endeavoured to take advantage of this disposition, and implored him to place the Ministers under arrest; our colleague who was with me offered to devote his sword to so noble a purpose; M. d'Argout then undertook to obtain an armistice, and the Marshal was to go to St. Cloud and offer his head as the pledge of the purity of his intentions. Already he was retiring to carry this resolution into effect, when the door of the Council room opened, and M. de Peyronnet came behind me and said, "What are you still in Paris?" From that moment our project was baffled, our only resource was to go to St. Cloud. The Marshal wrote a few pressing lines to the King, they were destitute of any of the formalities of etiquette, but the agitation in which I was at the time prevented my retaining any recollection of their purport. M. de Gerardin offered to be the bearer of this dispatch, but M. de Glandeves had taken the precaution to have a post-chaise in readiness, we threw ourselves into it, and it took the direction of St. Cloud. At this moment a circumstance occurred which I have never been able to understand exactly:—we were going with the rapidity of lightning through the grounds of the Tuileries, when we met in the principal avenue, a man, whom the postillion's horse nearly threw down, he turned to us, and pointing with one hand to the route leading to St. Cloud, and with the other, to the carriages which were following us, cried out, "Quick, quick." That man was M. de Peyronnet; this incident occupied our attention during our whole journey, and thence we concluded that we had had advocates even in the Council. At the moment of our arrival at St. Cloud, the simultaneous entrance of several carriages into the court, attracted a number of guards and officers of every description to the steps leading to the grand entrance; in the midst of this crowd, it was an easy matter for us to prevent M. de Polignac passing; in fact, we waited for him to get out of his carriage, both M. d'Argout and myself were grieved to exhibit ourselves before so many persons, as performing a part which we only valued from its utility, not its eclat. I, however, addressed M. de Polignac, and told him that I did not wish to assume to myself the honour of obtaining the revocation of the Ordonnances and the change

of the Ministry, that this honour might still belong to him that we therefore allowed him to proceed to the King, but charged him not to forget that every moment was precious, that we would go and wait for him in the apartments of the Duke of Luxembourg, but that we would not wait for him long, and that if our wishes and the wants of the country were not satisfied, we would return to Paris like the most humble individuals, without even speaking to the King, M. de Polignac made no reply, and passed on with his usual polite courtesy. M. d'Argout and myself entered the apartments of the Duke of Luxembourg; nearly all the inmates of the Chateau assembled about us in an instant, and we saw ourselves surrounded by Messrs. de Mortemart, de Duras, and a number of others whose names I have forgotten: these gentlemen were impatient to hear the details of what was passing at Paris. I had not even begun to speak to them, when an ursher of the closet came to beg me to go up to the King. I ascended the stair-case rapidly, and found M. de Polignac outside the exterior door of the King's closet: I expressed to him my surprise at being sent for so soon, before the Council could have had time to deliberate, or even assemble. "You know, Sir," he replied, "what duty you think of performing by coming here under existing circumstances; I have told the King you are here: you accuse me, it is for you to speak first." After these words he opened the door, and, having introduced me into the closet, closed it after me. I do not think I ought to repeat here the details of the conversation which I then had with the King; all that I can say is, that throughout the whole of that conversation, neither the name nor the intervention of any Minister was mentioned or alluded to. This is all I have to say respecting my communications with the Ministers on that day.

At the conclusion of this deposition, which was throughout listened to with intense interest, M. de Semonville sat down in a chair on which he had been leaning, and an usher brought him a glass of *eau sucree*.

The *President*.—It appears that M. de Semonville, both in his written deposition and in the evidence which he has just given, has thought it his duty to abstain from entering on the details of his conversation with the King: the Court perfectly understands the motives of delicacy which induc-

ed the Noble Peer to maintain this silence; but I must observe to him that his delicacy cannot be allowed to prevail entirely, in opposition to the oath which he has taken, not only to speak the truth, but the whole truth. Such a conversation, under such circumstances, could hardly have taken place without leaving its substance, if not its very words, engraven on the memory. The information he could give us would tend greatly to enlighten us on the situation of affairs: I ask him, therefore, whether he had occasion during his conversation with the King to remove some fatal errors with which the royal mind had recently been imbued; whether he was not obliged to remove a thick veil before he could give the truth a passage to the King? whether he was able to ascertain any particulars of his personal feelings? whether, in fact the King, without pronouncing the name of any Minister, appeared to be under the empire of any external influence whatever. The Court begs the Noble Peer to explain himself on these points.—(Marked expression of interest and curiosity in the assembly.)

M. de Semonville—If I rightly understand the question proposed to me by the President, I can reply to it in a manner calculated to satisfy the just anxiety of the Court, without derogating from those proper observances *(convenances,)* which the Court itself would be the first to call on me to respect.—(Profound silence.) I believe, and have always believed, that the resolution of the King, against which I had to contend on entering his closet, was personal, of long standing, deep and meditated on, that it was, in short, the result of a system both political and religious.—(Strong marks of adhesion in the assembly.) If I could have entertained any doubts on this subject, they would have been entirely removed by the painful interview which I had with the King. Every time I touched upon his system, I was repulsed with an immovable resolution. He would not allow his eyes to rest on the disorders of Paris, which he imagined exaggerated in my representations; he turned away his eyes from the storm which menaced his head and dynasty. I could only affect his resolutions through the medium of his heart. Having tried every other means, I ventured to represent him to himself as responsible for the fate which he might be preparing for Madame la Dauphine. "One hour, one minute's hesitation,"

said I, "may at this juncture compromise every thing. Think what might be the consequences, should the disturbances of Paris extend themselves to the places through which she has to pass. Would the authorities be sufficient for her protection?" I exerted myself to make him understand that it was necessary for him to do violence to his own feelings, in order to secure her from, perhaps, the only misfortune which she had not yet experienced in the course of her life of sorrows. Tears started from the King's eyes; his firmness vanished; his resolution changed; his head sunk on his breast, and he said, in a low tone and faltering voice, "I will tell my son to write, and I will assemble the Council." (This narrative, which was given by the witness with an affecting earnestness of manner, produced a strong sensation in the assembly. Messrs. Peyronnet, Chantelauze, and Guernon de Ranville, were moved almost to tears; M. de Polignac was more unsuccessful in suppressing his emotion.)

The *President*.—What motive induced you to withhold these details from the Committee of the Chamber of Peers?

M. de Semonville—I have before stated, and I will again add, that the names of the ex-Ministers was not in any manner alluded to in this conversation. I was entirely taken up with the present and with the future, which I considered near at hand. I did not think myself called on to trouble myself in any way with the past.

M. Persil—I wish the witness to explain the latter part of his written deposition relative to the possible refusal of a budget by the Chamber of Peers.

M. de Semonville—Whenever I have seen M. de Polignac, there were always two separate and distinct parts in our conversation. In the one, he spoke (and this frequently occurred) of what he proposed to do respecting the Chamber of Peers; of his intention to increase its political importance, by giving it a greater share in the Government, and a constitution of a more extended and elevated nature. These projects were always vaguely expressed, but I may add that I was always extremely distrustful of the system of the Ministry of the 8th of August. I have collected nothing respecting that system, but theories imported by M. de Polignac from England, which appeared very difficult to make applicable to our social system.

I never saw any plan drawn up by him on the subject. I must add that I never heard him at any time breathe the slightest hint of a wish to dispense with the concurrence of the Chamber of Deputies. He only appeared to contemplate a great extension of the functions of the Chamber of Peers. In our other conversations, M. de Polignac never failed to ask me what I thought would occur during the next Session; what course I thought the Chamber of Peers would pursue. I always replied that the Chamber of Peers would never quit the line of constitutional conduct; that nothing would make it deviate from it; and that the successive nominations which had been made fully proved the force of its resistance, and the nature of its opinions as a body. I repeated to him several times that if laws were proposed by an unpopular Administration, these laws would pass the Chamber if the Peers were convinced of their propriety and expediency. I told him also that the most popular Administration would never have a majority on a measure contrary to the conviction of the Chamber. M. de Polignac never spoke to me, either directly or indirectly, of the adoption of any *coup-d'etat;* on the contrary, he always made a point of endeavouring to inspire me with confidence on that subject, as he must have perceived my distrust, which was evident as far as the forms of society would allow me to show it externally. M. de Polignac asked me one day if the Chamber of Peers could be depended on; whether it could make up its mind to refuse a budget, in a case in which the safety of the Crown was dependent on it. I replied that if, arguing on impossibilities, an unconstitutional law were furtively and fraudulently introduced into a finance law, I had no doubt that the Chamber of Peers would reject the budget; I added, "If, as I may believe, or at least suspect, you are putting two questions in one, having answered the first, I will now reply to the second, if you imagine that the Chamber of Peers would grant you a man or a centime, without the concurrence of the Chamber of Deputies, do not deceive yourself; create a hundred and fifty Peers. It will be in vain; the Chamber will not step out of the circle of its functions, to enter a path in which it has no authority, and in which no one would obey its orders, because no one ought to obey them."

On Wednesday the 28th of July we were waiting the

determination of the Council, which was interrupted several times by the absence of the Dauphin: and the Prince de Polignac, feeling all the bitterness of our situation, became deeply affected. In the passion of his grief, he said to me "You are the cause of all this misery." I repelled with energy his inference, and called upon him for an explanation—"Have I not a long while ago turned your attention to the Chamber of Peers?" He, no doubt, regreted that he had not succeeded in inducing me to adopt a system from which he expected a great deal. I added that I was then inclined to give credit to reports that my personal safety had been in danger. Officers, who were attached to me, followed me wherever I went, to protect me, if attacked; but that others might have different intentions. In the height of our impatience, and the suffocating heat of the weather, we went frequently on to the Terrace of the Trocadero to get the fresh air, and I perceived that we were overheard.

I have repeated my conversation with the Prince de Polignac word for word, in order that it might be fully understood by the Court. I again declare that I never heard a single word from the Prince which had the slightest tendency towards a *coup d'etat*. I was deceived by events up to the last moment.

M. de Peyronnet—I have some short explanations to give; first, on the words that I addressed to the witness in the Tuileries, and on the gesture, with which I am said to have accompanied them; I confess that I have no recollection of the gesture which relates to the building I left behind me; if I used this action, it has not been faithfully interpreted. I will explain my thoughts; pointing to St. Cloud with one hand, I said, "Go quickly," and with the other I pointed to Paris, then the theatre of such fearful events. "Go," said I—make haste—time presses—neglect nothing to put an end to such dreadful calamities.—(Murmurs of assent and incredulity in different parts of the assembly.) Several persons know, that at this time, such were the painful sentiments of my heart. The second circumstance is relative to my arrival at St. Cloud, as also to that of M. de Polignac. I think that some errors have crept into the narrative of M. de Semonville. A very short time elapsed between our arrival, and the moment when M. de Semon-

ville was ushered into the king's presence. We had told the king what the Marshal desired us to tell him; the king heard nothing else from our lips. (The voice of M. de Peyronnet betrayed the depth of the emotion he had experienced during M. de Semonville's examination.

M. de Martignac—The result of the explanations which have just been given, is, that M. de Semonville was deceived as to the meaning of M. de Peyronnet's gesture, M. de Peyronnet wished to say to the witness—"Time presses —hurry on to St. Cloud." It does not result from it that he wished to make him understand that he ought to distrust M. de Polignac, whose carriage was following him. (Murmurs of incredulity in the assembly.)

M. de Polignac here rose and addressed the Court.—It is impossible for me not to give some explanation relative to the long deposition which you have just heard. Doubtless the talent engaged for the defence will, at the proper time, know how to reply to it, while extracting from it the truth; but, nevertheless, it is necessary that I should follow it on the instant by a few words. You cannot forget, Noble Peers, the indulgence to be accorded to a person under accusation; nor will it escape you that if, on the one hand, you hold the sword ready to strike the guilty, on the other, you also hold the shield destined to protect the innocent.—(Sensation.) I loudly declare that there never was a disagreement between my Colleagues and myself with regard to the events which have been made known to you; they will inform you that upon this point we were unanimous; that we all deplored the unfortunate events which took place in Paris, and that, to have prevented them, would have sacrificed our lives. Immediately after the conversation I had with M. de Semonville and the Noble Peer who accompanied him, immediately after I learned what had taken place, all that was done and still remained to be done, I perceived the abyss opening beneath my feet, and made known that I was ready to tender my resignation, if it was thought useful to the country. Fifteen days previously had I made the same offer. A sentiment of respect prevents me from stating the motives that then rendered my wish to withdraw of no effect. After my conversation with M. de Semonville and the Peer who accompanied him, we instantly set off for St Cloud, where, on

arriving, I entered the apartment of the King, and the repeal of the Ordonnances was determined by his Majesty. I then requested authority to employ M. de Semonville, before the Council even was assembled, to carry to the Marshal the orders of his Majesty consequent on that decision, so completely had it already been decided that I could no longer remain Minister. I must yet beg the indulgence of the Court for some moments longer. (Go on, go on.) The Commissary of the Chamber of Deputies yesterday said, that he would search for the truth, and nothing but the truth, as well in the interest of the accused as in that of the accusation. Coming from him, this language was not less conformable to his personal character, than to the very high public character in which he at present stands, as the Representative of the Chamber of Deputies demanding at your Bar—Justice, but without hatred—without animosity. Gentlemen, you will scrutinise with care, and weigh with exactitude, all that has been laid before you in these examinations, resolute to discover the truth. Consult your own consciences, and then declare whether I have not done all that was in my power to stop the effusion of blood, which I deplore in bitterness of heart. Noble Peers, I am confident it will be impossible for you not to acknowledge, that I neglected nothing to effect that object. If I did not receive the Deputies, it was because I was prevented from doing so by an irresistible influence—because I could add nothing to what I had said to the Duke de Raguse. Believe me, that though I never shrunk from danger, I dared not be guilty of disloyalty, and could not do otherwise than refer to the King, as soon as I became acquainted with their wishes; and as a proof that I duly appreciated their pre-eminent importance, I instantly hastened to his Majesty. From this, Noble Peers, you will be able to judge the injustice of the prejudices that at first were raised against me on this subject. I declare that, had the Charter not pointed out this Assembly as the High Tribunal before which I was to appear, I would not have refused to plead to the jurisdiction of any Court in France, confident that truth must ultimately have prevailed, even though my judges had been the people of Paris, who, during three days, proved themselves a population of soldiers. (At this point of the Prince's speech, which was delivered with deep feel-

ing, there was an evident emotion in the public galleries, where there were a great number of persons in the uniform of the National Guard, to whom the accused raised his eyes.) The violence of political divisions, the passions which spring from them, the excitation of the public mind, menace me in vain; my tranquility remains undisturbed, for truth must be triumphant. I call, then, on all present who form part of the armed population of Paris, to go forth and tell their brothers inn arms that I know my country well enough to be assured that, in France, no Judge will ever allow passion to find its way into the sanctuary of justice, and that Frenchmen acknowledge no enemies but in the field of battle. (This speech was delivered in a low tone of voice, and M. de Polignac was evidently deeply affected. At the conclusion of his speech, a very marked expression of approbation was perceptible throughout the Assembly. M. Martignac pressed his hand affectionately, and M. de Peyronnet wiped away the tears which started from his eyes.)

M. Mauguin was introduced.—

M. de Martignac—I am far from wishing that this witness should not be heard, if his evidence can in any manner enlighten your consciences, we should be the first to call for it. It is therefore, only as a point of law, that I call your attention to the fact of M. Mauguin having been one of the Members of the Committee of Impeachment. A decision of the Chamber of Deputies invested this Committee with powers similar to those conferred by the ordinary tribunals on the Juges d'Instruction. M. Mauguin has therefore, in this matter, performed the office of a Juge d'Instruction, and no Juge d'Instruction can also be a witness.

M. Mauguin—I was about to make an observation to the same effect myself.

The *President*—The Commissaries of the Chamber desired to have M. Mauguin examined; he is not cited as a witness, but only called before you by virtue of the discretionary power of the President. Do the accused oppose his being heard?

M. de Martignac—So far from opposing it we wish him to be heard.

M. Mauguin—I have in fact acted as Juge d'Instruction

in this affair: if, however, the Court order me to do so, I am ready to give evidence.

The Court decided that M. Mauguin should not be examined.

The *President*—The hearing of witnesses is terminated. To-morrow the Court will hear the Commissioners of the Chamber of Deputies, charged with supporting the accusation.

M. de Martignac—I shall take the liberty of observing to the Noble Court, that it would be impossible for me to reply, in the sitting of to-morrow, to the arguments in support of an accusation of which, up to this moment, nothing has occurred to explain to me the plan or system.

The *President*—The Court will form its decision on this point after having heard the accusation.

M. de Martignac—The Court will decide, but will not, I trust, refuse to acknowledge the justice of my observation.

(From all parts)—It is just; it is just.

The sitting was adjourned at ten minutes past four o'clock. The people assembled round the doors were rather more numerous than yesterday, but equally tranquil and silent.

We now proceed to report the Sitting of the Court on this day. It was nearly half-past ten before the accused entered; M. de Chantelauze appeared in a state of weakness and suffering; the Counsel followed then, and M. Sauzet, conspicuous by his height and figure, marched along the Chamber with the elevated mein and proud step of a conqueror in a triumph.

Immediately after the names of the Peers had been called over.

M. Sauzet, the Advocate of M. de Chantelauze, resumed his speech, which had already occupied two hours and a half of the sitting of yesterday, and was continued about the same time to-day.

[We regret exceedingly that we shall be obliged to omit this Speech and all the others, but that of Messrs. Beranger and Martignac, one for and the other against the Ministers. Even there two Speeches will greatly exceed our limits. We had intended to print the whole case, but reluctantly abandon it.]

The moment M. Sauzet ceased his address, the public galleries resounded with applause, which the President did not oppose.—The Advocates and the accused were the first

to testify their admiration. M. de Martignac and M. de Peyronnet pressed his hand with peculiar warmth, and M. de Chantelauze expressed his gratitude. M. Dupin, Sen. hastened from the gallery of the Deputies, and throwing himself into the arms of M. de Sauzet, publicly embraced him, his eyes being filled with tears. Several Peers of France also advanced to the eloquent Advocate, and addressed him in terms with which he was deeply affected. The whole assembly was excited, and the President declared the sitting suspended.

When the sitting was resumed, M. Cremieux, the Advocate for M. Guernon de Ranville, addressed the Court; at the conclusion of his speech, overcome by the violence of his feelings, he fainted away, and was carried out.

