THE

Carolina Law Repository.

CONTAINING

BIOGRAPHICAL SKETCHES

OF

EMINENT JUDGES;

OPINIONS

OF

AMERICAN AND FOREIGN JURISTS;

AND

REPORTS OF CASES

ADJUDGED IN THE SUPREME COURT OF NORTH-CAROLINA.

VOL. II.

"The mind of man not being capable of having many ideas under "view at once, it was necessary to have a REPOSITORY to lay up those "ideas."—*Locke.*

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THE

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ELOGE OF M. POTHIER.

The life of a man of science is seldom very fertile in events, which are calculated to interest our curiosity. Simplicity and uniformity are its character, and its only æras are those of his works. His history is like that of a nation, whose government has been long exempt from ambition, friendly to peace, solely occupied with the care of rendering its subjects happy, and enlightened in the means of doing so. The annals of such a people will be very barren; when you have learned its constitution and administration, you know its history; it will be the same in one age as in another, because the character of order is uniformity.

The agitation of the passions is the cause of events, and history is only the recital of the effects produced. The life of a man of science is the more happy, as it is the less replete with interesting occurrences.

Sometimes he is carried against his inclinations amidst the storms of life, to which he is naturally a stranger. Circumstances remove him from his proper sphere, and subject him to the passions of others, or raise him to situations which expose him to their contradiction. His life then becomes interesting at the expence of his repose.

Pothier had never any ground of complaint from the passions of himself or others. Nothing disturbed the tranquillity of his mind, no adventitious circumstances deranged

the plan and uniformity of his life. Nothing occurred to give him pain except the loss of his friends, to whom he was attached with great sincerity.

Perfectly free from all pecuniary anxiety, he consecrated the whole of his life to his functions, and the study of jurisprudence; he had no other duties to fulfil, nor any other inclination to gratify.

He never had the smallest disposition to marry. He said that he had not sufficient courage for it, and that he admired those who had.

Celibacy is doubtless the best and wisest course for a man frugal of his time, excessively devoted to study, and peculiarly anxious for tranquillity. This condition separates him from the generality of mankind, it secures him from many evils, and, by limiting the objects of his attachment, relieves him from the principal sources of anxiety.

No person ever availed himself of this advantage more than *Pothier;* he wished to enjoy it in its full extent, and thought himself excused from all attention to domestic affairs. His negligence in this respect would have been culpable in the head of a family. The fault in him became respectable from the motive which occasioned it. It originated from a sincere disregard for affluence, and a most disinterested character of mind. He, however, saw only the negligence that was produced by this sentiment, and reproached himself for it in the society of his friends.

He was no wise calculated for the details of domestic affairs, he was too indifferent to matters of interest, to study or attend to them. Fortunately he had a faithful domestic, who obliged him to undertake the most essential concerns, and relieved him from attending to those which did not require his personal interposition.

He never attempted to increase his fortune, and only left it as he found it. His disinterestedness was not occasioned by the affluenceof his fortune, which was not more than sufficient for all his purposes; but proceeded from the nature of his character, and from a real indifference for riches.

If he had been much more opulent, he would not have lived in a different manner, he would have made much larger donations, and would have been more incumbered by a more extensive fortune, in case he had condescended to take the trouble of giving it an additional attention. If he had consented to take more pains, it would only have been from a motive of economy in favor of the poor. He preferred indemnifying them by the frugality of his life, by which he was enabled to be more generous than his fortune would seem to allow. He was justified in thinking, that he discharged his duty towards them by the disposition of a superfluity, which was the more considerable, as what he applied in necessaries was very limited. He regretted even the amount which his domestics expended in these necessaries on account of his health, and they sometimes found it requisite to conceal from him the price which they gave for provisions. The *Dames de Pauvres* were always sure of finding a resource in him; he received their visits with gratitute and respect, he was pleased with making them the depositaries of his bounty, because he wished it to be applied with discretion; and by confiding it to them, he was easy with respect to the distribution, and did not think it requisite to ask for any account.

But how many persons, whose indigence was accompanied by a certain elevation in society, applied to him with confidence for assistance, and received an effectual relief, the value of which was enhanced by the tenderness with which it was administered? How many children did he put forward in life, by defraying the charge of their apprenticeship; a relief the more durable, as it prevents the accession

of poverty? How often have distant provinces experienced the benefit of his charities, for which there was no other solicitation than a knowledge of the miseries that excited them?

How many good works did he perform in secret, and which were known only to omniscience? In times of general calamity, he would have exhausted the whole of his income, and left himself destitute of necessaries, if his superintendant had not taken the precaution of reserving something for daily expenditure; he concealed his money from her for the purpose of charity, and she was obliged to conceal it from him for mere subsistence. This did not require very great management, as he never knew the amount of his money, and gave her his key whenever she asked for it As long as he found any money he took it to give away, and she could only check this excess, by threatening to take up goods upon credit. When his coffer was exhausted, the replenishing it was also the care of his superintendant; she was obliged to discover where money was due to him, and prevailed upon him to sign receipts to enable her to obtain it.

So many virtues and good works were concealed from the knowledge of the public by an extreme modesty, and the same disposition so entirely influenced all his actions, that it was the virtue which he had the greatest difficulty in concealing. It arose from a sincere humility, by which he really preferred others to himself, and prevented his conceiving himself to be possessed of a merit, which was conspicuous to every other person.

Equally disinterested with respect to reputation and fortune, he took no more pains for the one than the other; but there was this difference, that he never did any thing which had the effect of advancing his fortune, whilst every day was adding to his reputation, which extended without his knowledge, and contrary to his wishes, and any intimation of it

was by no means favorably received. He was as much averse to commendation as others are to reproach, and it was easy to observe by his embarrassment and his countenance, that he was seriously displeased with it.

To be indulgent to others, to be afraid of failing in what is due to them, to forbear exacting any thing for ourselves, is the true character of politeness; and this politeness was as prevalent in his character, as the modesty which occasioned it. He was only deficient in that superficial politeness, with which the generality of persons are fully satisfied, and which they so frequently pervert by expressing sentiments that they do not feel; he was deficient in the manners which are only acquired in the commerce of the world, and which are dispensed with in persons who have been more conversant with books than society, especially when they have nothing of that coarseness and asperity, which are sometimes contracted by a habit of study and retirement, without themselves being conscious of it.

Pothier's deportment was very different from this. Nothing could be imputed to him but an excess of diffidence, which rendered him timid and embarrassed in the company of strangers; or when he was forced by the duties of propriety to appear in a more extended circle. Upon these occasions he found himself out of his element, and generally requested one of his friends to accompany him, which he regarded as a signal favour.

Nature is frugal of her gifts, and does not always impart a variety of them to the same individual; but who would not prefer the allotment of *Pothier*, however destitute of exterior advantages? There was nothing prepossessing in his figure; his stature was tall, but ill connected; in walking, his body inclined on one side, his gait was singular and inelegant; in sitting, he was embarrassed by the length of his legs, which he kept twisted together, *Centrelassoit par des*

coutours redoubles.) There was a peculiar awkwardness in all his actions: at table it was almost necessary to cut his meat for him; if he wanted to mend the fire he placed himself upon his knees, but did not succeed in accomplishing his purpose. The simplicity of his manners, and of his whole appearance, might excite a favorable impression with respect to the goodness of his character; but gave no indication of the superiority of his mind. To have an idea of that, it was necessary either to judge of him by his reputation, or to have an intimate knowledge of him; a transient visit must have weakened the idea that was previously entertained of him. There was, however, a spirit and vivacity in his eyes, which indicated the quickness of his penetration; but they did not acquire animation until he became interested by the conversation.

He was always the readiest to indulge a pleasantry upon his own figure and want of address. He used to relate in a good humored manner, that in passing a coffee house at Paris, in his robe, the young men came out to point at him.

When he was at Paris, upon the invitation of *M. D'Agues-seau*, who wished to know and converse with him upon the work in which he was engaged, he called at the *Hotel de la Chancellerie*, and was told that the Chancellor could not be seen. He went away, and intended to return home the following day, if his friends had not detained him. He called again the next day, when the Chancellor, upon being informed that he was in his anti-chamber, came out to him, and received him wtth a distinction, which afforded considerable surprise to those who had only formed a judgment of him from his appearance.

He was mild and affable in society, gay and open with his friends, of a frankness in conversation that unbosomed all his thoughts, his tranquillity was never disturbed, nor his serenity overclouded. He had a simplicity which it is

pleasing to meet with in men of superior minds, as it tends to moderate the awe inspired by their merit. This simplicity would sometimes have the appearance of singularity, sometimes it was the result of an excess of reason, if we may use that expression to distinguish it from the ordinary mode of thinking and acting. For even the most sensible persons in many cases follow the common opinion, in opposition to the dictates of good sense; and it is very rare to meet with a person, whose opinions, being solely governed by the pure sentiments of reason, cannot appear otherwise thansingular.

He was averse to contention and dispute, was never personally offended with contradiction, and wondered at any person being displeased at another differing from him in opinion. But he strongly adhered to his opinion, not from an attachment to it as his own, but because he thought it correct, and the extent of his information would not suffer him to remain undecided. He defended it with firmness, and used a freedom of opposition, which he equally admitted to others; he argued with living persons in the same manner as he discussed the sentiments of an author, without feeling any other interest than the discovery of the truth. Authority alone did not impose upon him, because it is not a reason, it was only an additional motive for discussing a subject with greater care, and giving his reasons a force and clearness, which might counterbalance the weight of authority.

There was, therefore, a great advantage to be gained from stating objections to him, and entering into disputation with him. The attack excited him to relinquish his accustomed tranquillity, it forced him to resume the consideration of the question, to discuss it in all its aspects, to weigh the opposite arguments, and to establish his sentiment with a fullness, and an energy peculiar to himself.

But when he really felt an interest in a proceeding or an opinion, (and what interest could affect him but that of truth, of justice, of public utility?) his modesty and the mildness of his character did not prevent his maintaining his sentiment with a considerable degree of warmth and vivacity. If he was strongly contradicted upon these occasions, he would sometimes forget his moderation, become animated and irritated by resistance. The words then pressed upon him for utterance, and he could not express at once all that he wanted to say; and from his wish to persuade, he enfeebled the powers of persuasion, which naturally belonged to him. A harshness of expression would sometimes escape him that his heart would have disavowed; and which was certainly not instigated by any acrimony of sentiment; and which the zeal that excited it would have excused, if people were not ordinarily more sensible to exterior effects, than to the motives producing them, which is so far reasonable that they can only form a judgment of the latter from the former. Whoever had seen him at these moments, would have thought him eager for victory, susceptible of resentment, and no wise averse to excite it in others; but the judgment formed upon these impressions would have been very erroneous. No man was ever more simple, more mild, more devoted to peace, more remote from animosity. He never had occasion to pardon; for pardon supposes offence, which he was incapable of feeling. A failure in the attention that was due to him could not irritate his disposition; and he was still less susceptible of hatred than of anger. His reason, as well as his religion, would have precluded it from entering into his heart; and it may be added that it was equally impossible to conceive a hatred against him, or even to feel a coldness towards him.

His zeal and ardor upon these occasions was as great as his indifference with respect to matters of etiquette and ceremony, or the pretensions and interests of his company.

This manner of thinking and judging arose from the principles of his character, which was naturally inimical to contention, upon subjects that did not appear worthy of it. He supposed all other persons to have as much simplicity as himself, to be equally replete with that reason which rises above exterior circumstances, and equally indifferent with respect to what only concerns the manner of things, without having any relation to their substance.

To this mode of thinking, and to the openness of his character, we may attribute his custom of expressing his opinion aloud at the audience. Scarcely had an advocate opened a cause before he became master of it; he anticipated all the arguments of the respective parties, and had formed a judgment within himself almost before the bar could perceive what was the matter in dispute. He had afterwards only to observe the manner in which the case was supported and defended. If it was a cause of slight importance, he allowed his mind to amuse itself with other subjects; if it exercised his attention, he could scarcely avoid intimating his concurrence or dissent by his gestures, or by a half utterance, so that his opinion was known well enough previous to going to consultation.

But he allowed himself much greater liberty when he presided. The fondness for dispatch, which is confessedly laudable, but which ought to be kept within proper limits, carried him away, and made him forget the patience that is proper for a Judge, and is due to the parties. The party that fails in a contest ought not to have the opportunity of complaining that he has not been heard. Nobody will ever accuse Pothier of entertaining a wish to dictate the judgment and concentrate the whole authority of the tribunal in himself: his real disposition was too well known for even malignity to infer from these outward appearances, that he was actuated by any personal consideration. But he wished for expedition, and in causes of small importance he did not

think that it was possible to proceed too rapidly. If the advocates wandered from the point in question, he was in haste to bring them back to it; but if they advanced an improper argument, or maintained a false principle, he could not command his impatience, and interrupted them for the purpose of fixing them to the true principles and arguments of the cause. The audience sometimes degenerated into dissertations and a kind of conference. His friends sometimes remonstrated with him upon the subject, which he approved, but he was not master of his conduct. In any other person this manner of presiding would have appeared at least singular. But he was so respected, and so remote from all intention of giving offence, that every thing coming from him was assented to.

These details may perhaps not be considered as misplaced on the present occasion. We have a pleasure in knowing even the slight faults of illustrious persons, perhaps because it seems to place them more nearly upon a level with ourselves; perhaps also because these trifling defects commonly accompany an excellence of disposition, and are only the too prominent consequences of it. They are calculated to depict the man as he was, and to give a more familiar representation of his character.

It is great advantage, especially if the sciences which require continual assiduity, and for which human life is always too short, to be disengaged from any foreign pursuit that cannot be followed without injury to the principal object; and there is much merit in resisting the wish for extensive erudition; especially when it is flattered by the facility of success. Pothier might without neglecting jurisprudence, have been allured by some particular study, and applied himself to it in the vacations. He had certainly been attached to mathematics and literature, and had already sufficient knowledge of them to afford an inducement to extend it. He had formerly studied geometry, which, altho'

originally incapable of producing an accuracy of judgment, is so well calculated to bring it to perfection. He had likewise an inclination and taste for literature; but having acquired sufficient for the purposes of utility, he could only increase his stock of it by way of relaxation, for which he never found sufficient leisure.

The study to which he most devoted himself for the first ten or twelve years of his magistracy, was religion. He endeavored to enlighten his faith and to advance his piety. His attachment to religion arose from an intimate conviction, founded upon a knowledge of its evidences, and strengthened by the love and practice of its precepts. With what contempt therefore did he regard the new philosophers. He could never speak of them without indignation. He bewailed the progress of infidelity and the corruption of morals, which is the effect of it.

We lament the shortness of his life; we regret that he had not time to complete so many other treatises which he had projected. Could he have accomplished those which we have if he had applied himself to extraneous pursuits? It was only by a rigorous economy of his time, in conjunction with his facility and penetration, that he could be equal to the performance of so many different occupations.

Nothing can be more admirable, since nothing is more rare than the discretion and moderation, which he used in the labors of composition. That kind of labour which is the most pleasant and flatt-ring, easily obtains a peference. A man of science is impatient under the pressure of occupations that divert him from his favorite employment, and avoids them as much as possible. Pothier might very easily have conceived, that the publication of his works was a benefit of more permanent utility, than so many other services which he rendered the public, and have deemed this preference a sufficient excuse for neglecting his other duties.

We may entertain the same opinion; and regret the time which was so meritoriously employed, but of which no traces remain. He, however, could not have thought or acted in such a manner, without ascribing to his works a greater importance than his modesty would have allowed.

Besides, he made it a principle to reconcile all his duties with each other. Sparing of his time with regard to recreation, he was prodigal of it for the purposes of utility; and never evinced a greater partiality for one avocation than another. No person was more assiduous in his attendance at the court; and he never omitted his lectures. Upon retiring to his study, he examined the procedures on which he was to report; received visits which are often made without any necessity, with a patience very uncommon in a person so much engaged; he gave advice and answered letters, the number of which increased as his reputation extended: how many litigations has he prevented by the prudence of his counsels! how many family contests has he terminated by an amicable arrangement! the confidence of the public rendered him a voluntary tribunal.

Although he devoted a large portion of the day to employment, it was often fully occupied without admitting any parts of it to be allotted to composition. He had a talent of leaving an employment and resuming it with equal facility. He always quitted it without fatigue; because his moderation extended even to his studies, which he never continued during the night. His supper, which he took at seven, closed the labors of the day. This plan was only deviated from on Wednesdays, when he deferred the hour of supper until eight; on account of a conference which he had with all the young magistrates, and with several advocates whose pride it was to have been and to continue his pupils. These conferences were continued without interruption for more than forty years. They were at first held at the house of *M. Prevot de Janes*, and upon his decease Pothier had them at his own.

In the course of a life thus occupied, a short journey to *Rouen* and *Havre* in 1748 was almost the only voluntary interruption of his regular pursuits. He had always entertained a wish to behold the sea, for he was not indifferent to the contemplation of nature; and a view of the immensity of the ocean to those who have not been accustomed to it is truly impressive, as bespeaking the greatness of HIM who formed that repository for the formidable element, and assigned it its proper bounds. On his return from *Havre* he remained some time at *Paris* with *M. Gayenne*, for the purpose of conferring with him respecting his edition of the pandects. I had the honor of being his companion upon this journey. *M. l'Huillier, lieutenant particulier*, was also of the party; I was then in my first year of law, and the journey was no interruption to my study; I had the institutes with me, and the best commentary possible was the conversation of Pothier, who explained them to me.

While he was engaged in the composition of his great work, he was obliged, for the purpose of avoiding interruption in it, to withdraw in some degree from his other occupations. This was previous to his having the appointment of professor.

He went to pass a part of the summer at *Lu*, where he had the advantage of repose and solitude.

After obtaining the professorship in 1750, he only went there during the vacation; and the time which is usually allotted, even by the most assiduous, to relaxation, was that in which he was the most fully occupied, as he was then least subject to interruption. From *Lu* in a great degree proceeded his various treatises. He always had a horse there and was fond of riding. It is easy to form an idea of his appearance on horseback. His rides consisted in going every Sunday to mass at *St. Andrew de Chateaudun*, and paying visits to his friends, among whom were several of his colleagues, but he never slept from home.

Orleans ranked at the same time among her citizens two men of rare and equal excellence in different kinds, and for thirty years these two, each worthy of the other, resided together in the small mansion of *Lu*.

At the age of 88 M. Pichart *(Canon of St. Aignan)* still laments the loss of one whom he had not expected to survive, or rather tranquil as to the lot of his friend, he only deplores the misfortune of the public. As profound in the knowledge of the holy scriptures, as Pothier was in the science of the law, he was employed on those learned commentaries on the sacred books which are equally replete with genuine piety, and valuable information. Their relaxations consisted in a walk of an hour after dinner, and a conversation of the same length after supper; for Pothier breakfasted too early to have the company of his friend at that time. It may readily be conceived that their conversation would have considerable interest: Pothier, although commonly silent, was otherwise upon subjects adapted to his inclination, and he always found in M. Pichart a great facility of speech, and an extensive fund of literature, both sacred and profane. He had sufficient knowledge to support a conversation upon the subjects which were familiar to M. Pichart, and the field was sufficiently large for their amusement. But he also wished to converse with him respecting the Roman law, and spoke in such high terms of the pandects, that his friend could not forbear reading them; it is superfluous to ask whether he was satisfied with having done so.

The reputation of Pothier was necessarily extended with the diffusion of his works; and he had during the course of his life all the celebrity which a man of science can enjoy. The voice of the public acknowledged him as the greatest jurist of his age, or rather as the greatest since the time of *Dumoulins*, with whom he was frequently classed. Without waiting for his death, the weight of authority was given to

his decisions, and the highest tribunals have acted upon the citation of his works; an honor above suspicion, and the greatest which a jurist can receive.

This sentiment prevailed not only in France, but amongst foreigners, by whom he was as much esteemed as by his countrymen. His, indeed, are not works the utility of which is confined to any given space. Wherever the science of jurisprudence shall be known and cultivated; wherever men shall engage in contracts, and have occasion to appeal to the principles of justice for deciding the controversies that may arise from them; the name of *Pothier* will be known; his works will be studied and consulted. The authority of so illustrious a jurist is properly that of a legislator; or rather surpasses it, in as much as it participates in the laws of justice; and as these immutable laws which are adapted to all mankind are superior to the versatile, transitory, and arbitrary dispositions which men have been pleased to erect into laws.

If Pothier had only applied his assiduity to the municipal and particular laws of his own country, his reputation would have been confined to the same limits; but he is a jurist for all times and all places; he is likely to have even greater celebrity in countries where jurisprudence is cultivated with attention, than in France where it is so much neglected, where places are purchased, and the price which is given for them is a dispensation from study and from learning. And we may even add, that if he was a stranger to his country, by the simplicity of his manners, he was still more so by the course of his studies.

If he had been born in Germany, the Princes there would have disputed which of them should have attached him to their court, and those who could not fix him with themselves, would have felt a pride in distinguishing him by titles of honor. With us he lived as the most ordinary person, and

without receiving any distinction. He was himself very far from either desiring or supposing that he deserved any. But it seems surprising that no steps were taken, for discharging the obligations which were due to him from the country, by conferring some distinction that would reflect a greater honor upon those who procured such a reward for modest merit, than upon him who received it.

It is equally astonishing, that as his excellence was so well known, he was never consulted upon subjects of legislation; and that his talents were never resorted to for the reformation of the laws. He would have been the soul of a council of legislation. But, by a singular fatality, the existence of merit is less rare than the employment of it in its proper sphere.

It is not for us to complain of this neglect, or to regret that his merit was not raised to a more suitable elevation. We possessed him to ourselves, in prejudice of the general utility that would have arisen from his exertions, if the functions of a magistrate and professor, if the many private benefits that we incessantly received from him had not occupied the whole of his life. Every citizen had the benefit of his counsels, for from whom did he ever withhold his information? Every man of worth could name him as his friend. The poor deplore him as their father. His gentleness and propriety attracted an universal attachment and respect. It is not every one who can appreciate the excellence of the jurist; but the heart is the most essential portion of the man, and of that perhaps the people are the surest judges.

His death was therefore a general grief. The public are not always just; their view of the worth which is before them is sometimes dimmed; prone rather to criticism than to admiration, frugal of their esteem, and dealing it out with caution and restriction; they cannot agree to render justice

to merit, until it has departed from them. But the charge cannot be applied to Pothier; death has only confirmed the sentiments of the public, without augmenting them, which is the most exalted panegyric, and the most perfect proof of exalted and untarnished merit.

However extended the life of such a man may be, his death, when it occurs, is to the public premature. The death of Pothier, appeared the more so as from his age, which was only 73, and the regularity of his life, a much longer duration of it might have been hoped for. To himself it would have been sudden if the whole of his life had not been a continued preparation for it. He had experienced neither the infirmities of an advanced period of life, nor the decay of old age; no weakness of intellectual faculties, no bodily pains, none of those apprehensions of the approach of death, from which even the most pious life is not always a protection.

He was snatched away by an illness of six days. The fever, although severe, had not the appearance of danger; on the first of March he felt himself better and got up. He was supposed to be recovering, and he entertained the same opinion. In the evening he fell into a lethargy, and on the following day he terminated a life so precious in the eyes of God and man.

LAW OPINIONS.

INTERCOURSE WITH THE ENEMY.

A letter from the Attorney-General of the United States to the District Attorney of Massachusetts.

Washington, July 28, 1814.

Dear Sir—I have had the honor to receive your letter of the 16th of this month. I perfectly agree with you, that the intercourse which, in general terms, you describe as taking place on the part of our citizens with the enemy's ships of war upon the coast, is, unquestionably, a high affront on the National Sovereignty. It is altogether incompatible with a state of war. Whatever of necessary business, growing out of the belligerent state, is to be transacted with the enemy, should be transacted under the sanction of the government. Any other doctine might lead to consequences too palpably mischievous to be countenanced by any sound views of the public safety. To the highest powers of government alone does it belong to make war. To government alone does it belong to carry it on. To its exclusive authority is negotiation committed, whatever character it may assume, whether involving the highest interests of the nation at large, or merely those matters of subordinate individual concern which spring up an unavoidable concomitant to a state of national hostility. The legal operation of the act declaring war, was to put the subjects and citizens of the two countries in the condition of enemies towards each other. The slightest intercourse of trade between them, is, hence, forbidden. All property detected as the subject of such trade, is forfeited under the general law resulting at all times and

to all nations, from a state of war; and which this nation appropriated to itself when it became belligerent, as indispensable to its operations, its duties and its safety.

Much more subversive of these ends might it prove, if our citizens be suffered to hold, without the licence of public authority, personal intercourse with the enemy; to visit at pleasure their fleets, while actually invading our waters and threatening our towns. Such conduct constitutes an encroachment upon the attributes delegated to government, and which, under the theory of our constitution, should be exercised only by the executive branch, as a necessity incident to executive authority. The government that passively and promiscuously permits this encroachment, must agree also to surrender its power of self-preservation. The citizen who imagines himself at liberty to embark in the violation, must have a limited and erroneous sense of the obligations that should bind him. The forecast of the former, cannot fail to perceive that it too obviously confers the means of doing mischief, to suffer it to stand excused by any subsequent allegation of an unexceptionable or laudable motive, and should cut off remote and probable dangers by a strict inhibition of every species of such intercourse, under whatever pretences attempted. The latter should hesitate at taking a step so susceptible of abuse: which might open a door to pernicious imitation; and which, whatever its genuine or harmless complexion in this particular instance, is calculated to beget suspicions unfavorable to his intentions and hazardous to his fame. By the act of spontaneously repairing to the hostile ships, he separates himself from his country; identifies himself for the time being, with its foes; and by exhibiting himself upon their decks, without the stamp of national permission, is liable, under first impressions, to be viewed by the one and the other, as in a garb of doubtful innocence. He goes unshielded and unknown. If any one citizen may rightfully repair to the enemy for any purpose which he chuses either sincerely to avow, or fictitiously to

set up, all must be allowed to claim a participation in the same indulgence. Thus, an evil disposed person, veiling a malignant and treacherous intention under cover of these excursions, with no limit to their number and left to his own choice of circumstances and time, may become the destructive bearer of information and plans, to work the destruction of his country. These remarks are conceived to be founded upon principles intrinsically sound, because inseparable from the safeguard of the Commonwealth, and that must hold out the strongest titles to assent in every dispassionate mind. The policy of other nations, has adopted the method of a flag of truce from the government or its known agents, when intercourse is to take place with an enemy, which serves as an universal symbol, that it is under public permission, and for lawful and necessary purposes. That the citizens of the United States, during a war, should be all at once absolved from this ancient, cautionary usage; that they should be freely allowed to substitute their own will for that of the government; passing to the enemy's lines or to the enemy's ships for objects innocent or fatal, at their own loose discretion, seems as irreconcilable to reason, as it is opposed to the maxims of prudence that have heretofore regulated the conduct of contending nations.

In reply to your request for my opinion, is such an act to be passed over without any notice from the magistracy? thereby, in the absence of all correction, inviting its endless repetition; to the disparagement of that fidelity which should bind in its sacred ties, the citizen to the public, to the signal disrepute of our citizens themselves, in derision of all law, and to the manifest danger of the State?

To these most important questions, I feel happy in not being obliged to give a negative answer. I think, that every private individual who is seen to throw himself upon the armed and invading foe, without the knowledge and

permission of his government should be arrested and taken before the proper Judge or Court. That if this cannot be done with a view to prosecute him by indictment, it at least may be with a view to lay the foundation of a charge on which he may be bound in sufficient sureties to his good behaviour. For such intercourse with the enemy, puts him under a suspicion so strong, that the law should be actively awake. It lies on the direct road to treason; seems an approximation to it, opening at once every facility to its commission by taking the first and natural step. If no crime, in the moral scale, has in fact been perpetrated, which we are bound to admit may be the case, such verisimilitude of criminal intention is held out, as should put the party upon his excuse. And this, as I apprehend, not by his own mere voluntary asservations, but under the more authentic ceremonies of a judicial scrutiny and sanction. If he can make out, by unexceptionable testimony, his innocence; that is, if he can shew that during all the while he was in communion with the enemy, he did nothing, or uttered nothing that would bring him within the pale of treason; or if he can show that some invincible necessity compelled his going, the Judge, as the law now stands, would probably exercise a discretion in directing his discharge. On the other hand, if there be no such repellent proof, I should presume that the bare going on board being fixed upon him, would authorize his being held to his good behavior. The amount of security to be demanded would of course regulate itself, under judicial discretion, by the previous habits and standing of the party, which might serve to give cause of greater or less suspicion. It will be seen, that in this course, no departure is implied from the rule of law, which requires the proof always to follow up the allegation; since proof of the substantive act, which must always, in the first instance, be adduced of going at mere private instigation to the enemy while in armed array, is to be the standard of enforcing against the accused, this species of preventive justice. Nor

can he reasonably complain of being laid under this restraint, when, by his own imprudence, he has given such cause to suspect that he will perpetrate a crime.

It may, perhaps, be said, that as this binding over to good behaviour is a process at common law, and not particularly prescribed by any statute of Congress, to pursue it would be to recognize the authority of the former system, as the only source of the remedy. It appears to me, that such an objection is susceptible of a ready and obvious answer. The right to bind over, I take to be the necessary adjunct to the right to indict and punish the principal crime. It is, as it were, the accident inherent in the substance. Treason itself being forbidden and punishable by indictment, it becomes necessary that a step, which, until fully explained away, verges so closely upon treason, should be followed up by this incipient restraint, so strictly comprehended within and related to the power of final punishments. The voluntarily rushing into the enemy's camp, is to be considered in the light of a first probable commencement of that train, the entire series of which is, in sound construction, already declared to be a crime by the Constitution and the law. To wait its consummation, or the progressive stages of its developement, might be to render the parent statute itself little less than a dead letter. Its existence may surely be anticipated where violent presumptions are afforded, and the arm of the statute be reached out in indispensable extension of its efficacy to ward off, to check, to extinguish the first movements towards the criminal deed. The power to punish by established and known means. The less must be comprehended within the greater of its own quality and its own kind. Any other principles of construction would be over scrupulous and rigid, would be against all just reasoning upon judiciary powers, and might be in danger of paring down the statute of treason itself to a few naked and abortive words.

The doctrine which goes to exclude the common law of England, taken as a general system, from the criminal jurisprudence of our country, has never denied it a prevalence and force *sub modo*. It has been adopted in universal practice, as the incidental guide and hand-maid to our own acts of positive legislation. The very institution of a Court by Congress, necessarily implies its investiture with certain powers known at common law, fundamental to the discharge of its functions. How but by the aid of parts of this auxiliary code, incorporated by inference and deduction upon our own statutes; how else could the statute of treason; how could any other statute of Congress which creates an offence and authorises a punishment, be executed? The shaping of the indictment; its caption; the form and body of its phraseology; the legal idea of the offence; the rules of evidence on the trial; those applicable to the jury, to the carrying into effect the sentence upon conviction; these, and various other powers, are taken to be implied the moment that we are furnished by Congress with a statutory definition and punishment of a crime. Upon this foundation have the Courts of the United States acted as soon as an offence has been thrown upon their general cognizance, as to what course it might be proper to pursue towards persons who go on board the enemy's ships hovering upon our shores, without any previous licence derived from public authority, I beg leave to state:

That I think such intercourse should, in every case, be regarded as imparting a strong, *prima facie*, intention of guilt. It raises a presumption of design adverse to the good of the country, and favoring the enemy, which should not be passed over without a scrupulous inquiry, on the part of those functionaries who are charged with the punishing justice of the laws; and it behoves good citizens to be assistant to the magistrates upon all such occasions. If there be reason to think, that, under the guise of some specious or inoffensive purpose, any improper information has been conveyed,

by direct or indirect, but intelligible means of communication, or any supplies been furnished, and the competent evidence of such fact or facts can be obtained, it is obvious that the party stands embraced by the constitutional definition of treason, in giving aid to the enemy, and should be proceeded against accordingly.

If no evidence exist, or be discoverable to this effect, it may be asked, is the bare act of thus going on board punishable by indictment under our existing laws?

I am not prepared to answer this question in the affirmative. Good men may undoubtedly be found on board for ends that are innocent; however in the view of a wise and and safe policy, independent of any law, its impropriety could scarcely fail to strike every intelligent and patriotic mind. But there possibly may be room for fearing, and if there be, it is deeply to be regretted, that those who slight the unsophisticated verdict of the public feeling, in making these visits, may have been looking with a more anxious discernment into the presumed defects of our existing jurisprudence, than consulting under enlarged and unbiassed estimates of duty, their own paramount obligations as members of the social body. It is true indeed, that under my views of the subject, no statute has yet been passed by Congress, looking particularly to this kind of conduct, or establishing it by specific definition as an independent crime. It must be admitted, that the act of the 3d of January, 1799, entitled an act for the punishment of crimes therein specified, or the more recent one of the 6th of July, 1812, for the prohibition of trade with the enemy, cannot be considered as having contemplated the particular species of intercourse with the armed enemy, of which we are speaking; or that under the rules applicable to the interpretation of penal laws, they could not be made safely to embrace it. At the same time, it will be conceded, that there exists full power to prohibit and punish specifically such intercourse as an integral,

primary offence. The high exercise of legislative authority which made the United States a belligerent, necessarily invested the body corporate of their government with the resulting powers necessary to a state of war; which powers, I cannot doubt, may be called into activity in detailed and positive acts of legislation, at the discretion of the same authority, and made co-extensive with the exigencies and duration of war itself.

In what manner this kind of intercourse with a public enemy may be punished at mere common law, it is not necessary that I should enquire. Upon this point, if I must express an opinion, premising that it is of no more value than that of any other individual, I must declare that I do not think the common law applicable in such a case, to the government of the United States; I should feel regret at supposing, that any official functions of which I may recognize the obligations, implicated the necessity of my withholding the expression of this opinion. I do not think that a federal republic like ours, resting upon, as its only pillars, the limited political concessions of distinct and independent sovereign states, drew to itself, by any just implication at the moment of its circumscribed structure, the whole common law of England, with all or any portion of its dark catalogue of crimes and punishments; a code, which the more liberal and humane wisdom of later days; the labors of the Romilys and Benthams following the more ancient strictures of a Blackstone and a Hale; has been aiming ever since to free of its fierce and sanguinary features: a code, which, among a vast variety of actions that in a complicated community human frailty may be betrayed into, denounces upon scarcely less than two hundred capital inflictions; thereby, as the regular and melancholy fruits of such a system, and as authentic lights assure us, imprinting more of human blood upon the gibbet, than is known to the same extent of population in any other portion of Europe. Against the incorporation of such a code, even with the limitations that

might be implied, upon the jurisprudence of the Union, I perceive serious and insurmountable objections. I believe, also, that this opinion has been adopted, partially, at least, by the highest judicial tribunal known to the Constitution,* although I observe that you speak doubtfully upon this point, considering it not yet ultimately at rest. In order, therefore, to warant proceedings against a party under the systematic and regular course of a criminal prosecution by indictment, I confess it does appear to me, that the act for which he is to be so indicted, should *be marked down*, and the *penalty affixed* by some statute of Congress.

I am informed that this power of binding over, has had, as matter of undisputed authority, the sanction of the Chief Justice of the United States. That in a case which recently occurred before him in the District of Virginia, of a charge of treason, the proof being insufficent as to the overt acts, he dismissed the defendant without any recognizance to appear and stand his trial! but was nevertheless of opinion that circumstances justified his being held to his good behaviour; and bail not being at hand, committed him to prison. In this case the party had been on board the British ships in the Chesapeake.

In no part of any of the foregoing observations, (already I fear in danger of swelling to too much length,) have I introduced the question how far a grand jury would be strictly called upon, in every case, to find a bill for treason, against a citizen, founded upon the simple fact of his going, of his own accord, on board an enemy's ship while invading our waters; and considering this mere fact as proof quite sufficient to such an overt act, as to put him upon his trial and defence. Perhaps, however, if the proof stopped here without advancing any further, the petit jury might hesitate at a verdict which would fix upon the party the heavy penalties

* In the case of the United States against Hudson and Goodwin, Supreme Court, U. S. February, 1813.

of treason. I abstain from enlarging upon this point, though, surely, that the contumacious and unexplained repetition of such suspicious visits, more violent presumptions of the guilt of treason could scarcely be laid before the judgments and consciences of jurors. If the mere fact of going on board without permission from the government, no matter in what way attempted to be justified or palliated, were made in every case a misdemeanor, punishable by fine and imprisonment, it would, perhaps, be most effectual in putting an end to such reprehensible intercourse. But this is a subject for Congress alone to regulate. I will here just make the remark, that if at any time a boat should be seen to put off from an enemy's ship invading our waters, and be making towards our shores, without the exhibition of a known symbol of truce from our own government or from the enemy, I do not see what is to prevent our land and naval officers in the vicinity firing upon such boat, considering it as a hostile boat; and, until the appearance be explained, incorporated with the force and intentions of the enemy. This, I presume, is a hazard which the party making the private visit, agrees to take upon himself.

I have taken the liberty to express my opinions in the course of this letter with less reserve, under the satisfactory consciousness that, if ever any of them should be thought worthy to be acted upon, whatever errors they contain will be corrected by the superior and authoritative learning of those Judges and Courts, who confer such dignity upon the judgment seats of the Union; and to the controlling wisdom of whose decisions I shall ever be found amongst the foremost to pay reverence and submission.

I have the honor to be, with great respect,

Your obedient servant,

RICHARD RUSH, *Attorney Gen. U. S.*

To the District Attorney
of the U. S. for Massachusetts.

OPINION OF COUNSEL

On the Legality of Trade to a Neutral Port under a British Licence.

QUESTION....Would a trade by American citizens from a port of the United States to Lisbon, under the protection from British capture of such a British Licence as accompanies this paper, be a breach of any law of the U. States?

We are not aware of any law of the United States which can be supposed to interdict to American citizens the trade above mentioned, either with or without such a licence as has been shewn to us.

It seems to be clear, that without such a licence our merchants have a perfect right to carry on their ordinary commerce between this country and Lisbon, so long as the local authorities of Portugal allow it. Lisbon is not a British port, possession, colony or dependency. The armies of G. Britain are in Portugal as allies, not as conquerors. The native government remains, and we are at peace with that government. The ordinary American trade to Lisbon, therefore, connot be affected by the act of Congress declaring war against the United Kingdom of Great Britain and Ireland, or by the act entitled, "An act to prohibit American vessels from proceeding to or trading with the enemies of the United States, and for other purposes."

Then, as to the effect of the British licence upon the trade in question, the only act of Congress, which can be imagined to touch the point, is the act last mentioned; by the first section of that act, an American vessel cannot clear out or depart from "any port or place within the United States to any foreign port or place, till bond and security have been given that she shall not proceed to, or trade with the enemies of the United States," and the same act makes it penal to depart without giving such bond and security. This

provision has nothing to do with this case, if we are correct in supposing that Lisbon is not a port of the enemies of the United States.

The second and third sections of the act relate merely to the transportation, by the citizens of the United States, to the British provinces of Canada, Nova-Scotia, and New-Brunswick, of naval or military stores, arms or munitions of war, or provisions, from any place in the United States, and consequently have no bearing on this case. And as to the fourth, fifth and sixth sections, it is manifest they have no sort of relation to it.

The seventh and last section is the only one that has reference to the sailing of American vessels under British licences, and it will be seen upon the slightest inspection that it wholly excludes the case under consideration. This section enacts "That every person, being a citizen of the United States, or residing therein, who shall receive, accept or obtain a licence from the government of Great-Britain, or any officer thereof, for leave to carry any merchandize or send any vessel into *any port or place within the United Kingdom of Great Britain and Ireland*, or to trade with any such port or place, shall, on conviction, for every such offence, forfeit a sum equal to twice the value." Lisbon is not a port or place within the dominions of Great Britain, and of course this section does not in any manner look to a trade with it.

There is no other act of Congress which even approaches this matter; and it would be ridiculous to apply to it the law of treason, as defined by the Constitution. To trade directly with an enemy has never been supposed to be treason at the Common Law, or under the statute of the 25th Edward 3d, and it has only recently been settled in England to be a misdemeanor. Whether it would be held in this country to be even a misdemeanor, to be interred from a state of war by

the aid of speculative considerations of expediency, may justly be doubted. But it is quite impossible that a trade with a neutral port should ever be so held, on the mere ground that the enemy forebore to molest it. The single effect of the British licence on this occasion, is to place the commercial adventurer in a state of security against British capture on the high seas. It amounts to a waver *pro hac vice* of the belligerent right of Great-Britain to seize as prize of war American property embarked in commerce, to which the licence relates. How far it might be wise to forbid by an act of Congress the use of such licences by American merchants, we do not undertake to determine; but we feel confident, that at present it is not forbid in any manner. We are further of opinion, that the licence will not subject the property to capture as prize by American cruizers.

It may occasionally be a circumstance, among others, to produce a suspicion of a latent British interest, but it can have no other effect upon the question of Prize or no Prize.

JOHN PURVIANCE,
WILLIAM PINCKNEY.

Baltimore, October 12th, 1812.

JURIDICAL SELECTIONS.

OPINION

Of the Judges of the Superior Courts of Georgia, on the Constitutionality of an act to alleviate the condition of debtors.

The several cases presented to the consideration of the Judicial Department, render it necessary to decide upon the constitutional validity of the act to alleviate the condition of debtors, passed in November, 1812, and the act amending that act, as well as the act, entitled an act to authorise the several Courts of Equity in this State, to grant remedies in certain cases, &c. &c. and for affording temporary relief to the soldiers whilst in the service of this State, or of the United States, and for other purposes, passed at the last session of the Legislature—The former of these acts, being unlimited as to the time of its continuance, was originally a perpetual act—By the amendatory act of December, 1813, its operation was limited to the 25th December last. It has now, therefore, ceased to exist—But for as much as sundry actions inhibited by the provisions of that act, were instituted during its continuance, to which those provisions were pleaded in bar, and which actions are still pending and undetermined, it becomes necessary to decide upon the constitutional validity of that act, in determining the sufficiency or insufficiency of such pleas.

We do not propose to discuss the question, whether this department possesses the power to refuse its sanction to the execution of an act of the Legislature which manifestly violates the constitution of this State or of the United States —because, whether recurring to the period of the formation

the federal compact, we look to the contemporaneous expositions of the enlightened patriots who framed it, or direct our attention to the subsequently recorded opinions of the Courts of the Union, of those of the several individual States, or of our own, we find an uniform course of affirmative decision, which places that question beyond the reach of present controversy—At the same time, we are not insensible of the delicacy and the importance, which are involved in the exercise of such a power—We yield with cheerfulness to the Legislature, all the respect which is due to a distinct, co ordinate department of the Government. We acknowledge ourselves bound by the obligation of our oaths of office, to obey all the constitutional requisitions of that department. We are aware of the responsibility which we incur by a refusal to give operation to an act which has received its sanction—But the master feeling of our bosoms is that which is produced by the conviction, that it is our indispensable obligation to preserve inviolate the declaration of the people's will as it is expressed in the great constitutional charter of our liberties.

With these views, we proceed to the consideration of the acts before referred to, and first to that of the act to alleviate the condition of debtors. The following is an abstract of such of its provisions as we think material to cite:

That from and after a day specified in the act, it shall not be lawful for any civil officer of the State, to issue any civil precept or process whatsoever, during the continuance of the act, except as is therein excepted.

That it shall not be lawful for any Sheriff, Deputy-Sheriff, Coroner, Constable, or other civil officer, during the continuance of the act, to serve any civil writ, warrant, precept or process whatsoever, except as is therein excepted, or to levy any execution, *ca. sa:* or any other process whatever, which had theretofore issued, or might thereafter issue

against the person or property of any person or persons whatever, or to make sales by virtue of any execution at the time of the passing of the act, in his or their possession, or that might thereafter come into his or their possession, except such as were founded on attachment and such as were thereinafter excepted.

The eighth section excepts from the operation of the act, among others, the Planters' Bank of the State of Georgia, the Bank of Augusta, Landlords whose tenants refuse to give possession after the expiration of their terms, the University, Academies and Private Schools. The operation of the act is not limited to any definite period.

We are unanimously of opinion, that this act is in violation of the Constitution of the United States.

That it violates that fundamental principle which is inherent in every free constitution, which requires that justice shall be administered equally to every denomination of citizens, without respect to persons.

And, finally, that it is in violation of the constitution of the State of Georgia.

We will endeavor with as much brevity as may consist with perspicuity, to assign the reasons upon which we found this opinion.

1. The Alleviating Law is in violation of the constitution of the United States.

The tenth section of the First article, of that instrument, is in the following words:—

"No State shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal, coin money, emit bills of credit, make any thing but gold and silver coin a tender in payment of debts, pass any bill of attainder or

ex post facto law, *or any law impairing the obligation of contracts*, or grant any title of nobility."

We are of opinion that the act in question, "impairs the obligation of contracts."

There are two modes of considering this subject.

1. Upon the plain and manifest import of the words of the constitution.

2. With reference to its spirit and intention.

As to the first, the essence of a contract or agreement, (says Mr. Powell, in his essay, on the law of contracts and agreements) is the right vested in one party and the obligation incurred by the other. And again—The consummation depends upon the same consent, on which the inception of the contract is founded.

Now, if it be true that the *essence* of a contract consists in the *right* acquired by the one and the *obligation* incurred by the other of the contracting parties; that its inception and consummation depend, and depend only, upon the consent of the same parties, can it be doubted that an act of the Legislature which interposes between the inception and consummation of the contract, and recognizing the right acquired by one of the contracting parties, forbids the enforcement of the obligation incurred by the other, can it be doubted that such an act is destructive of one of those qualities of the contract in the union of all which its essence consists, and therefore, that it weakens and impairs the obligation of that contract. In one word, can you destroy the essence of a contract, without impairing its obligation?

"A law (says Judge Washington, in the case of Golden v. Prince) which authorises the discharge of a contract by a smaller sum, or at a different time, or in a different manner than the parties have stipulated, impairs its obligation, by

substituting for the contract of the parties, one which they never entered into, and to the performance of which they of course have never consented. The old contract is completely annulled and a legislative contract imposed upon the parties in lieu of it." If this be true of an act which merely varies the contract of the parties, as to the time or manner of its consummation, what shall we say of an act which totally and indefinitely inhibits the enforcement of such consummation? Assuredly such last mentioned act operates to annul the contract of the parties, without even the substitution of a legislative contract in lieu of it—It is to be recollected that the act under consideration was in its origin a perpetual act—that it contains a prohibition unlimited in point of time against the issuing of all civil process, except in certain specified cases.

In the very satisfactory opinion pronounced by the Judges of the Supreme Court of North-Carolina, in the case of Chittenden v. Jones, it is said, "whatever law releases one party from any article of a stipulation voluntarily, and legally entered into by him with another, without the direct assent of the latter, impairs its obligation, because the rights of the creditor are thereby destroyed, and they are ever correspondent to, and co-extensive with the duty of the debtor." But the act in question, it has been said, does not interfere with the stipulations of the contract—It affects the remedy only. The obligations of the contract remain. All the effect of the act is to prevent their enforcement through the instrumentality of the courts of justice—Herein lies the strength of the argument in favor of the constitutionality of the act. Let us see if the position be tenable—The proposition is that an act of the Legislature may suspend or destroy the judicial remedy for the enforcement of a contract, without impairing its obligation, in the sense in which that expression is used in the constitution of the United States—Now the obligations of a contract, are two fold.

There is first, a moral obligation—the obligation in *foro conscientiæ*—of which courts of law do not directly take cognizance, and which can only be incidentally enforced even in equity.

There is, secondly—a legal obligation, which is the proper subject of judicial cognizance and enforcement through the medium of the courts of law.

The moral obligations of man to his fellow man, have their foundation in the law of nature. They rest upon that first principle of natural justice which requires us, "*suum cuique tribuere*," to render to every man his due; and human legislatures do not possess the power to dispense with them—But legal obligations are the creatures of the municipal law. They may be created in relation to things, in themselves, indifferent; and they consequently may be discharged by the supreme controuling power of the state which has created them—When, therefore, the constitution inhibits the Legislature from passing any law impairing the obligation of contracts, it must clearly be understood to relate to their legal obligation, which alone, in the absence of such provision, would have been subject to legislative controul. The question is now within more narrow limits. Excluding the idea of the moral obligation of the contract, as that intended by the constitution, it remains to enquire whether an act of the Legislature may destroy the legal remedy for the enforcement of a contract, without impairing its *legal obligation*. The question seems scarcely within the limits of grave and serious discussion. The first principles of the science we profess, instruct us, that there is no right without its correspondent remedy—no perfect obligation which is not susceptible of enforcement—But those who answer affirmatively the question just stated, must maintain, that the creditor possesses a legal right for which no legal remedy exists—that the debtor is bound by a perfect legal obligation which nevertheless cannot be enforced.

Again—In what does the legal obligation of a contract consist, but in the remedy for its enforcement? The principal obligation of human laws, says Blacktone, their main strength and force consists in the penalty annexed—Without the remedial part, all laws would be vague and imperfect—Now a law is but a contract between the State and the individuals who compose it; since all laws are founded upon the express or implied assent of the governed; and the legal obligation of this contract, we are told, consists in the means of enforcing it. A learned Judge of the United States, incidentally touching this subject, has suggested a doubt, whether the words "obligation of contracts" can be considered as equivalent to the words "obligation and *effect* of contracts." In relation to which we remark, that the remedy for the enforcement of the contract, is the primary *effect* of its obligation—The ideas of obligation and of force cannot be separated. Thus Pothier, expressly says, "The *effects* of the obligation, in regard to the creditor, are, 1st, the right which it gives him to prosecute the debtor judicially, for the payment of that which is contained in the obligation"—The right to the enjoyment of the remedy, is then the primary *effect* of the obligation. Can you destroy the effect of the obligation, and yet preserve the obligation itself unimpaired? "Every one will agree, (say the Court in the case of Chittenden and Jones, before cited) that a law which should deny to all creditors the power of instituting the action of debt, covenant, assumpsit, or a bill in chancery, would invade the constitution." What description can more precisely characterize the Alleviating Act of Georgia? It inhibits the issuing of civil process, without which the actions of debt, covenant, &c. cannot be instituted.

We are aware, "That the States and the United States, are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting

existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance in the parties with such statutory provisions"—and we agree, that all these acts are within the most correct limits of legislative powers—They result from the undoubted constitutional right of the legislature to alter and reform the judicial system. Their primary and essential object is the promotion of the administration of justice, its advancement and improvement. They can therefore afford no justification for the act under consideration, the direct and obvious intention and tendency of which is to impede and paralize the judicial power.

The clause of the constitution may be considered—

2. With reference to its spirit and intention. We will very briefly dispose of this part of the discussion—The clause in question is remedial—What then was the mischief it was intended to remedy? We answer in the language of the Court, in the case so often referred to—"It is to be seen in the historical records of some of the States, that pressed and exhausted by their efforts in the great struggle for Independence, they had recourse to various expedients to relieve their suffering citizens. In addition to the issue of bills of credit and paper money, some laws were passed wholly changing the nature of the contract—others postponed the payment of the debt by authorising it to be made in instalments—the benefit resulting from these measures was partial and temporary—but the evil, as might have been expected, universal and permanent." That this was the mischief which it was the object of the clause in question to remedy, is further evidenced by the debates in the different State conventions when the acceptance of the constitution was under discussion: We cite a single instance. "I am a warm friend to the prohibition (said a member of the convention of Virginia) because it must be promotive of virtue and justice, and preventive of injustice and fraud—

If we take a review of the calamities which have befallen our reputation as a people, we will find they have been produced by frequent interferences of the State Legislatures, with private contracts." We might add to these evidences, but it is conceived to be unnecessary—They are supported by history, and the concurring testimony of those surviving citizens, who lived and were engaged in public affairs in that eventful period—A law then whose provisions are calculated to produce a recurrence of those evils, against which, it was thus manifestly the object of this clause of the constitution to guard, must be in violation of the spirit and intention of the constitution—

For these reasons, we are of opinion, that the act in question impairs the obligation of contracts, and is, therefore, in violation of the constitution of the United States.

2. But the act in question moreover violates that fundamental priciple, which is inherent in every free constitution, which requires that justice shall be administered equally to every denomination of citizens, without respect to persons.

Such a principle is inseparable from every free government—It is the peculiar and striking characteristic of its constitution, that which distinguishes it from despotism. When the people of the United States solemnly declare, that all men are by nature equal, the declaration is made with reference to this principle—Discarding the visionary idea of an equality in all the relations and conditions of man, which cannot practically exist, this declaration ensures and guarantees to the citizens of the United States, a political equality—an equal participation in all the rights and benefits to be derived from the social compact into which they have entered. It forms the basis of every free constitution, and receives no additional support from the declaration of its existence. The preservation of this great principle is moreover especially confided to the judicial department. They

are bound by their oaths of office to do equal right to all, without respect to persons. Let us apply these ideas to the consideration of the act under discussion.

We have seen that it inhibits for an undefined period, the issuing of all civil process, except in certain cases for which it provides. It proceeds to except from its operation, the Planters' Bank of the State of Georgia, the Augusta Bank, landlords whose tenants may hold over after the expiration of their leases, the University and all Academies and Private Schools. Lest this reservation in favor of certain persons, to the exclusion of all others, should be misunderstood, the amending act provides, "That nothing in the before recited act shall operate to prevent the President and Directors of the Planters' Bank of the State of Georgia, or the Bank of Augusta, from instituting suit or suits and enforcing all contracts made with them or either of them in their corporate capacity, in the same manner that they were authorized to do before the passing of said act." By the operation of these acts then a certain number of individuals, who are incorporated for purposes foreign to this controversy, are permitted in their corporate capacity, to institute suits and enforce all contracts made with them, while this same right is denied to the great body of the citizens of the State----and the Judges who are sworn to administer equal justice to all without respect to persons, are called upon to permit the institution of suits, and the enforcement of contracts, at the instance of the Banks against individuals; and to refuse the institution of suits or the enforcement of contracts at the instance of individuals against the Banks or against other individuals, against whom at the instance of the Banks, judgments may have been rendered--- Is it true that every citizen has an equal right to participate in the benefits to be derived from the social compact? And is it possible to display a more palpable violation of the principle? The privilege of resorting to the courts of justice, for the redress of his violated rights is indeed the constitutional, inalienable right

of every free citizen of this republic---Its preservation is entrusted to the judicial department; and we will not shrink from the solemn duty which is committed to our charge. But could we for a moment admit the right of the Legislature to invade this constitutional privilege of the citizen, the principle we are illustrating would require that the act by which it was exercised, should be general and equal in its operation. Let us attend for a moment to the consequences of a contrary doctrine. If the Legislature possess the right assumed by this act, who shall prescribe the limits of this power of discrimination? We should be shocked by a legislative act, which inhibiting the civil officers of thirty-eight counties in the State, from issuing all civil process, should, nevertheless, permit the inhabitants of one favored county to institute suits and enforce all contracts made with them, as if such act did not exist, and yet the principle of the present law is co-extensive with the case supposed. If the Legislature can deny to one class of citizens a right to which all are equally entitled, while they permit its exercise by another class, it belongs not to the judicial department to say, that the sectional division of counties, does not afford as fit a mode of discrimination as any other—

Because then the act under consideration is unequal in its provisions—because it violates that equality of rights to which the free citizens of this State are entitled under the constitution, and which we have sworn to preserve, we cannot lend our sanction to the execution of this act.

There is a further view of this subject. We are of opinion, that this act violates the constitution of the State of Georgia---It assumes a right subversive of all judicial power—calculated to annihilate one of the three great departments of the government, created by the constitution.

At the very threshhold of the instrument, we find this declaration. "The legislative, executive and judiciary de-

partments of government shall be distinct, and each department shall be confided to a separate body of magistracy, and no person or collection of persons, being of one of those departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

And again----"The judicial powers of this State shall be vested in a Superior, Inferior, and Justices Courts, and in such other Courts as the Legislature may, from time to time, ordain and establish."

"The Superior and Inferior Courts shall sit in each county twice in every year, at such stated times as the Legislature shall appoint."----Finally,

"It shall be the duty of the General Assembly to pass all necessary laws and regulations for carrying this constitution into full effect."

Let us attend now to the provisions of the first section of the act in question, first remarking that it is a perpetual act, not limited in its operation to any particular period. From and after the 30th day of the present month, [November] it shall not be lawful for any civil officer of this State to issue any civil precept or process whatsoever, during the continuance of this act, except as is herein excepted----Here is then the assumption of a power, by the Legislature, to inhibit the issuing of all civil process, for an undefined period. Let us recur now to the grant of power in the before cited sections of the constitution.

The judicial powers of the State are confided to a distinct body of magistracy; constituting, collectively, the judiciary department of the government. What are those powers? What is the medium through which they are exercised?

The judicial powers of the government are two fold.

1. The judicial department possesses a criminal jurisdiction, for the trial of offences against the State, which is exercised through the medium of the criminal process of the Courts.

2. It possesses a civil jurisdiction, for the redress of civil injuries to the State, its citizens, or others in amity with the government; and this jurisdiction is exercised through the medium of its civil process.

If now the Legislature possess the power to inhibit the civil officers of this State, from issuing any civil precept or process whatsoever, for an undefined period, there is obviously an end of the civil jurisdiction of the judicial department; because it is only through the medium of such process that this jurisdiction can be exercised----Thus, then, we have a judicial department, divested of civil jurisdiction. But the evil of the priciple does not stop here----If the Legislature possess the power to destroy the civil jurisdiction of the judicial department, the residue of its power, which we have denominated its criminal jurisdiction, is also at mercy. Both result from the same constitutional grant of power. If the constitution be inadequate to the protection of the one, it will also be insufficient for the preservation of the other. The same power which enables the Legislature to inhibit the issuing of all civil process, will authorise them to inhibit the issuing of criminal process also. The judicial department then, stripped of its constitutional powers, by a legislative act, would become the mere phantom of what it was—of what the constitution intended it should be. The Judges enjoined by that instrument to hold courts twice in each year, in the respective counties, would be incapacitated by legislative inhibition, from obeying its injunctions. It is no answer to this to say, that there are cases upon which the judicial power is permitted to operate by the act in question---We have already shewn that these very exceptions, of themselves, constitute an unanswerable objection to the act—because it thereby violates the equal right of every citizen

of the State to participate in the benefits of the social compact. But the power assumed in the first section of the act goes to the full extent which has been stated. The exceptions result obviously from considerations of expediency.

Nor is our view of the subject changed, by the provisions of the amending act, which limits the operation of the original act to a specified period. The former act appears to us to proceed upon the assumption of a power to annihilate the judicial department, while the latter merely suspends its existence for a stipulated period, or what is, in effect, the same thing, forbids the exercise of its functions during the prescribed interval. Unless we err, in the opinion which we have formed, it is equally protected against both these assaults, by the barriers with which the constitution has surrounded it----Way else are the judicial powers of the State confided to a distinct body of magistracy, constituting a primary and co ordinate department of the government, and protected from the interference of the other departments in the exercise of the functions with which they are entrusted? Finally, why otherwise are the Legislature specially enjoined by the constitution, to pass all necessary laws and regulations, to give full effect to the powers thus confided to this department?

For these reasons we are of opinion that the act in question violates the constitution of the State of Georgia.

It remains to consider the act to authorise the several Courts of Equity in this State, to grant remedies in certain cases, &c. &c. and for affording temporary relief to the Soldiers, whilst in the service of this State, or the United States, and for other purposes----Our view of this act is limited to the sixth and seventh sections, by the cases presented to our consideration.

The former declares, that it shall not be lawful for the Judges of the Superior Court, &c. &c. to suffer any verdict

to be entered, or judgment to be signed in either of their said courts, against any soldier or officer of this State, whilst such soldier or officer is in the service of this State, or of the United States, and provides that the fact of such service, shall be good ground and sufficient cause of continuance. We are of opinion, that this provision is liable to all the objections, which have been stated to be applicable to the act before under consideration:—

1. It impairs the obligation of contracts, by withholding from the creditors of those persons who are the objects of its provisions, the remedy for the enforcement of their contracts; in which, as we have before shewn, the obligation of the contract consists, in the sense in which that term is used in the federal constitution.

2 It is unequal in its provisions----It violates that equality of rights to which the free citizens of this State are entitled under the constitution----It affords an exemption to a soldier in service, which it denies to all the citizens of the State beside----It forbids the Judges from suffering a verdict to be entered or judgment to be signed against an officer or soldier in service, at the suit of a citizen, while it permits the officer or soldier to enforce his contracts, by obtaining verdicts and judgments against the very same citizen, to whom the like right is denied. We are not insensible of the merit of our brethren in arms----Our constitutional powers will always be cheerfully exerted for their protection, who are engaged in protecting us. But this is an inequality forbidden by the constitution; and we yield an unqualified obedience to its injunctions.

3. The provision is in violation of the constitution of the State of Georgia--- It proceeds upon the assumption of the same principle, which characterises the first section of the act heretofore under consideration, and which we have shewn to be subversive of the judicial power as it is secured by the constitution.

The seventh section of the act before us, provides, that in all cases where judgment has *already* been obtained, in any of the courts, the defendant may, by complying with the terms contained in the fourth section of the act, claim and receive the benefits and provisions of said section, and where execution has already issued, the officer in whose hands the same may be, shall be bound to take the security required, as directed in said section---- Turning to the fourth section, we find it provided, that in all cases of judgments *hereafter* rendered, the defendant may stay all further proceedings by entering good and sufficient security within ten days after the judgment of said court.

The provisions of the seventh section are obviously incapable of being carried into execution. In relation to judgments heretofore obtained, they do not prescribe a time within which the security is to be entered. The reference to the fourth section which relates to judgments *hereafter* to be obtained is clearly inapplicable.

We are therefore unanimously of opinion, that this section of the act is void; because it is incapable of being carried into execution.

ROBERT WALKER,
JOHN MACPHERSON BERRIEN.
YOUNG GRESHAM,
S. W. HARRIS.

OPINION

OF THE SUPREME COURT OF MASSACHUSETTS, IN THE CASE OF LEWIS AN ENLISTED SOLDIER.

The following is a sketch of the opinion delivered by Judge Jackson, in the Supreme Court of the State of Massachusetts, on the 6th of January, 1815, on the return of a writ of habeas corpus, issued to George W. Hight, Esq. an officer in the army of the United States.

This writ was issued on the complaint and affidavit of Caleb Lewis, setting forth that his son, Daniel Lewis, who was under the age of twenty-one years, was detained at Fort Independence, as an enlisted soldier; and that he, the father, had never consented to the enlistment. The return sets forth, as the cause of detention, that Daniel Lewis enlisted as a soldier, to serve in the army of the United States during the present war, and that his master gave his consent in writing to the enlistment. The return was filed on the 5th instant, when it was contended by the counsel for Mr. Hight, that the return was conclusive, and that the facts therein set forth could not be traversed on this occasion. The Judge, without deciding that question then, proceeded to examine the evidence on both sides; from which it appeared, that the boy was about nineteen years old; that he was bound by his father, about four years ago, as an apprentice to one Mr. Bryant until the age of twenty-one, to learn the trade of a shoemaker; that he afterwards left Bryant's service with his consent, and worked at his trade several weeks in another town; after which he returned to Bryant, and worked for him as a journeyman. It appeared that the boy had applied to his father for leave to enlist, but the father refused his consent, and expressly prohibited Bryant from giving such consent; insisting that he should keep the boy till he was twenty-one years old, according to the indenture of ap-

iceship. The consent of Bryant in writing under his was produced, and his signature was not denied.

was further contended on the part of Mr. Hight, that ourt has no jurisdiction of the cause, as the boy is under the authority of the United States, and by one ir officers. And thirdly, that if the court has cogni- of the cause, the boy ought to be remanded to the ly of the officer, as being duly enlisted under the act ngress passed January 20, 1813. After hearing the nce and the arguments of counsel on both sides, the remanded the boy, with directions to have him brought ourt the next day. He was brought in accordingly on y morning, when the Judge delivered his opinion as rs.

to the first question, it is not necessary now to deter- whether the return of a writ of habeas corpus is s conclusive, when made by private persons as well as blic officers; as I am well satisfied that the party may s confess and avoid it, which is all that has been done present case. It is not denied that the boy was enlisted, ith the written consent of his master; but he attempts id the effect of this, by showing that he has a father , who did not so consent. On this point, however, I remark, that in all cases, where such a return is held conclusive, it should, I apprehend, be limited to such s as are necessary and proper to constitute a good and nt return. An officer should not anticipate objections ay be made to his return, and introduce into it extra- and collateral matter by way of answer to such objec- so as to conclude and stop the other party from proving ole of his case. If a sheriff holds a person on a war- om a justice of the peace, he ought in his return to a corpus to set forth the warrant: but he should not o aver that the person who issued it is a justice duly ed, &c. in order to prevent the party from proving, as

he may perhaps be prepared to do, from the public records in the office of the Secretary of State, that the man never was commissioned, or that his commission had expired, or that he had been impeached and removed. This would be to enable the officer, from malice, ignorance, or mistake, to alter the case of the prisoner, and make it better or worse than it is in fact.* So in the case now under consideration, the substance of the return is, that the officer holds Daniel Lewis as a soldier enlisted in the army of the United States. This is prima facie a good and sufficient return; and of course it seems to be all that is necessary for the officer to set forth. If on filing the return it should be objected that the party is a minor, it is then time enough for the officer to reply that he was enlisted with the consent of his father or master, &c. It appears to me, therefore, that the suggestion of the master's consent to the enlistment might, if necessary to arrive at the substantial justice of the case, be rejected as surplusage, and would not conclude the prisoner, whatever might be the effect of the other part of the return.

As to the second point, respecting the authority of this court to discharge the prisoner, even if it should appear that he is unlawfully detained, it might be sufficient to say, that it has been done repeatedly in like cases by different Judges in vacation; and it was done by the whole court at the last March term in this county. In the case last mentioned I do not recollect whether the question of jurisdiction was argued at the bar; but it was considered by the Judges, and the case of Ferguson, in 9 Johns. N. Y. Reports, 239, was examined. It appears from that case that the law of New-York differs in one respect at least from the law of this State, inasmuch as the writ of habeas corpus there may be granted or refused in the discretion of the court; whereas here it is declared by our statute (1784, c. 72) to be "a writ of right, to which the citizens of this commonwealth are,

* Vide 1 Salk 93. 4.

by the constitution and law of the land, at all times entitled, to obtain relief from every wrongful imprisonment or unlawful restraint of personal liberty." The right thus solemnly declared and secured would be defeated if the court on the return of the writ should refuse to examine the causes alleged in justification of the imprisonment. Indeed the very question raised in this case could not occur, until the court had so far examined the return as to see that the party was held at least under colour of the authority of the United States. And can it be supposed that a mere colour of authority which perhaps on examination would appear to be wholly mistaken or unfounded, is sufficient to deprive a citizen of his personal liberty? Supposing the laws for raising this army had been repealed, or that this corps had been disbanded, or that this soldier had been regularly discharged, and that the officer, from ignorance of the fact, or from some less excusable motive, still detained the man under his command; must this court remand the prisoner and leave him in such unlawful restraint, merely because his oppressor thinks proper to allege that he is acting under the authority of the United States? The constitution of the United States, and the laws made in pursuance thereof, are the supreme laws of the land, and have the same force and effect in this court as in the courts of the United States. Suppose, then, that the law under which this man is enlisted had expressly prohibited the enlistmant under any circumstances of minors, or of any other particular description of persons; when one of that description is brought before us on habeas corpus, and is claimed as a soldier by the party who holds him, are we not authorised, nay, are we not bound to declare that such enlistment is void?

Suppose the constitution itself had contained a prohibition like the one here supposed, and that Congress should notwithstanding pass an act for the enlisting of minors; should we not be bound to declare that such act was void, and to discharge any minor enlisted under it? It is then evident

that in order to do our duty under the statute of this commonwealth before referred to, we must examine the whole case, both as to law and fact. If on such examination it appear that the party is lawfully detained, whether under the authority of this State or of the United States, we must remand him. But if the person to whom the writ is directed rely for his justification on a mistaken construction of the law, or on an act which is repealed, or in any other way void; or if the facts are not duly substantiated which are necessary to bring the case within an existing law; it is our duty to discharge the prisoner, although the officer should pretend, or really believe, that he was proceeding lawfully under the authority of the United States. In the present case the officer has returned the facts truly; and if Lewis has been unlawfully held, it has evidently arisen from a misconstruction of the law.

It is therefore necessary to consider the third point in this cause, and to determine from the facts disclosed in the return, and on the examination of the witnesses, whether Lewis was lawfully enlisted. In deciding this question, I consider the boy as lawfully bound as an apprentice to Bryant. The parol agreement between them could not annul the indenture, nor discharge any of the parties from their legal obligations under that instrument. This circumstance, however, presents, in a strong light, the inconvenience and injustice that might follow from the construction of the law adopted by the counsel for the officer. For if the master of an apprentice can authorise his enlistment, without the consent of the parent, he may do it against the express injunctions of the parent; and he may retain this right even after he neglects or refuses to perform any of the duties of a master.

The decision of this question depends on the construction of the act of Congress passed January 20, 1813, in which it is provided "that no person under the age of twenty-one

years, shall be enlisted by any officer, or held in the service of the United States without the consent in writing of his parent, guardian, or master, if any he have." It is contended by the counsel for the officer, that the consent of the master alone in this case is sufficient to authorise the enlistment. This question was new to me, when it occurred yesterday on the argument of this cause. I have since given it all the consideration that the time would allow, and have had the advantage of a conference with the chief justice on the subject. As I have no doubt at present upon the point, and both parties appear solicitous for a speedy determination of the cause, I shall not delay it for the purpose of any further consideration. It has long been well settled that the master of an apprentice cannot assign the indenture, nor transfer the services of the boy to any other person.* The authority of the master is a personal trust. Every parent, in binding his child as an apprentice, is supposed to have in view the education of the child, his moral habits, his preparation for the business for which he is destined, and whatever may affect his future welfare. He must then be influenced by the moral qualities, the capacity, and skill, of the man whom he selects for this delicate and important trust. But all his solicitude and care in this respect would be fruitless, if the master might at his pleasure dismiss the child from his service, prevent his learning the trade for which he was intended, and subject him to the dangers and corruptions of a camp. It is not to be presumed that Congress intended by the act in question to give a master an authority so utterly inconsistent with natural justice, and with the settled principles of the law, and subversive of the natural and legal rights of parents. Indeed I have not been able to find any authority in Congress thus to interfere with private rights and contracts between citizens of this State and to absolve either party from his obligations, whether

* Mass. Rep. 176. 8 Mass. Rep. 298.

conventional or merely natural. If they have such power, it may be exercised to dissolve or affect any one contract as well as any other; and thus all our private dealings, and most of the common concerns of life would be under the control of the general government. If Congress have the power supposed in the present case, they might with at least equal reason and justice ordain that a slave, in those States where slavery is tolerated, might be enlisted and held to serve in the army, without the consent of his master; for it will not be supposed that the rights of a master over his slave are more sacred, or founded on higher authority, than those of a father over his child. But it is unnecessary to pursue this idea any further, as I am well satisfied that the act of Congress may be reasonably construed, without supposing that they assumed a power so questionable in itself, and so injurious to the community. As I understand the act, it requires the consent of the parent, the guardian, *and* the master, *or* of as many of the persons as may exist in those respective relations to the child. There was no reason why the rights of any one of them should be sacrificed to those of the other. It was intended to protect and secure them all. If those relations were such as always, or even most commonly existed together at the same time, the word *and* would probably have been used instead of *or*, in the act. But as it rarely happens that a minor has a parent and a legal guardian at the same time, and as he is often found in only one of those relations of child, a ward or apprentice, it might have appeared improper and inconvenient to use the *and*. On the other construction, the consent of the parent alone would have been effectual without the consent of the master. This would be to enable the parent at his pleasure to absolve himself and his child from a solemn obligation into which they had voluntarily entered, and which it may be for the interest of the master to enforce. It is no answer to say that the parent or master gives merely a naked assent to the enlistment. That assent, it effectual within

the true intent of this act of Congress, is the only thing which renders the enlistment valid. The agreement of the minor without such assent is wholly void. The consent of the master would operate in the present case as an assignment of the apprentice to the officers of the army, in direct violation of the settled principles of law, and of the natural and legal rights of the parent. I am satisfied that the act gives no such power to the master; and am of opinion that the enlistment in this case, being without the consent of the father, is void; and that the prisoner. Daniel Lewis, cannot be held in the service of the United States.

MISCELLANEA.

ON CAPITAL PUNISHMENTS.

FROM JUDGE BRACKENRIDGE'S LAW MISCELLANIES.

IV Bl. Com. 194.

By an act of March 3d, 1812, the Governor was required "to request the Attorney-General, to draft and prepare a bill consolidating the whole of the penal laws of this commonwealth; and, suggesting what additions, alterations, and changes should take place in the system, for the purpose of laying before the next Legislature." I know not whether the Attorney-General may think proper to suggest any alterations, or change, with respect to the punishment of death in any case. But, be that as it may, the expression of the will of the Legislature to hear what may be suggested, generally, on the penal code, has emboldened me, though not within the legislative request, to suggest what has occurred

to me, in my reflections on the subject of *capital punishment in the case of murder in the first degree;* which now remains the only case, in which, the punishment is *capital.*

In limine, or, at the threshhold of an examination of what relates to this, we are arrested by the language of Revelation; "whoso sheddeth man's blood, by man shall his blood be shed." Gen. 9th, 6

The context, as the divines would say, is in these words; "and surely your blood of your lives will I require; at the hand of every *beast*, will I require it; and at the hand of man; at the hand of every man's brother, will I require the life of man."

Were it not for the preceding words, I should have been disposed, to have considered those of the text, as containing a *denunciation merely*, of what, in the course of things, would most usually, and most naturally happen; viz: that, in revenge of the person slain, some one would be prompted to slay the slayer; so that, in a course of retributive justice; and, in this sense, it might be said, "whoso sheddeth man's blood, by man shall his blood be shed;" but the words of the context do not leave room, in fair and candid construction, for such a meaning, to be put upon them: it must be taken, as enjoining *the avenging of the blood of man.*

But is this injunction to be considered, as respecting men in a state of nature; or, in a state of society? Doubtless, not to men *in a state of nature only;* but also in a state of society; because being promulgated to Noah, who was in a state of society; though his family consisted but of eight persons; it cannot but be considered as extending to that association; and, to all others that might spring from them. This must silence the allegation of those who undertake to say, that *no power can exist in the social state*, to put a man to death; *I speak of moral or lawful power.*

But, taking it up, independent of Revelation; and, on the principle of reason, why is it that the lawfulness of putting to death in a state of society, shall be questioned? It is said to be because the individual entering into the social state, can surrender to the community, no power, but that which he himself, in a state of nature had possessed; and having no power over his own life, he could not surrender that which he had not. But this *is a fallacy;* for, it is not a power over his own life which he surrenders; but *the right to preserve it*, at the expence of the life of him who would take it away.

It is this right of self-preservation which is surrendered; and unless in a case, where self-preservation is inconsistent with delay, the taking the life of an assailant is not warranted by any municipal law. But this right of self preservation so surrendered to a community, warrants the interference of the body politic to protect from the assailant, who attempts homicide; and, if that cannot be done, to provide against what may be presumed to be likely to be attempted by the same offender against the life of others. What can this provision be? The most certain, unquestionably, will be *putting an end to the power of action in the offender.* This must render it physically certain that this individual who has shown himself to be hostis humani generis; or, in the light of an enemy of mankind, will not again have it in his power to take away the life of another. But would it not be enough, if it could be rendered *morally certain*, that he should not have it in his power again, to take away the life of any one? Does not the highest degree of probability approach so nearly to absolute, as to be scarcely distinguishable from it: to be, in fact, to all practicable purposes, the same thing? A man so confined as to be to all human probability, out of the way, and not likely to have it in his power to take the life of another, would seem to be much the same thing as a dead man to the social state; and no longer endangering the safety of an individual of the community.

But still he is not dead; physically dead, says the objector; and he "whoso sheddeth man's blood," &c. is in the way. I grant it is; but this injunction, cannot be considered more than *a general rule*, and subject to exceptions. What was the occasion of this precept to Noah? It was the destruction of the whole race of man, by a flood, eight persons excepted. What was the object? The preservation of man in order to replenish the earth. Will it not be inconsistent with this object to take away the life of a man, provided the preservation of human life can be equally guarded and attained? This is the exception; and as the jurists say, makes it a part of the rule; it must be considered as coexistent with it, and involved in the nature of it. Where the letter of the law is inconsistent to any extent, with the spirit of it, the spirit must prevail. This is a rule of interpretation in all laws human and divine.

But the legislator of the Jews who has recorded this precept; for we assume it that he was the author of the five books, or Pentateuch, as the Septuagint calls it, has given us a practical application of the precept; and has laid it down in his law, that, "the murderer shall be put to death."—Numb. xxv. 6. This goes, in express terms, to sanction the right of a society to inflict death. But what was the state of the Jewish society to whom this law was given? Were they in a situation to be able to preserve themselves from homicide, without such extermination of an individual who had committed murder? In a wandering state of society, in a wilderness, had they the means of self-preservation by confinement, and keeping to hard labor. This being the case, could the injunction be understood otherwise than as having relation to the condition of the people? Can it be of binding obligation at all times, and in all cases to put to death; and not rather subject to the reason of the law given to Noah, *the preservation of the life of man?* Shall the slayer be slain, who not only can be put in a way to be re-

strained from a possibility of committing homicide; but may be also rendered useful, in his confinement to hard labor? It would seem to be subverting the end of all punishment, *precavention and reformation.*

The precept "whoso sheddeth man's blood, by man shall his blood be shed," still recurs. What has been the *application* of this precept from the earliest existence of *christian communities?* Christianity *is a ground of the common law, which is our birthright;* and, yet, this law admits the power of the society *to pardon.* What is this but *to dispense* with the injunction given to Noah, that "whoso sheddeth man's blood, by man shall his blood be shed?"

By our constitution, the executive magistrate is vested with *the power to pardon.* A felony of murder is not exempted from this power. If the magistrate, who in this particular represents the power of the society, can pardon, *he can reprieve.* Can there be any thing in his way to hold the criminal in confinement for life *under the idea of a reprieve?* Could this be said to be otherwise than a dispensing with the law of God; and yet our law, immemorially, and our late and present constitution warrant this.

If our magistrate has the power of reprieving in this way, it may be said, why not exercise it? There is one thing wanting, which may be a reason for not exercising it; and this is the not having a power under a reprieve, *to employ at hard labor;* and thereby, to relieve, in some degree the community from the burthen of the convict's support. He has the power to continue a reprieve without limit; but it must be at an expence, which, did the law go to embrace this case, might, in a great measure, be avoided; or rather the service of a criminal turned to an indemnification to some extent, for the injury to the society.

It is remarkable that it makes a part of the text and context of the scripture in this place, that, in the case of *a beast*

causing the death of a man, it shall be put to death; "your lives will I require at the hand of every beast;" and agreeable to this is the injunction of the Jewish Legislator. "If an ox gore a man or a woman, that they die, then, the ox shall be surely stoned." Yet in *christian countries*, this has never been carried into effect; the putting the beast to death in any way; and yet this makes a part of the injunction to Noah; and if this is dispensed with under all christian institutions; for I know of no exception, why not admit of the like softening in the rigor of the precept, under the christian dispensation, in the case of a homicide by man? Under our common law, in the case of a beast, causing or even occasioning the life of a man, it is forfeited to the king. 1 B. Com. 300. Why not the like commutation for death in the case of man; *the forfeiture of the labor for life of the culprit to the community.* My deduction is that the injunction to Noah is not of universal application under all circumstauces; and under the christian dispensation is taken away altogether. So that, though I *hold it lawful to put to death for murder*, yet I resolve it into a question of *expediency*, and, subject to *the reason of the law*, the security of the peace, and the preservation of the life of man. If, consistent with this, the criminal can be spared, it is inexpedient to put to death. If, on experience, the state of society should be found to be such as to permit this, without endangering the community, I should think capital punishment unnecessary; and it is only in a case where unavoidable, and necessary, that I should think it justifiable.

"*Ense recidendum immedicable vulnus.*"

In the state of society in which Noah, and his immediate descendants, must, for a length of time, be, and, under the circumstances, in which the Jews were: more especially, before their fixed habitations in Judea, and, improved establishments, it might be impossible, and it was certainly *morally* impossible, that the people could be safe, and a mur-

derer be permitted to live; but *a very different degree of proof was required, from that under the common law of England*, which, yet, continues to be our law. For, by the Jewish laws, "whoso killeth any person, the murderer shall be put to death by *the mouth of witnesses;* but *one witness* shall not testify against any person to cause him to die." Numb. xxxv. 30. And again, "at the mouth of two witnesses or three witnesses, shall he that is worthy of death be put to death, but at the mouth of one witness, he shall not be put to death." Deut. xvii. 6. Query—ought not the testimony of these witnesses to be direct; and, to the actual fact of killing; and not to *circumstances only*. I would take it, that the testimony must have been positive, and to *the actual fact of killing;* and not to be deduced from *the presumption of circumstance*. Under our law, one witness is sufficient to convict; and, even, *where the testimony goes but to circumstance*. In this respect, our law is more *sanguinary* than that of the Jews: and, even, though the injunction of Moses might be said to be given in this case, as in another, "because of the hardness of their hearts." Might it not then be a reason for a commutation of a capital punishment for imprisonment for life, that, especially, where a conviction had taken place, on the credit of *one witness*, or *from circumstance on the evidence of more than one*. Unless the code is so ameliorated, in this particular, it is more sanguinary than even the Jewish law; for the lesser degree of evidence being sufficient to convict makes the law more sanguinary. Nevertheless this is under the *christian dispensation*, which has been considered as softening the rigor of the Mosaic precepts in many instances.

It is not my meaning to suggest an alteration of the law in regard to circumstantial evidence being sufficient to convict; for *circumstance often speaks stronger than words;* and *there could be no security from assassination*, unless the law were so; but it will be a consideration for the doctrine of

continual reprieve which I advocate; as on a conviction from circumstantial evidence, if providence should at any time, bring to light the innocence of one condemned, as has sometimes happened, it might not have been altogether out of the power of the society to *relieve his person from confinement; and his name from infamy.*

But the restraining the malefactor from doing hurt, as *to future time*, in his own person, is not the only object of punishment. *The example* to others will be a preservative against what they may do. This will bring it to the question; which is most likely to affect, the carting to the gallows, or to the place of hard labor and confinement for life. I do not take it there would be much difference as to the effect. For I count but little on the effect of *present terror*, however *shocking the spectacle.* The best means of preventing the catastrophe, will be found in restraining the passions by a useful occupation, and impressing moral and religious instruction on the mind. Præstat cautela quam medela. In the countries of Europe, Britain in particular, where the effect of capital punishment has been tried abundantly, it has not been effectual; not more so than transportation and exile; which in most cases has been substituted for it. We have no Botany-bay to which we can transport; but we can accomplish the same thing by confinement and hard labor. What then would be the amendment, in this particular, which I would propose to the penal code? It would be, that, on conviction for murder in the first degree, the convict shall undergo *for life* the same punishment, which on a conviction for murder in the second degree, he shall be sentenced to undergo for years; the time specified in the act for the amelioration of the penal code of the 22d April, 1794. This will be *imprisonment at hard labor for life; and death in case of an escape.*

ON BREACH OF THE SABBATH.

FROM THE SAME.

"By Stat 22 Car. II. c. 7. no person is allowed to work on the Lord's day," &c. IV Bl. Com. 63.

"*To work*" is not an expression in the statute; though it is in the 8th commandment given to Moses; "*shalt not do any work.*" Exod. c. 20, sec. 10. The words of the statute Chas. II, c. 7. are that, "no tradesman, artificer, workman, or laborer, or other person whatsoever, shall do or exercise any *worldly* labor, business or *work* of their *ordinary calling* on the Lord's day." It has been holden that it is not unlawful, under this statute, to bargain for the sale of a horse, the vendor not being a *horse-jockey;* and so, not in the way of his *ordinary calling*. 1 Taunt. 130. The punishing the offender in Connecticut for letting his *beer work*, was carrying the matter to the other extreme.

Our act of assembly of 1705, copied in part from that of Cha. 2d. c. 7. judiciously omits the words *ordinary calling*, and steers clear of this difficulty, or rather absurdity, in distinguishing work done in the way of a man's *ordinary calling*, from that of work done in any other way; and in the act of assembly 22 [illegible], 1794, which is the last act, and supplies all antecedent, as to this particular, the words are, if any person do, &c. such persons *so offending* shall, &c. By these acts all *worldly labor* is prohibited, whether in the way of a *man's ordinary calling* or otherwise; and which, doubtless, also was the intent of the statute, Cha. II c. 7.; but, *as penal laws* are to be construed *strictly*, the judges have thought themselves warranted in taking the distinction, or bound to take it. For it is under the statute alone that it could be recognizable, not being *a misdemeanor* at common law; though as to this, there has been some contrariety of opinion. It depends upon the question whether the com-

mandment given to Moses is in force under the *christian dispensation.* It cannot be denied but that the *reason* of the institution goes some length in extending it to all times, and under all dispensations; "In six days the Lord made heaven and earth, &c. and rested the seventh; wherefore the Lord blessed the Sabbath day and hallowed it."* But the author of our religion, would seem to have claimed the authority of *dispensing* with the keeping it; at least, with the *Jewish strictness.*

"The son of man is lord also of the sabbath." Mark 2. sec. 28. Certain it is that the Jewish Sabbath does no appear to have been kept, or at all attended to under his immediate disciples; but whatever respect was paid in the observance of any day, it was to *the first day of the week*, the hebdom of the resurrection, and so called the *Lord's day.* On this day the brethren met to "break bread," as appears from Acts 20. sec. 7; "upon the first day of the week when the disciples came to break bread," &c. and this day appears to have been regarded, and no other day, from that time forward, whether for the purpose of *meeting*, and confirming each other in the faith, making charitable collections for the poor brethren; or settling matters of order and discipline in the church; or for the purpose of joining in religious devotion.

In the case in Taunton, 130, the counsel on one side argue that, "no canon, no opinion is to be found in any writer upon Ecclesiastical law, treating bargains made on a Sunday as illegal. The Jewish law prohibited them, but several of the councils have expressly declared that *christians shall not judaise.*" On the other side it was contended "that a sale on Sunday was illegal *at common law;* that in christianity as well as judaism, the 4th commandment is retained; and that which is an offence against it, when committed by a *Jew*,

* Exod. 20. sec. 11.

is equally such when committed by a *Christian;* that no case had been cited where a contract made on a Sunday has been enforced by law."

The court take notice that it is said by Lord Coke, that the *Christian Religion* is part of the common law; 2 Inst. 220. Where he cites a law of King Athelstun, dic autem dominico nemo mercaturam facito; id si quis egerit, et ipsa merce et triginta præterea solidis mulctatur; and note that *no merchandise* should be on the Lord's day. But it does not appear, say the court, that the common law ever considered those *contracts void* which were made on a Sunday.

That the contract should not be void, and yet the act a misdemeanor as contra bonus mores would seem to be an inconsistency. But the Legislature in England, as well as here having legislated on the subject, it can only be according to the prohibitions that it is a *misdemeanor* or the act *void.*

The Stat. Cha. 2. c. 7. goes farther than merely prohibiting secular work and employment, and enjoins what is to be done on that day; "Every person or persons, shall on the Lord's day, apply themselves to the observance of the same, by exercising themselves thereon in the duties of piety and true religion publicly aud privately." But by our act 22 April, '94, it is left to the conscience of the party, or the censure of the religious society to which they belong, if they belong to any, as to the duties in which they may employ themselves. It restrains only the doing worldly labor on that day. The compact of our political association embracing jews, or seventh day baptists, or others who do not use that day for the purposes of devotion, must be comprehended, so far as respects the exercise of public employment of a worldly nature.

It may be observed that whether of *divine* or *civil* institution merely, the observance of one day in seven, is a great

political good; and it cannot interfere with the rights of conscience in jew or others, who are left at liberty to observe other days of their own chusing. If it is even at the expence of being thrown out of a portion of time for their occupations, in addition to that out of which they throw themselves, *private convenience must give way to general good.*

THE LATE SIR WILLIAM JONES

At the End of his Bible wrote the following Note.

I have regularly and attentively read these Holy Scriptures; and am of opinion, that this volume, independently of its divine origin, contains more true sublimity, more exquisite beauty, more pure morality, more important history, and finer strains both of poetry and eloquence, than can be collected from all other books, in whatever age or language they may have been composed.

The two parts of which the Scriptures consist, are connected by a chain of compositions, which bear no resemblance, in form or style, to any that can be produced from the stores of Grecian, Persian, or even Arabian learning. The antiquity of those compositions no man doubts; and the unstrained application of them to events long subsequent to their publication, is a solid ground of belief that they are genuine predictions, and consequently inspired.

CASES ADJUDGED

IN THE

SUPREME COURT OF NORTH-CAROLINA,

AT JANUARY TERM, 1815.

Haralson v. *Dickens.*

This was an action of covenant, founded upon certain articles of agreement, executed the 13th of November, 1811, whereby the defendant, who was Clerk of the County Court of Person, employed the plaintiff as his deputy, and authorised him to retain, for his services, "one half the profits arising from the date of the contract," which they calculate to be one hundred dollars; which the said Haralson promises, at every term, the sum of twenty-five dollars, to pay the said Dickens as Clerk of said county—also, one half of fees on marriage licences, said Dickens is entitled to—and agreed to between both parties." The concluding clause of the agreement is as follows: "And the said Haralson doth oblige himself to pay over to the said Dickens, as before mentioned, one half of the profits which may be collected, which is one hundred dollars a year, to be in four instalments, viz. twenty-five dollars every court in a year; also, one half of the fees collected on marriage licences."

The Judge before whom the cause was tried, directed a nonsuit, from which decision the plaintiff appealed to this court.

Norwood, for the defendant.—This contract is rendered void by the statute of 6 *Ed. VI. c.* 16, which enacts, that all agreements, covenants, bonds or assurances for any of the public offices therein specified, or the deputation thereof, shall be void. Such contracts are void where a certain an-

nual sum is reserved to the principal, though the profits amount to more than the sum reserved to be paid by the deputy. *Mod. Ca.* 234. A sum in gross cannot be reserved to the principal. *Sal.* 468.

Nash, for the plaintiff.—The statute does not affect those contracts where the sum to be paid is reserved out of the profits of the office; for then, the principal only reserves part of that which was wholly his before. This is settled in *Godolphin* v. *Tudor* 6 *Mod.* 234; and in *Culliford* v. *Codonny*, 12 *Mod.* 90, the very point came in question, and it was held that a bond by a deputy to account for the profits he receives, and to pay his master one half of them, is not within the statute; for it is reasonable that the deputy should be paid for his trouble. In the case before the court the covenant is to pay half the profits, which amounted to one hundred dollars a year. But if this point should be adjudged against the plaintiff, he is at all events entitled to recover half the money received for marriage licences; that being, clearly, only a reservation of half the profits which have arisen from that source.

Norwood, in reply.—The profits of this office were altogether uncertain. It was impossible to estimate them prospectively; yet the sum to be paid is fixed, so that whether twenty or two hundred pounds were received by the plaintiff, he was bound to pay over one hundred. If by the parties arbitrarily stating a certain sum as the profits, a sum in gross might be reserved, the provisions of the statute might easily be evaded. On this point, the reasoning of Lord Loughborough, in *Garforth* v. *Ferson*. 1 *H. Bl.* 331, is strong and conclusive. As to the claim for marriage licences, we resist it on the ground that if any of the conditions of a bond be void by statute, the whole bond is void. *Willes* 574.

PER CURIAM.—The plaintiff, in this case, brings his action to enforce an agreement by which he has undertaken to pay the

defendant one hundred dollars per annum, in quarterly instalments, for five years for the deputation of a clerk's office; and it is recited in the articles, that this sum is one half the estimated profits. In the same contract it is agreed the defendant shall receive one half the fees of marriage licences during that period, and that the agreement is to continue for five years, unless sooner dissolved by death or consent.

It has been insisted on in the argument of the plaintiff's counsel, that the plaintiff was only bound to pay one half the profits, and that the sum set forth was only by way of description, and therefore the case was not within the statute of Edward the 6th, against selling offices.

We are all, however, of opinion, that no such construction can be put on the agreement, and that in an action by the defendant against the plaintiff, he would not be allowed to shew what were the profits—that he has undertaken to pay a sum certain, not *out of the profits*, but at all events, and that, therefore, the case is clearly within the statute. As to the other ground contended for, that he ought to be permitted to recover for the loss of marriage licence fees, we think it altogether insupportable; because the statute having declared all *contracts*, *bonds*, *agreements*, &c. for the sale of the deputation of such an office absolutely void, no action can be supported upon either of them.

Wherefore, we are of opinion, the rule for a new trial should be discharged.

Worthington v. *Colhane.*

This was a bill in equity, in which the complainant referred to a statement annexed to his bill, and which he prayed might be taken as part of it.

The defendant pleaded in abatement, that he had not been served with a copy of the bill ten days before the court, for that no copy whatever of the statement, had been served on him. The plea was overruled in the Superior Court, from whose judgment the cause was brought by appeal to this court; where it was submitted without argument, and the opinion was delivered by

SEAWELL, J...This point has already been determined, and, we think, properly, as reported in 1*st Haywood's Rep.* 286.

To give a different construction to the act of 1782, c. 11, § 2, would be abating the bill for an inconvenience which operated only upon the complainant: The court must necessarily perceive, that the complaint, *as appears of record*, has proceeded regularly, before any order pro confesso will be made. Upon examining the copy which is returned served on the defendant, that would appear, incomplete, and would, therefore, be the same in effect, as if the sheriff had returned upon a full copy "not served on defendant." Where, however, a full copy is served, but within less time of the ensuing term, than the act has allowed the party to prepare for his defence, the time of service must be disclosed by plea, as it would not otherwise appear. The opinion of the court in the case referred to, is so able and luminous, in the exposition of the act, that we deem it unnecessary to add further than our entire concurrence with the opinion of the court. And are, therefore, all of us of opinion the plea should be overruled, and with full costs in both courts.

Beard & Merrill v. *Long.*

This was a petition to establish a public ferry on the Yadkin River. The reasons why the prayer ought to be granted were stated at length in the petition, and a diagram accom-

panied the papers, shewing the respective distances by the way of the old ferries and the proposed one. The cause was ably argued by *Norwood* and *Nash* for the petitioners, and *Henderson* and *Browne* for the defendants; the principal topics urged on either side are noticed in the judgment of the court.

PER CURIAM.—The petitioners ask of the court the establishing a ferry for the benefit of the public: the petition, therefore, is substantially to be considered as the prayer of the community—for whose sake all public offices are created. It is necessary, therefore, to examine what are the facts which appear in this case.

It seems that the place at which the petitioners desire leave to establish a ferry, is a little more than a mile below one ferry, and not as much above another; that both these ferries are kept in good repair, and it does not appear that any inconvenience exists, or has existed, for want of expedition in passing at either of them: the *price* of ferriage can be no imposition, as that is to be regulated by the county courts, and may, therefore, be considered as dependent upon *public will*.

The river, however, is but about half the distance in width, and is smooth and gentle, and would authorise the petitioners, it is believed, to transport, for lower prices; and in travelling nine miles, not quite one mile would be saved in distance on one road, and a few yards lost on the other: it also appears that there is no public road leading to the place for the new ferry; but that the petitioners have, "by consent of the proprietors of the lands through which they pass," opened two roads, which are now in common use; and that they "are willing to keep the said roads in repair with their own hands and such of the neighboring inhabitants as have promised their voluntary assistance:" It is also stated in the case, that the existing ferries are old estab-

lished ferries; and from a fair examination of all the roads, it does not appear that any decided preference can be given (every thing taken into consideration) to either of them:— Upon this state of the facts, the court is to determine how far the *public*, for whose benefit the petitioners supplicate, would be accommodated by allowing the prayer of the petition: and in this determination, it is for the court to infer, who, in this respect exercises the province of a jury.

The sole object of the law, in conferring every public appointment, is the promotion of *public* convenience: and, though it is true, that in pursuing this great end, *private* interest must yield; yet, it would upbraid justice and the majesty of the law, by supposing it capable of sacrificing individual interest for any other purpose. The person who opposes the present petition may say to the law, "you have granted to me the right of a ferry many years ago, which has always been, and is now, in good repair; at which it is perfectly convenient for every body to pass, as much so as at the new ferry: I have been at great expence in fitting out my ferry, and have entered into bond to keep it in repair; that it was understood between us both, my interest should not be impaired but for my own neglect, or for the benefit of the community; and that though you have the *power*, yet you cannot *rightfully* exercise it, but in a case where it is to punish me or advance the public good." To this it has been answered, that the petitioners have an equal right to participate in all the benefits derivable from the use of their own property; and that as they have a place on the river where they might derive profit from a ferry, they ought not to be restricted or placed in a worse situation than the defendant, merely because he obtained his ferry first; and withal, that cupidity being the grand motive for all human action, it should be fostered, where its gratification would result in public convenience; that though the establishment of the new ferry might curtail the profits of the old one, yet the

rivalship which would follow, would ensure attention and good conduct at both.

In the present enquiry, the force of this argument has no bearing. If to have a *public* ferry was a right common to every body, and was acquired at pleasure by constructing boats and opening roads, it might possibly apply; but it ought to be recollected, that the law (and, as we think, a very wholesome one) under certain limitations, has taken it from every citizen, and that *none* is to exercise it but by licence and entering into bond; and, that the defendant, Long, has obtained this licence from the same source to which the petitioners make their application—the law: And that it behoves this authority to observe whether, consistently with the good faith of its engagement with Long, it can benefit Beard or Merrill; for to make it necessary to obtain a licence upon which no tax is paid the public, and at the same time to say the court is bound to grant it to all who apply, would be absurd. And to say also, that it would be *equitable* or *reasonable* for the court to interfere where the effect of granting the petition would be *only* to benefit the petitioners at the *loss* of defendants, would be more so. The law has wisely considered, that, by permitting every one at pleasure to keep a ferry and establish his own rates, great public inconvenience would result, from all being in bad order; that they would be so multiplied and the emoluments so trifling, as not to be sufficient to defray the expence:—The emoluments, therefore, are not an act of public favor, but intended as a remuneration for public services—the end in view is the facility of passing. In what respect, then, is the public convenience suffering for want of the new ferry? Are the citizens *at large*—the public, put to any difficulty in crossing this river which would be obviated? Do the citizens at large travel an unnecessary distance which would be remedied? The answer in both cases is, no: but it is said the narrowness of the stream would enable the petitioners

to perform the *same benefit* to the public at a *cheaper rate*, and, therefore, it would be serviceable to the community. Now this is merely speculative, it might turn out, upon experiment, that the fact was otherwise: that the least swell in the stream would make it more rapid by being confined to a narrower channel; and the circumstance of there being two ancient ferries, the one a little above and the other just below, established at a time when ease and convenience were principally consulted, is a strong proof at least of the opinion entertained by those who were acquainted with the nature of the stream; and, if it really be the case, as the petitioners state, that the road from Smith's to Salisbury, would be better, and one mile shorter, and cross the river at a much better place for a ferry, it is a little unaccountable that, with all these inducements, the road should at first have run where it is; and, not less so, that the eyes of the community should have so long remained closed against so obvious a benefit. If, therefore, any inference can be drawn from the facts and circumstances, they are *all* against the petitioners. The present application, then, seems to be substantially the same as an offer to *underbid*. Then the low price would be attained; but surely such an offer would deserve to be scouted by every court having just regard to its own dignity, as entrusted with the administration of the laws, if we have a just idea of the terms upon which such grant is made. There is another reason not without its weight. How can the *public* have an interest in a ferry at a place to which there is no way for the public to travel? How then can it be said the public convenience would be promoted by the establishing a ferry, when it is left in the power of every individual through whose lands the way may pass, to shut it up at pleasure? Again—the road leading from the new ferry to Smith's, runs so near the old road as to induce the belief that it would be unnecessarily burthensome to the community to keep both in repair. This, therefore, would be a good *public* reason against a new public road; and if it is to remain a

private way dependant upon the petitioners and those who are to contribute "voluntary assistance" for being kept in repair, it is easy to foresee, from a comparison with public roads on which individuals are obliged by law to work, what will be its condi ion: And if there are other motives which sometimes stimulate to action, that of itself ought, without great *manifest* public convenience, to induce the court to withhold interference.

Wherefore we are of opinion that the petition should be dismissed.

State v. *Newmans*.

The defendant was indicted for an assault, by the name of *William B. Newmans*, without any addition. To this he pleaded in abatement, "and the said W. B. Newmans is by trade a ship carpenter, by which addition he ought to be distinguished, &c." To this plea a demurrer was entered on the part of the State, which coming on before *Lowrie*, *J.* was by him referred to this court.

It was submitted without argument.

SEAWELL, J. delivered the judgment of the court.

We are all of opinion that there should be judgment for the State, on the point submitted: we deem it unnecessary to resort to any other authority in support of the bill of indictment, than the act of assembly originally passed for curing indictments in the county courts, and afterwards extended to the superior courts. The plea is grounded upon a mere formal defect, and that act declares, in substance, the indictment shall be sufficient to all intents and purposes, if it contain the charge in a plain, simple, intelligible manner.

If, however, the act of assembly is laid out of the question, the plea itself is defective; it commences, "and the *said* William B. Newmans comes, &c." By this plea, the defendant admits himself to be the *same* person indicted. The object of the law in allowing the plea of misnomer, is to save one the expence and trouble of answering, who has been wrongfully called in question, or to prevent one man from being arrested for another: the plea goes not to the merits of the charge, and when once it shall appear to the court that the person indicted is really before them, it is of no consequence by what name he is called; for all evidence must be shewn to have relation to the *person* then on trial. To prove the insufficiency of the plea, the case of *Roberts* v. *Moore*, *5th Term* 487, is in point; and though that was the case of a *special* demurrer, yet as we think the defect in *substance*, the principle is the same.

Wherefore, let there be a *respondeas ouster* awarded.

McMillan v. *Smith & Walker.*

A *certiorari* had been granted in this case by LOWRIE, J. upon the affidavit of Smith, which stated in substance, that a suit was instituted against him and Walker in New-Hanover county court, by McMillan; and that the cause was pressed in the deponent's absence, on Monday early in the afternoon of the first day of court, and a judgment obtained. That he understood a standing rule of the court had set apart the first day of the court for county business, and believed that no jury cause was usually pressed on that day: that the county business was not finished when the judgment was taken, which was done by surprise in the absence of his witnesses and himself, although the plaintiff knew that he defended the suit in person. That the note on which the

suit was brought, was lent by him to Walker without receiving any consideration, and passed by Walker on an usurious contract, which plea had been entered and could have been maintained, had the witnesses attended. That the suit was brought against both the maker and indorser.

The counter affidavits of Mr. Meares and Mr. Davis, stated that the practice of the county court was to give a preference to motions on the first and second days; but if no motions were made, to proceed peremptorily on the docket, unless postponed by consent of the bar. After those days jury causes have a preference, although motions are still made through the term when no cause is on trial; that judgments were taken on the first day of the term immediately preceding that, when the judgment complained of was taken; and that a motion was made shortly after the last judgment was entered.

The cause came on upon these affidavits before the superior court of New-Hanover, when the Judge ordered the *certiorari* to be dismissed, from which decision an appeal was taken to this court.

Together with these affidavits, two others were transmitted to the supreme court, which, by an endorsement of the clerk of New-Hanover superior court, appear to have been filed in his office posterior to the term of that court. The affidavit of McMillan states his information and belief, that the note was transferred to his agent for a good and valuable consideration; and that Smith, after the judgment recovered in the county court, promised to pay the money if indulgence were granted him, and it was the refusal of this which prompted him to apply for a *certiorari*.

The affidavit of McPherson states, that Smith told him, after the judgment, that the debt was just, that he only wanted time to pay the money; and that he intimated no

design to apply for a *certiorari*, until indulgence had been refused by McMillan.

Strong, for the plaintiff.—The ground of surprise is completely negatived by the affidavits of Meares and Davis, which shew that the judgment was taken in the ordinary course of practice. Motions, it is true, were entitled to a preference on the first day; but when none such were before the court, the business of the docket was to be kept in progress. Was that to be suspended until it could be ascertained whether all the motions had been brought forward? The defendant then had an opportunity of defending himself, and as he shews no reason why he did not appeal, he cannot be entitled to the remedy he seeks.

Henderson, for the defendant.—This cause ought to be retried to give the defendant an opportunity to substantiate his plea of "usury;" because it appears by his affidavit, that the note was obtained from Walker upon an usurious contract. How is this answered? McMillan says he believes it was fairly transferred to his agent; but McPherson, the agent, who obtained it from Walker, and must have known the consideration, is utterly silent on that head. This tends strongly to corroborate Smith's affidavit.

CAMERON, J. delivered the opinion of the court.

In deciding on the propriety of retaining or dismissing the writs of *certiorari* obtained by the defendant Smith, a majority of the court exclude from consideration the affidavits of the plaintiff and his agent, which appear to have been improperly filed and sent up with the papers in this cause; in as much as they have been made and sworn to *since* the cases were transferred to this court by appeal; and regard only the affidavits which were read in the court below.

Whenever a party applies for an extraordinary remedy, to have his cause re-examined in a superior tribunal, he

ought to shew some satisfactory reason why he was unable to avail himself of the ordinary remedy by appeal from the judgment of the inferior jurisdiction.

The judgments complained of by the defendant, were taken, according to his own statement, on the first day of the county court; he made no attempt to appeal, nor does he pretend to account for his not having done so—consequently, the writs of *certiorari* must be dismissed with costs.

Judgment for plaintiff.

SEAWELL, J.—I cannot concur in the opinion which my brethren entertain on the present question: For it seems to me, that in dismissing this certiorari, we are giving up the *end* for the *means*, and sacrificing the substance to the shadow. It appears that the affidavit upon which the writ issued, was retained by the Judge, and that the one which is now to be considered, was made by the defendant Smith, from the best of his *recollection*: this affidavit charges that the judgment was obtained in the county court, out of the ordinary rules of practice, and in the absence of himself and his witnesses; and that he defended his own cause in person, and had put in the plea of usury: and moreover states, that the transaction was usurious. The plaintiff moves to dismiss the certiorari upon the joint affidavit of Mr. Mears and Mr. Davis; and this affidavit, at *most*, only states that causes were sometimes tried on Monday by *consent*.

Now, the defendant Smith was entitled by law to defend his own cause, and if according to the course of practice his consent was necessary to the trial of his cause, he had a right to withhold it, and was therefore under no obligation to attend the first day. So far then it is apparent a judgment has been irregularly taken: and all *nigh cuts* or extraordinary proceedings, which are calculated to elude a full examination, are the strongest evidences of want of merits.

If the claim was well founded, a judgment on the next day would have answered every purpose.

But it seems, in the opinion of a majority of the court, that it behoved Smith to state in his affidavit the reason he did not appeal to the superior court. I ask why was it necessary (for at *one* time it probably might have been important)? The answer will show how important it is at this stage. Whenever an individual applies for assistance, which it is in the *discretion* of the court to grant; the bare circumstance of his not having pursued a plain remedy he was of *right* entitled to, and which it was convenient to do, raises a presumption that his claim is groundless, and that his object is vexation and delay: and whilst such presumption *exists*, the court deem it unjust to interpose. But whenever the presumption arising from such circumstances is removed by an explanation, and the court is enabled to perceive the applicant has merits, it is the anxious office of a court of justice to afford its aid. If the plaintiff had produced no affidavit to rebut the charges of the defendant, and the affidavit in court had been the *original* one, or if the original was not before the court through the neglect or default of defendant, the case then would have been widely different.

But he has thought proper to answer the defendant, and from this answer it appears evident, that the first impropriety commenced on his own side, in obtaining the judgment; and it is material to observe that this affidavit, made by officers of the county court, does not even hint at the opportunity defendant had to appeal: from which it may be inferred, that the original affidavit did explain that reason; and that it was known to these gentlemen the defendant had it not then in his power. The court, then, which is moved to dismiss the certiorari, is obliged to perceive that there is the strongest evidence of the injustice of the plaintiff's cause, *upon record*, arising from his own conduct as a *wrong-*

door; whilst it is called upon to suppress all further enquiry on account of a *subsequent* irregularity or neglect of the defendant, the *injured person*.

There is something further in this case worthy to be noticed. The plaintiffs have lodged in the office an affidavit which has travelled with the papers to this court, as appears, altogether unauthorised. This affidavit is made *after* the hearing in the superior court, when it is fair to presume the plaintiffs had a copy of the affidavit of defendant before them. By this affidavit, the plaintiffs do not presume to *deny* the usury charged by defendant, but are particularly careful to answer respecting the *manner* of obtaining the judgment.

This affidavit, however, the other members of the court seem disposed to lay out of view. This, I think, should be the case as to every purpose for which the *plaintiff* would use it; but as to every other, to allow the defendant all the benefit he can derive from it. The plaintiff, by his own act, has made it a part of the case, so far as it may operate against him, and to that end it should now be considered in the same manner as any other fact which appeared from the record, though not noticed in the trial below.

The case, then, may be thus simplified. The party asking the assistance of this court to be relieved from an unjust recovery, has acted in such way, as at *one stage* in the proceedings, would have cast suspicion upon the justice of his case, and *implied* a disposition to delay; who is now turned out of court on account of this presumption, with an admission upon record, (for it is not denied) that his complaint was well founded. The court, in its *discretion*, say to the defendants, "depart hence, we hear you no farther; for though it is admitted by the plaintiff, that the judgment you complain of was irregularly and *unfairly* obtained, and upon a contract forbidden by law; yet as you, on your part, in making out your case, did *at one time* act in such way as would *imply* you had no right to complain, this *presumption* shall over-

turn the *fact*, and the temple of justice shall be shut against you."