M. Berenger, one of the Commissioners of the Chamber of Deputies, then read a reply to the defence.

M. BERANGER'S REPLY FOR THE PROSECUTION.

"*Peers of France*,—By the division of the duties that the Commissioners of the Chamber of Deputies are called upon to fulfil before you, it has been reserved for me to discuss the general, political, and criminal questions which have arisen in the defence of the ex-Ministers. The care of producing, in all their force, the important and abundant judicial proofs furnished in aid of this prosecution, belongs to one of my colleagues; this duty will complete our task.

"Before a less enlightened Tribunal, in presence of Judges more susceptible of giving themselves up to first impressions, we should have reason to fear lest the brilliant eloquence and admirable talent displayed by the Advocates charged with the defence, might have distracted your minds from the true nature of the accusation. But, bearing freshly in your minds the recollections of the events so painful, so difficult to forget, could any exculpatory circumstances, however plausibly urged, allow us, even for a moment, to lose sight of the terrible reality of those crimes which the investigation we have made, has only dragged into clear day? Alas? spite of the efforts of a generous eloquence, spite of so many efforts to gloss over a criminality so evident, the accusation stands as it was; nothing is changed in the position of the late Ministers, with regard to their injured country.

With your permission, Noble Peers, we will take a rapid glance at those important matters which have been trus-

ted to for the defence; we shall then be able to judge of their value. The events of which France has been the theatre since 1814, are represented as having brought between the Monarch and the people, a division likely to produce the bitterest fruits; inquietude on both sides, mutual distrust, and opposition of interests; popular exactions, leading to extorted concessions, always ready to be resumed. Such has been, it is said, the relative position of the throne and the nation; such, in fact, were the causes that produced the Ministry of August 8.

This Ministry, it is added, had not at first the project of advising the Crown to resort to *coups-d'etat*; it was led to this by successive events. The Ordonnances of the 25th of July were the necessary accomplishment of conditions, to which this Ministry had neither voluntarily nor consciously submitted in entering the Cabinet; but which were imposed upon them by the very nature of things.

The Ordonnances presented under this aspect, and as the result of a species of fatality, the political defence of the late Ministers is reduced to two principal points. It has been attempted to establish, that the accusation was inadmissible, and void of foundation. Inadmissible, because for fail of the dynasty having destroyed the conditions of had neither legal cause, nor object nor interest; because the inviolability of the King not having been respected, the Ministers could not be submitted to any responsibility; because the Court of Peers having undergone a modification to the prejudice of the accused, by the suppression of those of its Members named under Charles X., and the immutable constitution of that Court being in question before the accusers themselves, it may be said that the cause has no judges; for the Chamber of Peers only having jurisdiction, it would be impossible to send it before any other Tribunal.

In this way, Noble Peers, it is that the defence pretends to destroy the accusation to its basis. An absence of responsibility, and consequently of criminality on the part of the Ministers, an absence of interest on the part of France to follow up the charges, and an absence of Judges. A decree of absolution, at least of incompetence, would be the result of this reasoning.

The defence has asserted that the accusation was ill founded, for the Ministers were led to believe that the

14th Article of the Charter authorised the Crown, under grave circumstances, to suspend the Laws and the Charter; that if this were an error, it had the sanction of numerous and imposing authorities. It was then to be considered whether such a crisis had not arrived; the opposition to the Ministry of August 8, was violent and systematic; it found no sympathy in the Chamber of Deputies; the new Elections returned the same men. There was not merely here an impossibility of proceeding, but a danger even in making concessions. All power was at an end; and the Constitutional Journals themselves proclaim that a permanent conspiracy had been established against the Government. In admitting, then the error of the Ministry as to the true meaning of the 14th Article of the Charter, every thing rendered it necessary for them to act as they have done; but error is not crime, and they cannot be punished for that. It is not here contended that there was crime, but it is represented as the fruit of error, as the consequence of the most imperious circumstances, and consequently as excusable.

The line of the defence naturally traces that of the reply: we shall adhere to it, in avoiding every digression. Can it be true, that this national accusation is divested of foundation? that a great nation which complains, has no motives for it? and that the imposing duty which we fulfil is without an object? What! because a wicked attempt might have been beneficial, is it to be left unpunished? Can public morality, admit this distinction? Can a tribunal at once severe, and just, entertain it without failing in its duty to that society from whom it derives its power? No: it is in the name of public morality, Noble Peers, that the country speaks: it is in its name that you will brand with criminality, those acts which have transpired before you. We should but offend you, if we were to examine how far these acts have favoured an order of things different from that which existed when they were committed.

Executors of your orders, instruments of your will, could they avoid the reproach of being accomplices, or escape the penalty attached to it? Is it under a Constitutional Government, that it is attempted to substitute passive obedience for the principle of responsibility?

The King would have it so, it will be said; to abandon him amidst these fatal occurrences was not to be thought of;

the honour of the Ministers was pledged against it. But if they who showed such a blind devotion, after having represented to him that he had violated his oaths, and shown him all the evils ready to fall upon the country; if they, Noble Peers, had returned to him their portfolios, what better step could they have taken? And if only *one* among them if he even, who, to the last moment appears to have combated the Ordonances of July, had had the courage to accomplish his duties by withdrawing—is it to be imagined, that breaking up of the Council, occasioned by his retreat, would not have turned aside the deadly stroke aimed at our institutions?

(Here M. de Peyronnet appeared struck with profound emotion.)

If we recur to an epoch already distant of our history, we shall see what a great Minister has said on a similar occurrence. "Into your hands I remit these seals, which I had accepted with the intention of making use of them for the benefit of your Majesty and the good of your subjects; I cannot keep them if they must be employed in a manner which I find to be impracticable with that desire."

What glory would the Ministers of Charles the Tenth have acquired, had they held the same noble language? What an undeniable proof of true fidelity would they then have given to their King! Instead of which, see the Royal sceptre crumble to dust in their hands—see the scowling shades of the numerous victims of their sad policy range their ghastly files, as if to pursue them even into the midst of this sanctuary!—see that aged Monarch, who had confided to them his authority, the happiness and the repose of his reign, obliged to fly and hide his dishonoured head amongst that people of Europe, who pardon the least easily kings who have violated their oaths, and where he has found the severest of his censurers. We owe to the pernicious counsels of these men, not merely the evils we have already experienced, but those we have yet to apprehend, for their very presence among us, even while rendering to us account of their deeds, occasions that feverish inquietude, of which, affecting as it does, all hearts, and all interests, it is yet impossible to define the termination.

If such a state of things has been their work, it also is their punishment; but such regrets, insupportable as they are to a humane mind; will it satisfy their country?

The duty of obedience, Noble Peers, can never justify them in your eyes; under a Constitutional Government this obedience has defined limits, that a Ministry can never pass without culpability. It is useful, it is salutary, that a great lesson should be given, that a severe example should be made, that, in times to come, no one should be tempted to obey, when obedience is contrary to the laws. Once allow impunity to such acts, and there is an end of all Constitutional Government; we must either surrender it up and live under a despotism the most absolute, or be daily exposed to the risk of new revolutions.

If Kings found themselves destitute of instruments to second their evil intentions, they must always do what is right; it rests with you then, Noble Peers, to establish, by a just judgment, the principle of responsibility so wisely introduced into our laws.

But, Noble Peers, are you held to be competent judges? You have heard it attempted to alarm your consciences as to the nature of your powers; your independence has even been brought into question. These doubts have been urged on your attention only in the view of touching your hearts; and special care has been taken not to lay too great stress upon these points—for what other judges are likely to be more favourable to the accused?—And we may, safely dispense with all further consideration on this head, seeing that they themselves have attached no real importance to it. With a similar aim some shade of doubt has been tried to be cast on the legitimacy of the powers which the Chamber of Deputies assumed to itself in the preparation of the present memorable process.

We, the Commissioners of that Chamber, which has honoured us with the mission we now fulfil—we are to be denied the priviledge of exercising the great powers of the State, within constitutional limits: if the Chamber have exceeded its powers, it is always amenable for it to the country, which has constituted it.

After all, I doubt whether any accused parties ever found more guarantees; I question whether great criminals were ever treated with more consideration: and on that point I would even appeal to themselves. Their process has been slow; it has been carried on without asperity;—we knew that we were acting for a nation which, while it demands signal justice at your hands, disclaims every feeling of vengeance.

This, Noble Peers, wholly disappears the political—let us say prejudicial—portion of the defence, having for its object to prove the inadmissility of the accusation. The other consideration which is bound up with the preceding, can find no more favour with you, and in effect you must have been much struck at the danger which would ensue to our institutions, were the doctrine to be received which has been advanced in the defence, relative to the responsibility of Ministers. According to this doctrine, this responsibility increases not in proportion to the magnitude of the evil that may have been incurred, but, on the contrary, diminishes the more that the Monarchy and the State is brought into danger! Thus, the more that Ministers are culpable, the less are they to be reflected on; the more that they are in the wrong, the less are they to be punished; and it is in sober seriousness these positions have been advanced.

The theory of ministerial responsibility is simple—*the Monarch can do no wrong*; like another Providence, he is supposed to be the source of all that is good, the dispenser of pardons and recompences; if he be accessible to the complaints and the expressed wants of his subjects, he can never be subject to their reproaches; no evil can be imputed to *him*, for it is his Ministers alone that are responsible for all that may be to blame in the conduct of his Government, and that resonsibility is at once the condition and the guarantee of stability.

Is it intended to attenuate the consequence of this responsibility? As soon as the complaints and reproaches changed their object, the Monarch became culpable; it is him that they are about to call to account, and cause to descend from the elevated station in which he was placed, to play the most humiliating part; but if he were compelled to justify himself, it is extremely doubtful if they would gain their end. At all events he lays down his dignity, and dissipates those illusions from the minds of the people, through which they had viewed his power; that respect which surrounded him, that almost religious awe with which they beheld him will vanish, and though they may still regard the man, they will no longer venerate the Monarch.

Yes, the Advocates for the defence were right, when they said that the responsibilty of Ministers was intimately connected with the inviolability of the Sovereign; one is an

essential consequence of the other. Only the counsel for the accused argue against the law which renders this principle sacred, when they petend to find an exception under circumstances involving the fall of the throne. An exception! and why? Because the most pernicious counsels have produced a catastrophe the most unforseen. If Charles had given way in time; if he had not allowed the crown to fall from his head, what would his situation be, relative to his Ministers? Would he not have a right to take them to account for the perils they had plunged him in? At all events, could he have successfully interposed himself between them and the justice of the nation? The dethroned monarch prefers no complaint, we shall be told. We wish to ask, can he? It may be supposed that, from the depths of his retreat, his bitter meditations on the recent events prevent him from thinking of their authors.

But after all, has this inviolability of the Prince been misunderstood? It might be inferred, from the strain of the defence, that Charles himself stood accused at your bar, rather than his counsellors: it is on them, then, the rightful vengeance of the laws ought alone to fall.

Has the inviolability of the prince been invaded by permitting him to leave the kingdom through the midst of a justly irritated population, which showed nothing but courtesies or forbearance? The good sense of the nation reserved all its anger for his guilty counsellors, and their firm determination to call these to a rigid reckoning saved the detroned monarch. Without that feeling, could he have quitted the soil of France in safety? And it is when the religious observation of this condition of our representative Government has been so favourable for the exiled King, when it has been the guarantee of his life and liberty, I might even say of his honour, it is now that the accused seek to make light of such a condition. Ah! Noble Peers, attached, as we may suppose them to be to their late Master, they ought to bless the operation of that prineiple to which he owes his safety.

But can they have any better success, now that his person is safe, in throwing upon him the charge of all the evils that have afflicted Paris and France, or find excuses for this blind obedience to his will? The accusation will now follow the accused in this new road thrown open for their

defence, notwithstanding that, by a sentiment which must be recognised as doing them honour, the ex-Ministers have avoided compromising the name of Charles X. and have rather permitted the nature of the commands laid on them to be guessed at, than declared what they really were; while the irresistible influence he exercised over them plainly appears.

Yes, Noble Peers, it afflicts us to proclaim what all France ought to know, every thing concurs to prove that the Ordonnances of July, and still more their sad results, but fulfilled the intentions of the late King. (Sensation.) Yet while we admit this fact, while we grant the part that he has taken in these events, and acknowledge the moral force that oppressed the minds of his Ministers, are they to be counted as less guilty?

The second part rests, as we have already said, on another chain of argument. The accused here allow themselves to be accountable for their acts; without conceding their rights to be considered as vanquished, and worthy of our interest and pity, they are content to take the attitude of accused parties, and they urge that the monarchy was in peril, and the 14th Article of the Charter presented the means of saving it: "if" say they, "we have overstrained the sense of this Article, we found opposing authorities ranged on our side, and an error ought not to be punished as a crime." Here, Noble Peers, we have all the pretensions of the Restoration recalled into existence, let us trust for the last time.

We do certainly avow that, during several late years particularly, there was a small number of men who urged the Government towards extreme courses, pretended that *coups d'etat* were authorised by the 14th Article of the Charter: but the more imprudent did not foresee all the mischief likely to proceed from its perverted application.

We may further remark, that the Government was itself unaware of the excessive power supposed to be invested in it by this Article; at all events, such an understanding of it was never officially or publicly avowed; for even after the coming into power of the Ministry of the 8th of August, the Journals devoted to absolutism, having counselled it to possess itself of the Constitutive power, the Government caused their own Journals to disclaim all right to hazard

coups d'etat, and denied all the imputations then laid to their charge; it professed to interpret the Charter in a sense totally different, and neglected putting forth an assurance that could calm the excited fears of the nation.

Can it be really true, that Louis XVIII., the author of the Charter, could have meant such an interpretation to Article 14th, as has been supposed? Our attention has been recalled to the origin of the Charter: it was no compact between parties; we have been assured it took its source in anterior Right Divine! it was merely granted *(octroye,)* at the good pleasure of the Crown. Alas, Noble Peers, the defence we have heard has, perhaps, without meaning it, in few words, explained the fundamental vice, the first cause which, sixteen years later, overturned a Monarchy founded on so weak and doubtful a basis.

Yes, it was one of the perpetually-recurring errors of the men who surrounded the throne, that the Charter of Louis the XVIII. was not a contract; and consequently, that the same hand which had given, could at pleasure modify, suspend, or annul it. It was the knowledge that this error was prevalent, which made the nation distrustful of its Government, and which haunted us with an incessant dread, lest the guarantees should one day be withdrawn.

But let us not do such an injury to the memory of the legislator-King, as to imagine that he regarded his Charter as any thing but a veritable compact between him and the nation. Would not that be to outrage his memory, after reading in its preamble the memorable words:—"Sure of our intentions, strong in our conscience, we engage ourselves, in face of the assembly now here present, to be faithful to this Constitutional Charter, reservant to ourselves to swear its observance, with a new solemnity, before the altars of Him who weighs in the same balance, both kings and nations."

And what was that assembly before which Louis XVIII. contracted such an engagement? It was that which represented the nation, which accepted for it, and swore in its name obedience and fidelity to that Charter, which the Monarch himself considered as *the wish of his subjects, and the expression of a real want*. In effect, the Address of the Chamber of Peers and of the Deputies, which immediately

followed this declaration, and added new force to the contract so solemnly entered into, to which an oath also added its solemn pledge of perpetuity.

Hardly were ten months elapsed, than the throne was threatened and France invaded—less by force than the power of a great name and its glorious recollections; Louis XVIII. hastened to explain to the nation in arms what was the character and value of that contract, whose origin was then, as now, a subject of contestation. If he then said that the Charter was his own work, the result of his experience, he took care to add, that "It is the common good I have wished to give to the interests and opinions which have so long divided France." Then in what manner could the Charter be a bond between interests and opinions, if it were not a contract for all?

On every occasion that presented itself, Louis XVIII. disclaimed the strange doctrines that some attribute to him; and Charles X., in ascending the throne, swore at the altar to observe, without restriction, the fundamental compact which defined the duties he had to perform to the country.

It might be imagined that some latent principle might be inherent in a Charter, conferring the power to effect needful ameliorations, to suspend, on necessity, the regular operation of the laws, or, in an extreme case, to create a Dictatorship: the best Constitutions are those endowed with such extensive and salutary powers—but such changes necessarily infer the united consent of all the powers of the State together, and they certainly ought in all cases to pass through those regular forms which ensure to the country that its institutions shall not be shaken by the sudden caprice of power on the one hand, or by that of parties on the other.

But to admit that one of the three powers might receive from an obscure article so extraordinary a faculty; to admit that it can alone judge of the opportunity, of the necessity, of the use, that it should make of it; to admit, also, that this should be precisely *that one* of the three powers charged with the executive authority; consequently, that most interested to extend it, which should be alone and exclusively invested with the right of appreciating this opportunity, and of seizing itself the dictatorship. This, my Lords, would be to admit an absurdity: every Constitution which

contained such a provision would be a monument of deception; it would bear within itself the principle of its own destruction: events have proved this; the proof is here—a grand lesson, which the Ministers of Charles the Tenth are to teach the universe.

You know full well—even the defence has told you—that France, since the Revolution, has changed her character, generation, manners, interests—all have been renewed; the manliest part, the most numerous portion of the nation, only knew by history the family of their former kings; the remembrances connected with them were already old. So many events, so many glorious events had enriched our new annals, that we felt but little sympathy for any thing that dated beyond them. What, then, were the Bourbons to us? What appeal did they make to our hearts? Above all, what were they to the unfavourable circumstances in which they presented themselves? It was foreigners, (you see I abound in the system of defence,) it was foreigners who brought them back to us; they marched in their suite; and nations seldom forgive sovereigns who come amongst them with such support. The *cortege* which accompanied them, was, besides, little calculated to inspire confidence; how hope for any wisdom on the part of so many irritated men who returned with them.

Louis XVIII. had then, and could have, but a single claim, in the eyes of Frenchmen; this claim was to dispel prejudice, and calm apprehension; he promised—and gave—the Charter; and, confiding in the guarantees which such a compact promised, the nation hastened to adhere to it. Had the nation suspected the intention which he is now supposed to have had, would there have been so much submission and obedience? That France, whom foreign nations, with all their armies, respected, dreaded, even in her defeat, would she willingly have submitted to a conduct like this?

Let us, my Lords, for the honour of Louis XVIII., repel an imputation, the direst which can afflict his memory.

But, it will be asked, what sense will you give to Article 14 of the Charter. The sense is clear—it requires no commentary. Article 14, in giving the monarch the right of making such regulations and Ordonnances as were necessary for the execution of the laws and the safety of the State,

limits itself to tracing out, by that, one of *the forms of the King's Government*; the essence of which is to confide to the Monarch the power of making regulations and ordonnances, and at the same time it imposes on him the duty of watching over the safety of the State.

Who is not aware that an Ordonnance or regulation can only be valid as long as it is conformable to the laws of the realm? Who is not aware that such provisions would have no power if contrary to them? Who is unacquainted with the numerous decrees which confirm the principles of our Constitution on this point?

Twice did Louis XVIII. have recourse to these heroic means.

Napolean had landed on the coast of Provence, towns opened their gates to him, the army ranged itself beneath his colours.—Swift as his fame Napoleon flew towards the capital. What did the King do? Did he pronounce the dissolution of the Chambers? Far from that; the members were scattered,—he hastened to convoke them.

Did he suspend the laws? No. He used the power they gave him; and if he invoked Article 14 of the Charter, it was to act within the circle it marked out. In truth, instead of considering Bonaparte as a foreign sovereign, bringing with him war, he declared him a traitor and a rebel; he ordered him to be arrested and brought before a Council of War, and invoked upon his head the application of the punishment *prescribed by the law*. He desired, in fine, that those who incite to revolt should also be punished; but how? conformably to Art. 102 of the Penal Code.

In fine, instead of suspending the Charter, listen to the character of order and union, which marks the Ordonnance of the 9th of March (Art. 9.)—"We wish that the Constitutional Charter should be the rallying point, and the sign of alliance of all Frenchmen; we shall consider such persons only well disposed to us, as pay deference to this injunction."

This the way in which Louis XVIII. understood Art. 14. We ask, is there any thing there which resembles the measures of July. It was on his return from Ghent, that for the second time, the monarch thought himself compelled to have recourse to measures, which the situation of affairs might authorise.

He came amongst us, brought back again by foreigners. His Government had committed errors; he nobly avowed it, but he believed that he had a two-fold duty to perform —that of soothing the public mind by the increase of liberty, and that of punishing rebellion. He accomplished the first of these duties; by his Ordonnance of the 13th July, 1815. New colleges were assembled—electors were added to them, but it was not in virtue of article 14 of the Charter, which is not even once cited in the Ordonnance; it was conformably to the rules of the empire.

Lewis, on re-entering France, punished what, by his Ordonnance of the 24th of July, he calls rebellion. Two distinctions were made: one concerned the illustrious Generals attached to the fortune of Bonaparte. They were arraigned before a Court Martial, and punished conformbly to the law; the other fell on men, whose influence the Government feared. Was it in virtue of Article 14 that they were condemned? No, Gentlemen, the Chambers pronounced upon their fate.

Thus before, as after the invasion of Bonaparte, subsequent to the return of the King in the greatest crisis which could threaten the Crown, Louis XVIII. constantly gave to Art. 14 of the Charter the true character which belongs to it.

In 1814, a Project of Law on the responsibility of Ministers was moved and adopted by the Elective Chamber: "A Minister becomes guilty of treason, when, by acts consigned by him, he endeavours to overthrow *the constitutional power of either of the three branches of the legislative power*; and when he invades the public rights of Frenchmen, consecrated and defined by the Constitutional Charter."

Now, Gentlemen, what Minister could have made use of Article 14, in the way that it is attempted to establish, without invading the constitutional power of one of the branches of the Legislature, and the rights of Frenchmen?

In 1816 a Project of Law, on the same subject, was proposed to the Chamber of Peers by one of its most illustrious Members; one of those whose doctrines make them dearest to the monarchy. The article adopted by the Elective Chamber, two years before, is there reproduced, word for word.—(Sitting of December 10, 1816.)

In fine, Gentlemen, in 1817, the Crown, presenting itself so desirable a project, appropriates to itself the article which had already taken birth in the two Chambers; it does not hesitate as has already been done, to pronounce the Minister who invades the constitutional power of either of the three branches of the legislature, guilty of treason.—(Sitting of February 5, 1817.)

Behold, Gentlemen, how the Chambers—how Louis XVIII. understood Article 14 of the Charter.

But, it said, there is a time when a dictatorship becomes a necessity; and, if the Monarch be denied the use of it, the State may run great risk.

Yes, Gentlemen, there unhappily are times when the majesty of the laws must be veiled; times of mourning, which every freeman deplores, where violent measures are necessary for the salvation of the State.

But who can be the judge of the necessity of this power? Is it the first who seizes it? No; that would be an usurpation.—At Rome it was the Senate that conferred it; in our modern times the concurrence of the three powers is necessary: with our English neighbours, it is the Parliament which suspends the *habeas corpus*, and which confers unlimited power on Government; but, in this case, the liberty of the press is entire; it must warn—enlighten—temper all that is absolute and alarming to the liberty of citizens, in the power conferred on Ministers.

The British Charter has no Article 14. I do not inquire why. I will not involve myself in the comparison of a Charter which owes its origin to democratic influence, with a Charter which monarchical power alone created; the distinction is more subtle than true, for every Charter is the result of a necessity; from what quarter soever it come, it must supply this necessity, or perish. Such has been the French Charter—with Article 14, such as you have comprehended and interpreted it.

But Louis XVIII. comprehended it better than you; he had also difficulties to encounter after the Hundred Days. Foreign nations wearied us with melancholy favours. France saw her treasury exhausted, her strong places abandoned, or occupied by others; her arsenals despoiled; her museums, which treaties had enriched, despoiled by pillage; and to these causes, mortifying to national pride, was ad-

ded the discontent excited by an enormous war-tax. Every mind was irritated, and you know what power was invoked; yet, in these perilous moments, did Louis seek from Article 14 of the Charter a dictatorial power?

No, my Lords, following the example of British Ministers, his government addressed itself to the Chambers, and obtained laws upon seditious placards and their vendors, measures of *surveillance;* in fine, the suspension of individual liberty; such were the expedients granted; such was the origin of the dictatorship with which it was invested; and it was confided on condition of rendering a faithful account to the Chambers.

After this, Gentlemen, how will it be possible to justify that which the Ministers of Charles X., have usurped?

They have spoken of necessity. Alas! how painful a task it is to follow them in this new discussion. Necessity? But who will understand that necessity, after the eloquent picture which the defence itself has made of the means which the Opposition intended to employ to resist an attempt at *coups d'etat.*

Is it sword in hand—is it by revolt that the opposition announced its resolution to defend our liberties? No: it was by the Laws! You wish to impose on us arbitrary tribute—we will have recourse to the Magistrates, to be released from them; you wish to establish by Ordonnance an unconstitutional system of Election—we will not go to the hustings; you wish, illegally, to deprive us of the liberty of publishing our thoughts—we will reclaim from the Tribunals the use of this liberty.

And where is the people from whom more perfect submission to the Laws could be expected? You prepare to violate them all, and you find the people guilty for announcing a firm resolution to observe them! Strange conspiracy, which has for its object the preservation, the stability, and the maintainance of all existing institutions.

M. Beranger then proceeded to justify the opposition shown by the Chamber of Deputies, in 1829, towards the measures of the then Ministry, which was followed by its retreat. The next Administration, that of August 8, did not possess the confidence of the country; and the Chamber was dissolved for having acquainted the Monarch, as was their undoubted right, with the general feeling. The

contest in fine resolved into a question of Parliamentary majorities, which two of the Ministers of that day, whose testimony you have heard, perfectly comprehended, and which is still better understood by our neigbours on an opposite coast.

Had the new Chamber been allowed to meet the Ministers of the King, I cannot venture to prophecy what would have been the line of conduct to the latter; but this I may venture to affirm, that each Deputy was fully impressed with the gravity of existing circumstances, and had been recommended by their respective Constituents to observe the utmost moderation, and were authorised to try every means of conciliation, consistent with the honour of the country, rather than expose it to a rupture.

Such was the real state of the kingdom; and it is useless for me to reply to the accusation raised against it, that it formed a conspiracy. The late Counsellors of the Crown know full well that during the last eight or nine years, and the two and twenty conspiracies, true, or invented, or provoked, with which they have occupied your attention, we have not a single attempt to carry any into execution to deplore. And if they really believed in a universal conspiracy, and which could have arisen only out of the alarms they themselves had generally created, they alone were guilty; it is upon them, and their Government, that the odium ought to be thrown.

Yes, a victory has been gained; but would it have been equally glorious, equally pure, had the attack been previously planned, the arms prepared, and the phalanxes mustered? Where were the leaders at the onset of the battle? Who gave the rallying cry? Was there any other than the name of that great Right which had been attempted to be destroyed? *La Charte!* this was the only word; and which by a spontaneous impulse, excited the courage of every citizen, and became the sure harbinger of victory. This is the only victory we acknowledge. To admit the idea of premeditation, for a single moment, would bring dishonor on our cause.

We have been told that there can be no victory without war, and consequently we say the accused are the vanquished! Would you treat us otherwise than as prisoners of war? Permit us then, in our turn, to enquire if the for-

tune of the fight had been reversed, and you had been victors, what would have been the fate reserved for us? Have you forgot your intended Martial Law, your five and forty warrants of arrest of men held in the highest esteem by their fellow-citizens? It is with regret that we repeat this severe reproach, but it is yourselves who have provoked it.

We confess we have been totally unable to comprehend how the Council for the defence could venture to discuss the fatal Ordonnances, and represent them as not being a violation of our Constitution. We have not the courage to follow them in this examination. Their direct opposition to the Constitution has been sufficiently proved, and condemned by the revolution, and we should forget our duty if we ventured to argue further in support of their criminality.

This important process now verges towards its close. It remains for you, Noble Peers, to come to a decision absolutely and irrevocably, but with independence and dignity. It is not merely men you are called upon to judge, but acts and doctrines. You are about to brand perjury with the stigma of your reprobation: for your judgment will reach more elevated personages than the guilty accused. It will be a lesson to Kings;—it will strike terror into every man, however exalted the rank in which he happens to be placed, who may be tempted to violate the rights of the people, or fail in the observance of their oaths. It will establish for ever the principle of the responsibility of Ministers; without which, as we have, alas! but too well been taught, there is nothing but disorder and anarchy. By a severe example you will secure the repose of nations, and this example will not be without its effect in strengthening the new Throne of France.

MARTIGNAC'S DEFENCE OF PRINCE POLIGNAC.

§ I.

Is M. de Polignac guilty of Treason for having abused his power as Minister in order to falsify the Elections, and to deprive the Citizens of the free exercise of their civil rights?

If I had to examine, Noble Peers, generally, and in the interest of all the accused, the question I have just laid down, I would ask if it were possible to mark with certain-

ty the line up to which the influence of Government over the Elections remained aright, and beyond which it became an abuse and a crime ?—Passing, afterwards, from the theory to the practice of this rule laid down for the application given, I would easily demonstrate that on all occasions, under the reign of all parties, the line prescribed by principle has been constantly passed in fact ; and I would substantiate this demonstration by the records of all times, without even stopping at those of the Restoration.

Threats, promises, dismissions from service, have been employed by others than the accused Ministers, and the parties who have complained of them when they were opposed to their interest, have not shrunk from using them when they could, in their turn, do so with advantage.

I only treat of this charge as far as regards M. de Polignac—so many blows have fallen on him—so much care has been taken to accumulate on his head an enormous weight of accusation, that he has a right to insist that all my exertions should be reserved for him alone. Indeed, I owe them to him all ; may they not betray the zeal with which I devote myself to the mission I have received from him. None of the acts which have been brought forward to prove that the Elections have been falsified belong to M. de Polignac. As Minister for Foreign Affairs he had no circulars to write—as Minister of War *par interim* he wrote one which has called forth no coment. The best way to justify it is to read it:

The King, Mounsieur le ——, expects from you, on this occasion, the same proofs of attachment to his service and his person, which you have given him, on many similar occasions. You have, several times, already, made the soldiers called to take part in the elections, acquainted with the nature and extent of the duties, which belong to their functions ; and, how incompatible with these functions, would be any conduct which might embarrass the system which his Majesty has deemed most conformable to the circumstances and present situation of the Kingdom ! There is not one of them who ought to understand that if they are free in their suffrages, they have, also, obligations, inseparable from their position ; that they cannot, at the same time serve the King's Government and the Opposition ; and, that loyalty, as well as duty, requires that they should make an

option between one and the other. You will now have to support the same doctrines, by your instructions, and example, and to call to your aid, to enforce them, the full force of your own conviction, and all those legitimate means, which the confidence of his Majesty has placed at your disposal. The views which direct the King's Government are known, and may be loudly declared. They have for their sole object, the preservation of the rights of the throne, and the stability of those institutions of which it is the fundamental basis; they are, henceforward, a certain rule for the conduct of all who loyally desire the maintainance of the Monarchy, and public liberty.

This is what M. de Polignac wrote to his subalterns: to me, it seems difficult to find matter of accusation in it. As a private individual, he sent a letter into his department, to solicit the suffrage of his friends in favour of a candidate who interested him. In that he has done no more than use a power which belongs to every one of us; and to exonerate himself in a peremptory manner, it would be, perhaps, sufficient for him to compare his letters with those which other electors have received more recently. In support of this point of accusation, will the proclamation, in which the King's name and person are introduced, be brought forward? I would frankly answer, for I have not promised to approve what I blame, that this interposition, was in my opinion, highly unbecoming: that, in our form of Government, the King ought not to be allowed to take a personal step; that, with the well-founded apprehensions, which the Ministry ought to have had, of seeing the Electoral Colleges again return the majority rejected by the Crown, it was impolitic and dangerous to compromise the King's person in an attempt at least uncertain. I say this because I believe it to be true; but I add, because it is equally true, that this attempt has been tried more than once; and that, if it has been a subject of comment, it has never yet been imagined to make it matter for accusation; and that it is impossible to find there *an abuse of power which may have deprived citizens of their civil rights*, nor, consequently, any element of the crime of treason towards King or country. The first point of accusation is, then, entirely void of foundation, particularly as regards M. de Polignac. Let us now pass to the second: it is there that

difficulties await us, serious and heavy difficulties, which I arrive at with apprehension, because conscience and reason tell me that I touch upon the cause of a great disaster, and that there I meet with real responsibility, positive acts, and terrible consequences.

§ II.

Are the accused, and particularly the Prince de Polignac, guilty of the crime of Treason for having arbitrarily and by violence altered the Institutions of the Kingdom?

I will not attempt, Noble Peers, to conceal my sense of the gravity of this count in the Act of Impeachment. If I owe my best endeavours to the unhappy accused who has required them, it is also my duty to observe the strictest truth before the Judges I am addressing. Neither of these duties will I betray. . . . .

The Ordonnances of the 25th of July contain various provisions.

The first declares the dissolution of the Chamber of Deputies. This Chamber was but just elected, and had not yet assembled. This circumstance has been represented as an abuse of power—a violation of the Charter. To dissolve the Chamber before it had performed a single act, before it could have made known the spirit with which it was animated, before even it had been regularly formed, has been represented as an annihilation of the elective privileges, and as a measure of the Crown unauthorised by any provision in the Charter.

I cannot deny that there is some appearance of foundation for this distinction; yet I think it is far from substantive. I will not stop to inquire whether the delivery of the usual Circular Letters to the Members was sufficient to show that the Chamber was existing and acknowledged; it is the soundness of the argument itself that I contend against, and which appears to me inadmissible.

The right of dissolving the Chamber of Deputies was vested in the King by Article 50 of the Charter. It was no where stipulated that the Chamber should be previously convoked: the only condition imposed was that a new Chamber should be called within three months.

The Ministers were fully acquainted with the sentiments of the majority of the newly elected Deputies, since it was identically the same as that previously dissolved; and they

might be thence led to conceive that the Crown was warranted in immediately deciding upon a second dissolution. It will be vain to seek in the Charter for any clause that this measure violated; I need not add that an accusation so serious ought to be supported by some actual clause, and not by argument or inference. If, then, the reproach of having violated the Charter by the Ordonnances of the 25th of July rested upon this alone, it would be a mere chimera; my duty would have been at once pronounced.

Unhappily, there are accusations of a graver character, and the acts that followed cannot be so easily defended.

Our Electoral System was founded on distinct laws. By an Ordonnance, these laws were set aside, and replaced by a different system.

The Press was regulated by formal enactments of the Legislature. These regulations were also destroyed by an Ordonnance, and arbitrary restrictions were provisionally substituted.

Such are the acts denounced by you as crimes, and they were incontestibly violations of the laws of the kingdom; they amount also to a formal infraction of two Articles of the Charter. But in order to ascertain whether they constitute the crime denounced, it is not merely necessary to look at the two Articles of the Charter, but to examine thoroughly the whole of the Constitution.

Article 8 granted to all Frenchmen the right of publishing their opinions, so that they conformed to the laws enacted, made to repress the abuse of this liberty.

Any Ordonnance, though merely temporary, which attempted to regulate that right, which could only be modified by a law, is an infringement of Article 8.

Article 35 declares that the Deputies shall be elected by Electoral Colleges, the organization of which shall be settled by laws; and consequently to attempt to make a different organization by means of an Ordonnance, is an infringement of this Article of the Charter.

You will perceive, Noble Lords, that I disguise none of the gravity which this branch of the Impeachment involves.

If, then, the accused are unable to produce from the Charter itself provisions of a different nature, and from which they have derived the right by which they have acted; unless they can repel, in all these cases, every idea of a crim-

inal intention, without which our laws acknowledge no crime to exist, it must be admitted that this part of the accusation rests upon solid grounds, and we must proceed to examine whether it amounts to the crime of treason, as intended by the Charter.

But *have* the accused, my Lords, no legal, or at least no sufficient, defence for their conduct? Hear, Noble Peers! and decide!

"The first duty of a Government, whatever may be its nature, is to watch over its own preservation, and the protection and defence of the society over which it has been called to preside. All publicists acknowledge that, whatever may be the interior organization of a state, there ought always to be in reserve an extraordinary power to be exercised as a remedy in violent cases, threatning its existence, and they all agree that there should be some paramount authority, which, slumbering and inactive while society remains in its natural state, should be ready to awake and spring forth to save, should a terrible moment arrive when safety depends alone upon its exertion.