Courts of law, when called upon to afford an extraordinary remedy, act upon the same principles as a court of equity: and suppose a bill should be filed in a court of equity to be relieved from a judgment, which was charged to be had on a bond that was paid, and the bill should set forth no circumstances why the complainant did not make defence at law? It will readily be admitted that a demurrer to the bill would be allowed, and the complainant would then share the same fate with these defendants; but suppose, instead of demurring, the defendant should answer and admit that the bond was paid, and that the judgment was unjust, would a court of equity dismiss the bill? It certainly would not, but would enjoin the plaintiff at law perpetually. Or suppose the bill was to open an account without pointing out the errors, and defendant should admit the mistake, it is apprehended the court would retain the bill in both cases. And it should be remembered, when a party moves to dismiss upon the strength of his affidavit, every thing which is not denied is *then* to be taken as admitted. And after all, it *may be* that the original affidavit steered clear of the objection to the present; that it was no part of the defendant's duty to have this forthcoming; and it is not *presumable*, a certiorari would have been granted upon one which, *when it was made*, seemed for the sake of delay, and was therefore to be presumed false. It therefore seems to me, there has been a scrupulous regard to the *form* of proceeding at the manifest expence of the *justice* of the case, without keeping in view that the great design of a court of justice is to afford to every citizen the full benefit of the laws, and that *rules* which courts have adopted are nothing else than instruments to *effect* that purpose, and that as it is evident the plaintiffs, by this irregularity, have deprived the defendants of all defence in an action founded upon an illegal contract.

this court should allow that benefit which was improperly withheld: and more especially in a case like the present, where every thing should be presumed against the plaintiffs, on account of the course they have pursued; and who now are straining to stifle a fair hearing, by which the defendants, if injured, are cut off from all redress. The plaintiffs, however, if they have a right to recover, run no risk. The defendants must give security to perform the judgment of the court, and if, really, they have no defence, the plaintiff will recover again If the plaintiff has recovered upon an unlawful contract, it is meet the laws should be respected; and as to delay, the plaintiff has brought it on by his own conduct. It was said during the discussion of this case, that it appeared by defendant Smith's own statement, that the usury complained of, did not relate to any part of his contract, and therefore he could not take advantage of it; that if he made a note *bona fide* to Walker, and Walker negociated upon an usurious contract with plaintiffs, Smith could not avoid it. This may be true and yet not material in this case, because this is somewhat strangely, a *joint* action, and at least Walker, one of the defendants, was entitled to the benefit of the plea: and although the proposition may be true in case of a *bona fide* note by Smith to Walker, when it comes to the hands of a subsequent *innocent* purchaser, who is not to be affected by an *intermediate* indorsement upon usurious consideration, yet this case is *certainly* different in *one* of the particulars; for the note is first negociated to the *plaintiffs agent* upon a usurious consideration, and it is the usurer who is plaintiff and not the fair purchaser; and it *may* be different without impugning the affidavit of Smith in another; for if the note was originally made by Smith to Walker, upon an agreement with both them, and the *plaintiff's agent* to *elude* the statute of usury, the whole transaction would be clearly void. In whatever point of view, therefore, I am capable of considering the case, I am of opinion the certiorari should be retained and a trial de novo awarded.

Potts v. *Lazarus.*

This was an action of covenant founded on a charter party entered into between the plaintiff, and the defendant, *as agent for Paul Errill Lorent*, of Charleston. The defendant is described as agent in every part where his name occurs, and he signs and seals it, also as agent. The question submitted to the court is, whether he is personally liable to the action.

The cause was submitted without argument.

SEAWELL, J. delivered the judgment of the Court.

The only question which can arise in this case is, who are the persons who are parties to this deed? In ascertaining this, it is the duty of courts to look into the whole of the contract, with a view of discovering who were contemplated by the *actors* in the transaction, to be those persons on whom the responsibility was to rest. Whoever these shall turn out to be, they, in law, are to be considered as the parties.

It was for a long while held that the technical mode of *signing* the instrument, was conclusive, and that, therefore, though in the body of the deed it should be clearly shewn who the parties were, yet if executed by the agent, without it was done in the name of the principal *by his* agent, that the agent becomes personally bound.

Modern decisions have, however, overruled this distinction, and have placed the responsibility upon what, by the plain terms of the contract, appeared to be the understanding of those concerned. The cases of *Unwin* v. *Wolseley*, *reported* 1 *Term Rep.* 674, and *Hodgeson* v. *Dexter* in 1 *Cranch* 345, are decisive of this point. In each of those cases the defendant had executed the deed by signing his own name, without any representative character, and affixing his seal

in the present case the defendant expressly signs as "agent for Lorent," so that if any thing could be inferred from the manner of signing, this is stronger than those which have been decided. It is no answer for the plaintiffs to say that unless the defendant be *bound* no one will; for both the cases cited furnished that answer also. From whose fault has this difficulty arisen? Suppose the deed had been executed "P. E. Lorent, by A Lazarus his attorney;" must not the plaintiffs then shew that Lazarus was authorised before Lorent would be responsible? The same result follows in both cases. Therefore, as the whole of this deed, from the beginning to the end, expressly states the contract to be made by Lazarus, not in his individual capacity, but as *representing* P. E. Lorent, we are of opinion that he is not personally bound, and that, therefore, the rule for new trial should be discharged.

The United States v. *Blount.*

This was an action of covenant on a deed, which is in the words and figures following, viz. "Covenant and agreement made and entered into this 13th day of November, A. D. 1800, by and between John Wallace of Shell Castle, in the county of Carteret, and John Gray Blount of the town of Washington and county of Beaufort, of the one part, and James Taylor, Surveyor of the port of Beacon Island, and in this instance, special agent for and on the part of the United States, of the other part, witnesseth, that for and in consideration of the sum of two thousand eight hundred dollars paid by him, the said James Taylor, for the United States, to him, the said John Wallace, the receipt whereof is hereby acknowledged, they, the said John Wallace and John Gray Blount, have sold to him, the said James Taylor, for the United States, eighty thousand bushels of shells for the works

intended to be erected at Beacon Island; which shells the said James Taylor, or his successor, or any and every person appointed by him or by the United States, may take at any time, or all times, until the same be fully completed, from the following places: Forty thousand bushels, or one half of the quantity now sold, to be taken from the rocks adjacent and contiguous to Beacon Island and Shell Castle, as he may choose, and forty thousand bushels, or the other moiety, to be taken from Shell Island; the quantities taken to be ascertained by the usual mode of measuring shells, or by any other which the said parties may hereafter agree on to facilitate and expedite the delivery.

"It is further covenanted and agreed upon by and between the said parties, that the said James Taylor may add to, or diminish from the said quantity, to wit, eighty thousand bushels, as he or his successor may hereafter think proper or find convenient; and should he add to the quantity, it is hereby covenanted that he shall have any further or larger quantity at the same prices with those now sold to him, which are three cents for the shells taken from Shell Island, and four cents for the shells taken from the rocks per statute bushel measured as customary: and in the event of his not taking the whole quantity now covenanted for, the said John Wallace and John Gray Blount are hereby bound to repay him at the rates aforesaid for such quantity so not taken.

"And the said John Wallace and John Gray Blount further covenant and agree to and with the said James Taylor, that should any let, hindrance, or molestation, prevent him, the said James Taylor, or his successor, or any person acting by or under their authority, or by virtue of this covenant, from taking the quantity or any part thereof from Shell Island, now covenanted for, by reason of any claim made or to be made to the said Island, then and in such case, the said James Taylor or his successor may make up the quantity so deficient in consequence of such hindrance, from the rocks

adjacent and contiguous to Shell Castle and Beacon Island aforesaid, at the rate of four cents per bushel as aforesaid; and the said John Wallace and John G. Blount bind themselves by these presents to defend any and every action or actions, suit or suits, which may be brought against him or his successor, or any other person acting by or under their authority, or by virtue of this covenant. In witness whereof, the parties aforesaid have hereunto set their hands and affixed their seals, and have interchangeably agreed upon the said covenant."

And the said United States say that they did not take the whole quantity of shells aforesaid, to wit, eighty thousand bushels; and that in fact, they did only receive five thousand bushels parcel thereof, to wit—2500 bushels from the rocks adjacent to Beacon Island and Shell Castle, and 2500 bushels from Shell Island; and as to the residue, to wit, 75000 bushels, they did refuse to take the same, to wit, on the 10th June, 1802, of which the said Blount then had notice: And that they, the said United States, on the said 10th June, 1802, demanded of the said Blount repayment for the quantity so not taken, which he refused, &c.——Damages £5000.

And the defendant demurs, and shews as the cause of demurrer, that the United States are not a party to the said indenture, and cannot maintain any action thereon, in their own name.

Donnell, in support of the demurrer.—This action cannot be supported in the name of the United States. The rule is, that where a deed is made *inter partes*, a stranger shall not take advantege of a covenant made for his benefit. 3 *Levintz.* 139. Nor where a bond is made to A for the benefit of B, can the latter sue, upon it, or release it, because he is not a party. *Levintz.* 235. 2 *Inst.* 673. In *Carthew* 76, it was held by Lord Holt, that a party to a deed cannot covenant with one who is no party to it; but that one who is no

party to a deed may covenant with one who is a party, and oblige himself by sealing the deed. The parties in this case are *Blount* and *Wallace* on the one side, and *Taylor* on the other. If the latter as agent of the United States, could communicate to them a power of enforcing this covenant, he could only do it by making them a party by signing and sealing in their name. If a person having a power of attorney to act for another, make a lease in his own name, such lease is void, for it should be made in the name of him who gave the power and commission to act in his behalf. 9 *Rep. Combe's case.* 2 *L. Raymond* 1418. If the covenant is badly framed and imperfectly executed, it is the fault of those who framed it; and, as the Chief Justice remarks, in 1 *Bos. & Pull.* 98, the court can look no further.

Mordecai, for the plaintiffs.—If the United States cannot sue on this covenant, no person can; and the effect will be to give the defendants a large sum without any consideration. Taylor could not maintain the action, for then his private debts might be set off against a just claim of the U. States; nor could he be liable to an action, for it appears manifestly throughout the whole deed, that the defendants did not contract with him on his personal responsibility, but as agent of the United States. This principle seems to be conclusively settled in the cases of *Macbeath* v. *Holdimand* 1 *Term Rep.* 172, *Unwin* v. *Wolseley*, *Ibid* 674, and *Hodgton* v. *Dexter* 1 *Cranch* 345. In the second case it is remarked by *Ashurst*, *J.* that whether the contract be by parol or by deed, it makes no difference as to the construction to be put upon it. Whatever may be the effect of a seal between private persons, it cannot be necessary that the seal of the United States should be affixed to every contract made for their benefit, in order to make them parties. Their agents are numerous and dispersed over a great extent of country, but they have but one seal, which is in the care of one officer. The true construction of this covenant is, that

the benefit of it is to enure to the United States, and the agent having put a seal to it, cannot change the intent of the parties. If B in consideration of his having leased land from A, promise to pay the rent to C, the latter may maintain an action. 3 *Bos. & Pull.* 149. So if one person make a promise to another for the benefit of a third, that third may maintain an action upon it. 1 *Bos. & Pull.* 101.

Donnell, in reply.—It is not necessary for me to prove that the action might have been brought by *Taylor*; for it does not follow that the United States may sue because he cannot. The benefit of a contract may enure to a party without his having a right to maintain the action, as in the case from 1 *Levintz.* to which may be added 7 *East* 148. But if a man covenant under his hand and seal, for the act of another, he shall be personally bound by his covenant, though he describe himself as covenanting in behalf of another. 5 *East* 148.

Taylor, C. J.—The principle which has been so fully illustrated by the defendant's counsel is doubtless a correct one, and is well established by the authorities cited. But whether a deed be made between parties, and who the parties are, must depend on a proper construction of the deed; and when we have once ascertained who the parties are, it follows that a stranger cannot sue on a covenant contained in it, though made for his benefit. The United States cannot be considered as strangers to this deed, because they are formally, as well as substantially, made parties to it; formally, since it is made by the defendants of the one part, and a public officer, a special agent for the United States, of the other part; substantially, because it relates altogether to the carrying on of a public work, in which the agent as an individual cannot possibly have a personal interest.—Indeed the observations made by the court in the case of *Potts* v. *Lazarus*, decided at the present term, apply fully to this case; for if *Lazarus* was not a party to that deed, the reasons leading to that conclusion must also prove that

the United States are a party to the deed in question. As to an agent's liability to be sued, the case of a public agent is stronger than that of a mere private one, because the former is never held liable where it appears that he contracted on the behalf of government; though cases have occurred in which a private agent has been held liable to an action, in consequence of the peculiar and express terms of the contract he has entered into. We are of opinion that the demurrer must be overruled.

McMillan v. *Hafley*.

The plaintiff became purchaser of a tract of land sold by the sheriff, under execution, on the 10th November, 1804, but the conveyance was not made until the 18th July, 1805. In the intermediate time, viz. on the 10th February, 1805, the defendant committed the trespass for which the suit is brought.

The execution issued from an order of the county court, directing *Bolin*, the prosecutor in an indictment, to pay the costs on the defendant being acquitted. After the order, and before the sale, *Bolin* conveyed for a valuable consideration to the defendant *Hafley*.

Two questions were presented to this court.

1. Whether the order was such a judgment as warranted the issuing an execution to sell *Bolin's* land?

2. Whether under the circumstances above stated, the plaintiff can maintain *Trespass?*

CAMERON, J. delivered the judgment of the court.

The plaintiff in an action of trespass, *quare clausum fregit*, must shew that at the time of the commission of the trespass,

he had possession of the premises, either actually, or constructively.

It is admitted in the statement of the case, that the plaintiff had not the actual possession of the land in question.

Constructive possession can only exist where the party claiming has title to the land, and there is no one in actual possession, claiming under an adverse title; and as the plaintiff had no title in law, at the time of the commission of the trespass, he cannot be considered as having a constructive possession—consequently, he cannot recover in this action.

The opinion of the court being in favor of the defendant, on the second point stated in the case, it is unnecessary to decide the first point.

Let the verdict for the plaintiff be set aside and a nonsuit entered.

State v. *Trexler.*

The defendant had been tried and found guilty on an indictment for a trespass in taking from *Hughes*, the prosecutor, a bank note of $ 100. On a motion for a new trial, it was agreed that this court should decide whether the facts alleged in the following affidavit of *Hughes*, the prosecutor, constitute an indictable trespass or not, and a new trial to be awarded or refused accordingly.

AFFIDAVIT.

"On the 5th day of June, in the year 1809, this deponent was walking on the pavement near John Trexler's house in the town of Salisbury, and stopped at Trexler's door to inquire of him how the frame of Mull's house went together.

at the raising, at which time Trexler invited deponent into his house. After some conversation, deponent asked Trexler to go to Pinkston's Tavern, which was the adjoining house, to drink some grog, which he declined, whereupon deponent went to Pinkston's himself, and after being there a short time returned to Trexler's house and found Trexler lying on the bed. It was about eleven o'clock in the forenoon. Upon being invited to sit, deponent took a chair and sat upon it near the foot of the bed, on which Trexler then lay. Trexler asked deponent how he came on with his affairs, which were then in a critical situation, to which deponent replied, "*bad enough*," but he was then preparing to go to Virginia for the purpose of collecting a judgment due to him there, which, he hoped, would enable him to prosecute his business with greater advantage. Deponent further stated, that he was then going to Mr. Evan Alexander's to settle with him, and receive a balance due, at which Trexler expressed some surprise that Mr. Alexander should be in deponent's debt, and that he should have delayed payment so long. Deponent said that Trexler need not be surprized at it, and drew out his pocket-book to show him a statement of the account; in doing which, some papers which had been in the pocket-book, fell upon the floor. Deponent then laid his pocket book, with the remainder of the papers, on the foot of the bed, and turned round to pick up those which had fallen. In the mean time Trexler changed his position on the bed, and lay with his head towards the foot of the bed, as deponent thought, for the purpose of being more coveniently situated to see the papers. As he then lay, the pocket book and papers were immediately before him.—While deponent was picking up the papers from the floor, Trexler said he thought that deponent was very careless with his papers;—deponent replied, yes, and looking round observed Trexler, in a secret way, opening a note of the Bank of the United States for one hundred dollars, which deponent had carefully placed in the pocket book that morn-

ing, for the purpose of having it changed for other money. In attempting to take the bank note out of Trexler's hands, the bank note was fully opened, and Trexler clenched his hand upon it, and refused to give it up, saying that he would not give it up unless deponent would tell him what it was. Deponent at first, observed, that it was no business of his what it was; but that it was money, and putting up the pocket-book and papers, finding Trexler still refusing to give up the bank note, deponent jumped upon him as he lay on the bed, to endeavor to force it from him. After struggling with him for some time, deponent told Trexler that he would spoil the bill, upon which he said, if deponent would let him get up, he would return it. As soon as deponent permitted him to rise from the bed, Trexler attempted to make his escape from the room in which he then was, to another room. Deponent seized him a second time, and endeavored partly by force and partly by intercession, to induce him to return it; Trexler still refusing to return it, and at the same time insisting that deponent should tell him what it was—upon which deponent at length said, "*to be plain with you John, it is a bank note of one hundred dollars.*" As soon as deponent had made this declaration, Trexler whooped and made a great noise, said it was more, and swore he would not take five hundred dollars for it. Trexler then make his escape into another room where there was a desk, and while deponent was struggling with him at the desk, he took out of the desk a red Morocco pocket book, after which the bank note disappeared, and deponent has never seen it since to his knowledge. In a few minutes afterwards, when deponent remonstrated with Trexler concerning such conduct, he (Trexler) said, if it was deponent's bill, Trexler's daughter had found it in the garden. At another time Trexler told deponent, that one of his journeymen (Dillon) had found it and given it to his daughter,—all which assertions deponent positively contradicted, and said they were false. Trexler afterwards, in the same day,

agreed that he would go with deponent to Peter Brown's store, and if he would say that deponent had had such a bill, that he (Trexler) would return it. At the time appointed, he failed to attend. About two days afterwards, deponent met Trexler in the street and again demanded the bank note, upon which Trexler asked deponent if he would swear to the bill, which deponent said he would do, and would also prove it by Peter Brown, now deceased. When deponent urged him to go before a Magistrate for the purpose, Trexler equivocated and asked deponent if he knew the number of the bill, and some other questions of a similar nature; but declined going to a Magistrate as deponent requested. The conversation at this time ended by Trexler's saying, that deponent never would get the bank note in question, without he could get it by law. Deponent told him then, that he would immmediately employ Mr. Henderson to obtain redress by law, and turned away; upon which Trexler said, that if deponent wanted a horse, he would give him his bay horse worth seventy dollars, and thirty dollars in silver, for the bank note. Deponent refused to accept this offer, and immediately employed counsel to prosecute him. Next day Trexler came to deponent and offered to return a Cape-Fear bank note of one dollar, and said that was the note he had taken from deponent; upon which deponent had him taken with a state warrant—and further, saith not."

SEAWELL, J. delivered the judgment of the court.

It has been argued by the prisoner's counsel, that an indictment for a trespass will not lie, on the facts set forth in this case; owing, as it is alleged, to the want of an *actual* breach of the peace—The bank note being taken from the pocket book *privily*, whilst the prosecutor was collecting the papers which had fallen—and that if any offence was committed, it was larceny: and even if the court should be of opinion, actual force *was* employed; yet, it would then be robbery, and in both instances the trespass be merged in the felony.

As to the latter argument, we find no difficulty in disposing of it. The bank note not being a subject of larceny, no felony could be committed to extinguish the trespass. And as to the first, we all agree, that if the prosecutor, upon discovering the note in prisoner's hands, had only *demanded* it, and the transaction had there *broken up*, the refusal to deliver, and the subsequent detention, could not have, nor does it have, any influence upon the case, so as to make the *first* taking forcible: for though it is true the prisoner had then committed a complete felony (supposing the note a proper subject); yet as the transaction did not then break up, but was continued by the prosecutor at the same instant seizing the prisoner, who then had the note, which continued in *sight* and which had never been out of *reach*, it was to every substantial purpose *reduced* to possession; and the prosecutor being then overcome by the prisoner, in the scuffle, the carrying off the note constituted the *actual* asportation: For where there is one *continuing* transaction, though there be several distinct asportations in *law*, yet the party may be indicted for the *final* carrying away, and all who concur are guilty, though they were not privy to the first, or intermediate acts The case of *the King* v. *Dyer and Dister* which is cited in 2 *East's Crown Law* 767, was, where Dyer, the master of a boat, was employed to bring on shore a quantity of barilla, and Dister and others were employed as laborers to remove the barilla after it was landed, to Hawkin's warehouse; that while the barilla was in the boat, some part of it was separated from the rest and concealed in another part of the boat, without the privity of Dyer; that afterwards Dyer and Dister and the others who had removed and concealed it, carried it off, and though a complete *legal* taking and carrying away was performed before Dyer had any agency or knowledge, yet as he joined in the *final actual* asportation, he was held guilty and convicted. To the same effect is the case of the *King* v. *Atwell & O'Donnell & als*, cited in the same book. Suppose a thief should privately

take money from one pocket and place it in another for the convenience of handing it at a suitable time to his comrade, and when he attempted to take it out again, the owner should seize his hand, upon which a scuffle takes place and the owner is overpowered or awed to desist, and the thief goes off with the money? This, surely, would be robbery—in the present case, the prisoner being seized before the note was even out of the prosecutor's *presence*, and being then in reach, was as much in his possession as the pocket-book he had laid down. Had the prosecutor caught hold of the bill and then been overcome or intimidated, it would have been robbery; and if an actual touching of the note be essential to the regaining possession, (which I, for my own part, by no means think necessary) the jury had ample room to presume it from the circumstances, and should have been so instructed. The snatching any thing unawares, is not considered a taking *by force;* but if there be a *struggle to keep it*, or any violence done the person, as in Lapier's case of the tearing the ear, the taking is a robbery. *Buller Justice in Rex* v. *Horner*, cited in Leach's Crown Law, in a note to Baker's case. This distinction steers clear of the cases cited in Hawkins and Hale of a stealing of the purse privily, and upon the owner's discovering it in the hands of the thief, *demanding* it, when the thief threatened to pull his house from over his head if he said any thing about it, and rode off, which was held to be no robbery: It is also to be remarked, that at that period, the prevailing opinion seemed to be, that a taking to constitute robbery must be *through fear.*— Wherefore, we are all of opinion, the jury did right in finding the prisoner guilty; that it was a rank trespass, and the rule for a new trial should be discharged. It would be a reproach to the law to consider the taking a hat which a frighted man had let fall accidentally from his head, a robbery, the lifting of a sash, a *breaking* of a house, so as in both instances to constitute capital offences, and not to consider the present, a taking by violence, when the final carrying away was by the dint of strength.

Johnston & wife v. *Hamblet.*

Detinue for several slaves which the plaintiff Elizabeth owned and possessed before her intermarriage with Johnston. On the day of her marriage, and before it's solemnization, she made a bill of sale to her mother of the negroes in question, without the knowledge or consent of her intended husband; and the question submitted to this court was, whether the plaintiffs are estopped by that deed from maintaining this action.

Nash, for the plaintiff, insisted that the deed being manifestly in fraud of the marital rights, was essentially void, not only against the husband, but also against the wife, who might have set it aside in a court of equity. It would have been no objection there, that the party seeking relief was a *particeps criminis*; for then there would be no redress at all against the fraud, and no body to ask it. 1 *Vern.* 340 2 *Vern.* 466. 1 *P. Williams* 496. The deed having then no operation, cannot amount to an estoppel against the party making it, or others claiming through him. A court of law has concurrent jurisdiction on this subject with a court of equity. 3 *Wils.* 349. 1 *Burr.* 396.

Norwood, for the defendant.—The wife cannot claim in this court against her own solemn deed, and the husband deriving his title from her, cannot have a better one than she had. If the plaintiff can make out a case proper for a court of equity, redress may be had there, the fraud charged being of that species which peculiarly belongs to that jurisdiction. Both by the common law and the statutes of fraud, fraudulent deeds, though void against others, are good as between the parties, and especially against the alienor.

PER CURIAM.—If the wife had continued sole and brought this action, she must have been barred by her deed. As the

husband brings the action in right of his wife, he can depend only upon such legal right as she had, and cannot, in this court at least, claim against her deed.

Let a nonsuit be entered.

Payne v. *Hubbard.*

The defendant had purchased, before the year 1777, an improvement on a tract of vacant land, and in 1778 duly made an entry. He was drafted before the 17th April, 1780, to serve in the militia, which he failed to do, or to find a substitute; and being delinquent, on the 24th June following, a warrant was on that day issued by the Colonel of the county, and directed to the deputy sheriff, commanding him to sell so much of the defendant's property as would make the sum of £3500. This warrant was issued under the 2d section of an act, passed on the 17th April, 1780. The deputy sheriff levied upon the entry abovementioned, and sold it publicly to Daniel Mitchell, who sold it to the complainant's father, who had the land surveyed and procured a grant to issue for it on the 18th August, 1787, in the name of the defendant. The sheriff afterwards in 1789, executed a deed to Payne, in completion of the sale by his deputy. The bill prayed a conveyance of the land, or a repayment of the purchase money.

Nash, for the defendant, stated several objections to the complainant's recovery.

1. That the entry being a mere *chose in action*, was not liable to execution. 1 *Cruise* 459. 1 *Bl. Rep.* 170. 1 *Saunders* 108.

2. The unconstitutionality of the act of 1780, under which the warrant was issued. 2 *Haywood's Rep.* and *Mr. Justice Patterson's* opinion in the *Wyoming* cause.

3. That the warrant was directed to the deputy sheriff, whereas by the act it should have been directed to the high sheriff. 1 *Wils.* 155. 1 *Vesey* 195. *Yelv.* 175.

4. When the land was sold by the sheriff, he could not convey any title, because *Hubbard* himself was incapable of doing so. *Act of* 1777, *Cap.* 33, *Sec.* 7.

Norwood, for the complainant, cited on the first point, *Shepherd's Touchstone* 501. 1 *Saund.* 56, 172, 45. 1 *Brown* 81. *Finch* 202. 3 *Atkyns* 309. On the second, *Vattel*, *B.* 1, *Sec.* 1, 2, *Cap.* 2. *Cap.* 20, *Sec.* 244.

PER CURIAM.—It is unnecessary to decide all the questions raised in this case, because we are satisfied that the law was correctly laid down in the case of *Allison* v. *Kirkland & alias*, in this court. It then follows, that Mitchell acquired no legal title to the land under the purchase made by him at the sheriff's sale, because Hubbard himself had none. The latter purchased an improvement, which gave him only a right in preference to others, to obtain a legal title from the State, towards which he had advanced so far as to make an entry. But the legal title remained in the State at the time of entry, an equitable title alone subsisting in the defendant, and this we have held could not be sold by execution.

Wherefore, the bill must be dismissed.

Knowis & alii v. *Baker & alias.*

Since the last continuance of this cause *Keziah Knowis*, one of the defendants, intermarried with *Hance Baker*, who at the fall term of 1814, was made a defendant, and there-

upon moved for a removal of the suit upon an affidavit, which stated in substance, that he did not believe he could have a fair and impartial trial in that county; that the subject of the suit had been much talked of, and improper impressions made as to his case, which would operate injuriously on the trial of the issues; that his wife, the party principally concerned, had resided at a distance from that county for some years, and only now became conusant of these facts, and the deponent avails himself of this first opportunity of procuring a removal.

The motion was overruled by *Lowrie, J.* from whose decision the defendant appealed. The cause was here submitted, and the opinion of the court delivered by

CAMERON, J.—It is essential to the due administration of justice, that the parties to a suit should have a proper degree of confidence in the integrity and impartiality of the jurors who are to pass on their rights.

We entertain no doubt but that the merits of this application come clearly within the just interpretation of the acts of assembly, authorising the courts to remove causes from one county to another for trial.

No neglect or delay in making the application, can be fairly imputed to the defendant; for although the suit has been depending for several terms, yet till he became interested in it, he had no authority to interfere in it: and the application for a removal is made at the same term at which he is made a party to the suit.

The defendant's wife living at a distance, and being ignorant of the existing impediments to a fair trial, ought not to be precluded (supposing her still unmarried) from applying for a removal of the cause.

Let the cause be sent back with directions that it be removed to some adjoining county for trial.

Dowd v. *Montgomery et alias.*

This was a bill in equity calling upon the defendants to execute the trusts of a deed of gift for a female slave and her increase, in favor of the children of John Carraway, jun. from whom the complainant purchased. The defendants are purchasers from John Carraway, jun. and demurred to the bill for want of equity. The question depended solely upon the construction of the following deed: "I also give my said son John, one negro girl called Rachel, to have and to hold to the said John Carraway, jun. and his heirs, for him and his wife to have the use of the said negro girl their natural lives; and at their death for said negro and increase, if any, to be equally divided amongst their children, only for me and my wife to have the use of her during our lives, and for him, the said John Carraway, jun. to use the said negro as his own property, not to sell her, but for his heirs to use and sell, at their own free will and pleasure, without any hindrance, let, or molestation from me, my heirs, or any persons whatsoever."

The case was argued elaborately and with consummate ability, by *J. Williams*, for the complainant, and *Browne*, in support of the demurrer. The authorities cited by the former were designed to prove that a trust for the benefit of the children of John Carraway, jun. was created by the deed. The position maintained on the other side was, that the deed was nothing more than a common law transfer.

SEAWELL, J. delivered the judgment of the court.

The question which presents itself on this demurrer, is, whether the limitation in the deed to the *children* of John Carraway the younger, can be sustained? And this leads us to enquire, what were the nature of the estates John the younger and his children severally were to take under the limitations in this deed?

As to the estate given to John, it has been properly admitted, throughout the argument, to have been purely legal; whilst it has been insisted on, that on his death this same estate became vested in his *heirs*, who were bound to *make* division amongst the *children:* and that nothing is limited to the children but an *use*—and the order in which "heirs" and "children" stand in the deed, has been relied on as evidence of this intention.

If it were not for a succeeding part of the deed, there might be force in the argument; but that part, by way of specifying the interests which the several parties were to derive, explicitly states, "*that the said John Carraway, jun. is to use the said slave as his own property, not to sell her, but for his heirs to use, sell, &c. without any hindrance, &c. from my heirs, or any persons whatsoever.*" It is then evident, that the maker of the deed, intended by "heirs," *children;* and as he must be understood so, in this part of the deed, it furnishes at least an answer to the argument insisted on.

The last limitation is then precisely of the same nature with the first. The *property* itself is wholly given to the children, under the appellation of "heirs," who are to dispose of it as they please, without any accountability; which can only be done by a *legal* owner. The deed then, contemplates the passing two legal estates, one to succeed the other; and is nothing less than the gift of chattels to John Carraway, jun. for life,—remainder to his children. This the *law* has forbidden, the last limitation being contrary to law.

The demurrer must be sustained and the bill dismissed with costs.

McFarland v. *Shaw.*

This was an action on the case for debauching the plaintiff's daughter, and for the trouble, expences and loss of service, incident thereupon.

To prove that the defendant did debauch and get the plaintiff's daughter with child, the plaintiff's counsel first offered the examination of the daughter, Catharine McFarland, deceased, which was taken before two magistrates, wherein she charged the defendant with having been the father of a child with which she was then pregnant, in order to charge the defendant with the maintenance of said child, according to the act of assembly. Objections were made to this testimony; and the presiding Judge decided it to be inadmissible. The plaintiff then offered to prove the declarations of the daughter, in her last illness and made in view and expectation of death. To this evidence, also, the defendant objected; but the objection was overruled.

The plaintiff then proved that the daughter was sick in childbed for about ten days, at his house, which was her usual place of residence—that three medical gentlemen were called to her, two of whom attended her together, and the other some time afterwards—that several times during that illness, she declared that the defendant was the father of the child with which she was then pregnant; and that after all hope of life was gone, she desired that defendant might be sent for, and upon being informed that he would not see her, exclaimed, "I am going—he will soon go too—where he will be obliged to see me and will not dare to deny the truth." Upon this evidence, the jury found for the plaintiff.

1. If the said examination of the daughter was admissible in evidence, then the verdict to stand:

2. If neither the examination, nor the declarations of the

daughter which were received, should be deemed admissible, then the verdict to be set aside and a new trial granted.

Strong, for the plaintiff.—The examination of the woman ought to have been admitted as evidence against the defendant. The act of assembly is positive, that it shall be conclusive evidence to charge him as the father; and that is the fact now in contest between these parties. The examination and the consequent judgment formed a judicial act, done by persons having a competent authority, in a case too where the defendant was a party. But if this point should be ruled against us, we contend

2. That the dying declarations of the daughter were properly received. It is unnecessary to cite authorities to prove the uniformity with which such evidence is received in criminal cases. The same motive which led to it's propriety there, is equally forcible here, necessity; because the fact can alone be proved by the daughter. There is, however, an authority for its admission in civil cases, in 3 *Burr.* 1253, where the dying declarations of *Medlicott* were received to prove his having forged a will.

McMillan, for the defendant.—The only case which gives any countenance to the competency of the examination, is that of *Rex* v. *Eriswell*, 3 *Term* 307; but the opinion of two Judges in that case was overruled, in 2 *East* 54. It is entitled to no higher respect than hearsay evidence, which is received only in certain excepted cases, probably as old as the rule itself. The correct principle is, that, except in cases of felony, and that by statute, informations or examinations of witnesses, taken before magistrates, in the absence of the party charged, cannot be admitted as evidence, either at common law, or by statute. 1 *McNally* 313.

It is not established as an exception to the rule of evidence in civil cases, that the dying declarations of a witness are admissible. In the case cited from *Burrows*, the declara-

tions of *Medlicott* were received only to invalidate the effect of his signature to the will.

Strong, in reply.—The point decided in *Burrows* is, that a subscribing witness to a will, acknowledged upon his death-bed, to the person giving the evidence, that he, the subscribing witness, did himself forge it; and this was held proper testimony. It is then a substantive ground of evidence.

TAYLOR, C. J.—This action is brought by the father, for an injury done to him, by the loss of his daughter's service, in consequence of her seduction by the defendant, and incidental illness. The examination of the daughter before the magistrates, is made evidence against the putative father, solely for the purpose of charging him with the maintenance of the child; and so far it is conclusive evidence, because he can adduce no evidence to repel it's force, or exonerate himself from the burthen. To that single object the act of 1741, expressly confines it, and the court cannot give it a greater extent, without subverting every principle of just construction, established in relation to statute, altering the common law, as well as violating the spirit and policy of the general law of evidence; for the act neither requires the putative father to be summoned, nor furnishes him with the means of having the benefit of a cross-examination. It is a question between the county and the father, who shall bear the charge of the child, and in receiving the examination for that purpose, the letter and spirit of the law are obeyed: but if it be received for any other purpose, we must wander from both, and in so doing, offer violence to the common law and inflict a wound upon private rights. Shall such examination be conclusive evidence against the father, in an action constituted as this is, between him and the injured parent, when, if the daughter had negatived his being the father, it could not have been received in his favor? The very statement of the proposition furnishes the answer. In both cases it is *res inter alios acta*, and cannot, on either side, be admitted for the purposes of this action.

2. The declaration made by the daughter, during her last illness, and under the apprehension of approaching death, was accompanied with an impressive solemnity,—a forcible appeal to every honest mind—a pathetic claim to confidence from the best feelings of the heart, as well as the most austere duties of the judgment, that seem to entitle it to as much consideration as any such evidence has hitherto received.

In cases where life is at stake, such evidence is uniformly received and credited, and numerous are the victims to its authority, recorded in the mournful annals of human depravity. Can the practice of receiving it to destroy life, and rejecting it where a compensation is sought for a civil injury, derive any sanction from reason, justice, or analogy? And though no direct precedent may exist to guide the court, yet it must be recollected that the law consists of principles, which precedents only tend to illustrate and confirm. In *Woodcock's* case the dying declarations were received, although the party wounded had not expressed any apprehensions of dying; because he had received a mortal wound, and his situation was such as would naturally preclude all temptation to falsehood. The case before us is stronger, for the woman believed she was dying and so expressed herself. It is also a circumstance in this case, upon which we chiefly ground ourselves, that the fact disclosed in her declaration could only be proved by herself; she was the injured party through whom the cause of action has arisen to the father. We give no opinion how far the dying declarations of an indifferent person, not receiving an injury, and not a party to the transaction, would be evidence in a civil case. Our decision is confined to the state of facts presented in this case; and in that we think the verdict has been properly found and ought not to be disturbed.

Haywood v. *Coman & the Administrators of H. Hunter dec.*

This was a petition on the equity side of the court, to set aside an interlocutory order, made at April term, 1813, whereby the administrators of *H. Hunter* were allowed to file their answer to the complainant's bill of complaint. The bill was served on the intestate, who neglected to answer, and the cause was set for hearing in his lifetime, at April term, 1810, after which he died, and his administrators were made parties at April term, 1811, before which time the complainant had completed his depositions, with notice to the other defendant, *Coman*, but without any to *Hunter*. At the term when the administrators were made parties, they offered to file their answer, but were not allowed to do so by the court. At the before mentioned term of April, 1813, the motion to file their answers was again renewed, and allowed by the court; and this is the order complained of. The defendants, in their answers, state, that the intestate, for a considerable time previous to his death, was reduced by intemperance to such a state of mental and corporeal debility, as unfitted him for business.

By the Court.—The facts disclosed in the answer of the administrators of Hunter, were sufficient to warrant the court below in setting aside the order (entered according to the usual practice) for taking judgment *pro confesso* against him; and receiving their answer. The complainant's petition, praying a reversal of that order, and that the answer of the administrators be suppressed, is disallowed and dismissed.

Justice to the complainant, however, requires, that he should have the benefit of the testimony taken without notice to Hunter, while the judgment *pro confesso* was in force against him—as during that period, the complainant was

under no legal obligation to give notice to him of the time and place of taking his depositions.

Let the cause be remanded with the following order and directions to the court below, viz. ..that the answer of the defendants, administrators of Henry Hunter, stand according to the order made for receiving it—that the complainant have the benefit of the testimony taken without notice to Hunter, in his lifetime, saving all just exceptions thereto.

Tinnen v. *Allison.*

This was an action of covenant founded upon articles of a race, entered into between the plaintiff and defendant, in the following words, to wit:

"Articles of a race, made this the 3d day of October, 1809, between Robert Tinnen, of the one part, and Joseph Allison, of the other, witnesseth, the said Tinnen runs his stud horse, known by the name of Solon, against Joseph Allison's stud horse Grey Medley, *alias*, Palafox, for the sum of two hundred dollars, carrying one hundred and sixty on each horse; the said race to be run on the paths known by the name of Bason's paths, on the 21st day of November next, as witness, our hands and seals, this day and year above written."

Upon the trial, the counsel for the defendant insisted that the plaintiff was bound to shew that the money was staked, and the court being of that opinion, the plaintiff suffered a nonsuit.

SEAWELL, J. delivered the opinion of the Court.

The plaintiff has brought an action to recover from defendant for an alleged breach of contract on his part, and it is

necessary the plaintiff should show that *he* has been guilty of no default. The articles on which the suit is brought, stipulate that a race is to be run at a particular day and place, between two horses, for two hundred *dollars*—they, therefore, do not contemplate that either is to trust the other; for no day being named for payment, *that* day is to be understood; and the winner, according to the import of the articles, would be immediately entitled to receive the money, which he could not obtain unless the loser had it to pay---and he who sues for a violation must show he was *ready* and *prepared* to do every thing requisite on his part.

Wherefore, we are of opinion the rule for a new trial should be discharged.

CAMERON, being of counsel for plaintiff, gave no opinion.

Ward v. *Administrators of Green.* } Action of debt upon a judgment—Plea—Payment.

On the trial of this cause, the following facts appeared in evidence: At January term of Onslow county court, in the year 1783, Richard Ward obtained a judgment against Samuel Green for the sum of £500. The action in the county court was commenced on the following instrument, viz.

"I promise to pay Richard Ward, or order, the just and full quantity of seven hundred and twenty-five bushels of good merchantable boiled salt, to be delivered as follows, viz. 125 bushels on the 15th of September next, 125 on 15th October, 125 on 15th November, 125 on 15th December, 125 on 15th February, 100 on 15th of May next. In case of default of payment of the aforesaid salt, I do hereby promise to pay, or cause to be paid, said Richard Ward, twenty shillings in gold or silver for every single bushel of salt, as will amount to £725 in gold or silver, for value received.

In case of default of payment of said money and salt, I do hereby empower Jas. Spiller, attorney at law, or any other practising attorney in this State, or elsewhere, to appear for me, at any subsequent court of law and confess judgment for said sum of money....All errors and misprision of errors excepted.

[*Signed*], SAMUEL GREEN."

August 8th, 1782.

Witness, &c.

KNOW all men by these presents, that I the within named Samuel Green doth acknowledge myself fully indebted for the within mentioned different payments, to be punctually made at the time within mentioned, all and all the clauses and agreements of the within mentioned obligation; and in default of payment, I do hereby empower the within mentioned Jas. Spiller, esq. or any other practising attorney, in any court of record in this State, in default of payment as within mentioned, to enter up judgment or judgments upon the bond or obligation; and I do hereby release my said attorney from all error that may happen in entering said judgment.

Given under my hand and seal, this 10th August, 1782.

[*Signed*] SAMUEL GREEN (Seal.)

Witness, &c.

On the back of said instrument are the following indorsements, viz. August 29th—then received first payment, which was 125 bushels of salt, in part of the within salt obligation. August 29th,—then received of Samuel Green 100 bushels of salt, in part of the within obligation, on the last payment. I say, received by Richard Jarratt.

Under the authority given in the instrument, judgment was entered up, without any writ having been served on the defendant, Samuel Green; on the trial docket of Onslow

county court, January term, 1733. The following entry was made in the suit---" R. Ward v. S. Green, viz. judgment confessed by warrant of attorney for 725 bushels of salt, with credit for 225 bushels, at 20s. per bushel £500." Execution issued against Samuel Green, returnable to October term of Onslow county court 1785, and was levied on defendant's land. The judgment afterwards became dormant and *scire facias* issued to revive it, returnable to October term, 1787, and was afterwards dismissed. In September, 1800, this action was commenced in the county court of New Hanover, and in 1808, at February term, the cause was tried, and the jury found the bond paid, from which the plaintiff appealed.

On the trial of the cause at this term, in pursuance of an agreement of former counsel, it was submitted to the jury whether the bond had been paid previous to the judgment in the county court of Onslow? It was in evidence, that at the date of the judgment Samuel Green was considered insolvent, and that he continued so to be considered until his death.

His heirs inherit land from him and have it now in possession. When execution issued against defendant and was levied on his land, he never complained of the injustice of the judgment---That he was a man careless of his business. A witness who was present at the last payment endorsed upon the bond, stated the bond was not present, but it was agreed, in consideration of a horse, that the sum should be credited on the bond. The jury found a verdict for the defendant.

Motion for a new trial upon the following grounds, viz.

1*st*. That the verdict is against the law and evidence of the case.

2*nd*. On the ground of surprise--the present counsel being ignorant of the agreement made by the former counsel, to

ry the cause on the merits of the bond; and, therefore, relying on the record of the judgment, were unprepared to shew that proceedings to revive the former judgment had been continued from 1787 to 1799, which fact they would have shewn had they been aware of the grounds on which the cause was tried—which was not admitted.

SEAWELL, J. delivered the opinion of the court.

A presumption in law does arise from the payment of the last instalment upon a bond, that those preceding have also been paid: but such payment must be in the manner and at the time contemplated by the parties; for whenever any course is pursued, different from the terms of the contract, it, of itself, affords a presumption that the parties are then acting under some new agreement, and not in discharge of the first contract: in such a case, therefore, the *law* would not presume any thing. A legal presumption only arises from the *regular* fulfilment of the contract, where the parties are seen acting according to the *time* and in the *order* and *manner* agreed upon for the performance of the *last* engagement, and the performance of the preceding part is implied, from the unexplained regular performance of the latter.

In this case, the last payment is endorsed on the bond, but is expressly restricted to be in *part payment*. The judgment was obtained in January, 1783, months before the last instalment was due; yet the last payment is there credited in the judgment---it must, therefore, have been an anticipated payment.

The plaintiff then issues execution and levies it on defendant's lands, who never complained of any injustice, and it appears from the testimony of the witness present when the last payment was made, that it was in a horse and was agreed to be *credited* on the bond.

If the contract had then been fully complied with, it is difficult to account why, instead of agreeing to credit the

bond, the bond itself was not agreed to be cancelled or delivered up, or why a receipt in full, or why, in short, the parties did not declare the bond paid. We cannot, therefore, perceive the least ground for presuming the bond paid, but should presume, from the whole circumstances, diametrically the reverse.

Wherefore, we are all of opinion the rule for a new trial should be made absolute.

Teare v. *White's administrators.*

This was a *sci. fa. vs.* the defendants, suggesting assets, who, at the return, pleaded *nul. tiel* record and no assets; and at a subsequent term the defendants pleaded the following plea, viz.

"And now at this day, that is to say, on the 26th of October, until which day the plea aforesaid was continued, comes the said Peterson Brown, by William H. Murfree his attorney, and the said Robert Teare, by his attorney William Slade, Esq. and the said Peterson Brown saith, that the said Robert Teare ought not to have or maintain his aforesaid action thereof against him, because he saith that after the last continuance of this cause, to wit, on the 20th day of April, from which day this cause was last continued, and before this day, to wit, on the 18th day of June, 1812, he, the said Robert Teare, became an alien enemy, by virtue of an act of Congress, passed on the said 18th day of June, entitled "An act declaring war between the United Kingdom of Great-Britain and Ireland and the dependencies thereof, and the United States of America and their territories," because the said Robert Teare is an alien, born at London, in the United Kingdom of Great-Britain and Ireland, in parts

beyond the seas, under the legiance of his Majesty George III. an enemy of the United States of America and of the State of North-Carolina, and to the enemies of the same now adhering; and this the said Peterson Brown is ready to verify: Wherefore he prays judgment if the said Robert Teare ought further to have or maintain his aforesaid action against him the said Peterson Brown, &c."

To which the plaintiff replied,—and at the succeeding term the jury found against the plea, (no other plea being submitted to them). The defendant, to support the plea, gave evidence that the plaintiff was born in England, and came to Virginia subsequent to the peace of 1783. To prove naturalization, the plaintiff gave in evidence the following certificate, viz.

"At a court held for Nansemond county, July 10th, 1786, Robert Teare, lately from the Kingdom of Great-Britain, came into court and took the oath of a citizen and resident of this State, which is ordered to be certified."

STATE OF VIRGINIA,
Nansemond County, to wit:

I John C. Littlepage, clerk of the court for the county aforesaid, do hereby certify that the foregoing is a true copy from the records of my office. In testimony whereof, I have hereunto set my hand and caused the seal of my office to be affixed, this 9th day of November, 1812, and in the 37th year of the Commonwealth.

[*Signed*] JOHN C. LITTLEPAGE, Clk.

(Seal.)

Nansemond County, to wit:

I Josiah Riddick, presiding magistrate for the county aforesaid, do hereby certify that John C. Littlepage, whose hand is affixed to the foregoing certificate, is clerk of the

court for the county aforesaid, and that due faith and credit ought to be paid to all his acts as such, and that his attestation to the foregoing certificate is in due form of law.

[*Signed*] JOSIAH RIDDICK

Certified this 9th day of Nov. 1812.

It is submitted to the Supreme Court, to determine, whether, from the certificate aforesaid, by the laws of Virginia, (which by consent are admitted to be referred to in the printed Statute Book) the plaintiff became naturalized. It is further submitted to the Supreme Court to determine, whether the foregoing plea be in abatement or in bar,—and if in abatement, whether it was a relinquishment of the former pleas: And for the Supreme Court to determine what course this court is to pursue.

The case was submitted without argument.

TAYLOR, C. J. This is a plea of alien enemy, which, from it's conclusion, might be called a plea in bar, as it asks the judgment of the court, whether the plaintiff ought further to have or maintain his action. An issue being joined on the replication to the plea, the jury found it untrue in point of fact. It is now to be decided whether the plea amounted to a waiver of the other defences previously entered: and whether the evidence to disprove the allegation in the plea was properly received.

As to the first question, it is believed to be an established principle that no matter of defence arising after action brought can properly be pleaded in bar of the action generally, but it ought to be pleaded in bar of the further maintenance of the suit; for by thus pleading a collateral thing which happens after the action brought, it is admitted that the action was well brought, but by reason of the new matter, the plaintiff ought not further to proceed in it. So that although the plea in this case begins and concludes as a bar,

yet the words "ought further to have or maintain," shew it to be a plea *puis darrein continuance*. Pleas of this description may be either in bar or abatement, according to the fact relied upon, *Sys. of Plea* 365; and as the act of 1796 does not distinguish between them, but expressly directs that a plea *puis darrein continuance* shall not amount to a relinquishment of former pleas, we cannot say that such effect is produced in the present case.

2. As to the proof of naturalization, we think it the best that could have been introduced. The plaintiff was made a citizen in a court of competent jurisdiction, before the adoption of the constitution, when each State had power to confer such a privilege according to its own conceptions of policy. The subsequent adoption of the constitution of the United States admitted all the citizens of the respective states to an equal participation of its benefits. This cause must therefore be remanded to be tried upon the pleas originally entered.

Clayton & wife v. *Markham.*

This is an action of ejectment to recover a tract of land to which the plaintiffs claim title in the following words, viz. "Anthony Markham, who was seised and possessed in fee of the premises in dispute, by deed with warranty, conveyed to John Pointer, in 1757—John Pointer died about the year 1783, and the plaintiff is his heir at law. John Pointer, in his lifetime, conveyed the premises in question to Stephenson, Stephenson conveyed to Morris, Morris conveyed to Cyprian Shepherd in 1800. In 1802, the defendant, claiming title to the land, sued Shepherd for a trespass on it, and recovered a verdict. After this recovery, Shepherd, on application to the representatives of Stephenson, who had warranted, received the value or consideration money. Stephenson's

representatives received from the representatives of John Pointer, who had also warranted, the greater part of the value or consideration money—This consideration money or value, in each of these cases, was paid voluntarily and without suit.

"The plaintiff Elizabeth, about seven years ago, being then under age, intermarried with the plaintiff John Clayton. There has been no re-conveyance of the premises in dispute from Shepherd, Morris or Stephenson."

The question submitted to the Supreme Court is, whether the plaintiffs have shewn a sufficient title in themselves to recover in the present action? If they shall be of opinion for the plaintiffs, then judgment to be entered for them.—if otherwise, then judgment to be entered for the defendant.

The cause was submitted without argument.

SEAWELL, J. delivered the judgment of the court.

The plaintiffs in this case claim title, as heirs of Pointer; and it appears from the case, that Pointer conveyed in his lifetime to Stephenson. If, therefore, Pointer ever had any interest, having conveyed it, nothing was left to descend to his heirs.

The repayment of the purchase money can have no influence on the case: it can in no respect operate as a re-conveyance of the legal estate of lands. Wherefore, we are all of opinion there should be judgment for the defendant.

Gregory v. *Hooker's administrator.*

This is an action on the case, on an open and unliquidated account. The writ issued 28th of May, 1810. At August term following, the defendant, by his attorney, entered the following pleas: "Gen. issue, set off, stat. lim. fully admi-

sistered, no assets, judgments and bonds, &c. no assets ultra, property sold under act of assembly, money not yet due." The plaintiff in order to shew assets in the hands of defendant, introduced an account of sales returned by the administrator into the county court, which sales were made on the 1st day of May, 1810, under an order of the county court, to the amount of £ 182

Money received by administrator in possession of deceased 22 16

She also proved that, after plea pleaded, the administrator sold property of the deceased, on the 1st of September following, to the amount of 377 6

That the deceased being a Physician and in partnership with Dr. Haywood of Tarborough, was, at the time of his death, entitled to one-third part of the bonds, notes and accounts of said firm. That Dr. Haywood was survivin partner, who placed these notes and accounts in the hands of Trustees for collection, and that the defendant agreed to receive one-third of these notes and accounts in discharge of his claim as administrator against said Haywood, in the month of February preceding the issuing of this writ; and by him received on the 31st of May, 1810, but received no part of the money arising from said collection, until November thereafter, to the amount of 375

£ 966 16

And the witness thought these notes and accounts good, except as to fifty dollars. It further appeared that the money arising from the first sale, was not received by administrator until after plea pleaded, as well as the amount of the money arising from the notes and accounts aforesaid.

The defendant, to shew his disbursements or application of assets, proved that three several writs sued out in June, 1810, on bonds due from the intestate, were prosecuted to judgments, subject to such assets as should come to his hands after the date of said judgments, to the amount of £ 531 15

That the intestate was, by a division made by commissioners of his father's estate, indebted to the amount of which, from a receipt, he paid in March preceding the plaintiff's action.	71	17
Two judgments, before a justice of the peace, on notes of hand	38	14 6
Judgment on a signed account	12	
Account for funeral expences	5	
Fees paid clerk for taking out administration	1	
Allowance for commissioners	41	12 6
Retainer for his own account for making a shirt		12 6
Sawyer's bond paid	71	17 7
	£ 774	9 1

On the above statement of facts, it is submitted to the Supreme Court to decide, whether the above sum of £ 182, arising from the first sale, was or was not assets subject to the plaintiff's demand, the money arising from said sale not having been received until November after the plea pleaded?

Whether the agreement of the defendant to receive a third part of the notes, bonds and accounts of the firm of Haywood and Hooker, in discharge of his claim against said firm, in February preceding the plaintiff's writ, although no part of the money arising therefrom was received until November thereafter, was or was not assets subject to the plaintiff's demand?

If the £182 should not be considered assets liable to the plaintiff's demand, ought they not to be considered as the assets out of which the debt of £71 17*s.* and the remainder of the vouchers claimed by defendant ought to be paid, and thereby leave the balance of the assets liable to the demand of the plaintiff?

The jury found a verdict for the plaintiff for the sum of £81 8*s.* 5*d.* that the defendant had assets, under the charge and direction of the presiding Judge. Motion for new trial.

Baker, for the plaintiff. The verdict has been properly found, because the plaintiff obtained the first lien upon the produce of the sales, which ought to be applied to the payment of this debt. The act 1794, *Cap.* 14, makes it the duty of the administrator to recover and receive the money on such sales, when the time of payment is past, or otherwise he is chargeable for it; and the monies when received shall be liable to the satisfaction of judgments previously obtained.

The money received from the partnership debts is also liable to the plaintiff's demand; because the agreement to receive it in discharge of the surviving partner, was made in February preceding the issuing of this writ. It is very clearly laid down, that executors may make monies assets in their hands, without having received them, by making releases, or acquittances, or acknowledgments of satisfaction. This amounts to a receipt and charges the executor 1 *Wentw.* 70. 2 *Wentw.* 147. *Comyns. Dig. Tit. Adm.*

Browne, for the defendant. The money arising from the sale was not received until after the plea pleaded, and cannot, therefore, upon these pleadings, be made chargeable as assets in the defendant's hands. 1 *Saunders* 336. 2 *Saunders* 216. The general doctrine is not denied, that an administrator may charge himself, without having received the money; but that is where he has a legal right to receive it. The remedy upon these partnership debts survived to *Haywood*,

from whom the defendant might claim his intestate's proportion of the balance. The defendant acquired only an equitable right to receive the money by the transfer from *Haywood* The subject then should be considered in the manner that it would be in a court of equity, where it is held, that an executor shall not be held charged with the money by altering the security. 1 *Cases in Chanc.* 74.

TAYLOR, C. J. delivered the judgment of the court.

The sale was made by the administrator before the commencement of the action, but the proceeds of it were not received by him until after plea pleaded; and the question is, whether such proceeds are liable, as assets, to the plaintiff's demand? If the plea of *plene administravit* were drawn out at length, it would state "that he has no goods or chattels which were of the said intestate at the time of his death, in his hands to be administered, nor had at the time of suing out the writ of the plaintiff, nor ever since."—When issue is taken on this plea, one question presented is, whether the defendant had assets at the time of pleading? To establish which the plaintiff may go into proof of assets received by the defendant after the issuing of the writ, and between that period and the time of entering the plea. But no proof can be given of assets received after the latter period, because they cannot be received in this action. If the plaintiff cannot prove that the defendant had assets at the time of the commencement of the suit, or that assets have come to his hands since then, and before the plea, he may pray a judgment *quando acciderint;* and in a *scire facias* on such judgment, the plaintiff may recover such assets coming to the defendant's hands after the plea, as are not already bound by outstanding judgments. This principle applies to every question which the court are called upon to decide in this case; for none of the several sums claimed were received until after the plea. The bare agreement to receive the bonds and notes from the surviving partner cannot charge

the administrator, for he had no right to sue for them, and the probable effect of such agreement was not to waste or diminish the fund out of which the creditors were to receive payment, but to call it sooner into activity. There must be a new trial.

The Executors of Ragland, dec. v. *Parish Cross.*

This is an action of debt brought upon the bond, which accompanies this case. This bond was given for the hire of a negro. A few months after the hiring, the negro being in the possession of the defendant, and in the ordinary discharge of his duty to the defendant, cut his knee pan with a drawing knife. An inflammation took place and his situation was considered dangerous both by the defendant and the plaintiff's testator, Frederick Ragland; whereupon Frederick Ragland took the negro to his own house. There is no evidence of any express consent given by the defendant for the removal of the negro to Ragland's house. The knee mortified and the negro died. The defendant insists that he ought not to be compelled to pay any more of the bond than shall be proportional to the time of service of the negro, and should be relieved from the payment of the residue of the bond, by reason of the death of the negro.

It is submitted to the Supreme Court to decide, whether, upon these circumstances, the defendant is entitled to the relief he insists for, upon any principle of law or equity—and it is agreed that the court shall decide this case in the same way as if the defendant had applied to a court of equity for relief.

The case was submitted without argument.

TAYLOR, C. J. As this case was commenced in a court of law, and has not been removed to another jurisdiction,

we must take the principles of law for our guide. On such alone we profess to decide it, as it would be novel and irregular to apply equitable considerations to a case not properly constituted in the proper forum. There is no principle or authority which warrants the apportionment of the sum secured by the bond in this case. The distinction is well settled between those covenants implied by law and the obligation created by the act of the party. In the first case, if the party, without default in him, is disabled from performing it, and has no remedy, the law will excuse him. A tenant is liable to waste, but if the house be destroyed by enemies or tempest, he is excused. But if he covenant to repair the house, he is bound by his contract although it should be destroyed by lightning or by enemies, because he might by his contract have stipulated against such liability. In *Dyer* 33, a lessor covenanted under a penalty to sustain and repair the banks of a river, which were afterwards destroyed by a sudden inundation. It was held that although he was excused from the penalty, he was bound to repair in convenient time. In *Allen* 20 it was decided that a lessor was liable by his covenant to pay the rent, although he had been driven from the premises by public enemies. These ancient authorities, to which others might be added, have been affirmed by an uniform current of modern decisions. In 2 *Str.* 763, the tenant was held liable on a covenant to pay the rent, though he had no enjoyment of premises by the default of the lessor, who had covenanted to repair, which he failed to do after the house was destroyed by fire. In 1 *Term Rep.* 710, Mr. Justice Buller says, "a lessee is obliged to pay rent, even though the premises should be burned down." There is no principle of the law better established than that an apportionment of the debt cannot be made in a case of this kind. There must be judgment for the plaintiff.

GENERAL RULES.

The Judges of the Supreme Court, with a view to improve the administration of justice by expediting the trial of causes and precluding a laxity of practice tending to impair the security and rights of the citizens, have availed themselves of the power confided by the act of assembly, and established the following

RULES OF PRACTICE:

I. It is ordered by the court that all causes now set for hearing on the equity dockets, shall be prepared for trial by the ensuing fall term; after which period, no further time to complete testimony shall be allowed to either party, without special order. And no cause in equity shall hereafter be set for hearing until the testimony shall be completed.

II. That in all suits at law brought on for trial at the ensuing fall term, or thereafter, declarations shall be filed before the trial; and no suit shall be tried after that period, unless this rule be complied with.

III. That in all causes, civil and criminal, where no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

IV. Where several counsel are employed on the same side, the examination or cross-examination of each witness shall be conducted by one counsel; but the counsel may change with each successive witness.

V. When a party in any civil suit moves for a continuance on account of absent testimony, such party shall state,

in a written affidavit, the nature of such testimony, and what he expects to prove by it.

VI. No person who is bail in any suit, either civil or criminal, or who is security for the prosecution of any suit, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several superior courts, to state on the docket for the court, the names of the bail and security for the prosecution in each case.

VII. No entry shall be made on the records of the superior courts (the appearance docket excepted) by any other person than the clerk, or his regular deputy.

VIII. In all cases of general replication, no special matter shall be heard.

IX. From and after the next term of the Supreme Court, no applicant for license to practice law in the courts of this State, shall be examined, except during the terms of the Supreme Courts. Licence to practice in the county courts only shall be granted in the first instance. Nor shall any person be admitted to practice in the superior courts, until one year after having obtained licence to practice in the county courts.

AN ABRIDGMENT

OF THE

ACTS OF THE GENERAL ASSEMBLY

PASSED IN 1814.

An act for the more perfect organization of the Militia of this State.

§ 1. Where a militia man has performed a tour of service, either as a volunteer or drafted militia man, he shall not be liable to a second draft until the whole of the militia within his beat or company district, have performed a like tour.

§ 2. Ashe regiment to be subject to a draft as infantry.

§ 3. On requisitions of the United States for detachments of the militia, Captains of Infantry shall enter upon their roll all able bodied freemen between the age of 18 and 45 (except such as are exempted by § 2 of the act of Congress of 1792 and except the Judges and Ministers of the Gospel regularly ordained) within his beat or company district, who are to be subject to draft. Persons heretofore exempted not to be subject to ordinary military duty.

§ 4. Each brigade to have a Brigade-Inspector with the rank of Major, one hospital surgeon and two mates, and one assistant deputy quartermaster-general, with the rank of captain, to be appointed by the Brigadier-General and commissioned by the Governor.

§ 5. So much of the § 11 of the act of 1813 as requires Major-Generals and Brigadier-Generals to muster the field and company officers and also § 8 of said act is repealed.

§ 6. The § 1 of the act of 1812, to amend the Militia laws is repealed. The captains and other returning officers, to

designate, by proper columns, free persons of colour from the rest of the militia.

§ 7. All that part of § 14 of the act of last session to amend the Militia Laws, as respects non-commissioned officers and privates, is repealed.

An act to extend the time for perfecting titles to land.

All bona fide purchasers of land who have paid their purchase money to the Public Treasurer since January 1, 1796, shall have until Dec. 15, 1816, to make and return surveys to the Secretary's office. No grant to be obtained under any survey under this act shall affect the title of lands heretofore granted; nor shall this act affect any entries made prior to 1800.

An act to provide means to furnish supplies to the Militia which may be called into the service of the State during the year 1815.

In the event of the Militia being called into the service of the State at any time during the year 1815, it shall be the duty of the Public Treasurer, under the direction of the Governor, to borrow of one or more of the Banks in this State, such sums of money as in the opinion of his Excellency the exigency may require, for the purchase of supplies for the Militia thus called into service, provided the whole sum do not exceed $ 50,000, and be borrowed at an interest not exceeding six per cent. reimbursable at such times and in such proportions as shall be agreed on between the Public Treasurer and the said Bank or Banks.

An act to provide for the purchase of Arms, Artillery, Tents and Camp Equipage for the use of the State, and for other purposes.

Two thousand stand of arms, with the necessary accoutrements, twelve pieces of artillery, tents and camp equipage for two regiments consisting of 1000 rank and file each, to be purchased, under the direction of the Governor, for the use of the State. The artillery to be mounted as the Governor shall direct.

§ 2. The arms and munitions of war thus purchased to be under the care and direction of the Governor, to be distributed by him, until the Legislature may further order, who is to discharge the expence of storage, &c. by warrants upon the Treasury.

§ 3. The arms now belonging to the State to be distributed and preserved in the same way.

§ 4. Said arms, &c. to be kept exclusively for the use of the State, except in cases where the detached militia shall be called into service, when the Governor may loan them the tents and camp equipage to their place of rendezvous; but they are not to be taken out of the State.

§ 5. Notice to be given for three months in the Raleigh papers, that proposals will be received by the Treasurer of this State for the supply of said arms, &c.

§ 6. To defray the expence of purchasing said arms, &c. the sum of $55,000 is appropriated, and the Treasurer is authorised and directed to borrow the same from the Banks in this State, provided the money can be got at an interest not exceeding six per cent. and upon a credit of five years, with liberty to discharge the debt at any earlier period.

§ 7. If peace should be concluded between the U. States and Great Britain before the monies hereby appropriated should be laid out, then all further purchases to cease.

An act concerning Divorce and Alimony.

Where a marriage has been or shall be contracted and celebrated, and it shall be adjudged that either party at the time of the contract was and still is naturally impotent, or that either party has separated him or herself from the other, and is living in adultery, it may be lawful for the injured person to obtain a divorce either from bed and board, or from the bonds of matrimony, at the discretion of the courts.

§ 2. Where any person has been or shall be injured in either of the ways abovementioned, the husband or the wife may exhibit his or her petition or libel to one of the Judges in term time, or in the vacation at least 30 days before the next term, setting forth therein the causes of complaint, with an affidavit that the facts are true, and that the complaint is not made out of levity, or by collusion between the said husband and wife, and for the mere purpose of being freed from each other. Bond to be given for the prosecution as in other cases; and thereupon a subpœna shall issue to the person so complained against commanding him or her to appear, &c. and upon due proof, at the return of said process, that a copy was served, &c. if he or she shall refuse or neglect to appear, then an alias subpœna shall issue, &c. but if he or she cannot be found, then proclamation shall be made at the court-house for the party to appear, &c. and notice given in two newspapers for three months, and in the mean time the court may make such preparatory rules and orders in the cause as may be necessary to prepare the same for trial, when the court may determine ex parte, if necessary. In all suits, the material facts charged in the libel shall be submitted to a jury, upon whose verdict, and not otherwise, the court shall decree.

§ 3. In any suit commenced for a divorce for adultery, if it shall be proved that the plaintiff has been guilty of the like crime, or has admitted the defendant into conjugal embraces,

after he or she knew of the criminal fact, or that the said plaintiff (if the husband) allowed of his wife's prostitution, or exposed her to lewd company whereby she became ensnared, it shall be a good defence and a perpetual bar against said suit.

§ 4. The Superior Court, after hearing any cause, shall and may determine the same as to law and justice shall appertain, by either dismissing the petition or libel, or sentencing and decreeing a divorce and separation from nuptial ties or bonds of matrimony, or that the marriage is null and void: and shall have power to decree alimony to the wife in the case of general divorce, upon the petition of the wife. But no judgment of final divorce from the bonds of matrimony shall be valid, until ratified by the General Assembly.—After a sentence shall be so ratified, all and every the duties, rights and claims of the parties in right of said marriage, shall cease and determine, and the complainant, or innocent person, shall be at liberty to marry again as if he or she had never been married. Nothing herein shall be construed to extend to render illegitimate any child born of the body of the wife during the coverture.

§ 5. If any person shall either abandon his family, or maliciously turn his wife out of doors, or by cruel and barbarous treatment endanger her life, or offer such indignities to her person as to render her condition intolerable or life burthensome, the Superior Court, on due proof made in manner aforesaid, shall and may grant a divorce, and also allow her such alimony as her husband's circumstances will admit, not exceeding one-third part of the annual income or profits of his estate, &c. which shall continue until a reconciliation shall take place between the parties. Nothing herein to be so construed as to affect the rights of any creditor of the husband.

§ 6. To guard the person thus injured against the heat of momentary passion, and to afford time and opportunity for

reflection and reconciliation, no petition shall be sustained, unless the petitioner shall swear that the ground of his or her complaint has existed at least six months prior to the filing of said petition, and no decree shall be made until at least 12 months after the filing of said petition.

§ 7. No person not a citizen of this State at the passing of this act, or who shall not have resided therein three years immediately preceding the exhibition of his or her petition, shall be entitled to sue under this act.

§ 8. Parties may take testimony by depositions as in suits in equity.

§ 9. A tax of 10*l.* shall be paid to the State by the party cast in every case under this act;

§ 10. Costs may be awarded to the party in whose behalf a decree shall pass, or that each party shall pay his or her own costs.

§ 11. The husband against whom alimony may be decreed shall give good security in open court; and in case of failure, stand committed until the order of the court is complied with; or the court may direct execution to issue as in cases at law for the money thus decreed. But no process to issue to carry the decree into execution until the same shall have been ratified by the General Assembly.

An act to continue in force certain acts concerning the Banks of Cape Fear and Newbern, and for other purposes concerning said Banks.

The act to establish a Bank in the town of Wilmington, and so much of an act to incorporate the Newbern Marine Insurance Company and to establish a Bank in said town, passed in 1804, as relates to the Bank of Newbern, and all other acts subsequently passed, relating to the management, direction and affairs of said Banks, are continued in force until the 1st of Jan. 1835, except as hereinafter provided for.

§ 2. The President and Directors of the Bank of Cape-Fear are authorised to add to the capital stock of said Bank 5250 shares, and the President and Directors of the Bank of Newbern are authorised to add to the capital stock of said Bank 5750 shares, of 100 dollars each.

§ 3. The President and Directors of the Banks of Cape-Fear and Newbern, within six months after notice given to the Governor of the acceptance of the amended charter by the stockholders, shall open books for receiving subscriptions to the said stock at Raleigh, Wilmington, Newbern, Fayetteville, Edenton, Halifax, Hillsborough, Washington, Warrenton, Salisbury, Tarborough, Morganton, Pittsboro', Salem, Rutherfordton, Plymouth, Murfreesborough and Greensborough and in Nash county, and keep the same open until the whole stock be subscribed. But all shares not subscribed for within 40 days, shall be sold by the President and Directors at such price as they may think proper, not exceeding an advance of $ 10 on each share. Purchasers of such shares to pay down at the time of subscribing, with the first instalment, the advance required.

§ 4. Ten dollars a share shall be paid at the time of subscribing, and the remaing $ 90, in payments of $ 10 every sixty days thereafter, until the whole is paid, the deferred payments bearing interest at the rate of six per cent. per annum, until paid; and it shall be at the option of each subscriber to fill up his share or shares by payment of the residue of the money due thereon, and each subscriber paying in advance shall have a discount of six per cent. per ann. When $ 50 on any share shall be paid, the holder shall be entitled to receive dividends on the whole share; and on failure to make payment punctually of any of the first five instalments, the subscriber shall forfeit to the company all the money previously paid; and such share shall be sold by the President and Directors for the benefit of the company; but there shall be no forfeiture after the payment of $ 50 on each share.

§ 5. The President and Directors of said Banks shall at all times be bound to make a loan or loans to the State, if required and authorised by law, of any sum or sums, not exceeding in the whole at any one time, one-tenth part of the actual stock of said Banks, at a rate of six per cent. per year, to be paid yearly, provided application be made by the Treasurer three months previously to such loan.

§ 6. That of the shares to be subscribed to the stock of said Banks, 1000 shares in each shall be reserved for this State, and subscribed by the Treasurer immediately upon the opening of the books; and as a consideration for this amended charter, the State shall be entitled to 180 shares of the said 1000 in each Bank without paying any thing therefor, shall be entitled to make payment for 410 shares in each of said Banks in Treasury notes to be issued as hereinafter directed; and shall make payment for the remaining 410 shares in each Bank, at any time or times she may think proper during the continuance of this act, and shall not be bound to pay to either of said Banks interest upon the shares not paid for; but the interest which may accrue thereon, shall be accounted for as hereinafter directed.

§ 7. The State shall receive full dividends upon the 180 shares in each Bank, and like dividends upon 410 shares in each Bank to be paid for in Treasury notes, after the second dividend to be declared by the said President and Directors after the first day of February next; and after the declaration of the said second dividend, the State shall receive whatever sum shall accrue upon the remaining 410 shares in each Bank over and above six per cent. per year.

§ 8. At all meetings of the Stockholders of the said Banks and at all elections for Directors, the Governor for the time being, or such other person or persons as he or the Ligislature may from time to time appoint, shall act in behalf of the State and shall have the same number of votes to which the greatest number of stockholders may be entitled possess-

ing an equal number of shares with those owned by the State at the time of such election; and the number of votes to which each stockholder shall be entitled, except the State, shall be according to the number of shares he shall hold, in the proportions following, that is to say: for one share and not more than two shares, one vote; for every four shares above ten and not exceeding thirty, one vote; for every six shares above thirty, and not exceeding sixty, one vote; for every eight shares above sixty and not exceeding one hundred, one vote; and for every ten shares above one hundred, one vote; but no person, copartnership or body politic, shall be entitled to a greater number than 30 votes. No share to confer a right of suffrage which has not been held three months previous to the day of election. Stockholders resident within the State, and none other, may vote at elections and at general meetings of the Stockholders, by proxy.—None but a stockholder being a citizen of the State, and holding at least ten shares, shall be eligible as a Director of the Principal Bank, nor shall a Director of any other Bank be eligible as a Director of either of the said Banks. Eleven principal Directors shall be elected at the annual meeting of the stockholders of each Bank, seven of such Directors of the Cape-Fear Bank to reside in Wilmington, and seven of the Newbern Bank, in Newbern. The Principal Directors of each Bank shall annually appoint the Directors of the several Branches and Agencies, and other officers required at the said Branches and Agencies. Not less than thirty stockholders, who shall be proprietors of 100 shares or upwards, shall have power at any time to demand a general meeting of the stockholders for purposes relative to the said corporations; and upon such demand, the President of the Bank shall call such meeting, giving four weeks notice in a Raleigh paper, and specifying the object of the meeting. Every Cashier to give bond with securities in a sum not less than $ 10,000. The total amount of debts which either of the said corporations shall at any time owe, shall not exceed

$ 2,400,000 over and above its deposits. In cases of excess, the Directors to be liable in their private capacities. The corporations to be also liable. Directors who may have been absent when the excess was contracted, or who may have dissented from the act, may exonerate themselves by giving notice of the fact before a Notary Public, and to the stockholders at a general meeting, which they have power to call. The Treasurer of the State to be furnished, from time to time, with statements of the situation of the Banks.

§ 9. From and after the 1st of January, 1816, the paper currency of the State issued in 1783 and 1785, shall cease to be a tender, except to the State Bank.

§ 10. The Cape-Fear and Newbern Banks shall not issue any note under one dollar. After the 1st of July next, the § 11 of an act passed in 1804 to establish a Bank in Wilmington, and the § 12 of an act passed in the same year to incorporate the Newbern Marine Insurance Company, and to establish a Bank in said town, also an act passed in 1809, to regulate the Banks of Newbern and Cape-Fear in certain cases, are repealed.

§ 11. A tax of one per cent. per annum shall be levied on all stock holden in each of the Banks of Cape-Fear and Newbern, except on the stock holden by the State, to be paid to the Treasurer of the State on or before the 1st of October annually.

§ 12. The Treasurer of the State is authorised and directed to issue Treasury Notes to the amount of $ 82,000 of the following denominations, viz. of 5, 10, 20, 25, 30, 40 and 50 cents, with such margin and device as he may think proper to adopt—shall be made payable to the bearer at the Treasury of this State, shall be dated and signed by the Treasurer and immediately paid over by him to the Cashiers of the Banks of Cape-Fear and Newbern, in equal portions, thereby paying to each for 410 shares of stock. The said Treasury Notes shall not bear interest. To be thrown into

circulation by the said Banks, redeemed by the Treasurer from time to time as they shall be presented, but by him may again be circulated, and shall be receivable in debts and taxes due the State.

§ 13. The Presidents of the Banks of Cape-Fear and Newbern to make known to the Governor within four months after the first of Jan. next, their acceptance of this amended charter; and in case they fail to do so, this act and every part thereof, shall become void.

§ 14, 15, 16. Contain provisions for redeeming the paper currency of the State, provided the stockholders in the State Bank of North-Carolina shall, by common consent or otherwise, dissolve the charter of said Bank previous to the 18th of December, 1816.

§ 17. Authorises the establishment of Branches or Agencies at such place or places within the State as the President and Directors may think proper. Not less than three Directors to be appointed at such Branch or Agency, and no Branch or Agency to be removed unless directed by the stockholders at a general meeting.

An act to amend an act passed in 1741, entitled "An act for the better observation and keeping the Lord's Day, commonly called Sunday, and for the more effectual suppression of Vice and Immorality."

When a man shall be accused by a single woman, in the manner prescribed in the above recited act, of being the father of her bastard child or children, he shall, on the return of the recognizance, capias or attachment to the county court, be entitled to have an issue made up to try whether he be the father of such child or children; upon which trial, the examination of the woman on oath before the Justices shall be prima facie evidence only against the person accused. If the jury, on trial, find the person accused to be the father,

he shall stand charged with the maintenance of the child or children; but if the jury find he is not the father, he shall be discharged. All examinations to accuse a man of being the father of a bastard child shall be taken within three years after the birth of said child.

§ 2. Costs of trial to be paid by the party claiming the benefit of such issue.

§ 3. The attorney for the county may appeal to the Superior Court.

An act to amend the Revenue Laws of this State and to provide a Revenue, for the payment of the Civil List and contingent charges of government.

The tax on land and improvements to be levied and collected as follows: the Justices of the Peace appointed to take the lists of taxable property in the several counties shall require every person liable to pay land-tax, to list each and every tract of land by him or her holden within the county, stating the number of acres of each separate tract, its local situation and its reasonable value, including the improvements: And where the dividing line between two counties runs through any tract of land, the owner may list it in either county. Guardians to list the lands of their wards, being minors, &c.

§ 2. Justices appointed as aforesaid to make out a fair copy of the lists of lands taken, with the number of acres and valuation annexed, and return the same to the Clerk of the County Court at the next term. And said Clerks must return a list of such property to the Comptroller on or before the first of September annually.

§ 3. Clerks of Courts, to deliver a copy of the returns made by the Justices to the Sheriffs within 40 days. And the Sheriffs after the 1st of March shall proceed to collect the taxes, and account for the same on or before the 1st of October.

§ 4. When the lands of non-residents shall not be given in, the Justice taking the list, or the Sheriff of the county, either from their own knowledge or from information, shall summon one freeholder in the neighborhood of such lands, who shall within five days proceed on said lands, and on oath value the same, describing the local situation and number of acres; this freeholder is to transmit a fair transcript of his valuation to the Clerk of the County Court, within ten days. Said freeholder to receive a compensation of one dollar for every tract of land by him assessed, to be levied by the Sheriff when he collects the tax, if not previously paid by the owner.

§ 5. Town lots with their improvements to be assessed as at present: the valuation to take place at the same time that land and other taxable property are given in, and the assessors shall make return thereof to the Clerks of the county courts at the same time that Justices of Peace are required to make return of the lists of taxables taken by them.

§ 6. If a Justice of Peace, at the time of receiving a list of the taxable property, is of opinion that the property is undervalued, he may summon two freeholders to value the land.

§ 7. Residents failing to give in the valuation of their lands within the time prescribed, is liable to pay a double tax; and the Justice who takes the list knowing of such failure, is to summon two freeholders to determine its value.

§ 8. The valuations to be made in dollars and cents.—Lands liable to be sold for taxes shall be sold as heretofore.

§ 9. For the year 1815, there shall be levied and collected eight cents on every $ 100 value of lands assessed and returned as aforesaid.

§ 10. The owners of stud-horses and jack-asses to pay the sum which they ask for the season of one mare.

§ 11. Hawkers and Pedlars to pay $ 6 for every county, not on a navigable stream, in which they travel and sell

goods; and in every county being on a navigable stream, $ 20. Hawkers and Pedlars trading without a licence, to forfeit $ 100.

§ 12. Merchants selling goods to the amount of $ 400 in a year, to pay a tax on their stores if a wholesale merchant, $ 16, if a retail merchant $ 6. Stores to be given in as other taxables. Retailers of spirituous liquors, except they sell other goods, are not to be liable to this tax. The sheriff may demand this tax from persons who keep stores for a less term than one year, who sell to the amount above specified.

§ 13. Owners of Billiard Tables to pay a tax of $ 50, and give them in as other taxable property. The tax to be paid whether the table was in possession on the 1st of April or not.

§ 14 Itinerant stage players, rope-dancers, tumblers, and wire-dancers, exhibitors of natural or artificial curiosities of any kind for reward, shall previously pay to the sheriff of every county into which they travel $ 20 as a tax; if they perform or exhibit in any county without first paying this tax, they are liable to a forfeiture of $ 60.

§ 15. A tax of $ 5 on all gates erected across any public highway. The owners to give them in with their other taxable property.

§ 16. A tax of 30 cents on every free poll, and a tax of 30 cents on each and every black.

§ 17. All free males between the ages of 21 and 50, and all slaves between 12 and 50 shall be subject to a poll-tax. All slaves to be listed in the county where they reside.

§ 18. At the first county court of every county after the 1st of January annually, the Justices shall lay a tax not exceeding five cents on every $ 100 valuation of lands with their improvements, and a tax on the other objects of taxation herein before enumerated, as is already prescribed by law for the purpose of paying the county charges.'

§ 19. The Wardens of the poor of every county to lay a like tax for the purpose of defraying the parish charges.

§ 20. The sheriffs to have the same powers, &c. in collecting taxes as heretofore.

§ 21. After paying the civil list and other specific appropriations by law, the balance of the revenue remaining in the Treasury during the year 1815, is declared to be a contingent fund to be applied to the incidental charges of government.

An act declaring Quakers competent persons to serve on Grand Juries and also on Petit Juries in criminal cases.

The people called Quakers shall be competent to serve on Grand Juries and also on Petit Juries in the trial of all criminal cases, and be entitled to be sworn according to the terms of their religion, as heretofore prescribed by law and observed in the trial of civil cases.

An act to continue in force the 3d section of an act passed in 1813, respecting scites for Light-Houses and Fortifications.

The provisions contained in said section, so far as they relate to the time of laying off and paying for land for the purposes in the act expressed, are declared to be in full force and operation till the 1st of December, 1818.

An act allowing further time for registering Grants, proving and registering Deeds, mesne Conveyances, Powers of Attorney, Bills of Sale and Deeds of Gift.

Two years after the passing of this act are allowed for registering grants, &c.

An act to amend and explain an act passed at the last session, entitled "An act to raise a Revenue for the payment of the Civil List, &c. for the year 1814.

The 1st section of the above recited act is declared to ex-

tend to all free males between the ages of 21 and 50 (which, owing to a mistake in the engrossing of said act was rendered doubtful.)

An act further to promote the administration of justice in the Supreme Court of North-Carolina.

No Judge, on his circuit, before whom, in any of the Superior Courts of this State, any cause in law or equity, or any matter of law shall be tried, and which may be transmitted to the Supreme Court by appeal, for the opinion of the Judges, shall sit on the trial of said cause or matter of law in the Supreme Court; but is hereby forbidden from giving his opinion on any matter of law which may have arisen on the trial of said cause in any of the courts below which said Judge may have held.

§ 2. The Judges of the Superior Courts shall hereafter arrange their respective ridings as to them shall seem fit, so as not to be located to any particular circuit.

An act to give to the Superior Courts of Law concurrent jurisdiction of Petitions for the amendment of Grants from the State and mesne Conveyances for Land.

The Superior Court of law in each county shall have as full power to hear and determine petitions for the amendment of grants from the State, and mesne conveyances for land in all cases whatsoever, as the several Courts of Pleas and Quarter Sessions now possess.

An act further to prescribe the duties of the Comptroller.

The Comptroller, immediately after the 1st of November, annually, shall prepare the account of the Public Treasurer with the State, as the same shall appear on his books for the year preceding, stating the balance of money in the Treasury at the last settlement, the receipts during the year, parti-

tularizing the monies and account from which the same accrued and were received, the amount received from each respectively; and a particular statement of the disbursements within the same period, and the money remaining in the Treasury; and shall annex a statement of the Revenue from each subject of taxation in every county of the State—of which account and statement the Comptroller shall have printed 250 copies before the meeting of the General Assembly next ensuing, to be delivered to the Clerk of either House within the first week of the session.

§ 2. The Treasurer to pay for the printing.

An act for the relief of persons who have made entries on vacant and unappropriated lands, and on which warrants of survey have been issued and lost by accident.

Any person who has made since the year 1800, or shall hereafter make an entry of land within this State and on which the entry-taker has issued or shall issue his warrant of survey, and the same be lost by accident, it shall be lawful, on due proof being made to the county court of the county in which such entry shall have been made, to issue an order directing the entry-taker to issue a duplicate warrant of survey of the tenor and date of the one lost, stating the same to be a duplicate, which shall be as valid as the original, provided seven Justices were present at the time of making such order. Nothing herein to have the effect of reviving such entries as have reverted to the State by the purchase money not being paid in due time. No survey or grant made under this act to affect or impair titles to land heretofore granted.

§ 2. Entry-takers to receive for duplicate warrants 25 cents.

An act to amend an act concerning old titles of land and for limitation of actions, and for avoiding suits in law.

All actions of debt grounded upon any lending or contract

without specialty, shall be brought within three years after the cause of such action, and not after. If any person entitled to such action of debt shall be, at the time of such cause of action given or accrued, fallen or come within the age of 21 years, feme covert, non compos mentis, imprisoned or beyond the seas, then such person shall be at liberty to bring his action, so that he bring it within such time as is before limited, after his coming to full age, discovert, of sound mind, at large, or returned from beyond the seas, as other persons having no such impediment might have done.

An act to appoint Commissioners to run the Boundary line between this State and South-Carolina.

Gen. Thomas Love, Gen. Montfort Stokes and Col. John Patton are appointed Commissioners on the part of this State, to meet such Commissioners as may be appointed by the State of South-Carolina, to run and mark the line established by the provisional article of agreement entered into between the Commissioners of the two States at M'Kinney's on Fox-away river, on the 4th of Sept. 1813 (since established by the Legislatures of both States) with power to employ surveyors, chain-carriers, &c.

An act to authorise the Courts of Pleas and Quarter Sessions to employ suitable persons to transcribe the Register's Books of their respective counties and for other purposes.

The county courts shall have power to employ suitable persons to transcribe and index such of the Register's Books in their respective counties, as from decay or other causes may require to be transcribed or indexed; and the said books when so transcribed and approved of by said courts respectively, shall be deemed and taken as public records.

§ 2. Each of the Clerks of the county courts, upon application of the Register of the county, at any time after ten days from the rise of each court, shall deliver to him all deeds

and other instruments of writing admitted to probate, and then in the Clerk's office, for registration, and shall at the same time pay over to the Register the several fees for registering the same. In case of failure, the Clerk shall forfeit and pay to the Register £50, for which sum judgment shall be entered by the succeeding court upon motion on behalf of the Register.

LIST OF THE ACTS OF A PRIVATE NATURE.

Academies.

To establish an Academy in Iredell
To incorporate Rush Academy in Hyde
To amend the act for erecting an Academy in Tarborough
To incorporate Hillsborough Academy
To establish a free school in Duplin
To incorporate a Female Academy in Louisburg
To incorporate Union Academy in Halifax
To establish an Academy in Greeneville

Courts and Juries.

Respecting the court officers of Buncombe
Surry court to appoint a committee of finance
Altering the time of holding Rowan county court
Concerning the superior court of Craven
Altering the time of holding the superior courts in Wilkes and Ashe
County court of Nash may appoint another ranger
Superior courts of Mecklenburg and Cabarrus, altered
Concerning Richmond superior court
Do. do. amended
To provide for paying jurors in Bladen
To amend the act providing for paying jurors in Bertie

Divorce and Alimony.

Securing to certain persons such property as they may acquire
To amend the act securing property to certain persons

Elections.

To establish one other separate election in Orange
Removing a separate election in Rockingham
Altering two elections in Iredell and one in Cabarrus
Altering a separate election in Rockingham
To remove a separate election in Franklin
To establish a separate election in Gates
To remove two separate elections in Orange
To establish and alter a separate election in Wilkes

To remove a separate election in Northampton
To alter an election in Camden
Respecting a separate election in Wake
Allowing compensation for holding elections in Carteret

Incorporations.

To incorporate Davie Lodge, No. 39, Bertie
To do. Fayetteville Thalean Association
To do. Raleigh Thespian Society
To do. Kilwinning Lodge, No. 64, Wadesborough
To amend the act making navigable Contentnea creek
To incorporate the Wilmington Thalian Association
To amend the act incorporating Clubfoot company

Roads.

Respecting two turnpike roads in Wilkes
Concerning a turnpike road in Buncombe
Allowing D. M'Farland to make two roads
Concerning roads in Lincoln, Burke, &c.
Authorising Charles Parish to open a road

Poor.

Respecting Poor Houses in Chowan
Better to provide for the Poor of Wake county
Laying an additional Poor Tax in Sampson

Towns.

For the better regulation of Wilkesborough
Further to regulate the town of Edenton
Establishing a town on the lands of Jonathan Hunt
Concerning the town of Smithfield
For the better regulation of Elizabeth Town
Commissioners of Beaufort to appoint Auctioneers
Concerning the City of Raleigh
To amend the act for regulating Lumberton
Respecting the town of Hillsborough
Concerning the town on Jesse Peacock's land

Sheriffs.

E. Chambers and John Smith of Rowan, may collect taxes
Certain Sheriffs may collect arrears of taxes
William Hampton, of Wilkes, may collect taxes
For the relief of Matthew Kelly of Bladen

Various.

To repeal the act of 1796, so far as relates to Beaufort
Fixing the dividing line between Burke and Ashe
For the relief of the Treasurer of Martin
Lottery granted to Cape Fear Agricultural Society
Lottery for the benefit of Alexander Smith
For the free passage of fish up Brice's creek
Respecting the militia of Rowan
To prevent Peter Hairston from keeping gates
Authorising T. Lacey and T. Searcey to erect gates
Fixing lines between Chowan, Perquimons and Gates.

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ELOGE OF MONTESQUIEU.

Charles de Secondat, baron of La Brede and of Montesquieu, late president *a mortier* of the parliament of Bordeaux, member of the French academy of sciences and belles lettres of Prussia, and of the Royal Society of London, was born at the Castle of La Brede, near Bordeaux, the 18th of January, 1689, of a noble family of Guienne.

The early marks of his genius, a presage sometimes so deceitful, was not so in Charles de Secondat: he discovered very soon what he one day would be, and his father employed all his attention to cultivate this rising genius, the object of his hope and of his tenderness. At the age of twenty, young Montesquieu already prepared materials for the Spirit of Laws, by a well digested extract from those immense volumes which compose the body of the civil law: thus, heretofore, Newton laid, in his early youth, the foundation of works which have rendered him immortal. The study of jurisprudence, however, though less dry to M. de Montesquieu than to the most part of those who apply to it, because he studied it as a philosopher, was not sufficient for the extent and activity of his genius. He enquired deeply, at the same time, into subjects still more important and more delicate,* and discussed them in silence, with that

* It was a work in the form of letters, the purpose of which was to prove that the idolatry of most of the Pagans did not appear to deserve eternal damnation.

wisdom, with that decency, and with that equity, which he has since discovered in his works.

A brother of his father, president *a mortier* of the parliament of Bordeaux, an able Judge and virtuous citizen, the oracle of his own society and of his province, having lost an only son, and wanting to preserve, in his own corps, that elevated spirit which he had endeavored to infuse into it, left his fortune and his office to M. de Montesquieu. He had been one of the counsellors of the parliament of Bordeaux since the 24th of February, 1714, and was received president *a mortier* the 13th of July, 1716.

Some years after, in 1722, during the King's minority, his society employed him to present remonstrances upon occasion of a new impost. Placed between the throne and the people, he filled, like a respectful subject and courageous magistrate, the employment, so noble, and so little envied, of making the cries of the unfortunate reach the sovereign :— the public misery, represented with as much address as force of argument, obtained that justice which it demanded. This success, it is true, much more unfortunately for the state than for him, was of as short continuance as if it had been unjust. Scarce had the voice of the people ceased to be heard, but the impost, which had been suppressed, was replaced by another: but the good citizen had done his duty.

He was received the 3d of April, 1716, into the academy of Bordeaux, which was then only beginning. A taste for music, and for works of pure entertainment, had at first assembled together the members who composed it. M. de Montesquieu believed, with reason, that the rising ardor and talents of his friends might be employed with still greater advantage in physical subjects. He was persuaded that nature, so worthy of being beheld every where, found also, in places, eyes worthy of viewing her; that, on the contrary, works of taste not admitting of mediocrity, and the metro-

polis being the centre of men of abilities and opportunities of improvement in this way, it was too difficult to gather together, at a distance from it, a sufficient number of distinguished writers. He looked upon the societies for belles lettres, so strangely multiplied in our provinces, as a kind, or rather as a shadow, of literary luxury, which is of prejudice to real opulence, without even presenting us with the appearance of it. Luckily the Duke de la Force, by a prize which he had just founded at Bordeaux, seconded these rational and just designs. It was judged that an experiment properly made would be preferable to a weak discourse or a bad poem; and Bordeaux got an academy of sciences.

M. de Montesquieu, not at all eager to shew himself to the public, seemed, according to the expression of a great genius, to wait for an age ripe for writing. It was not till 1721, that is to say, at 32 years of age, that he published the Persian Letters. The Siamois, and the serious and comic amusements, might have furnished him with the idea of it; but he excelled his model. The description of oriental manners, real or supposed, of the pride and phlegm of Asiatic love, is but the smallest object of these letters; it only serves, so to speak, as a pretence for a delicate satire upon our manners, and for treating of several important subjects, which the author went to the bottom of, while he only appeared to glance at them. In this kind of moving picture, Usbec chiefly exposes, with as much genteel easiness as energy, whatever amongst us most struck his penetrating eyes: our way of treating the most silly things seriously, and of turning the most important into a joke;—our conversations which are so blustering and so frivolous; our impatience even in the midst of pleasure itself; our prejudices and our actions perpetually in contradiction with our understandings; so much love of glory joined with so much respect for the idol of court-favor; our courtiers so mean and so vain; our exterior politeness to, and our real contempt of, strangers, or our affected regard for them; the

fantasticness of our tastes, than which there is nothing lower but the eagerness of all Europe to adopt them; our barbarous disdain for the two most respectable occupations of a citizen, commerce and magistracy; our literary disputes, so keen and so useless; our rage for writing before we think, and for judging before we understand. To this picture, which is lively, but without malice, he opposes, in the apologue of the Troglodytes, the description of a virtuous people, become wise by misfortunes: a piece worthy of the portico. In another place, he represents philosophy, which had been a long time smothered, appearing all of a sudden, regaining, by a rapid progress, the time which she had lost; penetrating even amongst the Russians at the voice of a genius which invites her; while, among other people of Europe, superstition, like a thick atmosphere, prevents that light, which surrounds them on all hands, from reaching them. In fine, by the principles which he has established concerning the nature of ancient and modern government, he presents us with the bud of those bright ideas which have been since developed by the author in his great work.

These different subjects, deprived at present of the graces of novelty, which they had when the Persian Letters first appeared, will forever preserve the merit of that original character which the author has had the art to give them; a merit by so much the more real, that in this case it proceeds alone from the genius of the writer, and not from that foreign veil with which he covered himself; for Usbec acquired, during his abode in France, not only so perfect a knowledge of our morals, but even so strong a tincture of our manners, that his style makes us often forget his country. This small defect in point of probability was perhaps not without design and address: when he was exposing our follies and vices, he wanted without doubt also to do justice to our advantages. He was fully conscious of the insipidity of a direct panegyric: he has more delicately praised us, by so often assuming our own air to satirize us more agreeably.

Notwithstanding the success of this work, M. de Montesquieu did not openly declare himself the author of it. Perhaps he thought that by this means he would more easily escape that literary satire, which spares anonymous writings the more willingly, because it is always the person, and not the work, which is the aim of its darts. Perhaps he was afraid of being attacked on account of the pretended contrast of the Persian Letters with the gravity of his office; a sort of reproach, said he, which critics never fail to make, because it requires no effort of genius. But his secret was discovered, and the public already pointed him out to the French academy. The event demonstrated how prudent M. de Montesquieu's silence had been. Usbec expresses himself sometimes freely enough, not concerning the fundamentals of Christianity, but about matters which too many people affect to confound with Christianity itself; about the spirit of persecution with which so many Christians have been animated; about the temporal usurpation of ecclesiastic power; about the excessive multiplication of monasteries, which deprive the state of subjects, without giving worshippers to God; about some opinions which have in vain been attempted to be established as principles; about our religious disputes, always violent and always fatal. If he appears any where to touch upon more delicate questions, and which more nearly interest the Christian religion, his reflections, weighed with justice, are in fact very favorable to revelation; because he only shews how little human reason, left to itself, knows concerning these subjects. In a word, among the genuine letters of M. de Montesquieu the foreign printer had inserted some by another hand; and they ought at least, before the author was condemned, to have distinguished which properly belonged to him. Without regard to these considerations, on the one hand, hatred under the name of zeal, and, on the other, zeal without discernment or understanding, rose and united themselves against the Persian Letters. Informers, a species of men dangerous and

base, which even in a wise government are unfortunately sometimes listened to, alarmed, by an unfaithful extract, the piety of the ministry. M. de Montesquieu, by the advice of his friends, supported by the public voice, having offered himself for that place in the French academy vacant by the death of M. de Sacy, the minister wrote a letter to the academy, that his majesty would never agree to the election of the author of the Persian Letters; that he had not read the book; but that persons in whom he placed confidence had informed him of their poisonous and dangerous tendency. M. de Montesquieu perceived what a stroke such an accusation might be to his person, his family, and the tranquillity of his life. He neither put so high a price upon literary honors, either keenly to seek them, or to affect to disdain them when they came in his way, nor, in a word, to regard the simple want of them as a misfortune: but a perpetual exclusion, and especially the motives of that exclusion, appeared to him to be an injury. He saw the minister; declared to him that, for particular reasons, he did not own the Persian Letters; but that he would be still farther from disowning a work for which he believed he had no reason to blush; and that he ought to be judged after a reading, and not upon an information. At last the minister did what he ought to have begun with; he read the book, loved the author, and learned to place his confidence better. The French academy was not deprived of one of its greatest ornaments, and France had the happiness to preserve a subject which superstition or calumny was ready to deprive her of; for M. de Montesquieu had declared to the government, that, after that kind of affront which they were about to put upon him, he would go among foreigners, who with open arms offered to receive him, in quest of that safety, that repose, and perhaps those rewards, which he might have hoped for in his own country. The nation would have deplored this loss, and the disgrace of it would notwithstanding have fallen upon it.

The late marshal d'Estrees, at that time director of the French academy, conducted himself upon this occasion like a virtuous courtier and a person of a truly elevated mind: he was neither afraid of abusing his credit nor of endangering it; he supported his friend and justified Socrates. This act of courage, so dear to learning, so worthy of being imitated at present, and so honorable to the memory of marshal d'Estrees, ought not to have been forgotten in his panegyric.

M. de Montesquieu was received the 24th of January, 1728. His oration is one of the best which has been pronounced upon a like occasion: its merit is by so much the greater, that those who were to be received, till then confined by those forms and by those *eloges* which were in use and to which a kind of prescription subjected them, had not as yet dared to step over this circle to treat of other subjects, or had not at least thought of comprehending them in it. Even in this state of constraint he had the happiness to succeed. Among several strokes with which his oration shines, we may easily distinguish the deep thinking writer by the single portrait of cardinal Richlieu, *who taught France the secret of its strength, and Spain that of its weakness; who freed Germany from her chains and gave her new ones.* We must admire Monsieur de Montesquieu for having been able to overcome the difficulty of his subject, and we ought to pardon those who have not had the same success.

The new academician was by so much the more worthy of this title, that he had not long before renounced every other business to give himself entirely up to his genius and taste. However important the place which he occupied was, with whatever judgment and integrity he might have fulfilled its duties, he perceived that there were objects more worthy of employing his talents; that a citizen is accountable to his country and to mankind for all the good which he can do; and that he could be more useful to one and the other, by instructing them with his writings, than he could be by de-

termining a few particular disputes in obscurity. All these reflections determined him to sell his office. He was no longer a magistrate, and was now only a man of letters.

But, to render himself useful by his works to different nations, it was necessary that he should know them: it was with this view that he undertook to travel; his aim was to examine every where the natural and moral world, to study the laws and constitution of every country; to visit the learned, the writers, the celebrated artists; every where to seek for those rare and singular geniuses whose conversation sometimes supplies the place of many years observation and residence. M. de Montesquieu might have said, like Democritus, "I have forgot nothing to instruct myself: I have quitted my country and travelled over the universe, the better to know truth; I have seen all the illustrious personages of my time." But there was this difference between the French Democritus and him of Abdera, that the first travelled to instruct men, and the second to laugh at them.

He first went to Vienna, where he often saw the celebrated Prince Eugene. This hero, so fatal to France, (to which he might have been so useful,) after having given a check to the fortune of Lewis XIV. and humbled the Ottoman pride, lived during the peace without pomp, loving and cultivating letters in a court, where they were little honored, and setting an example to his masters how they should protect them. M. de Montesquieu thought that he could discover in his conversation some remains of affection for his ancient country. Prince Eugene especially discovered it, as much as an enemy could, when he talked of the fatal consequences of that intestine division which has so long troubled the church of France: the statesman foresaw its duration and effects, and foretold it like a philosopher.

M. de Montesquieu left Vienna to visit Hungary, an opulent and fertile country, inhabited by a haughty and generous

people, the scourge of its tyrants and the support of its sovereigns. As few persons know this country well, he has written with care this part of his travels.

From Germany he went to Italy: he saw at Venice the famous Mr. Law, who had nothing remaining of his grandeur but projects fortunately destined to die away in his own head, and a diamond which he pawned to play at games of hazard. One day the conversation turned on the famous system which Law had invented; an epoch of so many calamities and so many great fortunes, and especially of a remarkable corruption in our morals. As the parliament of Paris, the immediate depository of the laws during a minority, had made some resistance to the Scotch minister on this occasion, M. de Montesquieu asked him why he had never tried to overcome this resistance by a method almost always infallible in England, by the grand mover of human actions, in a word, by money. *These are not*, answered Law, *geniuses so ardent and so generous as my countrymen, but they are much more incorruptible.* We shall add, without any prejudice of national vanity, that a society, which is free for some short limited time, ought to resist corruption more than one which is always so: the first, when it sells it's liberty, loses it; the second, so to speak, only lends it, and exercises it even when it is doing so. Thus the circumstances and nature of government give rise to the vices and virtues of nations.

Another person, no less famous, whom M. de Montesquieu saw still oftener at Venice, was Count de Bonneval. This man, so known by his adventures, which were not yet at an end, and flattered with conversing with so good a judge, and one so worthy of hearing them, often related to him the remarkable circumstances of his life, recited the military actions in which he had been engaged, and drew the characters of those generals and ministers whom he had known. M. de Montesquieu often recalled to mind these conversations, and related different strokes of them to his friends.

He went from Venice to Rome. In this ancient capital of the world, which is still so in some respects, he applied himself chiefly to examine that which distinguishes it most at present; the works of Raphael, of Titian, and of Michael Angelo. He had not made a particular study of the fine arts, but that expression, which shines in the master-pieces of this kind, infallibly strikes every man of genius. Accustomed to study nature, he knew her again when well imitated, as a like portrait strikes all those who are familiarly acquainted with the original. Those productions of art must indeed be wretched whose whole beauty is only discernable by artists.

After having travelled over Italy, M. de Montesquieu came to Switzerland. He carefully examined those vast countries which are watered by the Rhine. There was nothing more for him to see in Germany, for Frederic did not yet reign. He stopped afterwards some time in the United Provinces, an admirable monument what human industry animated by a love of liberty can do. At last he went to England, where he staid three years. Worthy of visiting and entertaining the greatest of men, he had nothing to regret but that he had not made this voyage sooner. Newton and Locke were dead. But he had often the honor of paying his respects to their protectress, the celebrated queen of England, who cultivated philosophy upon a throne, and who properly esteemed and valued M. de Montesquieu. He was no less well received by the nation, which, however, was not obliged to follow the example of its superiors on this occasion. He formed at London intimate friendships with men accustomed to think, and to prepare themselves for great actions by profound studies; with them he instructed himself in the nature of the government, and attained to a thorough knowledge of it. We speak here after the public testimonies which have been given him by the English themselves, so jealous of our advantages, and so little disposed to acknowledge any superiority in us.

As he had examined nothing either with the prejudice of an enthusiast or the austerity of a cynic, he brought back from his travels neither a saucy disdain for foreigners, nor a still more misplaced contempt for his own country. It was the result of his observations, that Germany was made to travel in, Italy to sojourn in, England to think in, and France to live in.

After his return to his own country, M. de Montesquieu retired for two years to his estate of La Brede. He there enjoyed in peace that solitude which our having viewed the tumult and hurry of the world serves to render more agreeable. He lived with himself after having so long lived in a different way; and, what interests us most, he put the last hand to his work *On the Cause of the Grandeur and Declension of the Romans*, which appeared in 1734.

Empires, like men, must encrease, decay, and be extinguished. But this necessary revolution has often hidden causes, which the veil of time conceals from us, and which mystery, or their apparent minuteness, has even sometimes hid from the eyes of contemporaries.

Nothing in this respect resembles modern history more than ancient history. That of the Romans, however, deserves, in this respect, to be made an exception of; it presents us with a rational policy, a connected system of aggrandizement, which does not permit us to attribute the fortune of this people to obscure and inferior springs. The causes of the Roman grandeur may then be found in history, and it is the business of the philosopher to discover them. Besides, there are no systems in this study as in that of physic; these are almost always overthrown, because one new and unforeseen experiment can overturn them in an instant: on the contrary, when we carefully collect the facts which the ancient history of a country transmits to us, if we do not always gather together all the materials which we

can desire, we can at least hope one day to have more of them. A careful study of history, a study so important and so difficult, consists in combining in the most perfect manner these defective materials: such would be the merit of an architect, who, from some curious learned remains, should trace, in the most probable manner, the plan of an ancient edifice; supplying, by genius and happy conjectures, what was wanting in those unformed and mutilated ruins.

It is in this point of view that we ought to consider the work of M. de Montesquieu. He finds the causes of the grandeur of the Romans in that love of liberty, of labor, and of their country, which was instilled into them during their infancy; in those intestine divisions which gave an activity to their genius, and which ceased immediately upon the appearance of an enemy; in that constancy after misfortunes, which never despaired of the republic; in that principle they adhered to of never making peace but after victories; in the honor of a triumph, which was a subject of emulation among the generals; in that protection which they granted to those people who rebelled against their kings; in the excellent policy of permitting the conquered to preserve their religion and customs; and that of never having two enemies upon their hands at once, and of bearing every thing of the one till they had destroyed the other. He finds the causes of that declension in the aggrandizement of the state itself: in those distant wars, which, obliging the citizens to be too long absent, made them insensibly lose their republican spirit; in the privilege of being citizens of Rome, granted to so many nations, which made the Roman people at last become a sort of many-headed monster; in the corruption introduced by the luxury of Asia; in the proscriptions of Sylla, which debased the genius of the nation, and prepared it for slavery; in that necessity which the Romans found themselves in, of having a master while their liberty was become burthensome to them; in that necessity they

were obliged to of changing their maxims when they changed their government; in that series of monsters who reigned, almost without interruption, from Tiberius to Nerva, and from Commodus to Constantine; in a word, in the translation and division of the empire; which perished first in the West by the power of barbarians, and which, after having languished several ages in the East, under weak or cruel emperors, insensibly died away, like those rivers which disappear in the sands.

A very small volume was enough for M. de Montesquieu to explain and unfold so interesting and vast a picture. As the author did not insist upon the detail, and only seized on the most fruitful branches of his subject, he has been able to include, in a very small space, a vast number of objects distinctly perceived, and rapidly presented, without fatiguing the reader. While he points out a great deal to us, he leaves us still more to reflect upon; and he might have entled his book, *A Roman History for the Use of Statesmen and Philosophers.*

Whatever reputation M. de Montesquieu had acquired by this last work, and by those which had preceded it, he had only cleared the way for a far grander undertaking, for that which ought to immortalize his name, and render it respectable to future ages. He had long ago formed the design, and had meditated for twenty years upon the execution of it; or to speak more properly, his whole life had been a perpetual meditation upon it. He had first made himself in some respect a stranger in his own country, better to understand it at last: he had afterwards travelled over all Europe, and profoundly studied the different people who inhabit it. The famous island, which glories so much in her laws, and which makes so bad an use of them, had been to him, in his long tour, what the isle of Crete had formerly been to Lycurgus, a school where he had known well how to instruct himself without approving every thing: in a word,

he had, if we may so speak, examined and judged those celebrated nations and men who only exist at present in the annals of the world. It was thus that he attained by degrees to the noblest title which a wise man can deserve, that of legislator of nations.

If he was animated by the importance of his subject, he was at the same time terrified by its extensiveness; he abandoned it, and returned to it again at several intervals. He felt, more than once, as he himself owns, his paternal hands fail him. At last, encouraged by his friends, he collected all his strength, and published *The Spirit of Laws*.

In this important work, M. D. Montesquieu, without insisting, after the example of those who preceded him, upon metaphysical discussions relative to the nature of man, supposed in an abstract state; without confining himself, like others, to consider certain people in certain particular relations or circumstances, takes a view of the inhabitants of the world in the actual state in which they are, and in all the relations which they can stand in to one another. The most part of other writers in this way are almost always either simple moralists, or simple lawyers, or even sometimes simple theologists. As for him, a citizen of all countries, and of all nations, he is less employed about what our duty requires of us, than about the means by which we can be obliged to fulfil it; about the metaphysical perfection of laws, than about that which human nature renders man capable of; about laws which have been made, than about those which ought to have been made; about the laws of a particular people, than about those of all nations. Thus, when comparing himself to those who have run before him in this noble and grand career, he might say, with Correggio when he had seen the works of his rivals, *And I also, am a painter.*

Filled and penetrated with his subject, the author of the Spirit of Laws comprehends in it so great a number of ma-

terials, and treats them with such brevity and depth, that an assiduous and studious reading of it can make us alone perceive the merit of this book. This will especially serve, we venture to say, to make that pretended want of method, with which some readers have accused M. de Montesquieu, disappear; an advantage which they ought not slightly to have accused him of having neglected in a philosophical subject, and in a work of twenty years. Real want of order ought to be distinguished from that which is only apparent. Disorder is when the analogy and connection of ideas are not observed; when conclusions are set up as principles, or precede them; when the reader, after innumerable windings, finds himself at the point whence he set o t. Apparent disorder is when the author, putting in their true place the ideas which he makes use of, leaves it to the readers to supply the intermediate ones; and it is thus that M. de Montesquieu believed that he might and ought to make use of them, in a book designed for men who thought, whose genius ought to supply voluntary and reasonable omissions.

The order which is perceivable in the grand divisions of the Spirit of the Laws takes place no less in the smaller details: we believe that, the more profoundly the work is studied, the more one will he convinced of it. Faithful to his general divisions, the author refers to each those objects which belong to it exclusively; and, with respect to those which, by different branches, belong to several subjects at once, he has placed, under each division, that branch which properly belongs to it. By this we easily perceive, and wi h-out confusion, the influence which the different parts of the subject have upon each other; as, in a tree or system of human knowledge well understood, we may perceive the mutual relation of sciences and arts. This comparison is by so much the more just, that it is the same thing with respect to a plan which we may form to ourselves for examining laws philosophically, as of that order which may be observed in a tree, comprehending all the sciences: there will always

remain something arbitrary in it; and all that can be required of an author is, that he follow strictly, without deviating from it, that system which he has once formed to himself.

We may say of that obscurity, which is allowable in such a work, the same thing as want of order. What may be obscure for vulgar readers is not so for those whom the author had in his view. Besides, obscurity which is voluntary is not properly obscurity. M. de Montesquieu being sometimes obliged to present to us truths of great importance, the absolute and direct avowal of which might have shocked without doing any good, has had the prudence to cover them; and, by this innocent artifice, he has concealed them from those to whom they might have been hurtful, without making them lost to men of sagacity.

Among those works which have sometimes furnished him with assistance, and sometimes with clearer views for his own, we may perceive that he has especially profited from two historians who have thought the most, Tacitus and Plutarch: but, though a philosopher who has read these two authors might have dispensed with a great many others, he did not believe that he ought to neglect or disdain any thing in this way that could be of use to his subject. That reading which we must suppose necessary for the Spirit of Laws is immense; and the rational use which the author has made of such a prodigious multitude of materials will appear still more surprising, when it is known that he was almost entirely deprived of sight, and obliged to have recourse to eyes not his own; this prodigious reading contributes not only to the utility, but to the agreeableness, of the work. Without derogating from the majesty of his subject, M. de Montesquieu has known how to soften its austerity, and procure the reader some moments of repose, whether by facts which are singular and little known, or by delicate allusions, or by those strong and brilliant touches of the pencil, which paint, by one stroke, nations and men.