"This Power, they add, 'we found in Article 14 of the Charter.' The general but positive terms in which this Article is couched, reserve even a Dictatorship in case the safety of the State should require it; and should any doubt remain as to its sense and meaning, it would vanish on referring to the origin of the Charter, the spirit in which it was drawn up, by the interpretation given to it, and by the use that has been made of it.—'Let us first,' say they 'consider the words of the Article.'

"The King is the supreme chief of the State, he commands the land and sea forces, he declares war and makes treaties of peace, of alliance and commerce, appoints to all offices of public administration, and makes the rules and Ordonnance necessary *for the due execution of the Laws and for the safety of the State.*

"This last part of the Article, manifestly contains two different provisions, involving two different powers or authorities.

"In the ordinary and legal state for which the Charter was made, the King issues such Ordonnances as are necessary for the due execution of the Laws. In this, his constitutional functions consist. The King, as founder of the

State, calls to partake with him in his power of creating Laws two great bodies politic, the one hereditary and emanating from himself, the other temporary and nominated by the people; he reserves to himself alone, without restriction and without partition, the power of carrying the laws into execution, and consequently he issues the necessary Ordonnances.

"But this Article adds—*and for the safety of the State.* This is a provision of a totally different order, a distinct regulation, the sense, of which, appears to us, cannot be misunderstood.

"Were these Ordonnances, then the sole cause and object of which was to be *the safety of the State*, were they to be subordinate to the Laws, or might they be issued in a spirit beyond the Laws? This is the whole question, and this question is solved by the approximation of terms.

"The Charter declares that the King isues Ordonnances necessary for the execution of the Laws, and immediately after this absolute declaration, it goes on to add, *and for the safety of the State.* This power annexed to the former, is evidently of a totally different nature; but if, as in the preceding case, the Royal authority was in this instance to be subordinate to the Laws, then was it superfluous as every thing had been comprised in the foregoing terms, *for the execution of the Laws.* The power for acting *for the safety of the State*, added to that of providing *for the execution of the Laws*, implies the faculty of going beyond the Laws, and in fact, involves a Dictatorship.

"'If,' say the accused, 'you pass from the terms of the article to seek for its spirit and meaning, and with this view, consider all that preceded, accompanied, and followed its preparation, all doubts will disappear from your minds.'

"The Charter of 1814 was not the result of a formal contract between France and the restored Dynasty, it was not a condition imposed by France, it was a voluntary act of Royal Authority.

"'From these causes,' said Louis XVIII. after recapitulating the prerogatives of the Crown, and the wants and wishes of the people, 'from these causes we have voluntarily, and from the free exercise of our Royal Authority, granted, and do grant, and made concession and gift (Octroi) to our subjects of the following Constitutional Charter.'

"It was thus that the Charter was given, and thus was it received in the name of France by the great powers of the State. No one ever thought of contesting the pre-existent right by virtue of which this concession was made, and eight years afterwards, in 1822, when perfect peace and order reigned, a positive law which you have lately modified, denounced heavy penalties upon all attempts against the Rights the King derived from his birth, or those by virtue of which he had granted the Charter.

"This origin of our Constitution, say the accused, the declaration that preceded it, and in which we find it recorded that the first duty of a Sovereign towards his people is to preserve for their interests the prerogatives of the Crown, announces in advance, and prepares the mind for Article 14, and at the same time clearly explains its meaning and intention.

"Have we now occasion to seek how others than ourselves have understood it, and to fix upon grave and imposing authorities the wide and direct interpretation we have given it? This task would be least difficult of all; and, in fact the accused refer to the most respectable names, those of men most known for their high capacity, and for the liberality of their constitutional opinions, they recall their words, the principles they have developed on this subject, and every where find the interpretation, which they had themselves given to the article, of which we are endeavouring to discover the real meaning.

"In fine, say they, after numerous quotations (which you will approve my not reproducing here, unless their reality and their authority should be disputed,) the most positive, the most peremptory interpretation, beyond all doubt, is that which has been given by the authors of the new Charter. Nothing has been changed in the attributes of the Royal authority, such as they were defined by Article 14 of the old Charter; and if, as our accusers wish, the terms of that article ought to be understood in this sense, that the Royal power, acting for *the safety of the State*, could neither arrest nor suspend the execution of the laws, the text ought to be strictly maintained. This is what has not been done in the new Charter. The words *and for the safety of the State* have been suppressed; and to make Ordonnances necessary for the execution of the laws, these formal and pos-

itive words have been added—*without ever being able either to suspend the laws themselves, or to dispense with their execution.*

"Let these two texts be compared together, and let it be said if they present the same sense, naturally, to the mind; let the origin of the two articles be considered, the power from which they emanated, the circumstances in which they were prepared, and let it then be said, if the same spirit could have dictated both, if both were created with the same view. Let the necessity, which has been approved, of substituting the second text for the first, be taken into view; and let it then be determined, if it does not also result from this fact, that the first ought, or at least, might be differently understood.

"Is this all? continue those whom we defend; and they must be forgiven for saying every thing that justifies them: that which accuses them has been so frequently, so well, and so loudly said. Is this all? No: look again at the use which is made of the power reserved by Art. 14: it is a rule of civil law, of that law which rests entirely on common reason, that, to discover the true sense of doubtful stipulations, it must be seen how the parties themselves have understood them in the execution. Let us follow this rule, and let us see what has taken place since the granting of the Charter in 1814.

"Eight months passed away. The throne, scarcely restored, was threatened with a new overthrow. Napoleon, banished, resolved to regain possession of that crown which Europe in arms had torn from his brow; he set foot upon the soil of France, and the soil of France trembled. The safety of the state is menaced; Louis XVIII., founder of the Charter, knows the extent of power that belongs to him; he invokes the Art. 14, the right which this article confers on him to provide for the safety of the state; he publishes Ordonnances which create jurisdictions, command prosecutions, pronounce, or apply penalties, which, in a word, receive from the circumstances, and the extraordinary power they had given rise to, all the force, all the authority of the law. The great bodies of the state were present; and far from complaining of the usurpation of their authority, they approve, and rejoice at it. The Chancellor told the Chamber of Peers, that the King was invested by the Con-

stitution with the right, and duty of providing, in case of need, *alone and by himself*, for all that the safety of the kingdom might require; that the circumstances in which they were placed, authorized the use of extraordinary, but still legitimate means; it being the safety of the state which called for them: and the Chamber of Peers approved and sanctioned this language.

"It was thus that Art. 14 was exercised at that time, it is thus that it was still executed, when after a short, but bloody war, the Throne of the Bourbons was a second time restored.

"We will not recall these Ordonnances, monuments of that sad re-action, which to punish old hostilities, sowed the seeds of new animosities, and which, therefore, had not even the excuse of interest or policy. But none of you can have forgotten those of 1815 and 1816, which not only substituted an entire electoral system for that prescribed by law, but which even changed the conditions of eligibility, in contradiction to the text of the Charter. 'It is here,' say the accused, 'that we have found those precedents, which have misled us as to the nature of Art. 14. We thought, and if our interest does not make us blind, we were justified, at least excusable, in thinking that this Article reserved to the Crown, in all momentous circumstances, by which the safety of the State might be threatened, an extraordinary power, superior to every other, which permitted it to act without the laws. Is this, then, a crime? If, as judges, your consciences answer yes—strike!' Such, Gentlemen, is their language; it was my duty to repeat it, for it belongs to them to state the motives that determined them, the stimulus which induced them to act, the moral impulse to which they yielded.

"I know all that may be urged in answer to this reasoning; nor do I dissimulate to myself all that is serious in the objectoins that may be opposed them. I do not know what I should say, if called upon to pronounce a disinterested opinion between the two opposite systems, but I have no opinion to put forth, no system to sustain.

"We have not here, as Counsellors of the Crown, to weigh the rights and interests of the Prince; it is not the question to examine, as legislators, how far the boundary of the Sovereign authority extends, and where usurpation

of the legislative power begins; our just legislation desires that in matters of crime and judgment every thing should be positive and manifest—that the conscience and the reason of the Judge should be struck at the same time by the evidence of the fact and by the wishes of the law. *Doubt* and *accusation* may be understood—*doubt* and *condemnation* are, in our language, a monstrous association. If the fact is doubtful the Judge absolves—if the law can be interpreted at the same time in the sense which acquits and in the sense which condemns; there is no crime, there is only error, and wherever reflecting minds are divided in opinion, we scarcely dare declare on which side it exists.

My Lords, is Art. 14 so clear that it is not possible to mistake its interpretation, and does it constitute the crime of high treason to have interpreted otherwise than the accusation? This is the question—you will allow my respect for you to dread nothing from your answer.

But I am arrested by the remark, admitting that the extraordinary power in question might in effect be found in Art. 14, but that it could only be invoked to save a tottering state.

A high remedy reserved for a mortal crisis—for circumstances whose imperious voice could silence laws, and create, in the midst of a free country, an armed dictatorship. Where were these circumstances? Who had shaken the throne? Where the power and dangerous enemies against whom it was necessary to defend the throne by arbitrary power? The real enemies of the throne were those who declared themselves its friends—those whose imprudence had deprived it of its support, and whose weakness let it totter on the abyss which they had already created.

My Lords—You have heard the accusation; listen to the defence. It is the first accused who is about to speak—it is he on whom the accusation presses with the severest force and most determined perseverance. I do not ask favour for him at your hands, but that supreme virtue of a Judge—impartiality.

"A revolution (the former one)—becomes terrible in passing from theory to action, from the enlightened classes to the blinded masses, had,"—says he, "in the midst of a long tempest, constructed a scaffold, with the ruins of a throne. France, herself again, soon gazed with horror

on the blood that had been shed; but the principles of that absolute liberty, which did not admit the curb of a sovereign authority, and, above all, of that authority, which, under the name of legitimacy, takes its source, had not disappeared with these dreadful punishments; they had taken root in the hearts of numbers, and remained there, menacing and inflexible.

"Dazzled by the glory of conquest, and kept down by the arm of power, they remained under the Empire without action, and almost without an organ; they began to manifest themselves with caution under the first Restoration, but the return of the banished Conqueror restored them all their energy. The skilful warrior, who has just grasped again his fallen crown, easily comprehended that he could find no possible support, but in the enemies of the fugitive family; that these enemies were, at the same time, partisans of popular doctrines, the adversaries of every thing that presented itself, in the guise of exclusive power. He felt that the iron sceptre broken at Fontainbleau, could not be again re-cast, and that he must derive his power from liberty. He marched, then, in this new path, and re-animated principles and doctrines long condemned to silence.

"A new compact, conceived in a popular system, was offered to the adhesion of France; and, one of the articles of this compact declared the family of the Bourbons, forever driven from the throne of France.—Europe in arms, and France divided, allowed only a duration of some days to this attempt, but its traces were deep.

"The armed Allies were at the gates of Paris; Waterloo had seen the Imperial Eagle sink in waves of blood; every hope of resistance was lost; and, yet the most energetic protestations, the most solemn threats were again heard at the same tribune of the Chamber of Representatives. 'If force,' said one of the Members, 'should succeed in imposing the Bourbons upon us again, an everlasting civil war would be the consequence of this violation of our independence. The partisans of this dynasty have wished to bring it back by a Royal La Vendee; but we, also, we will have our patriotic La Vendee.'—'You will declare to the Foreign Powers,' said another, 'that the perpetual exclusion of the Bourbons is the *sine qua non* of all negotiation, and that Frenchmen will rather perish than support the humiliating yoke now sought to be imposed upon them.'

"In the midst of these cries of hatred, accompanied but not drowned by acclamations of a different nature, Louis XVIII. and his family re-entered France. I am ignorant if, after so many conflicts, there existed any means of restoring concord and union in this country, so often distracted by the violence of contending parties. I know not if faults were committed. Who would presume to flatter himself that he had been able to traverse a road so difficult and so little known, without some deviation? What is certain is, that hatred was not disarmed, and that menaces were not abandoned.

"He knew it well, that grave and powerful orator, who was seven times the same day proclaimed a Deputy of France—he knew it well, when in 1819, he said with that depth of thought and force of expression that belonged only to him:—'The legitimate Government has enemies; these enemies act in concert; they will act and agitate the nation so long as they nourish the absurd hope of bringing it under the yoke. In order to be assured that they know each other, that they act in concert, I have need of no documents; although I know it not from positive facts, I affirm it with no less of authority than if I had proofs. I affirm it on the faith of history, of universal experience, of the immutable laws of the human mind.'

"Such were his words, and each day brought the proofs of which his powerful reason stood in no need. During eight years, conspiracies incessantly springing up signalised the existence of an irreconcilable hatred. Twenty-one criminal prosecutions have successively saddened France. The blood of conspirators has sometimes flowed; but in political crimes it is not the terror, it is hatred, it is the desire of vengeance that produces and augments the blood of the victims.

"Partial conspiracies come to an end, but the sentiment which had given them birth is not appeased. A system of absolute opposition was organised in order to support the press, and presented a perpetual obstacle to the movements of the Royal Government; associations were formed, and constituted a popular power always in opposition to the authority of the Crown. A Deputy proclaimed from his seat the repugnance which had marked the reception of the Bourbons; and honours awaited him when driven from the

tribune. Aggression every where found support; pecuniary condemnations were met by subscriptions, and foreign revolutions were countenanced and defended.

"The Crown had maintained itself against so many systemised attacks, by means of a majority in the elective Chamber; but, in 1827, that majority seem on the point of abandoning it. Recourse was then had to the measures open to it by the Constitution; the Chamber was dissolved; but the newly elected one formed under the influence of the opposition, declared itself incompatible with the Ministry left by Louis XVIII, to his brother. Charles X. determined to remain within the limits of our institutions, withdrew himself from his Ministry, and chose another from that portion of the two Chambers distinguished by its moderation and dislike of every measure contrary to the laws. He hoped that this change, effected in a spirit of kindness, that this explicit acknowledgment of the powers of the representative Government, would disarm the opposition against which all his efforts had failed. He proclaimed his intention of completing the work of his brother, by placing the legislation of the kingdom in harmony with the Charter.

"The new Ministry acted with this intention; it walked manfully in the line indicated by the Constitution; it disengaged the Press from its fetters; and it liberated the elections from the direct influence of the administration. The introduction to the schools of a religious order, suspected of professing maxims opposed to our civil and religious liberties, was declared by yourselves to be a subject of alarm: their exclusion seemed necessary to the preservation of the public tranquility; that exclusion was pronounced, and measures, the severity of which perhaps exceeded the bounds of justice, were adopted against them. It was complained that the choice of the Crown was limited to too small a number, and testimonies of confidence and important situations were granted to men attached to other political opinions.

"So many efforts made to bring back confidence and union: so many concessions entered into for the purpose of producing the necessary union between the three powers of the State, produced none of the results hoped for. The Press, now free, continued hostile and violent; the Elections

did not become more favourable; the demand of the Elective Chamber rose in proportion to the concessions accorded, and afterwards exhibited a character more imperious, more alarming; in short, in the session of 1829, the most imposing minority which had yet presented itself threatened even the budget

"The King was struck with the utility of his attempts; he imagined that the system adopted by his Ministers, without weakening the opposition, deprived the Crown of its means of resistance; and, stopping short in the course he had commenced, he entrenched himself behind his constitutional prerogatives. The task imposed by this new plan of operations on those charged with its execution presented serious difficulties, which were not even devoid of danger; devotion, zeal, courage, was necessary. Unfortunately, the King turned his eyes on me. You know my family; what we owe to our Princes; what empire duty and gratitude have over a heart which is not devoid of some generosity; you therefore are aware I could not hesitate.

"I did not form the Ministry of the 8th August, but I entered it. The most violent clamours immediately assailed it. We were supposed to entertain the design of destroying the Charter; that attempt was daily promised for the morrow, and in this supposition every means of resistance were organized, and ready to become the means of attack. That project, however, did not enter into our intentions, and all our wishes and efforts tended to the preservation, the consolidation of what we were supposed willing to destroy Six months passed without any one act that could justify this suspicion; and the convocation of the Chambers for the 3d of March gave to it the most striking contradiction.

"I recollected that, in 1814, in a projet of law on Ministerial responsibility, it had been proposed to invest the Chambers with the right of declaring the Ministers unworthy of public confidence; that that proposition had been strongly combated; and that M. Benjamin Constant, whose opinion it will be permitted me to cite, had especially maintained, 'that such a declaration would be a direct attempt to the Royal prerogative: that it would be to dispute the Prince's liberty of choice; that in accusing the Ministers, they alone were assailed, but in declaring them unworthy of the public confidence, it was the Prince who was

inculpated in his intentions or his judgment, a thing that should never happen in a constitutional Government.'

"Reassured by this doctrine, I hoped that the Chamber of Deputies would hear us previous to judging our intentions, and that it would learn our projects and witness our acts before declaring between the country and an invincible antipathy. If it had in truth consented to hear us, I am certain that the unfounded prejudice against us would have been dissipated, for in all that we had to propose to it, we had been animated only by the desire of increasing the prosperity of our country. My hope was deceived: you know in what terms the Address of the Chamber was conceived. The King imagined his authority compromised, his most precious prerogative attacked; he wished to appeal to the nation, and the Chamber was dissolved; but the associations and the press decided that it was necessary to send back to the Crown the Deputies by whom the King thought his rights violated; the Electoral Colleges executed that decision..

"The new Chamber advanced victorious and irritated, and the triumphant organs of opinion threatened to destroy the springs of Government, in employing the power, if not the right, of refusing the imposts. It was necessary to yield to sacrifice the Ministers; to recede those imposed by the majority—by the press, or by the hostile party, by whom it was put in motion; to yield to a torrent which might overwhelm every thing in its course; abandon an intention which had, perhaps, been imprudently proclaimed unchangeable; surrender to contempt an authority from that moment rendered contemptible, or resign ourselves to seek in the 14th Article, that dangerous power it contained.

"The King looked back upon past events; he remembered the reiterated dismissals and recalls of the Ministers of Louis XVIII., and the bloody penalty that followed this too ready obedience of his brother, whose feebleness of resolve, and the consequent miseries it produced during the revolutions of seven and thirty years, were constantly brought to his mind, and produced a conviction that similar conduct must produce similar effects. 'I also,' declares the accused, 'I also had the same disastrous predictions incessantly repeated to me, and I shuddered at the fatal prospect.'