In a word, (for we will not here play the part of Homer's commentators,) there are, without doubt, faults in the Spirit of Laws, as there are in every work of genius whose author first dared to clear out for himself a new route. M. de Montesquieu has been amongst us, for the study of laws, what Descartes was for that of philosophy: he often instructs us, and is sometimes mistaken; and, even when he mistakes, he instructs those who know how to read him.—The last edition of his works demonstrates, by the corrections and additions which he has made, that, if he has now and then made a slip, he has been able to find it out, and to rise again. By this he will acquire, at least, a title to a new examination, in those places where he was not of the same opinion with his censurers: perhaps, indeed, what he imagined stood most in need of correction has entirely escaped them; so blind commonly is the inclination to do hurt.

But that which is within the reach of all the world is the Spirit of Laws; that which ought to render the author dear to all nations, that which would serve to cover far greater faults than are in it, is that spirit of patriotism which dictated it. The love of the public good, a desire of seeing men happy, discovers itself in it every where; and, had it no other merit but this, which is so rare and so valuable, it would be worthy, on this account alone, to be read by nations and kings. We already perceive, by happy experience, that the fruits of this work are not confined to useless sentiments in the minds of its readers. Though M. de Montesquieu survived the publication of the Spirit of Laws but a short while, he had the satisfaction in some measure to foresee those effects which it begins to produce amongst us; the natural love of Frenchmen for their country turned towards its true object; that taste for commerce, for agriculture, and for useful arts, which insensibly spreads itself in our nation; that general knowledge of the principles of government, which renders people more attached to that which they ought to love. Those who have so indecently attacked this work,

perhaps, owe more to it than they imagine. Ingratitude, besides, is the smallest reproach which we have to make them. It is not without regret, and without blushing for the age we live in, that we proceed to expose them; but this history is of too much consequence to the glory of M. de Montesquieu, and advantage to philosophy, to be passed over in silence. May that reproach, which at last covers his enemies, be of use to them!

Scarce had the Spirit of Laws appeared, but it was eagerly sought after on account of the reputation of its author: but, though M. de Montesquieu had written for the good of the people, he ought not to have had the vulgar for his judge. The depth of his subject was a necessary consequence of its importance. However, the strokes which were scattered up and down the work, and which would have been displaced if they had not arisen naturally from the subject, made too many people believe that it was written for them. People sought for an agreeable book, and they only found an useful one; the whole scheme and particular details of which they could not comprehend without some attention. The Spirit of Laws was treated with a deal of light wit: even the title of it was made a subject of pleasantry: in a word, one of the finest literary monuments which our nation ever produced was at first regarded by it with much indifference. It was requisite that the true judges should have time to read it: they very soon correct the errors of the multitude, always ready to change its opinion. That part of the public which teaches dictated to that which listens, to hear how it ought to think and speak; and the suffrages of men of abilities, joined to the echoes which repeated them, formed only one voice over all Europe.

It was then that the open and secret enemies of letters and philosophy (for there are of both kinds) united their darts against this work. Hence that multitude of pamphlets which were aimed against him from all parts, and which we shall

not draw out from that oblivion in which they have sunk. If those authors had not taken proper measures to be unknown to posterity, it might be believed that the Spirit of Laws was written amidst a nation of barbarians.

M. de Montesquieu easily despised the dark criticisms of those weak authors who (whether out of a jealousy which they had no title to have, or to satisfy the public ill-nature, which loves satire and contempt) outrageously attack what they cannot attain to; and, more odious on account of the ill which they want to do, than formidable for that which they actually do, do not succeed even in this kind of writing, the facility of which, as well as its object, renders equally mean. He placed works of this kind on the same level with those weekly newspapers of Europe, the encomiums of which have no authority, and their darts no effect; which indolent readers run over without giving credit to, and in which sovereigns are insulted without knowing it, or without deigning to revenge it. But he was not equally indifferent about those principles of irreligion which they accused him of having propagated in the Spirit of Laws. By despising such reproaches he would have believed that he deserved them, and the importance of the object made him shut his eyes at the real meanness of his adversaries. Those men, who really want zeal as much as they are eager to make it appear that they have it, afraid of that light which letters diffuse, not to the prejudice of religion, but to their own disadvantage, took different ways of attacking him; some, by a stratagem which was as puerile as pusillanimous, had written to himself; others, after having attacked him under the mask of anonymous writers, had afterwards fallen by the ears among themselves. M. de Montesquieu, though he was very jealous of confounding them with each other, did not think it proper to lose time, which was precious, in combating them one after another; he contented himself with making an example of him who had most signalized himself by his extravagance. It was the author of an anonymous and periodical paper, who

imagined that he had a title to succeed Pascal, because he has succeeded to his opinions; a panegyrist of works which nobody reads, and an apologist of miracles which the secular power put an end to whenever it wanted to do it; who calls the little interest, which people of letters take in his quarrels, impious and scandalous; and hath, by an address worthy of him, alienated from himself that part of the nation whose affections he ought chiefly to have endeavored to keep. The strokes of this formidable champion were worthy of those views which inspired him. he accused M. de Montesquieu of spinosism and deism (two imputations which are incompatible); of having followed the system of Pope (of which there is not a word in his works); of having quoted Plutarch, who is not a christian author; of not having spoken of original sin and of grace. In a word, he pretended that the Spirit of Laws was a production of the constitution *Unigenitus;* an idea which we may perhaps be suspected of fathering on the critic out of derision. Those who have known M. de Montesquieu, and who understand his work and that of Clement XI. may judge, by this accusation, of the rest.

The unsuccessfulness of this writer ought greatly to discourage him: he wanted to attack a wise man in that place which is most sensible to every good citizen; but he only procured him an addition of glory as a man of letters; the *Defence of the Spirit of Laws* appeared. This work, on account of that moderation, that truth, that delicacy of ridicule which abound in it, ought to be regarded as a model in this way. M. de Montesquieu, charged by his adversary with atrocious imputations, might easily have rendered him odious; he did better, he made him ridiculous. If we are beholden to an aggressor for that good which he has done us without wanting to do it, we owe him eternal thanks for having procured us this master-piece. But what adds still more to the merit of this precious little piece is this, that the author, without thinking of it, has there drawn a picture of himself; those who knew him think they hear him; and

posterity will be convinced, when reading his *defence*, that his conversation was not inferior to his writings; an encomium which few great men have deserved.

Another circumstance gave him plainly the advantage in this dispute. The critic, who, as a proof of his attachment to religion, attacks its ministers, loudly accusing the clergy of France, and especially the faculty of Theology, of indifference for the cause of God, because they did not authentically proscribe so pernicious a work. The faculty had a title to despise the reproach of a nameless writer, but religion was in the question; a commendable delicacy made it resolve to examine the Spirit of Laws. Though it has been employed about it several years, it has not yet pronounced any thing; and, if some slight inadvertencies, which are almost inevitable in so vast a career, should have escaped M. de Montesquieu, the long and scrupulous attention, which they would have required from the most enlightened body of the church, might prove at least how excusable they are; but this body, full of prudence, will do nothing rashly in so important an affair. It knows the grounds of reason and of faith; it knows that the work of a man of letters ought not to be examined like that of a theologist; that the bad consequences, which odious interpretations may draw from a proposition, do not render the proposition blameable in itself; that besides we live in an unlucky age, in which the interests of religion have need of being delicately managed; and that it may do hurt to weak people to throw an ill-timed suspicion of incredulity upon geniuses of the first rank; that, in a word, in spite of this unjust accusation, M de Montesquieu was always esteemed, visited, and well received, by the greatest and most respectable characters in the Church — Would he have preserved among men of worth that esteem which he enjoyed if they had regarded him as a dangerous writer?

While insects plagued him in his own country, England

erected a monument to his glory. In 1752, M. d'Assier, celebrated for the medals which he has struck in honor of several illustrious men, came from London to Paris to strike one of him. M. de la Tour, an artist of such superior talents, and so respectable for his disinterestedness and greatness of mind, had ardently desired to give a new lustre to his pencil, by transmitting to posterity the portrait of the author of the Spirit of Laws; he only wanted the satisfaction of painting him; and he deserved, like Apelles, that this honor should be reserved for him: but M. de Montesquieu, as sparing of M. de la Tour's time as he himself was free of it, constantly and politely refused his pressing solicitations. M. d'Assier at first bore with such difficulties. 'Do you believe,' said he at last to M. de Montesquieu, 'that there is not as much pride in refusing my offer as in accepting of it?' Overcome by his pleasantry, he permitted M. d'Assier to do whatever he would.

The author of the Spirit of Laws, in fine, was peaceably enjoying his glory, when he fell sick at the beginning of February: his health naturally delicate, began to decay for some time past, by the slow and almost infallible effect of deep study; by the uneasiness which they had endeavored to give him on account of his work; in a word, by that kind of life which he was obliged to lead at Paris, which he felt to be fatal to him. But the eagerness with which his company was sought after was too keen not to be sometimes indiscreet; they would, without perceiving it, enjoy him at the expence of himself. Scarce had the news of the danger which he was in spread abroad, but it became the object of the conversation and anxiety of the public. His house was never empty of persons of all ranks who came to enquire about his health, some out of real affection, others to have the appearance of it or to follow the crowd. His majesty, penetrated with the loss which his kingdom was about to sustain, enquired about him several times; a testimony of goodness and justice which does equal honor to the monarch and the subject. M.

de Montesquieu's end was not unworthy of his life. Oppressed with cruel pains, far from a family that was dear to him, and which had not the comfort of closing his eyes, surrounded by some friends and a great crowd of spectators, he preserved to his last moments a calmness and tranquillity of soul. In a word, after having performed with decency every duty, full of confidence in the Eternal Being whom he was about to be re-united with, he died with the tranquillity of a man of worth, who had never consecrated his talents but to the improvement of virtue and humanity. France and Europe lost him the 10th of Februury, 1755, aged sixty-six.

All the public news-papers published this event as a misfortune. We may apply to M. de Montesquieu what was formerly said of an illustrious Roman; that nobody, when told of his death, shewed any joy at it; that nobody even forgot him when he was no more. Foreigners were eager to demonstrate their regrets: my lord Chesterfield, whom it is enough to name, caused to be published in one of the public London papers an article to his honor, an article worthy of the one and of the other; it is the portrait of Anaxagoras drawn by Pericles.* The royal academy of sciences and belles lettres of Prussia, though it is not its custom to pronounce the *eloge* of foreign members, thought itself bound to do him an honor which it had not before done to any one but

* See this encomium in English, as we read it in the paper called the Evening Post. "On the 10th of this month, died at Paris, universally and sincerely regretted, Charles Secondat, baron of Montesquieu, and president a mortier of the parliament of Bordeaux. His virtues did honor to human nature, his writings justice. A friend to mankind, he asserted their undoubted and unalienable rights, with freedom, even in his own country, whose prejudices in matters of religion and government (*we must remember it is an Englishman who speaks*) he had long lamented, and endeavored (not without some success) to remove. He well knew and justly admired the happy constitution of this country, where fixed and known laws equally restrain monarchy from tyranny, and liberty from licentiousness. His works will illustrate his name, and survive him, as long as right reason, moral obligation, and the true Spirit of Laws, shall be understood, respected, and maintained."

the illustrious John Bernouilli M. de Maupertius, notwithstanding he was at that time indisposed, performed, himself, this last duty to his friend, and would not permit an office so dear and so melancholy to fall to the share of any other person. To so many honorable suffrages in favor of M. de Montesquieu, we believe we may add, without indiscretion, those praises which were given him, in presence of one of us, by that very monarch to whom this celebrated academy owes its lustre, a prince made to feel those losses which philosophy sustains, and at the same time to comfort her.

The seventeenth of February, the French academy, according to custom, performed a solemn service for him, at which, notwithstanding the rigor of the season, almost all the learned men of this body, who were not absent from Paris, thought it their duty to assist. They ought, at this melancholy ceremony, to have placed the Spirit of Laws upon his coffin, as heretofore they exposed, opposite to that of Raphael, his last picture of the transfiguration. This simple and affecting ornament would have been a fine funeral oration.

Hitherto we have only considered M. de Montesquieu as a writer and philosopher; it would be to rob him of the half of his glory, to pass over in silence his agreeable personal qualities.

He had, in company, a sweetness and gaiety of temper always the same. His conversation was spirited, agreeable, and instructive, by the great number of men and of nations whom he had known It was, like his style, concise, full of wit and sallies, without gall, and without satire. Nobody told a story in a more lively manner, more readily, or with more grace and less affectation; he knew that the conclusion of an agreeable story is always the point in view, he therefore made dispatch to come at it, and produced the effect without having long promised it.

His frequent absence of mind only rendered him more amiable: he always awoke from it by some unexpected stroke which re-animated the languishing conversation; besides, these were never either frolicsome, shocking, or troublesome. The fire of his genius, the great number of ideas with which it was furnished, gave rise to them; but this never happened in the middle of an interesting or serious conversation; the desire of pleasing those, in whose company he was, made him attentive to them without affectation and without restraint.

The agreeableness of his conversation not only resembled his character and his genius, but even that kind of method which he observed in his study. Though capable of deep and long-continued meditation, he never exhausted his strength, he always left off application before he felt the least symptom of fatigue.*

He was sensible to glory, but he did not wish to attain it but by deserving it. He never endeavored to augment his own by those underhand practices, by those dark and shameful methods, which dishonor the character of the man without adding to that of the author.

Worthy of every distinction and of every reward, he asked nothing, and he was not surprised that he was forgot; but he has adventured, even in delicate circumstances, to protect at court men of letters, who were persecuted, celebrated, and unfortunate, and has obtained favors for them.

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* The author of the anonymous and periodical paper, which we mentioned above, pretends to find a manifest contradiction between what we say here and that which we had said before, that M. de Montesquieu's health was impaired by the slow and almost infallible effect of deep study. But why, when he was comparing the two places, has he suppressed these words, *slow and almost infallible*, which he had under his eyes? It is evidently because he perceived, that an effect which is slow, is not a bit less real for not being felt immediately; and that, consequently, these words destroy that appearance of contradiction which he pretends to point out. Such is the fidelity of this author in trifles, and for a stronger reason in more serious matters.

Though he lived with the great, whether out of necessity, or propriety, or taste, their company was not necessary to his happiness. He retired whenever he could to his estate in the country; he there again with joy met his philosophy, his books, and his repose. Surrounded, at his leisure hours, with country people, after having studied man, in the commerce of the world, and in the history of nations, he studied him also in those simple people whom nature alone had instructed, and he could from them learn something: he conversed cheerfully with them; he endeavored, like Socrates, to find out their genius; he appeared as happy, when conversing with them, as in the most brilliant assemblies, especially when he made up their differences, and comforted them under their distress by his beneficence.

Nothing does greater honor to his memory than the method in which he lived, which some people have pretended to blame as extravagant, in a proud and avaricious age, extremely unfit to find out, and still less to feel, the real benevolent motives of it.

M. de Montesquieu would neither make encroachments upon the fortune of his family, by those supplies which he gave the unfortunate, nor by those considerable expences which his long tour of travelling, the weakness of his sight, and the printing of his works, had exposed him to. He transmitted to his children, without diminution or augmentation, the estate which he received from his ancestors; he added nothing to it but the glory of his name, and the example of his life. He had married, in 1715, dame Jane de Lartigue, daughter of Peter de Lartigue, Lieutenant-Colonel of the regiment of Molevrier: he had two daughters and one son by her, who, by his character, his morals, and his works, has shewn himself worthy of such a father.

Those who love truth and their country will not be displeased to find some of his maxims here. He thought

That every part of the state ought to be equally subject to the laws; but that the privileges of every part of the state ought to be respected when their effects have nothing contrary to that natural right which obliges every citizen equally to concur to the public good: that ancient possessions were in this kind the first of titles, and the most inviolable of rights, which it was always unjust, and sometimes dangerous to want to shake.

That magistrates, in all circumstances, and notwithstanding whatever advantage it might be to their own body, ought never to be any thing but magistrates, without partiality and without passion, like the laws which absolve and punish without love and hatred.

In a word, he said, upon occasion of those ecclesiastical disputes which have so much employed the Greek Emperors and christians, that theological disputes, when they are not confined to the schools, infallibly dishonor a nation in the eyes of its neighbors. In fact, the contempt, in which wise men hold those quarrels, does not vindicate the character of their country; because, sages making every where the least noise, and being the smallest number, it is never from them that the nation is judged of.

The importance of those works, which we have had occasion to mention in this panegyric, has made us pass over in silence less considerable ones, which served as a relaxation to our author, and which, in any other person, would have merited an encomium. The most remarkable of them is the Temple of Gnidus, which was very soon published after the Persian Letters. M. de Montesquieu, after having been Horace, Theophrastus, and Lucian, in those, was an Ovid and Anacreon in this new essay. It is no more the despotic love of the East which he proposes to paint, it is the delicacy and simplicity of pastoral love, such as it is in an unexperienced heart which the commerce of the world has not yet

corrupted. The author, fearing, perhaps, that a picture so opposite to our manners should appear too languid and uniform, has endeavored to animate it by the most agreeable images. He transports the reader into inchanted scenes, the view of which, to say the truth, little interests the lover in his happiest moments, but the description of which still flatters the imagination, when the passions are gratified. Inspired by his subject, he hath adorned his prose with that animated, figurative, and poetic style, which the romance of Telemachus gave the first example of amongst us. We do not know why some censurers of the Temple of Gnidus have said upon this occasion, that it ought to have been written in verse. The poetic style, if we understand, as we ought by this word, a style full of warmth and images, does not stand in need of the uniform march and cadency of versification to be agreeable; but, if we only make this style to consist in a diction loaded with needless epithets, in the cold and trivial descriptions of the wings and quiver of love, and of such objects, versification will add nothing to the merit of these beaten ornaments; in vain will we look for the life and spirit of it. However this be, the Temple of Gnidus being a sort of poem in prose, it belongs to our celebrated writers to determine the rank which it ought to hold: it is worthy of such judges.

We believe, at least, the descriptions in this work may with success stand one of the principal tests of poetic descriptions, that of being represented on canvass. But what we ought chiefly to observe in the Temple of Gnidus is, that Anacreon himself is always the observer and the philosopher there. In the fourth canto the author appears to describe the manners of the Cyberites, and it may easily be perceived that these are our own manners. The preface especially bears the mark of the author of the Persian Letters. When he represents the Temple of Gnidus as a translation from a Greek manuscript, a piece of wit which has been so much disfigured since by bad imitators, he takes occasion to paint

by one stroke of his pen the folly of critics and the pedantry of translators. He concludes with these words, which deserve to be repeated: 'If serious people require some other work of me of a less frivolous nature, I can easily satisfy them; I have been laboring thirty years at a work of twelve pages, which will contain all that we know of metaphysics, politics, and morality; and all that the greatest authors have forgot in the volumes which they have published on these sciences.'

JURIDICAL SELECTIONS.

JUDGMENT OF THE SUPREME COURT OF NEW-ORLEANS, *ON MARTIAL LAW, & ON A SUSPENSION LAW.*

DELIVERED BY JUDGE MARTIN.

A motion that the court might proceed in this case, has been resisted on two grounds—

1*st.* That the city and its environs were by general orders of the officer commanding the military district, put, on the 15th of December last, *under strict Martial Law.*

2*d.* That by the § 3, of an act of Assembly, approved on the 18th of December last, all proceedings in any civil case are suspended.

I. At the close of the argument, on Monday last, we thought it our duty, lest the smallest delay should countenance the idea, that this court entertain any doubt on the first ground, instantly to declare *viva voce* (although the practice is to deliver our opinions in writing) that the exercise of an authority vested by law in this court, could not be suspended by any man.

In any other state but this, in the population of which are many individuals, who, not being perfectly acquainted with their rights, may easily be imposed on, it could not be expected that the Judges of this court should, in complying with the constitutional injunction, *in all cases to adduce the reasons on which their judgment is founded*, take up much time to shew that this court is bound utterly to disregard what is thus called *martial law*; if any thing be meant thereby, but the strict enforcing of the rules and articles for the government of the army of the United States, established by Congress, or any act of that body relating to military matters, on all individuals belonging to the army or militia in the service of the United States. Yet we are told by this proclamation of martial law, the officer who issued it has conferred on himself, over all his fellow-citizens within the space which he has described, a supreme and unlimited power, which being incompatible with the exercise of the functions of civil magistrates, necessarily suspends them.

This bold and novel assertion is said to be supported by the 9th section of the first article of the constitution of the United States, in which are detailed the limitations of the power of the Legislature of the Union. It is there provided that *the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of invasion, or rebellion, the public safety may require it.* We are told that the commander of the military district is the person who is to suspend the writ, and is to do so whenever, *in his judgment*, the public safety appears to require it—that, as he may thus paralyze the arm of the justice of his country, in the most important case, the protection of the personal liberty of the citizen, it follows, that, as he who can do the *more* can do the *less*, he can also suspend all other functions of the civil magistrate, which he does by his proclamation of martial law.

This mode of reasoning varies, *toto cælo*, from the decision

of the Supreme Court of the United States, in the case of Swartwout and Bollman, arrested in this city in 1806 by General Wilkinson.

The court then declared, that the constitution had exclusively vested in Congress the right of suspending the privilege of the writ of habeas corpus, and that that body was the sole judge of the necessity that called for the suspension. "If, at any time," said the Chief Justice, "the public safety shall require the suspension of the powers vested in the courts of the United States by this act (the habeas corpus act) *it is for the Legislature to say so.* This question depends on political considerations, on which the Legislature is to decide. Till the legislative will be expressed, this court can only see its duties, and must obey the law." 4 *Cranch.* 101.

The high *authority* of this decision seems, however, to be disregarded; and a contrary opinion is said to have been lately acted upon, to the distress and terror of the good people of this [redacted] it therefore meet to dispel the clouds which designing men endeavor to cast on this article of the constitution, that the people should know that their rights, thus secured, are neither doubtful or insecure, and supported on the clearest *principles* of our laws.

Approaching, therefore, the question, as if I were without the above conclusive authority, I find it provided by the constitution of this state, that "no power of suspending the laws of this state shall be exercised unless by the Legislature, or under its authority." The proclamation of martial law, therefore, if intended to suspend the functions of this court or its members, is an attempt to exercise powers thus exclusively vested in the Legislature. I therefore cannot hesitate in saying, that it is, in this respect, null and void. If, however, there be aught in the constitution, or laws of the United States, that really authorises the commanding officer of a military district to suspend the laws of this state,

as that constitution and these laws are paramount to those of the state, they must regulate the decision of this court.

This leads me to the examination of the power of suspending the writ of habeas corpus, and that which it is said to include, of proclaiming martial law, as noticed in the constitution of the United States. As in the whole article cited, no mention is made of the power of any other branch of government but the legislative, it cannot be said that any of the limitations which it contains extend to any of the other branches. *Iniquum est perimi de pacto id de quo cogitatum non est.* If, therefore, this suspending power exists in the Executive (under whose authority it has been endeavored to exercise it) it exists without any limitation—then the President possesses, without limitation, a power which the Legislature cannot exercise, without a limitation—thus he possesses a greater power *alone* than the House of Representatives, the Senate and himself *jointly*.

Again—the power of repealing a law and that of suspending it, (which is a partial repeal) is a legislative power. For *eodem modo, quod quid constituitur eodem modo destruitur.* And every legislative power that may be exercised under the constitution of the United States, is exclusively vested in Congress: all others, are retained by the people of the several States.

In England, at the time of the invasion of the Pretender, assisted by the forces of hostile nations, the habeas corpus act was indeed suspended, but the Executive did not thus of itself stretch its own authority,—the precaution was deliberated upon, and taken by the representatives of the people. *De Lolme* 409. And there the power is safely lodged without the danger of its being abused. Parliament may repeal the law on which the safety of the people depends; but it is not their own caprices and arbitrary humors, but the caprices and arbitrary humors of other men which they will have

gratified, when they shall have thus overthrown the columns of liberty. *Id.* 275.

If it be said that the laws of war, being the laws of the United States, authorise the proclamation of martial law, I answer that in peace or in war no law can be enacted but by the legislative power. In England, from whence the American jurist derives his principles in this respect, "martial law cannot be used without the authority of Parliament." 5 *Comyns* 229. The authority of the monarch himself is insufficient. In the case of Grants *vs.* Sir C. Gould, 2 *Hen. Bl.* 69, which was on a prohibition (applied for in the court of common pleas) to the defendant, as Judge Advocate of a Court Martial, to prevent the execution of the sentence of that military tribunal, the counsel, who resisted the motion, said it was not to be disputed that martial law can only be exercised in England so far as it is authorised by the mutiny act and the articles of war, all which are established by Parliament, or its authority; and the court declared it totally inaccurate to state any other martial law, as having any place whatever within the realm of England. In that country, and in these states, by martial law is understood the jurisprudence of these cases, which are decided by Military Judges or Courts Martial. When martial law is established, and prevails in any country, said Lord Loughborough, in the case cited, it is totally of a different nature from that which is inaccurately called martial law, (because the decisions are by a Court Martial), but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, *which was contrary to the constitution*, and which has been for a century totally exploded. When martial law prevails, continues the Judge, the authority under which it is exercised claims jurisdiction over all *military* persons in *all* circumstances: even their *debts* are subject to enquiry by military authority: every species of offence committed by any person *who appertains to the army*, is tried, not by a

civil judicature, but by the judicature of the corps or regiment to which he belongs.

This is martial law, as defined by Hale and Blackstone, and which the court declared not to exist in England. Yet it is confided to *military* persons—here it is contended, and the court must admit, if we sustain the objection, that it extends to *all* persons—that it dissolves for a while the government of the state.

Yet, according to our laws, all military courts are under a constant subordination to the ordinary courts of law. Officers who have abused their powers, though only in regard to their own soldiers, are liable to prosecution in a court of law and compelled to make satisfaction. Even any flagrant abuse of authority by members of a court martial, when sitting to judge their own people, and determine in cases entirely of a military kind, makes them liable to the animadversion of the civil Judge. *De Lolme*, 447. *Jacob's Law Dict. verbo court martial.* How preposterous then the idea that a military commander may, by his own authority, destroy the tribunal established by law as the asylum for those oppressed by military despotism.

II. It is further contended, that the 3d section of the act of Assembly, approved on the 18th December last, suspended all proceedings in civil cases, until the 1st of May next; but it is answered, that this section is unconstitutional and void, inasmuch as it violates the constitution of the United States, which provides, that no state shall pass any law *impairing* the obligations of contracts, this law delaying for upwards of four months the recovery of sums due on contracts.

It is no longer a question in the United States, whether unconstitutional acts of the Legislature be of any force and effect. This State is among those, the constitution of which contains an express provision on this subject: "All laws

contrary to this constitution shall be null and void;" and this court, in the case of the syndics of Brooks *vs.* Weyman, determined it was their province to enquire into and pronounce upon the constitutionality of any law invoked before them.

If, therefore, the section under consideration, really impairs the obligation of contracts, we must declare it null and void.

The obligation of contracts consists in the necessity under which a man finds himself to do, or refrain from doing, something. This obligation exists generally both *in foro legis* and *in foro conscientiæ*, though it does at times exist in one of these only. It is certainly of the first, that *in foro legis*, which the framers of the constitution spoke, when they prohibited the passage of any law impairing the obligation of contracts. Now, a law absolutely recalling the power which the creditor enjoys of compelling his debtor, *in foro legis*, to perform the obligation of his contract, would be a law destroying the obligation of the contract *in foro legis*, since a right without a legal remedy, ceases to be a legal right. It would impair the obligation of the contract by destroying its legal obligation; in other words, by reducing an obligation both in *foro legis* and *in foro conscientia* to an obligation *in foro conscientiæ* only; a legal and moral right to a moral right only. The remedy *in foro legis* constituting the legal right of the creditor, constitutes also its correlative, the legal duty or obligation of the debtor; and a law which reduces a legal to a moral obligation is one which *in foro legis* destroys the obligation. It appears therefore to me incorrect to say that the Legislature may effectually do, as to the *remedy* or effect of the obligation, that which it cannot do as to the right; and, I conclude, that a law destroying or impairing the remedy, is as unconstitutional as one affecting the right in the same manner; for *in foro legis* the effects of both laws must be the same.

Likewise a law procrastinating the remedy, generally speaking, destroys part of the right. He pays *less*, who pays *later*—*Minus solvit, qui serius solvit.* Neither is the procrastination properly compensated by the allowance of interest in the mean while. To many men, in many circumstances, there is a wide difference between one hundred dollars payable to day and one hundred and six dollars payable in a twelve month, whatever may be the certainty that no disappointment will occur; and, in many cases, the delay is likely to be productive of considerable danger to the solvability of the debtor. Any indulgence, therefore, in point of time afforded by the Legislature, to the debtor, is a correlative injury to the creditor in the same *degree*, though of a different nature, as a correspondent indulgence by a proportionate reduction of the debt.

That such were the impressions of the framers of the constitution, will appear, if, in expounding that instrument, we follow the rules laid down for the exposition of statutes—if we consider the old law, the mischief, and the remedy.

The charter of our federal rights was framed not many years after the termination of the war which secured our independence. The disasters attending the arduous conflict, had disabled many an honest individual from punctually discharging his obligations; and the Legislatures of some of the States, more attentive to afford immediate and temporary relief, than a more remote and lasting one, by a sacred regard for good faith, and the consequent preservation of credit, passed laws, meliorating the condition of debtors to the great *injury* and *ruin* of creditors. In one State, an emission of paper money, for the redemption of which, no day was fixed, nor any fund provided, was made a legal tender. In other words, an obligation to pay gold and silver, was impaired by being reduced to an obligation to pay irredeemable paper. Elsewhere a similar obligation was impaired by being reduced to an obligation to deliver a tract

of pine barren land, or an instalment law was passed, and an obligation to pay to-day was impaired by being reduced to an obligation to pay at several periods at the distance of intervening years—Such was the *old law.* The consequent diminution of the fortunes of several individuals, the total ruin of others, and the indispensable concomitant, the destruction of credit, produced a stagnation of business, which considerably affected public and private property—Such was the mischief.

The federal compact provided, that the Legislature of no State should retain the power of making any thing but gold and silver a tender in the discharge of debts, in order to avert in future the mischiefs resulting from laws impairing the obligation of a contract to pay gold and silver by reducing it to an obligation to pay *paper, pine barren lands*, or indeed, any thing, but gold and silver. Yet the remedy was not commensurate with the evil; the healing process was therefore continued, in order to prevent the passage of laws impairing the obligation of a contract to pay on a distant day or days—or indeed any attempt at a legislative interference between parties to a contract, by favoring either party, to the injury of the other; and it was provided, that no State should pass any law impairing the obligation of contracts—if the restriction from making any thing but gold and silver a tender in the payment of debts, had not preceded that from passing any laws impairing the obligation of contracts, there might be some, though very little ground to say that the latter clause would have been satisfied by restraining the passage of laws authorising the payment of one thing instead of another.

I therefore find no difficulty in concluding that an act of a State Legislature, the obvious object of which is to relieve debtors by postponing the recovery, and consequently the payment of debts, *impairs* the obligation of contracts, and, as such, is unconstitutional; and the court is bound to dis-

regard it, whatever may be the hard necessity which, in the opinion of those who exercise the legislative powers of the State, appeared to require that they should come to the aid of their suffering fellow-citizens. *Fiat justitia, ruat Cœlum.*

The people of the United States, assembled in federal convention, have decreed, that no State Legislature should exercise the right of thus stepping in between the parties to a contract, and the Judges are bound by their oath of office to prevent the violation of the constitutional injunction.

It does not, however, necessarily follow, that an act called for by other circumstances, than the apparent necessity of relieving debtors, one of the consequences of which is nevertheless to work some delay in the prosecution of suits, and consequently to retard the recovery and payment of debts, must always be declared unconstitutional.

In making a contract, each party must know that his legal remedy must depend on the laws of the country in which he may institute his suit. That the *lex loci* as to his remedy, even in the States that compose the federal union, is susceptible of *juridical improvement;* that the number of courts of original and appellate jurisdiction, the nature and extent of the respective jurisdiction of these, the number, time and duration of their sessions must, from time to time, especially in new and growing settlements, be regulated by the Legislature according to the wants and exigencies of the country.

If, for example, the sessions of the district courts, which, in Louisiana, are now held in each parish three times a year, were found too frequent, too inconvenient to jurors, witnesses and suitors, and too expensive to the State, no one can say that the Legislature could not enact that the session of these tribunals should be semi-annual only.

In most of the parish courts of this State, the trial by jury is not in use—Should the people of these parishes solicit the

introduction of a jury in these courts, would the constitution be violated by this improvement in our judicial system? In Pennsylvania and Louisiana, courts of equity, as contradistinguished from courts of law, are unknown. Should the people of these States, noticing the advantages resulting from the division of law and equity proceedings, in the neighboring States, see fit to try the experiment, is there aught in the constitution of the United States that forbids their representatives in General Assembly to accede to their wishes? Yet, semi-annual sessions of our district courts, the introduction of the trial by jury, and the institution of courts of equity, must lengthen the period between the inception of many a suit and its final determination, and, consequently, delay some plaintiffs. But as the laws introducing such alterations in the judicial system, would be productive of advantages in which both parties to the contract might occasionally participate, they would not, it is presumed, be considered as *impairing* the obligation of contracts.

Again—in time of war, domestic commotion or epidemy, circumstances may imperiously demand, for a while, even a total suspension of judicial proceedings. A suspension which, in many cases, may be peculiarly beneficial to a plaintiff who might be nonsuited if the court in which he may have instituted his suit were to proceed while his duty, and that of his agents and the interest of the State, called him to a distant part of the country. It would be dangerous in such times, and often impossible, to insist on the regular attendance of the officers of the court, of jurors, witnesses and parties. No one would, in such cases, doubt the ability, nay, the obligation, of the court, to adjourn to the probable period of returning tranquillity. Can it be said that the interposition of the Legislature, if it happened to be in session, declaring the necessity of such an adjournment, and with a view to that order and regularity, which uniformity produces, fixing a day on which juridical business will be resumed

throughout the State, would be an act *impairing* the obligation of contracts.

Even if that day was fixed by half a dozen of weeks beyond that on which any of the courts of the State might conceive they might safely re-enter on the execution of their duties, would not such a court recognize some advantage in their forbearance from pressing business to the injury of such suitors, who, entertaining a different opinion, and having no previous knowledge of the determination of the court, might stay aloof, in the fair persuasion that the unhappy period was not yet arrived?

I presume that in any time, obnoxious to the due administration of justice, it is the duty, and within the power of the Legislature, to pass laws to avert or diminish the consequences of the general calamity; and a law called for by such circumstances, and fairly intended to meet the exigency of the day, could not be properly classed among those which impair the obligation of contracts, though one of its consequences would be some delay in the recovery of debts.

Testing, therefore, the section under consideration by the principles which I have thus endeavored to lay down, I find it stated in the preamble that "the present crisis will oblige a great number of citizens to take up arms in defence of the State, and compel them to leave their private affairs in a state of abandonment, which may expose them to great distress, if the Legislature should not, by measures adopted to the circumstances, come to their relief." The 3d section next provides, that "no civil suit or action shall be commenced or prosecuted before any court of record, or any tribunal of the state till the first of May next."

In fact, at the time the act was approved the enemy was fast approaching, and five days after made his appearance within five miles of the city of New Orleans. Shortly after, the whole militia of the State was called *en masse* into ser-

vice, and they were not discharged till the middle of March. During the most of this period the fate of the contest was doubtful.

It was, therefore, advantageous to all parties, that the administration of justice should be confined to cautionary steps—which were not suspended. This was beneficial to all parties. Plaintiffs were relieved from attendance upon the courts, and the same indulgence was granted to defendants.

The object of this section of the act was therefore to prevent the ill administration of justice which must have been the consequence of keeping the courts open, while the presence of the enemy disallowed any other attempt but that of expelling him. Another object was to facilitate to every member and officer of the court, and to every individual in the community, the means of rendering himself as useful as he could in repelling the invading foe. From the moment the danger subsided, I mean from the discharge of the militia then called out *en masse*, about six weeks will elapse, a time barely sufficient for the return home of our fellow-citizens who dwell at the greatest distance from the spot which has been the theatre of the war. Violent diseases of the political, as well as of the natural body, are followed by a convalescence, during which, even ordinary exertions may be hurtful. It does not appear to me that the suspension was for a longer time than the courts themselves would have taken, if they had been left to the exercise of their own discretion, unaided by a legislative provision. I am not, therefore, prepared to say that the interference of the Legislature was any thing else than the exercise of legitimate authority. The suspension of civil proceedings under some authority or other, for a short time, was a measure imperiously called for: it has been beneficial to plaintiffs as well as to defendants in several cases, and although it may create a little delay in the collection of debts, I do not find myself led by duty or inclination

to consider the act as impairing the obligation of contracts, and I think it the duty of the court to comply with the object, by enforcing the law.

JUDGE DUVAL's CHARGE

In the case of Commodore Murray vs. M'Lane, Collector of the port of Wilmington, Delaware.

The declaration in this case is drawn with great care, and exhibits a full statement of the plaintiff's case. It contains two counts. The first count charges the defendant with having falsely, maliciously, or without cause, instituted a suit against the plaintiff, demanding heavy bail, whereby he was arrested and imprisoned. The second count charges, that the suit was instituted maliciously and without cause, and that excessive bail to the amount of 1,200,000 dollars was demanded *in a case where he had no right to demand bail*, in consequence of which he was arrested and imprisoned.

This action, in its nature, is peculiar and delicate. Formerly, it was used as a remedy for malicious prosecutions only. It was, afterwards, adopted as a remedy where a civil suit had been maliciously and without cause instituted against the party.

The court has been applied to by the counsel for the defendant to instruct the jury upon the law arising in the case.

The jury must have observed that the counsel engaged in this cause, have not materially differed as to the proof which the plaintiff must necessarily produce in order to sustain his case: *That the original suit was instituted maliciously, and without reasonable or probable cause.*

The court consider the law upon this subject as settled. This species of action is not favored in law. It is incumbent

on the plaintiff to prove that the suit, by the defendant, was instituted with malice, express or implied, and without probable cause. Without probable cause, malice may be implied according to the circumstances of the case: but from the most express malice, want of probable cause cannot be implied. Hence, to sustain this suit, the plaintiff must prove malice express or implied, that there was a writ without probable cause.

Whether malice existed or not, is a matter of fact for the jury to decide, taking into consideration all the circumstances of the case.

The question of probable cause, is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable, or not probable, are true, and existed, is a matter of fact; but whether supposing them true, they amount to a probable cause is a question of law to be decided by the court.

Whether the bail required in this case was excessive or not, depended, in a great measure, upon the law of the State of Delaware, and the practice of the courts under those laws. In Maryland, in an action of this kind, no man could be held to bail for the trifling sum of fifty dollars without an affidavit. In Delaware, I understand the practice is proved to be different, and that a man may be required, without affidavit, to give bail to any amount, according to the value of the thing in contest, in the first instance. He may afterwards be exonerated on application to a Judge or Justice for a rule on the plaintiff to shew cause why he may not be discharged on common bail; and it also appears that the practice is, to require bail in double the amount of the value of the ship in dispute. In the case under consideration, it does not appear to the court that 1,200,000 dollars was more than double the value of the Superior and her cargo.

The question of probable cause has been considered as involving the legality or illegality of the seizure, and possession of the Superior by the plaintiff—and by the defendant. Here it is necessary to recapitulate the evidence in the case. The principle facts appear to be these: On the 24th of August, 1812, Joseph Grubb wrote a letter to the Collector, informing him that the Superior was in the bay of Delaware, having on board a cargo of goods of the growth, produce and manufacture of Great-Britain, and he states that he gave this information in order that he may receive the proportion of any penalty or forfeiture to which he might be entitled by reason of his giving this information. That Thomas Little boarded the Superior near the Capes of Delaware, by instruction from the principal owners and consignees, and obtained a copy of the manifest to be given to the Collector.

That on the 25th of August one of the Gun Boats and the Revenue Cutter, were proceeding down the bay, the Gun Boat being ahead, at 7 o'clock in the morning the Superior was boarded near Reedy Island, by —— Smith, an officer of the Gun Boat, pursuant to the orders of Commodore Murray, commander of the flotilla, then lying in Delaware Bay, by whom she was ordered to Newcastle. About 11 o'clock of the same day she was boarded by Captain Sawyer of the Revenue Cutter, who demanded the ship's papers, and they were delivered to him by the master of the vessel. She was ordered by Capt. Sawyer to the mouth of Christiana Creek. A contest arose between the officer of the Gun Boat and the officer of the Revenue Cutter, as to the destination of the vessel, and both remaining on board she ascended up the river to Newcastle where the flotilla was stationed. Previous to her arrival off Newcastle, Samuel Spackman, the owner, declared his intention to the Collector to order the Superior to Wilmington, and the Collector advised the surveyor at Newcastle, and the Captain of the Cutter, of this circumstance. At Newcastle, orders were given that she should be fastened to the pier, but this was prevented by an

officer of the flotilla, who, aided by a number of his men, who were armed, forcibly carried her up the river to Philadelphia, the officer of the Revenue Cutter continuing on board. In this place it may not be improper to remark, that the force used was in the absence of Comm. Murray. If he had been present, in all probability it would not have taken place — Under these circumstances, the Collector, consulting the District Attorney, was advised to take out a writ of replevin to recover the possession of the vessel, but as she had been carried out of the District the writ could not be served. The Attorney then, in the absence of the Collector, ordered an action on the case, and directed the writ to be endorsed per bail, to the amount of 1,200,000 dollars, double the supposed amount of the vessel and cargo. The writ was served on Commodore Murray, and for want of bail, he was committed to gaol by the Marshal. This proceeding is the ground of the present action.

It is made by law the duty of the Collector of the Revenue to board, or cause to be boarded, all vessels arriving from foreign parts, within the limits of the United States, or within four leagues of the coast, if bound to the United States, for the purposes specified in the law, and it is the duty of the person on board to remain there until the vessel shall arrive at the port or place of destination.

Before the war a collision of this sort could not have happened. The authority of the Collector was complete and exclusive. How far the existence of war authorised the commander of the armed vessels of the United States to capture merchant vessels, belonging to citizens, which had arrived within the waters and jurisdiction of the United States, for a supposed violation of the non-importation act, is a question on which the opinion of the court is required.

The only question of difficulty is, whether the boarding by the officer of the Gun Boat, in the manner pursued, amounts

to a capture as prize of war, exclusive of the boarding by the Revenue officer, who demanded and obtained the ship's papers. No authorities having been cited on either side, we must decide the case as it is now before us.

There is no legal restraint on the officers of the navy to prevent them boarding a merchant vessel belonging to a citizen in the waters of the United States. Boarding for the purpose of examination is a legal act. Under the circumstances which have been stated, the court is of opinion, that after the Superior was boarded by the commander of the Revenue Cutter, who obtained possession of the ship's papers, he was, in construction of the law, in possession of the vessel, and that she ought to have been delivered up by the officer of the flotilla; and that the carrying her out of the District by force was wrongful on the part of that officer, acting under the authority, as he conceived, of Commodore Murray.

It has been contended on the part of the plaintiff, and authorities have been produced to prove, that in time of war, all trading with the enemy is unlawful, and that the goods of an ally or even of a citizen found trading with an enemy are lawful prizes of war, and confiscable as such. There can be no doubt that the law is so. If the Superior had been captured on the high seas trading with the enemy, or in violation of the laws of the United States, the vessel and cargo without doubt would have been prize of war. Such, I conceive, was the case of the Sally, condemned by the decision of the United States. I do not recollect particularly the facts in that case, but I have no doubt she was captured on the high seas, because she was captured by a private armed vessel whose right to capture is confined to the high seas.—The case of the Nelly referred to in the opinion, was a capture on the high seas. The reference, in the opinion, to the fourth, sixth and fourteenth sections of the act of June 26, 1812, seems to imply a capture at sea. The words of the

sixth section are, "And in the case of all captured vessels, goods and effects which *shall be brought within the jurisdiction of the United States*, the District Courts of the United States shall have exclusive cognizance thereof, as in civil causes of admiralty and maritime jurisdiction," &c.

In the case of the Sally it was contended by the Attorney General, on the part of the United States, that as soon as she had on board her cargo with intent that the same should be landed in the United States, they became forfeited, and that the forfeiture was complete and immediately attached, but the court was of a different opinion, and that she was lawful prize; there was no interesting claim in that case on the part of the Revenue officer.

Seizures of vessels within the waters of the United States, for violation of the non-intercourse act, are considered as properly belonging to the Revenue officers. This appears by the instructions of the Executive Department, to have been the opinion of the government: and although the instructions were not received in time by Comm. Murray to prevent this contest, yet this clearly shews the construction put upon the law by the Navy Department.

After seizure by the Collector, the vessel and cargo are considered to be at the risk, and in case of loss by the neglect or omission of the Collector, he is responsible to the owner. Hence the court is of opinion, that, admitting the facts to be truly stated, there was probable causes for the suit, which was the ground of this action. It would be rigorous in the extreme, to say that there was not probable cause for the original suit when the Attorney for the District, whom the Collector was bound to consult, advised and directed the measure. And if it be admitted that the District Attorney was mistaken, it cannot alter the case as it respects probable cause, because if the case was of so doubtful a nature as that eminent counsel was mistaken, it affords a strong presumption that there was probable cause.

The court are therefore of opinion, that there was a probable cause of action, and to the jury the case is now submitted.

After such a decided charge, the jury retired for about ten minutes, when they returned with a verdict in favor of the defendant, Col. M'Lean.

JUDGE TOULMIN's OPINION,

In the case of the United States v. *Sch. Active and Cargo, in the Court of Admiralty of Mississippi Territory, on the question, whether the army acquires a right to property captured in war.*

This is the case of a vessel and cargo, belonging to the enemy, taken in sight of the fort at Mobile Point, by the troops stationed at that place under the command of Maj. William Lawrence. It appears from the testimony of two of the persons who boarded the vessel, that a boat with six men was sent out by the commanding officer to examine a vessel, which, on approaching, they found to be British: that after being fired upon by the fort, she was boarded and taken without opposition, at the distance of about a mile, or perhaps more, as one of them says—or about two miles, as the other thinks: that she was under British colors—that the persons on board acknowledged themselves to be British subjects, and said they were detached from the Sea Horse to bring the schr. Active and cargo (consisting of flour captured at Alexandria) to Pensacola; and that the crew, consisting of six men, were armed with muskets, cutlasses and pistols. The log-book shews her to be British. The libel prays the condemnation of the vessel and cargo as good and lawful prize to the United States. A plea, however, is filed by Lewis Judson (in the character of consignee and agent for the captors) to the jurisdiction of the court, on the ground

that as this court has jurisdiction only in cases in which the United States are parties, it cannot legally entertain a suit in which the private captors (as it is alleged) are the only parties who have a right to claim the captured property. The said plea farther alleges that the "schooner Active and cargo were captured by Wm. Lawrence and others, on the high seas, and not in the enemy's forts, camps, or barracks, and, therefore, by the usages of the law of nations, and the laws of war, as enemy's property, became forfeited to the said private captors."

No question has been made as to the *regularity** of the plea, nor as to the legitimacy of the conclusion, that the government is in no sense to be regarded as a party, if the proceeds of a capture are suffered to go to the troops engaged in making the capture; but the whole has been liberally left by the Attorney† prosecuting on behalf of the United States, to depend on the simple question whether the troops of the United States thus making a prize, are entitled by law to the benefit of it? The general belief that they are so entitled, the want of a knowledge of correspondent cases, and the little attention which, in this part of the country, we have had occasion to give to enquiries of this nature, have apparently created doubts even in the mind of the Attorney acting for the United States, and have rendered both parties desirous that the question should be judicially settled. The most satisfactory mode, probably, of coming to a conclusion on this subject, will be to have recourse to general principles.

"1. What is war? It is a contest (says Bynkershock) carried on between independent persons for the sake of asserting their rights." Where society does not exist—where

* See Bee's Reports, p. 9.

† Mr. Haines.

there is no such institution as that which we call *government*, there individuals, being strictly independent persons, may carry on war against each other. But whenever men are formed into a social body, war cannot exist between individuals. The use of force among them is not war, but a trespass, cognizable by the municipal law. (Bink. on the law of war, p. 128.) If war then be the act of the nation, whatever is done in the prosecution of it, must either expressly or impliedly be under the national authority. Whatever private benefits result from it, must be from a national grant. "War (says Vattel, p. 268) is that state in which a *nation* prosecutes its right by force." The right of making war belongs alone to the sovereign power. Individuals cannot control the operations of war, nor commit any hostility (except in self-defence) without the sovereign's order. "The generals (adds that writer) the officers, the soldiers, the partizans, and those who fit out private ships of war, having all commissions from the sovereign, make war by virtue of a particular order; and the necessity of a particular order is so thoroughly established, that even after a declaration of war between two nations, if the peasants themselves commit any hostilities, the enemy instead of sparing them, hangs them up as so many robbers or banditti. This is the case with private ships of war. It is only in virtue of a commission granted by the sovereign or his admiralty, that they are entitled to be treated like prisoners taken in a formal war." *Vattel, p.* 365, '6. If, then, on the general principles of civil society, the whole operations of war depend upon the will and authority of the government, surely the appropriation and distribution of the property acquired in consequence of those operations, must equally be subject to the control of the government, and depend on those regulations which it may establish.

2. What indeed is *the object* of war? Is it to aggrandize individuals, or is it to maintain the rights of the nation? "The just and lawful scope of every war (observes Vattel,

p. 280) is to revenge or prevent injury. If to accomplish this object, it be expedient to encourage individual warfare, by granting all the profits arising from it to the parties engaged, the nation has a right to promise this encouragement; but until this encouragement be actually offered, it must follow that every thing which is acquired by individuals, whether acting as private persons or as part of the public force, must belong to the nation under whose authority they act."

3. What rights are acquired by a state of war? "A nation (says Bynkershoek, p. 4) who has injured another, is considered, with every thing that belongs to it, as being confiscated to the nation which receives the injury." The rights accruing, therefore, are national altogether. They are not individual rights. The case seems analogous to that of the internal administration of justice. A civil society—a nation—has the right of punishing those who are guilty of violating the public laws. Though the guilty be members of their own community, they may forfeit their property or their lives. But the right of the body politic does not attach itself to the individual members of it. The nation, indeed, *might* authorise individuals to take the lives or the property of known offenders—but without an authority delegated by the nation, individuals have no such right. A right in private persons to avenge violations of the law does not follow as a natural consequence from the circumstance of their being members of the great political body. On the contrary, the very same act which would be retributive justice when emanating from the sovereign power, would become murder or robbery in the individual. Why should it be otherwise, as it regards our intercourse with other nations? Why should a nation be less jealous of its rights with regard to hostile nations than with regard to hostile individuals—why less jealous when they are encroached upon on a large scale, than when they are encroached upon on a scale truly small and insignificant? And even admitting, that in the one case the public authority permits an individual to execute the

sentence of the law, and in the other to attack and vanquish the public enemy; it will not follow that in either case the property of the enemy is to become the property of the individual by whom the national will is carried into execution. This, it should seem, must depend on express stipulations made in behalf of the nation. Agreeably to these principles, the celebrated M. De Vattel, after observing that a nation has a right to deprive the enemy of his possessions and goods, of every thing which may augment his forces and enable him to make war, goes on to remark, that *booty* or the moveable property of the enemy taken in war, belongs to the sovereign making war, no less than his towns and lands: for he alone—*(the sovereign authority)*—has such claims against the enemy, as warrant him to seize on his goods, and appropriate them to himself. His soldiers (he adds) are only instruments in his hand, for asserting his right. He maintains and forms them. Whatever they do, is in his name and for him. *Vattel* 335. These principles are equally applicable to every form of government. It is perfectly immaterial with whom the sovereign authority resides. With whomsoever it resides, its power is erected on the doctrine of its being the legitimate representative of the nation—and the rights of the nation are not surely to be considered as being less, under a republican, than under a monarchical form of government.

The nation, however, as I have observed before, may give a bounty to individual captors—may relinquish a part of its rights to those who fight under its banners. Agreeably to this, the same writer goes on to observe that "the sovereign may grant to the troops what share of the booty he pleases. At present most nations allow whatever they can make on certain occasions, *when the General allows of plundering* what they find on enemies fallen in battle; the pillage of a camp when it has been forced, and sometimes that of a town taken by assault." The cases here enumerated, seem to be those where either the object was too trifling to become a matter

of national attention, or, where the services previously rendered by the troops, called for a degree of vigor and exertion which would merit extraordinary encouragement. The whole, however, is made to depend on the *will of the nation*, expressed through their commanding General. The soldier (he adds) in several services has also the property of what he can take from the enemy's troops, when he is on a party, or in a detachment, excepting artillery, military stores, magazines, and convoys of provisions or forage, which are applied to the wants and use of the army." He then goes on to observe, that when even this custom is introduced into an army, the same right should be allowed to auxiliaries as to the national troops: but proceeds to inform us, that among the Romans the whole booty was carried to the public stock, and sold under the direction of the General, who then gave a part of the proceeds to the soldiers, and remitted the rest to the public treasury. *Vattel* 335, '6. It is evident from the whole strain of this passage, that the author is not attempting to lay down general principles by which nations are *to be governed* in the disposition of property taken from an enemy; but, is merely describing the *practice* of different nations. *In several services*, says he, that is, in the service of several governments, the soldier has, on certain occasions, the property he takes from the enemy; but it was otherwise, he adds, among the Romans.

I have been more particular in stating the principles laid down by writers on the law of nations (or the dictates of justice and common sense, as applied to national intercourse) because the attorney for the claimant, whilst acknowledging that the laws of the United States are silent on the present case, places a great reliance on the injunctions of national law. It is contended that the law of nations gives the booty in this case to the captors, and the principal authority appealed to, is that passage in Vattel, which I have just quoted, where, as I conceive, he is simply narrating the usages of

some governments, and not laying down principles which are *binding* upon all.

What, indeed, is the law of nations? It is that rule of conduct which regulates the intercourse of nations with one another; or, in the words of the author last cited, "the law of nations is the science of the law subsisting between nations or states, and of the obligations that flow from it." *Vattel* 49. It is a law for the government of national communities as to their mutual relations, and not for the government of individuals, of those communities, in their relation towards one another—nor can it controul the conduct of nations towards their own citizens, except in cases involving the rights of other nations. Property once transferred by capture, must be subject to the laws of the nation by which the capture is made. The question whether it shall be public or private property must depend on the regulations adopted by the nation making the capture, and cannot naturally be regarded as subject to the controul of a system of laws which has respect to the rights and duties of nations towards one another. What our author states, as to the practice of nations towards their citizens, is not, truly speaking, a delineation of the laws of nations. The conduct of nations towards their own citizens, must depend on their own municipal regulations. It is by the laws of nations that we must determine the circumstances, under which prizes may be taken; but what is to become of them when taken under the sanction of that law, cannot depend upon the law of nations, but must depend upon the will of the nation by which the capture is made. Individuals of the capturing nation can have no right independent of the nation to which they belong. It is by a reliance on the authority of their nation, that they shelter themselves from the charge of robbery or piracy. The sovereign, however, may distribute the booty as he pleases. He may do it by a general law, or by special regulations, issued by his Generals, subject to the emergency of the case; provided the form of government admits of

such a delegation of authority. Even the property acquired by privateers, depends on stipulations made with the supreme power of the country to which they belong. "Persons (says Vattel, p 367) fitting out ships to cruise on the enemy, in recompence of their disbursements and the risk they run, acquire the property of the capture: but they acquire it, *by grants from the sovereign who issues out commissions to them.* The sovereign either gives up to them the whole capture or a part—this depends on the contract made between them." As to those who, without any authority from their sovereign, commit depredations by sea or land, they are regarded as *pirates* and *plunderers*, and things taken by them do not thereby undergo a change of property.—*Bynkershoek, p.* 127. The discussion, therefore, entered into by Bynkershoek, in his 20th chapter, respecting the captures made by vessels not commissioned, for the purpose of determining whether they should belong to the owner of the ship, to mariners, or to the shipper, (and on which a good deal of stress has been laid in argument) has really but little or nothing to do with the present case. That writer, having previously laid down the established doctrine about robbery and piracy, proposes, in his 20th chapter, to examine to whom a prize would belong which was taken by a non-commissioned vessel, *attacked by the enemy*, and in her own defence, seeing the enemy's vessel making the attack. He seems to take it for granted, that the government would put in no claim under such circumstances; and *under this supposition*, is merely canvassing the respective claims of the sailors, the shipper, and the owner. He afterwards states an objection, which may be raised against him, in the following words:

"It will be said, perhaps, that I am wasting words on an idle and useless question, as it is unlawful to make captures without a commission from the States General, or the Admiral; and so far from the one who takes a prize, without such a commission, being entitled to it, he is rather to be considered as a pirate, agreeably to the principles which I

have above contended for"–*page* 161. He then quotes Grotius, to shew that a prize *taken under circumstances of necessity*, belongs to those who take it.

The doctrine, therefore, which he contends for, has relation simply to the case of a mercantile vessel, which *being attacked* at sea by the enemy, successfully resists the attack and makes a prize of the adverse party. It has clearly no relation to the case now before the court. His reasonings have in general a reference to the laws of the States General of the United Provinces—and the learned translator, in a note upon this chapter, seems to state the discussion of the author as founded on the *supposition* merely, that any persons, *other than the sovereign of the captor*, may be considered as entitled to the prize.–*Page* 156. Again, in a note at the end of the chapter, he observes: "In France and Great-Britain, prizes taken by non-commissioned vessels, belong to the Lord High Admiral, as a *droit* of his office. No distinction is made whether the captor did or did not make the capture in his own defence, or from some other justifiable motive. But as in Great-Britain the office of High Admiral is vested in the King, and has for a long time been executed by commission, suitable rewards are given, *at the discretion of the government*, in meritorious cases." *Page* 162.

The English law, on this subject, seems to be pretty clearly laid down in the course of argument on the case of Lord Camden against Home and others—and I do not observe any thing in the decision of the court to impeach its accuracy. "Whatever is taken by any of the King's subjects from an enemy, in the course of naval operations, appertains to the King, either as a *jure coronæ*, or as a *droit* of Admiralty, according to the circumstances. If taken by a private ship, without any commission from the King, the prize belongs to him as a *droit* of Admiralty. If such a ship had a commission, only one-tenth of the prize belongs to the King as

a *droit* of admiralty, and the rest is the property of the owner of the privateer. But where the capture is made by the King's ships or forces, the property is vested in the King's *jure coronæ;* and in such cases it is judged by the admiralty *lawful prize to the King*. But that adjudication by no means imports the capture to have been made by the King's *ships* exclusively—for if it were made by his *forces*, the adjudication would be the same. Now there are three sorts of joint captures—one by the King's ship and privateer, with letters of *marque*—the distribution whereof is made, according to the number of persons on board the several ships—the King's share being adjudged to him in the *jure coronæ*. The second instance is of a capture by the King's ship and a *non-commissioned* privateer. There the King is entitled to the whole:—to the privateer's part thereof, as a *droit* of admiralty, and the other in *jure coronæ* according to the same mode of distribution. The third is the instance in question, of a capture by the King's army and navy conjointly; and there the whole rests in him *jure coronæ*." 4 *Term. Rep.* 387.

Agreeably to this statement, we find that Sir Wm. Scott granted a monition against the master and owner of a privateer not commisioned against the Dutch, to bring in the proceeds of a Dutch prize. The party appearing acknowledged that he had no commission, but prayed to be admitted as a joint captor. The court did not even suffer the case to be argued, but observed:—"The person admits that he had no commission. It is therefore impossible for him to contend for a legal interest in joint capture. If he thinks he has any equitable claims, arising from any services he has performed, they may be represented to the admiralty.

"The former proceedings (of condemnation at Jamaica) on the part of the non commissioned captor, are mere nullities; and the property must be proceeded against as droits of admiralty."—4 *Robin. R p. p.* 59. The case of the Re-

becca, which was a question of interest in the capture of a vessel made by naval officers from the island of St. Marinou, a naval station, used for the temporary accommodation of the crews of ships of war, gave occasion to remarks from Sir William Scott very applicable to the case now before me. "I accede, says he, entirely to what has been laid down, that a capture at sea, made by a force upon land, (which is a case certainly possible though not frequent) is considered generally as a non-commissioned capture, and inures to the benefit of the Lord High Admiral.

"Thus, if a ship of the enemy was compelled to strike by a firing from the castle of Dover, or other garrisoned fortress upon the land, that ship would be a *droit of admiralty*, and the garrison must be content to take a *reward from the bounty of the admiralty*, and *not a prize interest*, under the King's proclamation. All title to sea-prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority; and a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, and authorising them to take, upon that element, for their own benefit. I likewise think, cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet entitle the admiralty and not themselves, to a capture made upon the sea, by the use of a force stationed upon the land. Suppose the crew, or part of the crew, of a man of war, were landed, and descried a ship of the enemy at sea, and that they took possession of any battery, or fort upon the shore, and by means thereof, compelled such ship to strike:—I have no doubt that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally, and without any right under their commission, would be a droit of admiralty and nothing more." 1 *Robin. Rep. p.* 197.

Another case in which the right of a party not commissioned for the purpose, to share in a prize, came into view, was that of the Providence, a commissioned vessel, and the Spitfire, a vessel not commissioned, against the Dutch, and who jointly took a Dutch ship.

The Judge of the high court of admiralty, gave to the Spitfire half the share she would have been entitled to, if she had been commissioned—but the Lords of Appeal pronounced the whole share of the Spitfire liable to confiscation, as a droit or perquisite of admiralty. And yet in this case the Spitfire had not only applied for *letters of marque*, but had obtained a warrant for them to the Judge of the Admiralty, who, on account of the pressure of business, did not issue them till the day after the capture.—2 *Rob.* 235—*note.*

An English act of Parliament provides, "that in all conjunct expeditions of the navy and army against any fortress upon the land, directed by instructions from his Majesty, the flag and general officers and commanders, and other officers, seamen, marines and soldiers, shall have such proportionate interest and property, as his Majesty, under his sign manual, shall think fit to order and direct."—2 *Rob.* 237.

The prize act of the 21st George III. gives to the officers, seamen, and *soldiers* &c. *on board* every ship and vessel of war in the King's pay, the sole interest in prizes taken by them.—4 *Term. Rep.* 391. It should seem as if their courts adhered pretty strictly to the words of their laws in adjudging to whom captured property belongs, and took care to give it to the crown, where there is any doubt about the right of individuals. Thus, in the case of the ships taken at Genoa, which were given up, on the payment of 17,000 pounds by the owners, Sir William Scott said—"I am not aware that the prize act authorises me to condemn *to the captors*, in such a case as the present. The act gives them *ships, goods*, &c. *afloat*. This is a sum of money, which is not exactly of that description of things."

On this account, and another which he mentions, he made the condemnation pass to the crown.—4 *Rob.* 329.

In the course of argument, in the case before me, the counsel for the military force at Mobile Point, laid some stress on the observations of Sir William Scott in the case of the Dordrecht, which was a case of joint capture between the army and navy, and where the Judge seemed to admit that there might be grounds for making the condemnation partly to the benefit of the army, although the case did not come within the provisions of the act of Parliament, which directed the army to share, in some cases, in conjunction with the fleet. It has from hence been concluded, that a condemnation might have been made to the army under the law of nations. It is possible, however, that there are other British statutes, besides the 33d of George III. (the statute there referred to) under which the army preferred its claim. It may have been built on some royal proclamation: but that it *could not have been* founded on the law of nations, or on any general principles growing out of a system of national law, must surely be sufficiently apparent from the observations and authorities which have already been brought into view.

But the main stress seems to be laid on the consideration that the duty of the army is to fight on the land—that our troops are employed for that especial purpose—that land forces are not required to fit out boats and go to sea, and that fortune having thrown this prize in their way, it ought, on the principles of national law, to be condemned to their benefit. The view, however, which has been already taken of the law of nations, and the objects to which it can apply, seems to take off the weight of this argument. And how much soever one may regret that the gratification is not within the reach of this court to be the medium of awarding a prize to the gallant defenders of Fort Bowyer; it is its duty not to interfere with the prerogatives of the legislative or

executive branches of the government; and it must not be disguised, that if the troops at the fort were not, as it seems to be alleged, under any obligation of noticing the approach of an enemy, unless it were made on *terra firma*; if every thing done to obstruct or capture the enemy on the sea, were merely gratuitous, and beyond the line of their duty, (a doctrine which those gallant men themselves most certainly never would advance,) then their conduct in so transgressing their line of duty, would rather stand in need of apology than of reward. "Soldiers (says Vattel, p. 367) can undertake nothing without order, either express or tacit, of their officers. Obedience and execution are their province. They are not to act from their own opinions. They are only instruments in the hands of their commanders. Let it be remembered here, that by a tacit order, I mean the substance of what is included in an express order or in the functions committed to us by a superior; and what is said of soldiers must also be understood of officers, and of all who have any subaltern command: Thus, with respect to things, the care of which is not committed to them; they may both be compared to mere private persons, who are to undertake nothing without order. The obligation of the military is still more strict, as the laws of war forbid, expressly, acting without order; and this discipline is so necessary, that it scarcely leaves any thing to presumption."

"To fight without command, is almost always considered in a soldier as fighting against command, or against the prohibition."

For my own part, I do not believe that our valiant solders, who, but a short time before, so much distinguished themselves at Fort Bowyer, would be considered, with regard to this vessel, as fighting without command. A fort so situated, on a narrow, barren point of land, unconnected with any settlement of moment, but commanding the entrance by water into an extensive and valuable country, must, from

the very nature of it, be considered as intended to prevent the ingress of enemy's vessels; and it became the duty of the garrison stationed there, to guard the pass and to lay hold of every thing belonging to the enemy, whether the object could be accomplished by means of the guns at the fort, or by means of boats or other vessels attached to it.

The only question then, which remains to be considered, is, have the laws of the United States given to the military any share in prizes taken by troops so circumstanced? It may be desirable that they had done so. But this ground seems to be abandoned by the counsel for the army. A kind of negative argument has indeed been raised on the 58th article of the Rules and Articles of War. It is said that this article confirms to the United States property taken in *camps, &c. but not at sea.* The words of the article in question are, that "all public stores taken in the enemy's camp, towns, forts, or magazines, whether of artillery, clothing, forage, or provisions, shall be secured for the service of the United States; for the neglect of which the commanding officer is to be accountable." Hence it is concluded, that if they be not public stores, or be not taken in the enemy's camp, towns, forts, or magazines, they are not to be appropriated to the government, but belong to the captors.

The object of this article is clearly not to ascertain any thing about the right of property, but merely to provide for the safe keeping of public stores belonging to the enemy, and to render the commanding officer responsible for any neglect respecting them. Had a prosecution been commenced against the officer commanding at Fort Bowyer, for any inattention to the preservation of the cargo of the schr. Active, this 58th article, possibly (inasmuch as the property in question was not taken in the enemy's camp, towns, forts, or magazes) might not have afforded a legal basis for the prosecution; but no fair deduction from it certainly can ever be carried so far as to shew, that because the property captured

was not expressly required by this article to be secured for the United States, therefore it must be regarded as the private property of the captor.

Whether it be so or not, must depend on established principles, and not on so very strained an implication: and these have already been sufficiently examined.

As to the laws of the United States respecting property captured by the public force, the most material is the act of the 23d April, 1800, for the better government of the Navy.

This act gives to the captors the proceeds of vessels and goods taken on board of them when adjudged good prize. But this act is a law expressly for the government *of the Navy* of the United States—and, indeed, it does not appear to be contended, that it can, by any rules of construction, be extended to the army.

Private commissioned vessels, in like manner, derive their right, to appropriate to themselves the prizes they make, from the "act concerning letters of marque, prizes and prize goods," passed on the 26th day of June, 1812.

This act, after stating the conditions on which authority should be given to our vessels, to capture the vessels and property of the enemy, proceeds to vest the same, when taken under such authority, in the owners, officers and crews of the vessels by which prizes should be made.—*Laws U. S. Vol.* 11, *p.* 240. Had it been the intention of the government, that non-commissioned vessels should be entitled to the proceeds of prizes made, or that any persons in the employ of the United States, and not belonging to the navy or marines, should be entitled to the benefit of all enemy's property taken by them, it would surely have been natural that such intention should have been expressed in these or some other legislative acts. Moreover, indeed, it does not appear what occasion there could be to provide regulations and bonds for

the government and good conduct of vessels applying for commissions to make prizes, if *all vessels* of any description were authorised to take and to appropriate to their own use the property of the enemy, merely because, as it hath been contended, the fortune of war had thrown it in their way.

It has been stated that a case occurred in New-England soon after the war commenced, where a vessel, which had approached near to a fort of the United States, was condemned for the benefit of the troops by whom it was captured: and it is likewise urged that libels have been filed in behalf of military captors in the federal court of the State of Louisiana. As to the former case, it is only stated on a recollection, which I cannot help believing to be, in this instance, somewhat inaccurate; and as to the latter, how much soever it may afford a precedent sufficient to justify a practitioner at the bar in putting in a claim, it can afford no precedent to justify a court in sustaining it. In the whole view of the case, therefore, now before the court, it is adjudged, and decreed, that the plea be overruled, and dismissed, with costs in court, occasioned by the plea, and that the schr. Active and cargo be condemned as good and lawful prize to the United States.

MISCELLANEA.

ON THE CONNECTION BETWEEN THE STUDY OF RELIGION AND THE LAW.

I am now to treat of Religion, and of the claims which it has upon the acknowledgment and support of him, who sustains the character of an advocate in our courts of justice.

The worship of a Supreme Cause and the belief of a future state, have not only, in general, been concomitant, but have so universally engaged the concurrence of mankind, that they who have pretended to teach the contrary, have

been looked upon in every age and state of society as men opposing the pure emotions of our nature. This Supreme Cause, it is true, has been prefigured to the imagination by symbols suited to the darkness and ignorance of unlettered ages; but the great and secret Original has nevertheless been the same in the contemplation of the simplest heathen and the most refined christian.

There must have been something exceedingly powerful in an idea that has made so prodigious a progress in the mind of man. The opinions of men have experienced a thousand changes; kingdoms that have been most powerful have been removed; the form of the earth itself has undergone various alterations; but, amidst these grand and ruinous concussions, religion has remained unshaken; and a principle so consentaneous to the first formation of our nature must remain until, by some power, of which, at present we have no conception, the laws of that nature are universally dissolved.

Powers thus singular must have their foundation in truth; for men may rest in truth, but they never can rest in error. To charm the human mind, and to maintain its monstrous empire, error must, ere this, have chosen innumerable shapes, all, too, wearing, more or less, the semblance of truth. And what is thus true must be also just; and of course, to acknowledge its influences must be the spontaneous and natural effusion of a love of truth; and the love of truth either is really, or is affected to be, the character of those who have dedicated themselves to the study of our laws.

Thus naturally, even upon the first glance, do the characters of the lawyer and the supporter of religion meet; the conclusion must be, that he who affects to doubt of the fundamental truths of religion, much more he who dares to deride them, is dissolving by fraud and violence, a tie which all good men have agreed to hold in respect, and the violation of which must render the violator unworthy the esteem and support of his fellow creatures.

But having thus endeavored to establish the relation between the study of the law and an adherence to religion, let us no longer delay to inquire in what points of view religion comes most powerfully recommended to the notice and veneration of the student.

And we will confine our discussion, which shall be as brief as possible, to two ideas: first, its own intrinsic dignity and purity, considered with respect to a future state, and to its influence over the morals of men; and, secondly, its connection, in a political point of view, with the various conditions of society, and with the laws by which they are regulated. The first, it is true, relates to the advocate merely as a participant with other men in one common rational nature; but it relates also to his individual and abstracted character, and as such, is surely not unworthy of his consideration. The second claims our notice, as intimately connected with that very individual character alone.

It is evidently a false notion that religion is a visionary speculation, unworthy the serious regards of men who are engaged in the pursuits of scientific and philosophical learning. Religion performs that which philosophy, considered as distinct from it, (and which, in such case, I call philosophy only to accommodate myself for a moment to the language of fashion) cannot do; she carries the mind up directly to the Eternal Source of knowledge, while this boasted philosophy, confined to the present limited sphere of action alone, serves only to bewilder the mind in the mazes of doubt and error, which itself has formed. It is ever employed in raising questions that it has neither power nor inclination to solve. Religion enlightens the mind; she enables it to fix to every acquisition of learning and of virtue its proper value, and to discern its appropriate nature; she ennobles it, by the simplicity of truth, that disdains those quibbles and that little war of words that have disgraced the ancient, and that continue, I observe with concern, to de-

grade the modern schools; but this favorite philosophy, which its adherents would fain palm upon the world for a novelty, is continually employed in inventing sophisms that spring up only to be defeated by the common sense, and to be overthrown by the daily experience of mankind.

Consult the works and the lives of them who have embraced religion and rejected this false and foolish philosophy; compare them with the works and with the lives of the men who have labored to destroy the one and establish the other. And here, as to the former, I need only desire you to look into the list of those whose names have dignified our laws; behold the manly openness of their language and their conduct; all is manifest and clear like the light from which they are derived. How different from this dignified nature are the obscure surmises, the dark hints, the querulous doubts of the contrasted character! What is there that is generous or noble in their arguments? Do they tend to discover the truth with simplicity? Do they not rather endeavor to entangle it by the subtlety of disputation, or overpower it by a multitude of words? That which is true is single, and its language goes directly to the understanding and the heart; that which is untrue, but which nevertheless assumes the appearance of truth, must be double, and its language consequently perplexed; it has, indeed, a twofold task to perform; it has to conceal its own secret and genuine character, and to support a borrowed one. Take this idea constantly in your recollection, and you will presently be able to admire the character and the works of the one, and to detect the assumption and designs of the other.

Now if this be true, I would ask you whether you think yourself, as a lawyer, wholly independent of the influences of religion? Do you think it beneath you to receive great and expanded ideas of truth from the same Mighty Source from which those great men have received them, greater than whom we can scarcely hope to behold? Or do you

prefer to such clear and enlarged principles, the petty inventions and indecent quirks of human subtlety? I have before hinted, and I here openly repeat, that no man who delights in the latter of these will ever do honor to any situation in life: but most unequivocally will he disgrace that character that has to do with the explanation and the business of the English laws; and therefore, if contemplation of the dignity and purity of religion will exalt the mind to the plainness and simplicity of truth; if plainness and simplicity be contrary to the finesse and subtlety of the philosophy I have mentioned; it will require no uncommon portion of sagacity to discern, that the advocate is materially interested in the cultivation of the one and the destruction of the other.

It appears to me an ungracious, if not a difficult task, to account for the unwillingness that men of learning discover to the avowal of any religion; though at the same time I am ready and happy to grant that many may affect a reluctance upon this head, which they do not secretly possess; that which is dignified and pure seems to be naturally congenial with the influences of learning and wisdom; religion I have shewn to be dignified and pure; religion, one would think, would be therefore universally accepted and openly acknowledged by those who are alive to the influences of learning and wisdom; but I apprehend the truth to be, that there is in the world a very small number of deeply learned and truly wise men, many who have taken up these characters, being only, in fact, mere smatterers in knowledge.

And here the coincidence between the dignity of religion and the excellency of the character of a lawyer appears in a new light: a smatterer, a mere superficial taster of knowledge, is as incapable of understanding the nature of religion, as he is of becoming a consummate lawyer: great depth of penetration, acumen of remark, and patience of investigation, are equally the characteristics of the one and of the other; and it is doubtless worthy of serious observation, that the

greatest lawyers which have been produced in this country, within the last two centuries, have been men acknowledging, in plain terms, the government of a Supreme Being, and the hope of a future state; men, not seeking to perplex the human mind with uneasy doubts and far fetched sophisms, but laboring to exalt learning and the sciences, by demonstrating their progress from the same Eternal Source from which religion itself has sprung.

Emulous as you are of the honor that will ever attend excellence in every other part of your studies, and of your future purposes, can you see any reason why your emulation should decline in this? If religion, as flowing from the Almighty Spring of truth and justice, be the pure and dignified principle I have asserted it to be, do you think its influences can have the effect to debase and degrade you? Has it debased and degraded the great men to whom I have just alluded? Has it not rather been the very means of their exaltation? And what power, think you, should operate to alter the great law of nature as to cause and effect with regard to you? Be not deceived; be content, nay, be happy that religion presents you with those enlarged and energetic views of the truth that will enable you to rise a superior being in this world and in another.

I have, in some of my former letters, endeavored to impress upon your mind the necessity of attending to the practice of the moral science. Now of this science religion appears to me to be not only the source but the perfection also; it is that which not only leads us to the performance of our duties, but teaches us to understand and define them. It should seem, therefore, that a refined and useful morality is but a consequence of religion; but morality is necessary to the completion of the legal character, and religion is the source or parent of morality.

I insist not here upon the validity of the holy scriptures as containing most clearly the pure dictates of this religion,

because it is beyond my purpose to engage in defence of particular modes or opinions; I shall only observe, therefore, that it appears somewhat unaccountable to me, that men who seem to confess their belief of a natural religion should hesitate to receive the sacred writings, which contain the most beautiful and clear expositions, not only of that belief itself, but of the duties also that spring from it. However, I would have you read them with coolness and impartiality; compare them with other compositions that contain the principles of religion and morality; and if you find in them a language and design of a superior nature and congenial with the unbiassed sentiments of your heart and mind, adopt and retain them; and be not so little of a man as to appear ashamed of that which your solid judgment and natural feelings have engaged you to adopt and retain.

It is the nature of religion to preserve unbroken that secret chain by which men are united, and, as it were, bound together; and as you are interested in common with the rest of your species in its preservation, particularly does it become you, as a professor of those laws which are one of its instruments, to display an anxiety to guard it from violence or contempt. Yet how do you do this, if you are either forging doubts yourself, or listening to them who forge doubts of the existence or authenticity of religion? It is the great aim of those who would overturn the peace and order of mankind to undermine the foundations of religion, by starting doubts and proposing questions, which, being artfully calculated for every turn, are apt to dazzle and confound the common apprehension, like that famous question of the Elean philosopher, Can there be any such thing as motion, since a thing cannot move where it is, nor where it is not? Yet, by questions of an equally foolish and unmanly nature, do many men, of no inferior learning or capacity, suffer their time and their attention to be miserably wasted! But do you not perceive the mischievous tendency of such questions?

Do you not see that, by rendering every principle doubtful, they loosen all those sacred obligations by which men are kept within the bounds of duty and subordination? And shall you, who are continually in public to call out for the interposition of the law against injustice and wrong, be for ever in your private parties and conversations laboring to weaken every known and settled principle of justice and of right?

Give me leave to say, it is a weak pretence that is made use of by those who are thus unworthily engaged, that they are searching after truth; and indeed it is merely a pretence; for it is curious enough to observe, that many of these searchers after truth are men who have been employed near half a century in this pretended pursuit, and yet have they not settled one single principle; nay, they are more full than ever of doubts and conjectures: and as age and fatigue have exhausted their strength and robbed them of their wit, their questions gain in childishness and folly what they lose in subtlety and invention; nor is this a single case; I never in my life met with an old searcher after truth, but I found him at once the most wretched and the most contemptible of all earthly beings.

The fact is, the men I mean, are not searching after the truth; for where is it to be found? or who is to be the judge of it, when every certain principle is shaken or overthrown by which the decision is to be made? They have robbed their own minds of a resting place, and they would reduce the minds of others to the same unhappy and unsettled condition. With this spirit they attack every sentiment whereon men have been accustomed to rely: and as words are the common medium through which ideas are delivered, they play upon the meanings of words till they have thrown every thing into that confusion which, unfortunately for themselves and for others, is so congenial with their debased inclinations.

The propagation of doubt, with respect to religion, is at all times an injudicious, and frequently becomes an immoral act. He who seeks to destroy a system by an adherence to the pure principles of which mankind may be kept in peace and virtue, (how delusive soever he may esteem that system to be) without proposing a better for that important purpose, ought to be considered as an enemy to the public welfare.

I am here naturally led to consider religion as peculiarly powerful in settling the mind. It is impossible for a great and expanded intellect to be untouched by considerations of so great importance as those which religion presents to the contemplation; it will therefore either decide in certainty, or it will wander in doubt; for, to a thinking mind, what intermediate state can there be? And he that is in doubt, as I have before observed, cannot be at rest; and he who is not at rest cannot be happy. Now if this be true of doubt, the reverse must be true of certainty, which is a contrary influence. And need I point out to you the necessity of such a state to a mind engaged in the pursuit of a science so various and profound as the law? Or, on the contrary, how utterly impossible it is for a mind entangled in scepticism, according to the modern idea of that term, to attend with regularity and happiness to an object so important? Let me advise you to rest satisfied with those clear and fundamental truths upon which so many great and wise men have rested before you; and that, not merely because they have thus rested, for that would not be to be like them, but because they are ascertained by your uncorrupted sentiments, and produce clear ideas of the various virtues that adorn and elevate the mind, and also, which is of still greater importance, that stimulate you to the continual practice of them.

It is in vain to trifle about words and terms. Does a man know, or does he not know, whether the thing he is about to do be just or unjust? Does he feel, or does he not feel, a secret dread and shame at the latter, and an inward free-

dom in the former? Does he see, or does he not see, a beauty, a harmony, and a connection in his own formation, and in the structure of the universe, which human art cannot reach? Then whence is this internal sense, this reflection, this beauty, harmony and connection? It is agreed, that neither man, nor any other visible agent, has produced them; yet they are. And is it not a natural conclusion, that they are the consequences of some mighty but invisible cause? Why then not be content to argue in this respect from the effect to the cause, and rest satisfied with that as a matter of faith which the reason of man has never yet been able to explain? Reflect upon the thousands who are now in their graves, whose lives were spent in endeavors to ascertain that power which mocked all their efforts and baffled all their ingenuity: learn from them to confide in that first Great Cause, which, though it be hidden from your sight, you most sensibly feel, and against which your feeble arm is raised in vain.

If you will take my advice in this respect, I venture to say you will find yourself by so much the better and happier man. By possessing accurate and settled notions of the moral science, you will be able to act your part in life with the dignity of wisdom; and by possessing a firm and even mind, you will be free from those distractions from which the doubter is never free. What is the grand aim and end of knowledge, but to regulate our practice? And whence is this knowledge primarily to be acquired? from books? from men? No; by contemplation of these, it is true, our knowledge may be enriched and augmented; but it must first spring from the secret source of our own bosoms; these let us search with impartiality, and we shall need the assistance of no fine-spun theories, no finesse, no subtlety, to discover the truth: truth is of a certain, simple nature, and accordingly all will be certainty and simplicity here.

With your mind thus settled upon the solid basis of truth, you will be able to pursue the honorable avocation of the

bar in peace. Believe me, it will require all your strength; you will have no time, if you attend to the duties of your profession, to be eternally cavilling about terms and principles; and, in fact, it will be a mark of dishonorable weakness if these are found to be not well settled in your breast before you enter upon the career of public life.

Let us now proceed to the second division of the subject; the connection that subsists between religion in a political point of view, and the various conditions of society and the laws by which they are regulated.

There never yet has been a state without an establishment of religion; and in those nations who have existed under the influences of undebauched and simple nature, that establishment has been the chief concern; it has been reserved for the happy ages of refinement and philosophy to engender doubts of the existence of a Supreme, and boldly to overthrow his altars into the dust: yet few even of those who have been thus secretly crafty or openly impious have opposed national establishments of religion; though they have not scrupled to turn them into contempt, by declaring them to be useful only for the vulgar.

In all well-governed states these religious establishments have been connected with the laws of the country in the same way that all other establishments have been so connected, namely, being subordinate to their regulation and government; but they become more interesting, and claim a greater notice than other establishments in proportion to the superiority of their extent and dignity.

If, therefore, it be granted as a fact, that religion cannot subsist in any country as a national establishment without becoming thus connected with the laws of that country, it must become so through the only two mediums through which all other things become the objects of their cognizance, the conduct of its professors, and its worldly posses-

sions: for such is the power of all mundane influences, that not even the purity of religion can protect any regular system into which it may be formed, from the necessity of being supported by a certain degree of wealth and power, nor defend its professors from the common weakness of humanity, all excesses of which it is the object of well-formed laws to restrain.

Wealth and power and the conduct of men are therefore sensible objects upon which the laws of a community operate, whatever may be their description, or wherever they are to be found within that community; and, although they may constitute the establishment of a pure and divine religion, yet must they, as subservient to its earthly purposes, be composed of gold and silver, and so on, and consequently be subject to all those transmutations that are unavoidably incident to possessions of this sort. Nor is there any peculiar purity communicated to the nature of these objects by the dignity and holiness of their religious possessors, whereby they are rendered too high or too sacred for the interposition of the law of the land.

This being the case, it naturally follows, that, with respect to these possessions, numerous embarrassments and misunderstandings will arise, which, but for some powerful interference, would shortly breed the utmost disorder amongst the professors of this national establishment; and the right of interference I have already shewn to be in the legislature of the country, till, by degrees, that portion of the law, by which these matters are ascertained and regulated, forms a very capital object of the research and attention of the student.

Such has become, very eminently, the fact in this country; for, independently of the ecclesiastical jurisdiction properly so called, the religious establishment of England has attracted, in various directions and from numerous causes, the notice of the common and statute law and of our courts of

equity; so that he who is ignorant of the nature and history of religion and of its consequences, in this view of the subject, is ill qualified to sustain with honor and reputation the character of an English advocate.

In causes, therefore, that spring from this source you may, in the course of your future life, be frequently concerned; and I am anxious that you should be, in this as well as in every other point, well prepared with all those sources of argument, proof, and illustration, which can, indeed, be in the possession of him only who has taken repeated, accurate, and extensive views of the subject.

And this, you will remember, my friend, is not to be done with little labor, or in a moment; since even were you inclined to rest contented with a knowledge of its technical parts alone, to which I recommend a most diligent attention; yet the number of statutes that have been passed, and the variety of cases that have occurred in this department of the legal science, will prevent them from being presently engrafted upon the recollection; but, in truth, my opinion in this is the same that has been heretofore given you upon other branches of this extensive study. A technical knowledge, however valuable and necessary, will never of itself be sufficient to render a man excellent in his profession; and you will therefore have a still greater task to perform in the perusal and digesting of the best authors who have written upon religion, and upon the numerous forms and establishments it has assumed in the world.

For it will not, I apprehend, be sufficient for this purpose to have an acquaintance with the present state of the religious establishments of your own country, or with that establishment only; your researches must go back to the earliest authentic ages, and extend to the remotest periods of other countries: by these means alone you will be enabled to enlarge your mind, to place your arguments most forcibly, and

to illustrate them in that manner which is peculiar to a few, because to a few only belong the opportunities which patience and talents present of investigating the subject and tracing it to its source.

Do you wish to obtain the rare and valuable faculty of solving difficulties and obviating doubts, by the exercise of which obscurity is in a moment rendered clear, and darkness changed into light? It is to be acquired only by industrious reading and profound contemplation. Do you desire to know upon what subject this power can be most worthily exercised? I answer, Religion in all its varieties; of its purity as it came forth from the hand of its Omnipotent Founder, and of its degeneracy under the operation of human influences.

Persevere then in tracing, by labors of this nature, the forms and laws of religion to their source; the reward will not be disproportionate to the labor; you will not only be enabled thereby to stand as an advocate upon a very superior ground in a court of justice, an advantage of no small importance; but you will also establish your mind in the religious, philosophical, and moral sciences; you will read the human character in all its multifarious descriptions; you will meet it in all its varieties, and detect it in all its hypocrisies. This may not be a very pleasing task, bnt, to an advocate, it is a very necessary power.

The religious, like the civil part of the legal institutions of this country, is connected with those of other countries; occasions, therefore, sometimes occur, in which the latter may, with great beauty and propriety, be introduced to corroborate and enforce arguments that arise from any legal discussion of the former: hence the necessity at which I have just now hinted of extending our researches beyond the boundaries wherewith a fondness for our native country or a regard for the present age may surround us. And this

practice is sanctioned in a peculiar manner by the examples of all those great men who have left behind them the noblest monuments of learning and of wisdom: they overcame prejudices; they attacked and examined, without fear, opinions that had been well received and established in the world, but they attacked not the eternal principle of truth; they considered that it pervaded, without discrimination, other countries and other ages than those in which they lived: hence they naturally drew the inference of its secret and extended influences over the various forms of civil and religious systems by which these were governed: they knew also that humanity has preserved its multiform character, unchanged by the mutations of power or the lapse of ages: they therefore contemplated its works and surveyed its hidden springs in the writings of those who, in whatever country or in whatever age they lived, have gained the applauses of mankind for their learning, their wisdom, and their virtue: by these means they have themselves become the lights and ornaments of that system of which they formed a part. By the same means you may at least attempt to fill up a character of similar honor; and they cannot be more gloriously or usefully exerted than in acquiring a knowledge and in establishing the principles of religion.

Nor is even the common business of the lawyer unfriendly to the serious disquisition: the history of a long law-suit may be considered as no contemptible lesson of morality; amidst the sombre train of dusky parchments, Religion sometimes has condescended to rear her holy front. Do you not, in the perusal of these discolored monuments of human prudence, behold the consequence, the inevitable consequence of our most anxious care? What is this history but a tale of race following race in a rapid and melancholy succession of contrivance and industry? The extravagant mortgagor and the parsimonious mortgagee, the crafty buyer and the careless seller, the provident father and the impatient heir, are all gone down to the dust together; and

nothing now remains of their influence or their names to create fear or excite hope, but the legal instruments they have left to their posterity.

Sir James M'Intosh's letters on the Study of the Law.

MR. DUNNING'S* LETTER TO A LAW STUDENT.

Lincoln's Inn, March 8, 1779.

DEAR SIR,

The habit of intercourse in which I have lived with your family, joined to the regard which I entertain for yourself, makes me solicitous, in compliance with your request, to give you some hints concerning the study of the law.

Our profession is generally ridiculed as being dry and uninteresting; but a mind anxious for the discovery of truth and information will be amply gratified for the toil, in investigating the origin and progress of a jurisprudence which has the good of the people for its basis, and the accumulated wisdom and experience of ages for its improvement. Nor is the study itself so intricate as has been imagined; more especially since the labors of some modern writers have given it a more regular and scientific form. Without industry, however, it is impossible to arrive at any eminence in practice; and the man who shall be bold enough to attempt excellence by abilities alone, will soon find himself foiled by many who have inferior understandings, but better attainments. On the other hand the most painful plodder can never arrive at celebrity by mere reading; a man calculated for success, must add to native genius, an instinctive faculty in the discovery and retention of that knowledge only, which can be at once useful and productive.

* Afterwards LORD ASHBURTON.

I imagine that a considerable degree of learning is absolutely necessary. The elder authors frequently wrote in Latin, and the foreign jurists continue the practice to this day. Besides this, classical attainments contribute much to the refinement of the understanding, and the embellishment of the style. The utility of grammar, rhetoric, and logic, are known and felt by every one. Geometry will afford the most apposite examples of close and pointed reasoning; and geography is so very necessary in common life, that there is less credit in knowing, than dishonor in being unacquainted with it. But it is history, and more particularly that of his own country, which will occupy the attention, and attract the regard of the great lawyer. A minute knowledge of the political revolutions and judicial decisions of our predecessors, whether in the more ancient or modern æras of our government, is equally useful and interesting. This will include a narrative of all the material alterations in the Common Law, and the reasons and exigencies on which they were founded.

I would always recommend a diligent attendance on the Courts of Justice, as by that means the practice of them (a circumstance of great moment) will be easily and naturally acquired. Besides this, a much stronger impression will be made on the mind by the statement of the case, and the pleadings of the counsel, than from a cold uninteresting detail of it in a report. But above all, a trial at bar, or a special argument, should never be neglected. As it is usual on these occasions to take notes, a knowledge of short-hand will give such facility to your labors, as to enable you to follow the most rapid speaker with certainty and precision. Common-place books are convenient and useful; and as they are generally lettered, a reference may be had to them in a moment. It is usual to acquire some insight into real business, under an eminent Special Pleader, previous to actual practice at the bar: this idea I beg leave strongly to

second; and indeed I have known but a few great men who have not possessed this advantage.

I here subjoin a list of books necessary for your perusal and instruction, to which I have added some remarks; and wishing that you may add to a successful practice, that integrity which can alone make you worthy of it,

I remain, &c. &c.

JOHN DUNNING.

Read Hume's History of England; particularly observing the rise, progress, and declension of the feudal system. Minutely attend to the Saxon government that preceded it, and dwell on the reigns of Edward I.—Henry VI.—Henry VII.—Henry VIII.—James I.—Charles I.—Charles II. and James II.

Blackstone. On the second reading turn to the references.

Mr. Justice Wright's learned Treatise on Tenures.

Coke upon Littleton, especially every word of Fee-Simple, Fee-Tail, and Tenant in Tail.

Coke's Institutes; more particulary the 1st and 2d—and Serjeant Hawkin's Compendium.

Coke's Reports.—Plowden's Commentary.—Bacon's Abridgment; and First Principles of Equity.—Pigott on Fines.—Reports of Croke, Burrow, Raymond, Saunders, Strange, and Peere Williams.—Paley's Maxims.—Lord Bacon's Elements of the Common Law.

LORD MANSFIELD TO MR. DRUMMOND.

For general Ethics, which are the foundation of all Law, read Xenophon's Memorabilia, Tully's Offices, and Woolaston's Religion of Nature. You may likewise look into Aristotle's Ethics, which you will not like; but it is one of those books, *qui a limine salutandi sunt ne verba nobis dentur.*

For the law of nations, which is partly founded on the law of nature, and partly positive, read Grotius, and Puffendorf in Barbeyrac's translation, and Burlamaqui's Droit Naturel: as these authors treat the same subjects in the heads, they may be read and compared together.

When you have laid this foundation, it will be time to look into those systems of positive law that have prevailed in their turn. You will begin, of course, with the Roman Law; for the history of which, read Gravina's elegant work *De Ortu et Progressu Juris Civilis;* then read and study Justinian's Institutes; without any other comment than the short one by Vinnius. Long comments would only confound you and make your head spin round. Dip occasionally into the Pandects. After this, it will be proper to acquire a general idea of feudal law and the feudal system, which is so interwoven with almost every constitution in Europe, that, without some knowledge of it, it is impossible to understand Modern History. Read Craig De Feudis, an admirable book for matter and method; and dip occasionally into the Corpus Juris Feudalis, whilst you are reading Giannone's History of Naples, one of the ablest and most instructive books that ever was written. These writers are not sufficient to give you a thorough knowledge of the subjects they treat of; but they will give you general notions, general leading principles, and lay the best foundation that can be laid for the study of any municipal law, such as the Law of England, Scotland, France, &c. &c.

LAWS AND CUSTOMS OF THE HINDOOS.*

FROM FORBES'S ORIENTAL MEMOIRS.

A short time before Mr. Forbes was appointed to fix his situation at Baroche, some Musselmen walking through a village where a family of Raghpoots resided, accidentally looked into a room where an elderly woman was eating; no insult was intended, they merely saw her at her meal, and retired; but this was a disgrace for which there could be no expiation. She lived with her grandson, a high-minded young man; he happened to be absent: on his return she told him what had passed, declared that she could not survive the circumstance, and entreated him to put her to death. He reasoned with her calmly, his affection making him see the matter in its proper light: none but her own family, he said, knew the disgrace, and the very men who occasioned it were unconscious of what they had done. She waited till he went out again, and then fractured her skull by beating it against the wall! The young man found her in this state, but alive and in her senses; she implored him to finish the sacrifice which she had not strength to accomplish, and release her from her sufferings;—and he then stabbed her to the heart. Shocking as this is, the most painful part of the story is to come. The parties were English subjects; by the English laws the young man's act was murder; he was arrested, sent to Bombay for trial, and confined with common prisoners till the ensuing sessions; a true bill was found against him: the jury, consisting half of Europeans and half of natives, brought him in guilty, and the Judge condemned him to death.

'The Raghpoots in general have a noble mien and dignified character; their high cast is stamped in their counte-

* Quarterly Review.

nances; the young man possessed them all. I saw him,' says Mr. Forbes, 'receive his sentence, not only with composure, but with a mingled look of disdain and delight not easy to describe. Unconscious of the *crime* laid to his charge, he said he had nothing to accuse himself of but disobedience to his parent in the first instance, by permitting humanity and filial affection to supercede his duty and the honor of his cast;—that life was no longer desirable to him, nor, if acquitted by the English laws, could he survive the ignominy of having been confined with European culprits and criminals of the lowest casts, with whom he had been compelled to eat and associate in a common prison;—a pollution after which the sooner he was transferred to another state of existence the better. However inclined the government might be to clemency, it would evidently have been fruitless: the noble Raghpoot would not survive the disgrace, and the sentence of the law was executed, in the hope that it might prevent others from following his example.'

Useless as clemency would have been, it may be doubted whether the government was justifiable in inflicting death in this case—it cannot be doubted that it was most unjustifiable in inflicting the previous disgrace.

A Hindoo devotee, a man of amiable character, in the prime of life, married, and the father of four young children, who lived near Bombay, desired his wife one afternoon to prepare herself and her children for a walk on the beach, from whence, he said, he intended to accompany them on a longer journey; she inquired whither, and he informed her that his God had invited him to heaven, and to take his family with him; that they were to go by water, and set out from Back-bay. Perfectly satisfied with this explanation, the wife proceeded with her children to the sacrifice. The parents drove the two eldest children into the sea, and they were carried off by the waves; they then drowned the two younger who were infants; the wife walked in and perished,

and the husband was deliberately following her, when he suddenly recollected that the disappearance of a whole family would occasion inquiry from the English government, and might involve his neighbors in some trouble; so he determined to step back and inform them of the circumstance before he completed the sacrifice. His Hindoo neighbors heard the story with their characteristic insensibility, and perhaps admired the act: but a Mussulman was present, and he observed that the story was so extraordinary, that it might be difficult to convince the government of the truth, and therefore the husband must accompany him to a magistrate, and relate the facts himself. In consequence, the enthusiast was tried, condemned, and executed for murder; a sentence with which he was perfectly satisfied, and only regretted that it occasioned an unpleasant delay in his passing to that heaven, which he promised himself as his reward. In this case, also, the wisdom of the sentence may be questioned. The man, according to his belief, his laws, and his religion, had committed nothing wrong: he neither considered that act as a crime, nor death as a punishment. It is assuredly the duty of the British government to deter its idolatrous subjects, as far as lies in its power, from such abominable acts. Imprisonment or transportation might be efficacious where death would not; and might also afford opportunity for conversion. About half a century ago a most mischievous religious madness broke out in Denmark, which, like all other religious madnesses, was highly infectious. The persons who were influenced by it believed that they should ensure their own salvation by committing murder and suffering death; and that they might avoid the danger of sending any soul out of the world in an unprepared state, they selected children for their victims. Such madmen were not to be deterred by capital punishment, death being what they sought,—they were therefore sentenced to perpetual imprisonment, and this put a stop to the phrenzy.

In no country has superstition grown out into such distortions and deformities as in Hindostan; the monstrous forms of its idols are proper types of the extravagant and senseless ceremonies with which they are worshipped. A Brahmin will sometimes devote himself to death by eating till he expires with repletion! Another will make a vow of swallowing a certain quantity of clarified butter, and rolls upon the ground in agony till nature relieves him of the load. Some never eat any thing but grain which has passed through a cow, and been picked out from its excrement, holding this to be the purest of all food! Others live wholly upon milk, and, that their exalted natures may not be defiled by the ordinary process, affect to bring up all that is not convertible into chyle, by means of a small string of cotton, somewhat in the manner that Spallanzani made experiments upon himself and his unfortunate buzzard. The torments which devotees, in this benighted country, inflict upon themselves, are well known;—they differ more in fashion than in principle, from the practices which have entitled so many European fanatics to a place in the Romish Calendar. It is known, also, how the Brahminical system produces the utmost excesses of false humanity and of hideous cruelty. They who use force to keep the widow upon the pile which she would fain escape,—they who teach the mother to expose her infant to the ants and vultures, and the children to accelerate the death of their aged parents by forcing them into the river, or stopping their mouths and nostrils with mud;—they who grind in oil-mills the priests of a rival idolatry, and who pour boiling oil in the ears of the Sudra, who has been unlucky enough to hear their scriptures,—hold it a crime to destroy the insect that bites them! Some carry a light broom to sweep the ground before them, lest they should unwittingly crush any thing that has life, and others wear a cloth before their mouths lest they should draw in an insect with their breath. That part of the Banian hospital at Surat, where animals, when worn out in the service of man, or disabled by

any accidental hurt, are provided with food and suffered to die in peace, may make an Englishman feel shame for his country, when he recollects the facts which were stated by Lord Erskine before the British Parliament;—but those wards which are appropriated to the most loathsome vermin, and where beggars are hired by the night to serve as food for them, make us blush for human nature.

This superstitious reverence for life in the lowest stages of existence, is instanced in one of the most interesting anecdotes in the work before us. A Brahmin, far beyond his brethren both in powers of mind and extent of knowledge, lived in habits of great intimacy with an Englishman who was fond of natural and experimental philosophy; the Brahmin, who had learned English, read the books of his friend, searched into the Cyclopædia, and profited by his philosophical instruments. It happened that the Englishman received a good solar microscope from Europe; he displayed its wonders with delight to the astonishment of the Brahmin; and convinced him by the undeniable evidence of his senses, that he and his countrymen who abstained so scrupulously from any thing which had life, devoured innumerable animalculæ upon every vegetable which they ate. The Brahmin, instead of being delighted as his new friend had expected, became unusually thoughtful, and at length retired in silence. On his next visit he requested the gentleman would sell him the microscope: to this it was replied, that the thing was a present from a friend in Europe, and not to be replaced; the Brahmin, however, was not discouraged by the refusal; he offered a very large sum of money, or an Indian commodity of equal value, and at length the gentleman, weary of resisting his importunities, or unwilling longer to resist them, gave him the microscope. The eyes of the Hindoo flashed with joy, he seized the instrument, hastened from the viranda, caught up a large stone, laid the microscope upon one of the steps, and in an instant smashed it to

pieces. Having done this he said in reply to the angry reproaches of his friend, that when he was cool he would pay him a visit and explain his reasons. Upon that visit he thus addressed his friend .—

'Oh that I had remained in that happy state of ignorance in which you found me! Yet I confess, that as my knowledge increased so did my pleasure, till I beheld the wonders of the microscope; from that moment I have been tormented by doubts,—I am miserable, and must continue to be so till I enter upon another stage of existence. I am a solitary individual among fifty millions of people, all brought up in the same belief as myself, and all happy in their ignorance. I will keep the secret within my own bosom, it will destroy my peace, but I shall have some satisfaction in knowing that I alone feel those doubts which, had I not destroyed the instrument, might have been communicated to others, and rendered thousands wretched. Forgive me, my friend—and bring here no more implements of knowledge!'

This is a fine story; but how much finer might it have been if the European had been a Christian philosopher, as well as an experimentalist!

"I have been asked (says Mr. Forbes) by one of the most amiable men I know, and one of the most valuable friends I ever possessed, why I trouble myself so much about the Hindoos: why not allow mothers to destroy their infants, widows to immolate themselves with their husbands, and Brahmins to pour boiling oil into the ears of the lower casts who hear the Shastan? This gentleman lived upwards of twenty years in India, and, like many others, saw no impropriety in such conduct; or he would have been among the first to reprobate it, and attempt a change. But as I know he speaks the sentiments of numerous phi-

lanthropists, I shall answer the question in the language of the excellent Cowper.'

"I was born of woman, and drew milk,
As sweet as charity, from human breasts.
I think, articulate, I laugh and weep,
And exercise all functions of a man.
How then should I, and any man that lives,
Be strangers to each other?"

IRISH ELOQUENCE.

At a Catholic Meeting in Dublin where the Earl of Fingal presided, after the reading of some resolutions, there was a general call for Mr. Finlay, who rose amidst loud acclamations.

MR. FINLAY.——I should be very insensible, if I were not deeply impressed, by the loud and lengthened expression of approbation, with which your partiality induces you to greet the humblest of your advocates, but one who is influenced with a sincere anxiety to rank himself amongst the most zealous of your friends—I should be very insensible, my Lord, if I could not appreciate the honor, of which a high man might be proud—the honor which I this moment feel, when I stand in the presence, and hold the attention of the pure minded head of the House of Plunket—that illustrious House—that *ancient* House—whose noble progenitors were gloriously employed in leading armies, and guiding states, for centuries ere the founders of those late sprung Peers (who consider you as unworthy of your seat among them) had started from the herd of the vulgar in either Island.

The Catholic Delegates, and the Catholic Board, having discharged their duty abroad and at home, with much credit to themselves—with much benefit to their country, have now resigned their trust into the hands of the People. That

Board having performed its difficult journey under misrepresentation, slander, and unexampled persecution,—that Board so *formidable*—so alarming—so frightful to some of your friends—has now calmly and quietly dissolved itself, into the elements from which it grew, and your Lordship is, at this moment, the only authority recognized by your suffering brethren.

In the long column of obligations, which the Catholics of Ireland owe, and acknowledge to your Lordship's prudence and patriotism, there is, perhaps, no item more important, than the debt which you have imposed by your careful, and successful nurture of that rich blossom—that "bright promise of the young year"—that amiable youth, whose feeling effusion has delighted—affected—and melted the hearts of this audience in love and tenderness to the Son and Father.

Your son, my Lord, is what he ought to be—The Lord Killeen is called by his birth to take a high station among the rising race—great and serious duties may await him—he justifies our hopes—he starts for his country.

His education was a public question—and you have shaped it to the public good—it has been shaped with wisdom, foresight, and precaution. You did not send him to an English College, where he might dissolve his amiable and valuable partialities to Ireland—you did not send him to complete his acquirements in an Irish Catholic Seminary, whereby his enemies might take occasion to impute to him, that his mind took a tincture from a monastic institution. You provided against the accident of the possible mischief and the possible slander—you sent him to seek instruction in the liberal and learned seminaries of Caledonia, the nurse of Arts, the seat of Science, the Athens of our Empire, the country of Toleration, where there is neither bigotry nor ignorance. He has reaped instruction—he has escaped depravity—he may have lost prejudices there, but he could not lose patriotism.

The Englishman cannot say, that he was bred in bigotry to his faith—the Irishman cannot say, that he is denationalized by his education.

As you have preserved him from the contagion of the mushroom, stupid, vicious Lordlings of the day, may he, through life, resemble *you;* and after he has succeeded to your public station, and after his substitution gives you an opportunity to retire to the tranquillity of private life, may he support to your satisfaction, the honor of your house, the glory of your name—and I feel that I am but expressing the anxious wish of every Irishman, when I pray, that through the season of your political retirement you may long and happily enjoy the health and honors of a green old age, resting like Hercules on the pillar that you reared.

Catholics,—I have to give you joy on the progress of your cause—it has been reviled in its beginning as mean and contemptible—be it so—if the instruments of its late revival deserve to be undervalued, and with the exception of myself, I am bound to think otherwise, but admitting the truth of the unworthy imputation, it cannot be denied that its progress is uncommon. Like the grain of mustard seed, mentioned in the Scripture, it has expanded "into a tall and spreading tree"—it has gone onwards, strengthening from "strong to stronger," evincing the value of the great maxim, that Truth is mighty and must prevail.

Many of its former opponents are its presents friends. Its late involuntary adversaries have espoused the cause, and its late determined enemies are compelled to confess their inability to resist it.

The persuasion of its advocates, and the peril of the empire, combined to conduct it to its grand consummation.—Moral and political causes united—but two obstacles impeded its advancement, which neither moral nor political causes could remove—the *principles* of a Minister, and the

conscience of a King. The Minister said it was resisted by his *reason*—the King declared it was resisted by his *morality*. The King was *religious*—the Bigots were *obstinate*. Bigotry in this case, as in all cases, adopted the pretences of religion to counteract the purposes of religion. The Bigots of the day beset the monarch—they said to themselves, in the language of the great Poet—they said to themselves,

——————"The oath's the thing,
"In which we'll catch the conscience of the King."

In this way they succeeded in convincing the Sovereign, that concession to you must be perjury in him. Thus the semblance of religion, and the substance of bigotry united to oppose the free worship of God.

Against these two uncommon obstacles, moral and political causes worked in vain—in vain would reason expostulate with bigotry—in vain would it argue with religious conscientiousness. Reason could do nothing with the one or the other—secondary causes must fail to remove such obstacles—human causes could not remove them—Man could not remove—none but God could remove them. God has removed them.

By the two severest visitations with which man can be afflicted—by the loss of *reason* and the loss of *life*—these two impediments to your emancipation have been dislodged—your King no longer ranks with the rational, and the minister of that King is now numbered with the dead.

It is not for us, humble, feeble mortals, to question or arraign the decision of Omniscience. Let us rather bow in awful acquiescence to the inscrutable mandates of that all-wise Being, who is accustomed to convert instant evil into the means of future good.

As a subject and a man, I must, in common with you all, sincerely deplore this two-fold affliction; but as a moralist

and a christian, I may be permitted to infer, that these "awful signs of the times," may appear to the eye of the unborn historian, but as "the distinct evidence of a controling Providence." That for the future, man's free worship of his Creator is as it were written by "the finger of God"—and that it now stands a record in Heaven, that the time is past and never can return, when any man, or any set of men, can presume to rebuke, by any system of social or civil vilification, that great majority of the Christian Church, who bend the knee in the name of Jesus.

In the interval between these two melancholy dispensations—before we were yet taught to despair of our sovereign's recovery—and before the family of the minister had to lament the loss of a tender husband and a tender father—in that interval a new incident occurred to increase your difficulties and damp your hopes. An accident on which no one calculated, because it was one which no one could foresee—it was rumored that the Regent was *neutral* in your interests.

For the last thirty years, Irishmen had been educated in a reverential love for that illustrious personage. Hope, encouraged hope, had sublimed our duty into a chivalrous attachment. It was not mere loyalty—it was more than loyalty—it was loyalty and sentiment together—created by affection—cherished by expectation—suggested by reason to the old—conveyed by inheritance to the young—sanctioned by experience—confirmed by time. "Sure never Prince was loved as he was."

The mind of an Irishman is formed of soft materials—it takes impression—it melts in kindness. The Irishman is prodigal of eulogy and gratitude. The praise of his Prince ran riot on his tongue—the image of that Prince was carried in his heart. No Journal in Ireland dare asperse his character—no Catholic in Ireland who would not resent a dis-

respect offered to his Prince, as he would an insult offered to his sister. The affections of the country were strung upon him—and their public anxieties centered in his safety.

We must remember the time, for it is not remote, when Ireland was alarmed by the rumor of the Regent's ill health. The public anxiety was then so uncommon, that strangers accosted each other in the streets, and the devotee, on his knees, in the house of worship, interrupted his prayers to inquire from his neighbor, if the Prince was better—and when he received a favorable reply, he smiled in piety, and thanked his God.

When the rumor reached us, that our Prince was neutral to the Catholic—it was laughed at, as the "weak invention of the enemy." We disbelieved. How could we believe it? Our reason nurtured our incredulity. Could we believe, that modes of thinking, habits of converse, fruits of instruction, impressions of education, could vanish—instantly vanish—and leave no trace behind; that impressions deepening in the human mind for the third portion of a century, could instantly be effaced without a cause. True it was, that Fox was in the grave—irreparable misfortune to Prince and people! But is it the nature of instruction to die with the instructor?. No—the idea is repugnant to all moral and physical analogy—to the course of nature and the order of things. If the hand of Omniscience should extinguish the sun in the centre of our system, this world would, for a considerable time, continue in light. In truth, my Lord, there has been, and must be, an eternal survivorship of effects beyond the duration of their creating causes—and this grand eternal principle was a sufficient reason to the intelligent Catholic for disbelieving that his Prince could be instantly altered—and for believing, that the mind of any man which possessed the unaccountable and unnatural elasticity of quickly rejecting its ancient impressions, and making its established old opinions immediately evanescent, could not appear to the thinking man any thing short of a *moral miracle*.

The melancholy truth at last baffled all our sceptiscism, and the frightful reality flashed upon the mind like the surprise and shock of a stroke of thunder.

"O God, is it come to this?" they cried—Is hope, that "last medicine of the miserable," denied? And shall not the stream of bounty flow from the Throne? And have we amused our expectations with an unreal mockery, in supposing, that the era was just arrived, when the delegates of emancipated millions might be permitted to surround the throne, and say to our Prince—Sire, you have bound your Catholic subjects in the strong ties of lasting gratitude—we are ready to repay your justice with our blood. Whenever the honor or interests of your realms are threatened or endangered, assure yourself that a valorous, devoted, unmercenary army lies cantoned through the cottages of your Catholic subjects. Melancholy reverse!—to behold our Royal Favorite, in a few short months, receiving that minister whom he had so lately rebuked for measures uncongenial to the interests of the common weal—to see that minister levelling his libel against our Prince's character, and becoming the maker of his ministry, under the threat of becoming the defamer of his reputation—to see that minister ascribing our Prince's name to a recanting, illiterate, ungrammatical declaration—that name which was never before undersigned to any article that has not stood and must not stand, as an "Elegant Extract" to future compilers of the beauties of our language—a rich sample of constitutional principle and British literature.

Melancholy reverse—afflicting to you—to see your Prince receding from those friends who stood by his cause and shielded his character, when reward was remote and defamation incessant—men, who served him with fidelity and sacrifice, when they had little to expect—when he had nothing to bestow—when their faithful and lasting attachments could be influenced by no motive, but the rich remuneration

of their Prince's esteem. Melancholy reverse—afflicting to you—to see him receding from friends who had no interests but his, and resorting to flatterers, who have no interests but their own.

At a meeting of the Dublin Library the following Address (drawn by Charles Phillips) to the Master of the Rolls, on his election to the Presidency of that Institution, was unanimously agreed to.

To the Right Hon. JOHN P. CURRAN, Master of the Rolls.

SIR,—The death of Mr. Kirwan having rendered vacant the Chair of our Institution, we proceeded to the very difficult duty of selecting his successor.

Our arduous object was to discover a name, which united the purest principles, with the most brilliant genius; which adversity had proved, patriotism endeared, and years made venerable—A name which was of native growth, and carried in its very sound the conviction of its value—which taught purity, while it inspired pride, and shamed the venal, while it gladdened the virtuous. A name, of which in our best times we had been familiarly vain, and which in our worst, like an orphan pledge, had been fondled by the feelings of the country.

Such were the rare qualities we sought; and do not ascribe to flattery what you have won by merit, when we boast their discovery in the name of Curran.

We solicit you, then, Sir, in the name of our Institution, by accepting its Chair, to give us our only atonement for the loss of Kirwan.

The deputation appointed to wait on Mr. Curran, reported his answer to a general meeting on the 29th of June.

ANSWER.

Be pleased to accept my most grateful acknowledgment of the honor you confer upon me in the offer of that Chair, which was so splendidly filled by our illustrious and lamented countryman. I cannot but most highly value such a mark of favor from so respectable a body of my fellow-citizens.

It would be an unworthy affectation were I to say, that the gratification which I feel in accepting this offer, was in any degree diminished by the reflection, that a sort of comparison may be suggested, in which I could not have even the consolation of thinking, that the victory under which so unequal a competitor must sink, could add any thing to the credit of so honored a predecessor: I know the gifts which he has conferred upon science, and the glory which he has bequeathed to Ireland, in a name which cannot be involved in the mortality of his person, but must live forever. But I cannot think myself humiliated by the consciousness of individual disparity, while I feel that I am an Irishman, and as such, am raised in participating the honor of my country.

A long and intimate friendship with Mr. Kirwan gave me the opportunity of knowing how he felt and thought on such subjects as I was capable of discussing with him. As a man, his heart was exalted above every vulgar prejudice, and every interested antipathy—it was enamoured with liberty, and recoiled from thraldom. As a philosopher, he saw that servitude was a condition befitting no human being but him who was vile enough to inflict or to endure it. I can assume but little praise to myself in venturing to hope, that such facilities of communication were not utterly lost upon me—and that the high and manly tone of spirit, in which he took an interest in the various and wayward destinies of Ireland, could not fail of making some impression upon me; to your

kind belief that this may have been the case, and to that alone, I attribute your election of me to succeed him: because in that point only you could have hoped, that in my succession he would not be altogether unrepresented.

The time has not long passed away, in which I should have been unwilling to allude to my attachment to our common country: but in this happier period of patriotic liberality, thank God, there is nothing rare or peculiar in the sentiment; and every man may freely profess it, without incurring the charge of egotism or vanity.

Shall I presume to advert to the over-measure of commendation which your kindness has led you to use to myself? I should be mortified if you could suspect that while I felt the kindness I did not also look farther to the motive of such disproportioned approbation. It is wise and politic to reward even the most barren good intention beyond the exact limits of its claim—and perhaps it belongs peculiarly to the nature of the Irish heart, that it may be generous and even prodigal, without any risk of impoverishment.

On the answer being read, Charles Phillips spoke as follows:

"Allow me, Sir, to second this motion, and to trespass on your time for a few moments. I should be deficient in gratitude, if I did not return you my sincere thanks for the flattering manner in which you have received my very humble address. It was drawn up mid the confusion of the ballot, and, as my friends know, with very little previous notice—its unworthiness carries with it, however, at least this alleviation, that it mattered but little, whether it was maturely considered, or hastily sketched, it must have proved quite inadequate to the merits of the great man who forms its subject. He who composed an address on this occasion, had a double difficulty to encounter—the one arising from pride for him we had elected—the other from grief for

him we had lost! A loss, indeed, not only to individuals, but to science—not only to our institution but to the country—not only to our country but to the universe. He was one of those splendid prodigies which occasionally arise in our system, as it were, to vindicate the dignity of the species—created, one would imagine, by the hand of the Almighty God, for the purpose of confounding the speculations of the Atheist and the Blasphemer, by proving that even here our mortal nature may be sublimed into the semblance of inspired wisdom, and that there is a spirit within us which can emerge from our infirmities, and almost associate us with perfection! It is our boast to have lived with him—he has been a favor conferred upon our age. Such men as Kirwan are the offspring of centuries. Nature seems to put forth her whole energies in their formation, and to sink exhausted by the immensity of the effort. To follow him through the range of his discoveries, would require an intellect like his own. Few are the Arts that he has not enriched!—Many are the Sciences that mourn him!—Whether he was employed in developing the properties of matter, or in explaining the intricacies of mind, his powers seemed to be magical—almost miraculous. Error fell before him, and, at his bidding, like that of the Sage, in Holy Writ, even the barren rock became a fountain of fertility!—He illustrated the image of an expressive author: "his reason strode upon the mountain tops, and made for itself a plain of *continued elevations*." I have heard with sorrow some calculations made, as to the propriety of erecting his bust—a bust of Kirwan!—Why, it is a debt due not to him, but to ourselves—a tribute not to his name, but of our gratitude. Until nature perishes, he cannot want a monument—and the treasures she has poured forth at his command, are so many immutable inscriptions to his memory. But the theme is melancholy—Kirwan has left us, but not alone—no, no, not alone. Even while she mourns over his new-made grave, Genius lifts her head, and smiles in tears on his Successor.

Happy, happy, Ireland!—happy amid all your miseries—man cannot take away what God has given, and it is not in the power of all the despots in creation to wring from you the pride of retrieving such a loss, by such a reparation.—This transition from the tombs to the name of Curran, seems like rising from death to the prospect of immortality. And immortal he must be, if talents, direct from Heaven, exerted in the highest interests of earth, can constitute a claim to immortality. 'Mid the race of reptiles which our fall has generated, whom we see coiling round the broken columns of our state, and winding themselves into a loathsome and disgusting elevation, I cannot help looking upon this man as I would upon some noble statue 'mid the ruins of antiquity—a sacred relic of departed worth—a silent memorial of the virtue that has been. But it is not in my feeble tongue to do him justice—no, nor is it in the malice of his enemies to do him injury. He has the reward and antidote within himself—he has it in the sight of a people consecrating his old age. And, in my mind, Sir, if there be one reward on earth superior to another, 'tis the applause of our country, and the consciousness of deserving it—a reward richer than all the baubles in the power of Majesty to bestow—brighter than the star upon the Despot's breast—purer than the gems of the Imperial Diadem!—Sir, I have trespassed on your time—you will, I feel, excuse me; but these few remarks have been unavoidably extorted, lest, after having paid my poor tribute to living merit, I should appear ungratefully forgetful of the illustrious dead."

ADJUDGED CASES

IN THE

SUPREME COURT OF NORTH-CAROLINA.

JULY TERM 1815.

Smith v. *Walker's Executors.*

This was an action of debt *qui tam*, under the statute of usury, brought against Walker in his life time; and upon the return of a *sci. fa.* to revive it against his executors, they pleaded specially that the action being founded in *maleficio*, and unaccompanied with a duty, did not survive against them. To this plea there was a demurrer, which was overruled in Brunswick Superior Court, from whose judgment the plaintiff appealed to this Court.

No argument was made on the case.

TAYLOR, C. J. delivered the judgment of the Court.

The common law principle, relative to the abatement of suits by the death of the parties, has undergone such a variety of legislative alterations, that some attention is necessary to mark with precision what actions will now survive against personal representatives.

It was once doubtful, whether, from the general terms in which the maxim is expressed, the action of assumpsit did not come within its operation; because its form was trespass on the case, which imputed a wrong, and its substance was to recover damages in satisfaction of the wrong. But when, after much discussion, this doubt was removed, on the principle that the testator's property had received a wrong,

and that he consequently gained an interest, we are furnished with the plain and intelligible restriction of the rule, to all cases where the declaration imputes a hurt done to the person or property of another, and the plea is not guilty; thus including every case where the cause of action arose *ex delicto*. But all actions survived that were founded on any contract or duty to be performed, excepting the action of account, and the action of debt on simple contract, to which the law wager was attached. The first, because the account rested in the privity of the testator; the other, because the executor would lose the benefit of the law wager.

The first relaxation of the rule, now necessary to be noticed, was made by the statute 4 *Ed.* 3, *C.* 7, which gave to executors an action of trespass for taking away goods, in the life-time of the testator; and this remedy was extended to executors of executors by statute of 25 *Ed.* 3, *C.* 5, and to administrators by 31 *Ed.* 3, *C.* 11. Although the first statute makes use of the word *trespasses* only, yet a series of adjudications under it, made in a spirit of liberal interpretation, have produced the rule, that an executor or administrator may prosecute the same actions for an injury done to the personal estate of the testator or intestate, in his life time, whereby it is become less valuable, that the testator or intestate himself might have done. Notwithstanding these statutes, the common law maxim operates with full force, in England, with respect to the person by whom the injury is committed; for, if he dies, no action arising *ex delicto*, where the plea is not guilty, can be brought against his executor or administrator—though, for taking away goods, a remedy may be had against them in another form.

The act of 1799 enumerates the actions of *trover*, *detinue* and *trespass*, where property either real or personal is in contest, and the action is not merely vindictive; and provides that they shall not be abated by the death of either party. With respect to the action of *detinue*, the

act was unnecessary; because that action might have been brought before, either by, or against an executor, to recover goods in the hands of the wrong doer or his executor.—*Sir Wm. Jones* 173. The actions of *trover* and *trespass* might both have been brought by an executor, under the construction of 4 *Ed.* 3; so that all the operation of this act is, to enable them to survive against executors, and to prevent the action of *trespass* from abating by the death of either party, where real property is in contest.

The act of 1805 extends a similar provision to the actions of *trespass vi et armis*, and *trespass on the case*, brought to recover damages done to property either real or personal.

The same equitable construction given to these acts of Assembly, which has heretofore been put upon the antient statutes, will permit not only all actions to be brought by, or revived against, executors or administrators, which might formerly have been brought by them, but likewise other actions which are embraced by the more comprehensive words of the acts. The common law maxim still applies to injuries done to the person, and to all others which are in the nature of crimes, and consequently to all actions upon penal statutes, relative to acts arising *ex maleficio*, and where no right or duty is vested in the plaintiff. Wherever a duty is so vested in the plaintiff, it is probable that the true construction of our acts of Assembly, would sustain even a penal action against executors, as it has been held in England, under the statute of *Ed.* 3, that an action of debt will lie by executors, for not setting out tithes. The statute, however, which authorises such action, gives the penalty to the party grieved; and the tithes which ought to have been set out, were a vested right in the testator. The present suit is brought for an offence, and the penalty is given, in part, to any one who will sue for it—We are therefore of opinion, that it is not one of those cases, which the acts of Assembly meant to provide for; and that the crime is buried with the defendants' testator. Let there be judgment for the defendants.

Porter v. *Wood*.

This was an appeal from the decision of Edgecomb Superior Court, awarding a new trial to the plaintiff, upon an affidavit which stated in substance, that he had instituted this action against the defendant, for neglect of duty as a constable, whereby the plaintiff had lost the amount of a judgment recovered by him, before a magistrate, against Lawrence. That upon two trials in the county court, he offered the judgment of the magistrate as evidence of the amount of damage, which was received without exception—the defence being rested on an alleged misconception of the action—whence he believed it would not be necessary for him to provide evidence to prove the amount of the judgment in the Superior Court; that he was unprepared to do this, when the exception was taken, though he can do it by the next term; and that the same counsel defended in both Courts.

TAYLOR, C. J. It was an essential part of the plaintiff's evidence to prove his account against Lawrence, yet no witness attended for that purpose, nor does any appear to have been summoned. After so many trials, to grant a new one that the plaintiff may prepare his case, and do that, which ought to have been done from the time the pleas were entered, does not seem to be proper, from any reasons laid before us.

Motion for a new trial overruled.

Ray v. *Simpson.*

The defendant died between Spring Term, 1814, and Fall Term, 1814,—at which last mentioned term his death was suggested of record.

On the first day of this present term (say Spring, 1815,) the plaintiff served on the guardian of the heirs at law of Simpson (he having died intestate) a copy of the declaration in ejectment, with notice to appear and defend the suit.

It is referred to the Supreme Court to decide, whether such service prevents the abatement of the suit?

TAYLOR, C. J. There can be no doubt of the sufficiency of this service, under the act of 1799, *C.* 8—the words of which are, that no action of ejectment shall abate by the death of the defendant, but the same may be revived by serving on the guardian within two terms after his decease a copy of the declaration, with notice to appear and defend the suit; and after such service the suit shall stand revived. This is in the case where the heirs are infants as they are here.—Now this service was made within the second term after the death of the defendant, and is consequently within time.

Dark v. *Marsh.*

This was an action of debt to recover the penalty under the 4th section of the act of 1791, against harboring slaves. The declaration contained three counts. 1. For enticing and persuading the slave to leave the plaintiff's service. 2. For harboring and maintaining the slave, knowing her to be runaway. 3. The same as the second count, with respect to a negro child. The Jury found a vedict for the plaintiff, subject to the opinion of the Court, on the following case.

The plaintiff proved a title to the two slaves, mother and child, under a bill of sale, and possession of them from February, 1807, until the September following, when she absented herself, with her child, in the night time, taking with her all her apparel, and was the next morning in possession of the defendant, who, at that time, gave notice to the plaintiff of the fact, and said he should retain them until recovered by law; as he claimed them as his father's property. The defendant has had them in possesson till 1813, harboring and maintaining them, but in an open and avowed manner, the woman being the wife of one of his negro men. The plaintiff sued out a writ of detinue for the slaves in 1807, and in September 1813, recovered them, and damages for the detention. The writ in the present action was sued out in 1809.

SEAWELL, J. delivered the judgment of the Court.

The Jury have found for the defendant on all the counts in the declaration, except the one for *harboring* and *maintaining* the slave as a runaway: Upon that count we think there can be no doubt as to what verdict they should have found, under the facts which form the case. The act of Assembly gives a penalty, where any person shall "harbour or maintain, under any pretence whatever, any runaway servant or slave." Now, it has been contended by the plaintiff's counsel, that if the slave was runaway, and was in the possession of defendant, and retained by him, that it was then such a case as was provided for by the act, which, from the words, "under any pretence," would reach every possible case. That the Legislature was competent to give a penalty in such case, we do not deny, but feel warranted in saying they have neither *said* so, or *intended* it, in this case.

The act has in *express* words given a penalty for *harbouring*;—harbouring is a term well understood in our law, and means a *fraudulent* concealment—and the Legislature not having said in what *a maintaining under any pretence* consists, we are left to find it out by construction.

To us it seems clear, that it is a safe rule in construction, where acts of a known and definite meaning are described as constituting an offence, and then other words of a general nature are used as synonimous with the former, and apparently with a view of giving to the act a liberal construction in suppression of the mischief, that these *general* expressions should not render penal by construction, any act which does not partake of the *qualities* of the act *specially* set forth:—Such a construction would lead us to say, that the maintaining, intended by the Legislature, was *secret* and *fraudulent*—this being negatived by the statement of the case, we think the Jury should have found for the defendant on this count, and are all of opinion there should be judgment for defendant.

State v. *Hashaw.*

At September Term 1811, a bill of indictment was found against defendant, and was continued from court to court until September Term, 1814, when a *nol. pros.* was entered in consequence of a defect in bill, and a new bill was found against defendant for same offence, upon which he was tried and convicted.

Question for Supreme Court,—Is the defendant bound to pay the State's witnesses from the finding of the first bill unil the *nol. pros.* was entered?

TAYLOR, C. J. We think it very clear that the defendant is liable to pay the witnesses for the whole time of attendance. The charge, of which he was convicted, was the same upon which the witnesses attended, and though the indictment was altered in point of form, yet neither the defendant nor the witnesses were discharged during the time; the latter were subpœnaed or recognized to give evidence against him on a specific charge; they did so, and he was convicted.

Branch v. *Arrington*.

The only question arising in this case was,—on what principle ought interest to be charged in a guardian's account with his orphan? To establish which, the case was referred to this Court.

CAMERON, J. delivered the opinion of the Court.

By the 9th section of the 5th chapter of acts of 1762, the Legislature have enacted, that "every guardian shall annually exhibit his account and state of the profits and disbursements of the estate of such orphan, upon oath." By the 10th section of the same act, they have further enacted, that "where the profits of any orphan's estate shall be more than sufficient to maintain and educate him, or her, the guardian of such orphan shall lend the surplus, and all other sums of money in his hands, belonging to such orphan, upon bond with sufficient securities, to be approved of by the next succeeding court, and to be repaid with interest, which interest, such guardian shall account for annually."

The question arising on the construction of the foregoing sections, is,—whether the guardian is accountable for interest on the accumulated balance of principal and interest annually, after deducting the necessary expences of his ward? A majority of the Court are of opinion, that he is; because, independently of the just claim of the ward, to have the excess of the profits of his estate converted into an active fund, and of the injustice of permitting the guardian to retain the money of his ward, in his own hands, making gains for himself, the act has expressly required him to account for the interest *annually*. By this we understand, that the guardian is not only bound to exhibit the amount of interest which accrues on the debts due his ward, in his annual account, but he is bound to bring such interest into his account, debiting himself with the amount thereof, and forming a

part of the aggregate amount on which the succeeding accumulation of interest is to be estimated. Should the debtors of the ward neglect or refuse to pay the interest due on their bonds at the expiration of the year, the guardian is bound, within a reasonable time, to coerce the payment of the principal and interest, and when recovered to lend the same to some more punctual person.

It is not intended to place such a construction on the act, as will, at all events, compel the guardian to account for, and pay interest, on the balance of principal and interest, at the expiration of each year. We only lay it down, on the general principle resulting from the just and necessary construction of the act, that he shall be chargeable with the interest annually, unless he shews to the satisfaction of the Court, such equitable circumstances as ought, in conscience, to acquit him of his accountability for such interest.

SEAWELL, J. and TAYLOR, C. J. dissented.

Arrington v. *Arrington's Heirs.*

This was a petition for dower out of several tracts of land owned by William Arrington, the deceased, at the time of his marriage, and several others acquired by him afterwards, of which he died seized.

The defendants plead that the widow is barred of her dower by an agreement entered into between her and her husband, whereby she agreed to claim no dower in the lands of which her husband was then, or should afterwards become seized. The deed referred to in the plea, was executed by William Arrington and the petitioner, before marriage, and in contemplation of it: it conveyed to a trustee all the lands which Wm. Arrington then owned, and all which he might thereafter acquire, in trust that he should be permitted to

enjoy them during his life, or sell them if he thought proper; and in failure of his doing so, in trust for the use of such persons as he shall appoint by his will; or if he die intestate, to the use of his children. The deed contained no covenant on the part of the petitioner; nor was it expressed to be in satisfaction or lieu of dower.

TAYLOR, C. J. It is certain that this deed could only operate upon such lands as William Arrington owned at the time of its execution: lands afterwards acquired did not pass under it, however plain the intention of the bargainer and the words of the conveyance. Of the several tracts, therefore, specified in the petition, as purchased after the marriage, the widow is endowable, if the seisin continued in her husband at the time of his death. The plea must, therefore, be overruled and dower assigned according to this principle.

Bizzel v. *Bedient.*

The plaintiff, a resident of this State, sued out an original attachment against the defendant, a resident of New-York, and levied upon monies in the hands of Sutton, who, being summoned, sets forth in his garnishment, that Bedient was discharged under an insolvent act of the State of New-York, and all his property assigned to trustees for the general benefit of his creditors; that the monies in his hands were received by him in virtue of a power of attorney given by the assignees to Skinner in this State, and by Skinner to him —that he does not therefore consider them as the monies of Bedient, but of the assignees.

It was admitted in the case, that although the plaintiff had been a resident in this State from the commencement of the account, yet that it arose from disbursements and other

expences incurred by him as master of Bedient's vessel, in different parts of the world.

TAYLOR, C. J. delivered the opinion of the Court.

We cannot perceive any satisfactory reason why the plaintiff, who resides in this State, should not have a right to recover his debt out of any of his debtor's property found here, which is not bound by a prior lien. If it be objected that the debtor's property, wherever situated, had been previously assigned, by a law of the State of which he was a citizen—that such assignment was for the benefit of all his creditors, and that no one of them, in the event of a deficiency, should recover his whole debt, to the injury of the rest—we answer, let the assignment bind all the citizens of New-York, and let it have full effect even here, when it does not conflict with the rights of our own citizens. Upon all questions arising between persons, resident in New-York, its laws should in justice operate; but they ought not to have *extra* territorial force in binding the rights of residents of this State, who have no share in forming them, and are destitute of the means of ascertaining what they are. A creditor who, availing himself of the laws of his own country, attaches the property of his debtor found in this State, ought not to be turned round to seek payment under an assignment in another State. In one of the latest cases to be found in the books, it is held that a discharge under a foreign bankrupt law, will not bar an action for a debt arising in England, to a creditor residing there also.–1 *East* 6. Though if a debt contracted in a foreign country had also been discharged by the laws of that country, this would have been a discharge every where. The laws of foreign counties must be recognized as binding on personal property in a variety of instances —but the general rule must be taken with the exception of such laws interfering with the rights of our citizens here. Wherever one or the other must yield, our own law is entitled to the preference.–5 *East* 131.

From the numerous decisions which have taken place in England, relative to the operation of their bankrupt laws in the colonies, they are not held to affect *bona fide* creditors there who will not avail themselves of them. The assignees of a bankrupt in England may recover debts due to him in the colonies, in the same manner as if he had made an assignment of his property to them for a valuable consideration. No injustice can proceed from such a system, because the debt is the property of the bankrupt, and is assigned, with his consent, for a valuable consideration: as a subject of, and resident in Great Britain, he gives his implied assent to every legislative act of the country, and, amongst others, to the bankrupt laws. The debtor not being locally resident in England, is not bound, without actual notice, to take cognizance of any legislative or judicial act. If, therefore, without knowing of the disposition of the bankrupt's property, he pays the debt in good faith, either to the bankrupt himself, or to any person in his behalf lawfully empowered, he shall not be accountable to the assignees. If it is recovered from him by judicial proceedings, he shall not be accountable to them—*Douglas* 169—3 *Term Rep* 125. And it does not seem to have been doubted, that a foreign creditor is not bound by the bankrupt laws at all, if he recover a judgment *bona fide*, and has legal possession, according to the laws of another country, of any part of the bankrupt's estate.

It is also to be considered, that an insolvent law of this State would not discharge a debt contracted in New-York, to a creditor resident there—this has been decided in their courts there, as appears in several of the books of reports. Upon the whole, we are of opinion, that so much of the money in the garnishee's hands should be condemned, as is sufficient to satisfy the plaintiff's judgment.

Orr v. *McBryde, Sheriff.*

The plaintiff sued out an attachment against N. T. Orr, which was levied in the hands of McBryde, who, upon his garnishment, stated that he levied an execution upon N. T. Orr's property at the suit of the plaintiff, and raised from it the sum of $374 : 71 above the amount required in the suit.

This sum was condemned in the Superior Court as liable to the plaintiff's attachment, and from that judgment M'Bryde, the garnishee, appealed to this Court.

The case was submitted without argument.

TAYLOR, C. J. delivered the opinion of the Court.

The question presented on this record is,—whether the money in the hands of the sheriff, forming an excess beyond the amount of the execution, is liable to the plaintiff's attachment? We are of opinion that it is liable to be attached, because it was held by the sheriff, not in his official capacity, but in his private character. He was directed by the writ of execution to raise the amount expressed in it, together with the costs, out of N. T. Orr's property, and to return that sum to court for the benefit of the plaintiff in the suit. It has been ruled, that money in a sheriff's hands, raised by him in obedience to a writ, is not attachable; because it would interfere with the rights of others, embarrass, and sometimes render ineffectual, the process of the Court, and produce endless litigation. But a surplus remaining in the sheriff's hands, is the property of the defendant in the suit, who might immediately have demanded and enforced the payment of it; consequently, any of his creditors, in other respects entitled to the benefit of the attachment law, may levy upon it in the hands of the sheriff. The sum in contest is therefore condemned in the hands of McBryde, to satisfy the plaintiff's judgment.

Ballard & others v. *Griffin.*

In this ejectment a special verdict was found, the substance of which is, that S. T. Everitt being seized in fee of the first and second tracts of lands described in the declaration, devised to his only son, and heir at law, as follows:

"I give and bequeath, to my son James Everitt, my manor plantation, and all the lands thereunto belonging, &c. to him and his heirs forever. It is my will and desire, that if my son James should die without heir, lawfully begotten of his body, then all I have given him shall belong to my brother John Everitt, to him and his heirs forever."

That the testator died—and, afterwards, and subsequent to the year 1795, James died intestate and without issue; and that John died, in the lifetime of James, without issue; that the lessors of the plaintiff are the nephews and nieces of S. T. Everitt,—the heirs at law of John Everitt,—and the heirs at law, on the paternal line, of James Everitt. That the fourth tract of land was granted, by the State, to James Everitt, who died seized of all the tracts, leaving a brother and two sisters of the half-blood, of the maternal line, under whom the defendant claims.

Daniel, for the lessors of the plaintiff, cited *Co. Litt.* 18 *b.* 1 *Strange* 277.

Gaston, for defendant, cited *Cro. Jac.* 695.–9 *East* 382.–2 *Ld. Raym.* 830.

TAYLOR, C. J. The material question on which the right decision of this cause depends, is, whether James Everitt took the lands claimed in the declaration, by descent or purchase; for if he took them by descent, the heirs at law on the paternal line, who are the lessors of the plaintiff, are entitled to recover. If, on the other hand, James took them by purchase, his half-brother and sisters of the maternal line,

under whom the defendant claims, are entitled to the inheritance.

We think it very clear that the words of the will create an estate-tail in James Everit; for, although the first clause gives a fee, yet by the second, it is narrowed and restricted to an estate tail. The rule is, that if the devisor alter the estate, and limit it in a different manner from that in which it would have descended to the heir, the heir takes by purchase; because it is then another estate, which must descend from him, as the first purchaser, to his heirs on the part of his father.

It follows, therefore, that if a person seized in fee, devised lands to his eldest son in tail, the son, though heir at law, took by purchase; for it is a different estate from that which would have descended to him. This was undoubtedly the law of England, of course of this State, when this will took effect.—*Plowd. 545. b.*

But it has been argued for the plaintiff, that the act of 1784, which was subsequently passed, converted this estate-tail into a fee-simple, of which James became seized by operation of law, and without any act of his own; and, therefore, that he took the fee by descent.

He took the fee by force of the act of Assembly, but certainly not by descent from his father, for that was intercepted by the devise; he took, by the operation of the act, a new estate, with different qualities and incidents from his old one, and which could not have existed but for the previous estate devised under the will. The estate-tail was the *substratum* on which the fee was placed, and though it has larger capacities, cannot boast a higher or more worthy origin. Whether an estate accrues by descent, or by purchase, must be decided when it first falls or is acquired. To ascertain its character by any circumstance arising *ex post facto*, would be inconsistent with the policy of the law, in

relation to heirs who are liable to pay the debts of their ancestors, in virtue of lands coming to them by descent. It would involve the absurdity, that a person should take an estate by purchase, and continue to hold it a length of time without being liable as heir, during which period, all the suits against him, on the specialties of his ancestor, might be decided in his favor.—But afterwards the construction of some act of Assembly is applied to his estate—it is touched by the wand of legal magic—not only its name but all its properties are changed—time past, as well as present and future, yield to the enchantment, and the owner must pay those debts from which he has been once judicially exonerated.

To such a construction of the law we cannot yield. We believe that the estate-tail taken under the will, and the fee conferred by the act of 1784, were equally acquired by purchase, in the true sense of the word, and consequently that it descends to the brother and sisters of the half-blood of James Everitt.

Judgment for the defendant.

M'Gehee v. *Draughon & Jordan.*

This is an action on the case, brought by the plaintiff against the defendants, for negligently keeping and managing their boat, kept by them, at their licenced ferry, for the transportation of persons and property across Cape Fear river, by which negligence the plaintiff sustained an injury by loss of property; and has laid his damages at one hundred pounds and upwards. The defendants pleaded in abatement, that the plaintiff is an inhabitant of the county of Person—that they, the defendants, are inhabitants of the

county of Cumberland, and that the matter in contest is not of the value of fifty pounds. The plaintiff demurred to the plea, and the defendants joined in demurrer.

The case was submitted.

TAYLOR, C. J. delivered the opinion of the Court.

The plea in abatement cannot be supported—it is essentially defective both in form and substance. The words of the act of 1793, *C.* 18, are "any debt or demand," but the plea substitutes the words "the matter in contest." The plea is defective in substance, because the action arises *ex delicto*, and it is therefore impossible to ascertain the sum the plaintiff is entitled to, before the jury have assessed the damages. The sum demanded in the writ, is upwards of one hundred pounds, so that the plaintiff, living in a different district from the defendant, is *prima facie* entitled to sue where he lives, his demand being above that fixed by the act in such cases. But even if he should obtain a verdict for a less sum than fifty pounds, it would seem to be straining the interpretation of the act, to suffer the jurisdiction of the Courts to depend upon a rule so uncertain and capricious, as the amount of damages in cases of *tort*. Let the plea be overruled and a *respondeas ouster* awarded.

Dunn v. *Stone*.

Powell v. *Eundem*.

The declarations in both these actions were the same. The substance of them was, that the plaintiff was possessed of a tract of land on the River Neuse, and a fishery adjoining it, from which he made great profits—that the defendant, intending to injure him, erected a mill dam across the river, below the fishery, whereby fish are prevented from passing

up the river, and the profits and advantages of his fishery are thus destroyed.

The defendant, by protestation, denies that the River Neuse, at the place where &c. is a navigable river, or that he has any knowledge of the plaintiff, his land or fishery, except that he is informed that Powell lives 15 miles above the dam, and Dunn miles above it; and, for plea, saith that he built the dam on his own land, for the purpose of giving him a head of water to turn mills and other machinery, and not with an intent to injure the plaintiff. Demurrer and joinder.

The cause was argued at a former term, by *Browne*, for the defendant, and at this term by *Nash* for the plaintiff.

For the plaintiff, were cited, *Sir John Davis's Rep. case of the fishery of the Banne*, 155.–*F. N. B.* 430.–4 *Bac.* 1364.

For the defendant, 5 *Co.* 72.–*Co. Litt.* 56. *a.*–*Cro. Eliz.* 118.–1 *Wils.* 174.–2 *Bl. Com.* 35.–*Act of Assembly*, 1787, *C. XV.*

TAYLOR, C. J. delivered the judgment of the Court.

It is to be decided whether an action can be sustained upon the facts stated in the declaration. The inconvenience occasioned to the plaintiff by the erection of the dam, is felt by him in common with all those, who own lands on the margin of the Neuse River, above the dam; and who, in consequence of such ownership, have been accustomed to take fish in the stream. This action cannot be supported without admitting, at the same time, the right of all such persons, even to the very source of the stream, to maintain similar actions. Their respective losses may vary in degree, but the principle of the action is equally applicable to them all; and if suits were thus multiplied, the inevitable consequence would be to overwhelm any individual against whom they might be brought, and thus lead to a severity of pu-

nishment utterly disproportioned to the offence, without affording to the public, that benefit, to which alone punishments can be legitimately directed.

The law, with admirable wisdom, has interposed an effectual barrier against so fruitful a source of litigation and injustice; and has separated, by well defined boundaries, injuries done to the public, from those done to an individual. Hence, for any of those acts which are in the nature of a public nuisance, no individual is entitled to an action, unless he has received an extraordinary and particular damage, not common to the rest of the citizens; as if a man suffer an injury by falling into a ditch dug across a common highway, —*Co. Litt.* 56,–5 *Rep.* 73,—or is thrown from his horse by means of logs laid across a highway,—*Carth.* 194—or receive any other special injury which is direct and not consequential. In all cases where the right is of a public nature, the denial of the right to an individual is not actionable, unless the plaintiff charges in his declaration, and proves a special damage; as where an action was brought against the owner of a common ferry, for refusing to ferry the plaintiff over, who claimed a right by prescription to pass toll free, it was held not to lie, because the right was common— 1 *Salk.* 12—and this proves too, that the objection to the action is not removed, by the act being more prejudicial to one man than another. Nor is it answered by shewing, that only a certain portion of the community, and not all the citizens, are incommoded by the act; for that occurred in *Williams's* case, before cited from 5 *C.* 73; a reference to which will shew, that only the tenants of a particular manor could possibly receive any detriment from the neglect which was laid as the ground of the action.

It is true that the law enjoins upon every man, and will enforce in a suitable manner, that precept of natural justice, so to use his own as not to injure another. But the rule, in every instance, pre-supposes that the party complaining has,

in the thing injured, a property either absolute or qualified. The cases of injuring the dwelling, of obstructing lights, of exercising offensive trades, and the many others stated in the books, are all founded upon this principle. But what property could plaintiff have in the fish, in their wild state, before they ascended to the water flowing over his land? In animals *feræ naturæ* a man may have a qualified property, which continues only while they are in his possession or under his controul; and so long they are under the protection of the law. But the defendant has the same extent of ownership in them, in virtue of which he might have caught them in his own water, and thus have done an equal injury to the plaintiff's fishery. Whether their progress thither is obstructed by a mill dam, or by being taken in weirs or nets, the plaintiff loses the benefit of his fishery. But in both cases, the defendant is exercising a legal right, and certainly with as respectable and beneficial a motive in the case of erecting a dam, as in that of catching fish.

It would produce the most extensive mischief in society to sanction the principle, that a man may be sued for using a right, to the consequential and indirect damage of another. Such a doctrine would unnerve all intellectual efforts in the advancement of science, arrest improvement in those arts, which diffuse around civilized man his chief comforts and highest ornaments; extinguish the lights of knowledge, and effectually check that spirit of useful discovery with which the present, more than any former age, has teemed, for the utility and embellishment of social life.

The frequent interference of the Legislature on the subject of fish, both in England and this State, impliedly recognizes common law right in the owners of the soil on both sides of the river, to exercise the property as they may think fit. Until the enactment of the law of 1787, *C. XV*, it was probably usual to build dams quite across some rivers, and entirely to obstruct the passage of fish; that act requires

one fourth of the river to be left open for the passage of fish. The common law right has been restrained also by several other acts, relative to seine fisheries, all directed to promote the benefit of the public, at the expence of the individual owners of the rivers. A penalty is annexed to the violation of those laws, and the interest of the public seems, in general, to be well protected by them. The result of our consideration of this subject is, that there should be, in both actions, judgment for the defendant.

SEAWELL and CAMERON, Judges, gave no opinion, having been of counsel in these causes.

Clark v. *M'Millan.*

The defendant gave the plaintiff an instrument of writing, signed by the defendant, but without seal; whereby he acknowledged that he had sold to the plaintiff a certain note of hand, for which he had received part payment, and the balance was to be paid when the money was collected.

The plaintiff offered to prove, by parol, that at the time of the contract, the defendant promised to commence an action against the payers of the note, or one of them, within ten days from the first October, 1806—that, in fact, six months expired before the action was brought. And whether such evidence is admissible, is the question submitted to this Court.

TAYLOR, C. J. delivered the opinion.

If the tendency of parol evidence is to contradict, vary, or add to a written instrument, it cannot be received; if to explain and elucidate it, it may be received. Upon the face of this writing there is nothing doubtful or equivocal. It states a simple transaction, and imposes no obligation upon

the defendant; but the object of the evidence is to shew, that when he made the contract, he entered into a stipulation, by which a duty was imposed upon him, for the breach of which, this action was probably brought. This is in effect, to prove by inferior evidence, that which purports, on the face of it, to be a memorial of the defendant's contract, is in truth not so. Such evidence is inadmissible, according to all the authorities.

Williams v. *Lane.*

This petition was filed by Williams and Patsey his wife, and Jane Lane, against Alfred Lane, in order to obtain the opinion of the Court, as to the manner and proportion, in which a division should be made between the parties, of a tract of land devised to them, by the will of T. Hunter, dec.

The case was spoken to at a former term by *Gaston* for the petitioners, and *Browne* for the defendant, when the Court not having formed an unanimous opinion, it was continued under advisement till this term. The opinion of the Court was now delivered by

CAMERON, J. In this case, the testator, Theophilus Hunter, devised as follows: "I give and bequeath to my grandchildren, by my daughter Jane, as follows, to wit:—to my grandson Alfred Land, 350 acres of land, being the upper part of a tract of land of 700 acres purchased by me of Jas. Lane, lying on Crabtree Creek—Also, to my granddaughters Patsey Lane, and Jane Lane, I give and bequeath the lower part of the same tract of land, to be equally divided between them."

The tract contains, by actual survey, 1100 acres of land, and the question is, whether the defendant is entitled to 350

acres, being the upper part of the tract, or to one half of the tract?

The meaning of the testator is always to prevail, when it can be fairly inferred from the words he has used, and when it does not contravene any known or established rule of law. It does not follow, because the testator describes the tract in question, as a tract of 700 acres, and devises to the defendant 350 acres, being the upper part of the same, that he intended to give him one half of the tract. Suppose the tract only contained 500 acres, could the Court say that the testator only intended that the defendant should have 250 acres, when he has expressly and specifically devised to him 350 acres?—We apprehend not.

It was decided in the case of *Powel* v. *Liles*, in this Court, that describing a tract of land, as containing a specific number of acres, did not vary the case from a description of a tract by so many acres, more or less. If the testator had described the tract to be 700 acres, more or less, no question could have been raised. In our opinion, the words he has used mean nothing more than if he said 700 acres, more or less. Wherefore, a majority of the Court are of opinion, that the defendant, Alfred Lane, is entitled under the will of the said Theophilus Hunter, to 350 acres of land to be taken from the upper part of the aforesaid tract, and that the petitioners are entitled to have the residue of said land divided between them equally.

TAYLOR, C. J. I have formed a different opinion from that which has been pronounced, and will briefly state the reasons upon which it is founded. The intention of the testator seems to me apparent, upon the face of the will, to give his grandson Alfred, one half the tract of land, and the other half to be equally divided between his two granddaughters —and in this proportion he meant they should take, whatever number of acres the tract should be found to contain.

The testator believed that there were 700 acres in the tract, for in that way he described it—and under this belief he gives to Alfred that number of acres which amounts to half, describing it as the upper part. This induces me to think that he used the word "part" as synonimous to "half." But why is he silent as to the number of acres he devises to his granddaughters? For the obvious reason, that it was one half the tract, and must be the same in quantity that he had just given to Alfred. It had been twice told, and required not a repetition. He assigns one clause to the devise to Alfred; and a new, and separate one, to the devise to his two granddaughters—to the end, that the words "equally to be divided" might have a distinct and unequivocal reference to them, and to preclude any refinement of construction, which might also extend to Alfred and his half.

This would have been the undoubted construction of the will, if the tract of land had in reality contained the exact quantity of acres, which the testator believed it did. The intention would then have been considered clear, and the phraseology perspicuous. I cannot understand why this construction should be abandoned, because it happens in event that the tract contains 1100 acres. There is no revolting disproportion in the shares of the respective grandchildren; no ratio different from that which the testator himself designed. It is certain that each devisee would receive more than the testator expected, but they would receive it in the exact proportion that he designed and limited; inasmuch as 350 bears the same proportion to 175, that 550 does to 275. Yet how different is the result according to the judgment! Alfred's share instead of being equal to the shares of both his sisters added together, will be less than the share of either. If this question had been put to the testator,—"suppose there should be much more land in this tract than you think there is, do you intend in any event that your granddaughters shall, each, have more than your grandson?—I think he would have been very prompt in answer-

ing "No; I gave 350 to Alfred because I believe the tract contains 700, and I wish him to have half at all events, and the other half to be divided between his sisters."

As I take this to be the true construction, I cannot consent to yield it on account of a mistake in the testator as to quantity; a mere error in computation, which has been so often overlooked when the intention is plain.–1 *Vesey* 106. *Milner* v. *Milner* 2 *Bro. C. C.* 87.–*Williams* v. *Williams*: "If (says Lord Bacon) I grant my meadows in Dale containing 10 acres; and they in truth contain 20, the whole 20 pass" according to the maxim *veritas nominis tollit errorem demonstrationis.–Reg.* 25. If half the meadows had been granted in the same way, the grantee must have taken 10 acres; and I cannot perceive a difference between those cases, and where a man grants to A five acres, being the upper part of his meadows containing ten acres; and in another clause grants the lower part of the same meadows to be divided between B and C.

SEAWELL, J. dissented from the opinion of the Court.

State v. *Bryant.*

This case came before the Court on a motion to quash the indictment, which charged the defendant with petty larceny, in stealing *one half ten shilling bill of the currency of the State*, &c.

No argument was made in the case.

TAYLOR, C. J. delivered the opinion of the Court.

The thing charged to be stolen is not stated with the requisite precision and distinctness, to authorise the Court to pronounce judgment upon the offence, in the event of a conviction. Considered as currency of the State, it is of no

value, since no one is compellable to receive it; it is not a tender in payment. Nor could the defendant, by the description in this indictment, protect himself from a future prosecution for the same larceny. As it is actually decribed, there is no such thing known in the currency of the State; as it was probably meant to be described, it is not punishable as a larceny. Being therefore destitute alike of artificial and intrinsic value, the indictment cannot be supported.

Let it be quashed.

The State v. *Levin, a negro slave.*

The defendant is a negro slave, the property of William Pope. He was convicted of stealing a horse, the property of Zeno Worth—and it is referred to the Supreme Court to determine what judgment should be rendered against him.

TAYLOR, C. J. delivered the opinion of the Court.

The first time the offence of horse-stealing by a slave, appears to have been noticed by the Legislature, was in 1741, when, for the first offence, the punishment of whipping and the loss of ears was annexed to it; and for the second offence, death.—*C.* 8, § 10. At this period the benefit of clergy was taken away from the offence, generally, by several statutes,—*Ed. VI*, & 31 *Eliz. C.* 11—so that it must have been a capital crime in free persons: how long it continued so, we have not the means of immediately ascertaining, nor is it essential—it was so in 1779, because, in the private acts for that year, there is a pardon granted to a person under sentence of death for the offence. Shortly after the latter period, it is probable that the law underwent some change, because in 1784, an act was passed to prevent horse-stealing, only the title of which is preserved in the collection of the acts of

Assembly. But it was repealed by an act in 1786, from the preamble of which, it may be collected, that the act repealed, introduced the punishment of death; and the purview of this act substitutes the punishment of pillory, &c. Thus it continued till 1790, when the punishment of death was again introduced and has remained ever since. But all these acts subsequent to 1741 relate to the crime as committed by free persons, and do not interfere with its punishment when committed by slaves. It then follows that the judgment in this case must be pronounced under the 10th section of the act of 1741, *Cap. VIII.*

Bullock v. *Tinnen & wife.*

The complainant, Micajah Bullock, exhibited his bill against Nancy Bullock, (who afterwards intermarried with the defendant Carns Tinnen,) as administratrix of her former husband, Philip Bullock, charging that said Philip died intestate and without any children—that the complainant was entitled, as the representative and next of kin, to two thirds of the estate of said intestate, in the hands of the said defendant—and charged, that negro woman Betty and her children Jenny, Jordan, Davy and Leathy, with other property, came to the hands of said defendants. To which bill the said Nancy, before her intermarriage, filed an answer, admitting that her husband and intestate Philip, died on the 17th November, 1807—that the negro woman Betty and her children Jenny, Jordan, Davy and Leathy, with other property, came to her possession, but alleges, that on the day after the death of said Philip, the said Micajah did fully, freely, wholly and absolutely relinquish and yield up to this defendant, all the right and interest which he had, or might have, to any part of his said son's estate, by reason of his having died intestate. Whereupon the following issue was

made—Did the complainant, after the death of the intestate, yield and relinquish to the defendant, all his right and interest in the intestate's estate—if any, what part thereof, and what relinquishment did he make? If he did, upon what consideration, and whether by parol or writing, and at what time?—Whereupon the jury returned the following verdict—That on the 19th day of November, 1807, the complainant, Micajah Bullock, did yield and relinquish to the defendant, a certain negro woman by the name of Betty, and her children—that the consideration that influenced that relinquishment, was the love and affection the complainant had to the defendant Nancy Tinnen, (then Nancy Bullock;) and further—that the relinquishment was made by parol, on the day aforesaid, and that the said Nancy, then Nancy Bullock, was not present.

Upon motion to dismiss the bill, as seeks distribution of Betty and her children, it is referred to the Supreme Court to determine and adjudge what decree shall be made.

The case was argued by *Browne* and *Norwood* for the complainant, and *Nash* for the defendant.

TAYLOR, C. J. delivered the opinion of the Court.

Whatever wishes the circumstances of this case may be fitted to inspire, the Court are not apprised of any authority or principle of law, by which the transaction between Bullock and his daughter-in-law can be supported.

The delivery of possession has ever been deemed necessary to complete the gift of chattels, except they are granted by deed, or are incapable of being delivered. "Every thing that is not given by delivery of hands, must be passed by deed. The right of a thing, real or personal, may not be given in nor released by word."—*Noy. maxim* 33. If the gift does not take effect, by the delivery of immediate possession, it is then not a gift but a contract, the performance

of which can only be compelled upon good and valuable consideration.—2 *Bl.* 442. It has even been held that if a man, without consideration, deliver a thing to another to be given to a third person, he may countermand it at any time before delivery over.—*Dyer* 49.

The rule of the civil law appears to have been less strict, with respect to gifts, than the common law; but though it did not require a delivery, the presence of the party, to whom the gift was made, was deemed essential. It substituted, besides, other ceremonies, which were perhaps as well calculated to make the transaction public, and to guard against haste and imposition, as those required by our law. It is the object of all laws to enforce the performance of those contracts and engagements which grow out of the relations and state of society; and the ceremonies requisite to their validity are designed to fix and ascertain the intention of parties, and the degree in which they mean to incur a legal responsibility. No man who deliberately makes a promise, can in morality or honor, recede from the performance of it, without very sufficient reason; but the law lends its aid in compelling the performance of those engagements only, which are contracted under prescribed ceremonies, and evidenced by certain proofs of deliberation. A man may have a present intention to do a thing, or may intend to do it in future, and express himself to that effect, without meaning at the time, to lay himself under a legal obligation. And it may well be doubted whether it would be wise, if it were practicable, to give legal effect to those promises which are made without due deliberation, or under the influence of some strong emotion, the presence of which, in a greater or less degree, interrupts the calm decisions of the judgment:—whether the heart abandon itself to the transports of joy, or is weakened by the sympathy of grief, something is deducted from the prudence and circumspection which the mind exercises in the ordinary concerns of life. The Court overruled the motion to dismiss the bill.

Squires v. *Riggs.*

R. Squires made a conveyance, in consideration of blood only, to his child, the lessor of the plaintiff, by deed. Afterwards, R. Squires, by deed, for valuable consideration, conveyed the lands to William Jones—but such conveyance was not *bona fide*, being made with the intention of removing the land from the reach of the creditors of Squires—Jones conveyed to John Riggs, for a valuable consideration, who had notice of the circumstances under which Jones received his conveyance. The defendant holds under Riggs.

The jury, upon these facts, found a verdict in favor of the plaintiff,—and a motion is made for a new trial upon the ground, that the verdict is contrary to law.

The case was argued by *Donnell* for the plaintiff and *Gaston* for the defendant.

TAYLOR, C. J. delivered the opinion of the Court.

The statutes relative to fraudulent conveyances, have, from the periods of their enactment, received that construction which appeared most likely to suppress deceitful practices, and to obviate all temptation to commit them. And the principle arising in this case, was brought under the notice of the court at a very early period after the passing of 27 *Eliz.* when such a decision was made as might have been expected from the spirit and policy of the statute; for it would seem strange that a person setting up a title, which bore upon its face the character of iniquity, and was avowedly designed to defraud creditors, should shelter himself under a law, the very design of which was to frustrate and discountenance all such attempts. Accordingly it has been held in every case, in which the question has occurred, not only that a purchaser must have paid a valuable consideration, but that the transaction must be fair and honest; and

although it is not possible, perhaps, to find a case where the purchase was made precisely with the same view, viz. to defraud the creditors, as in the case before us, yet the *bona fides* is required as indispensable; for it surely cannot make any difference in principle, whether the transaction, if it be really corrupt, receive its impurity from one source or another. There is a case cited in *Twynes*, case 3 *Co.* which lays down the law in very explicit language. A person having made a voluntary conveyance of his lands, afterwards being seduced by deceitful covenous persons, for a small sum of money, bargained and sold his land, being of a great value. This bargain, though it was for money, was holden out of the statute, which being made against fraud does not help a purchaser who does not come to the land for a good consideration, lawful and without fraud and deceit. Though this case does not involve the rights of creditors, yet it may fairly be considered a direct authority for the principle, that a prior voluntary conveyance shall not give way to a subsequent purchaser who has conducted himself dishonestly. It is, in effect, giving to the word purchaser, under the statute, the same meaning which is affixed to it in Courts of Equity, as one who innocently and without fraud or surprise, for valuable consideration, acquires a right or interest. The cases in *Cro. Eliz.* 445, and 1 *Bur.* 396, are to the same effect. In the last case that is recollected, where the same question has occurred, the language of the Court is particularly strong. The amount of it is, that a purchaser is not entitled to the protection of the statute, unless the transaction is *bona fide* and the purchase fair in the understanding of mankind. It is not necessary that it should be for money, but it must be fair: if it is colourable only it cannot stand.—*Cowp.* 705.

Upon the whole we think the plaintiff entitled to judgment upon the reason of the thing, the policy of all the statutes and acts concerning fraud, and the unvarying exposition

they have received in respect to the point of this case.

Judgment for the plaintiff.

Harton & wife v. *Reavis.*

This was an action of slander, to which the defendant pleaded "general issue, justification and statute of limitation."

Upon the trial the plaintiff proved, satisfactorily, and clearly to the Court, the speaking of the words, and within six months before the commencement of the action.

The defendant attempted to prove justification, in which, in the opinion of the Court, he wholly failed—and the plaintiff, in the opinion of the Court, was entitled to exemplary damages.

One of the jurors was called by defendant, as to the time of speaking the words, who, in the opinion of the Court, from other evidence, was clearly mistaken in his evidence.

The jury found that the action was not commenced within six months of the speaking of the words, and upon a motion for a new trial, the point is referred to the Supreme Court.

The case was submitted without argument.

TAYLOR, C. J. delivered the opinion of the Court.

We entertained some doubts on first reading this case, whether it was competent in the Court to award a new trial, but not finding, upon examination of the authorities, any that can justly be considered as opposing it, and the reason and justice of the thing being clearly the other way, we think the case ought to be submitted to the consideration of another

jury. It is very difficult to lay down any general rule on this subject, on account of the numerous exceptions which the ever varying circumstances of cases continually furnish, which must, after all, influence the legal discretion of the Court, as directed to the furtherance of justice. The practice of the Courts in Westminster-Hall has been gradually acquiring liberality, in granting new trials, in cases of tort, where the damages are excessive. In the case of *Beardmore* v. *Carrington*, 2 *Wils.* 2144, it was said there was no case to be found where the Court had granted a new trial for excessive damages in a case of tort; and though the power of doing so was not denied, yet it was said it ought not to be exercised, but in flagrant and extreme cases. In *Dubberly* v. *Gunning*, 4 *Term Rep.* 651, which was an action of *crim. con.* the Court refused to grant a new trial, although they thought the damages excessive. But in an action of assault and battery, which occurred soon afterwards, they granted a new trial for excesive damages, saying that the case of *Dubberly* v. *Gunning* was *sui generis*, and that the Court were not unanimous.–5 *Term* 257. And there are several cases where, though the Court refused a new trial, they admitted their power to grant it, if the damages had been greatly disproportionate to the injury received.–3 *Bur.* 1845, 2 *Bl.* 184. It would appear from these authorities, that the Court have power to interfere in all cases of tort, except *crim. con.* respecting which, a notion prevailed that the jury were the uncontroulable judges of the damages, as they were given for wounded feelings, and the loss of happiness, the extent of which, only the jury could estimate. This exception, however, seems no longer to exist, for in a late case it is said, that if it appeared from the amount of the damages, as compared with the facts laid before the jury, that the jury acted under the influence, either of undue motives, or some gross error or misconception of the subject, it would be the duty of the Court to grant a new trial.–6 *East* 256.

There is a dictum of Lord Holt's cited in *Comyn's, Pleader, R.* 17, that a new trial is not usually granted in an action of slander. The case appears, by the report in *Salkeld*, to have occurred 8 *Wil.* 3, and as the same thing is said by the same Judge, at other times, it was probably the law and practice of that day.—*Holt's Rep.* 704. But in a case that occurred about forty-three years afterwards, on a motion to set aside a verdict, on account of the smallness of the damages in an action of slander, the Court state that verdicts had been frequently set aside for excessive damages, but they knew of no precedent for setting them aside for the other cause, though they acknowledge the reason to be equally strong in both cases.—*Barnes* 445. And it may be inferred from subsequent decisions, that these actions were governed by the same principles with all other actions of tort, with respect to new trials. In an action for words, which were fully proved, the jury found a verdict for the defendant. On a motion for a new trial, Lord Mansfield, who tried the cause, reported that he expected a verdict for plaintiff, but *with very small damages*, as the words were spoken in heat and passion, and never afterwards repeated. The Court, without adverting to any rule applicable to the particular action, and restraining the exercise of their discretion, said they would not grant a new trial for the sake of six-pence damages; in mercy to the plaintiff, as well as the defendant.—2 *Bl. Rep.* 851. In another case still later, where the jury had found for the defendant in an action for a libel, but which the Judge reported to be against evidence, but that the injury done the plaintiff was so very inconsiderable, that he should have thought half a crown, or even a much smaller sum, to have been sufficient damages, the Court overruled the motion for a new trial; saying they ought not to interfere, merely to give the plaintiff an opportunity of harrassing the defendant at a great expence to himself, where there has been no real damage, and where the injury is so *trivial* as not to deserve above half a crown compensation. The Court also advert

to the cause of action being in the nature of a crime, and its being indictable.—*Burton* v. *Thompson* 2 *Burr.* 664.

The unavoidable inference from these cases is, that if there existed any principle or usage, restrictive of the power of the Court to award a new trial in actions of slander, either for smallness of damages, or because the defendant had been acquitted, such rule would have formed the ground of decision—it would have been a decisive answer to the application for a new trial, and rendered a discussion of the merits altogether irrelevant.

And it may, with equal probability, be added, that if the cases had presented a positive injury sustained by the plaintiff, and a finding of the jury against evidence, the verdicts would both have been set aside, in order that justice might have been done; for it cannot be called ministering to the passions of a man, to furnish an opportunity of procuring legal redress to him, upon whose character a deep wound has been inflicted. In the case before us, the damages ought, in the opinion of the Judge who tried the cause, to have been exemplary,—and the verdict was against evidence. We therefore think a new trial should be awarded.

Darden's Heirs v. *Skinner.*

This was a bill in equity praying to be let in to the redemption of certain premises conveyed by a deed, absolute on its face, but which charged to have been procured so to be made by fraud and stratagem. The defendant claiming as devisee from grantee, denied all knowledge of the transaction, but admitted he was administrator *de bonis non* of the grantee, amongst whose papers he had found a bond for £174, given by the ancestor of the complainants, and bearing date a short time before the date of the deed. The defendant further

alleged in his answer, that if there was any trust between the parties to the deed, it was created with a view to defraud the grantee's creditors.

Upon this case two issues were submitted to the jury.—1. Whether the deed was intended to be an absolute one or a mortgage. 2. Whether the intent was to defraud Darden's creditors.

It appeared in evidence, that the land was worth five dollars per acre, that it was listed for three hundred acres, but the witness who had lived upon it, and was acquainted with the boundaries, believed there was not more than one hundred and seventy-five acres.

The consideration of the deed was five hundred pounds, and it appeared that about the date of it, the grantor was much embarrassed in his circumstances; and that shortly afterwards all his property was taken in execution and advertised for sale, which was forbidden by the grantee, who produced the deed: all the other property was then sold, except the land, but was insufficient for the payment of the debts. The grantor remained in possession of the land during his lifetime, from 1793 to 1798.

The verdict of the jury was, that the land was mortgaged, and that the deed was not intended to defraud creditors.—On a motion for a new trial, the case was submitted to this Court.

Taylor, C. J. delivered the opinion,

Every part of the evidence upon which the jury founded their verdict, tends strongly to establish, that the transaction between Darden and the defendant's intestate was fraudulent. The embarrassed condition of the former when the deed was made—his remaining in possession of the land continually till his death—the secrecy of the transaction, of which there is no proof that it was made public, till the ex-

igency of Darden's affairs required Skinner to come forward and save the land from being sold—and the inadequacy of the consideration, if indeed there was any paid, the only proof being that a bond of £174 was found amongst Skinner's papers, whereas the lowest value of the land was upwards of £800,—are all circumstances which would probably exist in a scheme to defraud Darden's creditors, but are not easily reconcileable with a fair sale to Skinner, or even with a *bona fide* mortgage to secure the payment of a just debt. The Court have no hesitation in awarding a new trial of the issues.

Lenox v. *Greene & others.*

This was an appeal from the decision of the Superior Court of Craven, overruling a motion for a new trial made by the plaintiff, on the following grounds, viz. a verdict against evidence, without evidence, and an erroneous charge of the Court.

This action was brought against the defendants as sureties of William Henry, Sheriff of Craven County, for breach of his official bond. On the plea of performance, the issue to be decided, turned wholly on the fact,—Whether a judgment recovered by John Lenox against Benjamin Williams, and which had been collected by Henry, under execution, had been paid to Lenox or not? The judgment of Lenox against Williams was for one hundred pounds in an action of assault and battery.

The execution issued from Salisbury Superior Court, tested the 2d October, 1793, and was returnable to the 19th March, 1794. On this execution the sheriff made two returns, which were in the following words, viz.

"Satisfied in full.—Wm. Henry, *Sheriff*." Also—"Judgment paid plaintiff.—Wm. Henry, *Sheriff*."

The defendant produced a receipt, in the following words:

"Received of William Henry, Esq. Sheriff of Craven County, 51*l.* 11*s.* 2*d.* by the hands of William Slade, in full, for the costs of a suit recovered in Salisbury Superior Court, at the instance of John Lenox against Benjamin Williams, Esq. together with the execution issued on said suit.

"MONTFORT STOKES, *Clk. Sup. Court Law.*

"Newbern, 20th July, 1794."

William Henry died in the fall of 1799. No demand was shewn to have been made by Lenox until the fall of 1809, when a claim was preferred against the securities, and in the June following the present suit was brought. John Lenox has been, since 1794, and yet is, a resident of Rockingham County. The defendants are residents of Craven County. Montfort Stokes was at Newbern, in Craven County, at the date of the receipt, as a Clerk of the State Legislature, then sitting at Newbern.

The Court instructed the jury that they were at liberty to presume, from the lapse of time, and the circumstances herein stated, that the judgment was paid—And the jury found a verdict accordingly.

The cause was argued by *Gaston* for the plaintiff, and *Mordecai* for the defendants.

Taylor, C. J. delivered the opinion of a majority of the Court.

The jury have presumed a payment of this judgment after a lapse of something more than fifteen years, of which Henry, the sheriff, was alive only about five; and in aid of the presumption, arising from length of time, other circumstances are relied upon, as that Henry returned the execution, with

two indorsements, one of which stated, that it was satisfied in full, the other, that he had paid the amount of the judgment to the plaintiff. In addition to these circumstances, the defendants relied upon a receipt, signed by the Clerk of Salisbury Superior Court, for the amount of the costs,—upon the non-production of proof by the plaintiff, of any demand made by him till the fall of 1809, and upon the fact of his residence in Rockingham County since 1794, and the defendants' in Craven County. It also appears that the Clerk of Salisbury Superior Court was in Newbern, at the period his receipt bears date.

These circumstances, it is said, fortify and support the presumption arising from the length of time, (which is admitted not to be alone sufficient) and completely justify the finding of the jury.

But we do not perceive in any of these circumstances, taken singly, nor in all of them together, that weight and conclusiveness, which ought to exist, before a man is deprived of a debt due by the high evidence of a record.

Presumptive evidence ought not to rest upon conjecture and surmise—it must be built on a solid foundation. A legal presumption does not arise because probability preponderates on one side, rather than on the other—it is created only then, when the circumstances are such, as to render the opposite supposition improbable; and when we are about to defeat a right, the presumption ought to be stronger, than when it is to be supported.—*Cowper* 216.

The sheriff's return is his own act, and considered as evidence *per se*, it cannot be introduced in favor of himself or his securities—it is evidence only against them. It might, in connection with other circumstances, become evidence against the plaintiff—if, for example, he had seen it a long time since and acquiesced in it, it might be supposed that he knew its truth. But this important fact, instead of being

proved, is supposed—this essential link in the chain of circumstances is deficient. But why should it be supposed that the plaintiff saw this return? The time when he would most probably have looked for the execution was, when it was returnable, and ought to have been returned. That was at March Term, 1794, but instead of being returned then, it was delivered to the Clerk at Newbern, in July, 1794, as appears by his receipt. And even if the return had been made in due time, the probability of its having come to the knowledge of the plaintiff, must depend upon many circumstances, not proved, and which the jury had no means of ascertaining,—upon the degree of attention usually paid by the plaintiff, to his affairs, upon his condition, wants, and vigilance.

The facts from which a presumption is deduced, ought to be consistent with the proposition which they are intended to establish. Here the proposition intended to be maintained is, that Henry paid the plaintiff his debt—but a fact proved is, that he did not pay the costs, an incident to the debt, when they ought to have been paid; and then not at Salisbury, but at Newbern, where the Clerk personally met him. Now, if the effect of a presumption, in serving as a proof, depends on the justness of the consequences, drawn from certain facts, to prove others which are in dispute, should we not lose sight of the principle, in presuming punctuality in that part of a transaction which we *cannot* see, when we are furnished with positive proof of delinquency in that part which we *do* see? As, therefore, we are not apprised of any adjudication where the jury have been left to presume payment even of a bond, after the lapse only of fifteen years; and as the circumstances here proved do not, in our conception, aid the time, we think a new trial should be granted.

HENDERSON, J. I do not concur in the opinion of the Court. It is not contended by me, that a presumption of payment arises, short of a period of twenty years, where

there were no circumstances to aid the presumption; but if there were, it was properly left to the jury to presume a payment, although twenty years had not elapsed. It was the province of the Court to see that those circumstances were relevant,—and of the jury, to give them their due weight;—and the Court, in this case, can grant a new taial, only in case the Court or jury erred in discharging their respective duties. That the plaintiff caused an execution to issue—that the execution was returned with an indorsement of satisfaction, and the money paid to the plaintiff—that the plaintiff lived not more than seventy miles from Salisbury, where the execution was returned—that he took no further steps during the life of the sheriff, to enforce the payment—that the sheriff died in the year ,—were, certainly, all relevant circumstances. That the plaintiff had a knowledge of the return of the execution, or that the return was true, was a fair inference made by the jury; for we can scarcely believe, that a man who had prosecuted an action to judgment, and recovered one hundred pounds, and caused an execution to issue, and to be delivered to the sheriff at the distance of two hundred miles, would, at once, remit his exertions and abandon his claim for fifteen years—so, take it either way, it affords a strong presumption that the sheriff's return was true. It is farther observable, that the execution was returned to the Court of the district in which the plaintiff continued to reside. It is said that this is permitting the sheriff to create evidence for himself; but it is not the sheriff's act, but the conduct of the defendant, which raises the presumption—it is like an assertion, made in the presence of a man, of a fact within his knowledge, and affecting his interest, and not contradicted by him. There are other circumstances in the case, but I deem those already mentioned sufficient. I therefore think it not barely such a verdict as ought not to be disturbed, but such as the law and justice of the case require.

Williams & wife v. *Holly.*

Nathaniel Holly being seised in fee of the premises in question, devised them in the following words:

"I give and bequeath to my daughter *Ann Britt*, one hundred and twenty-five acres, whereon she and her husband now live, to she and her husband during each of their life-time, and no longer, if dying without any lawful heirs begotten of their bodies, and if any lawful heir, to that and its heirs forever, otherwise, to return to my heirs at law and their heirs forever."

The testator died in 1780. The husband had issue by his wife, which issue died in 1788; the husband died in 1790, living his wife, who, in 1804, devised the land to the lessors of the plaintiff.

The preceding facts were admitted in a case agreed, sent to this Court and submitted without argument.

TAYLOR, C. J. delivered the opinion of the Court.

The Court do not perceive any circumstance in the character of this devise, which ought to prevent the direct application of the rule in *Shelly's* case,—that where the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee or in tail, that always in such cases, *the heirs* are words of limitation and not words of purchase.

In cases like this, where there is no intermediate estate, the remainder is executed in the ancestor, and as both estates are of the same quality, viz. legal, they unite and coalesce.

It is said in *Co. Litt.* 183, *b.* 184, that where there is a joint limitation of the freehold to several, followed by a joint

limitation of the inheritance in fee simple to them, as an estate to A & B, or for their lives, or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is, both joint, the fee rests in them jointly. And so if the limitation of the freehold be to husband and wife jointly, remainder to the heirs of their bodies, it is an estate-tail executed in them, as they are capable of issue, to whom such joint inheritance can descend. In this case the limitation of the freehold is joint to Britt and his wife, and is followed by a joint limitation of the inheritance. Upon the death of the husband it survived to the wife, who thus became seised in fee, and consequently had a right to devise the land to the lessor of the plaintiff, for whom there must be judgment.

State v. *McEntire.*

An indictment was found against the defendant, in the Superior Court of Rutherford County, for the murder of Larkin Dycus, and was transmitted for trial, to Lincoln Superior Court, upon an affidavit filed by the Solicitor. The defendant was found guilty, and upon being brought up to receive judgment, the following reasons, in arrest, were offered by his counsel.

1. That the County Court of Rutherford had returned to the Superior Court of the same County, forty jurors as a *venire*, whereas they had authority by law to return only thirty; and that the Grand Jury, who found the bill, were composed out of the *venire* so improperly returned.

2. That John Hardcastle was a juror on the coroner's inquest, and also one of the Grand Jury, by whom the bill was found.

3. That the transcript sent from one Court to the other, does not shew that the bill was either found upon evidence under oath, or that any witness was sworn and sent to the Grand Jury.

The case was argued by *Wilson* for the State, and *Murphey* for the prisoner. For the former, were cited, *Bac. Abr. Tit. Jurors A. Jones* 198—for the prisoner, 3 *Inst.* 33, *Cro. Car.* 134.

TAYLOR, C. J. delivered the judgment of the Court.

The act of Assembly specifies the number of jurors which shall be returned to the Superior Courts, and is directory to the County Courts in that respect; but is wholly silent as to the legal effect of returning a greater number. We must, therefore, have recourse to those principles of construction, and modes of proceeding, which have always been applicable to analogous cases; and none can be more strictly so, than when there have been causes of challenge, either to the array or the polls, which the party indicted did not avail himself of upon his arraignment, but withheld to a subsequent stage of the proceeding. Such instances have often occurred in the practice of this State, and the decisions, as far as they are known or remembered, have uniformly overruled the objections, upon the principle that where the law has given the party a full opportunity of bringing forward his objections, and ascertained the period when they shall be disclosed, he ought not to be heard at a future time.

The extent of this principle, the justice and necessity of its observance, and the decisive application it has to many branches of the law, may be illustrated by various examples; as in challenges, he who has several must take them all at once—after one hath taken a challenge to the polls, he cannot challenge the array.—*Co. Litt.* 58. If a party has a cause of challenge which he knows of before trial, and does not take it, he shall not have a new trial.—11 *Mod.* 119. In pleading,

if the defendant plead to the writ, he loses the benefit of a plea to the person.–*Ibid* 303. *a.* In the trial of right, after money has been paid under legal process, it cannot be recovered back again, however unconscientiously retained by the defendant.–7 *Term* 269.–2 *H. Bl.* 414. The statute of *West.* 2, *C.* 1 enacts, that all fines contrary to that act, shall be null, yet it has been construed to mean only voidable, by some legal proceeding.–4 *Term* 600.

With respect to the qualification of jurors, the statute *West.* 2, *C.* 38, directs the sheriff not to summon men who are sick, aged, or not dwelling within the County. Yet, if they were summoned, and did appear, they could not be challenged by the party, nor could they excuse themselves from not serving, unless there were enough without them–2 *Inst.* 448—though certainly these were as unlawful jurors, as the number above thirty, in the present case.

But the statute of 11 *H.* 4. *C.* 9, after prescribing the qualification of jurors, and the manner of their return, expressly declares that indictments, found by persons disqualified in the statute, shall be void. The strong expressions are, "that the same indictment so made, with all the dependance thereof, be revoked, annulled, void, and holden for none forever." It has been observed by Lord Coke, that the safest way for the party indicted is, to plead, upon his arraignment, the special matter given him by this statute, for the overthrow of the indictment, with such averments as are by law required, and to plead over to the felony. For this he cites *Brooke's Abridg. Indict.* 2. We have examined the passage referred to in *Brooke*, which, though written in the strange dialect of that day, is, if we rightly understand it, more explicit. His words are, which for the sake of authenticity, we extract in the original, *q ou home est indite de fel' p ceux dont part sont indites ou ult' de fel,' et ant acquite p pdn, issint q ils ne sont probi nec legales homenes, ideo fuit agard que les inditemts p eux present sera void, et les parties q sont intlites*

ne serd arraignes sur ceo, et nota q cest matter doet estr pledr p cesty q est err sur cest inditemt devant que il plede al felony, et felon arraign sur inditemt ne sera suffer de relinquer general paraon p parliant et de pleder al felon. The meaning of this, we take to be, that "where a man is indicted of felony by those, a part of whom have been indicted or outlawed of felony, and have been acquitted by a general pardon, so that they are not good and lawful men; therefore, it was agreed, that the indictments by them presented, shall be void, and the parties who are indicted shall not be arraigned on them; and note that this matter ought to be pleaded by him who is arraigned on such indictment before he pleads to the felony, and the felon arraigned on the indictment shall not be suffered to relinquish the general pardon, by parliament, and to plead to the felony." And this seems to be the method in which objections to the Grand Jury, arising under the statute, have always been taken, first by way of plea, and if that is overruled, pleading over to the felony-*Wm. Jones* 98 —or, as it is said in some books, pleading the objection to the indictment, and, at the same time, pleading over to the felony.-*Hawkin's Indictment*, § 26. At common law, whatever were good exceptions to a Grand Jury must have been taken before the bill found.-*Bac. Abr. Juries A.* And as to those objections which arise out of the several statutes, it is the better opinion that they are not allowable, unless they are taken before trial.-*Ibid.* We are therefore of opinion, that the reasons of all the decisions apply with increased force to the case under consideration; and that whatever weight there might have been in the objections to the Grand Jury, if taken at a proper stage of the proceeding, upon which, however, it is not necessary that we should give an opinion, it is now too late for them to prevail.

As to the third reason, it does not seem necessary to say more than that sufficient appeared upon the transcript to warrant the trial of the prisoner; the bill was found a true bill by the Grand Jury, and was pleaded to, and it cannot be

presumed that it was found without evidence. I am directed by the Court, to say, that all the reasons in arrest are overruled.

State v. *Davis.*

The defendant was indicted under the act of 1779, *Cap.* , "to prevent the stealing of slaves, &c." The indictment charged the negro stolen to be the property of *John Murrell, dec.* Upon the trial in Northampton Superior Court, the jury found a special verdict, the material statements in which were, that on or about the 15th December, 1814, the negro Luke, the property of John Murrell, was in his possession in the County of Northampton; soon after which the negro ran away from him, and whilst he was so runaway, the defendant knowing the fact, and that the slave was the property of Murrell, feloniously did steal, &c. and afterwards did sell him for his own benefit. The case was referred to the decision of this Court, whether, upon the whole matter, judgment could be awarded under the act of Assembly.

Daniel, for the prisoner, cited 1 *Hale* 506–1 *Hawk. C.* 33, §1.

TAYLOR, C. J. delivered the opinion of the Court.

The two questions to be decided are, whether the facts found amount to felony in point of law—and if they do, whether they are set forth in the indictment in a sufficient manner to warrant the Court in pronouncing judgment against the prisoner?

1. The finding of the jury fixes upon the prisoner all the essential circumstances to constitute a felony, and excepts this case from the operation of the principle relied upon in his behalf. It not only comes within the reason of the ex-

ception to the general rule, but is one of the very cases put in the books, to illustrate the rule and define its extent. The prisoner knew that the slave was run away, and that he belonged to Murrell, and, with this knowledge, took him into his possession, and, in less than a month afterwards, sold him. We lay no stress upon the jury having found that the taking was felonious, for we understand that the law is to be found upon the whole case, and that it is to be decided whether the jury have correctly drawn that inference.

The reason why felony cannot be committed in taking treasure trove, waifs, or estray is, that the owner is unknown; the first, becoming the property of the finder, if no owner appears; no property in the second vesting before seisure, nor in estrays until the expiration of the year from the time of appraisement—and in these, it is always understood, that the owner is unknown to the person who takes them up. The rule applies, also, to finding a purse in the highway, which a person takes and carries away,—it is no felony, although the usual proofs of a felonious intent follow the act. "If one lose his goods and another find them, though he convert them *animo furandi* to his own use, yet it is no larceny, for the first taking is lawful."—3 *Inst.* 107. But, in all these cases, the person taking the property must really believe it to be lost, for if he do not, and take it with the intent to steal, he will not be excused by the pretext of finding, otherwise every felony would be so excused. This is expressly laid down in *Hale* and other writers. If a man's horse, is grazing at large on his neighbor's ground, and it be taken with a felonious intent, the crime is complete. In short, this principle will be found to pervade all these cases, and ascertains every taking to be a felony, if the intent be such, provided there was no reasonable cause for believing that the thing was lost.

2. But judgment cannot be pronounced on this indictment, because it lays the negro as the property of John Murrell.

dec. The indictment speaks in the imperfect tense, and relates to the 6th January, 1814, confining the stealing to that period. To whom did the property *then* belong, which was thus stolen? The indictment answers, to John Murrell, deceased. This is the only way in which the charge itself can be understood, without interposing an advent of time present, between the name and "deceased." We learn, indeed, from the special verdict, that Murrell did not die till the March following; but if the indictment be not legal and certain, in itself, it cannot be aided by the finding of the jury. And that it is defective, in this particular, seems almost too plain to require argument or authority. If the owner of goods be really unknown, it may be so stated in the indictment; but if it be proved on the trial, who the owner is no conviction can ensue, upon such a charge. If the goods which belonged to a deceased person are stolen, they must be laid as the property of the executors or administrators, for on them the law casts the title. Judgment arrested.

AN ABRIDGEMENT

OF THE

STATUTE LAW OF GREAT-BRITAIN,

NOW IN FORCE IN NORTH-CAROLINA.

CONTINUED FROM VOL. I, PAGE 155.

BASTARDS.

20 *Hen. III, C.* 9. The Bishops instanced the Lords that they would consent, that all such as were born afore matrimony, should be legitimate, as to the succession of inheritance—but they, with one voice, refused to change the law of the realm.

BUYING TITLES.

32 *Hen. VIII, C.* 9. No one shall sell, or purchase, any pretended right, or title, to land, unless the vender hath received the profits himself for one year before the grant, or hath been in possession of the land, or of the reversion or remainder, on pain that both purchaser and vender shall each forfeit the value of such land.

CHAMPERTY.

33 *Ed.* 1. The attainted of Champerty shall suffer three years imprisonment, and be finable at the King's will.

28 *Ed.* 1. None shall take upon him a business in suit, with intent to have part of the thing sued for; neither shall any, upon any such covenant, give up his right to another,—on pain that the taker shall forfeit so much of his land and goods as amount to the value of the part so purchased for

such maintenance, to be recovered by any that will sue for the King in the Court where the plea hangeth.

This shall not prohibit any to take counsel at law for the fee, or of his parents or friends.

33 *Ed.* 1. Champerters are such as move pleas and suits, or cause them to be moved, either by themselves or others, and prosecute them at their own charge, to have part of the thing in variance, or part of the gains.

CONDITIONS.

32 *Hen. VIII, Cap.* 34. Grantees of reversions may take advantage of conditions and covenants against lessees of the same lands, as fully as the lessors, their heirs or successors, might have done.

II. Lessees may also have the like remedy against the grantees of reversions which they might have had against their lessors or grantors, their heirs or successors; all advantage of recoveries in value by reason of any warrant in deed or law by voucher or otherwise, only excepted.

CONSPIRACY.

33 *Ed.* 1. Conspirators are such as bind themselves by oath or other alliance, falsely and maliciously to indict, and move and maintain pleas; and such as cause children within age to appeal men of felony, and retain men to maintain their malicious enterprizes,—and this extendeth as well to the takers as givers.

CORONERS.

3 *Ed.* 1.* They shall take nothing of any man to do their office, on pain of great forfeiture.

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* The parts in Italics, are not in force here; and other parts of this act are omitted for the same reason.

4 *Ed.* 1. They shall go to the places where any be slain, or suddenly dead, or wounded, or where houses be broken, *or where treasure trove is found*, and shall make enquiry whether the person was slain, where, how, and who were present; and whoever is found guilty by the inquisition, shall be delivered to the sheriff, and committed to goal; and such as are found not culpable shall be attached, if they were present, till the coming of the Justices, and their names shall be written in rolls. If the body is found in the fields or woods, it is to be enquired whether the person were slain there or not; and if not, they shall try to trace him who brought the body there, and how it was brought; and ascertain whether the dead person were known, or a stranger, and where he lay the night before; and after all the proper enquiries are made, the body is to be buried.

II. They shall make inquiry where a person is drowned or suddenly dies, into the exact manner of his death; and if he was not slain, then to attach the finders and all others in company—*likewise of treasure trove, who were the finders, and who are suspected; of appeals of rape, of wounds, especially if they are likely to prove mortal, in which case the party appealed is to be taken immediately and kept till it be known whether the wounded person will recover or not.* Hue and cry shall be levied for all murders and burglaries.

14 *Ed.* 3, *C.* 8. A coroner shall have sufficient in the County whereof to answer all people.

COUNTERFEIT LETTERS.

33 *Hen.* 8, *C.* 1. If any shall falsely obtain any money or other thing by colour of any false token, or counterfei letters, they being thereof convict by witnesses or confession, shall suffer such punishment as shall be adjudged by the person or persons before whom they shall be so convict, the pains of death only excepted.

CREDITORS.

21 *Jac.* 1, *C.* 24. The party or parties at whose suit any person shall stand charged in execution, for debt or damages recovered, their executors or administrators, may, after the death of the person so charged in execution, lawfully sue forth new execution against the lands and tenements, goods and chattels of the person so deceased, in like manner as if the person deceased had never been taken in execution.—But this act shall not extend to land sold *bona fide* (after the judgment given) when the money raised thereupon is paid, or secured to be paid to creditors in discharge of due debts.

DECEIT.

3 *Ed.* 1, *C.* 29. If any person do act or consent to any thing in deceit of the Court or the party, and thereof be attainted, he shall suffer a year and a day's imprisonment; and if he be a pleader he shall also be expelled the Court.

II. Officers, &c. shall not take money otherwise than they ought to do, on pain to pay the treble thereof to the complainants.

DISCONTINUANCE OF RIGHT OR ESTATE.

11 *Hen.* 7, *C.* 20. If a woman that hath an estate in dower for life, or in tail jointly with her husband, or only to herself, or to her use, in any lands, &c. of the inheritance or purchase of her husband, or given to the husband and wife by the husband's ancestors, or any seised to the use of the husband or his ancestors, do sole, and with an after taken husband, discontinue, or suffer a recovery by covin, it shall be void; and he to whom the land ought to belong after the death of the said woman, may enter, (as if the woman were dead) without discontinuance or recovery.

II. Provided that the woman may enter after the husband's death—but if the woman were sole, the recovery or discontinuance barreth her forever.

III. This act extends not to any recovery or discontinuance with the heir next inheritable to the woman, or by his consent of record enrolled.

DOWER.*

20 *Hen.* 3, *C.* 1. A woman deforced of her dower or *quarantine*, in a writ of dower, shall recover damages, viz. the value of the dower from her husband's death, to the day of the recovery of her dower, and the deforcer shall be amerced.

3 *Ed.* 1, *C.* 49. In a writ of dower *(unde nihil habet)* the writ shall not abate by the exception of the tenant, that she hath received her dower of another before the writ purchased, unless he can shew that she received part of her dower of himself, and in the same term before the writ purchased.

13 *Ed.* 1, *C.* 4. The wife shall be endowed as well where land was recovered against her husband by default as by covin; so that albeit the land was lost by the husband's default, yet that shall be no good allegation for the tenant, but he must then proceed and shew his right, otherwise the wife shall recover.

When tenants in dower, in frank marriage, by the curtesy, for life or in tail, lose their land by default, and the tenant is compelled to shew his right, they may vouch the reversioner if they have warranty; and then the plea shall pass between the tenant and the warrantor, according to the tenor of the writ, by which the tenant recovered by default; and so, from many actions, they shall resort to one judgment, viz. that the demandant shall recover that demand, and the tenant shall go quit.

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* Though the whole of these Statutes are not in force, they serve to reflect light upon the subject of dower, as regulated by our Acts of Assembly.

Here, if the action of such a tenant, which is compellable o shew his right, be moved by a writ of right, albeit the great assize or battle cannot be joined by words accustomed, yet shall it in that case, be joined by words convenient.

If the wife be wrongfully endowed by the guardian during the minority of the heir, he (at full age) shall be righted; yet shall the wife retain her just dower if she make her title good.

1 *Ed.* 6, *C.* 12. The wife shall be endowed albeit her husband were attainted, convicted, or outlawed for treason or felony, saving the right of others.—*This clause is altered for treason by* 5 *Ed.* 6, *C.* 12.

13 *Ed.* 1, *C.* 39. If a wife leave her husband and continue with her adventurer, she shall be barred of her dower, if convict thereupon, except her husband be willingly reconciled to her, and allow her to live with him.

ELECTION.

3 *Ed.* 1, *Cap.* —. None shall disturb any (by force of arms, malice, or menaces) to make free election, on pain of great forfeiture.

ESTREPEMENT.

6 *Ed.* 1, 13. No waste shall be made hanging a suit for the land.

EXECUTION.

12 *Ed.* 1, *C.* 18. He that recovereth a debt or damages, may, at his choice, have a *fieri facias* of the chattels of the debtor, or a writ for the sheriff to deliver him all the chattels of the debtor (except oxen and plough beasts) and the moiety of his land, by a reasonable extent till the debt be levied; and if he be ejected out of the land, he shall have an assize and afterwards a writ of disseisin, if need be. And this last writ is called an *elegit*.

13 *Ed.* 1, *C.* 45. For all things recovered before the King's Justices, or contained in fines (whether contracts, covenants, obligations, services for customs acknowledged, or any other things enrolled) a writ of execution shall be within the year, but after the year a *scire facias*; whereupon, if satisfaction be not made or good cause shewn, the sheriff shall be commanded to do execution.

32 *Hen.* 8, *Cap.* 5. If lands delivered in execution on just cause, be recovered without fraud from the tenant in execution, before he shall have levied or received his whole debt and damages, he may have a *scire facias* out of the Court from whence he had the execution, returnable into the same Court at a day (40 days at least) after the date of such *scire facias*; at which day, if the defendant, being lawfully warned, make default or do not appear, and do not plead a sufficient cause (other than the former acceptance of the land) to avoid the said suit, for the residue of the said debt and damages, the said Court shall issue forth a new execution for the levying thereof.

5 *Geo. II, C.* 7. Houses, lands, negroes, and other hereditaments, and real estates, within any of the plantations belonging to any person indebted, shall be liable to, and chargeable with, all just debts, duties and demands, of what nature or kind soever, owing by such person, and shall and may be assets for the satisfaction thereof, in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond, or other specialty; and shall be subject to the like remedies, proceedings and process in any Court of Law or Equity, in any of the plantations, for seising, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates, in any of the said plantations, are seised, extended, sold, or disposed of, for the satisfaction of debts.

EXECUTORS.

13 *Ed.* 1, *C.* 23. Executors shall have a writ of account, and like action and process in the same writ, as their testator should, if he had lived.

4 *Ed.* 3, *C.* 7. Executors shall have an action for a trespass done to their testator, as for their goods and chattels carried away, in his life; and shall recover their damage, in like manner, as he, whose executors they are, should have done, if he had lived.

9 *Ed.* 3, *C.* 3. In a writ of debt brought against executors, they shall have but one essoin amongst them, before appearance, and another after, so that they shall not fourch* by essoin.

Here, though the sheriff upon the summons, return *nihil*, yet an attachment shall be awarded; and upon *nihil* also returned thereupon, the great distress; and then he or they that appear shall answer.

Albeit some of them after appearance make default at the return of the great distress, yet shall he or they be put to answer, that first appeared, at the great distress so returned.

If judgment pass for the plaintiff, he shall have judgment and execution, against them that have pleaded, and against all others named in the writ, of the testator's goods, as well as if they had all pleaded.

And may sue in this case, according to the law formerly used, (if he please) notwithstanding this statute.

25 *Ed.* 3, *C.* 5. Executors of executors shall have actions of debt, account, and of goods carried away of the first tes-

* From *fourchir*, Fr. to put off.

tator's, and execution of statute merchants and recognizances made unto them, and shall also answer unto others so far forth, as they shall recover of the first testator's goods, as the first executor should have done.

21 *Hen. VIII, C.* 4. That part of the executors which take upon them the charge of a will, may sell any land devised by the testator to be sold, albeit the other part which refuse will not join with them.

45 *Ed. C.* 8. If any person shall obtain any goods or debts of an intestate, or releases, or other discharges, of any debt or duty (which belonged to the intestate) by fraud, as by procuring the administration to be granted to a stranger of mean estate, and not to be found, with intent thereby to obtain the intestate's estate, and not upon valuable consideration, or in satisfaction of some just debt, answerable to the value of the goods so obtained in such case, such person shall be chargeable as executor of his own wrong, so far as the value of the goods or debts so obtained shall amount unto. Howbeit he shall be allowed such reasonable deductions, as other executors or administrators ought to have.

EXTORTION.

3 *Ed.* 1, *C.* 26. No sheriff, or other officer of the King, shall take any reward to do his office, but shall be paid by the King: and if he do so, he shall render the double, and be punished at the King's will.

3 *Ed C.* 30. Officers, &c. shall not commit extortion, on pain to render the treble, and to be otherwise punished at the King's will.

FELONS AND FELONY.

1 *Ed.* 2. It shall be felony in any person or persons to break prison, being in for felony, or otherwise not.

3 *Hen. 7, C. 2.* It is felony to carry away a woman, wife, widow, or maid, against her will, having land or goods, or being heir apparent to her ancestors—and the procurators, abettors, and receivers, in such an offence, shall be also deemed principal felons. This shall not extend to any that takes a woman, claiming her as his ward or bond-woman.

25 *Hen. VIII. C. 6. revived and confirmed by 5 El. C. 17.* The crime against nature, is made felony, and the offender therein shall not have his clergy.

21 *Hen. VIII, C. 7.* Servants that go away with, or otherwise embezzle their master's or mistress' goods, to the value of 40*s.* with an intent to steal them (being put in trust therewith) shall be punished as felons.—*Made perpetual by 5 El. C. 10.*

[TO BE CONTINUED]

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LEGAL BIOGRAPHY.

LIFE OF LORD CHANCELLOR ELDON.*

[SIR JOHN SCOTT.]

IT is the peculiar praise of the English aristocracy that it is accessible to every class of people. There is no impassable gulf between even the lowest order of the peasantry and the highest rank of nobility. Nothing is required but superior merit to pass from one to the other.

It is for this reason that the *study of the law* has enriched the English aristocracy with some of its most distinguished ornaments. *Nearly one third of the whole nobility of England are either lawyers or the descendants of lawyers.* The constitution reaps a double advantage from this distribution of its honors. In the first place, the laws are doubtless best supported by those who best understand them, or who, even if they have no professional knowledge, have, at least, an hereditary veneration for the means of their elevation. Hence, indeed, the House of Lords has ever been peculiarly considered to be the best guardian of the constitution in general, in the same manner as the popular rights are understood to be the peculiar care of the Commons. It is a second most undoubted good resulting from the same cause, that, un-

* American Law Journal.

der the contemplation of the high honors to which professional excellence may elevate its possessors, the students of the law are encouraged to greater efforts, and these efforts naturally lead to excellence. There are men who would be invincible by money, but who yield to honors. Neither lord Hale, nor lord Coke, nor lord Mansfield, would have embraced the profession, had they not promised themselves more than the bounty of their clients.

These remarks are naturally suggested by the subject of the present biography; who, by superior industry united to superior talents, has overcome the obstacles of inferior station, and raised himself to the highest honors of the state. Something of this, perhaps, may be imputed to fortune; but what is peculiarly his own, is, that he has accomplished this elevation without having become the instrument of a court or minister; that he has *forced his way* by his own talents and owes nothing to the minister of the day, but that he had discrimination enough to discover his own worth, and public spirit enough to call it into exercise.

John Scott, now lord Eldon, was born in the town of Newcastle-upon-Tyne, about the year 1774. His father, Mr. William Scott, was a coal or rather corn merchant in the same place; but who having a narrow capital, could seldom trade on his own bottom. His chief business therefore consisted in the freight of corn or coals to the metropolis. According to the best accounts, he did not succeed, and was never above a very slender mediocrity. His reputation, however, was untainted—he was superior to his business; and fortune, or rather providence seems to have indemnified him for his own obscurity by the honors of his sons. From the narrow profits of his business he contrived to give his children that education which has been the basis of their greatness. His two sons, John and William, were accordingly sent to a classical school, and as they boarded at home, the

expenses were rendered more moderate. There are yet living many respectable tradesmen in Newcastle, who remember to have seen the present lord Chancellor and Judge of the Admiralty, "with satchel on their backs, and fresh morning face," proceeding from their father's house to the free grammar school.

The progress of the children rewarded the care of their parents. John Scott early distinguished himself for solidity of judgment, and an understanding, which, in proportion to its slowness, was deep and comprehensive. He is said, therefore, to have learned slowly, but to have learned thoroughly. His attention was always at his command, and once fixed upon a subject was irremovable until he had examined it in all its parts. This is, in fact, the present character of the Lord Chancellor. He is considered at the bar, as he formerly was at school, as possessing a mind more solid than quick; very slow in determining, but always right. We believe that he has never had a judgment reversed. The late preceding Chancellor, Lord Erskine, was accustomed to say that the House would only lose its time by listening to appeals from the judgment of his predecessor—that they had only one character—they were brought only to gain time, and to run the life of one party against the other.

It was the decided opinion of Earl Mansfield, and an opinion recommended by his own peculiar excellence, that no eminence could be expected in the study of the law unless previously laid in classical learning. "It is not sufficient," said his lordship, "that the student of the law should understand the *dog-latin* which is used in his profession; this is a jargon, indeed, which has its use, inasmuch, as by long habit it has been brought to convey a precise meaning. The student, if he really aim at excellence, must form his taste and his understanding by the ancient models; it is in these only that he can learn to unite eloquence and reasoning—the utmost powers of the understanding with the discreet use of the

imagination. "The elements of the law, moreover," says the same authority, "are hidden behind a latin veil, and the most excellent learning must be lost to him who has not skill enough to raise it at his pleasure. Let the law student, therefore, possess himself of this key to ancient treasures."

The father of Lord Eldon entertained the same opinion; and though himself a man of narrow learning, spared no efforts to cultivate the understanding of his children. William Scott had a quickness of parts much superior to his brother, but their father, a man of much natural penetration, was not deceived by this external blazonry; and, if report may be credited, always predicted that John would be the more eminent. "The country," said he, "cannot produce such a boy as John; under that heavy stupid eye and that watery head, he possesses a mind of which the world will hereafter know the worth."

After some years passed by them at the grammar school, in which John Scott obtained most learning, and his brother William most reputation, their father sent them to the metropolis to be duly entered in the temple.

The name of John Scott appears in the books in the year 1765, but his brother was not entered until the following year.

The two brothers continued to study together in the temple as at school. They lived in the same chambers, and had the same books. Sir William Scott has been heard repeatedly to acknowledge his obligations to the more penetrating judgment of his brother. One thing, indeed, Sir William appears to have learned almost solely from Lord Eldon: We need not say that we here speak of the habit of application. Lord Eldon, during the six or seven years which he employed at the temple, consumed at least six hours daily in the acquisition of professional knowledge. His lordship has subsequently reaped the full advantage of this

early application. He now possesses the reputation of being the most profound lawyer on the bench.

It may be thought, perhaps, that the proverbial slowness of his decisions contradicts this assertion. But the point of fact is, that this tardiness is the effect of the variety of his knowledge. His memory is so stored with cases, that he is perplexed by the multitude of seemingly contrary precedents. He has so many rules before him that he scarcely knows which to apply. He has to seek distinctions in cases exactly similar. If one case alone is in his *memory**, he would have no difficulty to decide in the moment. His decisions would be more absolute—if his *learning* was more narrow.

In the year 1777, Mr. John Scott was duly called to the bar. He made his appearance in Court with more reputation amongst his immediate friends than amongst the bar in general. He was considered by some as an object even of ridicule, for his very attempt to succeed; others, who knew him more intimately, boldly *avowed* his excellence, and predicted that a few years would place him at the head of his profession. Amongst these was a Mr. Thurlow, at that time Attorney-General. He had studied under the greatest pecuniary difficulties. He had supported himself, in common with Burke, by writing for Dodsley. Thurlow, therefore, had a sympathy for Mr. Scott. During an intercourse, at

[* In the zeal of panegyric, the biographer has here mentioned a quality which is highly advantageous to an Advocate, and also, though in a less degree, to the Judge. It is not his *learning* or *memory*, but his want of judgment,—that faculty which compares and discriminates,—which embarrasses the Lord Chancellor according to this writer. It would be well if such writers would content themselves with giving *the point of fact*, without attempting to analyze the mind. They are not competent to the task, and their presumption generally produces some such bungling as is here exhibited. He seems moreover not to know the difference between learning and memory, or, rather, to think them synonimous terms.]

first merely casual, he discovered the talents and acquired knowledge of Lord Eldon. This was sufficient for Thurlow, who, in the consciousness of talents, venerated them in others. He immediately cultivated the acquaintance of Mr. Scott; and, by his direct encouragement, was the means of introducing him to the world.

Mr Scott was for a considerable time kept back by his own fault. "Two things," said Lord Thurlow "are necessary to a Counsel; confidence to push himself on the stage, and learning enough to justify him while he is there. Mr. Scott had a timidity of nature—an awkwardness of address, which kept him in the back ground.

Several years after he was called to the bar, nothing would induce Mr. Scott to push himself into notice; on the other hand, he very patiently suffered himself to be pushed aside. The remonstrance of his immediate friends, and the encouragement of Thurlow, were equally ineffectual. Under the influence of this natural diffidence, he almost wholly withdrew himself from the Courts, and employed himself as a conveyancer or draftsman; a part of the law, which, from its connexion with ancient tenures, has been deservedly the favorite branch of the most eminent lawyers. Mr. Scott advanced his fortune more than his reputation by this practice. He doubtless proved himself the best conveyancer of the day; but this did not satisfy those who knew him likewise to be the best lawyer. They accordingly remonstrated with him, that having so much in his power, he contented himself with so little.

About this time commenced the well known professional jealousy between Mr. Alexander Wedderburne and Mr. Thurlow. Thurlow possessed the more manly mind; Mr. Wedderburne had the talent of application and the power of retention. Wedderburne was slow, but patient, industrious,

examining in detail what he could not comprehend as a system. He overcame every difficulty by his assiduity. His comparative slowness of parts was more than compensated by his superior industry. Thurlow could have learned more in an hour than Wedderburne in a day, but Thurlow could not be brought to apply himself for the hour, while Wedderburne had no difficulty to study for the day. Wedderburne, therefore, with very inferior talents, had advanced so rapidly on Thurlow, that it became a doubt amongst the profession which was the better lawyer.

Mr. Thurlow had now an object to accomplish, and he fixed upon Mr. Scott for his means and instrument. He was resolved to bring him forward as a rival to Mr. Wedderburne. Mr. Thurlow had a vanity beneath his acknowledged talents. It was as if he had said, I will bring forward a scholar who shall excel Wedderburne.

Mr. Scott, under his patronage, was soon pushed upon the stage in his own despite. Mr. Thurlow soon afterwards became Chancellor, and continued his patronage to Mr. Scott. Mr. Thurlow is reported to have offered his friend one of the masterships of the Court at that time vacant, and which Mr. Scott is said to have declined. It is impossible to conjecture any probable cause for the refusal. It is stated, indeed, that something of delicacy occured to prevent Mr. Scott from accepting this favor from his patron. It had been previously, we believe, promised to another. Mr. Scott became in a short time well known and much respected as a sound lawyer. Such a reputation is necessarily accompanied by an increasing practice; and Mr. Scott was so fortunate, that in the short space of three years, he is said to have amassed many thousand pounds. His clients were liberal in proportion to the merit of their advocate.

In the year 1783, Mr. Scott obtained a patent of prece-

dency, entitling him to the honors of king's Council. In the same year his practice was considered as increasing so fast that he was thought to be in the road of becoming one of the richest men at the bar. His professional success was accompanied by so much prudence and economy, that his expenditure bore no proportion to his income.

In the following year, 1784, the Fox ministry brought in the celebrated India bill; the result of which was, that the king resolved to rid himself of an administration which he suspected to be about to render itself independent of his authority. A difficulty here occurred. No one was willing to encounter the opposition of such a powerful administration. In this state of things. Mr. Pitt became known to his majesty; and as the confidence of this young man was at that period equal to his abilities, he was persuaded to undertake the vacant office.

Lord Thurlow consented to retain the seals; and, in the bustle of party changes, cast his eyes upon Mr. Scott. It was not, however, politically convenient to bring him in either as Solicitor or Attorney-General; so that his lordship was contented that he should be brought into parliament. Accordingly, in the new parliament, he was elected for the borough of Weobly, in Herefordshire. It was fully understood, however, that he accepted his seat conditioning that he should be permitted to vote independently.

The business of the first parliament of the administration of Mr. Pitt was such as required the most powerful talents. It has even been understood that the minister was, during this time, almost solely governed by Lord Thurlow; who, upon his own part, is said frequently to have consulted Mr. Scott, and to have derived much assistance from his solid judgment. Mr. Pitt's India bill is understood to have been framed between Lord Thurlow and Mr. Scott. Mr. Fox's bill was the most able measure; but Mr. Pitt had entered

into office upon the avowed principle, and even positive engagement, of decided opposition to this measure. Mr. Pitt therefore was compelled to produce something in its stead. He borrowed much of the matter and direct stipulations of Mr. Fox's bill; but, in order that the measure might appear his own, he sometimes departed widely from his original. The consequence was, as might have been expected. It was an expedient of the day.

Lord Eldon is supposed to have had a considerable share in the bill for prohibiting the commercial intercourse of the West India colonies with the United States of America.

The West-Indies depend so wholly upon America for their supply of timber and fuel, that the importation of the produce of the colonies had often actually been prevented by the interruption of this supply. The necessary operations of preparing sugar, cotton, &c. require a large stock of wood; and even the largest of the West-India islands, Jamaica, is not equal to a tenth part of the supply.

It was unfortunately represented to the English minister, that the Americans derived considerable profit from this trade; a profit to which their revolt and subsequent independence had not entitled them. It was added, that the British trader lost in proportion as the American trader gained; that if the woods of Canada, and New Brunswick, and Nova Scotia were fully equal to the supply of the colonies, and that the American trade were prohibitted, the English plantations must necessarily succeed to the supply. Resentment was listened to before prudence; and to avenge ourselves on the Americans, a prohibitory bill almost ruined the colonies.

If this bill had been imputed to Mr. Scott, it is necessary to acknowledge, that the repeal of it is attributed to the same advice. It is, indeed, a part of the character of Lord

Eldon, that, however slow in determining, he is never obstinate in his decision—that his mind is open to argument, even after he has declared his opinion—that when convinced of his error, he never hesitates at the acknowledgment—and that he is as anxious to repair the effects of a mistake as others are to conceal it.

When, therefore, the unhappy effects of the American prohibitory bill were made known; when it was found that it had been productive of the most bitter and general distress, Mr. Scott was the first to propose in Parliament, that the obnoxious bill should be repealed. He was here, we believe, in opposition to Lord Thurlow, whose firmness too frequently bordered upon obstinacy.

The House, together with the minister, were of a different opinion; and concurred with Mr. Scott, that the mischief had been caused by the bill, and that the continuance of it would seal the ruin of the West India colonies. So much attention, however, was given to the pertinacious opposition of Lord Thurlow, that though the bill was repealed, another was substituted in its place, comprehending too many of the obnoxious restrictions. If this subject is again called before the House, we have no doubt that Lord Eldon will not disavow as Chancellor, the principles which he so ably supported as Mr. Scott.

The next important business in which Mr. Scott appeared with some eminence, and in which he is supposed to have assisted the minister, was the important subject of the "Irish commercial regulations." This unpleasant discussion, for such it eventually appeared, occupied the attention of the House during two succeeding sessions.

The principle of these resolutions is entitled to the praise of comprehensiveness. It will be found, as may be collected

from the resolutions, to be substantially as follows: That Ireland was entitled to a full participation of all the advantages of Great Britain; that, as a sister kingdom, she had a most undoubted right to be put on a fair, equal, and impartial footing, with Great Britain, in point of commerce; and this, both with respect to foreign countries and our own colonies; that, in the mutual intercourse between each other, the equality should extend to manufactures, to importation and to exportation: and that, in return for these concessions, Ireland should contribute her full share towards the protection and security of the general commerce.

Throughout the whole discussion of the several resolutions, founded upon the above principle, Mr. Scott distinguished himself by many able speeches. The minister, accordingly was considered as regarding him with peculiar favor, and his fortune was already deemed in a fair way of being established.

The Irish resolutions have been much misrepresented in the course of the contests of the two countries. It is impossible, however, that we can deny their being founded upon a principle of equal indulgence and extent, and that the English minister thereby merited, in no slight degree, the gratitude of the Irish nation. Mr. Scott should here come in for his share of praise. But, from some unaccountable cause, the Irish have ever considered the proposed concessions in a very different point of view; and Mr. Scott is accordingly regarded by them as no friend to Ireland. The time, however may arrive, when that nation may think of him with more justice. Faction is often powerful enough to stifle truth, but, fortunately for the interests of mankind, never to extinguish it.

In the following session, Mr. Scott again presented himself to the attention of Parliament, upon the subject of the

commercial treaty with France. This treaty, though favorable to England, and not injurious to Portugal, with some of whose political regulations it interfered, excited alarm in the country gentlemen—an alarm at which, considering the subject at this distance of time, it is impossible to suppress surprise that this nation, so characteristic for its common sense, should have been so egregiously misled.

The opposition, however, availed themselves of the popular prejudices to harass the minister, and the debates were warm, long, and personal. Mr. Scott vindicated the treaty with his accustomed solidity of reasoning; and what in a season of such party heats is so much to his credit) the personal attacks of his opponents could never either divert him from his argument or provoke him to personalities. He kept his argument and his temper, in despite of assaults on both.

Parliament and the kingdom were now attracted solely to one point, the impeachment of Warren Hastings. Mr. Scott possessed powers too active not to take a part in this important affair. He spoke on every point, which, in the course of this tedious trial, fell under the cognizance of Parliament. It is well known that the most interesting part of the impeachment was the daily contests between the Courts of Law on the one hand and those of the Parliament on the other. The advocates on both sides were the most able men of any time or nation.

Mr. Scott greatly distinguished himself in these discussions. From prejudices natural to professional men, he was considered as more peculiarly favoring the claims of the Courts. It must be confessed, however, that the Parliament seemed too much disposed to extend its jurisdiction, and to exempt itself from rules, to which, even as a Supreme Court, it should in natural reason, have been subjected. The rules

of evidence, and the limitations between what is evidence and what is not, are founded on natural equity; and there is, therefore, no sound reason why, any even Supreme Court of judicature, should adjudge itself above them.

The next business in which Mr. Scott took an eminent part—a part which immediately led to his future elevation—was the regency. Throughout the whole of this affair the minister is said to have been advised almost exclusively by Lord Thurlow and Mr. Scott. It becomes necessary, therefore, to enter into some detail upon a subject with which our future historians must connect the name of Scott.

On the 10th December, 1788, the report of the physicians, touching the state of his majesty's health, was presented to the House of Commons. Mr. Pitt, by the advice of Mr. Scott (now Solicitor-General) immediately proposed that a committee should be appointed to examine and report all the precedents of the proceedings of former Parliaments under circumstances of the interruption or suspension of the royal authority, whether by infancy, sickness, or other infirmity.

This committee was accordingly appointed; and the Attorney and Solicitor-General, together with the master of the rolls, were instructed to prepare the required report. Mr. Scott's learning and industry were here peculiarly conspicuous.

On the 12th, the report, which had been prepared, in fact before it was proposed, was proposed to the House. The precedents were chiefly three. The first was taken from the reign of Edward the Third. The Parliaments of those days, whether wisely or not, had provided a council about the king's person to act for him. The next precedent was in the reign of Richard the Second, when councillors were also appointed to exercise the regal power. The third pre-

cedent occurred in the reign of Henry the Sixth, during the infancy of that prince. Parliament was then called together by the king's second uncle, the first being still living, but out of the kingdom—and that act was ratified by Parliament, this grand council of the nation not deeming it sufficient that it was done by the authority of the duke.

It was contended by Mr. Pitt, Mr. Scott, and the Attorney-General, that in all these several precedents, the right of supplying the interruption of the royal authority was clearly in the Parliament: that the Parliament had been invariably consulted, in order to determine what was to be done—that in the course of their consultations they certainly considered with due respect, the right of the heir apparent—but that the right of the heir apparent required this confirmation of Parliament—that Parliament, therefore, having a right to reject, confirm, or prefer, had a most undoubted right to modify its trust and obligation.

Upon these principles, Mr. Scott, as Solicitor-General, was ordered to prepare the act of regency. This act, which was drawn with much ability, empowered his Royal Highness the Prince of Wales, to exercise the royal authority in the name and on the behalf of his majesty, during his majesty's illness, and to do all acts which might be legally done by his majesty. The limitations were, that the care of his majesty's person, and the management of his household, and the direction and appointment of the officers therein, should be in the queen—that the power to be exercised by the Prince should not extend to the granting of the real and personal property—to the granting of any office in reversion, or to the granting, for any other term than during his majesty's pleasure, of any pension, or any office whatever, except such as must by law be granted for life; nor to the granting of any rank or dignity of the peerage of this realm to any person, except his majesty's issue who have attained the age of twenty-one.

This act was rendered unnecessary by the unexpected recovery of his majesty. The conduct of Mr. Scott, however, during this affair, was no less able than honorable. He afterwards augmented his reputation by his support of the established church, against Mr. Fox's repeated motions for the repeal of the test act.

For these, and other services, Mr. Scott was made Attorney-General and knighted in the year 1793. The king received him upon his introduction with the most distinguished favor. His majesty seems, indeed, never to have forgotten the staunch friends who adhered to him during that melancholy crisis. Sir John Scott was considered as having become a member of that party, which, from the commencement of the present reign till this time, has retained its original name of the "king's friends."

As Attorney-General, Sir John Scott is regarded as having distinguished himself too much in favor of the prerogative, when it fell to his lot to have the conduct of the prosecutions which the government deemed it necessary to institute against the seditious leaders of the English convention. The times were full of peril and difficulty. A plan was formed to destroy the constitution and the government. That infamous body of men known by the name of the London Corresponding Society, was formed upon the direct plan of the French clubs. The plan was to unite, in the first place, small bodies of men; as soon as they reached a greater number, to divide them into smaller parties; and in this manner (as appeared by their letters and other documents) to spread from town to town, from village to village, and from hamlet to hamlet, till, as they explained it, there should not be an unenlightened man in the whole country.

The proclamation, by which they announced their object, was as singular for its boldness as for atrocity. They candidly avowed their purpose of purifying, as they called it,

the representation of the country. Openly accused the House of Commons of exercising a usurped authority, and professed their determined resolution to adhere together, and to unite themselves into one firm and permanent body, for the purpose of obtaining an adequate remedy for this intolerable grievance, by corresponding and co-operating with other societies united for the same objects.