"One of the most enlightened advocates of public liber-

ty, who must have fully comprehended its genuine character and extent, that national orator of whose electoral victories I have recently spoken, had prophesied, 'that the moment when the Government shall not stand without a majority in the Chambers, the day on which it is established, in fact, that the Chamber can compel the King to dismiss his Ministers and impose upon him men who are not of his own choice, on that day, not only the Charter is annulled, but the monarchy itself destroyed.' I pondered on these words, to which no suspicion could be attached, and the terrible responsibility thrown upon me appeared in all its magnitude. Convinced that the Charter invested us with power to save the Monarch, I conceived myself absolutely bound to employ it, under the pain of being taxed with cowardice or treason, if I hesitated. I was assured that France would bless the act by which she was saved; she would disavow the party that attacked the Throne; one act of firmness would preserve to the Crown that authority required for the happiness of the kingdom, and that would be the only means of maintaining the Charter. Such was the language poured upon my ear from every side, such were the reasonings of innumerable memorials addressed to me; and the violent hostility of the opposing opinions only increased in my eyes the danger of the impending evil, and the urgency of the remedy. Alarmed, but not for myself, and undertaking a task I felt beyond my powers, I was anxious to place in other and abler hands the trust I felt to be too weighty for my own. I was desirous of removing beyond the influence of commands I had not learnt how to disobey, but which enjoined me to remain at my post. I did not remain, because the peril was imminent, and activity indispensible. Were I to expose the Counsels I received, and name those who gave them—many of whom no doubt have joined their voices to the chorus of my accusers—could I have displayed to those who have condemned me with so much severity, all the alarms, all the illusions, all the influences, and all the moral violence which have at once overruled my conviction, and subdued my reason—it is more than probable that a full acquaintance thus acquired of my real situation, would have rendered my opponents less inexorable. I do not deny my acts, but I must leave to those who have participated in my alarms, and who now partake

in the danger, the care of examining and elucidating each particular evil to which each of us was to apply a remedy: But though I throw this charge upon them, I do not mean to divest myself of a particle of my own responsibility. I was the first to sign the Ordonnances of the 25th of July, and I know and admit that I am the first who ought to answer for their consequences, and it is not to-day that this responsibility appears in its greatest terror.—I have seen in my own country, in the very town in which I was born, the blood of Frenchmen shed by the hands of Frenchmen. I have seen that Throne, I was bound to defend and uphold, crushed into atoms. I have seen the Monarch, whose authority I was anxious to preserve, bow his time-blanched head, and with his own hand, remove from it the crown with which it was encircled, and disinherit his son—vainly seeking, by this bitter sacrifice of two generations of Kings to redeem the lost fortunes of the third. I have seen stalk before my eyes, that all devouring Revolution, and have been forced to confess to myself, that my hand had given birth to it. I have felt that it is myself that my country, and the whole world, have a right to call to a terrible account for such tremendous evils. Believe me, Noble Peers, it was then the accusation pressed upon me in all its terrible force, and no judges can inflict upon a mind, not lost to feeling a punishment in any degree equal to the affliction I have already undergone."

Such is the answer of an old and faithful servant of the exiled family, to the reproaches cast upon him of having changed the institutions of the Kingdom. It appears to me that there is in this statement—in this painting of so many opposing sentiments and adverse impulsions—sufficient to satisfy the mind of a judge, that crime is not to be found in it. There was a conviction that a powerful party was marching, with steady perseverance, towards the overthrow of the Monarchy—there was a belief that the Throne was attacked and the crown in danger, and the only arms that appeared sufficient for their defence were taken up. It may, no doubt, be replied, that the weapons were dangerous, and that the use of them has hastened the catastrophe they were intended to avert: that by laying an imprudent hand upon the Charter, and thus giving to the unjust aggression apprehended, all the force and all the advantage of a legal

resistance, the Crown was deprived of all its real power—all its true support.

But, who can now say that the danger foreseen was a mere chimera.—that the Throne, resting upon the Charter, had nothing to fear—that the whole country was tranquil, orderly and submissive—and, that in the then existing state of things, the Government might move boldly along the path pointed out by the Constitution.

On this point, Noble Peers, I am bound to say, for it is an essential and real part of the defence, which I am not at liberty to omit, doubt is no longer possible. During the last four months too many voices, too many writers have taken pains to dissipate all doubts on the subject. I shall not call to your minds all the avowals, or rather all the claims to national gratitude, that have transpired from the public press, for no one here can be unacquainted with them.

There we find it inscribed that *the conspirators of La Rochelle had friends and affiliations throughout all France.* Here we are told that during the fifteen years reign of the Bourbons, the opposition had availed itself of private grievances *to render the aversion manifested by all classes against the Government more and more inveterate.*

Other writers declare that France took up arms against the odious principles of legitimacy and the divine right of Kings; and have invoked the testimony of courageous Deputies *who have conspired with them against the Bourbons.* They add, that during the great days of July, that they only wished to punish a perjured King; but also to *seize a happy pretext for escaping from an odious Government, and entering again into the paths of* 1789.

In a celebrated association, which has been several years in existence, they state that the revolution had been long expected, and make no secret of the efforts made by them to expel Charles X. from his Throne—their correspondence with the patriots of the provinces, their influence over the elections, and their affiliation with the conspirators.

Here, however I will stop, though Noble Peers, you are well aware that it is not from want of means of swelling the account. I leave to those who are associated with me in the honourable, though difficult task, I am now performing, the care of filling up the picture, of which I have traced but an outline.

The only conclusion I can possibly draw from what I have laid before you is that the apprehensions entertained as to the dangers surrounding the dynasty were not illusory. The circumstances in which France found herself placed at the commencement of July were of a nature to awaken the zeal and alarm the responsibility of those who having received from their Sovereign the deposit of his authority had sworn to guard it faithfully, and preserve it undiminished.

If this be admitted as their duty, my task is ended. I am not called upon to justify the Ministry in the eyes of posterity for the disastrous error of the 25th of July, the record of which can never perish. I have only engaged to defend them against an impeachment of treason, and I repeat, with a sincerity which can only arise from a perfect conviction, that this crime is not to be found here, and that the severest scrutiny will search for it in vain. An insufficient or deceitful acquaintance with the state of the country, distruction occasioned by real danger and leading to an ill-judged defence, a dangerous confusion between rashness and courage, affection and obedience—the sacrifice of a clear and defined duty to what was considered imperious necessity, these are all that reason, policy, or conscience will be able to discover; but that wilful intention, that malice prepense, that predetermined resolution to commit an act known to be criminal, can ever be traced by the most invetenate of their enemies; how therefore can they be discerned by their impartial Judges?

The accused, and much less the Prince de Polignac cannot therefore be found guilty of treason, of having arbitrarily and violently changed the institutions of the country; because *in Law*, they might, without committing a crime, believe that the crown was authorised in acting with vigour beyond the Law, in order to secure the safety of the State, and, *in fact*, they might without committing a crime believe the State to be so far in danger, as to render necessary the exercise of extraordinary measures.

I consequently here find myself at liberty to proceed to the third head of the impeachment.

§ III.

Is the Prince de Polignac guilty of Treason, for having formed a conspiracy against the safety of the State.

I confess, Noble Peers, I find great difficulty in discussing this ground of accusation, from not being able to comprehend it.

What is the conspiracy here meant, and in which the Prince de Polignac has taken a part? It can be no other than that which had for its object a violation of the Charter, and an attempt against our institutions. If so, this complaint is completely identified with the preceeding complaint, and is so mixed up with it, that they form but one single accusation: for the act of affixing his signature to the Ordonnances, and the preparation of these documents, cannot form two distinct crimes.

The only real object that this Count of the Impeachment can have in view, must be to establish that the signing of the Ordonnances was not arising from the embarrassment created by unforeseen circumstances, but the result of a long considered combination—the execution of a plan previously laid, and; and for which purpose the Ministry of the 8th of August was formed. Even in this case, it might be considered as an aggravation of the principal fact, but could be converted into one of a distinct nature.

Nevertheless, let us examine the imputation by itself, and independent of the consequences that have been attempted to be deduced from it.

Is it at all proved that the Prince de Polignac had for any length of time entertained the project of violating the Charter, and destroying our institutions? that he entered into the Ministry with this view? and, that, during twelve months he pursued the same object? or, whether, on the contrary, is it not evident that he was led by circumstances to the fatal part he afterwards acted?

Noble Peers, thank Heaven, it will be easy for me to clear up this question.

From the commencement of the year 1829, when the Count de la Ferronnis was attacked with a serious illness, which appeared likely to terminate in his death, it was notorious that Charles X, intended to appoint the Prince de Polignac Minister of Foreign Affairs.

This desire, which was frequently expressed, was resisted by those who then formed the Council, and but for this obstacle the Prince de Polignac would have come into the Cabinet, as it was then composed, and most assuredly

it never could have entered the minds of any one of those who would then have become his Colleagues, to have followed the steps he afterwards was induced to pursue. It is therefore altogether erroneous to infer that the Prince de Polignac entered the Council with the project of making an attempt upon the Charter already formed.

The Ministry of the 8th of August was then constituted. Among its members, appeared, as I have already remarked, M. de Chabrol, whose prudence and moderation were well known; M. de Courvoisier, whose politics were founded upon Constitutional principles; and Admiral de Rigny, who can never be suspected of yielding to measures inconsistent with his opinions and duties. A man who had conceived the audacious design imputed to the Prince de Polignac, would never have selected such characters for his coadjutors.

If, this design, had in fact, been planned, if it had been the predominant creation of the Ministry of the 8th of August, it would evidently have been carried into immediate execution. The prompt adoption of these violent measures was their only chance of success. Nothing of the kind had been foreseen, and, no sort of resistance could have been prepared, and a momentary success was then possible; but to delay the execution of such a project, till it became known, and the country was warned of the impending danger; to allow the formation of the associations for resisting the payment of the taxes, to allow the public press time to promulagate the doctrine of the sovereignty of the people, and diffuse the theory of legal resistance, was to lay the foundation of an insurmountable obstacle to their own views. This is never the conduct of those who contemplate despotism, and common sense repels the idea of such, as total abandonment of all prudence.

But to continue; A short time elapsed—a division arose in the Council—one of its Members retired—and who was this Member? It was the man whose name has been most frequently quoted as an indication that counter-revolutionary principles were entertained. Those whose known sentiments were totally incompatible with this idea are retained, and M. Guernon de Ranville, who the very act of Impeachment itself almost acknowledges to have, in open opposition to the Ordonnances of July, up to the very last

moment, is called in—he whose "Political Gospel" was the Charter—he who professed that a Representative Government must of necessity accord with the opinions of the people, and that in France the political feelings of the country were represented by the *centre gauche*.

In the month of May, 1830, after the Address of the Chamber its adjournment and dissolution, and the orders for a new General Election, a fresh change took place in the Cabinet. M. de Chabrol and M. Courvoissier retired.—We will presently return to the subject of this retreat. Let us for the present fix our attention upon those who were admitted in their places. The first is M. de Chantelauze, who it is said delivered to the King such false calculations as to the majority of the Chamber—he who, as early as 1829, had developed the plan that was executed in 1830—he who recommended the Government to form a *Fifth of September Monarchy*.

Certainly if these suppositions are admitted as facts, it will be very easy to arrive at conclusions favourable to the Impeachment. But nothing in the whole course of the proceedings has been proved which establishes the truth of the rumours upon which the supporters of the Impeachment have argued. M. de Chantelauze positively denies the allegations, and a long while ago, fully explained the words quoted. Those who know him are perfectly satisfied that he would unhesitatingly prefer the danger that might arise from his declaring the truth, to any security he might derive from a falsehood.

The admission of M. de Chantelauze to the Council, therefore, was no indication of a plot, and M. de Chabrol, who had been long acquainted with him, would have drawn a very different inference.

M. Capelle was also admitted into the Council, an office being created expressly for him. M. Capelle was a manager of elections; but by no means an advocate for *coups d'etat*. It was only his experience and address in elections that were required, and these became of great consideration, as a majority was necessary. It was not then *coups d'etat* that were in contemplation, but a constitutional contest, in which the Ministry were naturally anxious to be strongest.

M. de Peyronnet received the appointment of Minister of the Interior; he is a man of great capacity and resolu-

tion, qualified to support and accomplish any undertaking, however arduous.

This no one can dispute; but, after all, what does it prove?

The known character of M. de Peyronnet appeared favourable to the elections, towards which attention was now turned. The Ministry was in want of men versed in Parliamentary discussions, and M. de Peyronnet was one of those who could best fulfill this condition of our form of Government. Here, then, is more than necessary to explain why the port folio of the Interior was confided to him But this is not all; and the observation must have already struck you, that M. de Peyronnet is in the same position as M. Guernon de Ranville. The proceedings clearly indicate, and there is no difference of opinions as to the fact, that M. de Peyronnet was strongly opposed to the party, which, in the month of July, obtained the triumph so terrible to the Throne; but his voice was long heard in the Council in opposition to that extreme measure, which, under the circumstances, was judged necessary, and which had powerful supporters.

If this be the state of the fact, as every thing proves it, it is then also true that the plot, to the existence of which our researches are directed, could not have been formed previous to the period when the acts took place. The entrance of M. de Peyronnet to the Council, in the month of May, appears irreconciable with the idea that the plan executed in the month of July had been formed before that period. Up to this point nothing proves the conspiracy, and every thing gives it a decided denial. Is the proof to be sought in the disposition of a Peer of the Realm, which has taken a strong hold of public attention? I cannot believe it. I well know all the confidence that is due to the exalted dignity as well as personal character of the Noble witness; but I was convinced, even previous to hearing it, that it would be to give to his language an interpretation more extensive than he himself wished, to find in it the positive proof of a plot long previously arranged.

The Marquis de Semonville met M. de Polignac at the bridge of Trocadero at St. Cloud, on the 29th of July, and he remarked in him the signs of great agitation. M. de Polignac said to him. "These misfortunes are owing to

you. Have I not been trying to explain to you for six months what might be done in the Chamber of Peers?" Such are the entire words then uttered by M. de Polignac, as recollected by M. de Semonville; and from that vague and scarcely intelligible expression to the proof of a plot directed against the safety of the State, the interval appears to me immense. Then comes the reply of M. de Semonville, at once energetic and temperate, calculated to make known the constitutional and legal line from which nothing would force the Chamber of Peers to deviate, and which it is not astonishing to see reproduced so correctly, nothwithstanding the agitation of the moment, the place, and the speakers, seeing it contains the habitual expression of sentiments of him who made it. "You once asked me," replied M. de Semonville "if the Chamber of Peers would take on itself to refuse a budget, and I answered, yes, in certain grave circumstances the Chamber would refuse a budget; but if you mean, as I am sure that this is your idea, that the Chamber would grant you a farthing, a man, or a law, without the Chamber of Deputies, you are mistaken, for you might make a hundred and fifty Peers, and this creation would be vain." Nothing is more just, or more constitutional, than the doctrine supported by M. de Semonville, but what our judges have to fear for, is not the opinion of the witness, nor his thoughts, it is the sense of the words which the accused uttered, in the circumstance recollected by the witness. "He had asked if the Chamber of Peers would resolve to *amend* a budget." There is the whole question, and M. de Semonville, with the loyalty that might be expected from him, has possitively affirmed, that the conclusion he drew from these words, was merely a supposition; and that no communication, made at any time by M. de Polignac had tended to confirm it. There is then nothing illegal there—nothing that could lead to a supposition of a violation of the Charter, nothing, consequently, which justifies the imputation of a plot against the safety of the State.

What other indication can be brought to the support of the charge.

The language of the Journals supposed to be the organs of the Ministry? If the law added to the responsibility for their actions, which already weighs on Ministers, responsibility for the political writings the direction of which is at-

tributed to them, the weight would be overwhelming and the law would be unjust.—M. de Polignac has often disclaimed the Journals which appeared devoted to him in their remarks on things; I am pleased to say that he loudly disclaimed them in their remarks on persons.

It has been said that an attempt was projected to establish Count Prevotales, but this suspicion has completely vanished, and neither these proceedings nor the accusation leave any thing to defend on this point.

Friends of truth, because you are also friends of justice, you have wished to know what motives determined the retirement of two Ministers, who were replaced in *1829*. You have felt that if the plot had in effect existed, the proof of it ought to have been found there. M. de Chabrol and M. de Courvoissier may be said to have found themselves placed between two imperious yet opposite duties; on one hand, sworn secrecy; on the other, promised truth; at one side the remembrance of former engagements; on the other, the necessity of satisfying justice; they have judged that, in this soleman circumstance, where the question was not their own personal interest, but the safety of others, their most sacred obligation was the latter alternative; and more than one conscience will sanction the decision of theirs. You have heard them, and all doubts have vanished.

Two opinions divided the Council, the one thought that the dignity and interests of the crown, and its interests made it a duty to persist in the resolutions it had announced and to maintain its ministry, no act of which had, as yet, justified the hostility of the Chamber. They hoped that the firmness of the King would win back to his cause, the opinion of the electors, who would not by a painful struggle, compromise the prosperity of the country. Flattering themselves they should be able to maintain a favourable majority, they inclined towards the dissolution.

The others not partaking these illusions, and considering the state of the public mind, wished that they should yield to the necessities of the Representative Government, and that they should endeavour to struggle against a majority, which would return, after the elections, more powerful, and more irritated. Such was the subject of the division, such was the honourable motive for the retreat of two Ministers, whose enlightened foresight had so well judged of the future.

There is not here, both declare it, either plot or combination against the Charter; and the idea of *coups d'etat* or extra legal measures was never proposed. Indeed no such plan was formed; this will be clear to all, who, without prejudice, examine the events of the last year, to all, who will remark that prolonged inaction, those frequent changes in the Council, that complete absence of precautions or necessary measures at the moment of the crisis, all of which prove, that no plan contrary to our institutions had been formed beforehand.

M. de Polignac had proceeded from hope to hope, from illusion to illusion; he had supposed that he could, in course of time, conquer the spirit of resistance which had hailed his admission to the Council. He supposed, in the month of March, that he could obtain a majority in the Chamber of Deputies; he continued convinced, after the address had been voted, that an energetic measure would bring back the hearts that were estranged, he thought his exertions would prevail in the new Elections, over those of an opposition, to the power of which he still seemed blind; he calculated so strongly on the result of these Elections being favourable, that he did not fear to mix the person of the King up with them. With fortunate Elections he had a favourable majority; with this majority he obtained, by constitutional means, laws upon the Press, and Electoral laws, which would give security to the Throne. All these chimeras vanished successively, one after the other, and the decisive moment arrived, without having been seriously meditated or foreseen.

It was when the Elections were finished, when the terrible reality presented itself, when we had to deal with a deed accomplished, and when the easy resource of time and adjournments had been exhausted, that it was necessary to decide on the step to be taken: and what step could be taken, at the point then arrived at? To endeavour to proceed by the regular and legal route were folly, for a compact and resolved majority stood in the way, an insurmountable barrier; to retire and abandon the Throne, when it firmly relied on the support of its counsellors, would have been cowardice. In this manner were they driven to the perilous resource of *coups d'etat*.

Thus, Noble Peers, there has been no fixed plan, no ri-

pened project, for the overthrow of our institutions. The Ordonnances of the 25th July, were not the result of a premeditated combination; and the accusation cannot therefore reckon on the existence of such a conspiracy as one amongst the number of the charges which press on those whom its rigour pursues. In this manner I arrive, Noble Peers, by a slow and painful route, to the last head of accusation, that is, to the subject of the accusation of treason.

§IV.

Is M. de Polignac guilty of treason for having excited civil war, by arming the citizens one against another; for having carried desolation and massacre into the Capital and several other Communes?

It is thus that the fourth count of the indictment is constructed, and it is particularly against M. de Polignac that it is directed.

Assuredly never was an imputation more cruel and more opprobious cast upon a minister; never was a man more generally held up to public hatred. To excite civil war, to arm the citizens one against another, to carry into various places devastion and massacre; such acts, committed with the will to commit them, are crimes which would remain crimes even were they successful. But the more grave and terrible the accusation, the more rigorous is the necessity of the proof. Shall we be unfortunate enough for this obligation to be fulfilled? Will our accusers obtain over us this melancholy triumph for which their hearts would have to lament? No, Gentlemen, they have proved great disasters without doubt, perhaps great faults, but they have not proved crimes, they have endeavoured in vain to give a character of ferosity to the accused, of one who beholds with *sang froid* the blood flow, and the victims fall, who ordains massacre, and prepares executions.

Ah! If such was the impression that their words have left upon your minds, in the name of heaven, do not suffer it to penetrate them. It would mislead your justice. No, the blindest zeal, and the most senseless fanaticism would not distort the heart and the character to such a degree. A man does not become sanguinary or barbarious because he is animated with a profound and exalted devotion.

After 45 years of a life passed in the exercise of the milder virtues, in the habit of generous and benevolent senti-

ments, a day does not render us inexorable or ferocious. No, Gentlemen, the accusation is mistaken—suspend your judgment, listen to me, and you will perceive whether it or we is the more gratifying, the more just, and the more natural to believe.

Here the facts are numerous. It is difficut to follow the series of acts held up to public wrath. Relative to these acts, the accusation finds every where the name of M. de Polignac and put it forward without indulgence. For all the other accused one often remarks kindness by the side of memory, and an extenuating supposition by the side of a lamentable fact. It is for him alone that the unmingled severity has been reserved, which explains nothing, which extenuates nothing, which never assigns to situation, to circumstances and the preoccupation of despair, the part which equity seems to claim for them.

M. de Polignac is far from complaining of the justice which there is a disposition to render to the sentiments and intentions of those who share his dangers; he knows better than any one how much it is their due; but, notwithstanding the degree of misfortune to which he has arrived, he cannot resign himself to the thought, that the remembrance which accuses is the only one that has been preserved for him.

Are his name and his antecedent conduct, such as it has been represented by popular rumour, of any weight in this deplorable accusation? In this respect, few men have been more cruelly treated.

Ultramontane fanatic, protector of that dangerous society which is an enemy to our liberties, intolerant in religious matters, intolerant in political matters, the constant adversary of our institutions, implacable towards those who have followed other colours, a stranger to every sentiment of patriotism and national honour—such is the features under which he has been held up to you—such is the man whom shouts for his death and the cries of hatred have pursued even under your shield. And how should this pernicious error be removed—how should it be weakened when we have heard the accusation, the language of which is so measured, declare that, in the opinion of France, *he alone represented the whole counter revolutionary faction*, and that it was always he who was offered *to the hopes of the enemies of order and the laws.*

Gentlemen, such an imputation imposes on the defence duties which it cannot hesitate to fulfil. Before it dwells upon the particular facts on which the accusation is grounded, it ought to repel openly those cruel suppositions, through which the truth which justifies is unable to make its way. You have need to know the man to become acquainted with the accused.

Permit me then to place before your eyes the rapid, but faithful sketch of a life so strangely disfigured.

Jules de Polignac, whose family had long been attached to the Royal Household, was brought up at Versailles, with the children which then bore the noble name of *Enfans de France;* with his mothers milk he imbibed respect and attachment for Louis XVIII. and his brothers, and devotedness to the King unfolded itself in him, with his earliest sentiments of filial tenderness.

He was nine years of age when the revolution broke out and his memory remained impressed with those popular benedictions which accompanied for some days the name of the Minister whom Geneva had given to France, and of that insulting clamour which shortly after pursued him.

Having quitted France with his family, when blood began to flow, he first travelled through Italy and Germany; he entered into the service of Russia, and in 1800 settled in England, near *Monsieur*, who attached him to his person. He then was 20 years of age.

No one has forgotten the great events of which France was at that time the theatre. The transition was then preparing for her, from a complete state of anarchy and licentiousness to a regular Government, which was to give her internal order and military glory in the place of liberty.

This transition could not be effected without effort, and without shock, and numerous dangers surrounded the first steps of the extraordinary man, who with skilful precautions, raised up the ruins of a Throne, upon which he had resolved to seat himself.

Among the audacious attempts made against him, there was one which was marked with the stamp of ferosity, and which is known by the name of plot of *the infernal machine;* an infamous plot in which barbarism disputes with cowardice and the remembrance of which after the laps of 29 years, still awakens just and legitimate indignation. A frightful sus-

picion formerly was thrown upon M. Jules de Polignac, and his name was mentioned among the accomplices of this horrible attempt. This suspicion was revived, or rather this calumny was reproduced, in one of those moments when calumnies of every kind re-appear, ardent and empoisoned; when, prosecuted and menaced, all misfortunes were doomed to overwhelm him at once, and among all the unjust aspersions by which it has been sought to brand his name, this is that, the weight of which appeared to him the most distressing to endure.

Reduced to repel the allegation of a fact, to contend against the impotency of a negative proof, he would have had to defend himself against these vague accusations, which rest only upon popular rumour; his solemn denial, and his challenge to produce any probable evidence in support of the suspicion. But against obstinate prejudices, of what avail are the denials and challenges of an accused individual, all whose words are received with distrust, and from whom the cry of wounded honour always seems wrested by the necessity of defending his life.

Providence, by whom, at least, the unfortunate are not abandoned, has raised up in his favour a sure witness; a witness not to be suspected, whose candid and positive language ought to remove every doubt.

Every body in France knows Count Real and the important functions which he discharged with such high distinction under the empire. I know that, from his situation, he might have known better than any one of the facts upon which the question is to throw light; I knew that his personal character and his political sentiments would give to his declaration all the weight of a proof. I applied to him to ascertain the truth. Allow me to read his answer.

(The Learned Counsel here read a letter from Count Real, stating that at the time of the *infernal machine*, he was in a situation to be acquainted with the most minute circumstances of the plot, and that having since examined all the documents and reports of the proceedings, he had it in his power to attest that *the name of M. de Polignac was not pronounced* in that horrible affair.)

Thus it is that a man of honour expresses himself to whom truth is known, and whose impartiality is above suspicion.

Thanks to Heaven, if the name of M. de Polignac is still mixed up with the recollection of the *infernal machine*, it can only be so through hatred and no longer through error.

Three whole years elapsed, during which he whose life I am relating to you, continued to dwell in England. He availed himself of this sojourn to study carefully the English institutions, and I would say, if there were not between this assertion and the events which have brought him before you something which appears contradictory, that he observed them with a lively interest, and expressed wishes that his country might one day be enriched with institutions like those the effects of which he admired.

In 1803 a movement was prepared in France in favour of the exiled dynasty. General officers of great renown directed this perilous operation, and appeared to reckon upon the support of a considerable portion of the army and the population. Pichergru, one of the chiefs of the enterprise, proposed to Jules de Polignac, to accompany him to Paris, and share with him in the dangers, the gravity of which he did not conceal from him, nor does he now hesitate to avow it.

Wearied by disorder, and disgusted by weakness and unskilfulness, France ardently wished for a protecting and lasting Government, which should restore to her repose. He who was to satisfy her had not laid the foundations of that sovereign power which has since shone with such splendour. The question was, not to overthrow an established Government, and deliver his country up to the chances of a Revolution, but to place the ancient family, instead of a new family, upon the Throne which was building up.

Jules de Polignac arrived at Paris with Gen. Pichegru and the Marquis de Rivere, his elder brother, had preceded him.—I will not relate to you the events which followed his arrival, and the results of their rash expedition. They formed the subject of a celebrated trial, that cannot have been forgotten. I will only dwell upon a single circumstance which it is impossible for me to pass over in silence, for it makes known this man who is held up as insensible to the ills of others, as indifferent to bloodshed! what do I say? as eager to have it shed! and my chief want is to break that cruel arm in the hands of those who may still make use of it.

His brother and himself had been arrested and arraigned before the Special Court with Georges, Moreau, and all the actors in that melancholy drama. The issue was drawing nigh; the President asked the accused whether they had any thing more to say in their defence. "I have only one wish to express," answered the elder of the two brothers. "If one of us two must perish, save my brother, for he is still very young! and let the blow fall upon me." "Do not listen to him!" exclaimed the young man, in a state of excitement and grief which it is impossible to describe, "do not listen to him! it is he who must be saved; it is he who must be restored to the tears of a wife. I have tasted too much of life to regret it, and I have neither wife nor children whose image can pursue me in the hour of death!"

These words, *which then he was able to pronounce*, affected the auditory and the judges themselves, but did not preserve the elder of the two brothers from the terrible condemnation with which he was threatened. The sentence of death was pronounced. Napoleon, however, showed himself generous, and the sentence was commuted to imprisonment for life. The other was condemned to only two years imprisonment; but the police added its rigour to that of justice; and the detention endured still eight years longer, after the expiration of the penalty.—These ten years were spent at the Temple and at Vincennes, amidst the most hard and painful privations. It was there that, living in adversity and solitude, without support or prospect, he accustomed himself to seek for consolation elsewhere than in this world, that he acquired that religious conviction which helps to support the ills of life, and contracted those habits of piety which have since served as a pretext for so many unfounded prejudices.

The events of 1814 restored him liberty; and those of whom he had perhaps had cause to complain during his long captivity, can say, whether they ever perceived that he had retained the recollection of them.

M. de Polignac beheld with a joy which he would not be pardoned in dissembling at present, the return of a family to which he had devoted his whole existence; he served Louis XVIII. with ardour until March 20, 1815; he quitted France at that period; he returned with the Royal Family, and was promoted to the dignity of Peer.

A restriction which he thought proper to make in his oath of obedience to the Charter, and which caused his admission into the Chamber to be adjourned, has been often mentioned; it has been considered the proof of long-standing hatred against our new institutions, and the first act of a lengthened plot carried on against them.

A few words will suffice to throw light upon all that is equivocal and obscure in this circumstance.

At the time of the second Restoration, modifications in the Charter were announced. Among which, it appeared, were to be modified the Article which declares the Catholic Religion the Religion of the State. Some Peers declined taking the oath required, without a formal reserve relative to the modifications that might be made, M. de Polignac was one of the number.

The Chamber of Peers did not think that it ought to admit an oath, couched in any other terms than those which had been prescribed; the admission of M. de Polignac was therefore adjourned, and he did not take his seat in 1815; but in 1816, the King, having positively declared that no modifications should be made in the Charter, the motive for the restriction existed no longer, and the oath was taken.

Perhaps, Gentlemen, it might be permitted to deduce from this fact thus explained a consequence diametrically opposite to that which it is sought to infer. At any rate, it is impossible to discover in it a sign of hatred against the Charter, or the first act of a plot carried on against it, nor can there be seen in it a disdainful lightness for the respect that is due to an oath.

I will not, Gentlemen, enter into the speeches and acts which have marked his political life among you; your recollections dispense me from the task, but I cannot dispense with reminding you of some of the words which he pronounced a short time after his admission.

In January 1817, the electoral law was discussed. He opposed it and particularly remarked that those who paid 300 francs taxes alone invested with the right of electing, only represented one third of the direct taxes; that two-thirds of property were deprived of all right of election, and that thus the interests of the mass of property were but very imperfectly represented in the elective Chamber.

Answering afterwards those who beheld in the law project only a trial which might be made without inconvenience he expressed himself in the following terms, which I recommend to your heart, even more strongly than to your understanding.

(M. de Martignac here quoted part of a speech of M. de Polignac, in which he opposed the experiment, upon the ground that the country was not perfectly quiet, and argued that it was necessary to wait till the Charter had, by its salutary influence, confounded together the sentiments of all, as it rallied the hopes of all.) Behold, then, Gentlemen, how the Peer of that day, the accused individual of the present day, was already preparing civil war.

Behold, Gentlemen, how the former Peer, and now the accused was already preparing the civil war. To continue. In 1823, M. de Polignac was named by Louis XVIII Ambassador to England, and found means to establish, in a country where strangers are sometimes heard with mistrust and judged with severity, a reputation for loyalty of which I shall limit myself here to citing one proof. A rather angry discussion having arisen in the House of Commons on the occasion of the adoption of Spain by the French army, Mr. Canning gave some explanations relative to the intentions of France, in order to satify the House. Several voices were raised to demand if the explanations given were founded on any diplomatic note? when Mr. Canning replied. "With regard to this affair, I have received no official communication, but I *have the word of the Ambassador*;" and this reply so satisfied the Commons, that not another question was addressed to the Minister. M. de Polignac had remained Ambassador six years, when, in the month of August 1829, he was called by the King to the Ministry of Foreign Affairs.

Such is the man upon whom weighs the terrible accusation of which you are the judges. He has come before you, surrounded by vague and general prejudices that render the conscience suspicious; and while lying under which, the accused loses even that involuntary interest that seldom fails to attach itself to misfortune. Contemplate, Gentlemen, with me, these destructive prejudices: it is your duty, as it is mine; for, in order to judge the accusation well, it is necessary that you should see it singly and alone.

Behold the odious *cortege* obliterated and effaced as soon as approached.

M. de Polignac is said to be an ultra-montaine fanatic, the friend and protector of a dangerous society, and intolerant in affairs of religion. This is one of those matters upon which people are not agreed. The fanatic braves the scaffold, and rushes to martyrdom. The man who is animated with a warm piety and a sincere faith does not deny his principles, and would not purchase life at the price of a false disavowal. The truth of the words I here pronounce for him may therefore be credited. M. de Polignac is unalterably attached to his ancestors; he is attached to his religion by affection and conviction, and he would make for no interest, no danger, the sacrifice of the duties it imposes upon him. But that piety, the offspring of misfortune, has nothing in it of the blindness, the fury of fanaticism: a faithful subject of his Prince, and an inhabitant of his native country, he has never acknowledged a power hostile to the authority of the one, or the rights of the other. It is not at the moment in which they are proscribed that he would disavow his relations with the members of a society of whom he is accused of being the friend; but he can say, for the truth may be told at all times, that no connection existed between him and them. He adds, that his name has never been found mixed up in any religious question, and that never did any relation on this subject exist between him and any foreign power.

Shall I speak of his intolerance? During fourteen years he has had in his service persons of a religion different from his own, and these persons would if necessary say, if his confidence in them has known bounds, if their religion has caused them either disquietude or oppression, if the fullest liberty in this respect has not been accorded them, and if ever a more humane and generous master found more faithful servants. In the number of the young gentleman attached to his embassy there was one whom I now cite, Baron Billing, who professed the protestant religion; let him be interrogated on this point.

Political intolerance has been spoken of, and what fact can be produced, what name cited, in support of such a supposition? M. de Polignac never preserved the vindictive remembrance of a political controversy, however keen it

might have been ; no one can say that he has been heard to express resentment against his antagonists. I here invoke the remembrance of all ; I call upon it from without, at a moment when the passions are excited, when public appeals are dangerous ; and nevertheless I dare to say that I shall not be contradicted.

He is supposed to entertain a constant and inveterate hatred to our institutions, and in this trait of his character an injury is found as the ground of the accusation. In England he had acquired the taste, the habit, the need of constitutional monarchies. In 1826, a French emigrant having published in London a libel, in which Louis XVIII. was insulted for having given a charter to France, M. de Polignac demanded, in the most energetic terms, authority to prosecute the libeller before the English tribunals. Again —the purchasers of the property of his family, confiscated in 1793, having at his return offered to restore them or to purchase his ratification, he replied to them that, in terms of the Charter, national property, was as inviolable as other property, and that therefore they had need of nothing to consolidate their right. Perhaps this testimony of respect for our fundamental law may dispense with the necessity of giving others. . . . . .

He has been deemed inflexible to the faults of others, and implicable towards those who had marched under other banners than his own. Deign, Noble Peers to listen to three letters addressed to M. Vertamy, by three different persons, all of whom had been condemned for political offences, and then judge whether there was any justice in these reproaches. . . . . .

The learned Advocate then read the three Letters, the first of which was from Capt. Delamotte, of the first ex-Legion of the Seine, who states that in the year 1823, he fled to England, to escape from two prosecutions for political offences, and in one of which he was condemned to death. That Prince de Polignac was then Ambassador at London, and though Capt. Delamotte had no personal acquaintance with the Prince, he ventured to solicite his interest to obtain a pardon, with permission to return to his native country, which was not only granted to him at the time of the Coronation, but afterwards, through the benevolence of the Prince, he was placed upon the list of the half-pay officers.