Sir John Scott's speech, as Attorney-General, was deservedly reputed, as no inconsiderable specimen of his learning and eloquence. Some parts of it were peculiarly animated. In describing the Corresponding Society he used the following words:

"You will find them organized, prepared for emergencies, and exigencies, relying upon their own strength, and determined to act in combination. In some instances, acting with a secrecy calculated to elude observation; in others, proceeding directly by contrary means to the accomplishment of the same end. Representing their numbers as greater than they were, and, therefore, encreasing their number by the very operation of the influence of the appearance of strength. You will find them inflaming the ignorant, under the pretence of enlightening them; debauching their principles towards their country, under the pretence of infusing political knowledge in them; addressing themselves principally to those whose rights, whose interests are, in the eye of the law and constitution of England, as valuable as those of any men, but whose education does not enable them immediately to distinguish between political truth and the misrepresentation held out to them; working upon the passions of men, whom providence hath placed in the lower, but useful and highly respectable situations of life, to irritate them against all that its bounty has blest, by assigning to them situations of rank and property; representing them as their oppressors, as their enemies, as their plunderers, as those whom they should not suffer to

exist—and (in order at the same time to shut out the possibility of correcting original error, or rectifying the opinions of those whom they had so inflamed, misinformed, debauched, and misled) not admitting them into these affiliated societies till they had subscribed tests, the principles of which they were not to examine, after they had been admitted."

From some cause or other, to the general surprise of the country, as well as to the disappointment of government, the several accused persons were acquitted. It seems, indeed, to be the general persuasion, that the ministers had been ill advised when they brought them to trial on an indictment of *treason*. Had they been tried for *sedition*, there cannot be a doubt but they would all have been convicted; as the papers produced in evidence clearly made out a most atrocious case. The jury, on the other hand, considered it their duty to acquit them of treason.

Sir John Scott continued Attorney-General till the administration of Mr. Addington, when he became Lord Chancellor.

We have before had occasion to mention that he is regarded as being too tardy in his decisions. This, certainly, is an evil of the first magnitude in a Court which is itself but too slow in its process. It must be acknowledged, however, on the other hand, that this tardiness of his lordship is owing to his anxious eagerness for justice. He is unwilling to decide whilst there can be a possibility of doubt. The tardiness of the decision, therefore, is in some degree compensated by the rare occurrence of any appeal from the Judgment when once delivered.

Lord Eldon remained Chancellor till the death of Mr. Pitt, when he resigned the seals and was succeeded by Lord Erskine.

The discussion of the Catholic question having removed Lord Erskine, in common with the coalition administration, Lord Eldon was again invited to take the seals; and, we believe, was only induced to accept them by the particular request of his majesty. Lord Eldon is now considered at the head of his majesty's councils.

The following is no unpleasing specimen of the general style of Lord Eldon's eloquence. It is a part of his lordship's speech, on the trial of *Hardy* for treason.

"Gentlemen, it is the great province of a British jury, and God forbid these prisoners should not have the benefit of the reflection, that British juries are able to protect us all; are able to sift the characters of witnesses—to determine what credit is due to them—listening to men of good character without any impression against their evidence—listening to men such as I have stated, with a strong impression against their evidence; that impression, however, to be beat down by the concurrent unsuspicious testimony arising out of the rest of the case, if, upon the whole, you should find the case to be made out as I have stated to you.

"Gentlemen, I forgot to mention to you, that you will likewise find, about the time that this convention was talked of, that there was a new constitution framed for the corresponding society, in which they speak of a royalist as an enemy to the liberties of his country—of a democrat as a friend to the liberties of his country; and you will find, that in a constitution again revised, the whole was thrown into a scheme, and into a system, which was to add physical strength to the purposes of that convention, which was, I submit to you, to assume all civil and political authority.

"If you find all these things, and, if, under the direction of that wisdom that presides here, with respect to which, gentlemen, let me say again, that the situation of

this country is indeed reduced to a most miserable one, if the respect which is due to the administration of the law is suffered to be weakened in any manner. If the respect which is due to the administration of the law—that administration, which, perhaps, is the best feature of the constitution under which we live—is destroyed, miserable indeed must be the situation of your country! If you find under that direction that the case, being proved in fact, is also made out in law, you will do that on behalf of the public, which is due to your places, to the public, and to your posterity and theirs.

"But, on the other hand, if, after hearing this case fully stated, and attempted to be fully proved, you should be of opinion that it is not proved, or you should be finally of opinion that the offence is not made out according to the *hallowed* interpretation of the statute of Edward the Third, I say then, in the conclusion, I join from my heart, in the prayer, which the law makes on behalf of the prisoner, God send the prisoner a safe deliverance!"

Lord Eldon, it will not be contested, is signally qualified to preside, as he now does, in the Court of Equity. His legal information is extensive and profound, his attention to cases is vigilant and unweared, and his attachment to justice is as inflexible as his penetration in the discovery of truth is admirable. This is his praise. He is an honor to the laws which it is his important business to administer.

JURIDICAL SELECTIONS.

OPINION OF CHIEF-JUSTICE TILGHMAN,

ON THE VALIDITY OF THE SENTENCE OF A COURT-MARTIAL ACTING UNDER THE AUTHORITY OF THE STATE, WHERE THE MILITIA ARE IN THE SERVICE OF THE UNITED STATES.

BY the return to this *Habeas Corpus* and the evidence produced to the Court, it appears that E. Bolton, being a Private in Captain Clark's Company, 19th Regiment Pennsylvania Militia, was drafted in pursuance of General Orders of the government of September 5th, 1812. On the 31st March, 1814, he was found guilty of delinquency, in not marching according to orders, by a Court Martial held in pursuance of General Orders of the Governor, dated October 29th, 1813, and sentenced to pay a fine of sixty dollars, or undergo an imprisonment for twelve calendar months. The sentence was approved by the Governor, and Bolton was arrested by virtue of a warrant issued by the President of the Court-Martial, directed to the Marshal of Pennsylvania or his Deputy, no goods and chattels having been found on which the fine could be levied. Bolton asks to be discharged from imprisonment because the Court who convicted him, acting under the authority of the State, and not of the United States, had no jurisdiction in his case.

By the Constitution of the United States, article 1st, section 8th, the Congress have power "to provide for calling forth the Militia, to execute the laws of the Union, suppress insurrections, and repel invasions."

By virtue of this power, Congress may make laws to enforce their call, they may inflict penalties for disobedience, and erect Courts for trial of offenders—and they have exercised these powers. By the act of February 28th, 1795, section 1st, the President of the United States is authorised in case of invasion, or imminent danger of invasion, to call forth such number of the militia as he may judge necessary, and to issue his orders to such officer or officers of the militia as he may think proper. By the 4th section of this act, the militia employed in the service of the United States are subject to the same rules and articles of war as the troops of the United States. By the 5th section, every officer, non-commissioned officer, and private of the militia, who shall fail to obey the orders of the President of the United States in *any of the cases before recited*, shall forfeit and pay a sum not exceeding one year's pay, and not less than one month's pay, to be assessed *by a Court-Martial*, and be liable to be imprisoned, by a like sentence, on failure of payment of the fine, one calendar month for every five dollars of such fine; and by the 6th section, Courts martial for the trial of such militia, shall be composed of militia officers only.

By the act of April 13th, 1812, the President is authorised to require of the Executives of the several States, to organize and arm 100,000 of the militia and to call into active service, any part or the whole of them, in all the exigencies provided by the Constitution, and the officers, non-commissioned officers, musicians, and privates, are made subject to the penalties of the before mentioned act of February 28th, 1795. Whatever orders were given by the Governor, respecting the militia called for by the President, must be considered as given in pursuance of the call of the President, and the breach of those orders was consequently a breach of the orders of the President, and falls within the provisions of the act of February 28th, 1795. The question then is,

how is that act to be understood when it speaks of the sentence of *a Court-Martial?* The object of the act being to provide for the exercise of a power vested in Congress by the Constitution, it must be supposed, unless the contrary is expressed, that every thing directed to be done, was to be under the authority of the United States; when a Court-Martial then is mentioned, in general terms, the most reasonable construction is, that it was to be a Court uuder the authority of the President.

The provision in the 6th section, that the Court shall be composed of *militia officers only*, show clearly that there was no idea of a Court under *state authority*, for in such case the provision would be nugatory, as a State could pretend to no authority to constitute a Court of any other than *militia officers*. There are other reasons for supposing that it was the intention of Congress to keep the whole authority over the militia, called into actual service, in their own hands. It is of great importance to prevent the collision of clashing jurisdiction on this vital subject. The act of 1795 authorises the President to issue his orders immediately to any officer of the militia, without passing through the medium of the Governor, and I believe it to be a fact well known, that this precaution was introduced, in consequence of difficulties which had occurred in calling out the militia to suppress an insurrection in the western parts of Pennsylvania in the year 1794.

We have further evidence of the sense of the United States on this subject, by the act of April 18th, 1814, by the 1st section of which it is enacted, that "Courts martial, to be composed of militia officers alone, for the trial of militia drafted, detached, and called forth, for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, whenever necessary, be appointed, held, and conducted, in the manner prescribed by

the articles of war, for appointing, holding, and conducting Courts martial for the trial of delinquents in the army of the United States." It appears then that whenever we consider the words or the object and spirit of the Constitution and laws of the United States, a Court Martial for the trial of offenders charged with disobedience of the orders of the President, can derive its authority from no other source than the United States. But it has been contended that the Governor by his own authority, as a commander in chief of the militia, may order a Court-Martial for the trial of persons who have disobeyed his orders. In answer to this it is observed, that the Governor issued his orders for calling out the militia expressly at the request of the President of the United States, so that it is in truth the order of the President, communicated through the Governor.

It is to be recollected too, that by the Constitution of Pennsylvania, article 2d, section 7th, the Governor ceases to be commander in chief of the militia when they are called into the actual service of the United States. This provision was necessary, because, by the Constitution of the United States, article 2d, section 2d, the President is "*commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States.*" Besides I know of no law of Pennsylvania which authorises the holding of a Court-Martial for the trial of offenders against the United States, and it would be extremely hard if there was; for it is certain, that no punishment inflicted under a state law could prevent the United States from prosecuting for the same offence on their own authority, nor would an acquittal by a State Court be any bar to a prosecution before a Court of the United States.

The granting that the Governor was not commander *in chief* of the militia, and therefore could not hold a Court-Martial by *his own authority*, it has been urged, that though

not *commander in chief*, he was still *commander* of the militia in the service of the United States, and as such might order a Court-Martial under the laws of the United States; and in proof of this construction of the Constitution have been cited the cases of the Governors of Pennsylvania and New-Jersey, who commanded the militia in person in the insurrection of 1794, and of the Governors of Ohio and Kentucky, who took the field and retained the command of their militia in the late war. What passed between the President of the United States and those Governors, or by what authority they exercised their commands, or what rank they held in the army of the United States, I am not informed, nor is it necessary to make a question of it on the present occasion, because the Governor of Pennsylvania did not take the field, but remained in the exercise of his authority at home, while the militia marched under the command of inferior officers.

Now it will not be pretended, that the President of the United States ordered the Governor, or had power to order him into actual service. The sovereignty of the State protects him from such an order; he still remains commander in chief of all the militia not in the actual service of the United States, and he has civil duties of so imperious a nature as may render his presence at the seat of government indispensable, for no law law can be enacted without him.

On no ground, then, which has been taken, nor on any other ground which I can perceive, can the proceedings of this Court Martial be supported. The offence was against the United States, and should have been prosecuted under their authority. But it was prosecuted under the authority of the State of Pennsylvania—the Sentence, therefore, was void, and we must direct that the prisoner be discharged.

OPINION OF CHIEF-JUSTICE MARSHALL

ON THE SAME SUBJECT.

William Meade v. *The Deputy-Marshal of the Virginia District.*

MOTION TO BE DISCHARGED UNDER A WRIT OF HABEAS-CORPUS.

BY the return of the Deputy-Marshal it appears that William Meade, the Petitioner, was taken into custody by him and is detained in custody on account of the non-payment of a fine of forty eight dollars assessed upon him by the Sentence of a Court-Martial for failing to take the field in pursuance of general orders of the 24th of March, 1313, the Marshal not having found property whereof the said fine might have been made.

The Court-Martial was convened by the following Order:

November 8th, 1813.

BRIGADE ORDERS.

A General Court-Martial to consist of Lieutenant Colonel Mason, President, &c. will convene at the Court-house in Leesburg, on Friday, the third day of next month, for the trial of delinquencies which occurred under the late requisition of the Governor of Virginia and Secretary of War, for Militia from the county of Loudon.

(Signed) HUGH DOUGLAS.
Brig. Gen. 6th Brig. Va. Mil.

The Court being convened, the following proceedings were had. It appearing to the satisfaction of the Court that the following persons of the county of Loudon were regularly detailed for militia duty and were required to take the field under general orders of March 24th, 1813, but re-

fused or failed to comply therewith, whereupon this Court doth order and adjudge, that they be each severally fined the sum annexed to their names, "to wit, William Meade forty-eight dollars." On the part of the Petitioner the obligation of this Sentence is denied:

1st. Because it is a Court sitting under the authority of the State, and not of the United States.

2d. It has not proceeded according to the laws of the State, nor is it constituted according to those laws.

3d. Because the Court proceeded without notice.

1. The Court was unquestionably convened by the authority of the State and sat as a State Court. It is however contended that the Marshal may collect fines assessed by a State Court for the failure of a militia man to take the field in pursuance of orders of the President of the United States. The Constitution of the United States gives power to Congress to provide for calling forth the militia to execute the laws of the union, &c. In the execution of this power, it is not doubted that Congress may provide the means of punishing those who shall fail to obey the requisition made in pursuance of the laws of the union, and may prescribe the mode of proceeding against such delinquents, and the tribunals before which such proceedings should be had. Indeed it would seem reasonable to expect that all proceedings against delinquents should rest on the authority of that power which had been offended by the delinquency. This idea must be retained while considering the acts of Congress. The first section of the act of 1795 authorizes the President "whenever the United States shall be invaded, or in imminent danger of invasion" to call forth such number of the militia of the State or States most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasions, and to issue his orders for that purpose

to such officer or officers of the militia as he may think proper."

The 5th section enacts, "that every officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the President of the United States in any of the cases before recited, shall forfeit a sum not exceeding one year's pay and not less than one month's pay, to be determined and adjudged by a Court Martial." The 6th section enacts, "that Courts martial for the trial of militia shall be composed of militia officers only."

Upon these sections depends the question whether Courts martial for the assessment of fines against delinquent militia men should be constituted under the authority of the United States, or of the State to which the delinquent belongs. The idea originally suggested, that the tribunal for the trial of the offence should be constituted by, or derive its authority from the government against which the offence had been committed, would seem to require that the Court thus referred to in general terms, should be a Court under the authority of the United States. It would be reasonable to expect that if the power were to be devolved on the Court of a state government, that more explicit terms would be used for conveying it. And it seems also to be a reasonable construction, that the legislature, when in the 6th section providing a Court-Martial for the trial of militia, held in mind the offences described in the preceding section, and to be submitted to a Court Martial. If the offences described in the 5th section are to be tried by a Court constituted according to the provisions of the 6th section, then we should be led by the language of the section to suppose that Congress had in contemplation a Court, formed of officers in actual service, since the provision that it "should be composed of militia officers only" would otherwise be nugatory. This construction derives some aid from the act of 1814. By that act Courts Martial for the trial of offences such as that

with which Mr. Meade is charged, are to be appointed according to the rules prescribed by the articles of war. The Court in the present case, is not appointed according to those rules. The only argument which occurs to me against this reasoning grows out of the inconvenience arising from trying delinquent militia men who remain at home, by a Court-Martial composed of officers in actual service. This inconvenience may be great and well deserves the consideration of Congress—but will not aid in so construing a law as to devolve on Courts, setting under the authority of a State, a power which, in its nature, belongs to the United States. If however this should be the proper construction, then the Court must be constituted according to the law of the State.

On examining the Laws of Virginia, it appears that no Court-Martial could be called for the assessment of fines on the trial of privates not in actual service. This duty is performed by Courts of Enquiry, and a second Court must sit to receive the excuses of those against whom a previous Court may have assessed fines, before the Sentence becomes final or can be executed. If it be supposed, that the act of Congress has conferred the jurisdiction against delinquent militia privates on Courts martial constituted as those are for the trial of officers, still this Court has proceeded in such manner that its Sentence cannot be sustained.

It is a principle of natural justice, with which Courts are never at liberty to dispense, unless under the mandate of positive laws, that no person shall be condemned unheard, or without an opportuity of being heard.

There is no law authorising Courts martial to proceed against any person without notice, consequently such proceeding is entirely unlawful. In the case of the Courts of Enquiry sitting under the authority of the State, the practice has, I believe prevailed, to proceed in the first place

without notice, but this inconvenience is in some degree remedied by a second Court, and I am by no means prepared for such a construction of the act as would justify rendering this Sentence final without substantial notice. But be this as it may, this is a Court-Martial, not a Court of Enquiry, and no law exists authorising a Court-Martial to proceed without notice. In this case the Court appears so to have proceeded; for this reason, I consider its Sentences as entirely nugatory; and do, therefore, direct the Petitioner to be discharged from the custody of the Marshal.

OPINION OF THE GENERAL COURT OF VIRGINIA,

ON THE CONSTITUTIONALITY OF AN ACT OF CONGRESS,

Giving Jurisdiction to a Court in a Case arising under the Revenue Laws.

DELIVERED BY JUDGE WHITE.

THIS is an Action of Debt, brought by the Plaintiff to recover a *Penalty* inflicted by an act of Congress to insure the collection of the revenue of the United States, which *Penalty*, the same act says may, under circumstances such as exist in this case, be recovered in a State Court; and the question submitted to the General Court is substantially this: "Could Congress constitutionally give to a State Court jurisdiction over this case, or can such Court be authorised by an act of Congress to take cognizance thereof"?

The very statement of the question points out its extreme delicacy and great importance. It involves the great constitutional rights and powers of the general government, as well as the rights, sovereignty, and independence of the state governments. It calls upon this Court to mark the

limits which separate them from each other. and to make a decision which may possibly put at issue, upon a great constitutional point, the Legislature of the United States and the Supreme Criminal Tribunal of one of the States.

Such a question, involving such consequences, ought to be approached with the utmost circumspection, with the most cool, dispassionate, and impartial investigation; and with a fixed determination to render such Judgment only as shall be the result of solemn conviction. The Court has not been unmindful of these things. It has approached the subject with those feelings and with that determination. It has bestowed its best consideration, its deepest reflection, upon it; and after viewing it in every point of light in which it has been placed by others, or in which the Court has been able to place it, has made up an opinion in which all the Judges present concur, and which it has directed me to pronounce.

But before that is done, it will be necessary to lay down and explain certain principles on which it is founded.

First—It is believed, that the Judicial Power of any State or Nation, forms an important portion of its sovereignty, and consists in a right to expound its laws, to apply them to the various transactions of human affairs as they arise, and to superintend and enforce their execution—and that whosoever is authorised to perform those functions to any extent, has of necessity to the very same extent the judicial power of that state or nation which authorised him to do so.

Secondly—That the Judiciary of one separate and distinct sovereignty, cannot of *itself* assume, nor can another separate and distinct sovereignty either *authorize* or *coerce* it to exercise, the judicial powers of such other separate and distinct sovereignty.

It is indeed true, that the interest of commerce, and the mutual advantages derived to all nations by their respectively protecting the rights of property to the citizens and subjects of each other, whilst residing or trading in their respective Territories, have induced civilized nations generally to permit their Courts to sustain suits brought upon contracts made in foreign countries, and to enforce their execution according to their true intent and meaning. And in order to ascertain that, our Courts do permit the laws of the country, where the contract was made, to be *proved* to the jury, or the Court of Chancery, as the case may be, as *facts* entering essentially into the substance of the contract. But, in doing all this, they do not act under the *command* or by the *authority* of the sovereign of that nation. Nor are they exercising any portion of its judicial powers. They are only expounding, applyng and superintending the execution of *the law* of their *own* State, which authorises that mode of proceeding.

But though there are the best reasons for permitting our Courts to sustain suits of this description, there is no good reason why one nation should authorise its Judiciary to carry the penal laws of another into execution, and it is believed, that no nation has ever done so. And, as has already been stated, there is no principle of universal law, which authorises one sovereign to *empower* or *direct* the Judiciary of another to do so. Such a right can be acquired by compact only. And we shall presently see whether Congress has so required it. Without such compact, a fugitive from justice cannot even be demanded, as of right, to be delivered up to the *tribunals* of the *nation whose laws he has violated*, much less can he be tried and punished by a foreign tribunal for violating them.

If such a system shall once be adopted it will introduce a strange kind of mosaick work into the Judiciary of nations. Here a Cadi sitting in Judgment upon an Italian denying

the Pope's infallibility. There the stern fathers of the Holy Inquisition putting a poor Turk to the rack because he denies that Mahomet is the prophet of God. The Judges of republican Virginia pillorying an Englishman for libelling royalty. And the Court of King's Bench inflicting the same punishment upon an American for libelling the government of the United States for the late declaration of war.

Thirdly—That the government of the United States, although it by no means possesses the *entire* sovereignty of this vast empire, the residuum thereof still remaining with the States respectively, is nevertheless, as to all the purposes for which it was created, and as to all the powers vested therein, unless where it is otherwise provided by the Constitution, completely sovereign. And that its sovereignty is as entirely separate and distinct from the sovereignty of the respective States, as the sovereignty of one State is separate and distinct from that of another. So that unless as before excepted, it cannot exercise the powers that belong to the state governments, nor can any state government exercise the powers which belong to it. And there is no one thing to which this principle applies with more strength than to the revenue of the United States and things appertaining thereto. It being notorious that a desire to give Congress complete and entire control over that subject was the great and moving principle which called the present Constitution into existence. It is admitted, however, that there are some exceptions to this last principle; they are such, however, as only prove the rule itself. Thus by the second section of the third article of the Constitution, among other things it is declared, that "the judicial power of the United States shall extend to controversies between citizens of different States, between citizens of the same State, claiming lands under grants of different States," &c. These powers in the nature of things belonged to the state sovereignties, and they were, at the time of the adoption of the Constitution, in complete posses-

tion of them, nor could the Courts of the United States, *merely as such*, by any principle of construction, have claimed them; there were reasons at that time deemed sufficient to justify the extending the judicial power of the United States to them, and they were extended to them, without, however, taking away the jurisdiction of the State Courts; so that as respects those matters, the State Courts and the Courts of the United States have concurrent jurisdiction *by compact*.

These things being premised, I return to the question. Can Congress, by any act which it can pass, authorise the State Courts to exercise, or *vest* in them, any portion of the judicial power of the United States; more especially that portion of it which is employed in enforcing their *penal laws?*

I shall not stop here to prove that the act in question is, as respects this case, a penal law, or that to enforce the payment of its *penalties*, in any way or form whatsoever, would be to execute, to enforce it. These are self-evident propositions which would only be obscured by any attempt to elucidate them.

Nor shall I waste much time in considering whether our Courts can resist an unconstitutional law. That question as it respects our state laws, has long since been settled in Virginia, and the decisions of her courts have been acquiesced in by the General Assembly, with that wisdom and magnanimity which belongs to it.

The argument is much stronger as respects the laws of Congress, the Legislature of a separate and distinct sovereignty, by whose laws we are not bound, unless, to use the very words of the constitution, they are "*made in pursuance thereof.*" Was it it otherwise, were the state courts obliged to execute every law which Congress might pass, without

enquiring whether it was or was not made *in pursuance of the constitution*, it is most manifest that the justly dreaded work of consolidation would not only be begun, but that, in principle, it would be completed; and that state sovereignty and state independence would soon cease to exist.

We have already seen that the government of the United States is, as to the purposes for which it was created, a separate and distinct sovereignty, having rights, powers, and duties, which it is bound to exercise and discharge itself, and which it cannot communicate to the States over which it presides, and which they cannot intermeddle with, and that the judicial power forms a portion, and a most important portion it is, of its sovereignty.

We have seen that there is nothing in the universal law, or the usage of nations, which will authorise one sovereignty to invest its judicial power, or any part of it, in the courts of another, or direct them to execute it: more especially that portion which respects its *penal code*.

If then Congress has a right to vest *that*, or any other portion of the judicial power of the United States, in the state courts, it must be in virtue of some compact. But there is no other instrument from which such a compact can be inferred but the constitution of the United States. Let us then see where it has deposited the judicial power of the general government, for where it has placed it, there it must remain.

That instrument does not take the least notice of the state courts as respects this subject. But it declares, section 1st of the 3d article, that "the judicial power of the United States *shall* be vested in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish." And by the 8th section of the 1st article, power is given to Congress, "to constitute tribunals inferior to the Supreme Court."

This judicial power then, the *whole* of it, *without any exception*, is given to this supreme court, and those inferior courts to be *ordained and established* by Congress. It has never yet been contended that Congress can compel or authorise the state courts, or any of them, to perform the functions of this supreme court. By what kind of reasoning then can it support a claim to exercise such a power with respect to the functions of these inferior courts: Did Congress ordain *and* establish the state courts? Did it decree their existence? Did it appoint their Judges? Did it institute, did it settle, did it *constitute* them? Most certainly it has done none of those things. It found them *already* ordained, established; and finding them so ordained *and* established, it has by *its law* directed them to exercise this portion of the judicial power of the United States.

But the Judges of these inferior courts are to have *offices* which they are to hold during good behavior. Now I take it for granted, that the man who holds an office is an officer, and an officer too of that government whose business it is the duties of his office to perform. And by the 3d section of the 2d article of the Constitution, "all officers of the United States are to be commissioned by the President," which the State Judges are not.

But who does the Constitution intend shall decide upon the good behavior of the Judges of the inferior courts? Most unquestionably the Senate of the United States, upon impeachment by the House of Representatives. So great an absurdity cannot be supposed, as that the Constitution intended to put the judicial power of the United States, or any part of it, into the hands of Judges in no wise responsible to its government. Yet no man can pretend that the State Judges can be impeached and tried by that government.

Besides, the Constitution of the United States does not provide that the *State Judges* shall hold their offices during

good behavior. Congress cannot direct that it shall be so by law; and, in fact, some of them are elected for a limited period, and others may be removed by the vote of their state legislature. So that if a law of Congress should be very unpopular in one of those states, the Judges could not execute it but at the risk of their commissions.

Moreover, the Judges of the state courts are called upon by this act to exercise judicial power, which they hold at the *will* of Congress, and which may be taken from them by the very breath which gave it—and which, it is almost certain, will be taken from them, whenever by a firm and independent exercise of their own judgments they shall much offend that honorable body. So that under this system, neither the people, nor the government of the United States would have that security for the uprightness of their judges which the Constitution contemplates.

But the Judges of these inferior courts are also to receive for *their services* compensation which shall not be diminished during their continuance in *office*, nor during the existence of a particular *law* calling for *particular services*.

From whom are they to receive compensation? Certainly from the general government, to which those *services* are to be rendered. But do the State Judges receive, or are they to receive any compensation for *these services* to be rendered to the United States? Every body knows that they do not. And we know, that if any Judge of this state was to accept either commission or compensation from the general government, he would by that act vacate his office.

But it is said that the state courts do take cognizance of suits brought to enforce contracts made in foreign countries, and that they will take notice of those foreign laws, under the faith of which such contracts were made, and enforce them agreeably thereto, and that this suit sounds in con-

tract. But how does it sound in contract? Has the defendant contracted to pay the amount of this *penalty* to the plaintiff? No, it is answered, it is not precisely so. But it is understood to be a principle of universal law, that every citizen and subject has entered into an *implied* contract, that he will obey the laws of his country—that the laws of his country subject the defendant to the payment of this *penalty* —that this suit is founded on that contract, and the state court has for that reason jurisdiction over it. Indeed! But before we yield our assent, let us see how far this reasoning will carry us. It is sometimes said, that an argument which necessarily proves too much, proves nothing.

By this same *implied* contract, every citizen and subject of every government, has agreed to submit his head to the block, or his neck to the cord, whenever the laws of his country require him to do so. If, therefore, this implied contract will give us jurisdiction over this *penal* law, and justify us in enforcing its *sanction*, the same principle will give us jurisdiction over the entire penal code of every nation upon the earth, which no man can pretend to say we have.

Upon the whole, however painful it may be, and actually is, to us all, to be brought, by a sense of duty, into conflict with the opinions and acts of the Legislature of the United States, for which we entertain the highest respect, and the constitutional laws of which we feel it our duty to obey and execute with cheerfulness, when their execution devolves upon us; yet we cannot resist the conviction, that this law is, in this respect, unconstitutional. It is the unanimous opinion of this Court, that to assume jurisdiction over this case, would be to exercise a portion of the judicial power of the United States, which, by the Constitution, is clearly and distinctly deposited in other hands: and that by so doing, we should prostrate that very instrument which we have taken a solemn oath to support.

OPINION OF THE COURT OF APPEALS OF VIRGINIA,

On the Constitutionality of an Act of Congress, authorising a Writ of Error from the Supreme Court of the United States to a Supreme Court of a State.

A Case was cited from the records of the General Court of Virginia, from which it was apparent that that court, the highest criminal tribunal in the state, had declined executing a *penal* law of the Congress of the United States. An allusion was at the same time made to a most important case then pending before the Court of Appeals, wherein this point was involved:

"Whether a law of Congress, which authorises a Writ of Error to issue from the Supreme Court of the United States to a Judgment of the Supreme Court of a State, be constitutional or not?"

We have now to state that this case was finally decided by the Court of Appeals, and that all the Judges who were on the bench (the whole Court being present with the exception of Judge Coulter) unanimously declined obeying the mandamus of the Supreme Court of the United States.

As it is due to the State to have the points in this case, and the principles on which they were decided, stated at length, we shall hereafter attempt to procure an abstract of the whole. In the mean time we shall cursorily observe, that the case began several years ago, in the District Court of Winchester; that it went up to the Court of Appeals, where it was decided against the appellee;—that, by a writ of error, it was brought before the Supreme Court of the United States, who finally issued a mandamus to the Court of Appeals, directing them to enter up a Judgment in favor of

the appellant in the Court of Appeals. Had they a right under the Constitution of the United States to issue this mandamus? In approaching this question, the Court of Appeals appeared to spare no pains to arrive at the truth. They called upon the ablest counsel at the bar for their disinterested opinions. The Court themselves took nearly two years in maturing and making up their Judgment. There was no precipitation; but, on the contrary, every effort was made to collect light and administer justice. The opinions of the four Judges bear the strongest marks of their laborious and disinterested researches. The decision has at length gone against the jurisdiction of the Supreme Court of the United States, as will appear by the following extract from the records of the Court of Appeals:

Philip Martin v. *David Hunter.*

On a Special Mandate from the Supreme Court of the United States.

The Court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this Court, under a sound construction of the Constitution of the United States. That so much of the 25th section of the act of Congress to establish the Judicial Courts of the United States as extends the appellate jurisdiction of the Supreme Court to this Court, is not in pursuance of the Constitution of the United States. That the writ of error in this case was improvidently allowed under the authority of that Court. That the proceedings thereon in the Supreme Court were *coram non judice*, in relation to this Court; and that, obedience to its mandate be declined by this Court.

TRIAL IN SOUTH-CAROLINA,

FOR VIOLATING THE FREEDOM OF ELECTION.

State v. *Fargues M'Dowell.*

THIS was an indictment upon the following clause of the 11th section of the Election Law, A. D. 1721, Brevard's Digest, vol. 1, p. 276:

"If any person or persons whatsoever, shall, on any day appointed for the election of a member of the Commons House of Assembly as aforesaid, presume to violate the freedom of the said election, by any arrests, menaces, or threats, or endeavor or attempt to overawe, fright, or force any person qualified to vote, against his inclination or conscience; or otherwise by bribery obtain any vote; or who shall, after the said election is over, menace, despitefully use or abuse any person, because he hath not voted as he or they would have had him; every such person so offending, upon due and sufficient proof made of such his violence or abuse, menacing, or threatening, before any two justices of the peace, shall be bound over to the next General Sessions of the Peace, himself in fifty pounds current money of this province, and two sureties, each in twenty-five pounds of like money, and to be of good behavior and abide the sentence of the said court, where, if the offender or offenders are convicted or found guilty of such offence or offences as aforesaid, then he or they shall each of them forfeit the sum of fifty pounds current money of this province, and be committed to jail without bail or mainprise till the sum be paid."

The indictment stated "that Fargues M'Dowell, on the 10th of October, A. D. 1814, with force and arms, at Georgetown in the district and state aforesaid, at an election then

and there holden, under and by virtue of the constitution of the said state, for one senator and four representatives and members of the General Assembly of the said state to represent the election district of Winyaw in the said state, the said 10th of October being a day duly appointed for the said election, did presume to violate the freedom of the said election by arrest, menaces, and threats; and that the said Fargues M'Dowell did then and there by arrest, menaces, and threats, endeavor or attempt to menace, fright, and force a certain Jacob R Parker (the said Jacob R. Parker, being then and there duly qualified to vote for the said senator and representatives and members of the said General Assembly) to vote against the inclination and conscience of him the said Jacob R. Parker, to the evil example of all persons in the like case offending, against the act of the General Assembly of the then province, now state of South-Carolina, in such case made and provided, and against the peace and dignity of the same state aforesaid."

The evidence adduced by the state proved, that Jacob R. Parker was convicted of an offence the previous term, and that a motion for a new trial was made, and the prisoner remanded to jail, with an order of Court that he should be bailed until his motion was determined. Parker not having obtained bail, M'Dowell permitted him to go at large with a promise that he should be subject to his control. The prisoner had, frequently during such license, driven the mail stage a considerable distance from town, and had generally lived with his family out of the jail and conducted himself according to his own will until the morning of the election, when M'Dowell sent for him and reprimanded him for having gone the preceding evening a few miles with a letter for one of the candidates who was obnoxious to him. After this preliminary conversation, the jailor interrogated him as to the manner he intended to vote, and finding that the obnoxious candidate was one of his favorites, he remonstrated with him on the impropriety of such a vote. Finding that

Parker was determined to vote for that gentleman, he resorted to the power of his office, and threatened to confine him if he voted for Mr. ..... He was hurrying the prisoner to jail when several gentlemen came up and remonstrated with him on the illegality of his conduct. All was unavailing; and the unhappy victim was committed to prison in despite of the constitution and laws of his country. A party of gentlemen, sometime afterwards waited on the defendant and again informed him of the heinousness of his offence. He was inflexible; and Parker remained his prisoner until the following morning, when he was bailed.

The Attorney-General, with the warmth and energy of the patriot, and the intelligence of the statesman and the lawyer, pourtrayed in glowing and correct colours the enormity of the transaction. The defence set up by Robert A. Taylor, Esq. was, the ignorance of the defendant, the humanity of his previous conduct, and the violation of the prisoner's parole of honor, concluding with an eloquent appeal to the jury not to minister at the altar of faction by surrendering his client a victim to the prosecution. His Honor Judge Nott, in a luminous and concise charge, explained the law and evidence to the jury, and commented upon the importance of preserving inviolate the elective franchise, by punishing the first attempts made against its purity. The jury retired; and in a few minutes returned a verdict of *Guilty*.

MISCELLANEÆ.

AMERICAN JURISPRUDENCE.

Supposed to be written by Mr. Rush, Attorney-General of the United States.

IT is truly gratifying to the patriotic observer of the enterprise which marks every line of human activity in the United States, that intellectual advancement seems to keep up at a fair and proportional pace with the physical energies that are almost hourly developing themselves. There is no one region of letters to which this remark may be better applied than to the profession of the law. America has a just title to be proud of the number of her able lawyers. At the close of the revolutionary war, and for full ten years afterwards, a book of American reports was scarcely to be met with in any one of the states. At the present day they have swelled to an amount not easy of recapitulation unaided by the periodical notices which so constantly announce some new addition to the number. Indeed the domestic law books, whether made up of reports merely, or consisting of treatises of a character more elementary, now occupy a place of gratifying conspicuousness in every professional library, and it need scarcely be added, are in every instance to be traced to the emulous and well bestowed industry of some one or other of the individuals who do such honor to the bar or to the bench of the country.

There is a line in which the talents of the American lawyer have been crowned with more illustrious chaplets of renown. Passing the limits of mere municipal acquirements

he has risen to the magnitude of the greatest occasions, and shown, when his country was the stake, with what dignity and effect he could put forth the highest qualifications of the civilian and the publiciste. Since the present century set in and at the close of the last, when the alternate injustice of enraged belligerents had beaten down or obscured some of the long established doctrines of international law, the public ministers of the United States, and with some distinguished exceptions they were lawyers, were seen to rescue them from a fate of total expulsion from the civilized code with which a course of retaliating violence seemed at one moment to threaten them; to clear away the entanglements which the subtle but brilliant adjudications of a cotemporary tribunal at London had in too many instances served to throw around them; and to re-assert with equal spirit, eloquence, and research, at both the British and French capitals, their pristine, sacred, and imperishable authority.

More recently at Ghent, how shall we estimate their important labors? Thrown into competition with the selected diplomatists of the first nation of Europe, who were backed too by the proximity of their court, whence, as to a fountain of refreshment, they could look when argument languished or when instructions became exhausted,—the commissioners of this remote republic, resting upon the independent foundation of their country and their cause, with no prompters but their own genius, their own circumspection, and their own knowledge, and with assembled nations as spectators of the successive displays of polemic skill which the turn of the discussion seemed so largely to have run into, acquired a fame which dispassionate judges have acknowledged and which is destined to shine durably in the pages of their country's history. Our recollections in diplomatic controversy supply us with no specimens of excellence in a dignified temper, in an applicable erudition, and in a chastened

style, beyond those stamped upon the letters of the American commissioners. We think we hazard little in supposing that the archives of the congresses of Chambray, of Soissons, or of Vienna, would not really afford state papers in contradiction of the remark.

If we were inclined to run a parallel between the mind of this country and that of Europe, but especially of Britain, we know of no line to which we could so fairly resort as to that of the law. Here it is where we think that a test of the relative intellectual cultivation and force of the two hemispheres may be found with the fewest intrinsic disadvantages to ourselves in the comparison. The theory upon this subject may be plainly resolved into this. That the prodigiously greater incentive which is forever applying itself to mind in Europe, rouses it into more keen action and gives it momentum towards purposes which it does not yet require, and which therefore it cannot be supposed to reach here. A numerous and condensed population; an infinitely intricate organization of society, producing habits and tastes not merely artificial, but in the highest degree fastidious and dainty in a countless variety of ways; every possible avenue in which human genius can exert itself, thronged with the most eager competition; the spectres of poverty at hand to reanimate, by their powerfully stimulating admonitions, flagging industry with resulting rewards, proportioning their incitements to the difficulty and the rarity of success,—these, and not royal munificence, have in all countries been the essential promoters of literature and the arts.

In the department of jurisprudence the United States probably approach, if not in all of these, yet in other great excitements of mind, nearer to a par with the old nations than in any other that could be named. Here the law is every thing. It makes its appeal to the strongest motives of interest and of ambition. In most instances it leads to a comfortable subsistence; and in many to independence and

wealth. To public honors, if so they are to be denominated, it unquestionably opens a wider door than any other pursuit. But we do not mean to dwell upon the connexion in this country between politics and the law, which would open a space that it is not our purpose on this occasion to occupy. The unbounded freedom of our institutions begets, throughout every portion of the country, a corresponding latitude of conduct and of discussion, which exultingly and fiercely disdains to acknowledge any limit or any regulator but the law. Hence the habit of bringing every thing to its test. The bolts of criticism shot from the most exalted heights of intellect on the one hand, and the shafts of unlettered simplicity upon the other, a Burke or a Jack Cade may fall in eloquent vengeance or in harmless mirth upon this profession; but in a country of equal rights it has ever been a formidable engine of influence in public affairs, and scarcely less of credit and authority in private life. We can only mean, when it is associated with those strict principles of probity and honor which only constitute its first ornament, but without which it is impossible that it can ever in any country signally and ultimately prosper So endowed, it is, after all in the beautiful words of the first Vinerian lecturer, a profession which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart.

As we outstrip England in her freedom, there is a still greater call amongst us for those who are found to be so usefully its ministers. It is like the rule of the political economist in all other cases, where the supply of the commodity adapts itself to the demand. It may be that the English loom makes a demand for ten or for twenty workmen where the American as yet does for one. Hence the comparative extent, variety, and perfection, of their manufactures. But it is probable that the habits, the manners, and the contentions of the universally thriving and self-

supported freemen on this side of the Atlantic, call for at least a couple of lawyers, take the two countries throughout, where the English do for one. Considering Burke's assertion in 1775, that nearly as many of Blackstone's Commentaries were sold in the American colonies alone, at that period, as in all England, we think it may be agreed that we set down the proportion at a safe rate. The noble definition of law, that nothing is so high as to be above its reach or so low as to be beyond its care, is probably true to a greater practical extent in this country than in any other. The cause obviously is, not our liberty alone, but an alliance between an active and restless spirit of freedom and the comfortable condition of all classes of the community, not excepting, relatively considered, even the poor. This encourages and provokes the disposition to go to law, by supplying it, almost universally, with the means. We have honest blacksmiths suing Banks for false imprisonment, and street-cleaners fine gentlemen for assaults and batteries, as the common occurrences of our Courts. Dear, too, as law is supposed to be in this country, it falls short of the expenses which are generally the concomitants of its benefits in England. The sums which, under the various denominations of fees and costs, fall upon the suitor by the time he gets into the House of Lords, when he carries his claims to that final stage of appellate authority, sometimes become enormous. A member of the House of Commons stated in his place, in 1810, that a bill of costs had been presented in a court of one of their colonial dominions *three fathoms* in length, and Sir William Scott himself gives us to understand, that there are "some suits famous in English juridical history for having outlived generations of suitors."

Under the names of Lee, Paul, Ryder, and Murray, and on an occasion so solemn as the answer of the English court to the Prussian memorial, was it formally said, that "in England the crown never interferes with the courts of justice."

True. And this is a legitimate boast. The holy sanctuary is never safe but when this is uniformly, sacredly, and unconditionally the case.

But he who has carefully surveyed the spirit of our own, in contrast with that of British jurisprudence, deceives himself if he supposes that it mounts no higher in a disdainful exemption from all extraneous impression. Taking the remark in its genuine meaning, we are called upon to *invert* it before we can arrive at the bold anomaly which sits upon the stern portals of American justice. Here the Courts are always in fact *interfering* with the government! Pass but an embargo law; pass but an act for the enlistment of minors; let the Legislature venture to abolish a Court or touch with only the pressure of a hair, the supposed rights of the citizen; and you will soon see what a storm will be raised about the ears of their supposed sovereign authority Sometimes too, in its own way, it will rage terribly. The merchant, or the master, or the Judge, or the citizen, declares he is aggrieved. The lawyers meet. They ponder, they deliberate, they analyze, they investigate; finally they denounce. Or, it may be, that they denounce first, and do all the rest afterwards. Then approaches a scene of high expectation. We behold crowded lobbies, witness a palpitating array of judges, and barristers, and by-standers. The selected advocate rises; the motive to his duty is momentous; a crisis has arrived; posterity may be implicated in the decision. This is his exordium. And then—with a a scrutinizing severity of critical examination, tasking the deepest stores of acquired learning, and drawing upon the powers of an invention sharpened by patriotic or unworthy passions, he proceeds to lay open the incompatibility of the exercise of the delegated trust with the limits and injunctions of the constitutional charter. If he be successful, as sometimes happens, away goes the act of Congress or the act of Assembly, with all its virtues or all its blunders upon

its head. The representatives of the people complain; but what follows? They submit to the defeat; or, roused by the discomfiture, are invoked anew to review their work supplying its oversights, filling up its defects, and making it proof, in short, against the well-directed, the bold, the ceaseless shocks of these terrible legal battering rams. The Constitution with Captain Hull in her, did not come down upon the Guerriere in a spirit of more daring and triumphant energy than the Philadelphia or New-York lawyers will sometimes do upon a statute that happens to run a little amiss!

We do not say these things in any political feeling. We merely say them because they are so. We refer to them as some of the haughty and intractable features of American jurisprudence, and as marking in this respect certainly an opposition to the genius of the British. Looking upon the good and the bad, we are inclined to approve and admire such occasional bursts of intellectual and forensick rebellion, as having their seat in the very soul of liberty, and as better assuagers of the public uneasiness than any which monarchies can resort to in seasons of alarm; the more especially, when co-operating with a press wholly exempt as to political matters, not only from previous, but (by the habit of the country) even all subsequent interposition. If they do sometimes embarrass, they may, in the long run, do good; and, considering the complicated counter-balancings under which the machine of our freedom, as it grows more vast and more magnificent, is to work, contribute their subsidiary aid to the safety, the happiness, and the grandeur of the republic. The same Providence which permits the lightening to rive the single oak, or blast the solitary traveller, freshens, through its instrumentality, the general atmosphere into purity and health.

The English jurisprudence in the parallel with this part

of ours, is, to say the least, tame, if it be not slavish. It is the soundest theory of their Constitution, that the Parliament can do whatever it pleases. Where any one of its acts speak an explicit language, the Courts dare not disobey. It operates as a sort of impressment upon the mind of the Judge, who must do his duty in carrying it into effect, whether he thinks it right or wrong, in consonance with the magna charta, or against it; while he consoles all judicial scruples with a declaration of his being reverently bound to believe, that the wisdom of the king, lords, and commons, could never ordain any thing unjust. There is no such courtesy or acquiescence here; no such compliments paid to infallibility. While the American legislator moulds his statute, a vigilant judicature fixes its eye upon him, and, moving in co-ordinate majesty, has ever yet warned him that he cannot pass over the markings of the compass and the square. We say, the British Constitution; but, in truth, it has none; or none, as we understand the term. It is, as the Abbe Montesquieu justly said in a late speech in the French Chamber of Deputies, "the offspring of circumstances, so linked together that no human combination could have foreseen or produced them."

The law itself, in this country, is, moreover, a science of great extent. We have an entire substratum of common law as the broad foundation upon which every thing else is built. It fills its thousand volumes like that of England, whose volumes in this respect are at the same time ours. But the extent of this law, its beginning, its termination; upon what subjects precisely it operates, and where it falls short; where the analogy of situation holds and where not, with the shades under which it may do the one or the other, (witness the great argument of Hamilton in Croswell's case, at Albany; that in the case of Blight's assignees, at Washington, so far as prerogative was implicated; with numerous other that might be referred to); these start questions upon

which the nicest discriminations of ingenuity and learning have been for a century at work. Often therefore the American lawyer has gone through but half his task when he has informed himself of what the common law is. The remaining, and perhaps the most difficult branch of inquiry is, whether it does or does not apply to this case? Notwithstanding the determination of the Supreme Court in the case of the United States vs. Hudson and Goodwin, it is still by no means certain that that tribunal would not sustain another and more full argument at this day on the question, in its nature more extensive and fundamental, whether or not the federal government draws to itself the common law of England, in criminal matters? When we speak of the great body of this system of law as a substratum, we mean of course, as applied to the individual states.

The statute law of England, during our provincial day, or anterior to it, is another great division liable to much the same sort of counter argument at the hands of those who have been charged with the heavy task, at which they still toil, of rearing the fabric of American jurisprudence. Next comes the prolific exuberance of our own statute law, superinducing its daily modifications upon the English code, and giving birth to original systems to meet the new exigencies of our incessant enterprise, our growing population, and the genius of all our other institutions. The statutes and the lawsuits to which steam-boats alone have given rise, within the last two or three years, would probably occupy several volumes. Those relative to turnpike roads and the contentions they have bred, taking all the states, would probably fill a dozen; and it would be difficult to limit the further illustrations we could give. Patents for new inventions would make an ample, not to say curious figure.

But the most fruitful theme upon which the abundant and commanding stores of intellect may be poured out, is

what we understand by our constitutional law, and which is nearly peculiar to the United States. The apportionment of power between the national and state constitutions, in the numerous channels into which it is made to flow, was originally a work surrounded on all sides with difficulties of equal novelty and magnitude. To draw with accuracy the line of separate authority between the conflicting charters, has often presented, and in all probability, will long continue to present complex problems, calling for the most artificial, untried, and elaborate investigations. These must not unfrequently borrow the lights of history as well as of law, of universal as well as of local jurisprudence; and by affecting the rights or touching the passions of entire communities, they often rouse the mind to the highest stretch of vigorous, and, in regard to the manifestation of its powers, of advantageous effort. This contrariety of jurisdiction between the federal and state governments, has been prettily compared by a celebrated elementary jurist of our country, to a line which "extends, like the Ecliptic, sometimes on one side and sometimes on the other of our political Equator." The judicial, the legislative, and the executive functions, which, under the two systems, in the numerous ranges of their exercise, are to be conciliated with an efficacious and harmonious whole, may well be supposed to open a wide field for the highest attributes of the understanding, where original strength must unite with the most complete state of improvement as to every kindred source of acquired knowledge. If we were to advert to a few instances occurring to us as lending countenance to the spirit of these remarks, they would be, such as the great case of the suability of a state, that of the British debts, that of the carriage tax, Colonel Burr's trial, M'Ilvaine's Lessee vs. Coxe, Vanhorne's vs. Dorance, Talbot vs. Janson, the Yazoo case, and the motion for the mandamus against the Secretary of State.

Moreover, while we are led into an allusion to such cases

as these, we will take upon us to say, without resorting to numerous others which the state as well as the national tribunals afford, that they are characterized by as universal and as splendid diplays of appropriate genius and learning, both from the bench and bar, as any recorded judicial decisions with which we are acquainted, will be found to boast. It is true, they are not yet much known or acknowledged abroad. But that is, because the day of our being treated as provincial is hardly quite worn out. It is far from impossible, that we may lately have been hastening the period of its obliteration, and that having become somewhat more known in our mere existence as a nation through our Jacksons, our Browns, our Biddles, our Blakeleys, and our Decaturs, we may be making more encouraging approximations than we could otherwise have flattered ourselves with the hope of doing, towards the more diffusive fame of our Jays, our Ellsworths, and our Marshalls. We are not much in fear of falling under imputations we should wish to avoid, when we imagine, that not the Literary Property case, nor that of Perrin and Blake, nor the opinion on Wilkes's Outlawry, nor the case of the Gleaners, nor that of the Commendams, nor the Somerset cause, nor the great Douglas' cause, nor any of the other prominent causes which adorn the law books of England, have earned fairer honors to the English bar and bench than the causes adverted to do already reflect upon the American.

It is not a little remarkable that the English law books or decisions scarcely ever notice, in any way, the legislative or judicial regulations that emanate from this side of the water. While they dwell, throughout whole pages, on the maritme institutions or decrees of Sweden, or Denmark, or Portugal, they spend no passing notice on those of a country now so largely transcending, and that for years, has so far surpassed these and all the other smaller states of Europe, in maritime extent and riches. Professor Browne, in his learned Lectures upon Civil and Admiralty Law, is an

exception to this remark. The reader of that work will perceive that he generally reviews, in connexion with those of the European states, the maritime ordinances and statutes of this country.

Lastly, in the structure of our judicature, we have a multitude of different sorts of Courts. We have courts of common law and courts of chancery, admiralty and maritime courts, courts civil and courts criminal, sittings at nisi prius and full terms in bank, registers' courts, orphans' courts, escheators' courts, justices' courts, with the many gradations of some of them, and with others that might be made to swell the catalogue. It may be said, that this is nothing more than the judicial polity of other countries, particularly Britain, is liable; that if you will begin at the Piepoudre and go up to the Peers in Parliament, you will run through, under some modification or other, as long an enumeration. This may be true. But the difference is, that the profession here is not subdivided, in any of the states, in the ways that it is in England; and the American lawyer is called upon, at one period or other of his life, to understand the constitution of each of these forums; to be familar at least with their principles, if not with their forms, as he passes on, through the usual stages, to the head of his profession.

It may be supposed that great labor is necessary to master such a range of knowledge. And such, undoubtedly, is the case. The men among us who reach the vantage ground of the science, who become as well the safe counsellors as the eloquent advocates, are only those who in their early day explore its ways with repetitions of intense, and, through all its dreadful discouragements to the young mind, unwearied assiduity; and who are afterwards content to devote their days to business and their nights to study. Sparing, indeed must be their relaxations. If they stop for repose or turn aside for indulgence, like the son of Abensina in the affecting oriental tale, they will be reminded, when

perhaps it is too late, of the impossibility of uniting the gratifications of ease with the rewards of diligence. The true enjoyments to be gathered from the rugged path of the profession, and, happily, they are at once animating and refined, are those reflections which come sweetly over the mind, under the consciousness of duty successfully performed, and of eminence honorably achieved.

While the law with us is so copious, we are still willing to believe, that it has all the essential characteristics of a good code. That its comprehensiveness is the unavoidable result of our wants and the glorious evidence of our freedom. That its occasional darkness, supposed or real, is nothing more than belongs to all free codes in a greater or less degree, and is generally to be dispelled by the penetrating rays of a comprehensive knowledge. That above all, if in the unravelling and adjustment of complicated concerns, it may sometimes at first sight seem itself complicated, it never fails to throw a broad effulgence upon all the fundamental securities of the liberty and property of the citizen.

The English jurisprudence, with all it has to boast, was our first inheritance. But we hope it will not be thought we are presumptuous in supposing, that we have but secured to ourselves more signally its advantages, by shaking off, more freely than is done there, the shackles fixed upon it in early and rude periods. In making this remark, we think we shall largely carry with us the concurrence of informed and liberal readers, when it is applied to the whole criminal branch. When such sober minded and profound names as Hale, Blackstone, Romilly, and M'Intosh will agree, at epochs distant from each other, in condemning the deplorable severity of the English penal code, it may surely be permitted to others to join in the grateful opinion. Scarcely indeed does a year now pass over in which modern Parliaments are not paying homage to this opinion, by lopping off

or mitigating some of the harsh and cruel features;—a work in which they have long ago been anticipated by the intelligent and humane wisdom of our own legislators. We still think, making all allowances for the exigencies of the two countries, that they have a great deal to do before they get to the point we have reached in this happy race of melioration. It cannot be said of us, as it is truly said of the English in reference to the numerous and small offences for which they punish capitally, that while, for centuries, every thing else had become dearer in its price among them, the life of man was continually allowed to grow cheaper.

The systems of law recently compiled for the French nation, if we will but abstract the political associations that go along with them, will challenge an almost universal judgment in their favor for the lights of ancient and modern wisdom so extensively intermingled in their formation. The imperialist bows to them from the auspices under which they were compiled; and Louis the Eighteenth, in his proclamation of January, 1814, speaks of them as containing, "under other modifications and names, the wisdom of all the ancient laws of France." If they do this they also do more. They embody much of the wisdom which the further experience of more recent times has evolved. It is gratifying to think, that the one which passes under the penal code of the French empire, is marked by many of the improvements familiar to the American states. To the Pennsylvanian it must be particularly so, when he finds that the law of homicide has been divided into the same degrees, and is couched in nearly the same terms, with the statute of that state upon this subject passed more than twenty years ago.*

* One of these codes, the commercial, has been translated into English by Mr. Du Ponceau of Philadelphia, who has added notes with his usual learning and ability. Mr. Rodman of New-York has translated the same code. We cannot help thinking that the latter gentleman would render an acceptable service to the public, by executing the

Leaving the criminal branch, and bringing into view, the entire scope of jurisprudence in the two countries, we are disposed to place ours at the highest pitch in the comparison. If the advantage even be with us, we should say, in searching for the cause, that it is owing to our having gotten rid, in the greatest number of instances, of that feudal turn, and of those perplexed and cumbrous forms of the Norman day, which so long disfigured the admirable system upon which, by force or by artifice, they were incorporated. These, nothing but a prying eye, coupled with a resolution bold enough to lift up its hand against gray hairs, can ever effectually root out. "Time," says Lord Bacon, "is the greatest innovator; and if Time is always altering things for the worse, and Wisdom and Counsel do not sometimes alter them for the better, what will be the end thereof?" The English are rooting out these abuses; but perhaps, from a greater dread of touching the hoar that encircles the old trunk, seem more backward than we at tearing away the poisonous shoots which, at the subjugation of the true proprietors of the soil, were suffered to grow up rank around it. In the law of ejectment and entails; in the order of paying debts; in the law of descent, independent of the principle of primogeniture; in the liability of real estate to the demands of the creditor; in the law of executors and wills, with other points that might be enumerated, did not the nature of this discussion, which aims at nothing but drawing outlines, forbid, we think the liberal and less manacled judgment of the American states has outstripped the judicial wisdom of England in wholesome amendments. The luminous mind of Lord Mansfield did wonders towards many and obvious prunings. But much more remains to be accomplished; and perhaps his efforts, successful as they

plan he has intimated, of translating the whole of them, after the manner he has done the first. He has shown himself amply equal to the task; not as a translator merely, but as an ingenious anotator also.

may have been, are in theory too bold for precedent even in his own meridian. Left to himself by the sluggishness of Parliament, he was forced to substitute a sort of judicial, for what would have been performed if not more efficaciously, more appropriately, by parliamentary legislation.

If the English would institute some legislative inquest, or set on foot some national commission, only once in a century, for the entire revisal of their admirable code, could it be, that in an enlightened age the father should never be able to succeed immediately as heir to the real estate of the son, or that, in the principal courts of the kingdom, land devised or descending to the heir, should not be liable to the simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the very land? Surely common sense would too powerfully have pleaded for the abolition of the effect, after so long an extinction of the feudal cause. But these commissions of review, although sactioned by the example of other great and enlightened nations both of ancient and modern times, an example which some of the American states have copied, have never been gone into by the English. While the rigors or absurdities of the Norman tyranny were yoked upon them in baneful heaps, during a single epoch, they seem, through an overstrained caution, little inclined to part with them, except one by one, in the tedious lapse of ages.

Not only has the nation been backward at any thing in the shape of a formal revisal of their code. It has been remarked also, as a fact somewhat curious, that, while the free states of Italy, in the 13th century, had their Consolato del Mare, of which they acknowledged their authority; Barcelona her Ordinances; Wisbuy and the Hanse-Towns, respectively, their Marine Codes; France, under Louis the Fourteenth, the same; and most other nations highly commercial, theirs,—Britain, the greatest naval power in the world, should never yet have any cemented naval or mari-

time collection compiled or published under the authority of the government. Different causes might be assigned, or different speculations hazarded, in accounting for this fact. Perhaps it has been the effect of accident; perhaps she has chosen to rely upon the compilations of other nations in connexion with her own statutory regulations and those of the crown. Or, possibly, the motive may have been generated by the vast and advantageous peculiarities of her political condition; and it may have been thought best not to confine within the restrictions or the certainties of a specific and stationary code, the rules of a commercial and warlike marine that has been so fast transcending, and that was so soon likely to draw entirely within the vortex of its own influence or control, that of every other country. Nothing is so apt as power, to flow over its bounds; and where its enterprizes are destined, in the plans or reveries of long-sighted and bold statesmen, to take a wide range it would be safest certainly, as with the press, to lay it under no previous restraints. These are but conjectures.

It is a subject of remark, scarcely less worthy to be alluded to, that this nation, so distinguished by great names in almost every branch of science, literature, and the arts, should yet be so barren in writers upon the public law. Few of her lawyers have soared beyond the fame of local learning. Of how little account, in the eyes of continental Europe, are her mere municipal jurists, may be gathered, in some slight degree—unless we look only at the humor of the idea—from Bynkershock's well known manner of speaking of the most valuable and profound of them all, my Lord Coke. He calls him, *Cocus quidam,—a certain Coke!*

(*To be continued.*)

THE SPEECH OF LORD ERSKINE

In the House of Lords in England,

ON CRUELTY TO ANIMALS.

My Lords,

I am now to propose to the humane consideration of the House, a subject which has long occupied my attention, and which I own to your lordships is very near my heart.

It would be a painful and disgusting detail, were I to endeavour to bring before you the almost innumerable instances of cruelty to animals, which are daily occurring in this country, and which, unfortunately, only gather strength by any efforts of humanity in individuals to repress them, without the aid of the law.

These unmanly and disgusting outrages are most frequently perpetrated by the basest and most worthless; incapable, for the most part, of any reproof which can reach the mind, and who know no more of the law, than that it suffers them to indulge their savage dispositions with impunity.

Nothing is more notorious, than that it is not only useless, but dangerous, to poor suffering animals, to reprove their oppressors, or to threaten them with punishment. The general answer, with the addition of bitter oaths and increased cruelty, is, "What is that to you."

If the offender be a servant, he curses you, and asks if you are his master? And if he be the master himself, he tells you that the animal is his own. Every one of your lordships must have witnessed scenes like this. A noble Duke, whom I do not see in his place, told me only two days ago, that he had lately received this very answer. The validity of this most impudent and stupid defence, arises from

that defect in the law which I seek to remedy. Animals are considered *as property only*—to destroy or to abuse them, from malice to the proprietor, or with an intention injurious to his interest in them, is criminal; *but the animals themselves are without protection*—the law regards them not *substantively*—they have no rights!

I will not stop to examine, whether public cruelty to animals, may not be, under many circumstances, an indictable offence: I think it is, and if it be, it is so much the better for the argument I am about to submit to your lordships. But if even this were clearly so, it would fall very short of the principle which I mean anxiously and earnestly to invite the House to adopt. I am to ask your lordships, in the name of that God who gave to man his dominion over the lower world, to acknowledge and recognize that dominion to be a *moral trust*. It is a proposition which no man living can deny, without denying the whole foundation of our duties, and every thing the bill proposes will be found to be absolutely corollary to its establishment; except, indeed, from circumstances inevitable, the enacting part will fall short of that which the indisputable principle of the preamble would warrant.

Nothing, my lords, is, in my opinion, more interesting, than to contemplate the helpless condition of man, with all his godlike faculties, when stripped of the aid which he receives from the numerous classes of inferior beings, whose qualities, and powers, and instincts, are admirably and wonderfully constructed for his use. If, in the examination of these qualities, powers and instincts, we could discover nothing else but that admirable and wonderful construction for man's assistance; if we found no organs in the animals for their own gratification and happiness—no sensibility to pain or pleasure—no grateful sense of kindness, nor suffering from neglect or injury—no senses analogous, though inferior to our own: If we discovered, in short, nothing but

mere animated matter, obviously and exclusively subservient to human purposes, it would be difficult to maintain that the dominion over them was a trust; in any other sense, at least, than to make the best for ourselves of the property in them which Providence had given us. But, my lords, it calls for no deep or extensive skill in natural history, to know that the very reverse of this is the case, and that God is the benevolent and impartial Author of all that he has created. For every animal which comes into contact with man, and whose powers, and qualities, and instincts, are obviously constructed for his use, Nature has taken the same care to provide, and as carefully and as bountifully as for man himself, organs and feelings for its own enjoyment and happiness. Almost every sense bestowed upon man, is equally bestowed upon them. Seeing, hearing, feeling, thinking; the sense of pain and pleasure, the passions of love and anger; sensibility to kindness and pangs from unkindness and neglect; are inseparable characteristics of their natures, as much as our own. Add to this my lords, that the justest and tenderest consideration of this benevolent system of nature, is not only consistent with the fullest dominion of man over the animal world, but establishes and improves it. In this, as in every thing else, the whole moral system is inculcated by the pursuit of our own happiness. In this, as in all other things, our duties and our interests are inseparable. I defy any man to point out any one abuse of a brute which is property, by its owner, which is not directly against his own interest. Is it possible then, my lords, to contemplate this wonderful arrangement, and to doubt, for a single moment, that our dominion over animals is a trust? They are created indeed for our use, but not for our abuse: their freedom and enjoyments, when they cease to be consistent with our freedom and enjoyments, can be no part of their natures; but whilst they are consistent, their rights, subservient as they are, ought to be as sacred as our own. And although certainly, my lords, there can be no law for man in

that respect, but such as he makes for himself, yet I cannot conceive any thing more sublime or interesting, more grateful to heaven or beneficial to the world, than to see such a spontaneous restraint imposed by man upon himself.

This subject is most happily treated by one of the best poets in our language.

Mr. Cowper, in his Task, says:—

> ——————"The sum is this—
> If man's convenience, health, or safety
> Interfere, his rights and claims are paramount,
> And must extinguish theirs,—else they are all."

Every other branch of our duties, when subject to frequent violation, has been recognized and inculcated by our laws, and the breaches of them repressed by punishments; and why not in this, where our duties are so important, so universally extended, and the breaches of them so frequent and so abominable?

But in what I am proposing to your lordships, disinterested virtue, as in all other cases, will have its own certain reward. The humanity you shall extend to the lower creation will come abundantly round in its consequences to the whole human race. The moral sense which this law will awaken and inculcate, cannot but have a most powerful effect upon upon our feelings and sympathies for one another. The violences and outrages committed by the lower orders of the people, are offences more owing to want of thought and reflection, than to any malignant principle; and whatever, therefore, sets them a thinking upon the duties of humanity, more especially where they have no rivalries nor resentments, and where there is a peculiar generosity in forbearance and compassion, has an evident tendency to soften their natures, and to moderate their passions, in their dealings with one another.

The effect of laws which promulgate a sound moral principle, is incalculable. I have traced it in a thousand instances, and it is impossible to describe its value.

My lords, it was in consequence of these simple views, and on these indisputable principles, that I have framed the preamble of the very short bill which I now present for a second reading to the House. I might, without preamble or preface, have proposed at once to enact, if not to declare wilful and wanton cruelty to the animals comprehended in it to be a misdemeanor, looking, as I now do, to the Commons to enforce the sanction of the law by pecuniary penalties. But then the grand efficacious principle would have been obscured; which, if fortunately adopted by your lordships, will enact this law as a spontaneous rule in the mind of every man who reads it—which will make every human bosom a sanctuary against cruelty—which will extend the influence of a British statute beyond even the vast bounds of British jurisdiction; and consecrate, perhaps, in all ages, and in all nations, that just and eternal principle, which binds the whole living world in one harmonious chain, under the dominion of enlightened man, the lord and governor of all.

I will now read to your lordships, the preamble as I have framed it.

"Whereas it has pleased Almighty God to subdue to the dominion, use and comfort of man, the strength and faculties of many useful animals, and to provide others for his food; and whereas the abuse of that dominion, by cruel and oppressive treatment of such animals, is not only highly unjust and immoral, but most pernicious in its example, having an evident tendency to harden the heart against the natural feelings of humanity."

This preamble may be objected to as too solemn and unusual in its language; but it must be recollected, that the subject of the bill is most peculiar and unusual; and it being

impossible to give practical effect to the principle in its fullest extent, it became the more necessary, in creating a duty of imperfect obligation, where legal restraints would be inefficacious or impossible, to employ language calculated to make the deepest impression upon the human mind, so as to produce, perhaps, more than the effect of law, where the ordinary sanctions of law were wanting.

It may be now asked, my lords, why, if the principle of the bill be justly unfolded by this preamble, the enacting part falls so very short of protecting the whole animal world, or at all events those parts of it which come within the reach of man, and which may be subject to abuse. To that I answer—It does protect them to a certain degree, by the very principle which I have been submitting to your consideration, and to protect them further, would be found to be attended with insurmountable difficulties, and the whole bill might be wrecked by an impracticable effort to extend it. But I shall be happy to follow others in the attempt. The bill, however, as it regards all animals, creates a duty of imperfect obligation; and your lordships are very well aware, that there are very many and most manifest and important moral duties, the breaches of which human laws cannot practically deal with, and this I fear will be found to be the case in the subject now under consideration.

Animals living in a state of nature, would soon overrun the earth, and eat up and consume all the sustenance of man, if not kept down by the ordinary pursuits and destruction of them, by the only means in which they can be kept down and destroyed; and it is remarkable, that other animals have been formed by Nature, with most manifest instincts to assist us in this necessary exercise of dominion; and indeed, without the act of man, these animals would themselves prey upon one another, and thus be visited by death, the inevitable lot of all created things, in more painful and frightful shapes. They have, besides, no knowledge of the

future, and their end, when appropriated fitly for our food, is without prolonged suffering. This economy of Providence, as it regards animals, which from age to age have lived in an unreclaimed state, devoted to the use of man and of each other, may serve to reconcile the mind to that mysterious state of things in the present fallen and imperfect condition of the world.

This state of wild animals is further strikingly illustrated, by the view of such of them as have been spared from the human huntsmen, or the more numerous tribes of animals of prey. They are swept away by the elements in hard winters, retiring as most of them do, to a solitary, protracted and painful death.

Old age, my lords, even amongst men, is but a rare blessing; amongst such brutes, perhaps, never. Old age can only be supported in comfort by that aid and tenderness from others, arising from the consciousness of those ties of nature, which it has not pleased the Divine Providence to dispense to the lower world; but which, as the greatest of all blessings, it has communicated to man. When the brutes have fulfilled their duties to their young for their protection they know them no more, and die of old age, or cold, or hunger, in view of one another, without sympathy, or mutual assistance, or comfort.

It is the same, to a certain extent, with regard to those reclaimed animals devoted to man's use for food, whose faculties, as far as our observation is capable of a just comparison, approach nearer to human reason. The old age even of such animals, for the reasons adverted to, would seldom be satisfactory. When they pass, therefore, from life to death, in a manner which gives them no foretaste of their doom, and consequently no sense of pain or sorrow in the road to it, the ways of God are justified to man.

The bill, therefore, as it regards wild animals, could not easily have been framed for practicable operation, except by sanctioning as it does the principle of the preamble, which will, I trust, insensibly extend its influence to the protection of every thing that has life; by bringing habitually into the view of the mind, the duties of imperfect obligation which it inculcates; and with regard to animals bred by man, or reclaimed for food, it will directly protect them against the cruelties which are generally committed on them, viz. the unmercifully driving them and beating them on their passage to fairs and markets, and against unnecessary sufferings in the hour of death.

As to the tendency of barbarous sports of any kind or description whatsoever, to nourish the national characteristic of manliness and courage, the only shadow of argument I ever heard upon such occasions, all I can say is this: that from the mercenary battles of the lowest of beasts (human boxers) up to those of the highest and noblest that are tormented by man for his degrading pastime, I enter this public protest against it. I never knew a man remarkable for heroic bravery, whose very aspect was not lighted up by gentleness and humanity; nor a kill-him and eat-him countenance, that did not cover the heart of a bully or poltroon.

As to other reclaimed animals, which are not devoted to our use as food, but which are most wonderfully organized to assist man in the cultivation of the earth, and by their superior activity and strength, to lessen his labor in the whole circle of his concerns, different protections become necessary, and they are also provided for by the bill, and without the loss or abridgment of any one right of property in such animals. On the contrary, all its provisions protect them, as property, from the abuses of those to whose care and government their owners are obliged to commit them. They also reach the owners themselves, if, from an inordinate desire

of gain, or other selfish considerations, they *abuse* the animals, their property in which is limited to the *use*.

It would be wasting your lordships' time, if I were to enumerate the probable cases which this part of the bill will comprehend. It is well observed by an Italian philosopher, "that no man desires to hear what he has already seen." Your lordships cannot have walked the streets, or travelled on the roads, without being perfectly masters of this part of the subject. You cannot but have been almost daily witnesses to most disgusting cruelties practised upon beasts of carriage and of burthen, by the violence and brutality of their drivers. To distinguish such brutality and criminal violence, from severe, but, sometimes, necessary discipline, may at first view appear difficult, and on that account a serious objection to the bill,—but when I come to that part of the subject, I pledge myself to show that it involves no difficulty whatsoever. But there are other abuses far more frequent, which will require a more particular consideration. For one act of cruelty in servants, there are a hundred in the owners of beasts of labor and burthen: sometimes committed by the owners alone, from a scandalous desire of gain, and sometimes in a most unworthy partnership with their superiors, who are equally guilty, with no gain at all, nor for any motive that it would not be disgraceful to acknowledge. I allude, my lord, to our unhappy post-horses. It is not my wish, my lords, to be a fanciful reformer of the world, nor to exact that the manners and customs of a highly civilized nation should be brought to the standard of simplicity and virtue, if indeed such a standard ever existed upon earth. I do not seek to appoint inspectors to examine the books of inkeepers, so as to punish any excess in the number of their stages, as you do an excess of outside passengers on the roofs of coaches. I know there are very many cases (which could not be brought strictly within the scope of necessities) where these poor animals must grievously suffer, yet where

no law can properly reach to protect them. The demands, though not imminent, of human health, and even of convenience; the occasional exigencies of commerce; the exercise of franchises; and many other cases which must occur to every body, would furnish obvious exceptions without violation of the principle, and which every court and magistrate would know how to distinguish. But the bill, if properly executed, would expose innkeepers to a reasonable punishment, who will probably devote an innocent annimal to extreme misery, if not to death itself, by a manifest and outrageous excess of labor, rather than disoblige a mere traveller, engaged in no extraordinary business, lest in future he should go to the inn opposite. When the law shall give a rule for both sides of the way, this most infamous competition will be at an end.

For my own part, my lords, I can say with the greatest sincerity to your lordships, that nothing has ever excited in my mind greater disgust, than to observe what all of us are obliged to see every day in our lives, horses panting—what do I say? literally dying under the scourge! when, on looking into the chaises, we see them carrying to and from London, men and women, to whom, or to others, it can be of no possible signification whether they arrive one day sooner or later, and sometimes indeed whether they ever arrive at all. More than half the post-horses that die from abuse in harness, are killed by people, who, but for the mischief I am complaining of, would fall into the class described by Mr. Sterne, of simple or harmless travellers, galloping over our roads for neither good nor evil, but to fill up the dreary blank in unoccupied life. I can see no reason why all such travellers should not endeavor to overcome the *ennui* of their lives, without killing poor animals, more innocent and more useful than themselves. To speak gravely, my lords, I maintain, that human idleness ought not to be permitted, by the laws of enlightened man, to tax for nothing, beyond

the powers which God has given them, the animals which benevolence has created for our assistance.

But another abuse exists, not less frequent and much more shocking, because committed under the deliberate calculation of intolerable avarice. I allude to the practice of buying up horses when past their strength from old age or disease, upon the computation (I mean to speak literally) of how many days' torture and oppression they are capable of living under, so as to return a profit with the addition of the flesh and skin, when brought to one of the numerous houses appropriated for the slaughter of horses. If this practice only extended to carrying on the fair work of horses to the very latest period of labor, instead of destroying them when old or disabled, I should approve, rather than condemn it. But it is most notorious, that, with the value of such animals, all care of them is generally at an end, and you see them (I speak literally, and of a systematic abuse) sinking and dying under loads, which no man living would have set the same horse to, when in the meridian of his strength and youth.

This horrid abuse, my lords, which appears at first view to be incapable of aggravation, is nevertheless most shockingly aggravated, when the period arrives at which one would think cruelty necessarily must cease, when exhausted nature is ready to bestow the deliverance of death. But even then a new and most atrocious system of torture commences, of which, my lords, I could myself be a witness in your committee, as it was proved to my perfect satisfaction, and that of my friend Mr. Jekyll, upon the information of a worthy magistrate, who called our attention to the abuse. But, perhaps, my lords, I shall better describe it, as it will at the same time afford an additional proof of these hideous practices, and of their existence at this hour, by reading a letter which I received but two days ago, the facts of which I am ready to bring in proof before your lordships.

Here Lord Erskine read an extract from a letter, which stated—

"A very general practice of buying up horses still alive, but not capable of being even further abused by any kind of labor. These horses, it appeared, were carried in great numbers to slaughter houses, but not killed at once for their flesh and skins, but left without sustenance, and literally starved to death, that the market might be gradually fed;—the poor animals, in the mean time, being reduced to eat their own dung, and frequently gnawing one another's manes in the agonies of hunger."

Can there be a doubt, my lords, that all such shocking practices should be considered and punished as misdemeanors? Here again it may be said that the bill, in this part of it, will invest magistrates with a novel and dangerous discretion. I am not yet arrived at that part of the case, though I am fast approaching it; when I do, I pledge myself without fear, to maintain the contrary, to the satisfaction of every one of your lordships, more especially including the learned lords of the House. No less frequent and wicked an abuse, is the manifest overloading of carriages and animals of burthen, particularly asses; and as far as this poor animal is unjustly considered an emblem of stupidity, the owners who thus abuse him are the greater asses of the two. The same may be said of keeping animals without adequate food to support their strength, or even their existence. This frequently happens to beasts impounded for trespasses. I have had complaints of this abuse from all parts of the country. The notice to the owner is seldom served, and thus the poor innocent animal is left to starve in the pound. As far as an animal is considered merely as property, this may be all very well, and the owner must find him out at his peril. But when the animal is looked to upon the principle of this bill, the impounder is to feed him, and charge it to the owner as a part of the damages.

Only one other offence remains which I think it necessary to advert to, which it is difficult sufficiently to expose and stigmatize, from the impudence with which it is every day committed; as if the perpetrators of this kind of wickedness were engaged in something extremely entertaining and innocent, if not meritorious. I allude to those extravagant bets for trying the strength and endurance of horses; not those animating races, properly so called, which the horse really enjoys, and which, though undoubtedly attended with collateral evils, has tended greatly to improve the breed of that noble and useful animal. The contests which I consider as wilful and wanton cruelty, are of a different kind: I maintain, that no man, without being guilty of that great crime, can put it upon the uncertain and mercenary die, whether in races against time—no—not properly so called, but rather journies of great distances within limited periods, the exertions shall very far exceed the ordinary power which nature has bestowed on the unhappy creature, thus wickedly and inhumanly perverted from the benevolent purposes of their existence.

All the observations I have just been making to your lordships, undoubtedly apply to the maliciously tormenting any animals whatsoever, more especially animals which we have voluntarily reclaimed and domesticated; and yet I fairly own to your lordships, that as the bill was originally drawn, and as it stood until a few days ago, it would not have reached many shameful and degrading practices. The truth is, that I was afraid to run too rapidly and directly against prejudices. But, on conversing with very enlightened and learned men, I took courage in my own original intention, and introduced the concluding clause, which comprehended the wickedly and wantonly tormenting any reclaimed animal; the effect of which in practice I will explain hereafter, when I come to show the practicability of executing the law without trespassing upon the just rights and

privileges of mankind. If your lordships, however, shall ultimately differ from me in this part of the subject, you can strike out this clause in the committee. I have purposely kept it quite distinct and separate from the rest of the bill, as I originally framed it, being resolved to carry an easy sail at first, for fear of oversetting my vessel, in a new and dangerous navigation.

I now come, my lords, to the second part of the case, which will occupy but a small portion of your lordships' time, on which I am afraid I have trespassed but too long already.

Supposing, now, your lordships desirous of subscribing to the principles I have opened to you, and to feel the propriety of endeavouring to prevent, as far as possible, the inhuman cruelties practised upon animals, so general and so notorious, as to render a more particular statement of them as unnecessary as it would have been disgusting: The main question will then arise, viz. how the jurisdiction erected by this bill, if it shall pass into a law, may be executed by courts and magistrates, without investing them with a new and arbitrary discretion.

My lords, I feel the great importance of this consideration, and I have no desire to shrink from it; on the contrary, I invite your lordships to the closest investigation of it, and for that purpose, I will myself anticipate every possible objection of that description, and give your lordships, in a very few words, the most decisive answers to them.

How, it may be first asked, are magistrates to distinguish between the justifiable labours of the animal, which, from man's necessities, are often most fatiguing, and apparently excessive, and that real excess which the bill seeks to punish as wilful, wicked, and wanton cruelty? How are they to distinguish between the blows which are necessary,

when beasts of labour are lazy or refractory, or even blows of sudden passion and temper, from deliberate, cold-blooded ferocious cruelty, which we see practised every day we live, and which has a tendency, as the preamble recites, to harden the heart against all the impulses of humanity?

How, in the same manner, are they to distinguish between the fatigues and sufferings of beasts for slaughter, in their melancholy journies to death in our markets, from unnecessary, and therefore barbarous, aggravations of them?

Here, my lords, I am at home:—here I know my course so completely, that I can scarcely err. I am no speculator upon the effect of the law which I propose to you, as the wisest legislators must often be, who are not practically acquainted with the administration of justice. Having passed my life in our courts of law when filled with the greatest judges and with the ablest advocates, who from time to time have since added to their number, I know with the utmost precision, the effect of it in practice, and I pledge myself to your lordships, that the execution of the bill, if it passes into law, will be found to be most simple and easy; raising up no new principles of law, and giving to courts no larger discretion nor more difficult subjects for judgment, than they are in the constant course of exercising.

First of all, my lords, the law I propose to your lordships, is not likely to be attended with abuse in prosecution; a very great, but I am afraid an incurable evil in the penal code. I stimulate no mercenary informers, which I admit often to be necessary to give effect to criminal justice; I place the lower creation entirely on the genuine, unbought sympathies of man.

No one is likely to prosecute by indictment, or to carry a person before a magistrate, without probable, or rather without obvious and flagrant cause, when he can derive no personal benefit from the prosecution, nor carry it on with-

out trouble and expence. The law is, therefore, more open to the charge of inefficacy, than of vexation.

It can indeed have no operation, except when compassionate men (and I trust they will become more numerous from the moral sense which this bill is calculated to awaken) shall set the law in motion against manifest and disgusting offenders, to deliver themselves from the pain and horror which the immediate views of wilful and wanton cruelty is capable of exciting, or is rather sure to excite, in a generous nature.

What possible difficulty then can be imposed upon the magistrate, who has only to judge upon hearing, from his own humane feelings, what such disinterested informers have judged of from having seen and felt. The task is surely most easy, and by no means novel. Indeed, the whole administration of law, in many analogous cases, consists in nothing else but in discriminations, generally more difficult in cases of personal wrongs.

Cruelty to an apprentice, by beating, or over labour, judged of daily upon the very principle which this bill will bring into action in the case of an oppressed animal.

To distinguish the severest discipline, to command obedience, and to enforce activity in such dependants, from brutal ferocity and cruelty, never yet puzzled a judge or a jury, never at least in my very long experience; and when want of sustenance is the complaint, the most culpable overfrugality is never confounded with a wicked and malicious privation of food.

The same distinctions occur frequently upon the plea of moderate chastisement, when any other servant complains of his master, or when it becomes necessary to measure the degree of violence, which is justifiable in repelling violence, or in the preservation of rights.

In the same manner, the damage from a frivolous assault or of a battery, the effect of provocation or sudden temper, is daily distinguished in our courts, from a severe and cold-blooded outrage. A hasty word, which just contains matter that is actionable, is, in the same manner, distinguished in a moment from malignant and dangerous slander. Mistakes in the extent of authority, which happen every day in the discharge of the complicated duties of the magistracy are never confounded for a moment, even when they have entrenched severely upon personal liberty, with an arbitrary and tyrannical imprisonment. Unguarded or slight trespasses upon property, real or personal, are in the same way the daily subjects of distinction from malicious deprivations of rights, or serious interruptions of their enjoyment.

Similar, or rather nicer distinctions, are occurring daily in our courts—when libel or no libel is the question. A line must be drawn between injurious calumny, and fair, though, perhaps, unpleasant animadversion; but plain good sense, without legal subtlety, is sure to settle it with justice. So every man may enjoy what is his own, but not to the injury of his neighbor. What is an injury, or what is only a loss, without being injurious, is the question in all cases of nuisance, and they are satisfactorily settled by the common understandings and feelings of men.

My lords, there would be no end of these analogies, if I were to pursue them, I might bring my whole professional life for near thirty years, in review before your lordships.

I appeal to the learned lords of the House, whether these distinctions are not of daily occurrence. I appeal to my noble and learned friend on the woolsack, whether, when he sat as Chief-Justice of the Common Pleas, he found any difficulty in these distinctions. I appeal to my noble and

learned friend who sits just by him, whose useful and valuable life is wholly occupied amidst these questions, whether they are doubtful and dangerous in the decision, and whether they are not precisely in point with the difficulties which I have anticipated, or with any others which opponents to the bill can possibly anticipate. I make a similar appeal to another noble and learned friend, who has filled the highest situation. I do not see him at this moment in his place; but to him also I might make the same fearless application.

I cannot therefore conceive a case on which a magistrate would be exposed to any difficulty under this bill, if it should pass into a law.

The cruelties which I have already adverted to, are either committed by owners, or by servants, charged with the care and government of horses and other cattle. If the owner unmercifully directs them to be driven to the most unreasonable distances, or with burthens manifestly beyond their powers; if he buys them up when past the age of strength, not for a use correspondent to their condition, but upon the barbarous and wicked computation of how long they can be tortured to profit. In neither of these cases can the cruelty be imputed to the servant whom you meet upon the road, struggling to perform the unjust commands of his employer. The master is the obvious culprit—respondent superior—the spectators and the servant are the witnesses—and these are the cases where an indictment would operate as a most useful example, without oppression, to those who thus offend systematically against every principle of humanity and justice.

On the other hand, when no cruel commands are given to the servant, but his own malice offends at once against his master and the unhappy animal which he wickedly abuses, he of course is alone responsible; and these are the cases in which a summary jurisdiction would be most generally re-

sorted to, as more favorable at once to the disinterested informer and to the offender, who would be thus punished with a small penalty, and be delivered from an expensive prosecution.

The other House of Parliament will no doubt accomplish this in the further progress of the bill.

But in neither of these cases, which comprehend, indeed, every abuse which the bill extends to, is there any kind of danger that it will work oppression, or produce uncertainty in decision.

A man cannot, if an owner, be the subject of an indictment, because he may have been less considerate and merciful than he ought to be; nor, if a servant, for an unreasonable blow of temper upon an unmanageable charge. No, my lords! Every indictment or information before a magistrate must charge the offence to be committed maliciously, and with wanton cruelty, and the proof must correspond with the charge. This bill makes no act whatever a misdemeanor that does not plainly indicate to the Court or Magistrate a malicious and wicked intent; but this generality is so far from generating uncertainty, that I appeal to every member in our great profession, whether, on the contrary, it is not in favor of the accused, and analagous to our most merciful principles of criminal justice? So far from involving the magistrate in doubtful discriminations, he must be himself shocked and disgusted before he begins to exercise his authority over another. He must find malicious cruelty; and what that is can never be matter of uncertainty or doubt, because Nature has erected a standard in the human heart, by which it may be surely ascertained.

This consideration surely removes every difficulty from the last clause, which protects from wilful, malicious, and wanton cruelty, all reclaimed animals. Whatever may be

the creatures which, by your own voluntary act, you choose to take from the wilds which nature has allotted to them, you must be supposed to exercise this admitted dominion for use, or for pleasure, or from curiosity. If for use, enjoy it decently for food; if for pleasure, enjoy that pleasure, by taxing all its faculties for your comfort; if for curiosity, indulge it to the full. The more we mix ourselves with all created matter, animate or inanimate, the more we shall be lifted up to the contemplation of God. But never let it be said, that the law should indulge us in the most atrocious of all propensities, which, when habitually indulged in, on beings beneath us, destroy every security of human life, by hardening the heart for the perpetration of all crimes.

The times in which we live, my lords, have read us an awful lesson upon the importance of preserving the moral sympathies. We have seen that the highest state of refinement and civilization will not secure them. I solemnly protest against any allusion to the causes of the revolutions which are yet shaking the world, or to the crimes or mistakes of any individuals in any nation; but it connects itself with my subject to remark, that even in struggles for human rights and principles, sincere and laudable as they occasionally may have been, all human rights and privileges have been trampled upon, by barbarities far more shocking than those of the most barbarous nations, because they have not merely extinguished natural unconnected life, but have destroyed (I trust only for a season) the social happiness and independence of mankind, raising up tyrants to oppress them all in the end, by beginning with the oppression of each other. All this, my lords, has arisen from neglecting the cultivation of the moral sense, the best security of states, and the greatest consolation of the world.

My lords, I will trouble your lordships no longer than with admitting, for the sake of argument, that there may be cases, especially in the beginning, where the execution of the

bill may call for the exercise of high judicial consideration, through the dignity and learning of the Supreme Court of Criminal Jurisdiction. And here I cannot help saying, that it adds greatly to the security I feel upon this part of the subject, that when the bill shall have received the sanction of Parliament, it will be delivered over to my noble and learned friend, who presides so ably in the Court of King's Bench. From his high authority, the inferior magistrates will receive its just interpretation; and, from his manly and expressive eloquence, will be added, a most useful inculcation of its obligations. For I must once again impress upon your lordship's minds, the great, the incalculable effect, of wise laws, when ably administered, on the feelings and morals of mankind. We may be said, my lords, to be in a manner created by them. Under the auspices of religion, in whose steps they must ever tread, to maintain the character of wisdom, they make all the difference between the savages of the wilderness, and the audience I am now addressing. The cruelties which we daily deplore, in children and in youth, arise from defect in education, and that defect in education, from the very defect in the law which I ask your lordships to remedy. From the moral sense of the parent re-animated, or rather in this branch created by the law, the next generation will feel, in the first dawn of their ideas, the august relation they stand in to the lower world, and the trust which their station in the universe imposes on them; and it will not be left to a future Sterne to remind us, when we put aside even a harmless insect, that the world is large enough for both. This extension of benevolence to objects beneath us, becomes habitual by a sense of duty inculcated by law, will reflect back upon our sympathies to one another, so that I may venture to say firmly to your lordships, that the bill I propose to you, if it shall receive the sanction of Parliament, will not only be an honour to the country, but an æra in the history of the world.

MR. NASH's SPEECH,

IN THE LEGISLATURE OF NORTH-CAROLINA,

On the Bill to amend the Act for the Suppression of the odious Practice of Duelling.

IT was not my intention, when I entered the House this morning to have made any remarks upon the bill now before you. There are reasons which induced me to hope that my duty might have permitted a silent vote. But as the bill has met with an opposition perfectly unexpected, I must crave the indulgence of the House, for a few moments, in unfolding my views.

I have ever, Sir, considered the Legislature as the grand inquest of the country—as that body upon whom devolved the obligation of devising ways and means whereby vice and immorality are to be suppressed—and that it is the duty of each individual member to present to the cognizance of the whole, those avenues through which the evil propensities of human nature make their inroads upon the peace and quiet of society.

Amongst our most important duties, is that of providing security to the lives of our citizens, because the most heinous of crimes is the unlawfully taking it away. "Whoso sheddeth man's blood, by man shall his blood be shed," is the precept of the divine law, and which has been recognized and adopted into the criminal code of all nations. The individual who has put his adversary to death deliberately and privately, is hunted from society as a monster unfit to live. We look upon him with shuddering disgust, and pronounce the sentence just which consigns him to an ignominious death: But if he has invited his opponent to the combat, and slays him *honorably* (as it is termed) he passes in security with impunity. Why, sir, is this distinction? It

is because a false splendor is thrown around the crime, by the daringness with which it is committed.

Few and feeble are the arguments upon which the practice of duelling is defended—while, on the contrary, those against it are numerous and weighty. Nor is it a little remarkable, that the former are drawn from the weaknesses and vices of human nature, while the latter have their foundation in its virtues. We are told, that the lofty spirit which leads the duellist to the field, is one essential to the well-being of society—placing the weak upon a level with the strong, and redressing injuries which lie beyond the reach of the law—that if you could succeed in entirely abolishing the practice, you would introduce in its place assassination. Is this true, sir? Do, indeed, the courtesies of life depend on the base principle of fear? And is this lawless practice a potent agent to correct the morals of society? Is it indeed true, that we depend on any part of our comfort, upon a practice condemned alike by the word of God and by the dictates of reason? No, sir, the idea is not to be harbored—Duelling fosters those feelings and principles which are at war with our happiness here and hereafter. What is that lofty spirit, but the spirit of revenge and pride? That deadly and vindictive principle, which, smothering every gentle and benign feeling of the heart, bids the duellist wash away the fancied insult, in the blood of the offender. To him, this man of high, punctilious honor, it matters not if his adversary have been the companion of his youth, the friend of his more advanced years; if together they have trod the flowery paths of science, or danced the giddy mazes of pleasure. At the voice of this Moloch, every virtuous feeling of the heart withers—every recollected endearment is crushed and subdued. The desolating ruin he is about to pour around others, who have never injured him, cannot arrest his progress—he presses forward to his object, regardless of every tie, social and divine; and glories in his lau-

rels, though steeped in blood, and bedewed with the tears of the widow and the fatherless! And can a practice, thus cherishing our evil passions, and destructive of the happiness of others, be important to the well-being of society? No, sir; and it is an insult to common sense to pretend it—it contains the very essence of folly.

Let me suppose a case. A husband takes into the bosom of his family, an individual whom he cherishes with a brother's love—his kindness is returned by the seduction of his wife. It will readily be admitted, that this case, if any, would justify a duel. Yet, let it be examined coolly, and Reason would pronounce, that the injured husband is not called upon to stake his life against that of the destroyer of his peace—that he has been injured sufficiently—that in a duel he would be as likely to fall as the offender. It would say to the injured husband, Look at your helpless children! You gave them existence—it is your duty to watch over and protect them. It would say, Forget the worthless woman and her seducer—his death could not heal her honor, nor the wounds your peace has sustained. No (it is answered) my reputation as a man of honor will not suffer this. 'Tis true, I am injured to the full extent of man's suffering, but my children may be still further injured, and I, their father, must deprive them of their sole remaining stay—must offer myself a sacrifice to satisfy fools and madmen! Horrible, detestible code, whose laws are written in blood; and, for the bubble, reputation, silences every better and nobler emotion of the heart. And what, sir, is this reputation, for which man impiously defies his Maker, and stakes his immortal hopes?

"- - - - - - - - 'Tis man's idol,
"Set up against God, the maker of all laws,
"Who has commanded us we should not kill.
"And yet we say we must for reputation!"

It is indeed strange, that the fear of eternal punishment should mark a man as a coward, while he whose only fear is that of the reproach of his fellow worm, should be counted brave.

> "Fear to do base and unworthy things, is valor.
> "If they be done to us, to suffer them
> "Is valor too."

But this is a valor of which the modern man of honor knows nothing, and to which he cannot rise; for it requires virtues of a hardy growth. It is valor; for it dares do right, regardless of the sneers of the witlings of this earth. Superior to their scoffs and contumelies, it defies them. The valor of the man of honor, as he is termed, is vicious,—having its foundation in the passions, prejudices, and pride of the human heart, and its fruit is death and misery. This patient valor is virtuous; for it is founded in meekness, love, and charity,—and its fruit is life and happiness. The former looks to this world for its reward and support,—to the smiles of beings weak and wicked; the latter, to a world beyond the grave,—to the approbation of a Being unbounded in power and goodness. But, sir, is it to redress injuries alone, that duels are fought? No. I venture to assert, that nine out of ten of those that occur, are fought to avenge insults existing only in the Hotspur brain of him who has conceived their existence. The closing scene of life is one of tremendous moment to every rational being. We would wish to approach it with every holy affection about us. Is this the case with the duellist when planting his foot on the verge of eternity? Is he prepared to appear before the judgment seat? Is is heart in charity with all mankind—glowing with love and gratitude to the great Author and Finisher of his being? How awful is the reverse! His heart, swelling with every malignant passion, pride, anger, and revenge, he comes to destroy and not to save—to curse and not to bless:—and in the bitterness of such feelings, is hurried un-

bidden into the presence of his Maker. But we are warned, that assassinations will succeed to duelling; that these strong and angry passions must have vent. Grant, sir, that it is probable; and that is as much as I can ask. Are we to submit to a positive evil for fear of the probable introduction of another by its suppression? To me it appears no way likely to be the case. We can reason correctly from what has been and is, to what will be, on the same subject. Duelling is a relic of those barbarous ages when all disputes were submitted to the arbitrement of force. But from the continent of Europe it has nearly fled; and in England alone, of the nations of the old world, is it found in all its vigor. Nor am I apprised, that in those countries where it is exploded, are the lives of individuals more exposed to secret violence than in England: Nor is society more refined in the latter than in the former, or the people more high-spirited. In our quarter of the globe how does it stand? In the Eastern States, that land of steady habits, duelling is unknown; while to the south, it is the passport of renown! Why is this difference? Are there among the former, none who are entitled to the appellation of gentlemen! No honorable men? Are they a tame, pusillanimous race of beings! New-England, sir, has been emphatically styled, the cradle of American Independence. Not its cradle only, but its birth-place. Her sons were the first to raise the standard of revolt. They are a nation alike distinguished for valor, and for every social and domestic virtue. It is true, in their system of morality it is a crime, unlawfully to deprive a human being of life; and they shrink, with loathing and disgust, from the bloody honors of the duellist; for they consider the crime as murder. Are assassinations more frequent there than here? If it be the case, I am yet to learn it.

The evils, sir, which I have endeavored to point out as resulting from this practice, will be readily admitted by every one who views the subject coolly and deliberately,—that no-

thing has been borrowed from fancy, but that they have been pourtrayed with a weak and feeble tongue. If then it be attended with such evils, I ask, shall we not endeavor to put a stop to it? With a view to aid in this desirable work, the bill upon your table has been presented. I will make a few remarks upon its provisions. The bill, by the first section as a amended, provides, that every person chosen to an office of profit or trust, after the first day of May next, before entering upon the discharge of its duties, shall take the oath therein prescribed. My object, sir, in this provision, is to offer to the young and thoughtless, the ambitious and aspiring spirits of our country, one more inducement to abstain from this practice. I wish to tell them, they are about to close upon themselves the doors of preferment. They will have to become their own accusers. And I do most truly believe, if you adopt this provision, you will do more to lessen the number of duels than all the gibbets in the world. Ours is a country in which, from its happy Constitution, the offices of government are open to genius of every grade. Our young men of talents, no sooner enter the busy scenes of life, than they perceive a glittering prize before them. Pressing equally forward, they encounter spirits equally ambitious, restless, and sanguine. And, it is by such, that most of these duels are fought. Once convince them that this act of folly and madness consigns them to the shades of private life, and many a one who now laughs to scorn the denunciations of religion, as the cloak of cowards, will pause and hesitate; and many a dispute that now is incapable of adjustment, will be amicably settled.

I am asked if I expect by this law to abolish entirely the practice of duelling? I answer, no. Such is not my expectation. But because we cannot destroy, shall we not endeavor to limit it? Because we cannot eradicate vice from the human heart, shall we not attempt to curb and restrain it?

But, sir, our laws are violated, not by our citizens only, strangers come here to settle their disputes. Our soil is made their battle-ground. I wish to purge our country of this stain,—to tell these violators of our peace to go elsewhere with their deeds of blood. The second section of this bill is bottomed upon this grievance and points out its remedy. If it be adopted, in my opinion, it will never be required to be carried into execution. Its very existence will deter these very honorable gentlemen from risking the consequence, and they will be obliged to seek for other soil to burthen with their crimes!

ADJUDGED CASES.

SUPREME COURT OF NORTH-CAROLINA.

JANUARY TERM, 1816.

Den on the Demise of Chessun and Wife v. *Smith and Wife.*

THE lessors of the plaintiff are heirs at law of *Mary Turnbull Butcher*, and claim title to the premises described in the declaration, under the following clause in the last will of *James Turnbull.*

"*Item.* I devise unto *Bell Butcher*, all my lands not already given; I mean *Bell's Gift* and *Gard's Island*, and my lands in *Edenton*, and the remainder of my personal estate, to him and his heirs of his body, lawfully begotten; and for want of such, one-half to the heirs of *Mary Pantry*, and the other half to the heirs of *Mary Turnbull Butcher*, or the survivors of them to have all."

Bell Butcher died without issue in 1777 or 1778. *Mary Turnbull Butcher* died in 1800, and before the commencement of this suit. Neither *Mary Pantry* nor either of her sons, were ever in this country, but have continued to be aliens.

The testator, in other parts of the will, notices that *Mary Turnbull Butcher*, *Mary Pantry*, and two sons of the latter, viz. *Robert* and *James*, were alive.

TAYLOR, C. J. delivered the Opinion of the Court.

When the case of *Smith* v. *Barnes* was decided in this Court, two of my brethren felt themselves restrained, by peculiar circumstances, from taking any part in the deliberation or judgment. They have both however declared their concurrence in the reasoning and principles applied by a majority of the Court to the decision of that case; and we are all of opinion that it goes the whole length of deciding the case now before us.

The principle of that case was, that no present vested estate was devised to the heirs of *Mrs. Stith*, but an interest which was not to vest until the death of the first devisee, without having had issue, and, by his having children, to be altogether prevented. That the word "heirs" must receive its technical meaning, except where it can be collected from the will: that the testator intended that the estate of the devisee should vest in interest immediately, and that by the word he intended heirs apparent, if the ancestor be then living.

It is true, that in this will the testator takes notice that *Mary T. Butcher* was then alive; but it does not appear that she had children then, or ever afterwards.

The remainder which was limited upon the tenancy in tail to *Bell Butcher*, must be either vested or contingent. It could not be vested, because *Mary Turnbull Butcher* had no children; and if issue had been born to her before the death of *Bell Butcher*, it cannot reasonably be argued that they should be excluded by those who stood presumptive heirs at the time of the testator's death. The remainder is not limited to any definite person, but merely to those, who, upon the death of *Mary T. Butcher*, should be her heirs. It is limited, also, upon an estate tail, a particular freehold estate capable of supporting a contingent remainder.

The ulterior termination must therefore be construed a contingent remainder, which could only become vested in the event of *Mary Pantry* and *Mary T. Butcher* dying and leaving heirs, during the continuance of the estate tail. This expired in 1777 or 1778 by the death of *Bell Butcher* without issue. *Mary T. Butcher* survived him upwards of twenty years; so that the remainder to her heirs could never vest in them.

Judgment for the Defendant.

Hodges v. *Pitman.*

This was an action brought to recover back money which the defendant had won by gaming at cards, and which the plaintiff had paid at the time of playing. The cause was tried before TAYLOR, C. J. at Cumberland Superior Court, when the jury, under charge of the court, that the law was in favor of the defendant, found a verdict for him. A motion for a new trial, for mis-direction of the Court, having been made and over-ruled, the plaintiff appealed to this Court.

Henry argued for the plaintiff, and cited 7 *Term Rep.* 535, 5 *Term Rep.* 405. *Ambler* 269. *Acts of* 1788, c. 5.

M'Millan for defendant, cited 2 *Comyn Cont.* 120. 8 *Term* 575.

CAMERON J. delivered the opinion of the Court:

There is no example to be found in the books, where money has been paid, by one of two parties to the other on an illegal contract—both being *particeps criminis in equal degree*, that an action has been maintained to recover it back

again; and it is unquestionably one of the greatest securities against transactions of this description, that the contracting parties can have *no redress* against each other; and that where they are equally guilty of an infraction of the law, the claims of either may be effectually resisted.

Of a principle so salutary in its operation in restraining crimes and immoralities, we should be reluctant to weaken the force, by any refinement of construction, or subtlety of reasoning; and without a broad legislative direction to the contrary, we feel not less disposed than the able men who have gone before us, so to expound the law, rs to promote the practice of private virtue, and check the growth of this most ruinous vice of gaming.

We do not find in the act of 1788, language sufficiently explicit for this purpose. It is at best *doubtful*, and does not afford a satisfactory ground of decision, to overrule the common law. The words "other personal estate," seem to relate to specific chattels, as they follow the words "transfer of slaves," and it would be difficult, if not impossible, to enumerate all the chattels that might be so transferred. Besides, the word *transfer*, is ordinarily applied to the sale or pledge of a chattel; never to the payment of money. A horse is transferred—but money is paid. If the latter had been intended by the Legislature, it would probably have been expressed. If it is now to be understood, the act must be read thus: "the transfer of money to secure or satisfy the payment of money."

Upon the whole, we are furnished with a clear, strong light to direct us in the plain, open road of the common law, and that leads to the advancement of morality, and the suppression of vice. We ought not to be diverted from it, by the faint glimmering in the statute, into the devious track of doubtful and mischievous construction.——Judgment affirmed.

Barge v. *Wilson.*

The plaintiff claims title to the land on which the supposed trespass was committed under the will of his father, Lewis Barge. The clause in question begins: "Item. I devise and bequeath to my beloved wife Christiana Barge, the store adjoining *the tavern* lately occupied by James Baker, together with the store lately occupied by Samuel Goodwin, during the term of her natural life, and after her death to my son John Barge, and his heirs for ever." The defendant claims title to the same under the same will. The clause in question begins, "I devise and bequeath to my son-in-law John Wilson, and my daughter Polly Wilson, during their, or either of their lives, and after their deaths, to the heirs of the body of the said Polly Wilson, my large tavern in Fayetteville, lately occupied by James Baker, excepting however the room over the store, which is to belong to the store." The store-house and tavern adjoin each other. The cellar wall under the store house is the dividing-line between the two buildings. In the rear of the buildings, and between them and the creek, there is a small piece of ground, being part of the lot on which they are erected. The plaintiff claiming the ground immediately in the rear of the store, and from the store to the creek, erected a fence, running immediately from the cellar wall under the store house to the creek. The defendant pulled down the fence, which constitutes the trespass for which the action is brought.—Both parties respectively occupy the buildings devised to them.

M'Millan for the plaintiff.—*Browne* for the defendant.

TAYLOR, C. J. delivered the opinion:

The question arising from this record, is, whether the plaintiff is owner of the ground on which he erected the fence; for if he is not, no trespass has been committed by

the defendant in pulling it down. And we are of opinion, that it was the intent of the testator to give the whole of the tenement to the defendant, except that part which is especially devised away to the plaintiff, or excepted from the devise to the defendant. Without adverting to the necessity of a curtilage to a tavern in a town, rather than to a store, and the utter inutility of a tavern without one, the exception made by the testator of the room over the store seems to mark his own conception of what he was doing. For why, in a devise of the tavern, should he make the exception, unless he believed that such precaution was necessary to prevent the whole from passing? The room over the store is to belong to the store, otherwise, the testator thought it was comprehended in the tenement, which he describes as his large tavern. We therefore think that the true construction of this will is, that all, except the store and the room over it, were devised to the defendant, for whom there must be judgment.

LOWRIE J. dissented.

Den on Demise of Jones v. *Ridley.*

Declaration in Ejectment.....Appeal.

In this case the plaintiff produced a grant from Earl Granville to Joseph Davenport, for the land in question, bearing date the * day of November, A. D. 1756. He then produced a deed from Edmond Taylor and John Potter to Howell Moss, for the same land, bearing date the day of June, 1771: thirdly, a deed for the land in dispute from Howell Moss to Vinkler Jones, bearing date the day of November, 1773; and lastly, a deed from Vinkler Jones covering the same land, to the lessor of the plaintiff, bearing date the day of June, A. D. 1798.

Under this title he produced witnesses to prove an actual possession in himself or those (or some of them) under whom he claimed. It appeared that one Searcey, as well as one Wilkins had been possessed of the land in question, but at a period ulterior to the date of the deed from Taylor and Potter to Moss. After this last conveyance, one witness said that Moss placed his father on the land, who lived on it for two years. Immediately after which time, Vinkler Jones took actual possession of it and held it for two years. Two other witnesses said that Vinkler Jones had actual possession of it four or five years. One of the latter two witnesses said, that this last mentioned possession was before the year 1775, because in that year he went to Kentucky, and knew nothing about a possession of it afterwards. It also appears, that some time after the expiration of Jones's possession, a free man of color, by the name of Henry Smith, lived upon the land by the consent of the present plaintiff, two years; and that some time after he moved away, another free man of color by the name of Hardy Artis, lived on the land, also by the consent of the plaintiff in this cause. None of the witnesses spoke positively as to the time that any one person had had actual possession of the land, but only from the best of their recollection. It appeared that an old field on the land had been for many years called Jones's Old Field.

The plaintiff produced no evidence to show the defendant in possession of the land; nor did the defendant object to the plaintiff's recovery for want of such proof; nor did the Court in its charge to the jury, say any thing on that head. It did not appear that the defendant had any title to the land in dispute.

The Court directed the jury to find for the defendant, unless they believed, from the evidence before recited, that the plaintiff had had a continued and uninterrupted actual possession of the land, for seven years.

The jury found a verdict for the plaintiff. The defendant moved for a new trial, which the Court refused.

It appeared that this suit had been instituted in the County Court of Granville, and there tried; which resulted in a verdict for the plaintiff. That the defendant appealed to this Court, and that a trial had likewise been had, when a verdict was again found for the plaintiff and a new trial granted.

It is now referred to the Supreme Court to decide whether or not a new trial should be granted.

It is further directed by the Judge to be stated, that the defendant's counsel moved the Court for a nonsuit, on the ground that a seven years' possession under color of title had not been proved;—and further, that James Hamilton, the real defendant, obtained title to the land in dispute after the commencement of this action.

TAYLOR C. J. delivered the opinion of the Court:

The repeated adjudications which have occurred in this State, throughout a long period of time, which may be dated, at least, as far back as the independence of the State, require it now to be considered as a fixed rule of property, that the possession under a colour of title, must be a continued one of seven years, in order to enable a person to recover in an action of ejectment.

It has been very justly supposed, both by those who made the law of 1715, and by those who have administered it, as far back as we have the means of ascertaining, that this was a reasonable period to warn all adverse claimants, that the person in possession set up an exclusive right, and to challenge them to come forward and exhibit whatever claim they might have against such possession.

But a possession for this period can only meet the spirit and design of the law, when it is unbroken and uninterrupted; for as it is founded on the supposition that the possessor really believes he has title, this idea is weakened rather than confirmed, by his occasionally withdrawing from the possession, and leaving the land without cultivation, without occupancy, and without a tenant.

Thus, the occasional exercise of dominion, by broken and unconnected acts of ownership, over property which may be made permanently productive, is, in no respect, calculated to assert to the world, a claim of right; for such conduct bespeaks, rather the fitful invasions of a conscious trespasser, than the confident claims of a rightful owner.

In this case, the first possession, after the date of the deed to *Moss*, is that in his father, which continued for two years. This is followed by *Vinkler Jones's* possession, which two witnesses say, continued four or five years.

It is to be observed, however, that one of these witnesses is altogether silent as to the periods when this possession began or ended; and therefore his testimony is not so satisfactory or convincing as that of the other, who gives a reason for his remembrance, and places the possession before the year 1775, because he then went to Kentucky. This possession therefore must have been before the date of *Jones's*, deed, and as early as that of *Moss's*, from which to June, 1775, would form only a period of five years.

This is believed to be a correct analysis of the testimony; and if so, there are but four or five years continued possession proved, since the colour of title accrued.—The other possession by the persons of colour, is altogether too vague to be taken into the account; for neither the period of its commencement nor that of its termination is ascertained by proof; it is not sufficiently connected with the other possession nor with the colour of title.

The law arising from the facts which are in proof, does not vest a title in the plaintiff; and if the verdict stands, the plaintiff will have recovered land, of which he is not the owner.

It would introduce much uncertainty into the law, and place land titles upon a very precarious foundation, if the Court were to acquiesce in a verdict so novel, because other juries had done the same. In cases of this sort, the law of a case cannot be separated from its justice. They are indeed, convertible terms; for where the law does not give title to a plaintiff, it cannot be just that he should recover the land and turn another out of possession. We are therefore of opinion that there must be a new trial.——Judgment reversed.

HALL J. gave no opinion; it being an appeal from his decision.

Williams v. *Harper.*

This cause was tried before SHAWELL J. at Warren Superior Court, where, on its being called in due course on the second day of the term, and the plaintiff failing to appear, he was nonsuited. In the course of the same day, he came into court and moved for a new trial, upon an affidavit which stated in substance, that he had attended the preceding day, and went home at night for the purpose of procuring the attendance of a very material witness, who had been subpœnaed for him; that on Tuesday morning he called upon this witness, whom he found unable to attend, from the effects of a severe illness, and the deponent then hastened to court, where he arrived too late, but as soon as he well could, considering the distance of his abode and the delay occasioned by his calling on the witness.