The second Letter from a M. Morrior, who had also received sentence of death for a political crime, which was commuted into banishment, and who at the same period and under the same circumstances as Capt. Delamotte, owed his full pardon and restoration to his family and friends, to the kind interference of the Prince, who obtained the insertion of his name in the anmesty granted on the occasion of the Coronation. The third letter was from General G. de Vaudoncourt, who being resident in London at about the same period and under similar proscription, being informed by some person in whom he had no great confidence that the Prince de Polignac had mentioned his name *in* conversation, and declared that he should be glad to see the General restored to his country, formed the resolution of waiting upon the Prince of himself, who declared that he had no acquaintance whatever with the person alluded to, and that he had never spoken to him on the subject of the General; but added "Since you wish to return to France, I shall be happy if I can contribute to the accomplishment of your desires. Send me a Memorial, and be assured you shall have all my interest. I have myself been proscribed, and know too well how terrible it is to be so situated, *not* to use my exertions in your behalf." The Memorial was sent and soon afterwards taken to Paris by the Prince himself. On his return, he informed the General that his petition had been granted, but that he must be content to wait till the Coronation. Finding a residence in England too dear for his limited means, the General obtained, through the Prince, permission to reside in Belgium or on the banks of the Rhine; and being aware of his motives for quitting England, offered him, through his Secretary of Legation, and as if from the Government, a supply of money. He adds, that on his arrival at Brussels, he was informed by the Ambassador Viscount d'Argoult, that the Prince de Polignac had strongly recommended him to his notice and protection, and authorised him to make advances of money if the General should be in need.

Such, Gentlemen, is that intolerant and implicable man, that man whose heart had been closed by the spirit of party against every sentiment of humanity.

In fine, he has been represented as often devoted to other interests than those of France, and as foreign to every sentiment of patriotism and national honour.

There is something in the very vagueness of such an imputation, something which wounds a man in what he holds dearest, something more painful and afflicting than in possitive accusations which affect his life, for against those defence is more easy.

I should wish here to unroll the chart of the ground gone over in the *diplomatic career* of him, the object of so many stigmas: it is the best defence I can make.

Since the Restoration, the English made encroachments on our fisheries of the coasts of ancient Normandy; he put an end to them. Our flag had been insulted on the shores of Africa, under divers pretexts; satisfaction for this has been obtained, and orders were given there to respect the French colours.

For ten years, the payment of certain sums due to French subjects had been refused; he caused them to be liquidated. The colonists of St. Domingo had obstacles thrown in the way of a settlement of the just claims: He caused these to disappear.

Many products of our manufacture were kept out of the English markets: they now find entry there. A treaty of navigation that might contain advantageous and equitable stipulations for France was long a desirable object: such a treaty has been signed. An expedition, alike called for by religion and humanity, was sent forth, accompanied by the best wishes of all civilized nations; the arms of France have stopped the torrent of blood which inundated a land so rich in heroical recollections; they have snatched from slavery a people born for liberty; but good policy only could crown so noble a work; and the duty of a minister of France was, while consolidating so great a deliverance, to push to their farthest possible extent its important and salutary effects. All the documents which have yet been published relating to this subject, permit me not to doubt that M. de Polignac has done these duties with indefatigable zeal—with a prudent yet energetic constancy; and the proofs of his efforts are demonstrated in the yielding up of every fortress and each territory which has been obtained beyond the Morea.

I will stop here, Noble Peers, and say nothing of the acts of his Ministry; I shall not even bring to recollection who it was that added to all the trophies of France a new

achievement worthy of her—seeing that prejudice, whose contact soils all things, has found means to make that great and noble enterprise a subject of reproach and accusation.

Algiers was at war with France, and the prolonged blockade which vexed her commerce, caused sacrifices without results. Attempts at conciliation were made, and the last of them had been followed by an insult which French honour could not endure.

The government, justly sparing of the blood and of the treasure of France, endeavoured to obtain, by the intervention of the Porte, the reparation which it had a right to demand. This attempt did not succeed.

It was, after having exhausted all specific means, that it resolved on employing the force of arms, and, in adopting this resolution, it hoped to render the sacrifices, that it was about to ask of the country, at once glorious and profitable. To punish the despot of Algiers, to re-establish our interrupted commerce with Tripoli—to destroy piracy—to abolish the shameful slavery of christians, and to deliver the European nations from the ignominous tribute, which civilization had for a long time paid to barbarism; such was the plan conceived, and it must be owned, it was worthy of France. This plan was executed by the French army with signal bravery, and God forbid that those who had projected it should take to themselves any portion of the glory which belongs to them; but should it, then be denied, that they well understood all that might be undertaken with French soldiers? must it not be admitted that their enterprise has not been without honour and utility?

The treasures, which were the fruits of this conquest, pay its expenses; and thank heaven, the brave fellows who have conquered them, stand forth, freed from the odious calumny which, springing up in their native land, went forth to wound them in a hostile country.

The vessels which spread terror in our commerce, now form part of the squadrons which protect it.

The innumerable cannons which defended the pirate's den against our attacks, now guard our conquest, or enrich our arsenals. Tunis and Tripoli have relinquished the tribute they extorted—abolished slavery—renounced piracy—and delivered their own subjects from a system of extortion and monopoly, as fatal to their interest as that of

European commerce—such is the result of the expedition to Africa.

Gentlemen, a Minister accused of treason to his country has, perhaps, a right to recal to your minds, this use which he made of an ephemeral authority. I will not say more on this head, but those who have had opportunities of examining his other acts, will not contradict me, if I say that in all our relations with foreign powers, the honour and the interest of France have been nobly defended. I will only add another word—I should be culpable if I omitted it; it is, that no foreign power was ever informed of, or consulted upon, any project of interior administration, nor on the intentions of the King towards the nation.

Such is the life—such are the actions of the man you are to judge; I see nothing in all this, I confess, which could win for him the shame of being offered up, "*to the hopes of the enemies of order and the law,*"

Assuredly, I am far from seeking praises; alas! I do not make even an apology—I well know, and cannot forget, that I defend an accused before his judges. All I ask is, that this accused may appear before you such as he is, and not such as passion and error have made him appear. What I wish is, that the judges of this great trial, that all France may know if hatred, hatred alone, ought still to cling to that man, whom events have cast here, defending himself in the midst of his Peers, against a capital accusation; if that man is a stranger to us—an enemy, let his country disown and banish him.

I can now, with more security, go over the sad particulars which remain; I shall no longer find incredulity armed by recollection. The accumulated charges which support the accusation of having incited to civil war, and led to massacre in the capital, may thus be classed: M. de Polignac has conferred on the Duke of Raguse, the command of the troops in the First Military Division.

The armed force received the order to fire on the people without warning and before any provocation. M. de Polignac alone instructed of these facts, and directing affairs, maintained during three days this barbarious order.

He threw Paris into a state of siege, and occupied himself with organizing Councils of War, before which the citizens were to be tried by martial law. Orders of arbitrary arrest were given.

On the 28th, M. de Polignac refused to receive the Deputies, and repelled all hope of conciliation. Nothing proves that he informed the King of this pacific step. On the 29th, money was distributed to the troops.

Finally, the same day, Messrs. de Semonville and d'Argout went to the Tuileries, to insist on an end being put to this horrible tragedy; they there saw the Ministers and the Marshal; all appeared in consternation, but under the influence of a power superior to their own. M. de Polignac supported the contest alone, and appeared opposed to the two Peers going to enlighten the King.

There is the entire accusation. I have omitted nothing—I have weakened nothing; why should I seek to deceive myself? your forgetfulness would not follow mine. What charge can you find in conferring on the Duke of Raguse the command of the troops assembled at Paris. The Duke of Raguse had been for several years titular governor of the 1st Division. General Courtard, who had the effective command, was absent for several weeks, and was not then expected to return: it had been resolved to confer on the Marshal the *Lettres de Service* were signed on the 25th, notice was given the 26th. If it were true that the extraordinary measures which had just been taken, had in some degree, contributed to the date of this nomination, what would be the conclusion? That the council had foreseen a popular resistance, a general insurrection.

But, my Lords, cast your eyes over all that has taken place, and ask yourselves if it is possible to believe it? never has Paris been so ill supplied with troops; never had less precautions been taken, no catastrophe was ever so unforeseen.

It was first thought that some approach to execution had been discovered in an Order of the Day, given to the Guard, by the Major-General, on duty, on the 20th of July, regulating the disposition of the troops *en cas d'alerte*; and as this order emanated from the Duke of Raguse, who five days later was called to the command of Paris, it was concluded, that all had previously been regulated, and prepared for action; but this conclusion soon fell with the fact that had given rise to it. It has been acknowledged that the Order of the 20th had nothing special or extraordinary attached to it; unconnected with this circumstance, the nomination

of the Duke of Raguse offers neither proof nor indication of preparation for, still less of excitement to civil war.

Nevertheless this war took place; the armed force received the order to fire on the people, without warning or provocation, as you know, my Lords, it is said that M. de Polignac maintained during three days the barbarious order.

Alas! Gentlemen, it is but too true. Paris for three days saw her streets defiled with blood, the mournful sound of her alarm bells, the noise of that destructive thunder which broke the silence of night, despair in the midst of hundreds of families, have left an impression on many a mind that will never be effaced. But what is there in this terrible recollection, which conveys a conviction of the crime for which punishment is here demanded.

Is it certain, *certain* as the conscience of a judge requires that it ought to be, that the armed force fired on the people without provocation, and otherwise than for its own defence?

Has this point been proved in a possitive manner, is it certain such an order was given? and, in fine, has proof been found, that it was given by M. de Polignac?

These three evidences are necessary to justify the accusation. You do not require, my Lords, that I should wade through all the bloody details of the three days;—that I should harrow up painful recollections; that I should re-open still bleeding wounds; that I should go forth to interrogate the tombs, or to question public rumour, in order that I may know, if the first Frenchmen who fell, were clad in the coat of a soldier, or in that of a citizen. Who does not feel how vague, unsatisfactory, and contradictory, evidence of this nature would be? How shall we seek for absolute truth amid so many different facts, and, consequently, so many different accounts?

On one part,—Messieurs Joly—de Mauroy—Delaporte—Pilloy—Marchal—de Boste—Grepps—Bayeux—Letournour—have been heard to declare, that in their presence, the armed force was carried into guilty excesses against the people, without provocation; and I do not dispute either the exactitude or the sincerity of their depositions.

But, on the other hand, Messieurs de Puybusque—Duplan—Count Virien—Saint Germain—Delaunay—and Gen-

eral SaintChamas—affirm that, wherever they chanced to be the first violence was committed by the people, and that the troops only resolved to employ their arms in the absolute necessity of self-defence.

M. Martignac here quoted the evidence of Messrs. Plougolm and Masson, Advocates, M. Petit Feret, Pilloy de Laporte, Ducastel, and others, in support of that given by the military witnesses and those attached to the police service, stating that the first acts of hostility were committed by the people, who in several places had assaulted and severely wounded the soldiery and gendarmerie before they had recourse to their arms. With the people, he contended, that after the first aggression, and when sedition had ripened into revolution, the necessity for attack became more imperious, as safety could only be found in victory. He admitted that, amidst the frightful disorder which prevailed the legal formality of warning the people to retire before the military commenced acting, was not in all places complied with, but there was nothing whatever to lead even to a suspicion that an order for dispensing with it had been given. The learned Advocate then argued, that all the testimony produced tended to the conclusion that the entire authority had been vested in the hands of the Duke of Raguse, who alone directed the proceedings after the capital had been declared in a state of siege, which was done in the last Council, held by the accused on the evening of Tuesday. He strongly denied that the Ordonnance, authorizing this measure, was justly liable to the imputation which had been fastened on it, of being the result of a plot formed by M. de Polignac, to deprive his fellow-citizens of their civil rights, and deliver them up to Military Law; contending that it was intended as a tempory means of restraint which, it was hoped, would secure the immediate restoration of order. Of the legality of the act, however, there was no question. Art. 53 of the imperial Decree dated December, 1811, expressly provided for the cases in which it might be issued, and a town, nay an entire department in the southern provinces, had even recently been placed under this law for the restoration of tranquility.

The learned Advocate went on to argue that the evidence in no manner showed M. de Polignac to have issued the orders of arrest so much complained of, which was the

act of the Duke of Raguse, and was never put in execution; relative to that part of the charge against the accused for not giving sufficient publicity to the Ordonnance declaring the state of siege, means were, in fact taken for this purpose; but so rapid was the march of events that, though partially made known, it was without effect. M. Martignac then described the reasons of the course taken by M. de Polignac in refusing to see the Deputies of the Tuilleries on the 28th July, as already explained in the statement of the accused himself; after reminding the court of the utter impossibility of the Prince's withdrawing the Ordonnance or agreeing to a change of Ministry without the consent of the King, the learned Advocate addressed himself as follows to the part of the charge relative to the distribution of money to the troops: so little did M. de Polignac wish it to be unknown, that, in his note to the Duke of Raguse (mentioned in the Report of the Chamber of Deputies,) there is a recommendation made, to *cry about every where*, that the King would give money to the artisans if they will leave the rebels; and that, on the other hand, the guilty would be judged by a council of war. I now, my Lords approach limits difficult to tread, for they touch the boundaries of honourable feelings. I know that it is permitted to sacrifice one's own safety to a noble sentiment of probity; but I am not permitted to sacrifice to it that of another, whose defence has been confided to me by his family. I should hesitate between two opposing duties, if a real danger were consequent on my silence; but my conscience tells me, that yours is sufficiently enlightened on this important subject to leave me nothing to fear.

I may therefore proceed to the charges that still remain. On the 29th money was distributed to the troops. Yes, it does in truth appear that money was given to the soldiers. M. de Polignac heard of it, he knew it; but it would be difficult for him to say how, by what orders, or on what foundation, the distribution was made. He recollects that provisions for the troops had not been made; that the soldiers were in want of every thing; and that in the midst of a parching heat and a city in disorder, they were suffering from thirst and hunger. Money was given them to procure for themselves what could not be furnished to them. Assuredly it is not the inhabitants of Paris who will be as-

tonished at the assistance afforded to our suffering soldiers; more than one citizen, after engaging them in the contest shared his bread with them. Besides, you know that the order arrived during the night, addressed to the Marshal himself; and at this stage of business let it be permitted to return to an important point, which the evidence has established, viz, that the Marshal rendered an account of his proceedings directly to the King, and received his orders directly from him.

God forbid that, taking advantage of the absence of an unfortunate Officer, I should seek to throw upon his shoulders the overwhelming weight under which another groans. I did not hear without the most lively emotion the recital of the terrible conflicts that afflicted his heart, and the sorrowful recollection of that fatality which has pursued his steps. I can believe that he wept for the evils which had befallen his country, for the fatal duty which has connected his name with that bloody epoch; that he made every effort to be expected from an honourable man, to conciliate his duty as a soldier with his sentiments as a citizen; but I cannot dispense with stating what is the truth, for I am certain that he would say it himself.

The Marshal acted under the direct orders of the King, and accounted to him alone. He acted directly, because he issued all orders of every description, and prescribed himself the proclamations to be published by the Prefect of Police—he rendered account directly to the King, for it has been proved, that in the course of Wednesday he wrote twice to Charles X. and received a verbal order from him, by an Aid-de-Camp he had sent to St. Cloud.

The Prince de Polignac was questioned whether he conceived that he was consequently discharged from all responsibility. Alas! Gentlemen, the answer is but too ready. It was this responsibilty that placed him where he now stands, and from which he has never pretended he was in law absolved. But this particular point rests on facts! He replies, that he is a total stranger to the acts imputed to him, and that his accusers cannot avail themselves of them to load him with an odium that he repels. "But this disgraceful dispute with the Marquis de Semonville, in the presence of his astounded colleagues, this precipitate departure for Saint Cloud, this anxiety to arrive

there before the Noble Peer who was about to open the eyes of the Monarch, and this animated and almost violent scene that passed in the King's cabinet, and which alarmed the officers in attendance." What is there in all this that resembles an implacable tenacity, a feeling for personal interest? Was it then over his office, his title, or his honours, that the Prince de Polignac watched with so much care? Can you believe that on the 29th of July, when the population of Paris was in possession of every point of defence, and that the tremendous cloud which veiled the future was already beginning to dissipate—can you believe that at such a juncture the pride of the Ministry, or the necessity for supporting coups d'etat retained any influence over his mind?

The Marquis de Semonville spoke with all the warmth of a man who is demanding the safety of the public, and the Prince de Polignac replied with that apparent firmness which is frequently at avarice with the genuine feeling of the heart, and with that affected confidence which is often assumed to conceal real weakness.

But from what act can it be inferred that he hesitated as to the step he ought to take? Does not all the evidence show that the Ministers hastened immediately to Saint-Cloud, reaching the chateau at the same time as M. de Semonville. Did the Prince throw any impediment to the interview sought? M. de Semonville attests the contrary, that was by the Prince himself he was introduced into the King's Cabinet. It was not in the presence of the Prince that the painful scene took place described by the Marquis, during which his name was not mentioned. Already was his formal dismissal pronounced, already he had sought M. de Mortemart. At the Council which was held after the departure of M. de Semonville, the formation of a new Ministry was settled, and from this moment the responsibility of delay no longer rests with the Ministers who had retired.

Thus are the facts weighing heaviest against the accused forcibly mitigated on impartial investigation, if not entirely justified, and are relieved from that odious character of barbarity with which they have been branded.

Is it necessary for me to recur to that hasty, cruel, insane expression, which has been attempted to be established by

hearsay evidence.—"The troops of the line are fraternizing with the people.—Well, then, fire upon the troops!" I have advanced, that when an accused positively denies what is asserted by one witness only, there is no evidence to go to a judge. I am answered contemptuously, that this is an old obsolete axiom. I now reply that it is a maxim laid down by Montesquieu, whose authority is rarely thus treated.

If then M. Delarue himself had appeared before you, and affirmed that he had heard these words spoken by M. de Polignac, and the Prince replied, you have, in the confusion of the moment, entirely misunderstood me, I say that even that would have been no evidence to go to a judge. But here, instead of a witness coming forward in person and delivering his testimony under the sanction of his oath, a fragment of a letter is produced, and in which not even the words are repeated. The law, I know, does not call upon you to account for the motives of your decision, but conscience demands it, and then will find how light in the balance will weigh that tattered scrap of paper on which they wish you to found a sentence of death. The learned Advocate then briefly recapitulated the heads of the impeachment, which he contended were not supported by the evidence. The events of July did not arise from any attempt or desire to stir up civil war. The Ordonnances, he maintained, excited discontent and irritation; from hence grew up riot and confusion, terminating in revolution. Government was driven by imperiousness of circumstances to defend itself, to array its soldiers in opposition to the citizens, and this contest produced bloodshed and disasters, the traces of which will be drawn by history with less fidelity than they will remain impressed on the hearts of those who are reproached with having produced them.