The Judge granted a new trial, upon the plaintiff's paying all the costs, from which order, as to the costs, he appealed to this Court.

The case was submitted.

TAYLOR, C. J.—The Court cannot perceive, in the order appealed from, any thing unusual or improper; for it seems to them perfectly reasonable, that the plaintiff should pay the costs of the nonsuit, occasioned solely by his absence when the cause was called. If upon the mere motion of the party, a new trial could be had under such circumstances, a great portion of the time of the Court would be consumed in awarding nonsuits and reinstating causes; for that sort of punctuality required from suitors, and which is so necessary to the regular dispatch of business, cannot well be enforced, unless the neglect of it be attended with some inconvenience and loss. When, therefore, an indulgence is asked of the Court, which involves a loss of the public time, and occasions inconvenience to the adverse party, it should be granted only on the payment of costs.—Judgment affirmed.

SEAWELL J. gave no opinion.

Blanchard's Heirs v. *M'Laughan's Adm'rs.*

The complainants, next of kin and the only children of *Miles Blanchard*, dec. state in the bill, that their father died seised and possessed of a considerable real and personal estate, leaving a widow, *Sarah*, who was appointed *administratrix*, and afterwards intermarried with *M'Laughan*; that *M'Laughan* had the exclusive management of the whole during the marriage, received monies for the sale of property and its hire, and for the rent of lands, and afterwards died without accounting to the complainants: That he also received monies for the rent of other lands, the property of the complainants, as their paternal guardian, which lands

were not derived from their father *Blanchard*: That after the death of *M'Laughan*, administration of his effects was granted to *Jeremiah Devan*, who received into his possession all the estate of *M'Laughan*, in right of his wife, as administratrix of *Blanchard*, and all the estate of the complainants, to which they were entitled by the death of their father and otherwise.

Upon the death of *Devan*, a supplemental bill was filed, making his executors *William Sutton* and *Margaret Devan*, parties, and charging that they had received assets of *Blanchard* and *M'Laughan*, sufficient to satisfy the complainants, and praying a decree against them.

The cause came on to be heard before TAYLOR C. J. at the Spring Term, 1815, of Bertie Superior Court, when a motion was made to dismiss the bill as to the executors of *Devan*, upon the ground that they were only responsible to the administrator *de bonis non* of *M'Laughan*, who is responsible to the complainants.

The motion to dismiss was overruled by the Court, and from that order an appeal was brought to this Court.

Browne for the appellants.—*Nash* and *Hogg* for the appellees.

SEAWELL J. delivered the opinion of the Court:

We are all of opinion, that the motion to dismiss the bill should be overruled. And although we hold that a creditor or next of kin cannot, without special circumstances, call upon a debtor to the estate; yet we think we are well warranted by authority and justice, to entertain a bill for both, against all persons in possession of the estate or fund, who have not paid for it a valuable consideration: And that in a case where such fund has been received from one, who was both in law and equity a trustee, there can be no possible objection against his accounting.

In this case, upon the death of M'Laughan, who was in possession of the fund as a trustee, that fund passed to his administrator, who could only stand in his shoes, and represent him in the character in which he originally stood; and upon the death of this administrator, the fund coming into the hands of *his* administrator, could acquire no different character, but still remained, in equity, the property of complainant; and has passed on in like manner to the defendants, who have moved to dismiss the bill. Now the objection that the property should first come through the medium of the administrators of *Blanchard*, with the view of paying creditors, completely fails; because these administrators, as well as the administrators of *Devan* (who may assert *Devan*'s right) are made parties, and who have it in their power to set up such defence as completely as if they were the only defendants. The case from *Ch. Cases* 57, *Nicholson* v. *Sherman*, was where a legacy was devised, and testator made baron and feme his executors and died: The baron afterwards made the feme, and his son *his* executor, and dies: The legatee exhibited his bill against both the feme and the son, charging that the *estate* of the testator who devised the legacy, had come to the hands of both; and upon demurrer, the same was disallowed, though the want of privity in law was there urged: And to the same principle are the cases in 2 *Vern.* 75, and 4 *Vesey, ju'r.* 651.*

Casey v. *Fonvilie.*

SEAWELL, J. stated the case and delivered the opinion of a majority of the Court, as follows:

The plaintiff's wife while sole, purchased of the defendant a slave; to secure the title of which, defendant gave a bill of

* This being an Appeal from the decision of TAYLOR C. J. he gave no opinion.

sale, with warranty as to title. Upon the marriage, the slave passed into the possession of the husband; and the wife dies. An action is then brought against the husband, and the slave recovered by one having superior title to defendant; and the plaintiff, in his own right, institutes the present action of covenant, upon the warranty in the bill of sale to the wife;—and the question is, can he maintain it in his *individual* character?

It was a saying of Lord Kenyon, that if *cases* and *principles* were at variance, the latter must be adhered to; and we think so too. The general principles respecting the rights which a husband acquires by marriage, seem to be as clearly laid down as any belonging to the law: and as regards her personal estate, that the marriage itself is an unqualified gift to the husband of all she is in possession of, whether he survive her or not. But as to such as she has not in possession, or as rests in action, as debts, contingent interests, and the like, or money due her on account of intestacy,—the marriage gives them only *qualifiedly*, namely, upon condition he reduces them to possession *during coverture*. For if she dies first, they go to her representative; if she survives, they belong to her. *Co. Lit.* 351. & *no.* 1. The husband, it is true, is entitled to administration, and as administrator, may recover them. These rules never have been questioned; and all the decisions on this subject, are professedly in accordance with them.

The slave then, in the present case, being in possession of the wife, passed upon the marriage, absolutely to the husband. But the covenant, which was a contingent and uncertain right, or more properly, was in *action*, remained to be asserted or not, according to its nature; and the wife having died before this right in action was reduced to possession, it is impossible, in the opinion of a majority of the Court, for the husband, consistently with the rule laid down, to maintain the action. If the marriage had the effect of trans-

ferring to the husband a complete legal right to the covenant, as has been contended, the representatives of the husband, if he were dead, could maintain the action; though the wife had survived the husband, and were alive. We can perceive no solid distinction between this, and any other covenant with the wife, before marriage. Its relation to a piece of property which became legally and absolutely vested in the husband, cannot affect its essential quality as a chose in action, and that the husband can no more maintain the present action than any other person to whom the wife, while sole, might have sold or given the slave,—the covenant being a mere *personal* contract, which abides with the *parties or their representatives.*

HENDERSON, J. and TAYLOR, C. J. dissented.

Den on the demise of the Trustees of the University v. *Holstead.*
Idem v. *Marchant.*
Idem v. *Parker.*

These were ejectments tried at Currituck Superior Court, at September Term, 1812, when the jury found special verdicts in the three cases, which, by consent, were referred to this Court.

The material facts found were, that about the 20th of December, 1788, *John Cockton* died, seised of the premises described in the declarations, having duly executed his last will, whereby he devised them to his wife *Agnes Cockton*, during her natural life, then to be equally divided between his two daughters, *Mary Tatum* and *Barbary Conpun*, to them and their heirs for ever; by virtue of which devise, Agnes entered, and on the 23d December, 1795, by deed of bargain and sale, conveyed in fee to *Jesse Simmons*, who,

on the 31st May, 1796, conveyed in fee to the defendant, who has actually been possessed thereof to the present time.

Barbary, one of the daughters, died in the beginning of the year 1792; *Mary*, the other daughter, died shortly afterwards, neither of them leaving any children, brothers or sisters, or the lawful issue of such; nor any heirs on the part of the father or mother, except the said *Agnes*, the mother, who survived them, and died on the 12th December, 1805, without leaving any heirs.

Browne, for the defendants, argued that the daughters took as purchasers under the devise. *Com. Dig. Assets B.* 1 *Leon.* 315. *Com. Rep.* 12?; and that by their death without issue, and the failure of heirs on the part of the father, the land became vested in the mother for life, by the 7th & 3d sections of the acts of 1784, c. 22 & 10; that the deed made by *Agnes*, should be considered as a feoffment which passed a fee, and displaced all remainders and reversions, according to the opinion of *Johnson J.* in *Wells* v. *Ne bold*, decided in this Court. He also cited 1 *Bl. Com.* 87. *Plowd.* 203. 1 *Co.* 93.

TAYLOR, C. J. delivered the opinion of the Court:

The first question to be decided in this case, is, whether the daughters took by descent or by purchase; for if they took by descent, the succession to them must be confined to the blood of the ancestor from whom they inherited, and this being extinct, the estate is vested in the University, as an escheat.

The rule of the common law is very distinct and well established, that where a person devises lands to his right heirs, without changing the nature or quality of the estate, although it be charged with incumbrances, the heir shall be in by descent, a title always favored by the policy of the law.

The cases on this subject proceed on the supposition that there is no election in the heir to take by descent or purchase, for the descent is immediately cast on him, and the devise is considered as having no operation at all.

For if the heir might, at his choice, have taken by purchase, the lord would have lost many emoluments of his seigniory, and the specialty creditor of the ancestor, the fund which was answerable for their demands, for until the *Stat. Will.* 3*d*, the devisee was not liable.

But if, on the other hand, the devisor alter the estate, and limit it differently from what it would descend to the heir, he shall take by purchase. Hence the cases cited by the defendant's counsel, prove unequivocally, that if at common law a person had devised to several daughters in fee, who would have been his heirs at law, they would have taken as purchasers; for had they succeeded as heirs, it would have been in parcenary, whereas by the devise, they take in joint tenancy, or in common.

It is now proper to look at our act of Assembly regulating descents, and to learn from it how lands are held which descend on several co-heirs; and the words are very explicit: "The estate shall descend to all the sons, to be equally divided amongst them, and for want of sons, to all the daughters, to be equally divided amongst them severally, share and share alike, as tenants in common in severalty, and not as joint tenants."

It is not necessary to cite authorities to prove, that the devise to the daughters in this case, gives them a remainder as tenants in common. The words "equally to be divided," have repeatedly been adjudged to be, in a devise, words of severance.

As, then, the daughters took the same estate under the will, that they would have taken had the ancestor died intes-

tate, it follows, that they were in by descent, and the devise was void.

After an attentive consideration of the acts of Assembly regulating descents, and particularly of the act of 1784, c. 22, sec. 7, we adopt the opinion, that none of the cases provided for, comprehend a descent from the parent, so as to vest a life-estate in the mother.

The parent shall succeed, where the child derives the estate from him; but that must be by some act *inter vivos*, for the parent must be dead before the child could derive it by descent from him. The parent shall also succeed where the child actually purchases the estate, or otherwise acquires it. The just construction of this clause, we think equally exclusive of the case of a descent from the parent, for reasons, which having heretofore been elaborately stated, it would be a waste of time to iterate. The opinion of the Court being in favor of the plaintiffs upon these points in the case, it is unnecessary to notice the others.——Judgment for the plaintiffs.

Jordan v. *Jordan's Ex'or.*

This was an Injunction Bill filed in the Court of Equity for Hyde County, where a motion was made to dismiss the bill for want of equity. That question was referred to this Court, upon the allegations contained in the bill.

The cause was submitted without argument.

TAYLOR, C. J. delivered the opinion of the Court:

The bill charges that the complainant was advised by his brother, the testator of the defendant, to invest $100 in the purchase of a slave, which he consented to do, and ac-

cordingly paid that sum to the defendant, who made the purchase for him. That this transaction took place about the year 1783, when the defendant delivered the slave to him, acknowledging his right and admitting that the purchase was made with his money. That, about the year 1788, the complainant became surety to his brother for one *Cosmo de Medici*, in the sum of $100, and the principal having left the State, that sum was demanded from him as surety, with a threat from his brother, that if payment were not made, he would keep the title of the negro as security; and the complainant being unable to prove the payment by *Medici*, did accordingly pay the debt. That afterwards the defendant's testator instituted an action of detinue against the complainant, to recover the negro;—and upon the trial, produced a bill of sale in his own name, dated in 1783, but registered immediately before the commencement of the suit. This claim was met by the complainant by proving his long possession, and payment of the purchase money. Upon which the defendant set up a claim of property, on the score of a pretended agreement as to the debt of *Medici*; on which the complainant was wholly surprised, and, being unprepared to repel that ground of claim, a verdict and judgment were rendered against him.

These are the material grounds of the bill, and they certainly charge a trust in the defendant's testator; the execution of which, it is one peculiar attribute of this Court to enforce. The property being bought with the complainant's money, and for his use, gives him an undoubted claim to the interposition of this Court, although the bill of sale conveys the legal title to the defendant. Over cases of trust the jurisdiction of this court can only be taken away by showing a complete execution. The delivery of the slave to the complainant cannot be considered as an execution of the trust; for the possession was consistent with it. Nor can it be collected from any other circumstances in the case that there

was an extinguishment of the trust. They are at best, but evidence of it; and such a fact ought to appear to the Court in as satisfactory a manner as the original creation of the trust. As therefore this cause is sent up on the case made in the bill, we are of opinion that this Court has, *prima facie* jurisdiction, and that the Injunction ought to be continued to the hearing.

Parmentier & wife & others v. *Phillips & al.*

This was an original bill in equity, praying for the appointment of commissioners to sell a tract of land, and to distribute the proceeds thereof, according to the will of *John Phillips*, amongst the complainants, who are minors, and the heirs at law of *Henry Phillips*, deceased, the devisee in the said will.

The amended bill calls upon the defendants for a discovery and account of the rents and profits; and that they may be decreed to deliver up possession of the land, in order that it may be sold.

The case made by the bill is in substance as follows. *John Phillips* died in 1784, having made his last will, in which he gave all his estate to his wife during her widowhood, for her support and that of his children, with direction that each of them should have a certain portion of the personalty, as they married or arrived at full age. On the death or marriage of his wife, he directs that the land shall be sold by his executors, and the money arising from it, to be equally divided among his sons, who shall then be living, or the heirs of their bodies, in case either of them shall have died before the said sale, leaving lawful issue.

Sarah, the widow, died in 1806, unmarried, at which time there was no son of the testator living, nor the issue

of any, except Patsey, the wife of *Parmentier*, the complainant, *Jordan Phillips*, *William Phillips*, *Eaton Phillips* and *John Phillips*, who are all the heirs and representatives of *Henry Phillips*, one of the sons of *John*, the testator.

Henry Phillips, in the lifetime of his mother Sarah, and without having a right, conveyed the land to *Frederic Phillips*, who, together with the other defendants, viz. *Hart*, *Jones* and *Bell*, were in possession when the bill was filed.

All the executors appointed in the will of *John Phillips*, have died without leaving executors.

To this bill there was a demurrer, on the ground that if the complainants have the right they pretend, they may assert it at law, by the action of ejectment.

TAYLOR, C. J. delivered the Opinion of the Court.

The twofold object of this bill is, to effect an execution of the trust in the sale of the land, which has been prevented by the death of all *John Phillips's* executors, in order that the proceeds may be divided amongst the complainants; and to call the defendants to an account for the rents and profits of the land. And we are of opinion, that for both these purposes, the suit is rightly instituted in this Court. It seems to have been long established as a rule of this Court, that when a person enters upon the estate of an infant, and continues the possession, equity will consider such person as a guardian to the infant, and will decree an account against him, and will even carry on such account after the infancy is determined. Even in those cases where the title is purely legal, and the complainant is put to his election to proceed at law or in this Court, where the bill is filed for the land and the mesne profits, he may proceed at law for the possession; and in equity on the account; because at law he can recover the mesne profits only from the time of entry laid in the declaration. The authorities which relate to this point

are, 1 *Atk.* 489. 3 *Atk.* 130. 1 *Ch. Rep.* 49. 2 *P. Wil.* 645. *Pr. in Ch.* 252. 1 *Vern.* 296.——Demurrer overruled.

Delamothe v. *Sarah B. Lanier, Executrix of Clement Lanier.*

In this case a *scire facias* had issued against the defendant, to show cause why judgment should not be rendered against her on a bond given by her testator, jointly with *Thomas C. Williams*, on an appeal obtained by said *T. C. Williams* from the County Court of Montgomery. A judgment was obtained by the plaintiff against *T. C. Williams*, at September Term, 1809, after the death of the defendant's testator. No motion was then made for judgment against the securities on the appeal bond. And the *sci. fa.* was made returnable to May Term, 1812, when the defendant pleaded, "Nul tiel "record, former judgments, payments made on specialties "and simple contract-debts before notice, and judgments "obtained against defendant on simple contract debts without notice—which has exhausted and attached the assets, "no assets ultra, fully administered."

At May Term, 1814, the following judgment was given by the Court: "*The judgment of the Court is, that there is such a record.*"

Question for the Supreme Court, Whether the defendant can give in evidence judgments obtained on simple contracts rendered against her before issuing or notice of this *sci. fa.* and without notice of the bond; and whether this bond is to be considered such a debt of record that judgments on debts of inferior degree, without notice, and payments thereon, amount to a devastavit?

The case was submitted without argument.

TAYLOR, C. J. delivered the Judgment of the Court:

The duty of an Executor would be attended with infinite peril, if he could not safely pay simple contract debts before he has notice of a bond; for then a bond creditor might withhold his claim, till all the assets were exhausted in the payment of simple contract debts, and compel the executor to pay *de bonis propriis*.

But the rule is, that an executor may pay debts of an inferior nature, before those of a superior, of which he has no notice; provided such payment is made without fraud. In debt on bond, the defendant, being an executor, pleaded a judgment had against him on a simple contract debt *ultra*, &c. and upon demurrer, the plea was holden good. *Davis* v. *Monkhouse*. *Fitzg*. 76.

But even notice of the bond in this case, could not, it is believed, have bound the assets before judgment, in exclusion of simple contract creditors; because it was not for the payment of a sum certain, but depended upon a contingency, whether the testator's estate would ever become chargeable with it. For until the appellant failed to prosecute the appeal with effect, and neglected to perform the judgment of the appellate Court, the bond was not fofeited. It has accordingly been decided, that a contingent security, as a bond to save harmless, shall not stand in the way of a debt by simple contract. 2 *Vern*. 101. We are therefore of opinion, that the evidence of payment of inferior debts was properly received in this case; and that the verdict for the defendant ought to remain.

Moss and Wife v. *Vincent*.

This was a petition filed in the County Court of Nash to set aside the probate of the will of *Joshua Vincent*, on the ground of the will having been made by fraud and circum-

vention; and that the petitioners were not made parties to the probate, although they would have been entitled to a distributive share of the estate.

To this petition there was a demurrer for want of an affidavit.

TAYLOR, C. J:

Upon the question of practice presented in this case, the Court are all of opinion, that an affidavit verifying the facts on which it is sought to set aside the probate of a will, is indispensable. A probate is an act of a court of justice, and a consequent degree of solemnity is attached to it forthwith. Property is held under it, and many important affairs of the estate transacted by the executor, on its authority. The Court therefore cannot sustain a petition, founded on a mere suggestion or assertion that it was fraudulently or irregularly obtained.

Petition dismissed.

Cameron v. *M'Farland.*

Overman v. Demmon 2. Dev. & B. 185.

The question reserved in this case was, whether an agreement not to prosecute for malicious mischief, forming part of the consideration of a bond, will vitiate it, as being against law?

M'Millan for the defendant, referred to *Comyn on Contracts*, 34.

TAYLOR, C. J. delivered the judgment of the Court:

We do not require the authority of an adjudged case, to enable us to pronounce clearly and unequivocally, that this bond is void. The principle of our decision is incorporated

in the common law, which does not sanction any obligation founded upon a consideration, which contravenes its general policy. This impresses upon the transaction an inherent defect, which cannot be removed by the most deliberate consent of the parties, or the utmost solemnity of external form.

Were it otherwise, there is no law, however important to the public welfare and happiness, which might not be paralized by the private agreement of individuals; and it would seem extravagantly absurd, that the law might be called upon to enforce a contract, whose essence and vitality are founded upon the violation of law. For all laws might be overthrown, if men could enter into covenants not to obey them; and if courts of justice recognized the validity of such engagements, the law would be accessory to its own destruction.

The consent of parties alone to a contract, does not impart to it obligatory force; it is also necessary that the subject of it be such as they have a rightful power to contract about. He who receives a vicious bond, does by that very act, relinquish all claim to the favor of the law, inasmuch as he does, as far as he can, give another an unjust and unlawful power over him.

This principle is very fully illustrated in *Collins* v. *Blantin*, 2 *Wils.* 347, where the defendant and others being indicted by one *Rudge*, the plaintiff gave his note to *Rudge*, to induce him not to prosecute; and the defendant, to indemnify the plaintiff against the note, gave the bond in question. *Rudge* did not prosecute; and the plaintiff paid him the amount of the note, and then sued the defendant on the bond, who having pleaded the consideration, it was resolved, that the note being given for an illegal purpose, viz. the compounding the prosecution, and the bond given to secure and repay that, that the bond was illegal and void.

In many subsequent cases, the same doctrine has been enforced, and they all establish, that every transaction, the object of which is a violation of a public duty, is void; such as bribes for appointing to offices of trust; private engagements that an office shall be held in trust for a person, by whose interest it was procured; agreements to stifle prosecutions of a public nature: All these considerations have been respectively brought into judgment, and pronounced illegal. And wherever it is attempted, by a contract, to prevent the due course of justice, the law gives no remedy upon it. As if a man promise money to another, in consideration that he will not give evidence in a cause; such promise cannot be enforced, on account of the illegality and iniquity of suppressing testimony in any cause.——Judgment for the defendant.

Grizza Collins, widow, v. *The Executors of Shadrach Collins, deceased.*

The testator died in November, 1814, having made and duly published his last will in writing; whereof he appointed the defendants his executors, who caused the same to be proven at February Term, 1815, of Edgecomb County Court.

The petitioner, his widow, being dissatisfied with the provision made for her by the will, entered her dissent to the same at the same Term, and exhibited this petition to the County Court, claiming the benefits of 29th chap. Acts of 1796,—alleging that by her dissent to the provision made for her by the will, her husband died *intestate as to her.*

CAMERON, J. delivered the Judgment of the Court*.

* TAYLOR, C. J. *dubitante.*

The widow's claim to the benefit of the act of 1796, ch. 29, depends entirely on the husband's dying intestate generally. Where he leaves a will, and she dissents to the provision made for her by it, such dissent, only produces a *partial* intestacy as to her.

The words of the act are "where a man shall die intes-"tate, leaving a widow," &c. Here the husband did not die intestate. He disposed of all his estate by will duly executed and published; and thereby made provision for his wife. He could not foresee that she would be dissatisfied with that provision and claim the privilege of dissenting from it.

According to the construction of the act contended for in behalf of the petitioner, it is not the omission of the husband to make and publish a will in his lifetime, but the act of the widow, which renders him intestate. By her acquiescence in the will, the husband dies testate; her dissent produces intestacy. It depends wholly on her conduct, after the death of the husband, and after his will is admitted to probate, whether he is to be considered as having died *testate* or *intestate*.

This surely is not such a *dying intestate*, as is contemplated by the act under consideration. In support of this opinion, let it be further observed, that the act directs that "where a man shall die intestate, leaving a widow, she may "take into her charge and possession so much of the crop, "&c. then on hand, as may be necessary, &c. until letters of "administration shall be granted," &c. Now the Legislature could never have intended to interfere with the will of the testator, or the rights of the executors, by authorising the widow to take into her possession that property which the law, operating on the will of the testator, authorised them alone to take possession—yet the construction of the act

contended for in behalf of the petitioner, would produce that effect.

Sales of the perishable estate of intestates usually take place immediately after administration is granted. The allowance for the widow and family should be set apart before such sale takes place. Hence she is required by the act to exhibit her petition "at the same court when administration is granted." Yet if by entering her dissent to the will, she can entitle herself to a year's allowance out of the crop, &c. she may do it *six months* after the probate of the will; when, in all probability, the executors have sold the perishable estate and disposed of the proceeds according to the will of their testator. Out of *what* will her year's support, in such case, be allotted?

The act of 1784, ch. 22, authorises the widow to enter her dissent within six months after probate of the will, and enacts, "notwithstanding her dissent, if the jury find and "return that 'she is as well provided for by the will as by "taking that allotted to her by law in case of her dissent,' "she shall be therewith content." Suppose a year's provision allotted to the petitioner, according to the construction of the act contended for in her behalf, and that the jury to be empannelled pursuant to the directions of the above recited act, should find that the legacy given to her by the will is equal in value to the distributive share she would take under the act of Assembly with which, in the words of the act, *she shall be content*, it would then appear that the widow of a man, not dying intestate either *generally* or *partially* (as respects his wife) had received the benefit of the act intended for those only whose husbands die *intestate*: and that she had received a portion of her husband's estate, not allotted to her by *his* will, or justified by the act in question.

Such difficulty can only be avoided, by bearing in mind, that the Legislature never intended that the acts of 1784 and 1791 on the same subject, and the act of 1796 (the act in question) on a different subject, should be blended together in their operation and effects.

A majority of the Court is of opinion, that the widow of a man dying and leaving a last will, cannot, by her dissent to such will, entitle herself to the benefits of the act of 1796, ch. 29, in addition to those conferred on her by the acts of 1784, ch. 22, and 1791, ch. 22.——Wherefore Judgment for defendants.

SEAWELL, J. I cannot yield my assent to the opinion of a majority of the Court, in this case.

I think we are disregarding the obvious meaning of the Legislature through a ceremonious respect to the words they have used.

In the exposition of all instruments, the intention of the makers is the only guide. And as regards statutes, it is a very ancient rule, to consider the old law, the mischief, and the remedy. And Lord Coke has ventured to assert, that it is the office of Judges always to make such construction as shall repress the mischief and advance the remedy, according to the true intent of the makers. *Heydon's case*, *Co. Rep.* and *Sir E. Plowden*, who is denominated by Lord Coke a grave and learned apprentice of the law. In a *nota bene* to the case of *Eyston* v. *Studd*, 2 *Plow.* 465. it is said, "that it is not the words of the law, but the internal sense "of it, that makes the law: that the law consists of two "parts, a body and soul; that the letter is the body, the "sense and reason the soul,—*qua ratio legis est anima legis*; "and that the law may be resembled to a nut, which has a "shell and kernel within; the letter representing the shell, "the sense the kernel." And as you will be no better for the

"nut if you make use only of the shell, so you will receive "no benefit from the law if you rely only on the letter." And Chief-Justice Brook, another venerable sage, in *Hill* v. *Grange*, reported by Plowden, in speaking of the construction of statutes, says, "that when an act is made to remedy a mischief, that in order to *aid things in the like degree*, one *action* may be used for another, one *thing* for another, and one *person* for another, notwithstanding that in some respects the thing is penal As in the action of waste given by *stat. Glou.* against termers for *y ars*, by *equity* it is extended to him who holds for a *half year*; so the *stat. of Westm.* which gives an action against a jailor who lets out one committed for arrears of account, is extended to a case of commitment for *debt.* So the *stat. Wilm.* which gives a *cui vita* after coverture dissolved by death, extends to a case of divorce. So one *thing* for another, as an *elegit de mediatatum suæ terræ*, which is given by *stat.* yet it extends to a moiety of a *rent.* And in respect to *persons*, the *stat.* 4 *Ed.* 3. gives an action *de bonis asportatis*, to executors, yet it is extended to administrators."

Servilely treading in the footsteps of these great fathers of the law, let us pursue their mode, and first enquire, how the old law stood, what was the mischief, and what the remedy the Legislature has applied? What the law was, and what the mischief intended to be remedied, are recited in the act itself. We are not left at large to conjecture or put in difficulty to collect from the remedy what was the disease; but the Legislature themselves, in an act, the title of which is to make "further provision for the widows of intestates," recites in the preamble, "that it is in the power of administrators to dispose of the whole of the crop and provisions of the deceased, and thereby deprive the widow of the means of subsistence for herself and family." To remedy which mischief they declare, "that whenever any person shall die

intestate, the widow may petition and she shall be entitled to a year's support."

By the act of 1784, it is declared, that if any person shall die intestate, or make such provision by will as shall not be satisfactory to the wife, upon signifying her dissent, she shall be endowed of a third part of the lands and a child's part of the personal estate,—placing the widow dissenting, precisely in the same situation as if no will had been made.

In the present case the widow dissented, and on her petition for the year's support, in virtue of the act of 1796, she is told, you are not within the meaning of that act, because your husband made a will, and the act only relates to the widows of those who died intestate.

Now it is very clear that the mischief which the Legislature intended to remedy, was the inadequacy of the provision allowed by *law*; and that the petitioner's case is precisely such a one; that is to say, she is a widow who has received only what the *law* has provided for her, petitioning in virtue of the act of 1796, which act declares that its design is, to make such widows a further provision If her case then, comes within the mischief intended to be remedied, it would seem, that inasmuch as it was the *mischief* the Legislature was aiming at, that she ought, by an equitable construction, to receive its benefit. The statute *de bonis asportatis* only enabled the executor to sue; yet, for the sake of reaching the mischief, it was extended, by construction, to an administrator. But let us examine if this difficulty in reconciling this case with the *words* of the act of 1796 cannot be gotten over. For if it can be shown, that the husband did die intestate, the petitioner will then be within both the *design* and *words* of the act—and this, to me, has not half the difficulty, as making an executor mean *administrator*, a rent issuing out of land mean the *land itself*, or a dissolution of marriage by death a dissolution by *divorce*; all of which have been done,

When a wife dissents to the provision made by a husband in his will, he thereby, as to her, dies intestate, in the same manner as he would do in case of a lapsed legacy not otherwise guarded, or as to real estate in case of a will with one witness; and whether as to the rest of the world, the husband died testate or intestate, is of no importance in the present inquiry. It can only be material, when a petitioner has been already provided for, and then only to prevent, as it were, a double portion; one from the bounty and duty of the husband, the other which the *law* has provided for those who have no other resource.

If the act is to receive this nice construction, what should we do with a case where a husband, possessed of a large estate, made no other will than barely to appoint executors who should refuse to qualify, and the widow should petition for her year's support? I can hardly suppose her petition would be rejected. And how does the present case differ from that in principle? The petitioner has received nothing from the bounty of the husband; he either omitted her entirely in the will or made such provision as she chose not to rely on, and has applied to the law. She has no other subsistence for herself or family than that which the law has allowed her, and this she may be kept out of for two years by the executor;—and as to the personal estate, that even may be swept away by creditors; and she is, in the mean time, either to beg or starve. Such a construction, therefore, seems to me at variance both with the letter and spirit of the act.

If it be asked, what is the situation of a widow who does not dissent, where the debts against the estate are sufficient to swallow up the assets? I answer, she acts with her eyes open. She may rely if she chooses, upon the provision made by the husband; and if she is doubtful of that, she ought to dissent, and rely upon the law. The maintenance allotted

her is exempted from the demands of creditors and claimants.

It is to me matter of regret, that any case should arise, in the determination of which, a difference of opinion should prevail; and greatly as I at all times respect the opinions of my brethren, when in opposition to my own, I cannot from mere respect, without conviction, subscribe to a construction, in my understanding, so much at variance with the true meaning of the act.——A majority being of a different opinion, there must, however, be judgment that the petition be dismissed.

Office v. *Gray*.

The defendant was endorsed as prosecutor on an indictment against *Gassett*, for malicious mischief, which was quashed by the Court, and the prosecutor ordered to pay the costs. An execution accordingly issued against him, comprehending the charges for the witnesses summoned for the State, as well as those summoned for the defendant To set aside the execution, so far as it related to the witnesses, was the object of this motion, which was referred to this Court, from the Superior Court of Randolph.

TAYLOR, C. J. delivered the judgment of the Court:

We do not apprehend that any of the acts of Assembly on this subject, will, when fairly construed, warrant the taxation of the costs of witnesses against a prosecutor, under the circumstances of this case.

The first act of 1779, c. 4, authorises the Court to order the costs to be paid by the prosecutor, where the State shall fail upon the prosecution of any offence of an inferior na-

ture, in case such prosecution shall appear to have been frivolous or malicious.

The uniform exposition of this act, has confined it to a failure by an acquittal of the defendant; because it contemplates that the witnesses must be examined in presence of this Court, to the end of enabling them to judge whether the prosecution is frivolous or malicious.

If it extended to other cases of failure, then it would embrace that of a *nolle prosequi*; yet in 1797, it was thought necessary to pass an act to provide for that case, and to authorise the Courts to tax the prosecutor with costs, if the prosecution was promoted on frivolous or malicious pretences and grounds. And this, it is believed, can only be made known to the Court by testimony.

The only remaining act is that of 1800, c. 17, which provides, that if the defendant be acquitted on any charge of an inferior nature, the Court may order the costs to be paid by the prosecutor, if such prosecution shall appear to have been frivolous or malicious.

An indictment may be quashed if the offence be not indictable, or if it is not set forth with legal precision; but if it is free from these imperfections, it is not easy to conceive how it could be quashed for being frivolous or malicious. This could only be done by a law authorising the Court to proceed as in the case of a *nolle prosequi*.

We are therefore of opinion, that all the witnesses' tickets should be struck from the taxation of costs.

Mumford & others v. *Perry*.

This is an action on the case, (for a nuisance) to recover damages done to the plaintiffs, in consequence of the defend-

ant's having erected a mill dam across the same stream on which the plaintiff's mill stands, and below it. The declaration contains three counts. 1st. That the defendant erected a dam on the same stream, below the plaintiff's mill—in consequence whereof, the water was thrown back on the wheel of the plaintiffs' mill, whereby, &c. 2d. That the plaintiffs have a good mill-seat on the same stream, and below their present mill—that the defendant hath erected a dam below said mill and mill seat, in consequence whereof, the water reflows, becomes dead, &c. and the plaintiffs cannot remove their mill to such mill-seat below their present mill or build a new mill at such seat. 3d. That the foundation of the present mill owned by plaintiffs, has become ruinous, &c. that there is a good mill-seat on the same stream below, belonging to the plaintiffs—that the defendant hath erected a dam below said mill-seat, in consequence whereof, &c. as in the 2d count—whereby, &c.

The defendant pleads to the jurisdiction of the Court, the plaintiffs having commenced this action originally in this Court, without having *first* filed their petition in the County Court, in conformity with the act of Assembly passed in 1809, c. 15, and without there having been any proceedings between the parties under said act.

It is submitted to the Supreme Court to decide, whether the plaintiffs, who sue for an injury alleged to be done by the erection of the dam attached to a public mill by the defendant, can maintain such original suit in this Court, without having first filed a petition, &c. as required by the aforesaid act of 1809, c. 15. Should the Court be of opinion that such suit cannot be *originally* brought and maintained in this Court, without a previous compliance with the requisites of said act, then the plea to be sustained, and this suit to be dismissed. Should the Court be of a contrary opinion, then the plea to be overruled, and the defendant to answer over.

The case was argued by *J. Williams* and *Henry* for the plaintiffs, and *Browne* for the defendant.

TAYLOR, C. J. delivered the opinion of the Court:

We have not doubted for a moment as to the design of the Legislature in passing this act, or the construction which, as well the terms of it as the mischiefs it was evidently intended to remedy, require it to receive.

The object of the act is to modify the common law right, because it was susceptible of abuse, and might sometimes be employed oppressively to the defendant, without affording proportional redress to the plaintiff; and to suspend it in all cases, except those provided for in the 5th section, the words of which are, "in all cases where the jury shall assess the yearly damage as high as the sum of ten pounds, nothing contained in this act shall be so construed as to prevent the person thus injured, their heirs or assigns, from suing, as has heretofore been usual in such cases; and in such cases, the verdict and judgment of the jury on the premises, shall only be binding for the year's damage preceding the filing of the petition."

In every case, therefore, of a person's receiving injury from the erection of a mill, a petition must be filed, in order to ascertain the extent of it, because upon that depends, whether the common law remedy is exerciseable. If the damage assessed be under ten pounds, the action is wholly taken away; if it be over that sum, the action is left to the party. Now when the act declares that nothing in it shall be so construed as to prevent persons in whose favor the jury have assessed the annual damage to the amount of ten pounds, from bringing an action, it is equivalent to express words of exclusion, as to all those in whose favor a less sum is assessed.

The general rule of construing affirmative statutes is, that they do not take away the common law, but leave the

party his election to proceed on either; yet if an affirmative statute introduce a new law, and direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner. *Plow.* 206. The case before us is still stronger, because it contains what are equal to negative words. The demurrer to the plea must therefore be overruled, and the suit dismissed.

Berry v. *Haines.*

This was a motion to set aside an execution issued against *Berry*, who had executed a bond under the suspension act, as security for *M'Glinn* for the stay of an execution against him, at the suit of *Haines*. The bond was given to the sheriff, who had the execution in his hands. The affidavit of *Berry* states that the act of 1812, "to suspend executions for a limited time," under which the bond was given, had been solemnly declared, by the Supreme Judicial Tribunal of the State, unconstitutional and void, and that execution had issued against *Berry* without suit having been brought against him, or any notice of a judgment to be moved for against him in his absence, and without an opportunity of being heard or making defence.

No argument was made in the case.

TAYLOR, C. J. delivered the Judgment of the Court:

The act "to suspend executions for a limited time" was brought under the judgment of this Court, in consequence of an application on the part of a debtor, to obtain the benefit of the stay.

The application was rejected on the principle, that the act in allowing such stay, impaired the obligation of contracts, and thereby violated the Constitution of the United States.

It was not intended by the case of *Crittenden* v. *Jones*, to anticipate any legal consequences which might appertain to those cases where the suspension had already been effected, further than to declare that it must thenceforth cease to operate, and that execution might promptly issue.

As the *spirit* of that decision was protective of the rights of creditors, so now, when we are called upon to consider its *operation* and *effect*, we are of opinion, that it left them in the unimpaired possession of those added cautions and securities of their claims, which their debtors had voluntarily imparted to them. For the idea must be borne in mind, that on the part of the debtors, there was no compulsion; they spontaneously did whatever was necessary to obtain the benefit of the act. Many did omit, and all might have omitted to ask any indulgence under it. On the part of the creditor, it was all compulsion; for whether he approved or not a compliance with the terms of the act would place the debt beyond the reach of legal process, for a shorter or longer period.

A law may be constitutional and valid in some points, and in others not so; and as the only reason why any part of the suspension act was deemed void, was, because it impaired the obligation of contracts, it follows, that such parts of the act as do not lead to that conequence, must be effectual.

It is only by a discriminative construction of this sort, that we can avoid the most palpable legal absurdity, blended with the grossest injustice.

It would appear extremely paradoxical to lay down the position in the abstract, that the obligation of contracts may be impaired by a law, which has been declared unconstitutional by the Judiciary, and so declared, because it did impair the obligation of contracts. Yet nothing is more easily

demonstrated, than that such consequences may, and probably will ensue, if the executions in these cases are set aside, and the securities discharged.

A sheriff had in his hands an execution against a person who was able to pay the debt, but who before the levy, gave the necessary bond and obtained the stay; he afterwards becomes insolvent, and the bond given by him and his securities is declared void, because taken under an unconstitutional law. In such case, that very law operates to deprive the creditor of his debt. And the case is yet stronger, where a levy is actually made, for the property must have been restored under the 4th section of the act. In both cases, the extended arm of the law was prepared to do justice to the creditor, when it was palsied by the touch of the Suspension Act; but the return of its animation, is marked by an increase of its vigor, derived from the very causes that impeded its functions. Like ANTÆUS, it has touched the ground but to receive new strength.

With respect to the other reasons stated in the affidavit, that execution hath issued against *Berry*, without suit or notice, or the opportunity of being heard, it seems only necessary to remark, that the Legislature had an undoubted right to invest these bonds with the force of judgments, because every person who should thereafter sign them, either knew, or might have known, the footing on which they were placed. And although it is a dictate of natural justice, as well as a rule of the common law, that no one should be condemned unheard, or without having an opportunity of being heard, yet it is competent for a person to enter into a contract, by which he waives this right, *quilibet potest, &c.* And this has been done by all those who executed these bonds under the act.—We are all, therefore, of opinion, that the *Certiorari* should be dismissed.

Cotten v. *Powell.*

Detinue for a slave. The plaintiff claimed title under a parol gift from *Wall*, whose daughter he had married. The proof of the gift was, that the slave had been sent to the plaintiff's house by *Wall.*

The defendant claimed title under a mortgage made by *Wall* to him prior to the gift; but the mortgage-deed was unattested. And the case was reserved upon the two questions: 1. Whether a subscribing witness was essential to the mortgage? 2 Whether a written conveyance was necessary from *Wall* to the plaintiff, under the circumstances above stated.

The case was submitted.

TAYLOR, C. J. delivered the judgment of the Court:

The first question arises under the 3d sect. of the act of 1792, c. 6, which requires, that where a written transfer or conveyance of a slave is introduced to support the title of either party, the due and fair execution of such writing shall be proved by a witness subscribing and attesting the execution.

The first section of this act has received a construction in the case of *Bateman* v *Bateman*, wherein it was held that a valid sale might be made between the parties themselves, without delivery; that being necessary only where creditors or third persons were concerned. The reasonin g which seemed to the Court to justify such a construction, and which it is not necessary here to repeat, goes the full extent of proving, that in this case, a subscribing witness is not necessary to the mortgage-deed, since the control is between the parties to it, or those claiming under them; and there are no interfering claims of creditors, or third persons, to call for a literal interpretation of the act.

We are of opinion, on the other question, that a written transfer is necessary in all cases, where a person gives slaves to the man who marries his daughter. The words of the act of 1806, extend to all cases of gifts of slaves, and there is reason to believe, that the policy of the act was especially directed to gifts to a son-in-law; because they were of the most frequent occurrence, and the difficulty of ascertaining the truth in old transactions which depended on the memory of witnesses only, the litigation, uncertainty, and perjury, which they produced, seemed to call for legislative interposition.

And upon the whole case, we think the law is, that as between *Wall* and *Powell*, the mortgage-deed is effectual, without a subscribing witness, and *Wall* could not claim the negro in the face of it; so the plaintiff, who claims under *Wall*, and stands in his place, can claim only in *æquali jure*, and cannot set up a right in opposition to the deed.

Shenck v. *Hutcheson.*

This was an action of trover brought to recover the value of two fifty dollar bank notes, one on the Bank of the United States, the other on the Farmers and Mechanics' Bank of New-York, which the plaintiff alleged he had lost in October, 1812. He proved that he had in possession a fifty dollar note on the Bank of the U. States, which had been cut in two and pasted together, and looked dirty; that the defendant had passed a fifty dollar U. States note to a merchant, and the plaintiff's witness, who had seen the note in possession of the plaintiff, upon seeing it in possession of the merchant, believed it to be the same note which he had seen the plaintiff have; that he had possessed several fifty dollar notes on one of the Banks of the State of New-York, not long before the alleged loss; that the defendant had been seen to have a fifty dollar note on a Bank in New-York, as well as the one

passed to the merchant; that upon the defendant's being asked where he had gotten the notes, he said he had won them from a certain man by the name of *Wauhop*, who had exhibited wax figures at Lincolnton, in January, 1813. The deposition of *Wauhop* was taken, who swore that he did not play at cards or gamble with said Hutcheson in any way, or let him have any money. The plaintiff further proved, that the defendant offered two fifty dollar notes to a man who handled a great deal of money, no way connected with him, for safe-keeping. The plaintiff offered no evidence of the loss of the notes but his own declarations in Oct. 1812, and afterwards, and that the defendant had been seen hunting for the notes, as he the defendant said.

The Court charged the jury that it was proper for them to receive the declarations of the plaintiff, connected with the other circumstances, to ascertain the loss; and upon this evidence, the jury found a verdict for the plaintiff: and a new trial was moved for on the ground of a misdirection of the Court as to the evidence.

Question. Was it proper to receive the declarations of plaintiff, connected with other circumstances, to prove the loss of the notes? If proper, judgment for plaintiff; if not, a new trial to be granted—otherwise not.

SEAWELL, J. delivered the opinion of the Court:

The only point submitted to this Court is, whether it was proper to admit the declaration of the plaintiff, together with *other circumstances*, to prove the loss of the notes: And we are all of opinion that it was. For we hold, that in all cases where the *acts* of a person can be given in evidence for him, that his declarations in relation to such acts, must necessarily be admitted; as in the case of a claim, demand or tender: For in the first two cases, it is the declaration which *constitutes* the act, and in the latter, they form *part* of it.

What these "other circumstances" were, does not appear in the case; but in answer to the general question stated, it is easy to state a circumstance proper to be connected with the declaration. Such, for instance, as that the party was seen with his friends and servants diligently searching the road. It not appearing to us, therefore, that these declarations were *improperly* admitted, we can see no reason for disturbing the verdict.——Rule discharged.

Speed and others v. *Harris and others.*

The plaintiffs obtained a decree in the County Court of Wake, against the defendants as executors, for distributive shares. The defendants prayed an appeal; which was allowed. The appeal bond sent up to the Superior Court, was executed by the plaintiffs. In the Superior Court, the plaintiffs moved for leave to withdraw the bond filed with the transcript; and that the appeal should be dismissed. At the same time the defendants moved for a writ of *certiorari* in case the Court sustained the plaintiff's motion. It was referred to the Supreme Court to say what judgment shall be entered in this case.

CAMERON, J. delivered the Judgment of the Court:

The act of 1777 requires that the party appealing shall give bond, &c. In this case, the party praying the appeal, gave no bond. That given by the plaintiffs (through error no doubt), cannot be noticed for the purpose of giving the Superior Court cognizance of the suit. The appeal must therefore be dismissed for want of such a bond as the act requires from the party praying the appeal. And let a writ of certiorari issue in conformity with the defendant's motion.

Marshall v. *The Executors of Marshall.*

To this bill answers were filed, to which a replication was entered. A reference to the master had been made at a former term, and a report made by him was submitted, on the cause being called. The defendants moved to dismiss the bill for want of prosecution; on which question the cause was referred to this Court.

SEAWELL J. delivered the opinion of the Court:

When a bill is filed and an answer put in, and the complainant makes no replication to the answer, it is in the discretion of the Court to refer it to the master. And this will depend upon the nature of the subject matter, the reference being always for the relief of the Court; and not by any means necessary for the determination of any case. For the Court may, if it will, take the account itself without any reference.

In this case there was a replication to the answers, by which all charged in the bill, and denied by the answers, was put in issue. The act of Assembly establishing the Court of Equity has provided, that a jury shall form part of the Court, and that all matters of fact shall be tried by them. The complainant, therefore, although there was no report, had the right to have the opinion of the jury upon the facts in dispute, who might differ from the master upon the extent of the testimony then in,—or if there were no depositions, the complainant, according to our practice, might produce before the jury *viva voce* testimony. From this it results, that the proper course in such case would be, to set down the cause for hearing absolutely, or with such provisions as the Court, in its discretion, should deem proper, which must depend upon the conduct of all parties. Wherefore, we are of opinion, that the motion to dismiss be overruled.

Nichols v. *Palmer.*

Detinue for a slave under the following circumstances: The plaintiffs, John Nichols and Jonathan Jacocks, obtained a joint judgment, by confession, against John Drew, the former proprietor of the slave, at Bertie County Court, which begun and was held on the second Monday of November, 1810. The second Monday in the month was the 12th day of the month. An execution issued on the judgment and was levied on the slave in question, who had been run away for some time before, and was sold by the sheriff the 10th of January following, when the sale was forbid by plaintiffs. Jonathan Jacocks became the purchaser, who sold to the defendant. The plaintiff claims under a bill of sale, which *purports on the face*, to have been executed on the 10th of November, 1810.

The subscribing witness deposed, that he was called upon by plaintiff and John Drew, on the same day of Jacock's purchase, to attest the bill of sale, the said John Drew declaring that he *had* executed it on the day *it purported*, and that witness then signed his name. The bill of sale had no other witness. The subscribing witness stated, that he believed the said Drew was indebted to the plaintiff other than by the judgment, for the purchase of his crops, and that J. Drew, jr. was security to the plaintiff therefor.

Defendant then gave evidence of the declaration of the plaintiff, that he had no interest in the suit, but that it was brought for the benefit of J. Drew, jr. the security.

The jury, under the direction of the Court, gave a verdict for the defendant, and, on motion for a new trial, it is referred to the Supreme Court.

CAMERON, J.—The only question in this case is, at what time did the bill of sale for the negro in question, from J. Drew to the plaintiff, take effect?

This bill of sale being a *deed*, like all other deeds took effect from its *delivery*. The attestation of the subscribing witness on the 10th of January, 1811, is the only evidence of a delivery. There was no evidence of a delivery on the 10th of November, 1810, the day on which it *purports* to have been made, nor of any delivery between these periods of time. The defendant (or person under whom he claims) had acquired a lien on the slave under the judgment and execution, previous to the consummation of the deed under which the plaintiff claims title.

We are all of opinion, that the charge of the presiding judge was correct, and that the motion for a new trial be overruled.

Drew's Ex'rs v. *Drew.*

Detinue for three negroes. Verdict for defendant, and motion for a new trial: Upon which a rule to shew cause was granted, and the case is ordered to be sent to the Supreme Court, to determine whether there shall be a new trial granted, or not, upon the following statement.

The negroes in question were the children of negro Edna, who many years ago belonged to the plaintiff's testator; but the defendant proved a verbal gift of her to himself by the testator about sixteen or seventeen years ago. It was proven by one witness that she continued, however, in the possession of the testator, and was employed by him as his own property until his death, which happened about the month of in the year , and during that time, had the children now in controversy. Immediately after the testator's death, the executors having taken an inventory of the estate, left the said negroes, with the other property of the deceased, in the care of the defendant, until a sale should take place, which soon afterwards happened, when the de-

fendant refused to deliver up the said negroes, and claimed them as his own property, upon which this suit was brought to this Court at April term, 1813. It was proven also in the trial, that on the day of the gift, the son, the donee, carried the slave home with him, and that she was afterwards backward and forward with the father and son, and that it was their practice for the one to assist the other in the crop, by the one who first finished, working with the other. And it was also proven, that all the children were born at the house of the father, and that he said, in allusion to the mother, "that let the possession be where it would, the property was still in the son, and that the mother would have a fine brood for the son, provided the son took care of them." The objection set up to the claim of the defendant, is a provision in the act of 1806, respecting parol gifts. In addition to the foregoing testimony, it was proven by another witness, that at different times, he saw the negroes in possession of old Drew, and never saw them in possession of any other person, and he never heard of any other title but the plaintiff's testator's.

SEAWELL, J. delivered the Judgment of the Court.

We have no difficulty in deciding this case. Whatever may be the effect of the act of limitations when a plaintiff shall endeavor to support his title by it in an action for personal property, we do not think necessary at this time to be decided, because this case steers clear of such question; and as to the clause in the act of 1806, requiring persons who claim slaves in virtue of parol gifts before that time made, to prosecute their actions within a limited time, that also must be understood to relate to *adverse* claims, and can therefore have no bearing in this case.

Whether the witnesses who deposed to the several facts stated in the case, were worthy of credit, was the peculiar province of the jury to decide. If they were believed, the

jury did right; and there is nothing in this case which shews that they ought not to have been believed. Taking the case, therefore, as it appears to *us*, whatever possession the father had, after the gift, was by the permission of the son, and in fact, according to the joint understanding of both: Such possession, therefore, was the possession of the son, and for which the son could have maintained no action, without shewing that the father claimed adversely. Wherefore, we are all of opinion, that the rule for a new trial should be discharged.

Cline v. *Lemon.*

This was an action to recover the penalty given by act of Assembly for turning public roads; and on the trial, the plaintiff proved by the records of the County Court, that an order issued in 1799, for a jury to lay off a road from the Fishdam ford on the South fork of the Catawba, to the road leading from Lincolnton to the Island ford: That they returned, "they had laid off a road from the South fork, crossing Clerk's creek at the old bridge place, to the road leading from Lincolnton to the Island ford:" And that an order issued to an overseer to open said road. The plaintiff then proved that the road was shortly after opened and had been worked on by the overseers for about fourteen years as the public road, as at first cut out, until the defendant turned it from that place and continued it turned for six months. The defendant then offered to prove by some of the jurors who laid off the road, that the road cut out by the overseer and continued, differed from their report in this—that it crossed the creek eighty poles above the old bridge place, called for in their report; and that the defendant whilst overseer, turned the road from where it had been cut out, to the old bridge place;—and that the road, as cut out at first, was complained of by some persons through whose land it passed, as not being the road laid out by the jury. The evidence of the defendant was rejected by the Court,

The plaintiff further proved, that the road first cut out was equally good and nearer than the road crossing at the old bridge place, as turned by defendant.

If the evidence offered by defendant was improperly rejected by the Court, then a new trial to be granted; if properly rejected, judgment for plaintiff.

CAMERON, J. delivered the judgment of the Court:

No principle of law in relation to evidence, is better settled, than that parol testimony in contradiction of matters of record is inadmissible. The testimony offered by defendant was in contradiction of the records of the County Court of Lincoln, confirming the report of the jury, and the road laid out by them. Such testimony was properly rejected by the presiding judge. Motion for new trial overruled.—— Judgment for plaintiff.

Holding v. *Holding*.

The defendant was served with a *sci. fa.* to show cause why a fine *nisi* imposed on him for not obeying a *subpœna*, whereby he was summoned a witness for the plaintiff in a suit between him and *Smith*, should not be made absolute. No sum was stated in the *sci. fa.* Plea: *Nul tiel record*, and *absent by consent of the plaintiff*. The last plea was negatived by the verdict of the jury; and in support of the issue to the Court the plaintiff produced a subpœna, on which was endorsed this return,—— "*Executed. Edmond Prince, D. S.*"

SEAWELL, J. delivered the Judgment of the Court:

In determining this case the question necessarily presents itself, whether it appears by the return on the subpœna, that the defendant was summoned? and we are all of opi-

nion that it does not. The law considers every Court cognizant of the officer to whom it authorises such Court to direct its precepts: And when return is made, the officer is presumed, in *law*, to have come personally into Court and there to have been recognized in virtue of his *commission*: and hence it was unnecessary at common law, to make any return *upon* the writ otherwise than "executed," or the like. The statute of Edward 2, however required that the return should be made in the proper name of the sheriff. When a precept then is directed to the sheriff of a particular county and is returned, and *appears* to have been executed by a person who was sheriff, the presumption exists that he *was* sheriff, until it shall be alleged otherwise by plea; and if the party affected does any act in aid of this presumption, as by pleading to the action, he becomes forever concluded.—2 *L. Ray.* 884. 1 *Sal.* 265.

Again:—Such high confidence does the law repose in the integrity and ability of such officers, that their acts are in most instances, conclusive upon the parties; and this in consideration of the dignity presumed to be attached to the character of him who is appointed to so important an office, and of the oath also, and the sureties of such officer, truly to execute the same. But with respect to a person deputed by the *sheriff* to act for *him*, this Court cannot judicially know him, because his *authority* to act rests upon the *private* delegation of the *sheriff*; and a strong authority in this point is *Woodgate* v. *Knattchbull*, 2 *Term Rep.* 148. per *Buller Just.* and 2 *Bla. Rep.* 834.

In the present case it is not pretended that Edmond Prince, in whose name the return is made, was the sheriff; and if it was, the fact appears otherwise, by the return itself; for he signs "Edmond Prince, D. S." a character perfectly understood in this State, to mean *deputy* sheriff. The subpœna then is directed to the sheriff of Chatham, commanding him to summon the defendant, and it is *certified* to be

executed by an individual, who (to make the most of the case) certifies that he is the deputy of the sheriff.

The return of a sheriff upon a precept is upon oath, and equal to the affidavit of a respectable citizen, and that is the reason why it concludes a party; but the return in the present case, contains no greater verity than the certificate of John Doe. Prince *may* have been the deputy, and the subpœna *may* have been served; but we cannot recognize a return made in the name of any other person than the officer appointed by law. If such officers are required to make the return in their own name, then there is the security the law intended for the citizen ensured by the return.

If we were to sustain such a return, it is placing it in the power of any individual to make a return upon a precept, provided he will add, 'D. S.' There is, moreover, an incurable objection to the scire facias—no sum being stated to have accrued by the forfeiture; and in a case brought up by a judge for his *own sake*, this Court will look into every thing which *incontrovertibly* appears in the proceedings.

Wherefore, we are all of opinion, that the return of the deputy sheriff cannot be respected, and that there be judgment for defendant.

Rossett v. *Thornberry*.

This case came up from the County Court of Wilkes, by *Certiorari*, to the last March term. No bond had been given to the Clerk of the County Court at the time of obtaining the certiorari. At the March term, when the writ and record were returned into this court, a motion was made in behalf of the plaintiff to dismiss the certiorari, for the want of a bond to prosecute it having been given by the defendant, at whose application it was obtained. Whereupon, the defendant immediately executed and filed in court a bond with suf-

ficient security, for prosecuting his writ of certiorari. And set forth on affidavit, that that was the first period at which he knew that it was his duty to file a bond. The motion to dismiss was held up for consideration until this term.

The question for the Supreme Court is, Whether the bond could be received by the Superior Court?

CAMERON, J. delivered the judgment of the Court:

The object of the act of Assembly which requires a bond to be given (according to the directions of the act) by the party obtaining a writ of *Certiorari*, is to indemnify the adverse party against the consequences incidental to the removal of the suit.

The Clerk of the County Court to which the writ goes, is directed to take from the applicant, such a bond as the act requires; if he fails in the performance of this duty, the ends of justice can no otherwise be attained than by such bond being taken in this Court, before a trial is had between the parties.

In this case, the applicant for the writ is in no fault. The omission of the Clerk of the County Court, should not drive him from the Superior Court *unheard*. He has done all that is in his power (and he has done enough) to secure his adversary, in the event of his being ultimately successful in the contest.——Let the bond be received, and the suit retained for trial.

M'Guire v. *Blair*.

This was an action on the case for words; in which the plaintiff charged in his declaration, that the defendant had spoken of him these words, to wit, "*He* (meaning the plaintiff) *one of our little Chowan justices of the peace, was taken up a few nights ago playing cards with negro Quomano.*

in a rookery box, and committed to jail, and remained there until next day nine or ten o'clock, and then was turned out, and split for the country." After a verdict for the plaintiff, it was moved, in arrest of judgment, that the words stated in the plaintiff's declaration are not actionable.

SEAWELL, J. delivered the opinion of the Court:

The words stated in the declaration to have been spoken by the defendant, are not in themselves actionable, as they impute no crime which, if true, would subject the plaintiff to infamous punishment. And it is not charged in the declaration that the plaintiff was a justice, or that they were spoken of him in relation to his office.——There must therefore be judgment for the defendant.

Beaner and Wife v. *Pilley and Wife.*

The plaintiffs brought an action of ejectment against the defendants to March Term, 1815, of Beaufort County Court. At the same term the defendants employed counsel, who appeared and entered into the common rule, &c. but the defendants did not give bond for costs, as required by act of Assembly, before making defence. For want of such bond, the plaintiff's counsel struck out from the appearance docket the plea entered for them, and entered up judgment by default final against the casual ejector. A writ of possession issued, under which the plaintiffs were put into possession. At June Term, 1815, the defendant, on an affidavit, stating "that he would have given security for the costs had he known it was necessary, and that he believes he has a good title to the lands in dispute," obtained a rule on the plaintiffs to show cause why the judgment should not be set aside, a writ of restitution awarded, and the defendants be permitted to plead on giving bond as required by act of Assembly. At September Term, 1815, the rule being made absolute,

the plaintiff appealed to the Superior Court, from whence the case is transferred to this Court.

CAMERON, J :—By the application of a positive statute, the defendants have been turned out of possession of the land in question, without having the judgment of a Court of Justice on the merits of their title. Such a course is at all times to be avoided, when practicable, consistently with the laws of the land and the powers of the Courts. When the suit of a plaintiff in ejectment is dismissed by the application of the same statute, the costs which he incurs is all the evil he is subjected to. He may recommence his suit and be heard on as advantageous grounds as if his *first* suit had progressed to hearing on the merits. The defendant in ejectment, who is *turned out of possession* without a trial, if compelled to become plaintiff to assert his title, loses many advantages which he possessed as defendant in possession.

New trials instituted and established as a *mean* of attaining the ends of justice, were not formerly countenanced in the action of ejectment, because the injured party might bring a new ejectment. But as the Courts became more liberal, they granted new trials in ejectment where the party applying would suffer by a change of possession; as where the plaintiff has obtained a verdict, it makes a great difference to the defendant whether he has a new trial or is forced to become plaintiff in a new ejectment.

"We should therefore," said Lord Mansfield in the case of *Clymer* v. *Littler*, 1 *Bla. Rep.* 348. "rather lean to new trials on behalf of defendants, in case of ejectments, especially on the footing of surprise." *Runnington on Ejectment*, 398.

We are all of opinion, that the application of the defendant rests on higher grounds than if the cause had been tried, a verdict found for the plaintiffs, and a motion made for a new trial on the part of the defendant. *Audi alteram partem*, is

a maxim in the law, founded in justice and highly to be respected. The order of the County Court, making the defendant's rule on the plaintiff was correct.——Judgment affirmed.

State v. *Landreth.*

The defendant was indicted for malicious mischief, in stabbing with a butcher's knife, a mare the property of *Young*; but from the circumstances disclosed in the evidence, HENDERSON, J. before whom the cause was tried, was inclined to doubt whether the facts proved constituted the crime. He therefore recommended the jury to find a special verdict; in which it is stated, that the defendant took the mare from his corn-field, where she was damaging his growing corn, to a secret part of the county, where he inflicted the wound, with a view of preventing a repetition of the injury.

The case was submitted.

TAYLOR, C. J. delivered the opinion of the Court:

We do not think that the facts found in this case, bring the ofience within the common law notion of malicious mischief. That seems to be confined to those cases, where the act is done in a spirit of wanton malignity, without provocation or excuse, and under circumstances which bespeak a mind prompt and disposed to the commission of mischief. It is essential, says *Blackstone*, to the commission of this offence, that it must be done out of a spirit of wanton cruelty, or black and diabolical revenge. 4 *Bl.* 244.

The conduct of the defendant was certainly highly reprehensible and barbarous, yet it was prompted by the sudden resentment of an injury, which is calculated, in no slight degree, to awaken passion; and there is a difference which

every one must feel, between an act committed under such circumstances, and one where the party goes off his own land in pursuit of an animal which had done him no injury, for the sake of exercising cruelty, or perpetrating wanton mischief.——Judgment for the defendant.

Britton, Guardian of Mary Ann White and others v. *Browne.*

The bill states that the complainants are the children of John D. White, who died intestate. That administration on his estate was granted to the defendant and Jonathan Jacocks now dead. That the administrator sold all the personal estate of their intestate, and, among other things the negroes, which form the subject of this suit. That before the sale of the negroes, it was agreed on by the administrators, that they would purchase the negroes for the complainants and pay for them out of their commissions. That at the sale, the defendant declared he was purchasing in the negroes for the children of his intestate; by reason of which declaration they were purchased at £140 0 6, when at that time they were worth £1000.

The bill further states that the other administrator, Jacocks, in his lifetime, did charge himself with *one-half* of the price bid for the negroes; and conveyed by bill of sale to the complainants, all his right to them acquired or supposed to have been acquired, under the purchase aforesaid. That the defendant Browne, possessed himself of the negroes, and has remained in possession of them ever since, enjoying the labor of them. That the guardian of the complainants has tendered to him £70 0 3, being the other half of the price of the negroes, and demanded possession of the slaves and an account of the profits, &c. That the defendant has refused to receive the money and deliver up the negroes to the guardian of the complainants, &c.

The bill prays that the defendant may be decreed to convey to the complainants all his right or title to the negroes, to deliver possession of them to their guardian, and to account for the hire and profits.

The defendant by his answer admits that the negroes were sold, but alleges that a certain Exam Lawrence, who the defendant had previously requested to attend and buy the negroes for the defendant, became the purchaser for and on behalf of the defendant. That he mentioned to Jacocks, and perhaps to some others, his intention of buying the negroes and giving them to the complainants at some future day (negro boy Henry excepted) if he could settle the estate without loss or injury to himself.

He denies such agreement between Jacocks and himself as stated by the complainants. That he never intended to let them have the negro Henry; and as to the rest, they were to have them or not as defendant thought proper. That he purchased the negroes without any solicitation from the complainants; and that his declarations in their favor were voluntary without consideration. That he always meant to reserve the power of disposing of the negroes as his discretion might direct him. He further states, that he has paid $300 more than assets have come to his hands. That he is probably liable for $42.5 more, being the amount allowed the widow for one year's support—there being no crop, &c. —which allowance he is advised was not warranted by law. That, as well as he recollects, he made no declaration at the sale of the said negroes, that he was purchasing them for the complainants. He denies that any part of the purchase money was paid by or charged to Jacocks; alleges that the whole was charged to and paid by himself: admits the possession of the negroes, the tender of £70 0 3 by the guardian of complainants, but denies that he is bound to deliver up the negroes on the tender of any sum of money.

This cause was referred to the Supreme Court, on the case arising out of the bill and answer, as a case agreed.

CAMERON, J. delivered the judgment of the Court:

An administrator, by accepting the appointment conferred by the law, becomes a trustee for creditors and the next of kin of the intestate. Among the latter, he is bound to distribute the personal estate, after satisfying the claims of the former, out of it.

Entrusted by law with the management of the intestate's effects, and credited by it as *agent* for paying debts and distributing the surplus, he is forbidden by principles of just and obvious policy to *sell to, and purchase from himself.* If the law were otherwise, who would (in such case) fix the price of the article sold between the seller and the buyer, when both characters united in the same person, and he interested on *one* side only.

The negroes in question are acknowledged by the defendant, as well as stated by the complainants, to have been the property of John D. White the intestate. They constitute a part of the fund out of which his creditors, (if any there be) ought to be satisfied; the defendant could not by a purchase for himself at *his own* sale, avoid the payment of his intestate's debts, but would be liable to creditors to the full *bona fide* value of the property so sold. Nor can he by such purchase, real or pretended (it matters not which) protect himself against the claims of the complainants, but must account in like manner to them, as to creditors.

The decision of this Court must therefore be the same, whether the defendant purchased the negroes in question, upon an express declaration that he was buying them for complainants, as they allege, or for himself by his agent, as he contends,

In either point of view, we hold that he is bound to account for the negroes and to deliver the possession of them to the complainants.

Motion to dismiss the bill overruled, and the cause retained for further proceedings.

Jones v. *Thomas & Luke Ross.*

This was a writ of error to reverse a judgment of the County Court of Martin. The error assigned was, that judgment had been entered up against one defendant, in a joint action of assumpsit against two; that the jury found that one did assume, and the other did not.

The case was submitted.

TAYLOR, C. J. delivered the opinion of the Court:

The rule of the common law is free from doubt, that where, in cases of contract, an action is brought against several, which cannot be supported against all, the plaintiff cannot have judgment; because the contract proved differs from that declared on—a joint contract is declared on, a several one is proved. But this rule is altered by the act of 1789, c. 57, § 5, which provides, "that in all cases of joint obligations or assumptions of copartners or others, suits may be brought and prosecuted on the same, in the same manner as if such obligations or assumptions were joint and several." Now the plaintiff sued both, and so far treated it as a joint promise, yet the verdict of the jury has made a severance; and as no time is limited within which the plaintiff is bound to make his election, there does not seem to be any good reason why it may not be made as well after the verdict as before: In the same manner as where a joint action is brought against two upon a tort, in its nature joint and several, and upon not guilty being pleaded, a verdict is given against one

and in favor of the other, the plaintiff shall have judgment against him who is found guilty.——The judgment must be affirmed.

Sawarusa & Longboard v. the Heirs, &c. of Wm. King.

On the 5th of June, 1717, Governor Eden, by and with the advice of the Lords Proprietors' deputies, made a grant of a tract of land, lying on the south side of Morrahock (now Roanoake) River, to King Blount, for himself and the Tuscarora tribe of Indians.

On the 13th Dec. 1775, Whitmill Tuff-Dick, King of the said tribe of Indians, for himself and his nation, made a lease in writing under seal, of a part of the aforesaid tract, to Wm. King, for 99 years—the lease contains a covenant on the part of said Wm. King, his heirs, &c. to pay to the lessors, their heirs and successors, the yearly sum of during the continuance of the lease.

King took possession of the land described in the lease, immediately after its execution—and he, and those who claim under him, have had the undisturbed possession of said land, from that time continually up to the bringing of this suit.

In April, 1726, obtained a grant from the Lords Proprietors' deputies for the same land mentioned in the lease from the Tuscaroras to Wm. King—and on the 21st of October, 1777, the said Wm. King obtained a conveyance in fee-simple for the same land, derived from the grant of 1726.

Some of the Indians of the aforesaid tribe remained in actual possession of part of the land comprehended in the grant of 5th June, 1717, until June, 1803, when they finally removed from the said land to the state of New-York, leaving one of their tribe in the county of Martin (not on the lands granted to them) to attend to their concerns, receive their rents, &c.

After their removal from the lands so granted on the 5th of June, 1717, in June, 1803 the defendants refused to pay the rent reserved by the lease. This action was brought on the covenant contained in the lease, to recover the rents in arrear. The defendants opposed the plaintiff's claim for the rents, on the following grounds: 1. That by the act of 1748, c. 3, § 3, it is enacted, "that it shall and may be lawful for any person or persons, that have formerly obtained any grant or grants, under the late Lords Proprietors, for any tracts or parcels of land within the aforesaid boundaries (meaning the boundaries of the land described in the grant to the Indians of the 5th June, 1717) upon the said Indians deserting or leaving said lands, to enter, occupy and enjoy the same, according to the tenor of their several grants, any thing herein to the contrary notwithstanding." 2. That the Indians having removed themselves from the said land, the defendants claim the possession of that which they occupy, under the title derived from the grant of April, 1726, and not under the lease made to their ancestor by the Indians in Dec. 1775.

The jury, under the charge of the Court, found for the plaintiffs, the amount due for the arrears of rent. A motion for a new trial was made for misdirection of the Court, which being overruled, the defendants appealed to this Court.

CAMERON, J. delivered the judgment of the Court:

If the title of the Tuscarora tribe of Indians to the lands leased by them to the defendants' ancestor, depended solely on the confirmation it received by the 2 § of c. 3, acts 1748, to which the 3 § (relied on by the defendants) is added, by way of proviso, the grant and the condition annexed to it, would now be regarded as forming one *entire* contract between the sovereignty of this State and the tribe of Indians. Their title, however, rests on higher grounds. The Governor and the deputies of the Lords Proprietors, having full and competent powers for that purpose, did, by the grant of

the 5th June, 1717, vest the lands thereby granted, in the Tuscarora tribe, absolutely and unconditionally. The grant recites, that it is made "in consideration of *great services* rendered by the said tribe of Indians to the Government, and of their agreeing to relinquish all claim to other lands, which had been before allotted to them." It contains no condition by which the Indians are bound to reside actually and perpetually on it. It is a conveyance (in substance) in fee-simple, by those having power to convey, to persons capable of taking and holding lands in fee.

The acts of the General Assembly confirming their title, providing for their comfortable enjoyment of it, by prohibiting white persons from hunting and trespassing on their lands, were such as policy and justice dictated, and are entitled to approbation and support; but the proviso in § 3 c. 3, 1748, under which the defendants claim, being in derogation of rights actually vested in the plaintiffs by the highest authority, cannot be regarded, or allowed to have any weight in deciding this case.

If, however, the Assembly of 1748, had power to annex the condition contained in the proviso referred to, they had equally a right afterwards, to modify, alter, or abrogate that condition. It cannot be contended, that the aforesaid 3 § 3 c. 1748, is irrepealable, and that all which has been done by subsequent assemblies for the modification of it, is void, because repugnant to that proviso.

Pursuing the acts of Assembly on this subject, we find that by c. 16 of acts 1778, certain leases made by the Indians were rendered valid—that the lands leased to *Jones*, and to *other* persons, shall revert to, and become the property of the State, at the expiration of the leases, if the nation be extinct; and the lands now belonging to, and possessed by the Tuscaroras, shall revert to, and become the property of the State, whenever the said nation shall become extinct, or shall

entirely abandon, or remove themselves off the said lands, and every part thereof."

The lease made by the Indians to Wm. King, is within the operation of this act; and if any effect is to be allowed to legislative will on this subject, a very different appropriation is made of the land granted to the Indians, on the happening of either of the events mentioned in the act of 1778, from that made by the act of 1748, under which the defendants claim.

We further find, that by the act of 1802, c. , the Indians were authorised to lease out their unleased lands, to extend other leases. Commissioners were appointed under its authority to superintend and direct the management of their concerns; and they finally agreed by treaty with this State (with the approbation and consent of the General Government) at the expiration of the leases, to abandon all claims to the lands, to the State. It is expressly declared and provided by said act, "that the possession of the lessees shall be considered the possession of the Indians."

At the time the act of 1802 passed and took effect, the plaintiffs, either by themselves or their lessees, were in possession of all the land comprehended in the grant of the 5th of June, 1717. The General Assembly were apprized that the Indians intended to remove from it; they had agreed to renounce all claim to the land on the expiration of the leases made, and to be made under the said act, for the purpose of securing to them the full benefit of the leases; to allay their apprehensions that their removal from the land might destroy their claims to the rents secured by their leases; in short, to obviate the *very objection* made by the defendants against the plaintiff's demand, under color of the proviso in the 3d sect. 3d c. 1748, the General Assembly, with a proper regard to liberality and justice, enacted and declared that the possession of the lessees should be considered the

possession of the plaintiffs;—In effect saying that the removal of the Indians from the land should not prejudice their claim to the rents due and to grow due on leases made and to be made by them.

Viewing this case with reference merely to the acts of Assembly passed on this subject, and admitting that the plaintiff's claim must be governed by those; it is very clear to us that they are entitled to recover.

There is however, another ground, on which the plaintiffs are entitled to prevail. Admitting (for the sake of argument) that the fee-simple of the land comprehended in the lease, vested by the grant of 1726, the mesne conveyances under it, coupled with the actual removal of the Indians, in Wm. King, the ancestor of the defendants (on which point we give no opinion): yet, as he accepted the lease on which this action is brought, and took possession of the land under it, he could not, and those claiming under him cannot, during the continuance of the lease, say that the plaintiffs have no right to recover the rents reserved and secured by it. Lord Coke says, "if a man take a lease of his *own land*, by deed indented, reserving rent, the lessee is concluded." *Co. Lit.* § 58. 47 B.——The Court is unanimously of opinion, that the motion for a new trial be overruled, and that there be judgment for plaintiff.

Richardson v. *The Administrator of Fleming.*

This was an action on a promissory note brought in New-Hanover Superior Court, where a verdict was entered up for the plaintiffs subject to the opinion of this Court, on the following case agreed. The defendant pleaded, "*fully administered*, *former judgment*, and *no assets ultra*," at August Sessions, 1811, of New-Hanover County Court, being the sessions at which the writ was returnable. The judgments pleaded are, one entered on the appearance docket of the same

sessions, and confessed in favor of *G. Hooper*, the other entered on the reference docket of the same sessions, and confessed in favour of *A. M. Hooper*, according to specialty filed. To the latter judgment a special replication is filed, that it was confessed *per fraudem*, and on an instrument of writing which was void for want of registration. This specialty was a bond in the penalty of £5000, conditioned to be void upon *Fleming* executing a marriage settlement, within six months after his marriage with *Mary Schaw*, whereby her estate shall be secured to her and the issue of such marriage.

The question arising from the case is, whether the judgment confessed to *A. M. Hooper* protected the assets to that amount?

Nash, for the plaintiff, cited *Bac. Abr.* 77, 2 *Saunders* 50. *Toller* 338. 1 *Term* 690. *Touchstone* 479. *Act of* 1785, *c.* 12.

Browne, for the defendant, cited *Yelverton* 196.

TAYLOR, C. J. delivered the opinion of the Court:

We do not pretend to touch the question as to the validity of this marriage settlement or contract against creditors, because it is not presented by the case or pleadings.

The only inquiry is, whether *Fleming* himself would have been bound by it without registration, if suit had been brought against him; and it is very clear that he would upon the express words of the act of 1785, c. 12, which makes such contracts void only against creditors.

Now the liability of the intestate devolved upon his administrator; and unless we could perceive some way in which he could have pleaded so as to have prevented a recovery, we must pronounce that he had a right to confess judgment, and that the assets are protected to the amount of it. The Clerk of New-Hanover Superior Court must therefore enter up judgment, according to the agreement of the parties, that the defendant has fully administered.

Richard B. Jones & wife v. *Blackledge.*

This suit is brought on a note of the defendant payable to *Geo. M. Leach*, *M. J. Spaight*, and *Frances Leach* (now the wife of *R. B. Jones*) of whom the said *Frances* is survivor.

Hugh Jones, attorney in fact for *R. B. Jones* and wife, moves for leave to dismiss the suit. This motion is resisted on behalf of the executors of *Wood*, to whose use, the endorsement of the writ states, that the suit is instituted; and who, it is alleged, are beneficially interested in the note upon which the suit is brought, and claim a right to collect the money sued for, derived from the facts disclosed in the accompanying affidavits.

The question referred to this Court is, whether *Hugh Jones*, the attorney in fact of *R. B. Jones* and wife, has a right to dismiss the suit?

TAYLOR, C. J. delivered the opinion of the Court:

It must be acknowledged that adjudications have taken place in England as well as in this State, wherein courts of law have recognized and protected the rights of the parties beneficially interested in the suit, when the nominal party has attempted to defeat them. Of these cases which have occurred in this State, it is believed that none have been decided under such circumstances as to confer on them the weight of conclusive authorities; for if they had, we should not feel ourselves justified in unsettling the law. And as to the decisions in England, they are in conflict with one which contains such forcible reasoning in favor of the opposite doctrine, as to convince us that it is founded on true principles of law, from which other cases have departed, under the influence, no doubt, of a desire in Judges to administer the real justice of every case, without reflecting on

the inconvenience and mischief likely to ensue from confounding the boundaries of law and equity. As the question now occurs for the first time in this Court, we think it right to restore the law of it to its ancient foundations, and to ground ourselves in doing so on the case of *Bauerman* v. *Radenius* in 7 *Term*, 633.

In that case Lord Kenyon observes, "our courts of law consider only legal rights: our courts of equity have other rules by which they sometimes supersede those legal rules; and in so doing they act most beneficially for the subject. We all know, that if courts of law were to take into their consideration all the jurisdiction belonging to courts of equity, many bad consequences would ensue. If the question that has been made in this case had arisen before Sir M. Hale, or Lords Holt, or Hardwicke, I believe it never would have occurred to them, sitting in a court of law, that they could have gone out of the record and considered third persons as parties in the cause. It is my wish and my comfort to stand *super antiquas vias*. I cannot legislate, but, by my industry I can discover what our predecessors have done, and I will servilely tread in their footsteps."

The Court are in this case all of opinion, that *Hugh Jones*, who claims to be attorney in fact of *R. B. Jones* and wife, ought upon verifying his power of attorney, to be allowed to dismiss the suit.

Perry v. *Fleming*.

Debt on bond to which *non est factum* was pleaded. The subscribing witness to the bond, had soon after its execution purchased the right, but without endorsement; but in order to restore his competency as a witness, signed and sealed a release of all his right to *Perry*, the plaintiff, who, not being at Court, the release was deposited in the clerk's office for his use; and the witness was allowed to prove the execution of

the bond. The defendant offered evidence of fraud in procuring the bond, practised on him by the plaintiff and the witness, which the Judge who tried the cause would not receive; on which a verdict was entered up for the plaintiff. On a motion for a new trial, the case was referred to this Court, on the points above stated.

No argument was made in the case.

TAYLOR, C. J. delivered the opinion of the Court:

We understand the principle of evidence to be well established, that the interest to disqualify a witness must exist at the time of trial; so that, if before then, the witness either removes the interest, or does all that can reasonably be expected from him to remove it, his competency is restored. The interest of the witness may arise from his being answerable to one of the parties, or that party to him, in the event of the cause being unsuccessful. A release from the party in the first case or a refusal by the witness, and a release from the witness in the latter case or a refusal by the party, alike restores the competency. This doctrine was recognized in the case of *Fowler* v. *Welford*, *Douglas* 139, where it is very sensibly observed by Mr. Justice Ashurst, "that every objection of interest proceeds on the presumption that it may bias the mind of the witness; but that presumption is taken away by proof of his having done all in his power to get rid of his interest."

As the plaintiff was not present when the cause was about to be tried, and it was necessary for the witness to divest himself of the interest, there is no way in which he could more formally and effectually do it than by depositing the release in the clerk's office for the use of the plaintiff: and such conduct does, in our opinion, bring this case within the reason and spirit of the rule, and renders the witness competent.

But on the other point in this cause, we are of opinion, that the evidence offered by the defendant of fraud in obtaining the bond, was improperly excluded. Such evidence, if true, goes in support of the plea of *non est factum*, and tends to show that the bond never had a legal existence. *Lester* v. *Zachary*, *Jan. Term*, 1814. What particular circumstances of fraud and imposition will render a bond void in law, it would be impossible to state *a priori*. They are infinitely diversified, and must of necesssity be entrusted to the sound and legal discretion of the Judge who tries the cause. For this reason alone, therefore, we all think there ought to be a new trial.

The Governor to the use of Gabie v. *Meilan, Jocelyn, and Foote.*

Debt on bond entered into by *Meilan*, as administrator of *Nathaniel W. Ruggles*, otherwise called, *Nathaniel Ruggles*, and *N. W. Ruggles*. The breaches assigned were, not making and exhibiting an inventory within ninety days ;— not truly administering and making a just account of his administration within two years. Pleas—" condition performed, and *plene administravit*."

On the trial of the cause in New-Hanover Superior Court, it was admitted that the breaches assigned had been committed ; whereupon the plaintiff, in order to show the damage he had sustained, offered in evidence the record of a recovery he had obtained against *Meilan*, as administrator of *Ruggles*. The defendant objected to this evidence, on the ground that he had been appointed administrator to *Nathaniel Ruggles*, in which form the bond was given, and that the record offered in evidence shows that a suit had been instituted against him by *Gabie*, as administrator of *N. W. Ruggles*, and judgment rendered against him as *executor*.

It was agreed by the parties that if the evidence be deemed admissible, then the following reason in arrest of judgment shall be considered as having been regularly entered, and be decided by this Court, for the sake of avoiding delay.

That the bond is made payable to *Nathaniel Alexander*, the Governor of the State and to his successors in office; whereas, it should have been made payable to the chairman of the County Court and his successors in office.

On the trial in New-Hanover, it was proved that a person named *Nathaniel W. Ruggles*, called *N. W. Ruggles*, died in Wilmington in September, 1807, and that *Meilan*, about three months after his death, took into his possession his effects, collected and paid his debts, and acted in all respects as his administrator; that no other person by the surname of *Ruggles* was recollected to have lived or died in New-Hanover County; and that no other letters of administration have been granted in that county to *Meilan*, except those before described.

TAYLOR, C. J. delivered the opinion of the Court:

This is a struggle to avoid the payment of the plaintiff's debt, upon two objections purely technical; and to be sure, if they are founded in point of law, they must prevail, whatever the justice of the case may call for otherwise.

The first objection goes to the introduction of the judgment recovered by *Gabie* v. *Meilan*, because the suit was brought against him as administrator of *N. W. Ruggles*, and the judgment was entered against him as *executor*. The inference drawn from this ground of objection is, that *Meilan* is not liable as administrator of *Nathaniel Ruggles* for a recovery had against him in a suit, which described him as the administrator of *N. W. Ruggles*; that the administration bond binds him only as the administrator of *Nathaniel Ruggles*, and he cannot otherwise be made liable.

If the objection be founded on the idea that there were two persons of the name of *Ruggles*, that is repelled by the evidence spread upon the record in this case, and by the manner of describing him in the declaration, as *Nathaniel W. Ruggles*, otherwise called *Nathaniel Ruggles*, and *N. W. Ruggles*.

The ground of variance is equally untenable, because if any advantage could have been taken of it, the proper time was, when *Meilan* was sued as the administrator of *N. W. Ruggles*. But, instead of availing himself of the variance between the administration bond, and the way in which his intestate was described in the writ, he waived all objection on that score, and expressly admitted that he was the administrator of *N. W Ruggles*, by confessing a judgment in that character. The objection that the judgment was rendered against him as executor, does not seem to be founded in point of fact. He is so called upon the docket, though a clerical error; but the writ describes him as administrator, and when he signs his name to the confession of judgment, he recognizes the character in which he is sued. We must therefore take it from all these proceedings, that the *Nathaniel Ruggles* upon whose effects *Meilan* administered, is the same *Nathaniel W. Ruggles*, as whose administrator he confessed a judgment to *Gabie*; to enforce which judgment is the object of the present suit. According to the plainest rules of pleading, *Meilan* is not estopped to deny this fact. Thus if a defendant omits to plead a misnomer, he may be taken in execution by a wrong name, 2 *Str.* 1218. If *A* give a bond by the name of *B*, and being sued by the name of *B*, plead the misnomer, the plaintiff may estop him by saying that he made the bond by the name of *B*. *Comyn's Dig. Abatement F.* 17.

With respect to the reason in arrest of judgment, we do not, on full consideration, think it ought to prevail. It is true, that the act of 1791, directs such bonds to be made pay-

able to the Chairman of the Court, changing in that respect the act of 1715, which directs them to be made payable to the Governor. But the act is merely directory, and does not render them void, or voidable, if taken otherwise. The defendants have then given a bond in a form which the law did not compel them to do; but it is conditioned for the most just and useful purposes, viz. to dispose of the goods of the deceased among his creditors and next of kin; and the defendants have entered voluntarily into such engagement. We think the law will lend its aid in enforcing this bond; and that in reason and principle, the case of *Johnson* v. *Laserre*, is an authority for the plaintiff. "Error upon a judgment in a *scire facias*, sued in the Common Pleas by *Laserre*, upon a recognizance entered into by *Johnson* to *Laserre*, in which judgment was given for *Laserre*. *Johnson*, the defendant, in the Common Pleas, prayed there *oyer* of the recognizance and the condition, which condition recited that *Hugh Howard*, and *Thomasere*, his wife, executors of *John Langston*, had sued a writ of error returnable in the King's Bench, upon a judgment recovered in the Common Pleas by *Laserre* against *Howard* and his wife; if therefore, the said *Howard* and his wife prosecute the writ of error with effect, &c. and paid the sum recovered and also the damages and costs that should be awarded, if the judgment should be affirmed, &c. that then, &c. after which *oyer* had, the said *Johnson* pleaded in bar of the *scire facias*, the act of 16 & 17 *Car.* 2. c. 8, to prevent arrests of judgments, and superseding executions, and the proviso therein, that that act should not extend to any writ of error to be brought by an executor, &c. *per quod*, the said recognizance taken contrary to the said statute *vacua in lege existit*.—And upon demurrer, judgment was for the plaintiff *Laserre*, in the Common Pleas; and Mr. *Strange*, for the plaintiff in error, insisted that executors by the act of *Car.* 2, were not obliged to enter into recognizances upon writs of error brought by them, upon judgments obtained against them, and that this appearing to be such a recognizance, was void.

But per *totam Curiam*, if a man will voluntarily enter into such a recognizance, it is good at common law. And judgment was affirmed." 2 *Ld. Raym.* 1460.

Upon the whole matter, therefore, the Court are of opinion, that the Clerk of New-Hanover Superior Court be directed to enter up judgment against the defendants for the sum of £5,000, the penalty of the bond, to be discharged by the payment of £594 12 9, with interest from the 1st of January, 1810, until paid.

Mariner & wife v. *Bateman & Rea.*

This was a bill in equity, the object of which was to exonerate the complainants from the payment of certain costs, and charge them upon the estate of Henry Norman, dec. which costs had been incurred from contesting the probate of the will of the said Henry, under the following circumstances.

Henry Norman made a will, in which he appointed his wife Sarah, one of the complainants, together with two other persons, his executrix and executors. This will was admitted to probate at April sessions of the County Court, in 1804, and the executors proceeded to transact the business of the estate.

At October sessions of the same year, another will was offered for probate, in which the defendant Bateman was appointed one executor, the complainant Sarah another, and the defendant Fanny Rea a devisee and legatee. The probate of this will was contested by the complainants (Sarah being now married to Mariner) but it was, after several trials in the County and Superior Court, finally established; upon which the complainants qualified as executors to it, together with the defendant Bateman. The expense of these various litigations amounted to near one thousand dollars.

TAYLOR, C. J. delivered the opinion of the Court:

Costs are made discretionary in this Court, with a view that they may follow as nearly as possible the conscience of the demand; and there is no instance of trustees being chargeable with them where they have acted fairly, although they fail in establishing a claim. 1 *Ves. jr.* 205.

The conduct of these complainants was such as might have been reasonably expected from executors who were disposed to do their duty; for seeing a will coming forward for probate at a considerable interval after the testator's death, and after the notoriety of one will being proved, it was natural to suspect the fairness of the attempt, and just to resist it, until it was established by testimony. It would be a great discouragement to executors to oppose even forged wills, if it were understood that it must be done at the private hazard of paying the costs out of their own estate, in the event of a failure. Where their conduct is wanton and litigious, and the Court can collect that from the facts of the case, it will require the application of a different rule.

All these expenses have arisen from the circumstance of the testator's having left two wills, without giving any reason to the person who had the custody of the prior, to believe that it was revoked by a subsequent one. It is equitable therefore that the costs should be paid out of his estate. Where a testator by his will has occasioned difficulties, the costs ought to be paid out of his assets. *Studholme* v. *Hodgson & al.* 3 *P. Wms.* 303. *Jotliffe* v. *East*, 3 *Bro. Ch. c.* 25. *Pearson* v. *Pearson.* 1 *Schoale & Lefroy*, 12.

Heirs of Orr v. *Ex'rs & Devisees of Irwin.*

This was a bill in equity for the specific conveyance of a tract of land, for which the bill charged that *R. Irwin* had, in his life-time, procured a grant to issue in his own name.

The executors pleaded to the jurisdiction of the Court, that the lands lay in Tennessee, the Courts of which State could alone take cognizance of such a claim.

TAYLOR, C. J. delivered the Judgment of the Court:

Though it may be admitted that the decree of this Court cannot act directly upon lands, yet its power may be exercised over all those persons who are within its jurisdiction. So that if a decree should be made ordering a conveyance, the party disobeying it, might be attached for the contempt. It seems to be a well settled principle, that any contract made, or equity arising between parties in one country, respecting lands in another, will be enforced in the Chancery Courts of that country where the parties reside, or can be brought within the jurisdiction of the Court. 1 *Eq. Ab.* 133. 1 *Vern.* 75, 135, 419. 3 *Atk.* 589. 3 *Vesey, jr.* 170.

To these cases may be added, a decision made by the late *Chancellor Wythe*, in Virginia, which may be cited as equal in point of authority, if not superior to any of the British decisions, from the luminous and conclusive reasoning on which that upright and truly estimable Judge founds it.

Clarum & venerabile nomen.

His words are, "the fourth question is, whether a Court of Equity in this Commonwealth can decree the defendants, who are within its jurisdiction, to convey to the plaintiffs lands which are without its jurisdiction?

"The power of that Court being exerciseable generally over persons, they must be subject to the jurisdiction of the Court; and moreover, the acts which they may be decreed to perform, must be such as, if performed within the limits of that jurisdiction, will be effectual.

"That the defendants are subject to the jurisdiction of the Court, and amenable to its process, hath not been denied; and that a charter of feoffment containing a power of attor-

ney to deliver seisin, a deed of bargain and sale, deeds of lease and release, or a covenant to stand seised, executed in Virginia, would convey the inheritance of lands in North-Carolina, as effectually as the like acts executed in that State would convey such inheritance, hath not been denied, and is presumed, until some law there to the contrary be shewn, because the place where a writing is signed, sealed and delivered is in the nature of the thing, is unimportant.

"If an act performed by a party in Virginia, who ought to perform it, will be effectual to convey lands in North-Carolina, why may not a Court of Equity in Virginia, decree that party, regularly brought before that tribunal, to perform the act?

"Some of the defendants' counsel supposed, that such a decree would be deemed by our brethren of North Carolina, an invasion of their sovereignty. To this shall be allowed the force of a good objection, if those who urge it will prove that the sovereignty of that State would be violated by the Virginia Court of Equity decreeing a party within its jurisdiction, to perform an act there, which act, voluntarily performed any where, would not be such a violation.

"The defendant's counsel objected also, that the Court cannot, in execution of its decree, award a writ of sequestration against the lands in North-Carolina, because its precepts are not authoritative there. But this, which is admitted to be true, doth not prove that the Court cannot make the decree; because although it cannot award such writ of sequestration, it hath power confessedly to award an attachment for contempt, in refusing to perform the decree. This remedy may fail, indeed, by the removal of the defendants out of the Court's jurisdiction, yet such a removal after the party had been cited, is not an exception which can be interposed to prevent a decree. A Court of Common Law may enter up a judgment against him, who, by removal of his

goods and chattels with himself, after having pleaded to the declaration, or after having been arrested, rendereth vain a *ca. sa.* or a *fi. fa.*

"From a contrary doctrine to that now stated and believed to be correct, may result both inconvenience and a failure of justice.

"1. A man agrees to sell to another, or holds in trust for another, lands in Georgia, Kentucky, or one of the new States north west of the Ohio, but he cannot be decreed to execute the agreement, or to fulfil the trust, by any tribunal but that in one of those countries, several hundred miles distant from the country *ex. gra.* North-Carolina, in which both parties, and the witnesses to prove matters of fact controverted between them, reside; like and greater inconveniencies may happen in numberless other cases; whereas a case can rarely if ever occur, the discussion of which can be so convenient to the defendant in any other, as in his own country.

"2. An agent employed to purchase lands for people intending to emigrate to America, or for others, having laid out the money deposited for that purpose with him by them, and having taken conveyances to himself, or to a friend for his use, refuseth not only to make title to his constituents, but also to discover the lands purchased. They meet with him in one of the States, and in the Court of Equity there, file a bill against him, praying for a discovery and a decree for conveyance; he excepts to the jurisdiction of the Court as to any lands not lying within that State, and denieth by answer, that any lands within that State were purchased by him for the plaintiffs, which was true. The bill in such case, according to the doctrine of the defendants' counsel in the principal case, must be dismissed, and this must be the fate of every other bill, until he shall have the good fortune to find out in what State the lands purchased are; and if they be in several States, a bill must be filed in every one. If to

this be said, the Court may compel a discovery though they proceed no farther, the answer is, that this is directly the reverse of the rule in the Court of Equity, viz. that the Court, when it can compel a discovery, will complete the remedy, without sending the party elsewhere for that purpose, and decree to be done, what ought to be done, in consequence of the discovery." *Wythe's Rep.* 143. *Farley* v. *Shippen.*

We have transcribed thus largely from the work of the *Chancellor*, because it is not in every library, and the discussion of the question, which is new in this Court, being the most able and copious we have any where met with, cannot fail to be instructive to the student, and acceptable to the practitioner, who will both be disposed to allow, that the excellence of the matter atones for the length of the extract. ——Plea overruled with costs.

Dunwoodie's Ex'ors v. *Carrington.*

Detinue for five negroes. A special verdict was found, stating the proofs and circumstances at great length; but the following extract is all that is necessary to a thorough comprehension of the points in the cause.

Warren the plaintiff, as executor of *Dunwoodie*, hired the slaves sued for two years successively to the defendant, who on the expiration of the last year, refused to restore them, resting his defence on the last will of *Henry Dunwoodie*, the plaintiff's testator, in which he devises all his property to his wife *Elizabeth* during her life, and after her death the negro *Jude*, one of those sued for and mother to the rest, to his grandson *Absalom*. To his grandson *James*, he bequeaths fifty pounds after the death of his wife, to arise out of his estate. To his son *John* one shilling; to his daughter *Nancy* one shilling; and to *Sarah Grissom* and his grand-

son *John Jackson*, the balance of his estate, after his wife's death.

Elizabeth the widow, after the death of her husband, lived with one *John Jackson*, who during her life kept *Jude* in his possession to her use, and at her death delivered her, together with the children born since the death of the testator, to the plaintiff. The widow died in 1809, and the years for which the negroes were hired to the defendant were 1810 and 1811. It was proved that the possession of the widow, or of *Jackson* for her use, was by the consent of the plaintiff.

The case was argued by *Norwood* for the plaintiff, and *Nash* for the defendant.

TAYLOR, C. J. delivered the opinion of the Court:

We take it to be very clear, that, under the circumstances of this case, it is not competent in the defendant to dispute the title of the plaintiff. As between those parties, at all events, the plaintiff is entitled to recover, because his right has been admitted by the defendant and possession taken under it. That possession he is bound to restore to the person from whom he obtained it; and cannot, with any shadow of justice, consider himself a trustee for any one, who in his conception, may have a better right to the property.

As to the assent, the general rule cannot be doubted, that where a legacy is limited over by way of remainder or executory devise, the executor's assent to the first taker will be considered an assent to all the subsequent takers or legatees. But this rule cannot prevail, where, after the death of the first taker, the executor has a trust to perform, arising out of the property, and which cannot be performed, unless the property is subjected to his control. Here several pecuniary legacies are to be raised out of the general estate

after the death of the wife, and therefore at that period, all the property bequeathed to her, must of necessity return to the executor, to enable him to perform the trusts of the will; and this point was so adjudged in this Court in the case of *Watson* from Johnston county.

Hamilton, Ex'trix, &c. v. *Shepherd, Adm'tor of Smith.*

This is an action on the case in the nature of deceit: and it is moved by the defendant's counsel that he be permitted to plead the act of 1789 barring claims against the estates of deceased persons. He does not state that he was directed by his client to make this defence, but he does state that the defendant believing the defenece open to him, has attended with the evidence necessary to support it. The suit has been depending two years; and it is submitted to the Supreme Court to say whether the plea shall now be entered, and if so upon what terms?

TAYLOR, C. J:—The Courts have of late years exercised much liberality in the practice, as it respects the addition of pleas, and the amendment of pleadings. Its general tendency is to advance the claims of justice, by putting the trial of a cause upon its merits; and as the Court may prescribe the terms of the permission, the power may be so employed as to prevent delay and tax inattention. The cases of *Reed* v. *Hester* and *Johnston* v. *Williams*, heretofore decided in this Court, are authorities for adding the plea in the present instance. It therefore may be added, upon payment of all costs up to the time of the application.

Harris v. *Peterson.*

The question reserved in this case, was upon the sufficiency of a notice to take a deposition. The notice was to

take the deposition on one of three days which were specified, viz. as days of the week and of the month, at a certain house in Putnam County, in the State of Georgia.

TAYLOR, C. J.—As the design of notice is to give the party the benefit of a cross-examination, its regularity must, in a great degree depend upon the circumstances of the case, and can oftener be tested by the dictates of good sense and sound discretion, than by any general rule applicable to all cases. It could not for example safely be laid down as a rule, that such a notice as this might be practised in all cases; for if the parties and witness lived near together, there would not only be no necessity for it, but it might tend to ensnare the party noticed, and aid the other in procuring testimony in a fraudulent manner. But where the witness lives at a great distance from the parties, and only one day is named, many accidents may intervene to prevent his arrival there; whereby the deposition is not taken, and justice is delayed. All this is avoided by naming two or more successive days; and as the witness lived in Georgia, in this case, we are of opinion that the notice was good.

Forsyth v. *M'Cormick.*

The defendant appealed from the County to the Superior Court, and executed an appeal bond, the condition of which was, "now if the said W. C. M'Cormick do prosecute this said appeal with effect, then the above obligation to be void, otherwise to pay such costs and charges, as by law in such case is required."

On a motion made in the Superior Court to dismiss the appeal for the insufficiency of the bond, the case was referred to this Court, where it was submitted without argument, and the opinion of the Court was delivered by

TAYLOR, C. J.—The provisions of the act of 1777, § 82, are so explicit on this subject as to leave no room for argument or doubt. The giving the bond and two securities in the manner directed, is in the nature of a condition precedent, for the words are, "that before obtaining the appeal;" and the condition must be for prosecuting the same with effect, and for performing the judgment, sentence, and decree, which the Superior Court shall pass or make thereon, in case such appellant shall have the cause decided against him. The condition of the bond taken in this case does not provide for performing the judgment of the Superior Court, and it would be satisfied by prosecuting the appeal with effect, and in the event of failure, paying merely the costs and charges. This omission is too substantial to be overlooked, for in reality the main purpose for which an appeal bond is required is totally unprovided for. We think that every bond must comprehend all the objects required in the act, we do not say, in the very words of the law, but substantially, they must be secured before the appeal can be rightly constituted in the appellate Court.

Let the appeal be dismissed.

AN ABRIDGEMENT

OF THE

ACTS OF THE GENERAL ASSEMBLY,

Passed in 1815.

An Act to provide a Revenue for the payment of the Civil List and contingent charges of Government for the year 1816.

THE Revenue Act of this year differs but little from the act of last year. The taxes are the same, except that the polls are reduced from 30 to 25 cents.

In case any justice appointed to take the lists of taxable property, fail to do so, the county court is to appoint another to perform the duty.

Where persons have neither given in their lands, nor the justices appointed to take the lists of taxable property have had them assessed, the sheriff shall, within the time prescribed for collecting the taxes, summon a freeholder residing near to, and acquainted with said lands, who, within five days after he shall be notified to do so, shall value said lands on oath, and shall transmit a copy of such valuation to the clerk of the county court, and give another to the sheriff. Said freeholder to receive a dollar for every tract of land thus valued, to be levied and collected at the time the sheriff collects the taxes, if not sooner paid.

A freeholder summoned by a justice or sheriff to assess land, refusing to perform the duty, to forfeit $50, one-half to the State, the other half to the county.

The better to secure the tax on pedlars, sheriffs, previous to their settlement with the comptroller, shall render to the clerks of the county courts, on oath, an account of the names of the persons from whom they shall have collected a pedlar's tax, which accounts the clerks are to forward to the comptroller.

An act to ratify and carry into effect an agreement relative to the Boundary-line between this State and the State of South-Carolina, entered into on the 2d November, 1815, &c.

§ 1. Enacts that the boundary-line between the two States shall begin at a stone set up at the termination of the line of 1772, and marked, "N. C. & S. C. Sept. 15, 1815," running thence west 4 miles and 90 poles to a stone marked "N. C. & S. C." thence south 25° west, 118 poles, to the top of the ridge dividing the waters of the North fork of Pacolet river from the waters of the North fork of the Saluda river; thence along the various courses of the said ridge (agreeably to the plat and survey) to the ridge that divides the Saluda waters from those of Green river; thence along the various courses of the said ridge to a stone set up where the said ridge joins the main ridge which divides the eastern from the western waters, which stone is marked "N. C & S. C. Sept. 28, 1815," thence along the various courses of the said ridge, to a stone set up on that part of it which is intersected by the Cherokee boundary-line run in the year 1797, which stone is marked "N. C. & S. C. 1813," and from the last mentioned stone on the top of said ridge, at the point of intersection aforesaid, a direct line south 68¼ degrees west, 20 miles and 11 poles to the 35th degree of north latitude, at the rock in the east bank of the Chatooga river, marked "Lat. 35, A. D. 1813," in all, a distance of 74 miles and 189 poles.

§ 2. The joint report, &c. of the commissioners to be recorded by the Secretary of State, in a well-bound book.

An Act providing for the appointment of Electors to vote for a President and Vice-President of the United States.

§ 1. Directs that the State be divided into fifteen districts for the purpose of chusing Electors, as follows:

Burke, Buncombe, Rutherford and Haywood.
Wilkes, Iredell, Surry and Ashe.
Mecklenburg, Cabarrus and Lincoln.
Rowan and Montgomery.
Rockingham, Stokes and Caswell.
Randolph, Guilford and Chatham.
Richmond, Anson, Robeson, Moore and Cumberland.
Person, Orange and Granville.
Wake, Johnston and Wayne.
Warren, Franklin, Halifax and Nash.
Bertie, Northampton, Hertford and Martin.
Pasquotank, Gates, Chowan, Perquimons, Camden & Currituck.
Beaufort, Edgecomb, Pitt, Washington, Tyrrell and Hyde.
Craven, Greene, Lenoir, Jones, Carteret and Onslow.
Bladen, Sampson, Columbus, Duplin, N. Hanover & Brunswick.

All persons qualified to vote for members of the House of Commons are to meet on the 2d Thursday of Nov. 1816, at their usual places of election in the several counties, and there vote for fifteen freeholders as Electors, one of whom shall reside within each of the Electoral Districts. The sheriff of each county to make return of the election to the Governor within eight days, under the penalty of £200, who, on or before the Monday before the 1st Wednesday in Dec. shall ascertain the fifteen persons elected, and notify them of their election.

§ 2. Provides the same regulations for ensuing elections.

§ 3. The fifteen persons for whom the greatest number of votes throughout the State shall be given, shall be the Electors, who shall meet at Raleigh, on the 1st Wednesday of Dec. 1816, and on the first Wednesday of Dec. next after their appointment at every succeeding election.

§ 4. Provides for elections in cases of vacancies occurring in the office of President and Vice-President.

§ 5. Any Elector chosen by his own consent, failing to attend to vote (except in case of sickness or accident) to forfeit £200.

§ 6. Provides for the Electors the same pay as members of the General Assembly.

§ 7. In case of any Elector failing to attend his duty, the Electors present shall appoint a person to supply his place.

An Act to amend an Act passed in 1808, c. 19, respecting the duties of Sheriffs.

Whenever any sheriff, constable or other officer shall return upon any writ of *fiera facias* or *venditioni exponas* to him directed, that he has made no sale for want of bidders, he shall state in his return the several places at which he hath advertised the sale, and the places at which he hath offered the same for sale. Every sheriff or coroner failing to make such specification, shall be subject to a fine of £20, and every constable for a like offence £5, for the use of the plaintiff, and be liable to indictment for a misdemeanor in office.

An Act making it the duty of Sheriffs to serve notices of taking Depositions.

§ 1. Sheriffs, by themselves or deputies, shall serve all notices of taking depositions in any suit, which may be delivered to them by either of the parties in suits, their agents or attorneys, and certify thereon the time when such notice was served, or copy left at the place of abode of such persons, and such return shall be evidence of the service. And the sheriff, or his deputy, shall deliver said notice with his return thereon, to the party at whose instance the said notice issued, his attorney, &c. on demand.

§ 2. Sheriffs neglecting to execute and return such notice, or making a false return thereon, to be subject to the same action and penalties as for neglecting to serve process directed to them from the superior court of law.

§ 3. Sheriffs to be allowed the same fees as for serving subpœnas for witnesses.

§ 4. Nothing herein to prevent a party in any suit giving notice, and proving the same as heretofore.

An Act for the relief of persons who have made entries of land with entry-takers, who have not renewed their bonds agreeably to law.

All entries of land regularly made shall be good, though the entry-taker may not have renewed his bond agreeably to law for the faithful performance of his duty. But this act shall not make good any entry made with an entry taker so failing after the county court shall have appointed a successor in consequence of such failure.

An Act to encrease the salary of the Public Printer.

The public printer to receive hereafter a salary of $100 per annum, in addition to the salary now allowed.

An Act to authorise the County Courts of this State, when they may deem it necessary, to lay a tax for the paying of Jurors of the Superior and County Courts.

The county courts shall have power to lay a tax for the purpose of paying their jurors not exceeding $1,50 nor less than 50 cents per day, and a sum equal to the daily allowance for every 30 miles travelling to and from said courts. A majority of the justices to be present when the tax is laid, which is not to exceed 10 cents on each poll, and the like

sum on every $300 value of town property and of land. To be collected as all other county taxes.

An Act making further provision in favor of the owners of Strays.

Every person who shall hereafter take up a horse, &c. as a stray, shall, at the time he gives notice to the Ranger, agreeably to the provisions of existing laws, pay to him, in addition to the fees already required, one dollar, for the purpose of having such stray advertised; and immediately after the Ranger shall be furnished with the appraisement of the persons appointed to value the stray, he shall cause an advertisement to be published for at least two weeks in the State Gazette, containing an accurate description of the stray, the value at which it has been appraised, and the name and abode of the taker-up. The dollar to be repaid by the owner at the time of receiving back his stray. If the owner of a stray shall not prove his property within 12 months, the taker-up shall be allowed one dollar in his settlement with the county.

An Act making further regulations for preserving the Health of the Sea-port Towns in this State.

§ 1. All ponds of stagnant water, all cellars, &c. containing putrid water, all dead animals lying about docks, streets, &c. all privies that have no wells under them, all slaughter-houses, all docks whose bottoms are alternately wet and dry, all accumulations of putrifying vegetable and animal substances and other filth, in the streets, &c. in any of the sea-port towns, are declared common nuisances, productive of disease, and ought to be removed.

§ 2. Persons owning lots liable to retain tide or rain water, who shall not, during the months of June, July, Aug. Sept. & October, keep them dry and free from stagnant water, shall forfeit $5 for the use of the town, for every week such

stagnant water or filth shall remain thereon: And if the owners do not remove such stagnant water or filth, the commissioners of the town may employ persons to do it, and add the expence to the fines.

An Act to declare the Jurisdiction of the Courts of Law in this State in relation to certain matters therein mentioned.

The courts of law of this State are declared to have full power to try and give judgment in all cases of forfeiture under any act of Congress, where cognizance thereof is given to the courts of record of the several States.

An Act authorising the Judges of the Superior Courts of Law to grant New Trials in Criminal Cases.

Where a defendant, in a criminal case, is found guilty, on application, a new trial may be granted, in the same manner as in civil cases.

An Act to improve the Inland Navigation of this State, so far as respects the River Roanoke and its waters.

The stockholders of the Roanoke Navigation Company, incorporated by an act of 1812, to make known to the governor, their acceptance or rejection of this amended charter, on or before the first day of March next; and if they fail to make this known on or before that day, it shall be held that they do accept this amended charter.

Places for opening books of subscription are detailed. Sucscriptions for $300,000, to be received in shares of $100 each. Books to be opened on the first of March and kept open till the first of June. The treasurer shall subscribe, on behalf of the State, in the books to be opened in the city of Raleigh, two hundred and fifty shares—equal to $25,000.

There shall be a general meeting of the subscribers on the 4th Monday of June 1816. And the acting managers shall lay before the meeting the books by them kept, containing the state of the subscriptions—and if the capital sum of $300,000 be not subscribed, the managers or any three of them may keep open the books for receiving subscriptions for the deficiency, during the continuance of the meeting, which may be adjourned from day to day until the business be finished—and if the deficiency be not then subscribed, the books may be opened from time to time for further subscriptions. If $150,000 be subscribed before the adjournment of the above meeting, the act takes effect, and the stockholders at that meeting shall elect a President and seven Directors for managing the concerns of the Company. And the President and Directors shall transmit to the Secretary of State a list of the subscribers, with the sums subscribed by each, to be recorded by him in his office. If more than $300,000 be subscribed, the subscription shall be reduced to that sum, by striking off first from the subscription of the State, then from the highest subscriber, &c.

The subscribers shall pay $10 upon each share subscribed, either at the time of subscribing, or by the meeting of the subscribers in June—and not more than $33,33 upon a share, shall be demanded in any one year thereafter. If the act takes effect, the Treasurer shall pay $10 upon each share subscribed on behalf of the State, within 30 days after the first meeting of the subscribers in June, and shall make subsequent payments as other subscribers.

The company shall be called "The Roanoke Navigation Company." The President and Directors or a majority of them are authorised to agree with persons on behalf of the Company to open and improve the navigation of Roanoke river from its source to its mouth, so far as the same lies in the State of North-Carolina, and all streams in said State running into said river. They are authorised to appoint a

treasurer, clerk, toll-gatherers, and all necessary officers, managers, and servants, and to make them a suitable compensation out of the capital and money arising from tolls. The President and Directors are appointed from year to year, subject to be removed by the stockholders in general meeting. They are re-eligible and may fill up vacancies in their body until the next general meeting of the stockholders. They shall take an oath or affirmation for the due execution of their office.

The general meeting of the stockholders shall be held on the 4th Monday in April annually. The presence of proprietors owning a majority of shares shall be necessary to constitute a general meeting. The meeting may be adjourned from day to day until a majority attend, and then from day to day until the business is finished. To their annual meetings, the President and Directors shall make report and render account of their proceedings, which being approved of, the stockholders shall give a certificate, a copy of which shall be entered upon the company books. At their annual meetings, dividends shall be declared. On any emergency, the President or a majority of the Directors may appoint a general meeting, giving one month's previous notice.

The company shall fix and regulate the tolls; but in such way that the annual amount of tolls shall not exceed 15 per cent upon the capital stock, after the payment of salaries to the officers of the company, sums required for repairs, and other incidental expenses. The Legislature may at the end of twenty-five years from the time the work shall be so far completed that produce may be transported and notice given by the company of that fact, and at the expiration of every 25 years thereafter, alter the rates of toll fixed by the company; but the Legislature shall not at any time reduce the rates of tollage so as to reduce the profits arising therefrom, below 15 per cent upon the capital stock. The President and Directors shall every 25th year after their works are completed and ready for the transportation of produce,

make return upon oath, to the General Assembly, of the amount of toll received by them for the preceding 25 years.

The canals, locks, and every work appertaining to the said navigation, with all the profits therefrom or any part thereof are vested in the proprietors, their heirs, and assigns, for ever, as tenants in common, in proportion to their respective shares: and the same shall be exempt from the payment of any tax, imposition, or assessment whatsoever. The navigation and works of the company when completed, shall be for ever thereafter considered as public highways, free for the transportation of goods, wares, and merchandize, on payment of the tolls which shall be from time to time fixed.

The President and Directors may agree for the purchase of lands, rocks, sluices, or fish-stands, through which the navigation is intended to pass. In case of disagreement, or if the owner be feme covert, under age, non compos, or out of the State, two justices, on application, shall issue a warrant to the sheriff of the county, to summon a jury of eighteen freeholders, disinterested and not related to the parties, to meet on the land to be valued. The sheriff shall summon the jury, administer an oath to each, that he will value the thing in question and consider all damages the owner may sustain in consequence of being divested of his property therein; and that he will not in such valuation spare any person through favor nor injure any person through malice or hatred. The inquisition shall he signed by the sheriff and twelve or more of the jury, and being returned to the clerk of the county to be recorded, shall be conclusive. The amount of the valuation shall be paid to the owner of the land if to be found, if he is not to be found, to the clerk of the court; and thereupon the company shall be seised in fee of the thing valued. But such condemnation shall not interfere with dwelling houses. In the same manner lands may be purchased or condemned for the erection of toll-houses, not exceeding 4 acres at each place intended for collecting tolls.

If the capital sum be insufficient, it may from time to time be increased by the company; and when books shall be opened for this increase, the proprietors of shares shall have a preference in the subscription for thirty days.

The company shall have power to purchase and hold real and personal estate—and if any person be sued for any thing done in pursuance of this act, he may plead the general issue and give this act and the special matter in evidence. The General Assembly shall not impose any restriction, duty, or impost, on commodities, manufactures, produce, or merchandize transported by said navigation: (and no distinction shall be made between the citizens of this State and those of Virginia.) But the General Assembly may make regulations respecting the inspection of produce brought down the said navigation, making no distinction as aforesaid.—None of the lands or other property of the company, other than that used for the navigation, to be exempt from taxation.

The President and Directors may, if they think it advisable, construct a turnpike road around the falls of the Roanoke, near the town of Halifax, and exact tolls for the transportation of produce along said road, until the navigation at the falls can be completed. The company may erect toll-bridges across the Roanoke and all the streams which run into it in this State.

The rights and privileges of the company extend from the mouth of Roanoke to the sources of all the streams running into it in this State. They may contract with any person or persons for improving the navigation, as soon as the company shall be organized.

Transfers of shares shall be by deed or devise, and shall be registered on the books of the company—part of a share shall not be transferred—no share shall be held in trust for the use and benefit and in the name of another, whereby the company may be challenged to answer such trust: but every

person appearing as aforesaid to be a proprietor shall be taken as to the others of the company to be such; but between the trustee and the person claiming the benefit of the trust, the common remedy may be pursued. Any proprietor, by writing under his or her hand, executed before a subscribing witness and acknowledged or proved before a justice of the peace, may depute any member to act as proxy for him or her at any general meeting or meetings. The treasurer of this State, either by himself or proxy, shall vote on behalf of the State in the meetings of the stockholders.

The several banks in this State, and other bodies, corporate and politic, are authorised to subscribe for shares.

All laws coming within the purview of this act are repealed and made void: but nothing contained in this act shall interfere with the stipulations and provisions of the act passed in the year 1811, "To incorporate a company for the purpose of cutting a navigable canal from Roanoke river and from the waters of Chowan river in this State, to some of the waters of James river in the State of Virginia, or to the Dismal Swamp Canal."

An Act concerning Cape-Fear River.

The style and title of "the Deep and Haw-River Navigation Company," is changed to that of "the Cape-Fear Navigation Company."

Books are to be opened on the first Monday of April, 1816, for receiving subscriptions for an increase of the capital stock of the company to the sum of $100,000 including the stock already owned. This capital is to be divided into shares of $100 each. The present stockholders shall deliver to the President & Directors the certificates of stock which they now hold, and receive other certificates in lieu thereof; and as to the present stockholders, new certificates may be issued for part of a share, but no subscription shall hereafter be received for part of a share.

Books shall be opened under the direction of such persons as the President and Directors of the Company shall designate and appoint for that purpose, and shall remain open till the first Monday of June, 1816, and on or before the 1st Monday of July, the books shall be returned to John Eccles and John Winslow, in Fayetteville, who with the President and Directors, or a majority of them, shall proceed to ascertain the number of shares subscribed: and if more shares are subscribed than are authorised by the act, they shall proceed to strike off, first from the subscription on behalf of the State, and then from the highest subscribers, until the sum shall be reduced to $100,000, including the present stock. If $50,000 shall be subscribed in addition to the present stock of the company, by the first Monday of June next, this act shall have effect. The books of the company are made good evidence of sales of shares which have heretofore been made or which shall hereafter be made for instalments due thereon.

The Treasurer of the State is directed to subscribe on behalf of the State 150 shares, and in the event of holding stock in the company, the State reserves the right of appointing a Director whenever the General Assembly shall think proper to make such appointment.

The subscribers shall pay $10 upon each share, either at the time of subscribing, or by the meeting of the stockholders in June or July; and not more than $33,33 cents, upon a share shall be demanded in any one year thereafter.

The stockholders in the Deep and Haw River Navigation Company shall make known to the Governor, on or before the first day of March, 1816, their acceptance or rejection of this amended charter; and if they fail to do so, it shall be deemed and taken as an acceptance thereof.

The affairs of the Company are to be managed by a President and five Directors, to be appointed annually, subject to be removed by the stockholders in general meeting. They are re-eligible and may fill up vacancies in their body until

the next general meeting of the stockholders—they shall take an oath or affirmation for the due execution of their office; they are authorised on behalf of the company to agree with persons to open and improve the navigation of Cape-Fear, and all streams which run into the same, and to appoint a treasurer, toll-gatherers, and all necessary officers, and make them suitable compensation.

The general meeting of the stockholders shall be held on 4th Monday in April annually. The presence of proprietors owning a majority of shares shall be necessary to constitute a general meeting. The meeting may be adjourned from day to day until a majority attend, and then from day to day until the business is finished. To their annual meetings the President and Directors shall make report and render account of their proceedings, which being approved of, the stockholders shall give a certificate, a copy of which shall be entered upon the company books. At their annual meetings dividends shall be declared. On any emergency, the President, or a majority of the Directors, may appoint a general meeting, giving one month's previous notice.

The company shall fix and regulate the tolls; but in such way that the annual amount of tolls shall not exceed fifteen per cent. on the capital stock, after payment of salaries to the officers of the company, sums required for repairs and other incidental charges.

The Legislature may, at the end of 25 years from the time the work shall be so far completed that produce may be transported and notice given by the company of that fact, and at the expiration of every 25 years thereafter—alter the rates of toll fixed by the company. But the Legislature shall not at any time reduce the rates of tollage so as to reduce the profits arising therefrom below 15 per cent. on the capital.

The President and Directors shall every 25th year after their works are completed and ready for the transportation of produce, make return upon oath to the General Assem-

bly, of the amount of toll received by them for the preceding 25 years.

The canals, locks and every work appertaining to the said navigation, with all the profits therefrom, or any part thereof, are vested in the proprietors, their heirs and assigns forever, as tenants in common, in proportion to their respective shares: and the same shall be exempt from the payment of any tax, imposition or assessment whatsoever. The navigation and works of the company, when completed, shall be forever thereafter considered as public highways, free for the transportation of goods, wares and merchandize, on payment of the tolls which shall be fixed from time to time.

The President and Directors may agree for the purchase of lands, rocks, sluices or fish-stands, through which the navigation is intended to pass. In case of disagreement, or if the owner be feme covert, under age, non compos, or out of the State, two justies, on application, shall issue a warrant to the sheriff of the county to summon a jury of 18 freeholders, disinterested and not related to the parties, to meet on the land to be valued. The sheriff shall summon the jury, administer an oath to each, that he will value the thing in question, and consider all damages the owner may sustain in consequence of being divested of his property therein; and that he will not in such valuation, spare any person through favor, nor injure any person through malice or hatred. The inquisition shall be signed by the sheriff and 12 or more of the jury, and being returned to the clerk of the county to be recorded, shall be conclusive. The amount of the valuation shall be paid to the owner of the land, if to be found; if he is not to be found, to the clerk of the court, and thereupon the company shall be seised in fee of the thing valued. But such condemnation shall not interfere with dwelling-houses. In the same manner, lands may be purchased or condemned for the erection of toll-houses, not exceeding four acres at each place intended for collecting tolls.

If the capital sum be insufficient, it may from time to time be increased by the company; and when books shall be opened for this increase, the proprietors of shares shall have a preference in the subscription for 30 days.

The company shall have power to purchase and hold real and personal estate; and if any person be sued for any thing done in pursuance of this act, he may plead the general issue and give this act and the special matter in evidence. The General Assembly shall not impose any restriction, duty or impost on commodities, manufactures, produce or merchandize transported by the said navigation. But the General Assembly may make regulations respecting the inspection of produce brought down the said navigation, making no distinction as aforesaid. None of the lands or other property of the company, other than that used for the navigation, to be exempted from taxation.

The President and Directors are authorised, whenever the same shall be deemed advisable by a majority of the stockholders in general meeting, to erect toll-bridges across Cape-Fear River, or any of the streams which run into the same: And for the condemnation of lands for erecting the abutments of said bridges and the erection of toll-houses, the same proceedings shall be had as are required for the condemnation of lands for canals.

The general meetings of the stockholders shall hereafter be holden in the town of Fayetteville.

The rights and privileges of the company extend from the mouth of Cape-Fear to the sources of all streams running into it.

Transfers of shares shall be by deed or devise, and shall be registered on the books of the company. Part of a share shall not be transferred. No share shall be held in trust for the use and benefit, and in the name of another, whereby the company may be challenged to answer such trust; but every person appearing as aforesaid to be a proprietor, shall be

taken as to the others of the company to be such; but between the trustee and the person claiming the benefit of the trust, the common remedy may be pursued.

Any proprietor, by writing under his or her hand, executed before a subscribing witness, and acknowledged or proved before a justice of the peace, may depute any member to act as proxy for him or her at any general meeting.

The Treasurer of the State, either by himself or proxy, shall vote on behalf of the State in the meetings of the stockholders.

The several banks in this State, and other bodies corporate and politic, are authorised to subscribe for shares.

All acts and clauses of acts which come within the purview of this act, or which give rights at variance with those given by this act, but which rights have not as yet been used and enjoyed, are repealed and made void.

LIST OF THE ACTS OF A PRIVATE NATURE.

Rivers, Canals and Roads.

An Act for cutting a Navigable Canal from the Sound of Cape-Fear River, near to the place called the Hawl-over, in New-Hanover.

To amend an Act appointing commissioners for the purpose of compleating the Navigation of Neuse River, and for other purposes.

To facilitate the Navigation of Little River, in Cumberland county.

To incorporate a company for the purpose of rendering Navigable Great and Little Contentnea Creeks.

To amend the 5th section of an act to open & make navigable Fishing Creek, from the mouth thereof to Wiatt's Bridge.

To amend an act passed in 1812 to incorporate a company to build a Bridge across Trent River, near the town of Washington, &c.

To incorporate a company to make a Turnpike-Road from Pungo River, in Hyde, to the town of Plymouth.

To authorise the erection of a Draw-Bridge across Pungo River, at Coghouse Landing, in Hyde.

To regulate the working of Seines & Nets in Tar & Pamlico Rivers.

To amend an act passed in 1810, to amend several acts heretofore passed relative to obstructions for the passage of fish up Cape-Fear.

Relative to Fish-traps on the Yadkin or Pedee Rivers.

Courts, Jurors, Public Buildings, &c.

To authorise Buncombe county court to lay a tax for a new Jail, &c

To authorise Montgomery county court to appoint a Committee of Finance to settle with the officers of said county.

To alter the times of holding the Superior Court of Orange county.

To alter the time of holding the county court of Hyde.

To amend and continue in force an act passed in 1814, to authorise the county court of Surry to appoint a Committee of Finance.

To amend the several county laws of Rutherford, respecting the Finances of said county, and for other purposes.

To amend an act passed in 1814, to provide for the settlement with the court officers of Buncombe county.

Authorising the county court of Wilkes to lay a tax for the purpose of building a new Jail, &c.

To provide for the payment of Jurors who may serve in the courts of law in Lincoln county.

To appoint commissioners to fix on a suitable & central place in Nash, for erecting a court-house and other public buildings, &c.

For the removal of the public buildings in Montgomery county.

Separate Elections.

To appoint commissioners for fixing on a suitable place for holding the separate election in Stokes county, heretofore held at John Ward's.

To alter the place of holding the separate election in Craven county.

For further regulating the separate election in Camden county.

To establish one other separate election in Iredell county, and to alter the place of holding the election heretofore held at Jacob West's.

To establish one other separate election in Lincoln county.

To establish a separate election in the county of Nash.

To establish one other separate election in Buncombe county.

To establish a separate election in Surry county, and to alter the places of holding two other separate elections.

To establish a separate election in Mecklenburg county.

For the removal of a separate election in New-Hanover county.

To establish one other separate election in Moore county.

Specifying the time of closing the elections in Chowan county.

To alter the place of holding one of the separate elections in Tyrrell.

To alter the place of holding a separate election in Chatham.

To alter the place of holding one separate election in Northampton.

To remove one of the separate elections in the county of Warren.

Regulation of Towns, &c.

Appointing commissioners for the town of Kinston, &c.

To incorporate the town of Charlotte, in Mecklenburg county.

Authorising the commissioners of the town of Halifax to sell a part of the town commons.

To alter the name of the town of Martinsborough, in Surry, to that of Jonesville, and for appointing commissioners of said town.

To enable the intendant of police and commissioners of Raleigh to supply the city with water, and for other purposes.

Appointing commissioners to lay off a town at or near the junction of Dan and May Rivers, in Rockingham county.

To establish and lay off a town in the county of Iredell.

For the regulation of the police in the town of Tarborough.

Academies.

To incorporate the Fayetteville School Association Company.

Respecting the Newbern and Iredell Academies.

The Poor.

For the relief of the Poor of Pasquotank county.

To establish a Poor-house in Guilford county.

Sheriffs.

To authorise the several persons therein named to collect the arrearages of taxes due them as late sheriffs.

To authorise W. W. Carter, late sheriff of Halifax, to collect the taxes due him in said county for 1814.

Miscellaneous.

To encourage the destruction of Wolves in the county of Ashe.

To amend an act passed in 1805, to establish the rates of Pilotage from the Swash Straddle to Camden and Edenton.

To restore to credit Charles Sutton ond others, of Stokes county.

To authorise Jonathan Parks to peddle or exhibit articles for shew, in the several counties in this State, free from tax.

To establish a charitable fund for the relief of indigent and decayed Mechanics in the town of Wilmington.

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JURIDICAL SELECTIONS.

MARTIN vs. HUNTER.

OPINION

Of the Supreme Court of the United States on the Appellate Authority of that Court in respect to State Courts.

STORY, J. This is a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this court, requiring the judgment rendered in this very cause at February Term 1813, to be carried into due execution.

The following is the judgment of the Court of Appeals rendered on the mandate:—"The Court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States. That so much of the 25th section of the Act of Congress to establish the Judicial Courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States. That the writ of error in this cause was improvidently allowed under the authority of that act.

That the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court. And that obedience to its mandate be declined by the Court."

The questions involved in this judgment are of great importance and delicacy. Perhaps it is not too much to affirm that upon their right decision rest some of the most solid principles which have hitherto been supposed to sustain and protect the Constitution itself. The great respectability of the court whose decisions we are called upon to review, and the entire deference which we entertain for the learning and ability of that court, add much to the difficulty of the task which has so unwelcomely fallen upon us. It is however a source of consolation that we have had the assistance of most able and learned arguments to aid our inquiries; and that the opinion which is now to be pronounced, has been weighed with every solicitude to come to a correct result, and matured after solemn deliberation.

Before proceeding to the principal questions, it may not be unfit to dispose of some preliminary considerations which have grown out of the arguments at the bar.

The Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but, emphatically, as the preamble to the Constitution declares, by "The people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers, which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure; and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the States the exercise of any powers which were in their judgment incompatible with the objects of the general compact; to make the powers of the state governments in given cases subordinate to those of the nation, or to reserve to

themselves those sovereign authorities which they might not choose to delegate to either. The Constitution was not therefore necessarily carved out of existing state sovereignties; nor a surrender of powers already existing in state institutions; for the powers of the States depended upon their own Constitutions, and the people of every State had the right to modify and restrain them according to their own views of policy or of principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

These deductions do not rest upon general reasoning, plain and obvious as they seem to be. They have been positively recognized by one of the articles in amendment of the Constitution, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively or *to the people*."

The government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted, must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction according to the import of its terms. And where a power is expressly given in general terms, it is not to be restrained to particular cases, unless that construction grows out of the context expressly or by necessary implication. The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.

The Constitution unavoidably deals in general language. It did not suit the purposes of the people in framing this great charter of our liberties to provide for minute specifi-

cations of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the Legislature from time to time to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers as its own wisdom and the public interest should require.

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the Constitution, so far as regards the great points in controversy.

The 3d article of the Constitution is that which must principally attract our attention. The 1st section declares, "the judicial power of the United States shall be vested in one Supreme Court, and in such other inferior courts as the Congress may from time to time ordain and establish." The 3d section declares that "the judicial power shall extend to all cases in law or equity arising under this Constitution, the laws of the United States, and the treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State

and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under the grants of different states; and between a state or the citizens thereof, and a foreign state, citizens or subjects." It then proceeds to declare that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have *original jurisdiction*. In all other cases before mentioned, the Supreme Court shall have *appellate jurisdiction* both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Such is the language of the article creating and defining the judicial power of the United States. It is the voice of the whole American people solemnly declared, in establishing one great department of that government which was in many respects national, and in all supreme. It is a part of the very same instrument which was not to operate merely upon individuals but upon states. And to deprive them altogether of the exercise of some powers of sovereignty, and to restrain and regulate them in the exercise of others.

Let this article be carefully weighed and considered. The language of the article throughout is manifestly designed to be mandatory upon the Legislature. Its obligatory force is so imperative, that Congress could not without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall be vested* (not may be vested) in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish. Could Congress have lawfully refused to create a supreme court or to vest in it the constitutional jurisdiction? "The judges both of the supreme and inferior courts *shall hold* their offices during good behaviour, and *shall*, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." Could Congress create

or limit any other tenure of the judicial office? Could they refuse to pay at stated times the stipulated salary, or diminish it during the continuance in office? But one answer can be given to these questions. It must be in the negative. The object of the Constitution was to establish three great departments of government,—the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter it would be impossible to carry into effect some of the express provisions of the Constitution. How otherwise could crimes against the United States be tried and punished? How could causes between two states be heard and determined? The judicial power must therefore be vested in some court by Congress. And to suppose that it was not an obligation binding on them, but might at their pleasure be omitted or declined, is to suppose that under the sanction of the Constitution they might defeat the Constitution itself. A construction that would lead to such a result cannot be sound*.

If then it is the duty of Congress to vest the judicial power of the United States, it is a duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all. If it were otherwise, this anomaly would exist,—that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to

* The same expression, "shall be vested," occurs in some other parts of the Constitution in defining the powers of other co-ordinate branches of the government. The first article declares "that all legislative powers herein granted *shall be vested* in a Congress of the United States." Will it be contended that the legislative power is not absolutely vested? The 2d article declares that "the executive power *shall be vested* in a President of the United States of America." Could Congress vest it in any other person, or is it to await their good pleasure whether it is to vest at all? It is apparent that such a construction in either case is inadmissible. Why then is it entitled to a better support in reference to the judicial department?

all. For the Constitution has not singled out any class on which Congress are bound to act in preference to others.

The next consideration is as to the courts in which the judicial power shall be vested. It is manifest that a supreme court must be established. But whether it be equally obligatory to establish inferior courts, is a question of some difficulty. If Congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases, the judicial power could no where exist. The Supreme Court can have original jurisdiction in two classes of cases only, viz. in cases affecting ambassadors, other public ministers, and consuls, and in cases in which a state is a party. Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself. And if in any of the cases enumerated in the Constitution the state courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court (admitting that it could not act on state courts) could not reach those cases; and consquently the injunction of the Constitution, that the judicial power "*shall be vested*," would be disobeyed. It should seem therefore to follow, that Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the Constitution, is *exclusively* vested in the United States, and of which the Supreme Court cannot take original cognizance.

They might establish one or more inferior courts. They might parcel out the jurisdiction among such courts from time to time at their own pleasure. But the whole judicial power of the United States should be at all times vested either in an original or appellate form in some courts created under its authority.

This construction will be fortified by an attentive examination of the 2d section of the 3d article. The words are "the judicial power *shall extend*," &c. Much minute

and elaborate criticism has been employed upon these words. It has been argued that they are equivalent to the words 'may extend,' and that 'extend' means to widen to new cases not before within the scope of the power. For the reasons which have been already stated, we are of opinion, the words are used in an imperative sense. They import an absolute grant of judicial power. They cannot have a relative signification applicable to powers already granted, for the American *people* had not made any previous grant. The Constitution was for a new government organized with new substantive powers, and not a mere supplementary charter to a government already existing. The confederation was a compact between states; and its structure and powers were wholly unlike those of the national government. The Constitution was an act of the people of the United States to supersede the confederation, and not to be engrafted on it, as a stock through which it was to receive life and nourishment.

If indeed the relative signification could be fixed upon the term 'extent,' it could not (as we shall hereafter see) subserve the purposes of the argument, in support of which it has been adduced. This imperative sense of the words "shall extend," is strengthened by the context. It is declared that "in all cases affecting ambassadors, &c. that the Supreme Court *shall have* original jurisdiction." Could Congress withhold original jurisdiction in these cases from the Supreme Court? The clause proceeds—"in all other the cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." The very exception here shows that the framers of the Constitution used the words in an imperative sense. What necessity could there exist for this exception, if the preceding words were not used in that sense? Without such exception, Congress would, by the preceding words,

have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words "may have" appellate jurisdiction. It is apparent then that the exception was intended as a limitation upon the preceding words, to enable Congress to regulate and restrain the appellate power, as the public interests might from time to time require.

Other clauses in the Constitution might be brought in aid of this construction. But a minute examination of them cannot be necessary, and would occupy too much time. It will be found, that whenever a particular object is to be effected, the language of the Constitution is always imperative; and cannot be disregarded without violating the first principles of public duty. On the other hand, the legislative powers are given in language which implies discretion, as from the nature of legislative power such a discretion must ever be exercised.

It being then established that the language of this clause is imperative, the next question is as to the cases to which it shall apply. The answer is found in the Constitution itself. The judicial powers shall extend to all the cases enumerated in the Constitution. As the mode is not limited, it may extend to all such cases in any form in which judicial power may be exercised. It may therefore extend to them in the shape of original or appellate jurisdiction, or both. For there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.

In what cases, if any, is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers, and consuls; and

cases of admiralty and maritime jurisdiction. In this class the expression is, and that the judicial power shall extend to *all cases*; but in the subsequent part of the clause which embraces all the other cases of national cognizance, and forms the second class, the word "*all*" is dropped seemingly *ex industria*. Here the judicial authority is to extend to controversies, (not to *all* controversies) to which the United States shall be a party, &c. From this difference of phraseology perhaps a difference of constitutional intention may with propriety be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to *all cases*: and in the latter class to leave it to Congress to qualify the jurisdiction original or appellate in such a manner as public policy might dictate.

The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arising under the Constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the Constitution, and it could not afterwards be directly conferred on them. For the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would therefore be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety. The

same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls, who are emphatically placed under the guardianship of the law of nations. And as to cases of admiralty and maritime jurisdiction, the admiralty jurisdiction embraces all questions of prize and salvage; in the correct adjudication of which foreign nations are deeply interested. It embraces also maritime facts, contracts and offences; in which the principles of the law and comity of nations often form an essential inquiry. All these cases then enter into the national policy, affect the national rights, and may compromit the national sovereignty. The original or appellate jurisdiction ought not therefore to be restrained, but should be commensurate with the mischiefs intended to be remedied, and of course should extend to all cases whatsoever.

A different policy might well be adopted in reference to the second class of cases. For although it might be fit that the judicial power should extend to all controversies to which the United States should be a party; yet this power might not have been imperatively given, lest it should imply a right to take cognizance of original suits brought against the United States as defendants in their own courts. It ought not have been deemed proper to submit the sovereignty of the United States against their own will, to judicial cognizance, either to enforce rights or prevent wrongs. And as to the other cases of the second class, they might well be left to be exercised under the exceptions and regulations which Congress might in their wisdom choose to apply. It is also worthy of remark that Congress seem in a good degree, in the establishment of the present judicial system, to have adopted this distinction. In the first class of cases the jurisdiction is not limited by the subject matter. In the second, it is made materially to depend upon the value in controversy. We do not however profess to place any implicit reliance upon the distinction which has

hence been stated and endeavoured to be illustrated. It has the rather been brought into view in deference to the legislative opinion, which has been so long acted upon and enforced this distinction. But there is certainly vast weight in the argument which has been urged, that the Constitution is imperative upon Congress to vest all the judicial power of the United States, in the shape of original jurisdiction, in the supreme and inferior courts created under its own authority. At all events, whether the one construction or the other prevail, it is manifest that the judicial power of the United States is unavoidably in some cases exclusive of all state authority, and in all others may be made so at the election of Congress. No part of the criminal jurisdiction of the United States can consistently with the Constitution be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance; and it can only be in those cases, where, previous to the Constitution, state tribunals possessed jurisdiction independent of national authority, that they can now constitutionally exercise a constituent jurisdiction. Congress throughout the judicial act, and particularly in the 9th, 11th, and 12th sections, have legislated upon the supposition that in all the cases to which the judicial powers of the United States extended, they might rightfully vest exclusive jurisdiction in their own courts*.

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. We have already seen that appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction, subject

* But even admitting that the language of the Constitution is not mandatory, and that Congress may constitutionally omit to vest the judicial power in courts of the United States, it cannot be denied that when it is vested, it may be exercised to the utmost constitutional extent.

however to such exceptions and regulations as Congress may prescribe. It is therefore capable of embracing every case enumerated in the Constitution which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the Constitution in the most general terms, and may therefore be exercised by Congress under every variety of form, of appellate or original jurisdiction. And as there is nothing in the Constitution which restrains or limits this power, it must therefore in all other cases subsist in the utmost latitude, of which in its own nature, it is susceptible.

As then by the terms of the Constitution the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the 3d article to any particular courts. The words are "the judicial power, (which includes appellate power) shall extend *to all* cases," &c. and "in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction." It is the *case* then, and not *the Court* that gives the jurisdiction. If the judicial power extends to the case it will be in vain to search into the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent then upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the Constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to *all* cases arising under the Constitution, laws, and treaties of the United States, or *to all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some* cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive. And this not only when the *casus fœderis* should arise directly, but when it should arise incidentally in cases pending in state courts. This construction would abridge the jurisdiction of such courts far more than has been ever contemplated in any act of Congress.

On the other hand, if, as has been contended for, a discretion be vested in Congress to establish or not to establish inferior courts at their own pleasure, and Congress should not establish such courts, the appellate jurisdiction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the state courts. Under such circumstances it must be held that the appellate power would extend to state courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress,

and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power.

But it is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States, not only might but would arise in the state courts in the exercise of their ordinary jurisdiction. With this view the 6th article declares, that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; any thing in the Constitution or laws of any state to the contrary notwithstanding." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the Constitution, laws and treaties of the United States—"the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state. No person can doubt that the jurisdiction completely and exclusively attaches in the first instance to such courts. Suppose at the trial, the defendant sets up in his defence a tender under a state law making paper a good tender, or a state law impairing the obligation of such contracts, which, if binding, would defeat the suit. The Constitution of the United States has declared that no state shall make any thing but gold or silver coin a tender

in payment of debts, or pass a law impairing the obligation of contracts. If Congress shall not have here passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? Can a mere plea in defence be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to whom judicial cognizance of such cases is confided? Suppose an indictment for a crime in a state court, and the defendant should allege in his defence that the crime was created by an *ex post facto* act of the State, must not the state court in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult upon any legal principles to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the 6th article would be without meaning or effect, and public mischiefs of a most enormous magnitude would inevitably ensue.

It must therefore be conceded, that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen, that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the Constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction, if that was already rightfully and exclusively attached in the state courts; which, (as has been already shown) may occur. It must therefore extend by appellate jurisdiction, or not at all. It would seem to follow, that the appellate power of the United States must

in such cases extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the Constitution. That the latter was never designed to act upon state sovereignties, but only upon the people; and that if the power exists, it will materially impair the sovereignty of the states and the independence of their courts. We cannot yield to the force of this reasoning. It assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon states in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their sovereignties. The 10th section of the 1st article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the states. The language of the Constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the State Legislatures to make laws prescribing the time, place, and manner of holding elections for senators and representatives, and for electors of President and Vice-President. And in these as well as some other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by State Legislatures. When therefore the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the Legislatures of the states are in some respects under the control of Congress, and in every case are, under the Constitution, bound by the para-

mount authority of the United States,—it is certainly difficult to support the argument that the appellate power over the decision of state courts is contrary to the genius of our institutions. The courts of the United States can without question revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power. Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States.

In respect to the powers granted to the United States they are not independent. They are expressly bound to obedience by the letter of the Constitution; and if they should unintentionally transcend their authority, or misconstrue the Constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other subordinate departments of state sovereignty. The argument urged from the possibility of the abuse of the revising power is equally unsatisfactory. It is always a doubtful course to argue against the use or existence of a power from the possibility of its abuse. It is still more difficult by such an argument to engraft upon a general power a restriction, which is not to be found in the terms in which it is given. From the very nature of things the absolute right of decision in the last resort must rest somewhere. Wherever it may be vested, it is susceptible of abuse. In all questions of jurisdiction, the inferior or the appellate court must pronounce the final judgment; and common sense as well as legal reasoning has conferred it upon the latter.

It has been farther argued against the existence of this appellate power that it would form a novelty in our judicial

institutions. This is certainly a mistake. In the articles of confederation, an instrument framed with infinitely more deference to state rights and state jealousies, a power was given to Congress, to establish "courts for revising and determining finally *appeals* in all cases of captures." It is remarkable that no power was given to entertain *original* jurisdiction in such cases; and consequently the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of state tribunals. This was undoubtedly so far a surrender of state authority. But it never was supposed to be a power fraught with public danger, or destructive of the independence of state judges. On the contrary, it was supposed to be a power indispensible to the public safety, inasmuch as our national rights might otherwise be compromited and our national peace be endangered. Under the present Constitution the prize jurisdiction is confined to the United States; and a power to revise the decisions of state courts, if they should assert jurisdiction over prize causes, cannot be less important or less useful than it was under the confederation.

In this connexion we are led again to the construction of the words of the Constitution, "the judicial power shall extend," &c. If, as has been contended at the bar, the term "extend" have a relative signification and mean to widen an existing power, it will then follow that as the confederation gave an appellate power over state tribunals, the Constitution enlarged or widened that appellate power to all the other cases in which jurisdiction is given to the courts of the United States. It is not presumed that the learned counsel should choose to adopt such a conclusion.

It is further argued that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases of their own courts; first, because state judges are bound by an oath to support the Constitution of the United States, and must be presumed

to be men of learning and integrity; and secondly, because Congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States at any time before final judgment, though not after final judgment. As to the first reason,—admitting that the judges of the state courts are and always will be of as much learning, integrity, and wisdom as those of the courts of the United States, (which we very cheerfully admit) it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers and cannot enquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not enquire) that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct or control, or be supposed to obstruct or control the regular administration of justice. Hence in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens or foreigners, and between citizens and foreigners, it enables the parties under the authority of Congress to have controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated, can be assigned why some at least of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases, the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction; reasons of a higher and more extensive nature touching the saftety, peace, and sovereignty of the nation, might well justisfy a grant of executive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity in different states, might differently interpret a statute or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different states; and might perhaps never have precisely the same construction, obligation, or efficacy, in any two states. The public mischief that would attend such a state of things would be truly deplorable; and it cannot be believed that they should have escaped the enlightened convention which formed the Constitution. What indeed might then have been prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purpose. It was not to be exclusively for the benefit of parties who might be plaintiffs and would elect the national forum; but also for the protection of defendants who might be entitled to try their rights or assert their privileges before the same forum. Yet if the construction contended for be correct, it will follow that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can in no respect be considered as giving equal rights,

To obviate this difficulty, we are referred to the power which it is admitted Congress possess, to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the Constitution. If it be given, it is only given by implication as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language, an exercise of original jurisdiction. It presupposes an original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases, an exercise of appellate and not of original jurisdiction. If then the right of removal be included in the appellate jurisdiction it is only because it is one mode of exercising that power. And as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorise a removal either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control. A writ of error is indeed but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory, as well as final judgments. And if the right of removal from state courts exist before judgment, because it is included in the appellate power, it must for the same reason exist after judgment. And if the appellate power by the Constitution does not include cases pending in state courts, the right of removal, which is but a mode of exercising that power, can-

not be applied to them. Precisely the same objections therefore exist as to the right of removal before judgment as after, and both must stand or fall together. Nor indeed would the force of the arguments on either side, materially vary, if the right of removal were the exercise of original jurisdiction. It would equally trench upon the jurisdiction and independence of state tribunals*.

On the whole, the Court are of opinion that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorises the exercise of this jurisdiction in the specified cases by a writ of error, is supported by the letter and spirit of the Constitution. We find no clause in that instrument which limits this power, and we dare not interpose a limitation where the people have not been disposed to grant one.

Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is a historical fact, that this exposition of the Constitution, extending its appellate power to state courts, was, previous to its adoption, uniformly and publicly avowed by its friends and admitted by its enemies as the

* The remedy too of removal of suits would be utterly inadequate to the purposes of the Constitution, if it could act only on the parties, and not upon the state courts. In respect to criminal prosecutions, the difficulty seems admitted to be insurmountable; and in respect to civil suits, there would in many cases be rights without corresponding remedies. If state courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to criminal cases, there would at once be an end of all control, and the state decisions would be paramount to the Constitution. And though in civil suits the courts of the United States might act upon the parties; yet the state courts might act in the same way. And this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests.

basis of their respective reasonings both in and out of the state conventions. It is a historical fact, that at the time when the judiciary act was submitted to the deliberations of the first Congress, composed as it was not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is a historical fact, that the Supreme Court of the United States have from time to time sustained this appellate jurisdiction in a great variety of cases brought from the tribunals of many of the most important states in the union,—and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the Supreme Court until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubts.

The next question which has been argued is, whether the case at bar be within the purview of the 25th section of the judiciary act, so that this court may rightfully sustain the present writ of error. This section, stripped of passages unimportant in this inquiry, enacts in substance that a final judgment or decree in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favour of such their validity; or the Constitution, or of a treaty or statute

of, or commission held under the United States, and *the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such* clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, *except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution.* But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, *than such as appears upon the face of the record and immediately respects the before mentioned question* of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute.

That the present writ of error is founded upon a judgment of the court below, which drew in question and denied the validity of a statute of the United States is incontrovertible, for it is apparent upon the face of the record. That this judgment is final upon the rights of the parties, is equally true; for if well founded, the former judgment of that court was of conclusive authority, and the former judgment of this court utterly void. The decision was therefore equivalent to a perpetual stay of proceedings upon the mandate, and a perpetual denial of all the rights acquired under it. The case then falls directly within the terms of the act. It is a final judgment in a suit in a state court, denying the validity of a statute of the United States; and unless a distinction can be made between proceedings under a mandate and proceedings in an original suit, a writ of er-

for is the proper remedy to revise that judgment. In our opinion, no legal distinction exists between the cases.

In causes remanded to the Circuit Courts, if the mandate is not correctly executed, a writ of error or appeal has always been supposed to be a proper remedy, and has been recognized as such in the former decisions of this court. The statute gives the same effect to the writs of error from the judgments of state courts as of the circuit courts; and in its terms provides for proceedings where the same cause may be a second time brought up on writ of error before the Supreme Court. Here is no limitation or description of the cases to which the second writ of error may be applied; and it ought therefore to be co-extensive with the cases which fall within the mischiefs of the statute. It will hardly be denied that this cause stands in that predicament; and if so, then the appellate jurisdiction of this court has rightfully attached.

But it is contended that the former judgment of this court was rendered upon a case not within the purview of this section of the judicial act, and that as it was pronounced by an incompetent jurisdiction, it was utterly void, and cannot be a sufficient foundation to sustain any subsequent proceedings. To this argument several answers may be given. In the first place, it is not admitted that upon this writ of error the former record is before us. The error now assigned is not in the former proceedings, but in the judgment rendered upon the mandate issued after the former judgment. The question now litigated is not upon the construction of a treaty, but upon the constitutionality of a statute of the United States, which clearly is within our jurisdiction. In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be

conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formerly adjudged in this court the same point was argued by counsel and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties and could not be re-examined.

In this case however, from motives of a public nature, we are entirely willing to waive all objections and to go back and re-examine the question of jurisdiction as it stood upon the record formerly in judgment. We have great confidence that our jurisdiction will, on a careful examination, stand confirmed as well upon principle as authority. It will be recollected that the action was an ejectment for a parcel of land in the Northern Neck, formerly belonging to Lord Fairfax. The original plaintiff claimed the land under a patent granted to him by the state of Virginia, in 1789, under a title supposed to be vested in that state by escheat or forfeiture. The original defendant claimed the land as devisee under the will of Lord Fairfax. The parties agreed to a special statement of facts in the nature of a special verdict, upon which the District Court of Winchester in 1798 gave a general judgment for the defendant; which judgment was afterwards reversed in 1810 by the Court of Appeals, and a general judgment was rendered for the plaintiff; and from this last judgment a writ of error was brought to the Supreme Court. The statement of facts contained a regular deduction of the title of Lord Fairfax until his death in 1781, and also the title of his devisee. It also contained a regular deduction of the title of the plaintiff under the State of Virginia, and further referred to the treaty of peace of 1783, and to the acts of Virginia respecting the lands of Lord Fairfax and the supposed escheat or forfeiture thereof as component parts of the case. No facts disconnected with the titles thus set up by the parties were alleged on

either side. It is apparent from this summary explanation that the title thus set up by the plaintiff might be open to other objections; but the title of the defendant was perfect and complete, if it was protected by the treaty of 1785. If therefore this court had authority to examine into the whole record and to decide upon the legal validity of the title of the defendant, as well as the application of the treaty of peace, it would be a case within the express purview of the 25th section of the act. For there was nothing in the record upon which the court below could have decided but upon the title as connected with the treaty. And if the title was otherwise good, its sufficiency must have depended altogether upon its protection under the treaty. Under such circumstances it was strictly a suit where was drawn in question the construction of a treaty, and the decision was against the title specially set up or claimed by the defendant. It would fall then within the very terms of the act.

The objection urged at the bar is, that this court cannot enquire into the title, but simply into the correctness of the construction put upon the treaty by the Court of Appeals; and that their judgment is not re-examinable here, unless it appear on the face of the record that some construction was put upon the treaty. If therefore that court might have decided the case upon the invalidity of the title (and *non constat* that they did not) independent of the treaty, there is an end to the jurisdiction of this court. In support of this objection much stress is laid upon the last clause of the section which declares that no other cause shall be regarded as a ground of reversal than such as appears *on the face* of the record and *immediately* respects the construction of the treaty, &c. in dispute.

If this be the true construction of the section, it will be wholly inadequate to the purposes which it professes to have in view, and be evaded at pleasure. But we see no reason for adopting this narrow construction. And there are the

strongest reasons against it founded upon the words as well as the intent of the Legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be, in the words of the section, a suit where is drawn in question the construction of a treaty and the decision is against *the title set up by the party*. It is therefore the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How indeed can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the Court can control the treaty in reference to that title. If the court below could decide that the title was bad, and therefore not protected by the treaty, must not this court have a power to decide the title to be good, and therefore protected by the treaty? Is not the treaty in both instances equally construed, and the title of the party in reference to the treaty equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction.

It requires that the error upon which the appellate court is to decide shall appear on the face of the record and *immediately respect* the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party; and every error that immediately respects that question, must of course be within the cognizance of the Court. The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question. Any error therefore in respect to that title must be re-examinable, or the case could never be presented to the Court.

The restraining clause was manifestly intended for a very different purpose. It was foreseen that the parties might claim under various titles, and might assert various defences altogether independent of each other. The Court might admit or reject evidence applicable to one particular title and not to all. And in such cases, it was the intention of Congress to limit, what would otherwise have unquestionably attached to the Court the right of revising all the points involved in the cause. It therefore restrains the right to such errors as respect the question specified in the section. And in this view it has an appropriate sense, consistent with the preceding clauses. We are therefore satisfied, that upon principle, the case was rightfully before us;—and if the point were perfectly new we should not hesitate to assert the jurisdiction.

But the point has been already decided by this Court upon solemn argument. In *Smith v. the State of Maryland*, 6 *Cranch* 286, precisely the same objection was taken by counsel and overruled by the unanimous opinion of the Court. That case was in some respects stronger than the present, for the court below decided expressly that the party had no title, and therefore the treaty could not operate upon it. This Court entered into an examination of that question, and being of the same opinion affirmed the judgment. There cannot then be an authority which could more completely govern the present question.

It has been asserted at the bar that in point of fact the Court of Appeals did not decide either upon the treaty or the title apparent upon the record; but upon a compromise made under an act of the Legislature of Virginia. If it be (as we are informed) that this was a private act to take effect only upon a certain condition, viz. the execution of a deed of release of certain lands, which was matter *in pais*, it is somewhat difficult to understand how the Court could take judicial cognizance of the act or of the performance

of the condition, unless spread upon the record. At all events, we are bound to consider that the Court did decide upon the facts actually before them. The treaty of peace was not necessary to have been stated, for it was the supreme law of the land, of which all courts must take notice. And at the time of decision in the Court of Appeals and in this Court, another treaty had intervened which attached itself to the title in controversy, and of course, must have been the supreme law to govern the decision, if it should be found applicable to the case. It was in this view that this Court did not deem it necessary to rest its former decision upon the treaty of peace, believing that the title of the defendant was at all events perfect under the treaty of 1794.

The remaining questions respect more the practice than the principles of this Court. The forms of process and the modes of proceeding in the exercise of jurisdiction are, with few exceptions, left by the Legislature to be regulated and changed as this Court may in its discretion deem expedient. By a rule of this Court, the return of a copy of a record of the proper court under the seal of that court, annexed to the writ of error, is declared to be "a sufficient compliance with the mandate of the writ." The record in this case is duly certified by the clerk of the Court of Appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return, cannot prevail.

Another objection is, that it does not appear that the Judge who granted the writ of error did, upon issuing the citation, take the bond required by the 22d section of the judiciary act.

We consider that provision as merely directory to the Judge; and that an omission does not avoid the writ of error. If any party be prejudiced by the omission, this Court

can grant him summary relief, by imposing such terms on the other party as, under all the circumstances, may be legal and proper. But there is nothing in the record by which we can judicially know whether a bond has been taken or not. For the statute does not require the bond to be returned to this Court; and it might with equal propriety be lodged in the court below, who would ordinarily execute the judgment to be rendered on the writ. And the presumption of law is, until the contrary appears, that every Judge who signs a citation has obeyed the injunctions of the act.

We have thus gone over all the principal questions in the cause, and we deliver our Judgment with entire confidence, that it is consistent with the Constitution and Laws of the land*.

It is the Opinion of the whole Court, that the Judgment of the Court of Appeals of Virginia, rendered on the Mandate in this Cause, be reversed, and the Judgment of the District Court held at Winchester be, and the same is hereby affirmed.

Johnson, J. It will be observed in this case, that the Court disavows all intention to decide on the right to issue a mandamus to the State Courts; thus leaving us, in my opinion, where the Constitution places us,—supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals.

In this view, I acquiesce in their decision, but not altogether in the reasoning or opinion of my brother who deli-

* We have not thought it incumbent on us to give any opinion upon the question whether this Court have authority to issue a writ of mandamus to the Court of Appeals, to enforce the former Judgments, as we do not think it necessarily involved in the decision of the cause.

vered it. Few minds are accustomed to the same habit of thinking, and our conclusions are more satisfactory to ourselves when arrived at in our own way.

I have another reason for expressing my opinion on this occasion. I view this question as one of the most momentous importance; as one which may affect in its consequences the permanence of the American Union. It presents an instance of collision between the judicial powers of the Union and one of the greatest states of the union, on a point the most delicate and difficult to be adjusted. On the one hand, the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which acts upon the physical powers of man,—or the judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to the genius of our Constitution, except as far as it shall be sanctioned by the latter; but let the latter be obstructed in its progress by an opposition which it cannot overcome or put by, and the resort must be to the former, or government is no more.

On the other hand, so firmly am I persuaded that the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the general government, nor the proud consciousness of equality and security, any longer than the independence of judicial power shall be maintained, consecrated, and intangible, that I could borrow the language of a celebrated orator, and exclaim—"I rejoice that Virginia has resisted."

Yet here I must claim the privilege of expressing my regret, that the opposition of the high and truly respected tribunal of that state, had not been marked with a little more moderation. The only point necessary to be decided

in the case then before them, was "*whether they were bound to obey the mandate emanating from this Court?*" But in the judgment entered on their minutes, they have affirmed that the case was in this court *coram non judice*, or in other words, that this court had not jurisdiction over it.

This is assuming a truly alarming latitude of judicial power. Where is it to extend? It is an acknowledged principle of I believe in every court in the world, that not only the decisions, but every thing done under the judicial process of courts not having jurisdiction, are *ipso facto*, void. Are then, the judgments of this court to be reviewed in every court of the Union? and is every recovery of money, every change of property, that has taken place under our proceess to be considered null, void, and tortious?

We pretend not to more infallibility than other courts, composed of the same frail materials which compose this. It would be the height of affectation to close our minds upon the recollection that we have been extracted from the same seminaries in which originated the learned men who preside over the state tribunals. But, there is one claim which we can with due confidence assert in our own name upon those tribunals. The profound, uniform, and unaffected respect which this court has always exhibited for state decisions, give us strong pretensions to judicial comity. And another claim I may assert, in the name of the American people. In this court, every state in the Union is represented. We are constituted by the voice of the Union. And when decisions take place, which nothing but a spirit to give ground and harmonize can reconcile, ours is the superior claim upon the comity of state tribunals. It is the nature of the human mind to press a favorite hypothesis too far. But magnanimity will always be ready to sacrifice the pride of opinion to public welfare.

In the case before us, the collision has been on our part wholly unsolicited. The exercise of this appellate jurisdiction over the state decisions has long been acquiesced in, and when the writ of error in this case was allowed by the President of the Court of Appeals of Virginia, we were sanctioned in supposing that we were to meet with the same acquiescence there. Had that court refused to grant the writ in the first instance, or had the question of jurisdiction or on the mode of exercising jurisdiction, been made there originally, we should have been put on our guard, and might have so modelled the process of this court as to strip it of the offensive form of a mandate. In this case it may have been brought over to what probably the 25th section of the jurisdiction act meant it should be, to wit, an alternative judgment either that the State Court may finally proceed, at its option, to carry into effect the judgment of this court; or if it declined doing so, that then this court would proceed itself to execute it. The words "sense" and "operation," of the 25th section on this subject, merit particular attention. In the preceding section, which has relation to the causes brought up by writ of error from the circuit courts of the United States, this court is instructed not to issue the execution, but to send a special mandate to the Circuit Court to award the execution thereupon. In case of the Circuit Court's refusal to obey such mandate, there could be no doubt, as to ulterior measures, compulsory measures might unquestionably be resorted to. Nor indeed was there any reason to suppose that they ever would refuse. And therefore there is no provision made for authorising this court to execute its own judgment in cases of that description. But not so in cases brought up from the state courts. The framers of that law plainly foresaw that the state courts may refuse; and not being willing to leave ground for the implication, that compulsory process must be resorted to, because no specific provision was made, they have provided the means, by authorising this court, in case

of reversal of the state decision, to execute its own judgment. In case of *reversal* only, was this necessary; for in case of affirmance, this collision could not arise. It is true, that the words of this section are, that this court may, *in their discretion*, proceed to execute its own judgment. But these words were very properly put in, that it might not be made imperative upon this court to proceed indiscriminately in this way, as it could only be necessary in case of the refusal of the state courts. And this idea is fully confirmed by the words of the 13th section, which restrict this court in issuing the writ of mandamus, so as to confine it expressly to those courts which are constituted by the United States.

In this point of view the Legislature is completely vindicated from an intention to violate the independence of the state judiciaries. Nor can this court, with any more correctness, have imputed to it similar intentions. The form of the mandate issued in this case is that known to appellate tribunals, and used in the ordinary cases of writs of error from the courts of the United States. It will perhaps not be too much in such cases, to expect of those who are conversant in the forms, fictions, and technicality of the law, not to give to the process of courts too literal a construction. They should be considered with a view to the ends they are intended to answer, and the law and practice in which they originate. In this view, the mandate was no more than a mode of submitting to that court the option which the 25th section holds out to them.

Had the decision of the Court of Virginia been confined to the point of their legal obligation to carry the judgment of this court into effect, I should have thought it unnecessary to make any further observations in this cause. But we are called upon to vindicate our general revising power, and its due exercise in this particular case.

Here, that I may not be charged with arguing upon a hypothetical case, it is necessary to ascertain what the real question is which this court is now called to decide.

In doing this, it is necessary to do what, although in the abstract is of questionable propriety appears to be generally acquiesced in, to wit, to review the case as it originally came up to this court on the former writ of error. The cause then came upon a case stated between the parties, and under the practice of that state, having the effect of a special verdict. The case stated, brings into view the treaty of peace with Great Britain, and then proceeds to present the various laws of Virginia and the facts upon which the parties found their respective titles. It then presents no particular question, but refers generally to the law arising out of the case. The original decision was obtainted prior to the treaty of 1794, but before the case was adjudicated in this court the treaty of 1794 had been concluded.

The objection arises under the construction of the 25th section above mentioned; which, as far as it relates to this case, is in these words—"a final judgment or decree in any suit, in the highest court of law or equity of a state, in which a decision in the suit could be had," "where is drawn in question the construction of any clause of the Constitution or of a treaty," and the decision is against the title set up or claimed by either party under such clause, may be re-examined and reversed, and affirmed," &c.

"But no other error shall be assigned or regarded as a ground of reversal in such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said treaties," &c.

The first point to be decided under this state of the case was, that the judgment being a part of the record, if that judgment was not such, as upon that case it ought to have

been, it was an error apparent on the face of the record. But it was contended, that the case there stated, presented a number of points upon which the decision below may have been founded, and that it did not therefore necessarily appear to have been an error immediately respecting a question on the construction of a treaty. But the Court held, that as the reference was general to the law arising out of the case, if one question arose which called for the construction of a treaty, and the decision negatived the right set up under it, this court will reverse that decision; and that it is the duty of the party who would avoid the inconvenience of this principle, so to mould the case as to obviate the ambiguity. And under this point arises the question, whether this court can enquire into the title of the party, or whether they are so restricted in their judicial powers as to be confined to decide on the operation of a treaty upon a title previously ascertained to exist.

If there is any one point in the case, on which an opinion may be given with confidence, it is this. Whether we consider the letter of the statute, or the spirit, intent, or meaning of the Constitution and of the Legislature, as expressed in the 25th section, it is equally clear that the title is the primary object to which the attention of the Court is called in every such case. The words are—" and the decision be against *the title*" so set up, not against *the construction of the treaty* contended for by the party setting up the title. And how could it be otherwise? The title may exist notwithstanding the decision of the state courts to the contrary: and in that case, the party is entitled to the benefits intended to be secured to him by the treaty. The decision to his prejudice, may have been the result of those very errors, partialities, or defects in state jurisprudence, against which the Constitution intended to protect the individual. And if the contrary doctrine be assumed, what is the consequence? This court may then be called upon to decide on

a mere hypothetical case,—to give a construction to a treaty, without first deciding whether there was any interest on which that treaty, whatever be its proper construction, would operate. This difficulty was felt, and weighed, in the case of Smith and the State of Maryland, and the decision was founded upon the idea that this Court was not thus restricted.

But another difficulty presented itself. The treaty of 1794 had become the supreme law of the land, since the judgment rendered in the court below. The defendant, who was at that time an alien, had now become confirmed in his rights, under that treaty. This would have been no objection to the original judgment. Were we then at liberty to notice that treaty in rendering the judgment of this court? Having dissented from the opinion of the court below, on the question of title, this difficulty did not present itself in any way, in the view I then took of the case. But the majority of the Court determined that, as a public law, the treaty was a part of the law of every case depending in this court. That as such, it was not necessary that it should be spread upon the record; and that it was obligatory upon this court, in rendering judgment upon this writ of error, notwithstanding the original judgment may have been otherwise unimpeachable. And to this opinion I yielded my hearty assent. For it cannot be maintained that this court is bound to give a judgment unlawful at the time of entering it, in consideration that the same judgment would have been lawful at any prior time. What judgment can now be lawfully rendered between the parties? is the question to which the attention of the Court is called. And if the law which sanctioned the original judgment expire, pending an appeal, this court has repeatedly reversed the judgment below, although rendered whilst the law existed. So too, if plaintiff in error die, pending suit, and his land descend on an alien, it cannot be contended that this court

will maintain the suit in right of the judgment, in favour of his ancestor notwithstanding his present disability.

It must here be recollected, that this is an action of ejectment. If the term formerly declared upon expires, pending the action, the Court will permit the plaintiff to amend, by extending the term. Why? Because although the right may have been in him at the commencement of the suit, it has ceased before judgment, and without this amendment he would not have judgment. But suppose the suit were really instituted to obtain possession of a leasehold, and the lease expire before judgment, would the Court permit the party to amend, in opposition to the right of the case? On the contrary, if the term formally declared on, were more extensive than the lease in which the legal title was founded, could they give judgment for more than facts? It must be recollected, that under this judgment a *writ of restitution* is the fruit of the law. This, in its very nature, has relation to, and must be founded upon a present existing right at the time of judgment. And whatever be the cause which takes this right away, the remedy must, in the reason and nature of things, fall with it.

When all these incidental points are disposed of, we find the question finally reduced to this—Does the judicial power of the United States extend to the revision of decisions of state courts, in cases arising under treaties? But, in order to generalize the question, and present it in the true form in which it shows itself in this case, we will enquire whether the Constitution sanctions the exercise of a revising power over the decisions of state tribunals, in those cases to which the judicial power of the United States extends?

And here, it appears to me, that the great difficulty is on the other side. The real doubt, whether the state tribunals can constitutionally exercise jurisdiction in any of the cases to which the judicial power of the United States extends,

Some cession of judicial power is contemplated by the 3d article of the Constitution. That which is ceded can no longer to be retained. In one of the circuit courts of the United States, it has been decided (with what correctness I will not say) that the cession of a power to pass a uniform act of bankruptcy, although not acted on by the United States, deprives the States of the power of passing laws to that effect. With regard to the admiralty and maritime jurisdiction, it would be difficult to prove that the States could resume it if the United States should abolish the courts vested with that jurisdiction. Yet, it is blended with the other cases of the jurisdiction, in the 2d section of the 3d article, and ceded in the same words.

But it is contended, that the 2d section of the 3d article contains no expression of cession of jurisdiction. That it only vests a power in Congress to assume jurisdiction to the extent therein expressed. And under this head arose the discussion on the construction proper to be given to that article. On this part of the case I shall not pause long. The rules of construction, where the nature of the instrument is as certain, are familiar to every one. To me the Constitution appears, in every light of it, to be a contract which, in legal language, may be denominated tripartite. The parties are the People, the States, and the United States. It is returning in a circle to contend, that it professes to be the exclusive act of the people; for what have the people done but to form this compact? That the States are recognised as parties to it, is evident from various passages, and particularly that in which the United States guarantee to each state a republican form of government. The security and happiness of the whole was the object; and to prevent dissention and collision, each surrendered those powers which might make them dangerous to each other. Well aware of the sensitive irritability of sovereign states, where their wills or interests clash, they placed themselves, with

regard to each other, on the footing of sovereigns upon the ocean; where power is mutually conceded to act upon the individual, but the national vessel must remain unviolated. But to remove all ground for jealousy and complaint, they relinquish the privilege of being any longer the exclusive arbiters of their own justice, where the rights of others come in question, or the great interests of the whole may be affected by those feelings, partialities, or prejudices which they meant to put down forever.

Nor shall I enter into a minute discussion of the meaning of the language of this section. I have seldom found much good result from hypercritical severity in examining the distinct force of words. Language is essentially defective in precision. More so than those are aware of, who are not in the habit of subjecting it to philological analysis. In the case before us, for instance, a rigid construction might be made, which would annihilate the powers intended to be ceded. The words are—"shall extend to." But that which *extends to*, does not necessarily *include in*. So that the circle may enlarge until it reaches the objects that limit it, and yet not take them in. But the plain and obvious sense and meaning of the word *shall* in this sentence, is the future sense, and has nothing imperative in it. The language of the framers of the Constitution is—"we are about forming a general government. When that government is formed, its powers shall extend," &c. I therefore, see nothing imperative in this clause; and it certainly would have been very unnecessary to use the word in that sense. For as there was no controlling power constituted, it would only, if used in an imperative sense, have imposed a moral obligation to act. But the same result arises from using it in a future sense; and the Constitution everywhere assumes, as a postulate, that wherever power is given, it will be used, or, at least, used as far as the interest of the American people require it, if not from the natural proneness of

man to the exercise of power, at least from a sense of duty, and the obligation of an oath. Nor can I see any difference in the effect of the words used in this section, as to the scope of the jurisdiction of the United States' courts over the cases of the first and second description, comprised in that section. "Shall extend to controversies" appears to me as comprehensive in effect, as "shall extend to all cases." For if the judicial powers extend "to controversies between citizen and alien," &c. to what controversies of that description does it not extend? If no case can be pointed out which is excepted, it then extends to *all controversies*.

But I will assume the construction as a sound one, that the cession of power to the general government, means no more than that they may assume the exercise of it whenever they think it advisable. It is clear that Congress have hitherto acted under that impression, and my own opinion is in favour of its correctness. But does it not then follow that the jurisdiction of the State Court, within the range ceded to the general government, is permitted and may be withdrawn whenever Congress think proper to do so? As it is a principle that every one may renounce a right introduced for his benefit, we will admit that they may constitutionally exercise jurisdiction in such cases. Yet surely the general power to withdraw the exercise of it, includes in it the right to molify, limit, and restrain that exercise. "This is my domain. Put not your foot upon it. If you do, you are subject to my laws. I have a right to exclude you altogether. I have then a right to prescribe the terms of your admission to a participation. As long as you conform to my laws, participate in peace. But I reserve to myself the right of judging how far your acts are conformable to my laws." Analogy then, to the ordinary exercise of sovereign authority would sustain the exercise of this controling or revising power.

But it is argued that a power to assume jurisdiction to the constitutional extent does not necessarily carry with it a right to exercise appellate power over the state tribunals.

This is a momentous question, and one on which I shall reserve myself uncommitted for each particular case as it shall occur. It is enough at present to have shown that Congress has not asserted and this court has not attempted to exercise that kind of authority *in personam* over the state courts which would place them in the relation of an inferior responsible body *independent of their own aequiescence.* And I have too much confidence in the state tribunals to believe that a case ever will occur in which it will be necessary for the general government to assume a controlling power over those tribunals. But is it difficult to suppose a case which will call loudly for some remedy or restraint? Suppose a foreign minister or an officer acting regularly under authority from the United States, seized to-day, tried to-morrow, and hurried the next day to execution. Such cases may occur, and have occurred in other countries. The angry vindictive passions of men have too often made their way into judicial tribunals, and we cannot hope for ever to escape their baneful influence. In the case supposed, there ought to be a power somewhere to restrain or punish, or the union must be dissolved. At present the uncontrollable exercise of criminal jurisdiction is most securely confided to the state tribunals. The courts of the United States are vested with no power to scrutinize into the proceedings of the state courts in criminal cases. On the contrary, the general government has in more than one instance exhibited their confidence by a wish to vest them with the execution of their own penal laws. And extreme, indeed, I flatter myself, must be the case in which the general government could ever be induced to assert this right. If ever such a case should occur, it will be time enough to decide upon their right to do so.

But we know that by the 3d article of the Constitution judicial power to a certain extent, is vested in the general government; and that by the same instrument power is given to pass all laws necessary to carry into effect the provisions of the Constitution. At present it is only necessary to vindicate the laws which they have passed affecting civil cases pending in state tribunals.

In legislating on this subject, Congress in the true spirit of the Constitution, have proposed to secure to every one the full benefit of the Constitution without forcing any one necessarily into the Courts of the United States. With this view, in one class of cases, they have not taken away absolutely from the state courts all the cases to which their judicial power extends, but left it to the plaintiff to bring his action there originally if he chose, or to the defendant to force the plaintiff into the courts of the United States, where they have jurisdiction, and the former has instituted his suit in the state courts. In this case they have not made it legal for the defendant to plead to the jurisdiction, the effect of which would be to put an end to the plaintiff's suit and oblige him, probably at great risk or expense, to institute a new action; but the act has given him a right to obtain an order for a removal on a petition to the state court, upon which the cause with all its existing advantages is transferred to the circuit court of the United States. This, I presume, can be subject to no objection. As the legislature has an unquestionable right to make the ground of removal a ground of plea to a jurisdiction, and the court must then do no more than it is now called upon to do, to wit, give an order or a judgment, or call it what we will, in favour of the defendant. And so far from asserting the inferiority of the state tribunal, this act is rather that of a superior, inasmuch as the circuit court of the United States becomes bound by that order to take jurisdiction of the case. This method, so much more unlikely to affect official delicacy, than that

which is resorted to in the other class of cases, might perhaps have been more happily applied to all the cases which the legislature thought it advisable to remove from the state courts. But the other class of cases, in which the present is included, was proposed to be provided for in a different manner. And here again, the Legislature of the Union evince their confidence in the state tribunals, for they do not attempt to give original cognizance to their own circuit courts of such cases, or to remove them by petition and order, but still believing that their decisions will be generally satisfactory, a writ of error is not given immediately, as a question within the United States shall occur, but only in case the decision shall finally in the court of the last resort be against the title set up under the constitution, treaty, &c.

In this act, I can see nothing which amounts to an assertion of the inferiority or dependance of the state tribunals. The presiding judge of the state court is himself authorised to issue the writ of error, if he will, and thus give jurisdiction to the Supreme Court; and if he think proper to decline it, no compulsory process is provided by law to oblige him. The party who imagines himself aggrieved is then at liberty to apply to a judge of the United States, who issues the writ of error, which (whatever the form) is in substance no more than a mode of compelling the opposite party to appear before this court and maintain the legality of his judgment obtained before. An exemplification of the record is the common property of every one who chuses to apply and pay for it, and thus the case and the parties are brought before us. And so far is the court itself from being brought under the revising power of this court, that nothing but the case as presented by the record and pleadings of the parties is considered, and the opinions of the court are never resorted to unless for the purpose of assisting this court in forming their own opinion.

The absolute necessity that there was for Congress to exercise something of a revising power over the cases and parties in the state courts, will appear from this consideration.

Suppose the whole extent of the judicial power of the United States vested in their own courts, yet such a provision would not answer all the ends of the Constitution, for two reasons.

1st. Although the plaintiff may in such case have the full benefit of the Constitution extended to him, yet the defendant would not: as the plaintiff might force him into the court of the state at his election.

2dly. Supposing it possible so to legislate as to give the courts of the United States original jurisdiction in all cases arising under the Constitution, laws, &c. in the words of the 2d section of 3d article, (a point on which I have some doubt and which in time, might perhaps render the *quo minus fiction* of Great Britain necessary,) yet a very large class of cases would remain unprovided for. Incidental questions would often arise, and as a court of competent jurisdiction in the principal case, must decide all such questions, whatever laws they arise under, endless might be the diversity of decisions throughout the Union upon the Constitution, treaties and laws of the United States; a subject on which the tranquility of the Union internally and externally may materially depend.

I should feel the more hesitation in adopting the opinions which I express in this case, were I not firmly convinced that they are practical and may be acted upon without compromiting the harmony of the Union, or bringing humility upon the state tribunals. God forbid that the judicial power in these states should ever, for a moment, even in its humblest departments, feel a doubt of its own independence.—

Whilst adjudicating on a subject which the laws of the country assign finally to the revising power of another tribunal, it can feel no such doubt. An anxiety to do justice is ever relieved by the knowledge that what we do is not final between the parties. And no sense of dependance can be felt from the knowledge that the parties, not the court, may be summoned before another tribunal. With this view, by means of laws avoiding judgments obtained in the state courts, in cases over which Congress has constitutionally assumed jurisdiction, and inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others. Under a liberal extension of the writ of injunction, and the habeas corpus ad subjiciendum, I flatter myself that the full extent of the constitutional revising power may be secured to the United States, and the benefits of it to the individual, without ever resorting to compulsory or restrictive process upon the same tribunals. A right which I repeat again, Congress has not asserted, nor has this Court asserted, nor does there appear any necessity for asserting.

The remaining points in the case being mere questions of practice, I shall make no remarks upon them.

MISCELLANEA.

AMERICAN JURISPRUDENCE.

Supposed to be written by Mr. Rush, Attorney-General of the United States.

(*Concluded from Page* 347.)

WE have been indulging in the foregoing train of reflections with a view to clear the way for the remaining and chief question. And that is, how the profession of the law here, does, in point of fact, compare with the profession in England? If the reflections collectively be at all just, they have already more than half afforded the answer and shown how safely we may go into the comparison. For there seem to be good reasons why, in this country, the profession should stand upon high ground.

If mind be the result of external stimuli forcing it into action, our Jurisprudence is surrounded by that which must provoke and improve its powers. There are reasons why it ought not to be expected of us to produce a Lord Byron or a Walter Scott, a Dugald Stewart, perhaps, or other men of like stamp with those who enrich the British press with such a copious and constant flow of profound or elegant literary and scientific productions. We are yet at some distance, though, we trust, at no very great distance from the age that can feed in any extent the merely classic mind into fullness and perfection. But we see no reasons at all why we may not breed Gibbses, and Gartows, and Saubevs, and

Lawrences, and breed them in abundance. If we have not gained that stage of our growth when the luxury of the arts and sciences goes hand in hand with all other luxuries, we enjoy in a proud degree, to use an expression of the Edinburg Review, "the luxury of liberty;" and it is not irrational to suppose that those who officiate so largely at her altars should arrive at a perfection in their duty.

In throwing out a conjectural sentiment, and one not altogether hasty, we presume to think that the law mind, if we may so speak, of the United States, has, from adequate causes, forerun the general condition of literature, and already been accelerated and matured into as much force and discipline as it is likely to reach in any more distant period of the country's advancement. How it may be in medicine, and in divinity, we do not presume on this occasion to intimate. If there be fit matter for reflection under these heads, it must be gone into in some separate disquisition. In painting, there might be room to say something, keeping to the walk of native genius at least. We pass to our proper subject. The profession of the law with us, then, seems to be absorbed by duties as numerous and commanding at this day, as it is probable that it can be at any more remote period of fuller population and greater riches. Those scenes of portentous convulsion which in their occasional visitations rouse the mind of a whole community into temporary and preternatural force, and which more frequently belong to a full than to a slender population, and to age than to youth, may indeed form exceptions. But we speak of the settled and ordinary course of things. As our lovely territory continues to be overspread with cultivated fields, and to glitter with the spires of villages and cities, we shall, to be sure, witness a corresponding increase in the professors of this science; but it does not appear to follow that their faculties will be tasked to a higher compass of exertion than the faculties of those who now flourish in the

walks of full occupation. There are, doubtless, more men in England at the present day who write well, than there were in the time of queen Anne or queen Elizabeth; but it will scarcely be said that they write better than those who were at the head of the list at either of those periods.

As to profound scholarship, as a Wakefield or a Porson might define the term, it is not to be looked for as an adjunct of the profession in any country. But, for those classical embellishments which are ancillary, and whose tincture lends its chastening without monopolizing, it is probable that they are as much its concomitants with us at the present as they will be at a more distant era, because as much so we incline to think, taking the profession upon a large scale, as can be made compatible at any time with its unrelaxing and intrinsic toil. The necessity of those preparatory studies which alone can form the taste, and lift up the mind to proper conceptions of eminence, cannot be too anxiously and too constantly impressed upon the youth who is destined for the bar. But when once he has plunged into the profession he will find that, to the precepts of Blackstone's Valedictory to his Muse, he must submit in the full spirit of obedience.

It may possibly be supposed, that the subdivision of the profession in England affords a cause for its greater eminence in a particular line, than in a country where this system is not known; and that here we are consequently thrown under a division into counsellors and attornies, but that which assigns to counsellors and advocates of high standing a distinct range of business in distinct courts. Upon this opinion we must be permitted to bestow a moment's examination, being, as we own we are, decided and zealous dissentients. We admit also that it constitutes the stress of the argument.

It is certainly true, as a general proposition, that as you subdivide labour you increase its excellence. *Ars longa, vita brevis*, is a remark that every schoolboy knows. But the proposition has its modifications, and it has its limits. Its truth runs into a greater extreme as to the hand, than it does as to the mind. It may well enough be conceived that a pin win will be better made for being divided into eighteen distinct operations. So that palaces, orreries, optical instruments, or steam frigates, may be made to exhibit a result of greater capability and perfection from the number of artizans employed in their construction. But he who should, as a general rule, infer from this, that a book will be better written because one man furnishes the ideas and another the words, might be in danger of falling into a strange mistake.

Under what limitations precisely the proposition must be brought, is not easy to say by any previous definition; but there are some general principles by following which we may in all probability be led to sound conclusions. The law is, in itself, one entire science. Its various departments are but so many smaller orbs moving within the one grand outline of a smaller one. They all harmonize with each other. They enlarge, they illustrate, they enrich each other. They are social handmaids flourishing and delighting in proximity. That, with the requisite diligence, life is not long enough to arrive at an acquaintance with them all, we can by no means admit. Still less that the knowledge of one will weaken the knowledge of another. Did not Sulpicius, who was so celebrated an orator, also find time to write out more than a hundred volumes of the law? In rendering homage to intellect let us rather wish to see its powers carried to the utmost practical verge, than compressed within the scantiest limits.

That the lawyer should not also be able to master the lore of the metaphysician, the chemist, and the astronomer, we freely admit. Falling without the grand periphery of his own circle, or touching it but incidentally, a *pro hac vice* knowledge must content him. But we will not so underrate the comprehensive and ductile attributes of the human understanding as to imagine, that he must necessarily be the greater criminal lawyer who never goes out of the old Bailey, the greater civilian who practices exclusively in the Courts of Admiralty, or the greater common lawyer who takes briefs only in the King's Bench. The structure of society there may render this necessary, or may render it profitable; but that it is likely to elevate the mind in the same degree to its highest efforts of successful skill, we do not think follows. It would be difficult to make us believe that Tully pleaded with less learning and with less eloquence for Archias and for Murena, because he happened at the same time to be an accomplished master in every branch of the Roman law. It is not the language which he himself beautifully holds in the latter oration. We do not think it very probable either, that the exclusive practitioner in doctors' commons would be ready to admit, that the world must set him down as a less accurate English scholar, if it so happened that he understood also the Greek and Latin and the French languages.

Let us suppose a Bishop to be an eloquent preacher and learned divine. We shall certainly conclude, that he has trimmed his lamp over the whole body of theological research rather than stored away in his memory, ambitiously tenacious of nothing, the tenets of the Church of England. It may be this that might enable him to quote in its order a little more promptly one of the thirty-nine articles; but it would be poor praise, and at best only rounding the head of the pin. So we imagine, that he would be likely to be much the most able commander in chief who was master of the

principles and movements of every branch of service, the artillery, the cavalry, and the infantry, and where necessary could direct each, than he who understood but one. The analogy holds in the law. Within its own limits, considering it one science, all the parts of which are intimately kindred, we think that one mind is competent to move; and that its movements will be the more vigorous and the more effective from the space not being cramped. We would not have the general an admiral. We would not have the lawyer a mathematician. We would not have the bishop a judge. This would be for each to transcend entirely his own proper boundaries. But as little would we have any one a prisoner in a single cell of his own castle. We are allowing to each the spacious range of all the apartments. We do not see how else they are to comprehend, upon any thing of a large scale, the plan of the edifice.

Endeavoring to divest ourselves, as far as possible, of the national feeling, we candidly think, that the English lawyers, taken in the bulk, bear upon them, in the comparison with our own, something of the stamp of this rigidly exclusive occupation of the faculties.

Open, at random, a volume of Burrow or of East, and then do the same with one of Dallas or Cranch. We declare, that, to us, there seems in the general discussions of the former, a certain stiffness. Nearly every thing appears to turn upon the memory. The argument is a statement, accurate if you you will, but scarcely any thing in most instances, beyond a naked statement of the cases decided upon the same point, nicely fixed off in chronological order. The work, shall we add, appears to wind up like that of the mechanic, who has been less deeply engaged in thinking than in keeping to the rules of the trade. In those of the latter, it strikes us that there is more freedom; more fullness; more learning poured out; more illustration borrowed from the whole science; more trials of the mind's strength

in the higher province of reasoning; and mixed with no dearth of authorities from the books, a more frequent mounting up to principles.

These are only opinions. We would by no means be understood as asserting them with any dogmatic confidence. The English have theirs upon all subjects and no doubt will upon this. There can be no harm in having and expressing ours. Those who do not think our way of accounting for them good, will not agree with us. It lately seemed strange, and to some inexplicable, that we should keep vanquishing their frigates, and their sloops of war, and their squadrons, with scarcely an exception, wherever we happened to find them. And yet so was the fact. Now, as their Jurisprudence has been as long and is as justly their boast as their navy, who knows, if we only could get impartial arbiters, but that this country of their own peopling might also be thought in danger of tearing from them some of the laurels of the law? We leave others to talk about the causes or effects of the war; and for ourselves have nothing more to do with its events than barely to try if we can draw from them some remote but possibly not imperceptible analogies to mix with our speculations. Humbly supposing that we have gone near towards surpassing them in the one line, we do not know that it ought wholly to shock belief, should any one be bold enough to dream of our falling into the same unexpected sort of sacrilege in another!

Single instances may start to the recollection. It may be asked, have we produced an Erskine, or can we point to such a speech as M'Intosh's defence of Peltier?

We reply, that it is each bar in its general character and entire body which must decide the question under review. There has never yet been any printed collection made of the speeches of our great advocates in state prosecutions, or in trials otherwise of great prominence. They have been per-

mitted to pass off as they were delivered, and the flowing strains or the impressive bursts by which they may have been elevated and adorned, too generally committed only to the fleeting evidences of cotemporaneous and traditional memory. The stenographer is not as yet a frequent attendant upon our courts. Were the liberty permitted us of going into a recapitulation of private names, we could gratify our public and personal feelings, by a list known to fame in most of the States, where none will agree to be provincial, but all must be rated, and have in fact like claims to be rated, as acting an equal and a leading part,—of names that unite what is lofty in understanding and in knowledge with virtues that ennoble the heart, and the train of qualities that make private life dignified and delightful. The States of an ancient Greece, says Gibbon, "were cast in that happy mixture of union and independence, and had that *identity* of language, religion, and manners, which rendered them the spectators and judges of each other's merit, and excited them to strive for pre-eminence in the career of glory." How applicable to confederated America.

At some names we could point, who, too, are decked with the trophies of eloquence. Nor should we be prepared to admit, that in the combination of what is profound with what is brilliant, in touches of fancy gilding the superstructure on foundations of logical strength, in tones bold, animated, and thrilling, in language copious, gorgeous, and pure, we could not make a further selection to meet the challenge held out by this towering, yet solitary champion of the British metropolis. Mr. Erskine, for more than twenty years, stood alone at the English bar. Nor had he ever had his prototype. Sunk into a peerage whose perishing honors to the body were derived from man, he seems to have put off, to speak with Burke, the splendors of an intellect conferred upon him by God. Mr. Brougham will probably be his successor. In adverting to such names, while

we pay them the tribute which their genius demands, we do it with much the more pleasure in confidently imagining that even should the first be thought to bear off the meed of pre-eminence, they afford corroboration to the general spirit and theory of our remarks. They both conspicuously illustrate the truth, that to shine from afar in the profession, something more is necessary than to be harnessed up, like a thill-horse, always to work in one way. That to a wider scope a wider fame belongs. Mr. Erskine's speeches give incontestible proofs of his acquaintance with the entire range of the laws, constitution, and judicial policy of his country, sometimes in one line, and sometimes in another. History, theology, literature, the arts, all are tributary to the strength or to the ornament of his efforts. His defence of Stockdale, of Paine, his prosecution of Williams, his speech for Captain Baillie, for Carnan, are, in themselves, sufficient samples of these characteristics.

Sir James M'Intosh's defence need be the subject of but a single observation. It deserves every praise; but it is not the proper praise of bar oratory. It is a highly elaborate and ornate performance, with knowledge and rhetoric and beauty meeting in lavish and chaste union; which it is difficult to read without conviction if without tears, and certainly not without gathering up some of the choicest reflections of history and jurisprudence, refined by ethics and wrought together with the most exquisite skill, to produce in artificial minds a favorable and sympathetic glow. But it is not the speech of the advocate trained and proficient in the habits of the bar. It would be classed more properly, in our apprehension of its merits, among the fine pieces of composition of writers or of statesmen. He was not, we believe, at the time of its delivery, nor has he been since, a lawyer much engaged in the business of courts. And we think we can scarcely be wrong in supposing it to be the

production of the closet, rather than the true offspring of the forum.

There is, indeed, at the present day in England a Judge, perhaps their first, of the volumes containing whose decisions it has been said in the British House of Commons, "that they were no less valuable to the classical reader than to the student of law, by perpetuating the style in which the Judgments of the Court were delivered.*" A man he is of dazzling mind. Born, we believe, a miller's son, he can talk of giving a *rusticum judicium*. Yet, surely, no Judge upon the face of the earth was ever farther from having rendered such a one. His intellect is so polished that it has been called transparent. Some of his pages are as if diamond sparks were on them. When he deals in wit, it is like a sunbeam and gone as quick. But so much the worse. We pity the suitor, or the poor Vice-Admiralty Judge, it may happen to hit. Abundant learning is also his. We must say of him, that if he wants qualities necessary to consummate the fame of a great Judge, he has others which perhaps no Judge ever possessed before, or in the same degree. It was said,

"How great an Ovid was in Murray lost!"

But the Judge we speak of is an Ariel. He holds a judicial wand. Touching the scales with it, they at once look even, no matter what preponderance an instant before. How can such a Judge be truly great? One day, in the midst of some of those beautiful little judicial aphorisms the web of which he can weave so fine, he declares "that *astutia* does not belong to a court." The next, "that humanity is but its second virtue, justice being forever the first." The third, that it is "monstrous to suppose, that because one nation falls into guilt, others are let loose from the morality

*Lord Henry Petty, speaking of Robinson's Reports.

of public law." But a frost comes on the fourth! Certain retaliating orders are laid upon his desk, that shrine which no foreign touch ought ever to pollute. Unlike an illustrious British Judge who has just returned from India, the pliant spirit bows obedience. Instead of the dignity of his mind upholding the independence of justice, its subtlety is enlisted to show that on her majestic form no violation was imprinted. In one breath admitting that the rescript of the throne was the rule of his decision, he strives in the next to hide the consciousness of judicial obeisance. In an argument where the utmost extenuation of thought is drawn out into corresponding exilities of expression, he labors with abortive, yet splendid ingenuity to show, that justice and such rescripts must ever be in harmonious union. So spake not the Holts and the Hales! No doubt it is a keen, and an exquisite, and a supple mind. It can enchain its listeners. Leaving its strength, it can disport in its gambols; it can exhale its sweets. But is it, can it be, great? Where is the lofty port when it can thus bend? Acknowledging its confinement within royal orders, can it hold, in true keeping, the divine attribute it was sworn to cherish unsullied? It is impossible.

There graces the first seat of judicial magistracy in this country a man of another stamp, and exhibiting different aspects of excellence. Venerable and dignified, laborious and intuitive, common law, chancery law, and admiralty law, each make their demands upon his profound, his discriminating, and his well-stored mind. Universal in his attainments in legal science, prompt and patient, courteous and firm, he fills up, by a combination of rare endowments, the measure of his difficult, his extensive, and his responsible duties; responsible not to the dictates of an executive, but moving in a sphere of true independence, responsible to his conscience, to his country, and to his God. What a grand, and to a mind exalted and virtuous, what an awful sphere? How

independent, how responsible! Vain would it be for us to expect to do justice to the full-orbed merit with which he moves in it. Bred up in a state rich in great names, counting her Washingtons, her Jeffersons, her Madisons, he long sustained a career of the highest reputation at the bar.—Passing to the bench of the supreme court of the United States, he carried to its duties a mind matured by experience, and invigorated by long, daily, and successful toil. In the voluminous state of our jurisprudence, every portion of which is occasionally brought under view, and in the novelties of our political state, often does it happen that questions are brought before him where the path is untrodden, where neither the book-case nor the record exist to guide, and where the elementary writer himself glimmers dimly. It is upon such occasions that he pierces what is dark, examines what is remote, separates what is entangled, and draws down analogies from the fountain of first principles. Seizing with a large grasp what few other minds at first see, he embodies his comprehensive and distinct conceptions in language not sarcastic, but suited to the gravity and to the solemnity of the temple around him; thus he is found always with masterly ability, and most frequently with conviction, to lay open and elucidate the difficult subject. If there be any applicable learning, to a mind so formed, so furnished, and so trained, it is reasonable to think that it will be at hand.—Where there is none, the fertile deductions of its own independent vigor and clearnesss stand in the place of learning, and will become learning to those who are to live after him. His country alternately a neutral and a belligerent, again and again is he called upon to expound the volume of national law, to explore its intricate passages, to mark its nicest limitations. Upon such occasions, as well as upon the entire body of commercial law so conspicuously in the last resort intermingled with his adjudications, his recorded opinions will best make known to the world the penetration of his views, the extent of his knowledge, and the solidity of

his judgment. They are a national treasure. Posterity will read in them as well the rule of conduct, as the monuments of a genius that would have done honour to any age or to any country. Such is the sketch we would attempt of the judicial character of the Chief Justice of our country. That country is on a swift wing to greatness and to glory. To the world at large, the early day of her jurisprudence may remain unknown until then. But then it will break into light, and his name, like the Fortescues and the Cokes of the early day of England, fill perhaps even a a wider region from the less local foundations upon which it will rest. Let the courts of England boast of Sir William Scott. Those of America will boast of John Marshall!

Having been wandering so long, it is high time we should bestow some words upon the work which stands prefixed to our remarks, and which formed the occasion that led to them. Whatever errors they may be thought to contain, we pronounce an unequivocal opinion in its favor. We regard it, in its line, as a valuable present to the profession and to the public. It treats of most of the questions that belong to a state of war upon the ocean, and although not so largely as works that handle them separately, may nevertheless, for what it purports to be, which is only a digest, be confidently and strongly recommended. Wherever the author has resorted to the independent powers of his own pen, which the plan of his work does not however frequently contemplate, he has plainly shown that it can do more whenever it will attempt more.

In regard to the doctrines which he is for maintaining, he takes the ground of the most eminent writers, and dwells upon the enlightened adjudications of the tribunals of his own country. He does not push the neutral right to the

extent of either Martens or Schlegel. Nor does he carry the belligerent claim, or the belligerent justification, to that pitch of rapacious rigour, which it assumes when such decrees as the orders in council are declared to be sanctioned by public law; a rigour which the sound reason of civilized mankind will ever condemn, and which the better reason of England herself in other days has also condemned.

The value of the work is greatly enhanced from its embodying an abstract of all the important decisions which took place in the Supreme Court of the United States during the late war, as well as those of an able Circuit Court in the northern district. The first supply, in some degree, a desideratum severely felt from the valuable reports of Judge Cranch having been so long and so inconveniently suspended. The second set forth the industry, the zeal, and the talents, of a Judge who seems to know no relaxation in his learned labours, and who daily becomes more and more an ornament of the American bench. Upon the whole, as Chesterfield has said that every man should at one period or other of his life aim at doing something worthy to be written, or at writing something worthy to be read, we think Mr. Wheaton has fairly complied with the latter part of the injunction. The style of his book has that simplicity which ought always to belong to subjects that are didactic. We will barely subjoin a slight regret, that, as to its paper and type, it does not wear exactly the appearance in which the gentleman just quoted would probably have been best pleased to see it dressed.

Washington City, September, 1815.

ADJUDGED CASES

IN THE

SUPREME COURT OF NORTH-CAROLINA,

AT JULY TERM, 1816*.

Haywood v. *Craven's Executors.*

John Craven, by his last will and testament, gave and bequeathed to *James Turner*, *Nathaniel Macon*, and *John Hall*, to the survivors of them and the executors of the survivor, immediately after his death, three of his slaves, viz. *Prince*, *Hannah*, and *Grizzy*, and their increase, *in trust*, to have them emancipated and set free by the laws of the State, in such manner and at such time, as they shall think fit. He also devised to his said executors the half of Lot No. 223 in trust for the use of *Hannah* and *Grizzy*, and a quarter of an acre of land in trust for the use of *Prince*. To his sister *Margeret Craven* he left his town house, during her life-time, and the residue of the lot not before disposed of, together with a plantation and thirty slaves, and whatever else was not given away by the will. After sundry bequests, he gives and bequeaths, after the death of his sister, to his executors, the survivor of them and the executor of the survivor, twenty nine slaves and their increase, *in trust*, to have them set free by the laws of the State, in such time and in such manner as they may think

* TAYLOR, C. J. gave no Opinion in many of the Cases decided at this Term, being prevented by indisposition in his family from attending the consultations.

proper--He gave also to his executors after the death of his sister, his plantation tools, and implements of agriculture, in trust for the use of such of the male slaves as were, at the date of the will, of the age of sixteen years or upwards, and for the females of all ages, to hold the same as naked trustees, for the use and benefit of the said negroes and their heirs for ever. The executors are empowered to bind out all the male negroes at sixteen years of age to different trades, until they attain the age of *twenty one*, when they are to be emancipated: he directs his executors to sell his house and lot in town after the death of his sister, on a credit of five years, and the interest to be collected annually and applied to the use of *Prince*, *Hannah*, and *Grizzy*. He also gives to his executors eight acres of land in trust for *Grizzy*, and directs them to sell his furniture, or if necessary, his stock for the payment of his debts; and in the event of his sister dying before him, requires his will to be carried into immediate execution; his slaves to be lawfully liberated as soon as his executors can find it convenient to do so.

The testator died and his sister *Margaret* was put into possession of the property, and by her last will and testament devised and bequeathed all her property to the complainants *Stephen* and *Dallas Haywood*; the former of whom, after the death of the testatrix, had the will proved, and was duly appointed administrator with the will annexed.—*Prince* and *Hannah* were emancipated by the County Court during the life time of *Margaret Craven*.—Grizzy died a slave.

The Bill prays that the defendants may be decreed trustees for the benefit of the complainants, and compelled to deliver unto them the land and slaves, and account for the profits.

To this Bill the executors demurred.

A. Henderson in support of the demurrer.

No trust can result for the benefit of the heir at law or next of kin of *John Craven*, for if the devise is to an improper use, the Court will direct it to be applied to a proper one.—1 *Salk* 162—1 *Coke, Porter's case*, 25.

The testator has signified most expressly his will that no benefit should devolve upon his heirs, beyond the provision he has made for them. The Court will substantially carry the will into execution, if it cannot be done literally, or in the form and manner directed by the testator. Where the substance of the will may be effectuated, the rule of this Court is to perform it *cy pres*.—2 *Vern.* 266.

It is a well settled rule in the British Court of Chancery that when a devise is to a superstitious use and made void by statute; or to a charity and made void by the statute of mortmain, then it shall belong to the heir at law or next of kin; but where it is in itself a charity, but the mode in which it is to be disposed of is such, that by law it cannot take effect, the officer of the crown is directed to specify the charitable manner in which it may be disposed of. *Ambler* 228. So where the charitable object is uncertain.—*Ibid.* 712. A sum of money was devised for such charity as testator had by writing appointed, and no such writing being to be found, the King appointed the charity.—1 *Vern* 224. When the testator has empowered other persons to dispose of his estate, the heir at law is disinherited, as much as if he had disposed of it himself, and there can then be no resulting trust.—2 *Atkyns* 562.

The Court will not decree in favour of the complainants unless such a course is clearly directed by law, for the trust being of the most humane and benevolent kind, is entitled to a construction of correspondent liberality. As the testator has sought for nothing to be done except in pursuance of the law, it is possible that the slaves may yet be emanci-

pated by the Legislature; or the executors may procure their liberation by sending them to some other State. They ought to be allowed full time to make every proper effort to obey the will of their testator, and the discretion of the Court cannot be more wisely exercised than in holding up the bill till this is done.

Browne and *Gaston* for the complainants.

A Court of Equity puts the same construction upon *trusts* that a Court of Law does upon legal estates.—2 *Burr.* 1108. 9. It must follow the law and cannot adopt different rules for the transmission of estates.—2 *Vesey, jr.* 426. Where a case is sent to a Court of law for their opinion, it must be stripped of all appearance of trust, otherwise that court will not answer.—4 *Vesey, jr.* 788.

Were this case so sent, it must be stated as a devise to *Margaret Craven* for life, and after her death, these slaves to themselves, and all the rest of the testator's property to them too. But in every gift there must be a *donor*, a *donee*, and a *thing* given.—*Plow.* 563. The donee must have capacity to take or hold.—*C. Lit.* 2, 6. Where he has neither, the conveyance, of whatever sort it may be, is absolutely void. An alien may purchase lands but he cannot hold; by the civil law he can do neither, and a conveyance to him is void.—1 *Bl.* 371. It makes no difference whether the incapacity is created by the common law or by statute. The property must remain in the donor or devolve upon his heir at law or next of kin, whether the attempt to tranfer it is made at law, or by way of trust or will.—3 *Atkyns* 806. 2 *Vesey, jr.* 482. If then there is no person, who by the will, can take, the heir at law does; and trustees who are to have no profit cannot even present to a living.—2 *Vesey, jr.* 282.

A slave is considered in law as a chattel and not as a person. He cannot maintain an action; he passes under a

bequest of personal estate, and is levied upon and sold under a *fieri facias* to take the goods and chattels. To kill him wilfully and maliciously was only a trespass.—*Act* 1741, c. 24. It was declared to be murder by 1791, c. 4, and ousted of clergy 1801, c. 21. Even if the master sets him free, he shall be treated as a slave—1741, c. 21. The holding of property for him, whether by trust or otherwise, is illegal.—*Conf. Rep.* 353.

By the common law, a monk professed can neither take nor hold—*C. Litt.* 36. He is considered as having once existed, but not as now existing except for special purposes. The case of property given or limited to a monk professed is exactly in point, only not so strong. An immediate estate given to a monk is void—*Plow.* 35. So of a devise—1 *Str.* 337. 2 *Roll.* 415.

If a devisee is incapable of taking when the estate ought to vest, the devise is void.—*Plow.* 345. *Cro. Eliz.* 422. 9 *Mod.* 167, 181. 1 *Str.* 369. 1 *Salk.* 227. In the case of a descent, a person not in *esse* may take when he comes in *esse*; but in the case of a purchase it is forever gone—1 *Str.* 378. The legislatures has not said that a devisee may take without being in *esse*, at the time the estate ought to vest; but it has been said, and the Courts have held, that a child in *ventre sa mere*, shall be considered as in *esse*, and therefore may take as a purchaser. This decides the question as to all the negroes who had not been set free and enabled to take at the death of *Margaret Craven*, when the property ought to have vested in possession. But it may be said in reply, that this depends upon the rule of law that the freehold shall not be in abeyance, but that the inheritance may; and that although an immediate devise to a person incapable of taking shall be void, yet a remainder shall be good, if the person was capable of taking when the particular estate is determined, as *Prince*, and the others who were emancipated, were in the present case. This is true to a

certain extent; but the remainder man must be in *esse* or in *potentia propinqua*.—*Noy* 123. *Plow.* 27. 2 *Co.* 51.—Here the devise of the negroes and lands are plain perpetuities; to the trustees it is in fee without the power of alienation. The trust is of the negroes and their increase until they are set free, which may not happen in 57 years, is equally so. The executors themselves are the persons who may set these negroes free—the county court only grants a license to do so. But while the executors hold this property, no one can call them to account; so that as they are bare trustees and cannot sell, it will remain in their hands as long as they please, unalienable. If such a trust is valid, it must be equally so when created by deed, and no doubt, it would become a common way of forming perpetuities. It cannot be imagined that the County Court would grant a license to set those negroes free; for it can only be done for meritorious services. But some of them are very young, and many in contemplation, not yet born. It is equally improbable that the Legislature would do so contrary to the rule they have laid down for the Courts. To carry this trust into effect then, what is it but setting all these slaves free contrary to law? It is evident that the executors were not intended to be benefited by the labour of the slaves or the cultivation of the land; but the slaves themselves were to have the whole. Now the devise of the whole profits of a thing, is both in law and equity a devise of the thing itself.

The cases on charitable uses bear no analogy to the case before the Court. The objects to which such devises may be applied are enumerated in the statute 43 *Eliz.* and are all consistent with the policy and welfare of the country. But the object of this devise, so far from being compatible with the national policy, is absolutely forbidden by a variety of statutes.—*Acts* 1741, 1777, 1779, 1788.

The rule applicable to this case is that wherever a conveyance is made on particular trusts, which by accident or otherwise cannot take effect, a trust will result.—3 *P. Wms.* 20, 252.—1 *Bro. Ch. Rep.* 508.

A. Henderson and *Murphey* in reply. The cases relied upon to show that there must be a donee capable of taking, relate to an immediate gift by deed. But the principle is different where trustees are appointed by will, who take for the benefit of the donee, and hold till his capacity arises. Thus in *Porter's* case 1 *Co.* The trustees held the land for the benefit of a corporation not then created. And if the contingency of emancipation is too remote, why was not the devise in the same case held void? for there two acts were to be done,—an act of incorporation to be procured, and a license to hold land obtained. Yet it was considered not to be too remote. There are cases where a charity was never created, yet the Court would not take the estate from the trustees against the intention of the testator.

In 1 *Bro. Ch. C.* there was a devise for a Bishoprick in America, which it was contended there was no probability of being established, yet the Chancellor held the money in Court, and would not allow the executors to have it, and the money was held in Court for 60 years. In 2 *Bro. Ch. C.* 498, a demise was held up until a license to hold in mortmain could be obtained. The case in *Ambler* 571 is a devise in trust for a charity not in *esse*; and before the trust could be executed it was necessary to obtain a license to purchase ground in mortmain, and also a charter of incorporation; yet the devise was supported. The contingency in this case must happen within the period established for executing devises, viz. a life or lives in being and 21 years afterwards, for the slaves to be benefited by it are all named in the will. When the question is as to the remoteness of an event, it is proper to consider the nature of the property bequeathed—

2 *Fearne* 369. All the doctrine relative to this part of the case is fully discussed in 2 *Call* 319.

The cases cited to prove that a trust results to the heir where the devise cannot take effect from accident, confine the rule to those instances in which the accident is such as renders it impossible to execute the will of the testator, as the death of the devisee or legatee, &c.; or to those where lands are devised for a particular purpose, that which remains after the purpose is satisfied results.

It is not denied that trusts have the same construction with legal estates in Courts of Equity, but this position is too broadly laid down on the other side, and to be rightly understood, it must be received with some qualification. The intervention of trustees will not convert an estate for life into an estate of inheritance; it will not enable the testator to create a perpetuity, nor will it change the properties and incidents of an estate. The rule in its general bearing is confined, however, to trusts executed and not executory. In the latter sort a difference of construction is allowed in order to effectuate the intent of the testator. *Cases Temp. Tal.* 19.

PER CURIAM*.

As those members of the Court, who alone can decide in this case, have no doubt on the subject, and both parties seem anxious to avoid further delay, we see no reason to postpone the judgment; although it would have been more consonant to the respect with which we have listened to the able arguments on the part of the defendant, to have stated particularly wherein they have seemed to us inconclusive, and failed to produce conviction in our minds. But this could only

* SEAWELL, CAMERON, and HALL, J. gave no opinion in this case, the two former having been consulted while at the bar; the latter being one of the executors of Mr. *Craven*. The cause was decided by TAYLOR, C. J. LOWRIE and DANIEL, J.

be done by the delay of a term, as we have ascertained the general principles on which we do agree a few minutes only before coming into Court, and as this is the last day of the term, we must give the opinion in general terms or not at all.

We are of opinion, that the trust attempted to be created by the will of *Mr. Craven* is void in law, not only as contrary to its general policy, but as repugnant to positive provisions by statute; for the law has pointed out one method only in which slaves can be liberated, act of 1741, c. 24, and the principle on which it is permitted, can by no construction be applied to the case before us The same act directs the slaves to be sold if the owner sets them free in any other manner. With respect to the cases decided upon the 43. *Eliz.* it is believed that not one can be found in which a Court of Equity has executed a charitable purpose, unless the will so described it, that the law will acknowledge it to be such. The disposition must be to such purposes as are enumerated in the statute, or to others bearing an analogy to them, and such as a court of chancery in the ordinary exercise of its power, has been in the habit of enforcing. But wherever the intention is to create a trust which cannot be disposed of to charitable purposes, and is too indefinite to be disposed of to any other purposes, the property remains undisposed of, and reverts to the heir at law or next of kin, according to its nature. This is the construction of courts of equity, even upon charitable dispositions.—10 *Vesey jr.* 552. But for the reasons already stated, we do not perceive any resemblance between them and this case. It must therefore be governed by the general rule, and as the trustees have no interest, they must be considered as holding the property for the benefit of those on whom the law casts the legal estate.

Demurrer overruled.

Cutler v. *Blackman.*

This ejectment was tried before DANIEL, J. at Sampson Superior Court, where the following case was dicloseđ by the testimony.

The plaintiff produced a grant to James Spiller from the State, dated in the month of October, in the year 1787, and deduced title regularly from the grantee. Neither the grantee, nor any person under him, has ever had any actual possession of the premises in dispute. The defendant claims under one Marley, to whom a grant issued from the State in November, 1805, in pursuance of a sale made by the commissioner of confiscated property, who had sold the land described in the declaration as the property of one Thomas Christie, of Ireland, whose property in the state had been confiscated by the act of 1779, c. 2. The defendant alledged that the land in question had been granted by the said Christie at a very early period of the settlement of this county by the Lords Proprietors. It was admitted by plaintiff's council that diligent search had been made by defendants and that no grant to said Christie, and that the copy of no grant could be found. The defendant and those under whom he claims have been in actual possession of the land in question ever since the grant issued to the said Marley in 1805. The defendent then offered in evidence the following circumstances to show that the land had been granted to the said Christie. The witness proved that about forty-eight years ago he was called on as a surveyor by one McDonald, who called himself the agent of Christie, to survey a large tract of land including the premises in question. He saw no grant, and no paper was exhibited to him by the said agent except a plat which was of the size and shape of those which were formerly attached to old grants, but smaller than the plats which were usually attached to grants that issued about the time that he was requested to make

the survey. There was no seal on the plat. And he does not recollect whether there was any hole through the plat by which it might have been attached to a grant. That he ran the lines agreeably to the plat, and found the two first lines plainly marked all the way and three corner trees;—one of the corner trees was short of the distance mentioned in the plat; the corner trees and all the line trees were uniform in appearance, and bore the marks of great age. On the third and fourth lines he found no marked trees; but he stated, it was usual at the time this land must have been surveyed from the age of the marked trees, for the first and second lines only to be marked, and for the plats to be made out without running the third and fourth lines.

The plat above spoken of represented the tract as square. One of the lines would have answered for a line of a large tract granted to Richard Dobbs. He does not know that the other marked line would have answered as the line of any adjoining tract, but the three corner trees designated the land delineated in the plat. He did not know that any grant had ever issued to Christie for the land. He had never seen one or heard that one had issued. Neither Christie nor any person under him ever had actual possession of the land in dispute. Christie resided in Ireland, and he does not know nor did he ever hear that Christie ever owned any other land in this State. The witness was called on to survey this large tract, because several persons were in actual possession of parts of it; four or five persons were assembled to accompany the surveyor and protect him from the threatened attacks of those who were in possession. The lands represented in the plat and which he ran, were called in the neighborhood and generally understood to be Christie's lands. The persons in possession disputed that Christie had title; and if he had title, their possession gave *them* title. The act of 1779, c. 2, confiscsted all the property of Thomas Christie in this State. The infancy of the lessor

of the plaintiff in this case has prevented the operation of the statute of limitation. From these circumstances the jury presumed that a grant had issued for the land in dispute to Christie, and found the defendant not guilty of the trespass and ejectment laid in the declaration. Plaintiff moved for a new trial. First, on the ground that no grant can be presumed where there has been no possession of the premises. And second, if a grant can be presumed where there has not been possession, these facts are not sufficient to warrant the verdict of the jury.

Motion overruled by the Court, and a new trial refused. Appeal.

Browne, for the plaintiff.

There is no case to be found where a grant has ever been presumed without possession.—*Gilb. S. E.* 27, 28.—*Peake* 22, 110, 301, 2. Nor ought such a presumption to be made here, even with possession, so readily as it is in England; because all grants must be registered; and this was required so early as by the great deed of grant. It is observable that one of the evils complained of in the act of *1715*, c. 33, § 6, is, that persons pretended title to large tracts of land, upon a bare entry or survey.

Shaw for the defendant.

Possession of lands according to the books always means an actual possession, and refers to a state of things where the land is generally occupied. But necessity has enacted and usage sanctioned a different notion of possession in this State; and a constructive possession is equivalent to an actual one. If then, other circumstances are equal, may not a grant be presumed from such possession?

Browne was about to reply but was stopped by the Court.

Cameron, J. delivered the opinion of the Court.

It is a very clear rule of law that the existence of a grant cannot be presumed, unless the party claiming the benefit of such presumption proves the actual possession of the land. No such possession having been proved here, the verdict must be set aside and a new trial granted.

Hendricks v. *Mendenhall.*

The premises in the plaintiff's declaration mentioned, are parcel of a tract of 150 acres of land, granted by the State of North Carolina to one Patrick Boggan, on the 19th of October 1783. The same 150 acres were conveyed by said Boggan to one Thomas Wade, sen. on the 23d October 1784. The premises in the plaintiff's declaration mentioned, were by said Thomas Wade, sen. conveyed to his son George Wade, by deed of gift, on the 26th August 1786. Thomas Wade, sen. died before George Wade, leaving the said George Wade, Thomas Wade, jun. and Holden Wade, his only sons and heirs at law. George Wade died unmarried before the year 1790, leaving the said Thomas Wade, jun. and Holden Wade, his only brethren and heirs at law. Mary Henrdricks, wife of James S Hendricks and Sally Wade (they all being lessors of plaintiff) are the only heirs at law of said Holden Wade, who is also deceased, and the defendant, William Mendenhall, is in possession of lots No. 7 and 19, in the plaintiff's declaration mentioned.

Thomas Wade, sen. before his death made a will which was duly proven, whereby, among other things, the said Thomas Wade, jun. the said Holden Wade, and three other persons, were appointed executors thereof with authority to

them generally to sell and dispose of the testator's real property for the payment of his the testator's debts. Said Thomas Wade, jun. and Holden Wade undertook the execution of said will, and were the only acting executors thereof. After the death of the said Thomas Wade, sen. in the year —, a judgment was obtained by one Eveleigh against the said Thomas Wade, jun. and Holden Wade, as executors of said Thomas Wade, sen. in the County Court of Anson county, of the term of , of the same year, for the sum of . Said judgment was however taken by confession, without the finding or acknowledgment of any plea in favour of said executors upon said judgment. No *scire facias* issued to the heirs of said Thomas Wade, sen. to show cause why execution should not issue upon said judgment against the lands of said Thomas Wade, sen. then descended in their hands. A writ of *scire facias* upon said judgment nevertheless did issue, returnable in said County Court to the term of July in the year 1790; by virtue of which a levy and sale regularly took place of a variety of lands. In pursuance of the sale so made, one William May, then sheriff of said county of Anson, made and executed a deed to the purchasers. At the same day and place of making said sheriff's deed, the said Thomas Wade, jun. and Holden Wade, on the back of said sheriff's deed, made, executed, and delivered, under their respective hands and seals, an instrument of writing in the following words, viz.

"To all to whom these presents shall come. Know ye, that we, Holden Wade and Thomas Wade, as well for ourselves as the other executors and executrix of Thomas Wade deceased, do hereby agree to and confirm the within deed, made and executed by William May, sheriff of Anson county, for the intent and meaning therein specified, by virtue of the power vested in us by the last will of T. Wade, deceased. In witness whereof, we have hereunto set our

hands and seals the day and date of the within presents." Signed by Holden and Thomas Wade, as acting executors of T. Wade, deceased.

The tract of 150 acres, first before mentioned, is the same tract of 150 acres which is mentioned and described in the said deed of William May. The same 150 acres were conveyed by the purchasers at the said sheriff's sale to one Joshua Prout, on the 28th June 1798. On the 19th July 1809, said Joshua Prout conveyed lots No. 7 and 19, parcel of the said 150 acres and also parcel of the premises in the plaintiff's declaration mentioned, to one George Wade (uncle to the George Wade before named and brother of Thomas Wade, sen.) On the 21st January 1811, said George Wade who purchased of Prout, conveyed said lots, No. 7 and 19, to one John Coleman, who on the 9th day of May 1812, conveyed the same lots No. 7 and 19, to the defendant William Mendenhall.

M'Millan, for the defendant, contended, that the endorsement on the deed amounted to an estoppel as to those who signed it, and all claiming under them; and cited *Cro. Eliz.* 362. 2 *Cro.* 756, 769.

A. Henderson, for the plaintiff.

The executors had no design to estop themselves of their own property, but only of that which they held in their representative character. It was in this character they endorsed the deed, and not as heirs at law. Any other construction would be to make a contract for the parties. Besides, there was nothing on which the estoppel could operate; for the sheriff's deed was void, because there was no *scire facias* against the heirs, and no verdict on the plea of *plene admin.*

The cases cited are of person acting in their proper capacity. But it is different when they act in a representative character.—*Comyn's Dig. Tit. Estoppel. Letter C.*

SEAWELL, J. We are called upon in this case to say whether the plaintiffs have made out a legal title to the premises in question? and it is admitted they have, unless Holden, their father, parted with it in his lifetime. The only act done by him was an endorsement upon a sheriff's deed, in which the premises were conveyed by the sheriff to a purchaser under an execution, which by the statement appears unsupported by any judgment. The sheriff therefore, had no authority to sell. By this endorsement the father declare that in *virtue of the authority* derived from the will of his testator, he confirms the sale. These if not the words, are at least their substance. Now it may be laid down as the general doctrine in relation to the execution of powers, that it is not necessary to recite that the act is done in *virtue* of the power; but that it is sufficient execution if it can be done *only* in virtue of the power; for though the *form* of executing may not suggest the execution of a power, yet the *purpose* of the act done, can only be explained by resorting to the power: and the maxim is, that it is immaterial whether the intention be collected from the *words* used or the *acts* done. *Quia non refert au quis intentionem suam declaret, verbis, au rebus ipsis vel factis.* And on the other hand, it is equally clear, as this *intention* is to guide and give efficacy to the act, that where a party has both power and interest, and he does not act *purporting* to be in virtue of his interest, that he shall be held to intend *that*, and not to exercise his power.—Sir *Edward Cleaves's* case and 10 *Vesey, jr.* 346, present Lord Chancellor in the case of *Maundrell, & Maundrell.*—And this therefore at once disposes of all that has been said upon the subject of estoppel. For if the endorsement only professed to be in execution of a power, the party making it can only be concluded from denying any

of the *facts* affirmed by him; and if it should be suggested that it may operate as the confirmation, the answer has already been given, that the endorsment *excludes* the idea of the exercise of any personal dominion. And indeed it is essential to the operation of every confirmation, that there should be some *estate*, though voidable, for it to act upon; the maxim there being, *confirmatio est nulla, ubi donum precedens est invalidum*, it may make a *voidable* estate good, but can give no effect to one that is *void*.—*Co. Lit.* title *Confirmation*.

The sheriff could convey by his *deed* nothing but what old Wade had, and he having nothing, the deed was void. Whatever title is claimed, from the effect of the endorsement, is at last referrible to the testator's will. The executors as trustees are only as instruments to effectuate the devise. The father of the plaintiffs has therefore done nothing which, in *law*, has passed his interest, and whether he ought in justice and equity to be restrained from asserting it, must be referred to those courts, to whom the jurisprudence of our country has confided the power of deciding. It may turn out that the father was guilty of a fraud; or it may be the case, he acted under a mistake. If the former, he would be compelled to convey. If the latter, it would be unjust he should lose his land.