I have thus, Gentlemen, gone through the four heads of impeachment adopted by the resolution of the Chamber of Deputies, and I trust that by the aid of truth and reason, that I have now only to fix your attention and call for your impartial decision upon one important point, and on which I have already touched, and which goes to the very core of the accusation.

THIRD PROPOSITION.

The Court of Peers cannot apply to any of the four points

of accusation, the articles of the Penal Code quoted by the resolution of the Chamber.

It is sufficient to state this proposition, to make its accuracy be understood.

The late Ministers are, and can only be, accused of treason; it is a point already known. The crime of treason not being defined, the Chamber of Deputies has thought proper to construe it by the aid of four facts, already qualified by the penal code. I have already demonstrated the illegality of this mode, but I reason in the supposition of the legality. Each of the facts indicated forms not a separate crime, for which the late Ministers could be accused and punished, in virtue of the text of the law, but a distinct element of the crime of treason, the only one on which the law could determine.

The Court of Peers, therefore, cannot have to pronounce on each of these facts, and to apply to it, if it were so, the punishment ordered by the code; this would be to pervert the accusation, and to violate the Charter. The Court will have to declare if the Ministers, who have signed the Ordonnances of the 25th of July, are guilty of treason, or not. To arrive at the solution of this single question, the justice of every one of the judges will appreciate the influence that each of the stated facts may have over this solution.

It is then solely on the crime of treason that you will have to pronounce. I know not what will be the cry of your conscience, on this important question. If it were contrary to the defence; if, in spite of so many motives which repel every idea of crime, your voice should proclaim the culpability of the accused, you will still have to determine the punishment. No law pronounces it; the crime that is here pursued is neither defined, nor affected by a legal provision. Its name is not to be found written in any of our codes.

It will be then to your power, which partakes, at the same time, of legislature and justice—of the authority which makes the laws, and those which applies them—that will be reserved the immense, the terrible right of making for a man the law with which you would strike him.

I know that this jurisprudence, noble and generous as itself, has sanctioned its right to qualify penalties; but it has only admitted and exercised this right, for the benefit of

parties accused; it has never used it to create law, but to soften the rigour of existing laws.

Here this jurisprudence is without application, and without authority; for, here it is the crime which is not defined; it is the punishment which is not pointed out; it is the law, in fine, which is silent, which is wanting, which must be made.

There is but one single measure, for which I could understand the intervention of political power blended with judicial power, this power would be applicable to things rather than to men; it would spring from the necessity of ensuring public peace in the country, and would be accomplished by the removal from the territory of those whose presence might trouble it. There, my Lords, is neither judgment nor law, there is an act of high political administration, for which one of the two great bodies of the state, informed of the danger by the other, seems to have an adequate and protecting authority.

Beyond this, I repeat it, I should fear to find arbitrary power without justification.

God forbid; that in the silence of the law, and looking to the supposition of your authority being substituted in its place, that I should suffer a vain terror to gain possession of me! The more the power, exercised by you, might be extended, the less should I dread the abuse of it. It is not by death, by an irreparable deed, which leaves the conscience neither refuge nor repose, that a doubtful power, placed in pure and generous hands, would be first exercised. Oh! why, in the present day, should I conceive such gloomy apprehensions? Is it not against a political accusation that we are pleading? Is it not the Chamber of Deputies which accuses—pursues—and demands satisfaction? And has not that Chamber acknowledged. "That no where has liberty been strengthened by the scaffolds that have been erected in her name; that liberty is only durable in as much as she is pure; that revolutions only succeed in giving solidity to her cause, by moderation in victory, by generosity towards the vanquished, by justice towards all."

Is it not understood that bloodshed by the executioner brings "to the friends of the victims only tears and a thirst of vengeance, to the oppressor remorse, and to society regrets." Such being supposed to be the sentiments of our accusers, what should we have to fear from our judges?

Is it in the name of the people's security, is it in the interest of honour, that the glaive of the law is unsheathed?

Listen to the words pronounced formally by one of the friends of this people, one of their most ardent defenders, one of their most able counsellors—of him whose tomb has so lately been watered with their tears: "Neither the death;" says Benjamin Constant, "nor even the captivity of any man has ever been necessary to the well-being of a people, for the security of a nation which fears any thing from leaving at liberty, or in life, a Minister dispossessed of power. Such a miserable people may be likened to slaves who assassinate their masters when they have overpowed them less, they should reassume their authority, and appear with their whips in their hands."

Here have we then, in what relates to the security and true honour of a people, the present prosecution anticipated and judged, by a man whose sentiments and thoughts cannot be disavowed by the accusers.—I drive far from me then as unworthy of you and of France, every sinister presentment, all vain fear of the result—at the aspect of the accusers and judges, I dare pledge myself to my country that no blood will be here shed, to continue our civil discords.

I pause, Noble Peers, at the close of the long and painful route I have traversed, and in reviewing what I have done, I believe I have fulfilled all the engagements I have contracted to perform.

Thus I have proved that the accusation is inadmissible.

First, Because the tempest we have just experienced has carried away, along with the throne and the dynasty, all materials and elements necessary to such a prosecution.

Secondly, Because, from the changes operated in our institutions, by the recent revolution, it was not possible to afford to the accused the guarantees promised them by the Charter, under whose domination the acts charged against them have been committed.

Thirdly, In fine, that, by the terms of the Charter, the Ministers can be accused and judged only for the crime of treason; and that, in the present state of our legislation, there exists no law defining that offence, or applying its befitting penalty.

In anticipation of a case wherein the Court might appre-

ciate separately the charges contained in the accusation, I have successively ran over the four heads on which it relies; I have established that no one of them stands within the limits comprehended by any act that our criminal laws allow to be considered as punishable.

I have demonstrated that none of those four heads could furnish matter for a decision of the Court, because the fact of treason alone was the only thing which could be submitted to your deliberation, and on which you could pass to judgment. In fine, I have shewn that, supposing treason to be recognised, such crime not having any penalty awarded to it by the Legislature, it was for the Court to inquire whether the nature of its institution, and its double quality (Legislative et Judicial) conferred the power to at once create and make application of a law; and in admitting the power (the origin of which, however, I am at a loss to conceive,) I have already intimated my profound conviction, that it could only be exercised by you in the interests of your country and humanity.

COURT OF PEERS.

SEVENTH DAY.

The sitting commenced at half-past ten o'clock; the spectators in the public galleries were less numerous than on the preceeding days, doubtless on account of the measures of precaution which had been adopted. We remarked Messrs. Jouy, Charles Dupin, St. Cricq, de Schonen, and Carbonnel (Aide-Major-General.) Casimir Perrier was on one of the arm-chairs reserved for the witnesses. The gallery allotted to the sons of Peers of France was much less filled than at former audiences. The accused were led in; they wore the same serious aspect which marked their demeanour yesterday, and appeared sensible that the crisis of their fate was at hand. M. de Peyronnet conversed for a few moments with a friend who was in the public tribune near him, the others took their seats in silence. The Counsel followed them.

M. Hennequin wore under his gown the uniform of the National Guard. All eyes were turned with interest towards M. Cremieux, who was in the uniform of the Chasseurs of the Guard, and without gown; his countenance was still pale; several Peers surrounded and talked with him.

M. Sauzet also excited much attention; under his gown he wore his uniform, as Captain of the Cannoneers of the Rhone.

When the President ordered the Registrar to call over the names, a deep attention was manifest in the Assembly. All the Members present at the other sittings, answered again to-day except M. Mollien, who was stated by the President to have been bled yesterday evening in consequence of a sudden illness. The number of Peers present was 163.

The *President* then called on M. Madier Montjau, Commissary of the Chamber of Deputies, who immediately came forward leaning on a cane, being prevented walking by a rheumatic affection in the knee. The President and several Peers requested him to sit down, but he remained standing supported on an arm-chair. A profound silence succeeded; and he read a reply to the arguments of the Counsel for the defence, which we shall insert in to-morrows *Messenger*. While he was speaking, a note was handed to Prince Polignac.

M. de Martignac then rose, and spoke as follows—I could wish, my Lords, that it had not been my duty to avail myself of the sad and precious privilege which the law grants me as Counsel for the accused, to trouble you with a second address. I could wish that it had been permitted me to close this high controversy, in which the life, honour, and liberty of four accused individuals are at stake, without further trespass on the time of the Court. But the extreme rigour with which the right of accusation has been employed, will not allow me to be silent. I shall not trouble your patience long. I feel that this trial ought to be brought to a termination, for the truth has been made evident; it has shone in all its effulgence, and has removed the doubts which might have existed on your minds. I feel, also, my Lords, that it is time, your judgment should put an end to the long anguish of the accused; that it should restore calm and peace to the country, shaken by this mournful prosecution, the fatal heritage of a time that is no more.

Before entering again on the defence of the accused, why must I have to justify those who have answered the call of misfortune when it invoked their aid? We are accused of having braved the justice of public opinion; of

having expressed no other repentance than that of not having been the victors.

How, Gentlemen, the forebodings which troubled me, that dread of incompetency for such a cause, which weighed so heavily on my mind, are then realised! That thought will weigh on my heart like a remorse. I have failed then, in all the recommendations given to me; in all the prayers addressed to me. Ah! if it is thus, let the individual accused disavow me—(M. de Peyronnet gave a sign of assent)—for I have betrayed my trust. The order I had received and accepted was a commission of respect, justice, and regret; such was what I ought to have accomplished. If I have not done it, I have failed in my duty, and done injustice to my commission, and am become unworthy of it. But I have some hope, Gentlemen, that the reproaches addressed to us have not been merited by the defence which you have heard.

It is said that I pronounced the eulogium of M. de Polignac, when I simply related his history. I wished only to prove that the individual accused of inhumanity had shown towards his brother a devotion that never enters the heart of one prompt to issue orders of murder and massacre. I said, that I thought it worthy the dignity of Paris and of France to exercise generosity after victory; I said so because I am desirous of seeing my country strong and powerful, and do not believe that this strength and power are to be found in blood unnecessarily shed.

But blame is not attached to me alone, Gentlemen; the same censure has embraced another system, that presented to you by a young orator, of whom the first city in France envies the second the possession—a young orator whose talent not merely promises an eloquent advocate to the bar, but a powerful defender to his country.—(General approbation.)—He also has been misunderstood.

I now return to the defence. We find ourselves, according to the opinion of the Hon. Commissioner for the Accusation, in the same situation as at the beginning of the trial, that is to say, four causes of complaint are defined, by the aid of which, it has been sought to establish a crime not defined. But three obstacles arise to oppose this mode of argument, and this system of accusation. Namely, being without definite grounds, without judges, and without applica-

ble laws: the four subjects of accusation, are high treason, —a plot against the interior safety of the State, incitement to civil war—and, finally, promoting that civil war, by arming the citizens one against the other, not only in Paris, but in all the rest of France.

The hearts of the Ministers repel this horrible responsibility; they have shuddered to hear the investigation as to when, and how, and by what hands the first blood was shed. I will not longer fatigue the Court with these mournful details.

The Noble and learned Advocate then briefly defended his client from the charge of not arresting the course of the disasterous events of July, which he (M. de Martignac) declared was not in his power. Ah! (said the learned Advocate) no more of this accusation imbrued with blood! In mercy—place not on this head, already so bowed down, a burthen it cannot bear; no—the Ministers were not the authors of the fatal delay imputed to them, they deplored with every citizen the misfortunes of our country; but they had not the power of bringing them to a close; they repel this responsibility; they had no longer a mandate in which it originated.—(Here M. de Peyronnet gave a gesture of assent, and spoke to Messrs. Chantelauze and Guernon de Ranville, who also assented.)—After briefly replying to the various arguments urged by the Hon. Commissioners, and re-urging the arguments in his former speech, M. Martignac concluded as follows:

Noble Peers—I have fulfilled my duty, and the time is arrived for you to perform yours. The task is noble and worthy of you, and nothing that has passed or may occur without the Court will have any influence on your decision. Let those who may imagine they can by their menaces make an impression upon your minds approach—let them come with the trial of Strafford in their hands—let them reckon on the number of the Peers of France, who have answered to your appeal. I desire no better guarantee.

This speech was spoken, not read, when it was concluded.

M. Hennequin rose and said, he should occupy but a few minutes of the time of the Court, and would make but one observation. The Council at St. Cloud did not sit for six hours; it was assembled merely to dissolve the old Minis-

try and arrange a new one. The time which elapsed between the departure from the Tuileries and the Council was consumed by the affecting interview of the Marquis de Semonville with the King. "Is it then true" asked the Learned Advocate, "that the defence has left the cause where it found it?" No, Gentlemen, it has treated of high questions, and discussed noble and genuine theories. Truth will emanate from every point, and enlighten every heart.—Hours of passion are never hours of justice. Let us hope that the courageous and patriotic efforts of that guard of citizens in the ranks of which I have the honour of holding a place, will by its loyalty and firmness, cause the voice of justice alone to be heard, and suppress forever the outcries for vengeance.

M. Sauzet, with a feeble and exhausted voice said, that weakness arising from painful exertions would not allow him to address the Court, but after what had been already delivered he felt no regret at his incompacity. He added that some of his expressions and feelings had been misunderstood, but as he had declared himself incapable of exertion on behalf of his client, he should make no efforts in his own justification.

M. Cremieux, in a very short address, expressed his regret at having found it announced in a public paper that the advocate of M. Guernon de Ranville had endeavoured as well as the other Counsel to maintain the legality of the Ordonnances and appealed to the Court for his justification. "The counsel for the accused," said the learned advocate in conclusion, "have said every thing without reserve, and without fear, for they were addressing an assembly of Frenchmen; they had forgotten nothing, because the fate of four of their fellow-men were entrusted to their care. You, Noble Peers, are about to enter upon the consideration of your judgment; nothing that may be passing without will reach the sanctuary in which you will be inclosed; and France will respect your decree, because it will know that it is the fiat of justice.

The *President*.—Have the accused any thing to add? (The accused bowed in silence.) Have the Commissioners of the Chamber of Deputies any thing to add?

M. Beranger (Slowly and impressively.)—The cause has been heard; our mission is accomplished; yours is about

to commence. You have before you the resolution of the Chamber of Deputies, and the book of the law: the nation awaits your decision; it hopes it will obtain sound and *severe* justice. (Sensation.)

The *President.*—The pleadings are ended. (Slight movement.) The Court is about to withdraw to the council-chamber, to decide upon the mode and moment of deliberation. I request the Court and auditory not to leave their places previous to the departure of the accused.

The prisoners then withdrew, and were reconducted to their prison. In going out, M. de Polignac bowed to the right and left, and particularly recognized M. Billot; the others made a slight inclination of the head: and all eyes followed them to the door of that hall into which they are never again to enter.

After the lapse of a few minutes, the President said, in the midst of a profound silence. "The sitting is finished." It was then nearly two o'clock. In the course of the day's proceedings, numerous messages reached the President.

SENTENCE.

Precisely at ten o'clock the public sitting was resumed. The President and Peers occupied their usual seats. The Commissioners of the Chamber of Deputies were also in the places alloted to them. The accused were absent but their Counsel were all in Court. But very few persons were in the tribunes. The President in a voice of deep emotion, pronounced the following sentence:—

"The Court of Peers, after deliberation, in pursuance of the resolution of the Chamber of Deputies, having heard the Commissioners of that Chamber for the accusation, and the accused in their defence:

"Considering that by the Ordonnances of the 25th July, the Constitutional Charter of 1814, the Electoral Laws, and those securing the liberty of the press were manifestly violated, and that the Royal power, thereby usurped the functions of the legislature.

"Considering that, although the individual will of Charles X. may have influenced the determination of the accused, that circumstance cannot relieve them from their legal responsibility:

"Considering that it appears from the proceedings that Auguste Jules Armand Marie Prince de Polignac, as Min-

ister of Foreign Affairs, Minister of War *ad interim*, and President of the Council of Ministers; Pierre Denis Comte de Peyronnet, as Minister of the Interior; Jean Claude Balthazar Victor Chantelauze, as Garde des Sceaux and Minister of Justice; and Martial Come Annibal Perdetue Magloire, Comte de Guernon Ranville, as Minister of Public Instruction and Ecclesiastical Affairs, all responsible in the terms of the 13th Article of the Charter of 1814, countersigned the Ordonnances of the 25th of July, the illegality of which they themselves acknowledge; that they took every means to enforce the execution of them; and that they advised the King to declare the city in a state of seige, in order to subdue by arms the legitimate resistance of the citizens:

"Considering that these acts constitute the crime of treason, provided against by the 56th Article of the Charter of 1814:

"Declares le Prince de Polignac, le Comte de Peyronnet, Victor Chantelauze, and le Comte de Guernon Ranville, guilty of the crime of treason:

"Considering that no law has determined the punishment of treason, and that the Court is therefore under the necessity of supplying the defficiency:

"According to the 7th Article of the Penal Code, which classes transportation (1) among the punishments stigmatising with infamy *(peines afflictive et infamantes:)*

"According to the 17th Article of the same Code, which declares transportation to be for life:

"According to the 18th Article, which declares, that transportation involves civil death, and the 25th Article of the Code Civile, which regulates the consequences of civil death:

"Considering that there is not any place, out of the continental dominions of France, to which criminals sentenced to transportation can be taken and detained:

"Condems le Prince de Polignac to be imprisoned for life in the continental dominions of the Kingdom, declares him deprived of his titles, rank, and orders, declares him civily dead—all the other consequences of transportation remaining in force, as regulated by the Articles before mentioned.

"Considering the facts of the case as appearing from the proceedings:

"Condemns le Comte de Peyronnet, Victor Chantelauze, and le Comte de Guernon Ranville to imprisonment for life; directs them to be placed in a state of *interdiction*, conformably to the 28th and 29th Articles of the Penal Code, declares them equally deprived of their titles, rank, and orders.

"Condemns all the accused, individually and collectively, to pay the expenses of the proceedings.

"Orders the present sentence to be communicated by message to the Chamber of Deputies.

"Orders, that it shall be printed and posted up in Paris and every other Commune of the Kingdom, and transmitted to the Garde des Sceaux, Minister of Justice, for the purpose of being carried into execution."

Note.—This number completes the first volume of the Law Journal. For reasons, which it is unnecessary to state, the work will be discontinued.

Those who have not contributed the amount of their subscription will see the propriety of remitting the same immediately, that the business relating to the Law Journal may be brought to a close as early as possible.

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