TAYLOR, C. J. The land sued for in this action was no part of the estate of Thomas Wade, sen. at the time of the judgment against his executors. He had conveyed it in his lifetime to George Wade, upon whose death it descended to his brothers Holden and Thomas Wade. The recital in the sheriff's deed, therefore, that Thomas Wade, sen. was seised in fee of that tract when the execution was levied, is not founded in fact. But it is contended by the defendant that this land being sold by the sheriff, and his sale confirmed by the executors, their heirs are now

estopped to claim it. But I am of opinion that this would be to give a forced interpretation to their endorsement on the deed. For from the very terms of it, they profess to act only in pursuance of the power given to them by the will of their father, viz. to sell and dispose of *his* lands for the payment of *his* debts. And it seems an unlikely circumstance that they should intend to confirm the sale of a tract of land belonging to themselves, for the same purpose, when it was not derived by descent from the father. It is possible that in a sale of so many tracts, not less than eight or nine, comprehended in the same deed, they might not have distinguished this one, which certainly the sheriff had no right to sell. Nor do I think that the cases relied upon prove that the plaintiffs are estopped to claim.—They proceed on the common principle that a tenant shall not deny the title of his landlord. But the question here is, whether persons acting in the character of executors, and with an express reference to the power conferred by the will, shall convey lands not belonging to the testator? I think the deed is not so to be understood, for Lord Coke says that every estoppel must be certain to every intent, and not taken by argument or inference;—that it ought to have a precise affirmation of that which maketh the estoppel.—1 *Co. Lit.* 352. *b.*

Judgment for the plaintiff.

Littlejohn v. *Underhill's Executor.*

This is an action of debt upon an obligation given by the testator in his lifetime. The defendant pleaded 'payment and set off, prior judgments, judgments confessed, no assets, no assets ultra, retainer, plene administravit in all its forms;' on which pleas issue was joined. The jury

now find a verdict for the plaintiff, on all the issues, subject to the opinion of the Court on the following case.

The plaintiff's writ was executed on the defendant on the 2d January 1815, returnable to Chowan County Court on the second Monday of March ensuing. The defendant sold all the property of his testator on the 17th January 1815, at six months' credit. At March Term, to wit, on the 17th of March 1815, the defendant entered the foregoing pleas. The defendant, on the trial, introduced satisfactory evidence under the plea of 'retainer,' and for the payment of the funeral charges and his own commissions, with the disbursement of all the assets with which he was charged, except the sum of $ 704 60; and as to that sum, he offered the following evidence. First, as to $ 100 of it,—that among his testator's negroes was one by the name of Sarah, so old and infirm as to be incapable of labour; and that he had set her up to be provided for during the remainder of her life, to the lowest bidder; that the sum of $ 100 was the lowest bid; and that accordingly he had paid that sum for this purpose. And as to $ 604 60 he offered in evidence a number of judgments on warrants brought on specialties before a justice, which were taken between the 21st of January and the 17th of March 1815, and were paid by him previous to the issues being joined in the suit, and which judgments were of the following tenor, to wit, "judgment in favour of the plaintiff for the sum of . Thomas Brownrigg the executor, present, pleads 'plene administravit in all its forms, no assets, judgments, bonds, notes, retainer, and no assets ultra, suits on bonds and notes." The pleas are admitted, and signed by the justice.

In some of these warrants the magistrate had given judgment for thirty pounds, the amount of the specialty, together with interest according to specialty, previously accrued thereon; and the whole judgment thus exceeding

thirty pounds. The amount of the excess of interest, which upon the warrants collectively, is $ 28 40, has been paid by the executor. It is submitted to the Court to determine if the preceding questions are decided in favour of the defendant, whether these judgments should be allowed the defendant, as proper vouchers for the whole amount, or for any part? And it is agreed, upon this statement of the case, to be submitted to the Court to decide whether the defendant was justified in paying the above mentioned sum of money for such purposes, in preference to the plaintiff's demand. And judgment is to be entered up according to the opinion of the Court, for such sum as they shall direct.

Browne, for the plaintiff.

The plaintiff's writ was executed January 2d, 1815. All the estate was sold January 17th, 1815.

All the estate being in his hands when the writ was executed, was *assets* to satisfy the plaintiff's claim.—1 *Law Rep.* 99. *Ib.* March 1715, 120.

Unless he can show that he *retains* it for the purpose of satisfying a prior claim of a third person, or an equal one of his own; or that, before pleading, he *paid* on compulsion, or voluntarily before notice.—1 *Off. Ex.* 145.

The utmost that has ever been allowed, is for the administrator to *confess* assets to an equal claim, and then plead that confession.—*Doug.* [452]. *Waters* v. *Miel's Administrators.*

These assets had not been confessed to the judgments offered in evidence, nor had they any lien on these assets; for they were, *quando acciderent.*

The act of 1803, c. 1, gives to justices of the peace jurisdiction of "all demands of thirty pounds and under, for a balance due on any specialty contract," &c.

Here, it *appears*, that some of the judgments were given in cases where there was *above* thirty pounds due on the specialty; which was assuming a jurisdiction not given by the act of Assembly, and the judgment was absolutely void, and of no more force than if given by any other individual. *Com. Dig. Courts P.* 15.

Therefore, being no judgment, the payment cannot be justified as the payment of a judgment; and as the payment of a specialty it cannot be justified; for the bringing of our suit had so attached the assets as to prevent the defendant from disposing of them unless by confessing them to a suit. 1 *Off Ex.* 145. *Doug.* [452]. *Waters* v. *Meil's Admin.*

As to the § 100. If it is said that he was bound to support the negro, I answer that he was bound *as administrator*. And as administrator, he was bound to pay our debt. To pay simple *contract debts*; but that would be no answer to a specialty creditor, who had given notice. To pay legacies; but that would not defeat a creditor who had paid in time. To pay the rent of leased premises; but if he had no assets and did not enter, he would be excused.

Besides, the duty of maintenance was only to become due from time to time. And even among equal claims the administrator is bound to pay that which *is* due, in preference.—1 *Off. Ex'or.* 143.

The rent due at testator's death is a debt. That which becomes due afterwards is not.—*Ib.* 146, 7.

Nash, for the defendant.

There can be no difference between one judgment absolute, and one rendered *quando*, with respect to the question now before the Court. For if we were not protected by the letter, we must pay both plaintiffs without having assets to do so, and without mispleading. We do not set up a vo-

luntary payment against the plaintiff's writ, but judgments which we had no power to resist. As to the judgments, the magistrate had jurisdiction. The warrants show this.—And even if the judgments might be reversed for error, they are nevertheless a bar as long as they remain in force. The true inquiry is, not whether judgments so obtained are erroneous, but whether they are fraudulent;—and of this there is no suggestion.—1 *Stra.* 410.

With respect to the support of the negro, we think it sanctioned by the act of 1798, c. 13.

PER CURIAM.

The principal question in this case depends upon, whether the judgments obtained after the service of the writ and *before* plea, be of such a nature, as hold the executor responsible for the assets he had when served with the writ? and if these judgments had been, that the plaintiff *then have* execution, and *not quando*, it seems admitted they would, provided they are not void in law. As to the *nature* of the judgments, according to the *circumstances* of this case, we think that can make no difference; because it was true, when they were rendered, that the effects previously sold on the six months' credit, were not assets;—the act of Assembly having only made the executor accountable for them, in a reasonable time after the proceeds were due. Whenever, therefore, they *should* come, or *might* be obtained, they then would be assets, and the executor accountable to the judgment creditors for them. If, therefore, he was accountable to them, it is clear he ought not to be accountable to the plaintiff; for it has been properly admitted, that the priority of suit only ties the hands of the executor against a *voluntary* payment.

Then, as to the exception which has been taken to the judgments because they exceed thirty pounds. And we think, as the warrants did not exceed thirty pounds, that

the Justice, therefore, had *jurisdiction*, and his judgment therefore, was not *void*, but only *voidable*.

The only remaining question is as to the $ 100 paid for the support of the disabled slave? and that we think must depend upon the nature of the transaction. If with a fraudulent design, upon being so *found*, would be unavailing. But if fair and honest, that it is good. For we consider this as a kind of *charge* upon the estate in favour of the *community*, which in case of a deficiency of assets, is entitled to a preference against the claims of *individuals*.— Wherefore, we are all of opinion there should be judgment for the defendant.

Collins v. *Underhill's Executor.*

This is an action of the same nature as the foregoing. The writ was executed at the same time, returned to the same court, the pleas the same as in that case and entered at the same time; but that case stood first on the docket. And now at this term, after the trial of that case and judgment for the plaintiff, the defendant moved for leave to plead that judgment as a plea since the last continuance, in discharge of the assets *pro tanto* in this case. And it is agreed to be referred to the Supreme Court to decide whether this plea shall be admitted. And it is further agreed, that in other respects, this case shall be governed by the decision of the Supreme Court, in the foregoing case of *Littlejohn* v. *Underhill's Executor*.

Browne, for the plaintiff.

I believe the plea of *plene administravit* will not be received when it delays the plaintiff.

A plea of judgments recovered since the plea will not be admitted.—2 *Hayw.* 155.

And if admitted, not good.—*Conf. Rep.* 555.

By administering, the defendant got the advantage of retaining that which he hath lost by misconducting his business.

PER CURIAM.

The Judgment cannot be pleaded in the manner proposed.

Williams v. *Collins.*

Assumpsit on the following letter written by the defendant, and addressed to the plaintiffs.

SIR,——The bearer hereof, Mr. Henry Fleury, informs me, that he is about bargaining with you for the purchase of a new vessel and a cargo for her, also for a quantity of Indian corn. In case you and he should agree, I will guarantee any contract he may enter into with you for the same or any part thereof, and am,

Sir, very respectfully,
Your obedient servant.
JOSIAH COLLINS.

Edenton, Nov. 2, 1808.

The material facts in the case were, that in consequence of the above letter, the contract was made, and the vessel and cargo delivered to Fleury, who was to pay for them in three several instalments; for which he executed three notes,—one payable 1st January 1805, one on the 15th June 1805, and one on the 15th June 1806. These notes being unpaid, Williams instituted suit against Fleury, on the 17th August

1807, returnable to September term of the same year. A verdict was found for the plaintiff at March term 1808, and an execution issued from that term which was returned at June term 'nothing to be found;' an *alias* issued which was returned at September in the same manner.

The writ in this suit issued the 9th October 1808, returnable to November of the same year, at Martin Superior Court.

On the 15th January 1807, Fleury mortgaged to creditors in New-York, property which was sold on the 19th December 1809, for £1283 7.

Fleury became entitled to property under the will of Vallett, which was found in December 1806, to the amount of £345. Fleury and Collins both lived in Edenton.

Henderson and *Nash* for the plaintiff.

The contract is, that the defendant will guarantee *any* contract which Fleury may enter into with the plaintiff. The defendant is therefore bound to the full extent that Fleury himself would have been. There is no analogy between a bill of exchange and a guaranty. In the latter, no notice is necessary. In *Peil* and *others* v. *Tatlock*, three years had elapsed before any notice was given; yet the plaintiff recovered—1 *Bos. & Pull.* 419. In *Eddowes* v. *Neil*, there was a lapse of nineteen years without notice.—4 *Dallas* 133. All the cases go to establish, that the guaranty, binds indefinitely; and that he who gives it is bound to take notice of the circumstances of the debtor, and to do the first act.—1 *Binny* 195. 8 *East* 243. 3 *Cranch* 490.

Browne, for the defendant.

Where a creditor has a right to look to two in succession, he is obliged to use due diligence against the first. This applies to all cases whatever, whether the liability has arisen from the endorsement of a bill of exchange, or from any

other cause. With this difference, perhaps, that in the first case, the law merchant requires more vigilant diligence on account of the sudden changes of fortune to which mercantile men are liable.

The endorser of a note is only a warranty thereof, that the drawer will pay it, and if he does not, that the indorser will.—1 *Wils.* 43.

There is the same undertaking, or guaranty, on an unnegotiable instrument and due diligence, although perhaps not so strictly, is there also required.—2 *Wils.* 353.

The law is precisely the same with regard to a letter of guaranty. The writer only warrants the solvency of the person in whose favour he writes; and if a loss happens owing to the want of diligence of the person written to, he must bear it.—8 *East* 242. If the warrantee *might* have saved himself and did not, he can have no recourse on the warrantor. Justice and equity require, that the person benefited by the transaction should be first applied to, to pay for that benefit. And wherever the law makes it the duty of a man to do any thing, it requires of him due diligence in doing it.

Fleury remained absent for two years after the first note became due; one year and seven months after the second; and seven months after the last became due; and the plaintiff took no step to recover the money from him until one year and two months after the last note had become due. Nor did he give the defendant any notice whatever, that the notes, or either of them, had not been paid. Surely, no one can pretend that the plaintiff used due diligence, or that the loss arising from Fleury's insolvency was not owing to his neglect.

Of the cases cited for the plaintiff, that of *Peil & als. v. Tatlock*, admits the doctrine contended for on behalf of the

defendant. But the Court thought "there was no want of communication with the defendant." They further thought that no loss had been sustained, which could by any means have been avoided. The case in 4 *Dallas* 133, also admits the doctrine. But the Court thought that, considering the war, the situation of the parties, and the other circumstances of the case, due diligence had been used.

In the case cited from 1 *Binney* 195, the writer of the letter of guaranty promised to be *accountable with* the person in whose favour it was written. And the question now before the Court was never raised in that case. What weight will be allowed to the decisions of a Court where a cause can be discussed at great length and decided without even once glancing at the principal question arising from the facts, is not for me to say.

Nash, in reply, entered into a particular examination and analysis of the cases before cited for the plaintiff, for the purpose of showing that the law relative to bills of exchange was in no respect applicable to letters of guaranty. As to the case cited for the defendant from 1 *Wils.* it was on a promissory note endorsed; and of course, subject to the rules which govern bills of exchange. The case from 2 *Wils.* was where the drawer of the order had effects in the hands of the drawee, and a demand and notice were consequently indispensable. The plaintiff here was under no obligation to concern himself about Fleury's circumstances, who was not contracted with on his own credit, but on Collins's. The latter, therefore, should have observed the transactions of Fleury, and apprised the plaintiff of any probable loss. Not having done so, he must be supposed to have approved of the moderate forbearance exercised by the plaintiff. It is a part of the case, that Collins and Fleury resided in the same town; the plaintiff lived in Martin county.

SEWELL, J. delivered the opinion of a majority of the Court:

The present action is brought for a breach of defendant's agreement, to which the defendant has pleaded, the 'general issue and act of limitation.' The agreement which the plaintiff exhibits is a letter written by the defendant to the plaintiff, in which the defendant states, that he will guarantee any contract which one Fleury may make with the plaintiff for a vessel and cargo, or any part thereof. Fleury makes a contract for the vessel and cargo, payable in instalments, the last of which was within three years of the commencement of the present action. And the defence relied upon is, that Fleury was *able* to have complied with his own engagement if the plaintiff had used due diligence, but that he is now, and has been for some time, insolvent; and that the loss should be borne by the plaintiff, who might by proper vigilance have obtained payment from Fleury.

In the opinion of a majority of the Court, the case is completely stripped of all difficulty by examining what was the nature and extent of the guaranty. It was not, as seems to be supported by the argument, that Fleury should be *able* to comply with any contract he might make; but that he *should* comply. The defendant, therefore, to all legal consequences, became pledged, *absolutely* to the same extent that Fleury was bound, as soon as the plaintiff parted with his property; for it is apparent, from the terms in which the letter is written, that it was the defendant who was principally relied on. And as to the failure of Fleury, that was an event which it was incumbent on the defendant to guard against; and it behoved *him*, to hasten the plaintiff, or make such other provision for his own safety as Fleury's circumstances would afford. But as to the plaintiff, he had from the *beginning* provided against that, by requiring some other person to be bound to him, who should be able to make good the contract of Fleury, though Fleury himself might

fail. That the extent of the defendant's liability, as to every consequence in law, was the same as if he had himself signed the obligations which Fleury executed to the plaintiff; and that if his situation as a surety, or *warrantor* was to avail him any thing, *he* must himself entertain and *express* an anxiety that suit should be brought against Fleury, otherwise the plaintiff need not; for indeed the fact may be, that the plaintiff considered the defendant and Fleury equally interested in the purchase, as a joint concern. As to the act of limitation, that is out of the question. The plaintiff could maintain but one action upon the agreement, and to have the full benefit of it, he must wait till the last failure of Fleury. Upon the whole, we think there is not the least analogy between this case and those which were cited for defendant.

The guaranty made by an endorser is a *conditional* one, this an absolute one. The guaranty that the purchaser of cotton should be indemnified upon a resale, can only be understood to mean an engagement that the price of the article shall be such, that if the purchaser *chooses*, he may have an opportunity of saving himself. The engagement in the present case to be analogous to those, must be, that defendant guaranteed Fleury should be *able* to comply with his engagement. He has however thought proper to warrant that he *should* comply, and, consequently, as Fleury has failed, the defendant is bound to perform his own; and therefore there must be judgment for the plaintiff.

TAYLOR, C. J. I formerly considered this case upon the whole statement, and made up an opinion when it was usual for the Court to pronounce upon the record as sent up, without distinguishing, as we now do, between questions of law and those cases which contain only evidence or facts exclusively belonging to a jury. From the view I have taken of the case, it does not appear to me within our jurisdiction; as it presents only the question, whether the debt has been

lost by the want of diligence in the plaintiff; and though this is sometimes called in the books a mixed question *of* law and fact, and more frequently a question of law, yet I believe that the practice of this State has, with much uniformity, treated it as a question of fact to be decided by the jury. My brothers think that the character of this *contract* excludes the question, and that the defendant is bound to make good Fleury's engagement, to the same extent as if he had signed the notes himself. I am of opinion that there is a distinction founded in justice and recognized by law, between an original debtor and a surety or guarantee; and that whenever a contract is shown in Court, which upon the face of it, exhibits the defendant in the character of a surety, certain principles immediately apply to it; one of which imposes on the creditor the duty of showing that nothing has been done on his part tending to exonerate the principal and burthen the security.

Upon a joint and several bond, although one of the parties may in truth be a surety, yet in a court of law both are principals, because there is no way of getting at the transaction. But take the same case into a court of equity, and a difference will be made between the principal and surety; for if it can be shown that any act has been done by the obligee that may injure the surety, the Court will lay hold of it in favour of the surety.—4 *Vesey, jr.* 824. 2 *Bro. Ch. Ca.* 578. 2 *Vesey, jr.* 540.

In the case before us, the true nature of the relation between the defendant and the plaintiff is shown by the letter; and if upon the question being submitted to a jury, they should be of opinion that the plaintiff might have recovered his debt from him who was benefited by the contract, and that the loss was occasioned by the plaintiff's want of diligence, I should think he ought to bear it. For, to use the language of Lord Loughborough, in a case depending on the same principles, "it is a breach of the obligation in con-

science and honesty, and it is not too much to say of that objection in point of law."—*Nesbit* v. *Smith*. 2 *Bro. Ch. Ca.* 578. By a guaranty I understand a contract of indemnity which binds the party who gives it, only in default in him for whose benefit it is given. And from the nature of such a contract it results, that the debtor must be resorted to in the first instance.

In respect to the degree of diligence, that must depend on the circumstances of each case; and though I am not disposed to think that the strict rules relative to bills of exchange are applicable to this case, yet I am persuaded that the justice on which such rules are founded ought to have a correspondent effect wherever a man is sued for a debt for which he was not originally liable. The plaintiff in this case has considered the contract in the same light; for he has received part payment from Fleury, and prosecuted a suit for the residue.

Blount v. *Blount*.

This is an action of trespass *quare clausum fregit*, in which the jury found a verdict for the plaintiff subject to the opinion of the Court on the following point, to wit, whether a deed regularly executed, proved, and registered from Levi Blount, under whom the plaintiffs claim as heirs at law,—(which deed expresses that "the said Levi Blount, as well for and in consideration of the natural love and affection which he hath for and beareth unto the said Judith Whidbie, his natural born daughter, as also for the better maintenance and preferment of the said Judith Whidbie, hath given, granted, and confirmed, and by these presents doth give, grant, and confirm unto the said Judith Whidbie, her heirs, and assigns for ever, the land in dispute,")—is suffi-

cient to convey the said Blount's title to the said Judith Whidbie, under whom the defendant claims.

Hogg, for the plaintiff, cited 3 *Cruise*, title *Deed. C. Lit.* 123, *a. Comyn's Dig.* title *Covenant. c. 5.*

TAYLOR, C. J. delivered the opinion of the Court.

The question arising upon this record is, whether the deed relied upon by the defendant, is sufficient in law to convey the title from Levi Blount? The distinction between a deed and a parol contract is well settled at common law, and upon the basis of sense and justice. The inconsiderate manner in which words frequently pass from men, would often betray them into acts of imprudence, and not unfrequently, expose them to the artifices of fraud, were they not placed under the safeguard of that rule, which denies validity to a parol contract, unsupported by a consideration. On the other hand, the ceremonies which accompany a deed imply reflection and care: and serve to enable a man to avoid either surprise or imposition.

This rule was changed only when Chancery assumed a jurisdiction of uses, when they acted upon the maxim of the civil law, *ex nudo pacto non oritur actio*, and would not carry a deed into execution which was not supported by a consideration.

Lord Bacon, in his reading on the statute of uses, remarks, "they say that a use is but a nimble and light thing and now contrariwise it seemeth to be weightier than any thing else: for you cannot weigh it up to raise it, neither by deed, nor by deed enrolled without the weight of a consideration. But you shall never find a reason of this to the world's end in the law; but it is a reason of Chancery and it is this: that no court of conscience will enforce *donum gratuitum*, though the intent appear never so clearly, where it is not executed or sufficiently passed by law; but if money have

been paid and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the Chancery."

Of common law conveyances it is necessary to notice only a feoffment, and it is very clear that this deed cannot operate as such. Because the case does not state that Levi Blount was in possession, nor that he gave livery of seisin; and if the deed were in all other respects formally in feoffment, the mere signing and sealing such a deed was, in no instance, sufficient to transfer an estate of freehold, unless the possession was delivered from the feoffor to the feoffee, and without which a deed of feoffment only passed an estate at will.—1 *Co. Lit.* 43 *a*. The livery of seisin is the delivery of actual possession; and therefore cannot be made by a person who has not at the moment actual possession. Consequently, if a person make a feoffment of lands which are let at lease, he must obtain the assent of the lessee to the livery. The old practice was for the lessee to give up the possession for a moment to the lessor, in order to enable him to give the livery.—*Betterworth's* case, 2 *Rep.* 31.

It is next to be enquired whether the deed can operate under the statute of uses, the effect of which is to impart efficacy to certain conveyances without a transmutation of possession.

A bargain and sale is a contract by which a person conveys his land to another for a pecuniary consideration: whence a use arises to the bargainee, and the statute immediately transfers the legal estate and possession to him without any entry or other act on his part.

For want of a pecuniary consideration then, it is perfectly clear that this deed cannot operate as a bargain and sale.

Nor can it operate as a covenent to stand seised to uses, because it is essential to this sort of conveyance, that the consideration be either affection to a near relation or mar-

riage. The love and affection which a man is supposed to bear to his brothers and sisters, nephews and nieces, and heirs at law, as well as the natural desire of preserving his name and family, all form good considerations.

There is an implied obligation subsisting between parent and children, who are considered in equity as creditors, claiming a debt, arising from the duty a parent is under to provide for them.

But love and affection to an illegitimate child is not a sufficient consideration to raise a use in a covenant to stand seised.

Where a person covenanted in consideration of natural love and affection, to stand seised to the use of himself for life, remainder to A, his reputed son, (who was illegitimate) for life, &c. and also covenanted to levy a fine or make a feoffment for further assurance. Afterwards he made a feoffment in fee to the covenantees, in performance of his covenant to the same uses. It was resolved that no use arose to A, the bastard, by the covenant, for want of a consideration. Nor could he take any thing by the feoffment, it being only made for further assurance.—*Dyer* 364, pl. 16.

This case is expressly in point, and its authority is unquestionable; wherefore, there must be Judgment for the plaintiff.

Hilliard v. *Moore.*

"Robert Hilliard departed this life intestate, some time prior to the year 1790, seised and possessed of a tract of land, lying in the county of Northampton, in fee simple. The said Robert left three daughters, his only children and heirs at law; to whom the aforesaid tract of land descended.

The land was divided; and the part which fell to Martha is the land in dispute.

"The lessors of the plaintiff are the other two children of Robert Hilliard the ancestor. Martha, one of the daughters, intermarried with Norfleet Harris, some time in the year 1790, and on the 25th December 1792, he by deed, conveyed the land in dispute to Willam Bridgers, under whom the defendant claims. Martha, the wife of Norfleet Harris, was no party to that deed. Norfleet Harris had issue by his wife Martha, a son, Robert Hilliard Harris, the only issue of that marriage. Martha, the wife of Norfleet Harris, died some time in the year 1793. Norfleet Harris married a second wife and had issue by her Elizabeth and Richard, who are living. Then Robert H. Harris the son, died some time in the year 1799, under age, intestestate, and without issue. Norfleet Harris, the father, died on the 22d October 1807.

"The question submitted to the Supreme Court is, who are the heirs at law of the deceased son, Robert H. Harris? Are his half brother and sister on the part of his father? Is the father? Or, are the plaintiffs, who are the aunts of the intestate son on the maternal side of the whole blood? If the latter, then Judgment to be entered for the plaintiffs for the land in the declaration. If otherwise, then Judgment for the defendant."

SEAWELL, J. delivered the opinion of the Court:

The question in this case is, whether the aunt of the whole blood, on the side of the mother, from whom the lands were derived by descent, shall take in exclusion of a brother of the half blood on the side of the father? And this will depend upon the effect of the acts of 1784.

We will however premise, that this is the first case that has ever occurred in which the action was decided solely up-

on this point. For in the case of *Sheppard* and *Reef* two of the judges who decided for the defendant founded their opinion upon a title which they supposed the half blood acquired from the common mother; two other judges were of opinion that the half blood could not take; and the remaining two were of opinion that the mother had title. A majority, therefore, being of opinion that the defendant had title, though they differed as to the mode by which he acquired it, the defendant was necessarily entitled to judgment. For we are free to declare, that had the decision of the cause been upon this point, the length of time which has elapsed, and the effect the decision might have produced upon landed titles, and the decision being of the highest Court known to our law, we should have felt ourselves bound by it, though at variance with our own opinion. But as that question still remains to be decided, and this case embraces it, we must perform our duty without any regard to what may have been the general understanding, or what particular inconvenience it may produce to individuals. We will proceed now to an examination of the question.

Previous to the act of 1784, all the rules of the common law in relation to descents, were in full force in this State; and it is quite certain, that under those rules the half blood could in no case inherit. Whatever, therefore, the Legislature of this country have done in regulating descents of real estate, so far operates as a repeal of the common law; and from this view it will result, that the rules of the common law still continue in every particular but in those cases in which they have been altered. That the Legislature themselves considered it so, must be apparent from their noticing in the preamble of the act of October 1784, that it was necessary to amend the third section of the preceding act in order to let in the brothers of the half blood; for what but the common law could keep them out? The first

act of 1784 does, as was contended by the counsel for the half blood, profess to regulate descents of real estates; and if the act had gone no further than the 3d section without any proviso, there could have been no room for the present question; and it may be wondered, if they meant no more, why they should have superadded the subsequent clauses. The act then would have had the effect of placing the half blood upon the same footing as the whole blood. In other words, would have abolished the distinction. But it is a sound rule, and of very ancient date, that in construing acts of Parliament, the meaning of the Legislature, in a particular part of an act, is to be ascertained by all they have said upon the same subject; for it will rarely happen that the act as it finally passed, has undergone no alteration as to the *extent* of the design of the Legislature from the time it was introduced, and this reasoning therefore applies with peculiar force to the operation of a proviso.

To this 3rd section a proviso is added, that when an intestate shall have half blood on father's side, and half blood on mother's side, that the half blood on the side from which the land descended shall exclude the other. Now it might be asked, if the half blood brother of the line of the first purchaser is permitted to exclude the brother who is not of that line; and this for no other reason than on the score of blood, can the brother of the whole blood be supposed not to do so? And yet this will result from the construction contended for.

In the 7th section of the same act, the Legislature declares, that in case of the death of a child, intestate and without issue, or brother or sister, a dying *with* either of which had already been provided for, the estate should vest in the parent from whom *derived*; and in case of a puchase, it should vest in the father; but if he should be dead, then in the mother and her heirs; and if the mother be dead, then the heirs of the father; and in *default* thereof, the heirs of the mo-

ther. And the Legislature in the same year made an alteration in this section, declaring, that by accident the descent may be altered and the paternal excluded, which in all other instances is most favoured; from the proviso therefore of the 3rd section, from the 7th section of the same act, paying respect to the ancestor from whom the estate descended, and from the amendatory or explanatory act of October 1784, stating that the paternal line in *all instances* is most favoured, and assigning that as the motive for making the amendment, it is clear that it was not the intention of the Legislature in all cases to put the half blood upon an equality with the whole blood; for though in the first section of the act of October 1784, there are some general expressions that it was the intention of the Legislature to let in the half blood equally with the whole blood, yet from the preamble it is plain that they were only guarding against a critical construction of the 3rd section of the act of April 1784, which possibly might only let in the sisters of the half blood; and the only effect of this clause is to make brothers of the half blood capable of inheriting as well as sisters of the half blood.

If then, this be the proper construction of this clause, we have abundant reason to believe that the Legislature had not *entirely* lost sight of the principles of the common law in looking for the heirs in that stock from whom the land had been derived. That they narrowed down the principle, it is true, and would not permit one stock to exclude another upon a feigned presumption; for in cases of actual purchase, as the lands had not been derived through any channel by inheritance, they have permitted the half blood to share equally with the whole blood, provided they are of that line most *favoured by law*; for we see that in a case of actual purchase they do not lose sight of this principle, for they declare, that in case of a death without issue, brother or sister, that the paternal line shall be, as in *all other instances*, *most favoured* and exclude the maternal.

To us, therefore, it appears that the general terms of the 3rd section of the first act, have been so cut down and controlled, as well by the proviso as by the 7th section and the amendatory act of October 1784, and the first clause of that act having no other object than to place *brothers* of the half blood upon the footing of *sisters* of the half blood; that in a case of a person dying intestate, none can claim to inherit the lands which the intestate acquired by descent but those who are of the blood of the ancestor from whom derived, and that therefore there must be judgment for the plaintiff.

Daniel, J. was of counsel in this cause, and therefore gave no opinion, but expressed himself to be of the same opinion.

Executor of Henry v. *Ballard and Slade.*

The jury find that Perry Fulsher, seised of the premises in fee, on the 2d of April 1796, executed the instrument of writing (a copy of which is annexed to this case); that at the time the said instrument was about to be written, the said Fulsher asked, whether it was better to make a *will* or deed? and upon being told 'a deed,' directed the paper referred to, to be written, and accordingly executed the same. The jury further find, that Reading Squires *paid no* consideration to Fulsher, nor was he related to him by blood, otherwise than being the illegitimate son of Fulsher's wife; that Squires conveyed the lands mentioned in the said paper writing referred to, to the plaintiff, and that defendants entered upon the plaintiff's possession; and if the law from these facts be for the plaintiff, they find for him and assess his damages to six pence; if otherwise, for the defendant.

In the progress of this cause, it was first objected to the admissibility of the probate of the paper referred to, as a will, upon the ground that the certificate did not state that

it was *proven* to have been attested by two witnesses in presence of testator. The evidence was received without prejudice to the exception. The defendant then offered the two living subscribing witnesses to prove the circumstances which attended the execution of the paper writing, as are found in the special verdict of the jury. This evidence was objected to, but admitted without prejudice to the plaintiff. The other witness who proved it as a will was dead. The special verdict, together with the several exceptions to the evidence, are transmitted to the Supreme Court for their determination. The paper writing referred to, together with the certificate of probate, is also made part of the case.

North-Carolina, Beaufort County.

Know ye all men by these presents to whom it shall come greeting, I, the said Peregrine Fulsher of the said county and province aforesaid, being weak in body and health, do ordain this to be my last deed of gift. In the first place, I want all my just debts to be paid, and funeral charges, and to be buried in a Christian-like manner. In the first place, I give to my son-in-law, Reading Squires, 350 acres of land, to him and his lawful begotten heirs of his body, after the decease of me and my wife Tamar Fulsher. In the next place, I do give to my son-in-law, Reading Squires, all the property I own and shall own during my natural life, clear of all wills, legacies, or any thing that shall come against the said Peregrine Fulsher's estate, or any incumbrances whatsoever.

Given under my hand and seal, this 2d day of April, in the year of our Lord 1796.

his
PEREGRINE ⋈ FULSHER, (L. S.)
mark.

Test of us,

his
William ⋈ *Riggs*
mark.

her
Susannah ⋈ *Riggs*
mark.

Samuel Harrison.

State of North-Carolina, Craven County.

Court of Pleas and Quarter Sessions, September Term, A. D. 1811.

The last will and testament of Peregrine Fulsher was produced, and the execution thereof by the testator was proved in open court, and in due form of law, by the oath of Samuel Harrison, one of the subscribing witnesses thereto, who swore that he saw the said Peregrine sign and seal, and heard the said testator declare said instrument to be and contain his true and only last will and testament; and the said Samuel Harrison further swore, that at the time thereof the said testator was of a sound and disposing mind and memory. Whereupon, ordered, that said will be recorded.

Badger, for the defendant, argued that the paper writing exhibited could only operate as a deed, which was the instrument intended to be made.—*Pow. on Dev.* 13. *Cruise Devise* c. 5, § 26. 2dly, That if it operated as a will, the certificate of probate was not admissible evidence, because it does not state that it was signed by two witnesses in the testator's presence.—*Acts* 1784, c. 22, § 11.

It is not sufficient that the certificate states that the will was found in due form of law; for that is to be judged of by the Court when a title is set up under it. A probate being *ex parte* is not conclusive.—4 *Johns.* 162.

Gaston, for the plaintiff, cited the act of 1784, ses. 2, c. 10, § 6, which makes the probates sufficient testimony for the devise of real estates.

PER CURIAM.

It is not necessary to decide in this case upon the nature and effect of a probate when offered in evidence, because the Judge who tried the cause informs us that in point of fact the witnesses introduced by the defendant did prove the execution of the will in the manner required by law; and in this respect we consider the statement as amended by the Judge. On the other question, we are of opinion that this

instrument of writing was made with a view to the disposition of the estate after the death of Fulsher, and although it is called a deed in the body of it, and the testator was advised to make a deed, yet the whole structure and operation of it shows it to be a testamentary paper.

Judgment for the plaintiff.

Norwood v. *Branch and others.*

John Branch, being seised and possessed of a large real and personal estate, devised the same amongst his children, with the exception of his daughter Patience, as to the real estate, but to whom he bequeathed more than a full proportion of his personal property. Upon several of his children also he had made settlements in his life time of lands to a considerable value, but none upon his daughter Patience. John Branch died without making any disposition of a certain tract of land of 789 acres. Several of his children, to whom he had devised and given land died, leaving children; all of whom were parties to this petition, the object of which was to compel the children of John Branch and his grandchildren, whose fathers had been advanced, to bring into hotchpot the lands respectively settled, provided they claimed a share with Patience of the tract of land of which John Branch died intestate.

The case was argued by *Norwood*, for the plaintiff, and *Browne*, for the defendant.

TAYLOR, C. J. delivered the opinion of the Court:

This case depends entirely upon the just construction of the act of 1784 regulating descents, and the act of 1795 admitting females to the inheritance: the great object of

which laws is to make the estates of the children entitled to the inheritance, as nearly equal as possible. It is to descend to all the children, share and share alike, except such sons or daughters as have had lands settled on them by their deceased parents, equal to the share descending to the other children. If the share so settled, be not equal to the part descending, it is to be made so out of that. The term employed by the law is, 'settle,' and this applies as significantly to a devise as to a deed. The opposite construction drawn from the English statute of distribution, has been in consequence of the peculiar wording of the act, which has the word 'lifetime,' and has been thought to signify such a provision as is made in the intestate's lifetime, and not by will—2 *P. Wm.* 441, though the decisions have not been uniform in this.—9 *Vesey*, 413. We are therefore of opinion, that the children of John Branch, upon whom lands have been settled by him, either by deed or devise, and his grandchildren upon whose parents similar settlements have been made, must bring into hotchpot all such lands, provided they claim to share with Patience or the petitioner who purchased from her, in the tract of land of which John Branch died intestate.

Williams v. *Baker*.

The special verdict in this case found that the testator, Robert Bignall, duly made his last will and testament on the 13th July 1809, and that at the time of his so doing, he was upwards of seventeen years old, but not of the age of eighteen; but was of sound discretion. The question reserved is, whether he was of sufficient age to make a will of personal property?

In support of the will, *A. Henderson* and *R. H. Jones* argued at length, and cited may authorities; amongst which

were, *Swinb.* 115. *Sheph. Touch.* 403. *Cooper's Justinian* 493. *Hale's Hist. C. L.* 23, 26. 1 *Reeve's Hist. E. L.* 54. *Precd. in Ch.* 316. 1 *Bl.* 80. 2 *Bl.* 497. 1 *Vern* 255.

Baker, in opposition to the will, cited 3 *Bac.* 118, *A. Dr. and Student* 95. *Infants' Lawyer* 44. *C. Lit.* 89, *b.* 2 *Vent.* 367. *Sheph. Abr.* 130. *Swinb.* 75. *Yelv.* 92. 2 *Fonbl.* 325. *Bud. of L. & E.* 517. 1 *Tucker's Blac.* 62.

CAMERON, J. delivered the opinion of a majority of the Court.*

The only question raised on the special verdict found in this case is, whether a person under the age of eighteen years, can dispose of his personal estate by will.

The common law has wisely fixed on the age of twenty-one, as the earliest period, when the human mind has attained sufficient maturity to act with discretion. The rules established in the ecclesiastical courts in England, which allow infants to dispose of their personal estate by will, have never been in force and use in this State. If they had, we should feel ourselves bound by them, notwithstanding their repugnancy to common sense, and the common law. We cannot subscribe to the doctrine that a person may have a legal capacity to dispose of property by will, and yet be under a legal incapacity to dispose of the same property by deed.

TAYLOR, C. J. The consideration of this cause has not enabled me to concur in the opinion which has been delivered. But as the Legislature has, by a recent act, provided for all future cases, I shall content myself with stating, in few words, the grounds of my dissent.

That the testamentary age, when this will was made, commenced at fourteen in males and twelve in females, is, I think, proved by the act of 1715, which validates all pro-

* Scawell, J. gave no opinion.

bates made before that time, and places them on the same footing with probates made before an *ordinary* or *ecclesiastical* Judge or person; and by the act of 1789, c. 23, which transfers the power to the County Courts. The Legislature must have been aware of the age at which persons were considered as capable of making testaments, in the Ecclesiastical Courts; and where jurisdiction over a subject is transferred from one Court to another, without limitation, it must be understood that the Court to which it is transferred, is to proceed according to the rules and principles adopted in the Court from whose cognizance the subject is taken.

The age of making a testament was originally derived from the civil law; but so are the rules which relate to representation in dividing an intestate's estate; and the evidence of the adoption of both by the common law is equally satisfactory to my mind. *Shephard's Touchstone*, written by an eminent common lawyer, *Justice Doddridge*, states the testamentary ages at twelve and fourteen; *Hargrave*, in his Notes on *Co. Littleton*, is to the same effect; together with many other writers. In *Mosely's Rep.* 5, the same rule is admitted in the Court of Equity. That the common law knows no rule different from this, is evident from their refusing to issue a prohibition to the Ecclesiastical Court before which a testament was proved, made by an infant under twenty-one —2 *Mod.* 315. The common law itself has established the same ages for certain things, as in choosing a guardian, and the capacity of committing crimes. I cannot but think it probable, that this rule has been acted upon in this State, and as it is to be found in all those books which the Legislature has directed the County Courts to be furnished with, it has been considered a matter of course and never drawn into question.

Ballord and wife v. *Hill.*

SEAWELL, J. This case presents the claim of half blood on the mother's side, to lands derived by the intestate from the father, and depends upon the same question which was decided at this term in the case of *Hilliard* v *Moore*. The demurrer must therefore be sustained and the bill dismissed.

Wistar v. *Tate.*

Assumpsit against the defendant as indorser of a promissory note, made payable to him by Kittera and Musser, dated 25th August 1795, and payable a twelvemonth after date. The endorsement was in the following words, "pay the contents to W. Wistar, or his order, for value received, with recourse to me at any time hereafter, without further notice."

The makers of the note were insolvent in 1797; but separate suits were brought against them in 1799, in which judgments were confessed; but nothing was made by the execution, which was returned in 1800. A demand was made on the defendant in 1815; after which this suit was brought. The pleas were 'general issue' and 'statute of limitations.'

Henderson, for the plaintiff. *Browne*, for the defendant.

For the plaintiff it was urged, that the terms of the endorsement gave the plaintiff a right to call upon the defendant, whenever thereafter he thought proper, without limitation as to time, or restriction as to the person's performance of any act on his part. In an ordinary endorsement the plaintiff must have made a prompt demand upon the drawer, and in case of failure, have given notice to the defendant;

and after all this, must have brought his action within three years, if the defendant thought fit to plead the statute. But the doing of these things has been dispensed with by the defendant, who has also restrained himself from taking advantage of the statute. That in the most favourable construction for the defendant, the cause of action accrued only upon the demand; so that the suit being brought immediately after that, the statute has not attached.

For the defendant it was insisted, that the statute must be presumed to be pleaded the right way, either *non assumpsit infra annos* or *actio non accrevit*, as the case may require, or even both ways.

Where the action accrues by the promise, the plea is *non assumpsit infra*, &c. Where it accrues by some collateral matter, *e. g.* "if you will board such a one, I will pay you," it is *actio non.*—*Ep.* 156. If it be, as has been urged, that the action could be brought at any time hereafter, next moment or 100 years, the plea would be *non assumpsit infra*, and is certainly a bar. What is it but a promise to pay on demand? If it was, that he might at any time hereafter have recourse, *provided he could not get the money from the obligor*, after using due diligence, the cause of action, if it accrued at all, accrued in 1798, as completely as when the writ was brought; and so the statute is a good bar still, but the plea is *actio non accrevit*. With respect to the maxim of *quisquis potest* &c. that signifies that the defendant is not obliged to plead them.—*Gilb. L. E.* 43. But if the statute is pleaded, then the law says the suit shall not be maintained, and the parties saying it may, signifies not.

The Court will not under any circumstances assume jurisdiction, where it has none—4 *Vesey, jr.* 790. 5 *Ibid.* 581. Nor can the agreement of parties oust the jurisdiction of the Court.—1 *Wils.* 129.

CARRUTHERS, J. delivered the opinion of the Court:

Although the endorsement of the notes to the plaintiff is couched in unusual terms, we cannot give to them the extraordinary latitude, which would subject the defendant to the payment of the demand after any lapse of time, as contended for the plaintiff. To place these cases on the most favourable grounds for the plaintiff, we must say, that the cause of action accrued against the defendant, from the return of the executions against the drawers of the notes. That was in 1800. No demand on defendant was made till January 1815, when the plaintiff's demand was most clearly barred by the statute for the limination of actions.

Judgment for defendant.

Irving v. *Glazier.*

The plaintiff declares, in an action of indebitatus assumpsit upon two counts, for money laid out and expended, and for work and labour done. To which the defendant pleaded 'the general issue.'

The plaintiff was the owner of a sloop called the Farmer's Daughter. The sloop was employed by Moses Jones, owner of the schooner Newbern, then bound on a voyage from Newbern to New York, to carry from Newbern to Occacock Bar and there deliver to the schooner a part of her cargo, consisting principally of Indian corn, which the schooner was unable to carry over the shoal near Occacock Inlet called the Swash. The defendant was a passenger in the schooner, and as such entitled to carry his chest or trunk from Occacock to New York free of freight. The sloop received on board the lighter a load which he was hired to carry. It was not a full load for her, and she used no shift-

ing boards. The defendant's trunk, intended to accompany him on the voyage to New York, was also put on board the sloop or lighter to be carried down to the schooner; and for the freight of this to the Bar it does not appear whether there was or was not to be any charge. In this trunk, besides his apparel, the defendant had $345 in cash and bank notes. While the sloop was on her way down the river, a sudden flaw of wind careened her much on her side. The corn shifted over to leeward, and in consequence of this shifting of the cargo, she upset and sunk. Had shifting boards been used, the misfortune would not have happened. Shifting boards is the name for a rough partition of plank made in the hold of a vessel to prevent a cargo from rolling or shifting over from windward to the leeward side. They are well known to all persons concerned in navigation, and are almost universally used by vessels which go to sea with cargoes and corn. It has never been the practice for lighters to Occacock to use them, whether with a full cargo or only with part of a cargo. These generally carry a full cargo; and with a full cargo shifting boards are unnecessary.

The captain of the lighter, admitted to be a man of skill and experience, testified that he should have deemed it proper to put up shifting boards, and would have used them had he known when the lading commenced, that she was to take less than a full cargo. It was testified that this case was the first accident of the kind known to have happened in the river. The plaintiff, after his lighter was thus sunk, at the expiration of , caused her to be raised; and by thus raising her enabled the defendant, who was present during the process, to recover his trunk and its contents. The plaintiff, deeming this a case of general average or salvage, claims from the defendant a contribution to this expense proportioned to the rate, which the money and the bank notes of the defendant thus saved bear to the value of the lighter and cargo thus saved.

TAYLOR, C. J. delivered the opinion of the Court.

This action cannot be supported on the ground of general average, because the rule of the maritime law upon which such claim is founded, renders it indispensable that the goods should be thrown overboard to lighten a ship, in which case the loss incurred for the benefit of all shall be made good by the contribution of all. It is not sufficient even that the goods are washed overboard by the agitation of the sea, or destroyed by tempest or lightning; they must be thrown overboard by the direct agency of man for the purpose of easing the vessel in a moment of peril, and thereby increasing the chance of her preservation, and that of the residue of the cargo.

The plaintiff claims from the defendant a proportionate part of the expence of raising the vessel and cargo, but such claim it is impossible to fix on the principle of a general average, because all were involved in the same common calamity, and no portion was sacrificed for the safety of the rest. The cases where the expence incurred in relation to goods have become the subject of a general contribution bear no analogy to the present one. A ship may sustain damage in a storm which cannot be repaired without unlading the goods, and as all are interested that the voyage should be continued, the expence of such unlading should be borne by the owners of the goods. Yet if sails are blown away, or masts or cables broken, the owner alone must bear the loss. The defendant's goods in this case were not saved, nor was the vessel raised with any view to prosecute the voyage: that was necessarily ended by the oversetting of the vessel and the consequent injury to the cargo. But the decisive ground on which this claim must be rejected, and which is also an answer to the claim for salvage is, that the damage and consequent expense proceeded from the neglect of the owner himself. It was his duty not only to have provided a sufficient vessel at the commencent of the voyage, furnished with whate-

ver was necessary to convey her cargo in safety through an uncertain navigation, but to maintain her in a proper condition throughout the whole voyage.

The neglect of providing shifting boards where the cargo of grain was incomplete is not to be excused; the necessity of them is admitted by the captain and is obvious to every person. It can scarcely be doubted, that if they had been provided, the vessel would not have overset by a sudden flaw of wind. It is certainly a matter of surprise that no accident of the kind has happened before, and can only be accounted for by supposing that a continual vigilance has been exercised to meet the approach of sudden flaws of wind, and by taking in sail before they strike the vessel. But the general neglect of ordinary precaution cannot excuse him who has thereby occasioned a loss to another's property; and no reason can be urged, why the shipper of goods or a passenger should be made liable, in any shape, towards the performance of a duty incumbent on the owner. This would be to place him in a more unfavorable situation even than an insurer on the vessel, who is not liable on the policy for the vessel, nor even for goods shipped in the vessel by a person no way interested in her, if she has any deficiency in any one article necessary for safe and secure navigation.

Gilchrist v. *Marrow.*

This cause was tried before DANIEL, J. at Cumberland Superior Court. It was an action of covenant to recover damages for the breach a warranty of soundness contained in a bill of sale, whereby the defendant sold to the plaintiff "a girl slave, named Mary, about eleven years of age, *sound and healthy*, and do by these presents *further* covenant and

agree to warrant the right and defend the title of the said slave," &c.

On the trial, it was contended that the warranty related only to the title, and not to the soundness; but the Judge being of a different opinion, a verdict was entered up for the plaintiff. The defendant moved for a new trial, which was overruled, and he appealed to this Court.

M'Millan, for plaintiff, cited 6 *Johns.* 49. 10 *Johns.* 484.

Henry, for the defendant, cited *Com. Dig. Covenant. A.*

PER CURIAM.

It is contended by the defendant, that the only covenant contained in this bill of sale relates to the title; and that there is no other express covenant in the deed. We are clearly of opinion, that the following words in the deed contain an averment of a fact, and amount to an express covenant: "I have bargained, sold, and by these presents do bargain, sell, and deliver unto the said Archibald Gilchrist, one certain negro girl slave, named Mary, about eleven years of age, *sound and healthy*." These words are not as has been contended, barely words of description, but aver facts sufficient to maintain this action. The warranty of the title in the latter end of the bill of sale, does not destroy or interfere with the covenant upon which this action is predicated. The motion for a new trial must be overruled, and a Judgment entered for the plaintiff.

Cramer v. *Bradshaw*, 10 *Johns.* 484, is a case very much like the present.

Allen and Wife v. *Gentry.*

Detinue for a slave of which the defendant made a parol gift in 1801, to Sarah his daughter, one of the plaintiffs, who in December 1803, and when she was an infant, intermarried with Allen, the other plaintiff, who was of full age. The writ was sued out on the 12th September 1814, and the defendant pleaded the act against parol gifts of slaves.

Norwood for the plaintiff:

This case is excepted by the infancy of the wife and the supervening coverture, and she would have three years after discoverture to bring the action. Since the cases of *Johnson and wife* and *Harris and Norfleet*, decided in this Court, it is understood that the husband cannot sue without joining the wife.

SEAWELL, J. delivered the opinion of the Court:

This case depends upon the proviso of the act of 1806. The act requires all persons claiming slaves in virtue of any parol gift, to bring their actions within a limited time after the passing of the act. And the proviso alluded to, is of the saving to infants, femes covert, &c.

The wife, in this case, was an infant at the passing of the act, and became covert during her infancy, and has continued so, to the bringing the present action; and seems therefore so completely within the savings, as to admit of no question.

But it has been alleged, that the husband who laboured under no disability, *might* have brought an action in his own name, and ought therefore to be barred of the present. And a case decided in this Court some years past, supporting this kind of action in the name of the husband alone, has been relied on. As to that case, it is only necessary to

say, that there are as authorities to support it, 2 *Lev.* 101. 3 *Salk.* 64. 3 *Lev.* 403, and *Bull. Ni. Pri.* 50; but that the present affirmative of the proposition by no means disposes of the question. For by that mode of reasoning, the object of the proviso would be totally defeated; because the husband *can* at all times use the wife's name, and so *may* any of the persons included in the savings bring and *support* their actions; but the Legislature, in tenderness to their situations, exempts their claims from the operation of the act, till their disabilities cease. That the husband and wife *may* join in all actions, which survive to the wife, can admit of no doubt. And indeed it seems now settled that, regularly, they *ought* to join in such cases.

We are *all* therefore of opinion that the present action is not barred, and that there should be Judgment for the plaintiff.

Dyer v. *Rich.*

This cause was tried before DANIEL, J. at Sampson Superior Court, where the certiorari was dismissed; from which decision an appeal was taken to this Court.

The affidavit made by Dyer, on which the certiorari was obtained, stated that he purchased from Rich, a certain slave for the price of $ 450; in payment of which he endorsed a note of Robeson's to Rich, for $ 650, the latter paying the excess by a note, and some produce. That after the sale of the slave, the parties entered into a contract in writing, but without seal, that Dyer should convey the slave out of the State and dispose of him in two months; which he avers he performed. That afterwards Rich sued him upon the agreement to Sampson County Court at May Sessions 1815, which he was unable to attend through a vio-

lent attack of illness, and had no opportunity to employ an agent. That at the return term a judgment final by default was taken against him, and an execution issued. At the succeeding term he moved, upon the foregoing facts, to have the judgment and execution set aside, but was overruled.

The counter affidavit of Rich avers, that the agreement to carry the slave out of the State, was a part of the original bargain, and not made after it; and that if Dyer did remove the slave, it was done so evasively that a very short time afterwards he returned, and is now in Dyer's possession.

SEAWELL, J. delivered the opinion of the Court:

We are all of opinion, that the certiorari should be sustained in this case.

It is stated by the applicant, that he never had an opportunity of making any defence; and from the facts he has stated, if they be *true*, great injustice has been done him. The defendant, in the *certiorari*, does not deny that the trial was *ex parte*, but insists, that according to his belief, the applicant has no defence upon the merits. If, therefore, the petitioner is turned out of Court and he is injured, he is without remedy. But as to the other side, if he has good cause of action, he will still prevail, and his ultimate recovery be secured. Let the cause be placed on the trial docket and a trial be had *de novo*.

Clements v. *Hussey.*

This is an action on the case in *tort*, to recover damages for the breach of a patent right. The defendant pleaded to the merits of the cause, and after the suit had been continued several terms, he died. A *scire facias* was served on

David Mock, administrator of the property of the defendant, returnable to April term 1816; and he pleaded in abatement, that the defendant died on the 5th day of October 1814, and that no process was served on him until the 1st day of April 1816. To which plea the plaintiff replied, that at October term, 1814, the death of the defendant was suggested. He prayed a *scire facias*, against the representatives of the defendant, which was ordered, and that a *scire facias* was made out accordingly; that an *alias scire facias* was issued from April term 1815 to October term 1815, and was delivered to the sheriff of Rowan, the said administrator being a resident in that county, and that *pluries scire facias* was issued from October term 1815, to April term 1816, which was executed and duly returned, the defendant demurred to the replication, and the plaintiff joined in demurrer.

CAMERON, J. delivered the opinion of the Court:

The plaintiff has omitted nothing necessary to prevent the abatement of his action. Process having regularly issued from term to term, after the death of defendant intestate, till the administrator was made party, although not actually served, prevents the abatement which the defendant seeks.

Demurrer allowed, plea overruled.

Gibbs v. *Ellis.*

In this ejectment for plea since the last continuance, the defendant saith, that the lessor of the plaintiff, by his agent and attorney in fact, hath possessed himself of the premises in question and maintains the possession, &c.

To which the lessor of the plaintiff demurs generally. Joinder in demurrer. The question upon the demurrer is, at whose cost the suit shall be dismissed? Which is referred for decision to the Supreme Court.

PER CURIAM.

The costs must necessarily be paid by the plaintiff, whose entry on the premises has destroyed the effect of his writ.

Harper v. *Gray and others.*

SEAWELL, J. delivered the opinion of the Court:

We think a statement of this case will free it from difficulty.

Park's will is exhibited in Randolph County Court for Probate, is carried from thence by way of appeal to the Superior Court: from that Court is removed for trial to Rowan county, where it is tried by a jury who find in favor of the will, and the same is directed to be recorded by the Clerk of that Court, and a *copy* directed to Randolph for record in that county. The petitioners charge that the *probate* was irregular, and petition Randolph County Court to set it aside, and order probate *de novo*. If the probate was irregular, application must be made to the Court which erred, or to one of *controlling* power. The Court of Randolph has committed no blunder which stands in the way, as by the *appeal* to the Superior Court, a new trial was produced. It has no control over Rowan Superior Court; and therefore if it should direct the probate to be set aside and award a rehearing, it would be vain and nugatory. We think, therefore, the petition must be dismissed.

Baker v. *Evans.*

The plaintiff claims title to the premises in the declaration, by virtue of a mortgage deed, dated 17th November 1797, from Samuel Purviance to Isaac Burkloe, to secure the payment of £170, payable 1st December 1799.

The said Samuel was in possession of the mortgaged premises and sold the same to Lewis Johnston, the 5th July 1800, who entered into possession soon afterwards, and in two weeks after Purviance went out. Johnston sold to John Evans the devisor and husband of the defendant 18th of February 1804, who entered into possession in two or three days after Johnston went out, continued in possession, and died seised of the premises, and the defendant has continued in the actual possession ever since. There was no evidence that Johnston had notice of the mortgage before he purchased from Purviance, nor was a knowledge of the mortgage brought home to Evans before he purchased.

But it was proved that Johnston knew of the mortgage before he sold to Evans, and complained of the injury done him by Purviance; and it was proved that about the time Purviance was a candidate for Congress, it was universally spoken of to his disadvantage, that he sold land to Johnston which was mortgaged; and Johnston himself spoke of it as a dishonest act in him. It was also proved, that Evans lived a near neighbour to Johnston and was intimate with him, and the opinion of the witness was, that Evans must have heard that the land was mortgaged. The whole of these purchases were for a full and valuable consideration.

Philemon Hodges proved, that in 1803 or 1804, he was desirous to purchase the land, but had heard of the mortgage and went to Burkloe and asked him if he had a mortgage for it, who answered that he had, but that it was nearly paid up, and for him not to stop purchasing on that ac-

count, for that he should not be disturbed. He proved that Burkloe died in 1807 or 1808.

Jackson proved, that near about the time Johnston sold, he heard Burkloe say to him he had received satisfaction for the mortgage, and that he might sell, he should never be disturbed. The same witness swore that on the trial of this cause in the County Court, David Evans, (then a witness, but now dead) swore, that about one or two months before Evans, the devisor, his father, purchased the land from Johnston, Burkloe told him he had received satisfaction for the mortgage.

George Evans, another son of the devisor of the defendant, swore that Burkloe told him the day before his father purchased the land, that he had no mortgage for it, and he searched the Register's office for a mortgage, but could find none. The mortgage produced, was not registered until after the commencement of the suit.

The jury found a verdict for the defendant. And on motion for a new trial, the same is ordered to the Supreme Court, on the following questions:

1st. In a case like the present, is there such an adverse possession as upon which the statute will attach?

2d. The estate once forfeited and become absolute at law, is it a good defence in ejectment by the mortgagee to offer parol evidence of the payment of the mortgage under the act of Assembly, or such evidence as is here offered?

Henry, for the plaintiff, cited *Powell on Mortg.* 207, 219.

M'Millan, for the defendant, cited 3 *Bla.* 435. *Powell Mortg.* 54. *Douglas* 630.

PER CURIAM.

Samuel Purviance executed the mortgage deed to Burkloe, on the 17th November 1797, to secure the payment of £170, payable 1st December 1799. The mortgagor was permitted to remain in possession, and after the time the mortgage became forfeited, to wit, on the 5th July 1800, he conveyed the land to Lewis Johnston, who had no notice of the mortgage, and who entered into possession of the premises, and held them as his own property until the 18th February 1804, when he sold the premises to John Evans, who entered as soon as Johnston went out of possession, and continued the possession as long as he lived, and the defendant (his widow and devisee) has continued in possession ever since.

It appears from the case, that Lewis Johnston, John Evans, and the present defendant did, each in succession, hold the possession of the land, as their own, and adversely to all the world. It does not appear from the case, when the action was commenced; but it is admitted that it was more than seven years after the entry of Johnston. We are of opinion, that the defendant and those under whom she claims, have been in the continued possession of the premises, under a colour of title for more than seven years, holding the lands adversely to all the world, and therefore the act of 1715 bars the lessor of the plaintiff in the present action. The opinion given by the Court, upon the first point in the cause, renders it unnecessary to give any opinion on the second point.

The motion for a new trial in this cause is overruled.

State v. *Commissioners of Fayetteville.*

Gaston, for the defendants, cited *Crown Circ. Comp.* 307. 1 *Hawk.* 368. *Acts* 1786, c. 18, § 4. 1715, c. 36, 2, 1784, c. 14 1786, c. 18. *Private Acts* 205. 2 *Hayw.* 228. 1 *Hayw.* 243.

M'Millan, for the State, cited *Private Acts* 1783, c. 25, § 7. *Crown Cir. Comp.* 548 *Doug.* 797. 2 *Coke's Inst.* 701.

DANIEL, J. delivered the opinion of the Court:

It is referred to the Supreme Court to decide upon consideration, of the public law, and of the private acts which have been passed to regulate the town of Fayetteville (which private acts are a part of this case) whether the persons who hold the office of Commissioners are liable to an indictment upon the ground that the streets are out of repair.

We are of opinion, the defendants are subject to an indictment, if the streets of the town are permitted to be and remain out of repair. Annoyances in highways, by rendering the same inconvenient or dangerous to pass; either positively by actual obstructions, or negatively, by want of reparations, are deemed nuisances. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse the same, may be indicted.

Let us examine who are bound to repair and cleanse the streets of the town of Fayetteville. By an act of the General Assembly passed in the year 1787, the Commissioners are invested with full power and authority to make rules and regulations, and to pass ordinances, for levying and collecting taxes on the persons and property in said town; and they are directed and empowered to appropriate the money which they shall cause so to be collected to various objects for the good government and well-being of said town;

One of which objects, as expressly declared by the act, is the reparation and keeping in good order the streets of said town. It is not denied, that the keeping the streets in repair, is a thing that concerns the public in general. If the Commissioners are guilty of omission, in laying the taxes, and appropriating some part of the proceeds, in repairing the streets; I would ask if they have not completely omitted to perform an essential duty, imposed upon them by law, which duty was of public concern? The law says, that where a statute commands or prohibits a thing of public concern, the persons guilty of disobedience to the statute, are liable to be indicted for the disobedience. The Commissioners, instead of calling out the hands to work on the streets, like an overseer of the public roads, call forth the pecuniary resources of the town, and hire labourers to perform the duty, &c. It has been said, that as the Commissioners are annually elected, it might so happen that one set of Commissioners might be punished, for the omission of their predecessors in laying the taxes, &c. The defendants are charged in the indictment with their own culpable omission and negligence, and not with the faults of others; and unless this principal charge in the indictment, be substantiated, they cannot be convicted. The law requires an impossibility of no man.

The demurrer is overruled.

LOWRIE, J. I doubt.

M'Farland v. *Patterson.*

This cause was tried before DANIEL, J. at Robeson Superior Court. It was an action of assumpsit. There were two counts in the declaration. One on an agreement reduced to writing by the parties; the other for goods sold and delivered. The plaintiff failed to produce the agreement

declared on, and moved to give parol evidence of its contents, offering to prove by his own oath that the agreement was lost. The Court would not permit him to prove the loss by his oath. He then introduced two witnesses, who deposed as follows, viz. John M'Farland stated, that the plaintiff had a small chest at his turnpike bridge where he kept many of his valuable papers, such as deeds, &c. That it had a lock on it. That the plaintiff had his, the witness's, bond for a sum of money, which he paid on a report of his the plaintiff's valuable papers having been lost, and has never seen the bond since. Sarah M'Farland said, that she lived at the plaintiff's turnpike-house; and some time after the commencement of the suit, one night after she had gone to bed, she was awaked by the noise of an old negro woman who was scolding at some body. She then got up and found the chest open. When she went to bed the chest was shut. It had a lock on it; but she does not know whether it was locked that night. She saw some papers in the chest afterwards.

The Court permitted the plaintiff to give parol evidence to support the second count in his declaration, which was for the sale and delivery of a yoke of oxen, cart, and log-chain, and were the principal subjects of the agreement mentioned in the first count. The plaintiff obtained a verdict (after all the evidence of each party was given in) for fifteen dollars.

A new trial was moved for, because the Court had permitted parol evidence to be given, without sufficient evidence of the loss of the written agreement, which was overruled and appeal taken to this Court.

PER CURIAM.

We are of opinion, that the loss of the written agreement was not sufficiently established to let in the plaintiff to prove the contents of it by *parol*. This case does not come

within that class of cases which authorises a plaintiff to abandon his count predicated upon a special undertaking which has been reduced to writing, and recover on a *quantum valibat*, or any other general count which may be incorporated in his declaration. Those cases are, where the plaintiff has performed a part of the work or duty which he bound himself by his written agreement to perform, or when it is done not in pursuance of the argreement, and the defendant has had the benefit of the work or other thing thus imperfectly executed. In a case of that kind, it is very clear that the plaintiff could not recover on the special contract, because he would be unable to aver and prove performance;—and it would be the height of injustice to permit the defendant to derive a benefit from the plaintiff's labour or services, without an adequate compensation. Therefore, the law will, in such cases, permit him to abandon his special agreement and recover upon the other counts in his declaration.—10 *Johns.* 36.

The case now before the Court, stands upon the long established rule, that parol evidence cannot be admitted to prove the contents of the written contract, unless it shall be clearly made appear that the written contract is lost by time or accident.

The plaintiff not having shown that the written contract was lost in either of the above ways, he should not have been permitted to prove the same by parol.

A new trial must be granted.

Deaton v. *Gaines.*

IN EQUITY.

Joseph Deaton, being seised of a tract of land, agreed to sell it to one William Smith, who gave his bond to

Deaton for the purchase money, and Deaton gave his bond to Smith to make him a deed for the land. No time was mentioned in the bond within which the deed was to be made.

When Smith's bond became due, Deaton brought suit on it, and Smith brought suit against Deaton upon his bond to make title. Deaton recovered a judgment against Smith, and Smith was non-suited in his suit against Deaton.

Soon after Smith sued Deaton, Deaton tendered him a deed for the land, which he refused to accept. Deaton placed this deed in the hands of his attorney in the suit, and returned to the Mississippi, where he resided.

An execution was sued out at the instance of Deaton on his judgment against Smith, and no personal property being found, the execution was levied upon Smith's equitable estate in the said tract of land, which was sold by the sheriff and purchased by James Gaines, for a sum much less than the judgment and costs. Gaines, at the time of the purchase, had full notice of all the preceding facts, and of the further fact that Smith was insolvent, and had no property out of which the residue of Deaton's debt could be made. Some time after the sale of the land by the sheriff, and at the Court at which Smith was nonsuited, Deaton's attorney handed to Gaines the deed aforesaid, but not by the direction of Deaton or with his knowledge.

It is submitted to the Court, whether Gaines is bound to pay the residue of the debt, or to surrender his purchase upon his receiving back the money he has paid with interest?

DANIEL, J. delivered the opinion of the Court:

Gaines was a *bona fide* purchaser under a regular judgment and execution, at a sheriff's sale. I would ask what principle of equity it is, which can compel Gaines to pay the balance of the judgment or surrender the lands, as the

complainant proposes? I confess I know of none. The equitable estate of Smith in the land was subject to an execution, by virtue of the act of Assembly of 1812, c. 6. Gaines was the highest bidder. He is entitled to keep what he bought on paying his bid.

The bill should be dismissed with costs.

Byrd v. *Clark.*

An action of ejectment in which the plaintiff obtained a verdict; and the question reserved was, whether the premises were sufficiently described in the declaration to authorise the issuing of a writ of possession. The description is as follows:—"One tract of land containing 150 acres, lying and being in the county of Martin, and State aforesaid, in the low grounds of Roanoke River, on the south side; it being part of 350 acres, according to contents of patent granted to John M'Caskey the 7th November 1730; beginning at a sycamore tree supposed to be Colonel Cullen Pollock's line, and so extending out and in, according to courses of patent aforementioned, to conclude and make out the above said 150 acres, with the appurtenances."

Browne, for the plaintiff:

In ejectments, there is no great certainty required in the description of the premises; for the sheriff's assistance is required only for the purpose of preserving the peace.—2 *Cromp. Prac.* 212. He delivers possession on the showing of the plaintiff, who is at his peril, to take possession of no more than he is entitled to. And if he does take possession of more, the Court will set the matter right in a summary way.—1 *Burr.* 623. 5 *Burr.* 2672.

The precedent in 2 *Cromp Prac.* 162, is of "four messuages, four barns, with the appurtenances, in the parish of St. Mary, Islington." In which parish there are probably more than 400 messuages, and as many barns; any four of which would answer the description.

In *Lilly's Entries* 192, it is of "five messuages, twenty cottages, 400 acres of land, 200 acres of meadow, 400 acres of pasture, with the appurtenances, in Welhen-Slawston, Harborowe and Bowden Magna." And the other precedents in the same book, are not more accurate in their description.

The description in the caae before the Court, is of "one tract of land, containing 150 acres, lying and being in the county of Martin, and State aforesaid, in the low grounds of Roanoke, on the south side, it being part of 350 acres granted to John M'Caskey, the 7th of November 1730, beginning at a sycamore tree, supposed to be Colonel Cullen Pollock's line. This, without laying any stress on the balance of the description, is more accurate and precise than that of any of the precedents in the books.

There never occurs a case of disputed boundary, where the Court and jury can decide solely on the description in the grant or deed. They are obliged to have recourse to the testimony of witnesses. As the sheriff cannot do so, he has recourse to the information of the plaintiff, who gives it to him at his peril.

PER CURIAM.

We are of opinion, that a writ of possession ought to issue, and that the description is sufficiently certain for that purpose.

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Shepherd v. *Monroe and others.*

This bill was filed against the defendants Malcolm Monroe, Pleasant Wicker, and John M'Lennon; all of whom, with the complainant, were co-sureties for one Nathaniel Williams, to Thomas Stokes, since deceased, in a penal bond conditioned to pay £ 93 7 6, with interest.

Stokes afterwards recovered judgment and execution on the said bond against the said Nathaniel, the principal, and the complainant and the defendants, the sureties. The *fieri facias* was returnable to May Court 1810, levied on Shepherd's property, and Shepherd paid the execution, viz. £107 1 1½. Williams, the principal, is insolvent.

The end of this bill is, to compel the defendants, who were co-sureties for Williams, with the complainant, to contribute their proportionable parts of the said debt and the costs and expenses thereby incurred and paid by the complainant.

The defendants have been duly served with process &c. and are all in contempt for want of answering, and the bill is taken *pro confesso*, absolutely, against all of them, and the cause held for hearing *ex parte* at the next term. And now at this May term, 1816, a motion is made by the counsel of Monroe to dismiss the bill for want of equity. To which the complainant's counsel objects,—1st, because it is not regular or proper to dismiss for such a cause, on motion; and it is too late even to demur and *a fortiori* to move to dismiss. 2dly, That there is equity in the bill, and the remedy lately given at law does not take away or oust the Chancery of its jurisdiction.

The questions therefore submitted, are, 1st, Can this bill under its circumstances be dismissed, on motion, at this time? 2dly, Is there equity to sustain the bill?

DANIEL, J. delivered the opinion of the Court:

Before the year 1807, it was thought a bill in equity was the only remedy a party could have, to obtain his right in a case like the present. In that year, the Legislature passed an act giving an action at law; but on examining the act, we do not discover the Legislature intended to oust the Court of Chancery of its jurisdiction altogether; for there are no negative words in the act. We are, therefore, of opinion, that this Court has concurrent jurisdiction with a court of law. In England, courts of law have sustained actions, of late, by one security against the other, when the principal has become insolvent; and we find authorities which say, the Court of Chancery retains its jurisdiction in such cases notwithstanding.—*Coop. Plead.* 142. 5 *Vesey* 792. 8 *Vesey* 312.

The motion to dismiss the bill is overruled. It is unnecessary to decide the other point in the cause.

Wright's Executors v. *The Heirs of Wright.*

This was an issue to try the validity of a paper writing, offered by the plaintiffs as the last will and testament of John Wright, deceased. It was witnessed by James Berry and Demsey Squires.

On the trial, it was proved, that James Berry, one of the attesting witnesses, had left the country some time before and was not to be found. Squires, the other witness, then proved that the will was duly executed by John Wright in his presence and that of the witness Berry; and that each of them subscribed as a witness, at the request of Wright; Berry subscribing in the presence of this witness.

Squires also proved, that he was sent for by Wright to attest this will. That when he came, Wright and Berry were together, That Wright requested this witness to leave the room until Berry read over the will to him. That after remaining out of the room some time, he was called back, and then the will was executed, as stated above. That the whole of the will was in Berry's hand-writing. It was also proved, on the part of the plaintiffs, that Wright had made a former will which was also written by Berry; in which the legacies and devises were nearly the same as those contained in this.

The defendants then offered to prove, that Berry was not a credible witness. This was objected to; but the Court overruled the objection and permitted the testimony to be introduced. A number of witnesses proved, that Berry's general character was such, that he was not entitled to be believed, on his oath. It was then attempted to discredit Squires, the other witness. The only evidence to this effect was, that of two witnesses, who deposed that soon after Wright's death, they had heard Squires say, he had not heard Wright acknowledge it to be his last will, and if it was not proved till they proved it by him, it would never be done. All the witnesses, and these two among the rest, deposed, that Squires had always borne an excellent character for probity and honesty; and that they would not hesitate to believe him on his oath.

The Court, after recapitulating all the evidence in the course of the charge to the jury, told them, that if they believed the evidence of Squires, although Berry was not a credible witness, they ought to find that it was a will.

The jury found that it was not the will of John Wright. A new trial is moved for on the grounds that the evidence as to Berry's credibility, was improperly admitted and tend-

ed to give an improper bias to the jury, and that the jury found a verdict directly contrary to the evidence.

It is agreed, that the foregoing case be submitted to the Supreme Court; and if they are of opinion, that a new trial be granted, then that the verdict be set aside and a new trial granted; otherwise the verdict to stand.

CAMERON, J. delivered the opinion of the Court:

This case gives rise to no question of law. The matters of fact having been passed on by the jury, their verdict must stand; and the motion for a new trial must be overruled.

B. Hawkins v. *P. Hawkins.*

The question in this case arose upon the admissibility of the deposition of C. Marshall, under the following circumstances. Marshall was an original defendant in this bill in equity, in which it was charged that certain deeds were delivered to him as trustee to be re-delivered to P. Hawkins, deceased, upon his request, which he made in his lifetime; but Marshall refused to re-deliver them. The bill contained a prayer for the delivery up of the deeds, which it appeared had been delivered up to P. Hawkins, jun. the defendant's son, after the death of P. Hawkins, deceased, to whom the promise had been made. The deeds were annexed to the answer of Marshall, and they were proved and recorded, and his answer submitted it to the Court to do with them what might be just. The deposition of Marshall had been taken, subject to all just exceptions, and the object of it was to show that he was a subscribing witness to the deed, that they were delivered unconditionally, and that he kept possession of them during the lifetime of P. Hawkins, deceased, with his consent and approbation.

Marshall afterwards died, and the suit has not been revived against his representatives.

Upon several issues submitted to the jury, they found that Marshall was requested by P. Hawkins, deceased, of his own will, to re-deliver the deeds, which he unjustifiably refused to do.

The question was argued by *A. Henderson* and *Gaston*, in support of the deposition, and *Browne*, against it.

The grounds assumed in favour of the deposition were, that when Marshall attested these deeds, the defendant acquired an interest in his testimony, of which he could not afterwards be deprived without his own act. That any subsequent interest of Marshall's cannot render him incompetent. That the interest must exist at the time the fact happened which the witness is to prove, or be thrown upon him by operation of law, or the act of the party calling him. If a witness were allowed to disqualify himself, or if the adverse party could deprive the party calling him, of the benefit of his testimony, the utmost injustice would ensue.—*Bent v. Baker*, 3 *Term. Rep.* 27. It was further urged that Marshall was a mere formal party, having no interest in the cause; and the suit being now in progress without being revived against his representatives, shows the light in which the plaintiff made him a party to the bill.—2 *Atk.* 229. 2 *Vesey* 220.

Against the deposition it was urged, that persons interested are excluded from giving testimony.—*Gilb. Law Ev.* 141, 2. Also those who are stigmatized.—*Ib.* 142.

If an instrumentary witness after subscribing becomes interested as executor or administrator of the obligee, his hand-writing may be proved as if he was dead.—1 *Str.* 34. 1 *P. Wms.* 289. So if such witness afterwards becomes infamous.—2 *Str.* 833.

If an instrumentary witness is interested at the time of subscribing, and at the trial, he cannot be a witness; nor can his hand-writing be proved.—*5 T. R.* 371. *Esp. N. P.* 253.

It is charged in the bill, and also found by the jury on the trial of the issues, that the deed for the re-delivery or setting aside of which this bill was brought against Charles Marshall and P. Hawkins, jun. was delivered to the said C. Marshall, on trust to re-deliver it to P. Hawkins, sen. if he should require him so to do: and also that the said P. Hawkins, sen. did require the said C. Marshall to re-deliver the said deed to him, P. Hawkins, sen. which he the said C. Marshall refused to do, and in breach of his trust, delivered it to P. Hawkins, jun. the other defendant. Under such circumstances, the deposition of C. Marshall, taken while the bill was pending against him, cannot be read in evidence; because he was, *at least*, liable to costs. 3 *Atk.* 401. *Barrett* v. *Gore and Umfreville* in point. Nay, if P. Hawkins, jun. should be unable to compensate the injury sustained, C. Marshall would be decreed to do so.—*3 Brs. Ch. Rep.* 112. *1 Vesey, jr.* 206.

The witness C. Marshall was placed in this situation with the consent of the other defendant, P. Hawkins, jun. who received the deed from him, and now wishes to use his testimony in exculpation of them both. He hath poisoned the source, and now insists that we shall drink of the stream.

The *dicta* that "if, after the event, the witness become interested by his own act, without the interference or consent of the party by whom he is called, such subsequent interest will not render him incompetent, *Peake's Ev.* 137, 8, and if they be law, do not apply to this case. This doctrine is mentioned in *Bent* v. *Baker*; but that case was not decided on it; and Lord Kenyon calls it a minor point. It is not easy to imagine a case to be decided upon this distinction.

In *Allen* v. *Hearn*, 1 *T. R.* 56, a wager between two voters was held to be void, as having a tendency to induce bribery and corruption at elections. And ought not a wager, or any other contract or transaction by which a witness attempts to gain an interest concerning a suit in which he is to give testimony, to be also void, as having a tendency to induce perjury?

If a witness is convicted of perjury, or otherwise becomes infamous, the party loses his testimony, however material it may be: and why shall he not, if the witness becomes interested? Interest disqualifies from giving testimony as completely as infamy.

TAYLOR, C. J. delivered the opinion of the Court:

It appears from the statement sent up, that the character given by the bill to C. Marshall, is that of a trustee, and the question is, as to the competency of his testimony? Upon this subject there is a variance in the practice of courts of law and equity. In the first, no person made a defendant can be a witness, unless in some particular cases where he is improperly made a defendant, and there is no proof against him: in which case, the jury are directed to pass upon him, and upon acquittal, he is received as a witness. In the Court of Equity, it is frequently necessary to make a person defendant for the sake of form; and then it is almost a matter of course to examine him upon motion. Where a trustee has the legal interest in an estate, but is in all other respects nominal, he cannot be examined at law as to the merits or design of the deed, but there are several authorities to show that he may be admitted in equity. It is not to be understood, that these rules of evidence at law and in equity differ in general, but only in particular cases. Where fraud is charged by a bill, or the inquiry is relative to a trust, the jurisdiction of this Court would be greatly circumscribed, and its power of fully investigating the latent

elements of a transaction over which artifice sometimes spreads the thickest disguise, much abridged, if it were confined within the strict rules prescribed by courts of law. In *Ambler* 393, a trustee plaintiff was examined on behalf of a defendant. In 1 *P. Wms.* it was ordered that the defendant might examine one of the plaintiffs who were assignees of a bankrupt as a witness for the defendant. In *Gilb. Eq. Rep.* 98, it is said, that a defendant may be made a witness because he is forced into the suit. In *Ambler* 592, the deposition of a trustee was admitted to be read as to the quantity of trust money in her hands. In 2 *Vesey* 629, it is said that when a trustee or attorney is a defendant, the objection goes only to his credit. If he is *particeps fraudis*, or interested, it goes to his competency. We cannot consider Marshall in any other light than as a formal party. The suit is not revived against his representatives, and they, therefore, cannot be liable to a decree or the costs.

There must be a new trial, and his deposition is allowed to be read.

Arrington v. *Horne.*

Defendant offered, and was permitted to read in evidence the deposition of a Mr. Hardy. It stated, that he had purchased the bond on which the present suit was brought, pending the action, and that this purchase was from the plaintiff, and for a valuable considera ion; that this purchase was without writing, and accompanied with the delivery of the attorney's receipt for the bond; that afterwards deponent, for a valuable consideration, sold the interest in the said bond to a Mr. Purnell, and that he had made an endorsement to that effect, upon the receipt of the attorney;

which receipt was produced in Court, endorsed as stated by the deponent. Defendant then offered in evidence the receipt and release of Purnell in discharge of the bond; which release contained on the part of Purnell, a covenant of indemnity to defendant. Defendant also offered in evidence, a settlement of mutual dealings between himself and Purnell, at the time the amount of the bond was taken into consideration and the receipt given. Plaintiff then gave evidence, that at the time he parted with the attorney's receipt for the bond, that the interest of the bond was sold conditionally, namely, that Hardy was to give surety to a bond that day executed to the plaintiff; and that he had called on Hardy to do so, and that he failed, and soon after became insolvent and was dead. Plaintiff further gave in evidence, that he gave notice to Purnell and defendant before the payment and receipt, but after Purnell's purchase, that he claimed the interest in the bond. It further appeared in evidence, that the plaintiff had brought suit on the bond given by Hardy, before mentioned, recovered a judgment, and that Hardy was taken in execution and sworn out of jail.

This evidence was all given to the jury, subject to the charge of the Court: and the Court directed the jury, that neither the receipt or evidence of settlement amounted to a payment, who found accordingly; and upon motion for a new trial, the same is transmitted by order of this Court to the Supreme Court.

Seawell, J. delivered the opinion of the Court:

This may be a hard case, but sitting in *a court of law*, the plaintiff must prevail. We cannot look into the *equitable* claim of persons who are, or are not *parties*, but must dispose of each case as the rules of *law* direct. Whether, therefore, the plaintiff has parted with the *beneficial* interest in the bond on which suit is brought so as to enable such assignee in *equity* to discharge it, must be referred to the

rules of a court of equity. According to the rules of law, the right of action still remains in him, and as such must be respected. He having done no act which in *law* has *passed* his interest, nor which in *law* has defeated such right of action, there is nothing by which a court of law can restrain him. The idea of defendant's paying in *good faith* to one he supposed *authorised* to receive, is entirely excluded, from the circumstance of his taking a bond of indemnity. As to *him*, therefore, he acted with his eyes open, and during the pendency of the present action.

Wherefore, we are all of opinion, that the rule for a new trial, be discharged.

State v. *Everit.*

This was an indictment against the defendant as the overseer of a road, charging the said road to have been out of repair. The defendant had pleaded 'not guilty.' Evidence of the defendant's having acted as overseer, was offered on the part of the State. It was objected, that no evidence other than the record of his appointment, was admissible to charge the defendant as overseer. A juror was withdrawn by order of the Court and without the consent of the defendant. And it is referred to the Supreme Court, whether any other evidence than the record of his appointment from the County Court, be admissible for the purpose of showing the defendant to be the overseer, and whether defendant can again be put upon his trial.

PER CURIAM.

This case must be governed by the regulation which the Legislature has thought proper to make on the subject; and as the act of 1812 has declared that an overseer shall not be responsible for the insufficiency of the road, until ten

days after he is served with notice of his appointment, such notice and the time of service form an indispensable part of the testimony before legal guilt can be inferred.

State v. *Bright.*

This was an indictment against the defendant, who is Register of Lenoir County, for taking a greater fee for copying a deed than the law allows. Upon 'not guilty' being pleaded, the jury found that the defendant took more than his legal fee, but that he did not take it corruptly.

A motion was made in behalf of the defendant, that the verdict be entered up as one of acquittal; and a motion was made on the part of the State, for a *venire facias de novo*.

LOWRIE, J. The jury having found that the defendant did not take the fee charged in the indictment *corruptly*, have by their verdict negatived the very *gist* of the indictment, it is equivalent to a verdict of 'not guilty.' The defendant must, therefore, be discharged.

Jeffreys and others v. *Alston and others.*

DANIEL, J. delivered the opinion of the Court:

This was a petition to the County Court of Franklin to set aside the probate of William Jeffreys's will and re-examine the same for the several grounds mentioned in the petition. The practice in cases of this kind has been settled by this Court in the case of *Moss and Wife* v. *Vincent*, an affidavit must be annexed to the petition "verifying the facts on which it is sought to set aside the probate of a will."

It appears that the accompanying document alleged by the petitioners to be an affidavit, was sworn to before William Boylan, esq. one of the justices of the peace in and for the county of Wake. We are all of opinion, that the deponents could not be convicted of perjury, provided the contents of said document were false, as the Justice of Wake county had no legal authority to administer an oath to any person to prove the contents of an affidavit which was to be made use of in the County Court of Franklin.

The Court are of opinion, that as this petition stands without any accompanying affidavit, it must be dismissed.

Gervin v. *Meredith.*

This was an action of trespass *quare clausum fregit.* The plea '*liberum tenementum.*' The dispute is altogether as to the boundaries of two tracts of land.

The declarations of a man by the name of Wingate, who lived on the land upwards of twenty years ago, and who was the tenant and son-in-law of the person under whom the defendant claims, were offered in evidence by the plaintiff and admitted by the Court.

The jury found a verdict for the plaintiff; and a motion was made for a new trial, on the ground that the evidence of Wingate's declarations should not have been admitted, *as he is now alive*, but lives in the State of Tennessee, and beyond the process of this Court

CAMERON, J. delivered the opinion of the Court:

The rule which allows hearsay evidence to prove the boundaries of lands, restricts it to the declarations of *deceased* persons. We do not conceive that the circumstance

of the witness living out of the State, authorises any relaxation of the rule. The testimony of the witness, though living in Tennessee, might have been procured by deposition. The declarations of the witness, not on oath, was not the best evidence, which it was in the power of the party offering it to adduce.

We are, therefore, of opinion, that the rule for a new trial should be made absolute. A new trial granted.

Steele, Chairman, &c. v. *Harris.*

This was an application, on the part of the defendant, under the following circumstances. At the sessions of the County Court of Rowan, when the verdict was taken against the defendant, he prayed an appeal, which was granted; and his attorney prepared an appeal bond, and requested the clerk of the County Court to send it or take it up with the other papers, who promised to do so. The clerk of the Superior Court was absent from the State a considerable time, and the County Court Clerk transacted business for him; but the latter was also in the habit of returning all appeal papers to the Superior Court, and these papers he undertook to file in time. He accordingly brought them to the town where the office was kept, but neglected to leave them. He, however, considered them as filed, and so informed the clerk of the Superior Court upon his return.—The clerk of the Superior Court returned three weeks before the sitting of the Court, but the papers were not actually filed till the week preceding the Court, and then it was that the information was given him that the clerk of the County Court considered the papers as filed. The Superior Court office is kept seven miles distant from the County Court.

The plaintiff also moved to amend the writ.

CAMERON, J. delivered the opinion of the Court:

The circumstances disclosed by the affidavits filed in this case, show, that a failure of justice will probably occur, unless the party who has without fault failed to obtain a new trial by appeal, is assisted with the process which he prays.

Let a certiorari issue, with leave to the plaintiff to amend his writ.

Baker v. *Moore.*

Debt on bond in the County Court of Hertford, where at May Sessions 1815, a verdict was found for the plaintiff, but by mistake in calculating interest or entering up the verdict there was a deficiency of $ 61 46. At August Sessions 1815, the mistake was dicovered and a rule obtained on the defendant to show cause why the verdict should not be amended and an execution issue for the deficient sum. This rule was made absolute at February Sessions 1816, and the defendant appealed to the Superior Court, whence the case was transmitted to this Court.

Browne, in support of the amendment, cited 1 *Wils.* 33. 2 *Str.* 1197. 1 *Salk.* 47. *Dougl.* 376. 3 *Term Rep.* 349, 659, 749.

PER CURIAM.

This is a motion to amend the verdict after judgment, and where there is nothing to amend by. We recollect no precedent of such a case. To permit it here, would be to make a new verdict for the jury.

Motion overruled.

Administrator of Allen v. Peden.

Detinue for two mulatto children born of a negro woman slave, and reputed to be the children of Allen, who in his lifetime conveyed some property to each of them, and on the back of the deed, expressed a desire that they should be emancipated. After the death of Allen, administration with the will annexed was granted to the plaintiff, and the Legislature, without his consent, passed an act emancipating the children sued for.

CAMERON, J. delivered the opinion of the Court:

The administrator in this case, was, in law the owner of the persons emancipated by the General Assembly. The act of emancipation passed not only without his consent, but against it. However laudable the motives which led to the act of emancipation, it is too plainly in violation of the fundamental law of the land, to be sanctioned by judicial authority.

We are compelled to pronounce it a nullity, and to give Judgment for the plaintiff.

INDEX

TO

THE PRINCIPAL MATTERS

IN THE SECOND VOLUME.

Page.

Legal Biography.

Eloge of Pothier - - - 1
Eloge of Montesquieu - 145
Life of Lord Eldon - 305

Juridical Selections.

On Intercourse with the Enemy 13
On the Legality of Trade to a Neutral Port under a British License - - - 28
On the Constitutionality of an Act of the Georgia Legislature to stay Executions - - 31
On a Writ of Habeas Corpus to discharge a Minor from Enlistment as a Soldier - - 47
Opinion of the Supreme Court of New-Orleans on the Power of a Military Commander to declare Martial Law - 173
Opinion of the same Court on the Constitutionality of a Legislative Act to suspend Judicial Proceedings - - 178
Judge Duvall's Charge in an Action for malicious Prosecution brought by the Commander of a Flotilla against a Collector 186
Judge Toulmin's Opinion on a Capture, by Land Forces, of a Vessel and Cargo - 192
Chief Justice Tilghman's Opinion on the validity of the Sentence of a Court Martial - 324
Chief Justice Marshall's Opinion on the same Question - 329
Opinion of the General Court of Virginia on the Constitutionality of an Act of Congress 333
Opinion of the Virginia Court of Appeals on the Constitutionality of another Act of Congress - - - - 342

T

Page.

Trial in South-Carolina for violating the Freedom of Elections 344
Opinion of the Supreme Court of the United States on the Appellate Authority of that Court in respect to State Courts 496
Judge Johnson's Opinion on the same Subject - - 495

Miscellanea.

On Capital Punishments - 54
On Breach of the Sabbath - 62
On the Inspiration of the Holy Scriptures - - 65
On the Connection between the Study of Religion and that of the Law - - - 208
Directions for the Study of the Law, by Mr. Dunning - 223
Directions for the same, by Lord Mansfield - - - 225
Laws & Customs of the Hindoos 227
Irish Eloquence - - 233
Mr. Findlay's Speech - 233
Mr. Curran's Speech - 240
Mr. Phillips's Speech - 242
American Jurisprudence - 348
Lord Erskine's Speech on Cruelty to Animals - - 364
Mr Nash's Speech in the North-Carolina Legislature, on Dueling - - - - - 385
American Jurisprudence, concluded - - - - - 343

INDEX

To the Adjudged Cases in the Supreme Court.

A.

Abatement.

1. Where a Bill in Equity is served on the Defendant ten days before the Court, but a statement referred to

in the Bill and made a part of it, does not accompany it, so that no service is made of the latter. Such omission cannot be pleaded in abatement.....*Worthington* v. *Calhoun*, - - - *Page* 68

2. For the copy which is returned served, appearing incomplete, would be the same as if it had been returned 'not served.' - - 68

3. Where a complete copy is served within less than ten days of the term, the time of service must be stated in the plea, - 68

4. An Action of Debt *qui tam*, under the Statute of Usury, abates by the death of the Defendant, and cannot be revived against his Representatives.....*Smith* v. *Walker's Executors*, - - - 245

5. Where the Defendant died between the Spring and Fall Terms of the same year, and his death was suggested at the latter, a service on the Guardian of the Infants on the first day of the ensuing Term, is within the time prescribed by the Act of 1799, c. 8....*Ray* v. *Simpson*, - - - 249

6. For that Act prevents the abatement of an Action of Ejectment by the death of the Defendant, provided that, within two Terms after his death, a copy of the Declaration is served on the Guardian of the infant Heirs, - - 249

7. Where the Plaintiff and Defendant reside in different Districts, and the sum demanded in the Writ exceeds a hundred pounds, the Plaintiff is, *prima facie*, entitled to sue in the county where he lives.... *M'Gehee* v. *Draughon and Jordan*, 260

8. The words of the Statute are 'debt or demand;' Therefore a plea in abatement which employs the words 'matter in contest' formally departs from the Statute, - 260

9. Where the Action arises *ex delicto*, the sum which the Plaintiff is entitled to, cannot be ascertained before the Jury have assessed damages, - - - 260

10. It would be a forced interpretation of the Statute to let the Jurisdiction of the Court depend on the amount of damages found by the Jury in a case of debt, - - 260

11. Wherever a person has sustained an injury in his property from the erection of a mill by another, it is necessary first to file a Petition in the County Court according to the Act of 1809, c. 15.....*Mumford* v. *Terry*, - - *Page* 425

12. The Common Law right of suing in such cases is suspended unless the Jury on hearing the Petition assess the damages as high as 10*l. per annum*, - - 427

13. A Bill in Equity, for the specific conveyance of Land, will not be abated because the lands lie in another State, provided the person liable to convey, is within the Jurisdiction of the Court....*Heirs of Orr* v. *Irwin*, - - - 466

14 Where the Defendant dies, and a *Scire Facias* regularly issues from Term to Term in order to make the Administrator a party, which is not however effected till after the lapse of five or more Terms, the suit will not be abated.....*Clement* v. *Hussey*, - - - - 611

15. A Plea in Abatement to an Indictment which describes the Defendant without any addition, cannot be sustained.....*State* v. *Newman*, 74

16. And even if the Indictment were defective from the omission of the addition, a Plea in Abatement which commences 'And the said W B comes,' &c. is in substance defective, since it admits the Defendant to be the person indicted, 74

Action.

1. An Action will not lie on any Contract, Bond, or Agreement, for the sale of the Deputation of the office of Clerk of a Court....*Harralson* v. *Dickens*, - - 66

2. An Action will not lie against a person who executes a Charter Party as Agent for another....*Potts* v. *Lazarus*, - - 83

3. An Act on may be sustained in the name of the United States, on a Covenant made on their behalf by a public officer and their special agent *ad hoc*, although such agent do not sign and seal the Contract in their name.....*United States* v *Blount*, 84

4. An Action will not lie for a public nuisance unless the person suing has

received a special damage from it, *Dunn* v. *Stone*, - *Page* 261
5. Therefore an individual who owned land on Neuse River and a Fishery adjoining it, was held not entitled to maintain an Action against one who erected a Mill Dam across the River below the Fishery *Ibid.*
6. An Action will not lie, to recover back Money which the Defendant has won by Gaming at Cards, and which the Plaintiff paid at the time of Gaming....*Hodges* v. *Pitman*, 394
7. Where a Woman when sole purchased a Slave with Warranty of Title, and afterwards married and died, when the Slave was recovered from the Husband by a title paramount, he cannot maintain an Action in his individual character against the Warrantor....*Casey* v. *Fonville*, 404
8. An Action will not lie on a Bond, part of whose consideration is an agreement not to prosecute for Malicious Mischief.. *Cameron* v. *Mac Farland*, - - 415

See *Baron* v. *Feme* 4. *Abatement* 7, 11. *Average* 8. *Slaves* 1. *Words* 1.

Administrator.

1. Where an Administrator receives the proceeds of a sale after a Plea pleaded, which sale was made before the suit was brought, the Creditor suing cannot recover such proceeds in that Action.....*Gregory* v. *Hooker's Administrators*, 116
2. Where issue is joined on the plea of *plene administravit*, one inquiry is, Whether the Defendant had assets at the time of pleading, - 120
3. If the Defendant had no assets at the commencement of the suit, and none have come to his hands since and *before* the plea pleaded, the Plaintiff should pray a Judgment *quando*, - - 120
4. And in a *Scire Facias* on such Judgment, the assets which came to the Defendant's hands after the plea pleaded will be liable to the Plaintiff, unless they are bound by prior outstanding Judgments, 120
5. An Administrator may pay Debts of an inferior nature before he has notice of those of a superior nature, if he do so without fraud... *Delamoth* v. *Lonie*, - - 414
6. But a contingent Debt, though secured by specialty, shall be postponed to a simple Contract Debt, - - *Page* 414
7. An Administrator is a trustee to creditors and next of kin, and therefore cannot sell to an purchase from himself....*White* v. *Brown*, 449
8. And an Administrator so purchasing, is liable to creditors to the full *bona fide* value of the property so sold, - - 449
9. And on a Bill filed against him by the next of kin, is liable to account to them in like manner, 449
10. Where an Administrator confesses a Judgment on a Penal Bond, the condition of which is, that the intestate shall execute a Marriage Settlement within six months after his marriage, the assets are protected by the amount of the Judgment, although such Bond was not registered.. ...*Richardson* v. *Fleming's Administrators*, - 456
11. The Act of 1785, c. 12, which requires the registration of Marriage Contracts, makes them void against creditors only, if it be omitted, 456
12. But as without registration it might have been enforced against the party himself, his Administrator is not the less bound by it, 456
13. In an Action against an Administrator upon an Administration Bond, which described his Intestate as N R the Plaintiff may give in Evidence a Judgment confessed by the Administrator in a suit brought by the Plaintiff against him, wherein his Intestate was described as N W R.....*Governor* v. *Nedom*, 450
14. And it is not material that such Judgment was entered against him as Executor, when the suit described him as Administrator, for the confession recognizes & adopts the character in which he is sued, *Ibid.*
15. And the confession of Judgment estops him afterwards to deny the identity of his Intestate. *Ibid.*
16. Although the Act of 1791 requires Administration Bonds to be made payable to the Chairman of the Court, yet where a Bond was made payable to the Governor, it was held not to be a good ground to arrest the Judgment, because made voluntarily, - *Ibid.*

17. Judgments obtained against an Administrator after service of the Writ and before plea, make him responsible for the assets he had when served with the Writ, although such Judgments are entered up *quando*, *Littlejohn* v. *Underhill's Executors*, *Page* 578

18. And such Judgments may be pleaded although given by a Magistrate for a sum exceeding 30*l* provided the Warrants do not exceed that sum, *Ibid.*

19. The Administrator is entitled to an allowance for honestly maintaining a disabled Slave, for that is in the nature of a charge upon the estate in favour of the Community, which in the event of a deficiency of assets, is entitled to a preference against individuals, - 579

20 The Administrator cannot plead a Judgment recovered at the same Term, as a plea since the last continuance, - - - 579

21. Where Slaves are emancipated by a private Act of the Legislature passed without the consent of the Administrator, he may recover possession of them.....*Administrator of Allen* v. *Peden*, - - 638

Agent—See *Action* 2.

Alien.

1 Where a Subject of the King of Great Britain was duly naturalized in a State, before the adoption of the Federal Constitution, and continued to reside there till that event, he became by virtue of it, a Citizen of the United States.....*Teare* v. *White's Administrators*, 112

Amendment.

1. After a Suit has been depending two years, the Defendant was allowed to add the Plea of the Act of Limitations of 1789, upon payment of all costs up to the time of application.....*Hamilton* v. *Shepherd*, 471

2. Where in entering up a Verdict a mistake is made in computing Interest, and a Judgment is in fact given for 8 61 less than the Plaintiff is entitled to, but such mistake was not discovered till the ensuing Sessions of the Court leave to amend was refused; for there is nothing to amend by, and to alter it must be to make a new Verdict for the Jury....*Baker* v. *Moore*, *Page* 637

Apportionment.

1. Where a Bond is given for the Hire of a Slave for a year, in the course of which time the Slave becomes disabled, and ultimately dies, there can be no Apportionment of the sum agreed to be paid....*Ragland* v. *Cross*, - - 121

Appeal.

1. Where the Defendant appealed from the County to the Superior Court, but by mistake the Appellee executed the Bond instead of the Appellant, the Appeal must be dismissed for want of a proper Bond. But in this case a Certiorari was directed on the Defendant's Motion....*Speed* v. *Harris*, - - 444

2. The condition of an Appeal Bond must be to prosecute the Appeal with effect, and to perform the Judgment Sentence or Decree which the Court shall pass or make thereon, in case the Appellant shall have the Cause decided against him..... *Forsyth* v. *M'Cormick*, 473

3. And if an Appeal Bond does not substantially provide for these objects the Appeal is not properly constituted in the Appellate Court, - - *Ibid.*

Attachment.

1. A surplus of money in the hands of the Sheriff, raised by Execution, is the property of the Defendant in the Suit, whose creditors may attach it in the hands of the Sheriff.... *Orr* v. *M'Bryde*, - 257

See *Insolvent* 1.

Average.

1. A Claim on the ground of General Average, can only arise where a portion of the cargo is sacrificed for the safety of the rest; and that by the direct agency of man, by throwing over board the cargo of the vessel in a moment of peril....*Irving* v. *Glazier*, - 604

2. Therefore, where the Defendant's trunk containining money and apparel, was put on board the Plaintiff's Lighter, which vessel overset in a sudden flaw of wind, in consequence

of not being provided with shifting-boards, the Defendant was held not liable to contribute to the expense of raising the lighter, although by such means he obtained his trunk, - - *Page* 604

B.

Baron and Feme.

1. Where the Wife, on the day of her Marriage, but before its solemnization, conveyed Slaves to her mother, the Husband cannot after the marriage recover them back in right of his Wife, although the Conveyance was made without his knowledge or consent...*Johnson & Wife* v. *Hamblet*, - - - 95
2. For had the Wife continued sole & brought an Action, she must have been estopped by her deed; and the Husband has nothing to rely upon but such legal rigat as his Wife had, - - - - *Ibid.*
3. Where the Wife was an infant when the Act of 1805 relative to Parol Gifts began to run, and became Covert during her infancy, the Act cannot afterwards be set up against a Suit brought by her Husband and herself...*Winn & Wife* v. *Gentry* 669
4. The Husband and Wife *may* join in such Action; and *semble* they *must* join, - - - *Ibid.*
5. Marriage operates as an absolute gift to the Husband of all the Personal Estate which the Feme is in possession of, whether he survive her or not; but to such as rests in Action, the Husband is entitled only on condition that he reduces it into possession during the Coverture... *Casey* v. *Fonville*, 405
6. Therefore a Warranty of Title, annexed to a Slave sold to the Wife before Coverture, the Slave being recovered from the Husband after the death of his Wife, does not survive to the Husband; because tho' related to property which did vest in the Husband, its essential quality as a chose in Action remains unchanged, - - - *Ibid.*

Bond—See *Appeal* 1, 2, 3. *Action* 1, 8.

C.

Carrier—See *Average* 1, 2.

Contract.

1. Where in a Racing Contract it is expressed that the Race is to be run on a certain day for a specific sum, the party running the Race and suing for the money must show that he staked the money at the time agreed on...*Tanner* v. *Wilson*, 107
2. For the parties do not mean to trust each other, and as no day of payment is expressed, the day on which the Race is run is to be understood, - - - *Ibid.*

See *Administrator* 11.

Costs.

1. Where an Indictment is found against a person, on which he is recognized from Term to Term, until on the discovery of a defect in the Bill a *Nolle Prosequi* is entered, and a new Bill is then sent and found against the Defendant for the same offence; on which he is convicted; the Defendant is liable to pay the Attendance of Witnesses for the whole time...*State* v. *Hasbern*, 201
2. If an Indictment be quashed, the Prosecutor is not liable to pay the attendance of the witnesses on either side...*Office* v. *Gray*, - 444
3. Therefore in an Indictment for malicious mischief which was quashed, the charges for witnesses were struck out of the taxation in an Execution against the prosecutor, *Ibid.*
4. Where a Testator by his Will has created difficulties, the costs ought to be paid out of his assets,—in a Court of Equity...*Maurice* v. *Bateman*, - 464
5. Therefore persons named Executors in a Will which has been proved, who fairly contest the Probate of a Will which is produced after a considerable interval, and under circumstances fitted to awaken suspicion, though afterwards established may charge the expense of litigation upon the Estate, *Ibid.*
6. Where the Lessor of the Plaintiff in Ejectment enters on the Premises, he becomes liable to pay the Costs of the Suit...*Gubbs* v. *Ellis*, 612

See *New Trial* 2. *Practice* 7.

Constitutionality of a Law.

1. That part of the Suspension Act which authorizes Bonds to be given to the Sheriff having an Execution in his hands, and Execution to issue on such Bonds, is Constitutional.....*Berry* v. *Haines*, *Page* 425
2. A Law may be valid in some parts though in others it infringe the Constitution; and as only such parts of the Suspension Law are void as impair the obligation of Contracts, the other parts are valid and obligatory, *Ibid.*
3. Therefore a Security who had executed a Bond under the Act, was held liable to an Execution without suit, and without notice of a Judgment to be moved for against him, *Ibid.*

Covenant.

1. Where a person sold a Slave *about eleven years of age, sound and healthy, and do by these Presents further covenant and agree to warrant the right and defend the title of the said Slave*, it was held to amount to a warranty of soundness.....*Gilchrist* v. *Mann*, 607

See *Action* 2, 3.

Consideration.

1. A Deed cannot operate as a Bargain and Sale, unless it has a pecuniary consideration...*Blount* v. *Elwell*, 587
2. Nor as a Covenant to stand seised to uses, unless the consideration be affection to a near Relation, or Marriage, *Ibid.*
3. But love and affection to an illegitimate Child is not a sufficient consideration to raise a use in a Covenant to stand seised, *Ibid.*

D.

Delivery.

1. Delivery is necessary to complete the Gift of a Chattel unless it be granted by Deed, or is incapable of Delivery...*Bullock* v. *Farmer*, 271
2. Therefore where a Father, the day after the death of his Son, relinquished to the Widow of the latter, all the right which he had to a distributive share of his Son's Estate, but without Deed or Delivery, and in the absence of the Widow, the Court of Equity sustained a Bill afterwards instituted by the Father to recover his share of the Personal Estate, *Ibid.*
3. A Bill of Sale, like other Deeds, takes effect from the Delivery. A Bill of Sale which purported on the face of it to have been executed on the 10th of November 1810, but which was attested by the only subscribing witness on the 10th January 1811, was held to have been delivered at the last period, there being no proofs of any prior Delivery.... *Nichols* v. *Palmer*, 436

Descent.

1. A person seised in fee before 1784, devised Lands to his Heir at Law, in tail, the Heir took by purchase...*Ballard* v. *Griffin* 258
2. And the Act of 1784 which subsequently converted the Estate Tail into a Fee, did not change the original form of acquisition, which still continued to be by purchase,
3. Therefore where such Devisee died leaving Heirs at Law on the Paternal Line, & a Half-Brother and Sister on the Maternal Line, it was held that the latter were entitled to the Inheritance, *Ibid.*
4. Where a Devisee takes the same Estate under the Will which he would have done had the Ancestor died intestate, he is in by Descent, and the Devise is void, *University* v. *Holstead*, 406
5. Where a Testator devised land to be equally divided between his two daughters T and G, to them and their heirs for ever, they took as Tenants in Common; and as they were the Testator's Heirs at Law, they would so have taken, had he died intestate,

6. Therefore the Mother surviving the Daughters, both of whom died without Issue, was held not to be entitled to a Life Estate under the Act of 1784, c. 22;—because the derivation from the Parent there adverted to, signifies by same Act *inter vivos*, *Page* 406

7. The Aunt of the whole blood on the side of the mother, from whom the Lands were derived by Descent, shall take in exclusion of a Brother of the half blood on the side of the Father...*Hilliard* v. *Moore*, 599

8. Therefore where A died seized in Fee of Land which descended upon his three daughters, and was divided between them, one of them, M, intermarried with H, by whom she had issue a Son, R; M died, and H married another Wife, by whom he had issue a Son and a Daughter, E and F; R died, and then his Father, H. In a Suit brought by the two surviving Daughters of A against E and F the Half-Brother and Sister of R, on the Paternal side, it was held that the two daughters were entitled to recover, *Ibid.*

Devise.

1. A man devised 'to his Grandson, A L, 350 acres of land, being the upper part of a tract of 700 acres;—also to his Granddaughters, P L and J L, the lower part of the same tract, to be equally divided between them.' Upon the land being surveyed after the death of the Testator it was found to contain 1100 acres, and it was held that the Grandson, A L was entitled only to 350 acres, and the Granddaughters to 375 each....*Williams* v. *Lane*, 266

2. For the meaning of the Testator is to prevail when it can fairly be inferred from his language, and does not contravene any Rule of Law, *Ibid.*

3. It does not follow from the Testator's describing the tract as containing 700 acres, and giving to the Grandson 350, being the upper part of the same, that he intended to give him one half of the tract, *Ibid.*

4. If the tract had contained 500 acres, the Court could not have said the Grandson should have only 250, against the express Devise of 350.

5. Describing a tract of land as containing a specific number of acres, is the same as a description of a tract of so many acres more or less, *Ibid.*

6. Where the Ancestor takes an Estate of Freehold, and in the same Gift or Conveyance an Estate is limited to his Heirs in Fee or in Tail, the *Heirs* are words of limitation and not of purchase...*Williams* v. *Holly* 286

7. Where there is no intermediate Estate, the remainder is executed in the Ancestor, and if both are legal estates they coalesce.

8. Therefore where a Testator devised Land to his Daughter A B, to her and her Husband during each of their lifetimes and no longer, if dying without any lawful Heirs begotten of their bodies, and if dying without any lawful Heir to that and its Heirs for ever,' it was held that upon the death of the Husband it survived to the Wife in fee, *Ibid.*

9. A Testator devised to his Son in Law and Daughter his large Tavern in Fayetteville, excepting the Room over the Store which is to belong to the Store. And by another Clause he devised to his Wife the Store adjoining the Tavern, and after her death to his Son the Plaintiff. It was held that the ground in the rear of both Buildings which adjoined each other, passed under the Devise of the Tavern.....*Barge* v. *Wilson*, 396

10. For the exception of the Room over the Store indicates a belief in the Testator that he would have conveyed that too under the Devise of the Tavern, without such exception. And a C...

tillage to a Tavern in a Town is of indispensable necessity, *P.* 396

11. Where a man devised Land to B B, to him and his Heirs of his body lawfully begotten; and for want of such, one half to the Heirs of M P, and the other half to the Heirs of M T B or the survivors of them, to have all.—B B died without issue, and M T B about twenty years afterwards without issue. Neither M P nor any of her children were ever in this County. This was held to be a contingent remainder which never vested in the heirs of M T B, as she survived the Testator....*Chessum* v. *Shuck*, 393

Distribution.

1. Where a person settled upon several of his children lands, and by his last Will devised and bequeathed to them lands and chattels, with the exception of one of his daughters as to land, but to whom he bequeathed a full share of his personals. The Testator died intestate as to one tract of land, and upon a Petition filed by the daughter it was held, that the Children of the Testator upon whom lands have been settled either by Deed or Demise, and his Grandchildren upon whose Parents similar Settlements had been made, must bring all such Lands into Hotchpot, if they claim to share with the Daughter in the Tract of which the Testator died intestate....*Norwood* v. *Branch*, 598

Dower.

1. Where a Woman before Marriage enters in an Agreement with her intended Husband, that she would claim no Dower in the Lands of which he was then seised, or shall afterwards become seised; it was held that such Agreement did not operate upon any Lands he might afterwards acquire.....*Arrington* v. *Arrington*, 255

E.

Error.

1. Where a Joint Action of Assumpsit is brought against two, and the Jury find that one did assume and the other did not; Judgment may be entered up against one, and it is no Error....*Jones* v. *Ross*, *Page* 450

Estoppel.

1. Executors are not estopped to claim Lands in a Deed which they have endorsed and attempted to confirm under an express reference to the powers confided to them by the Will of the Testator....*Hendricks* v. *Mendenhall*, 569

2. In the execution of a power it is not necessary to recite that the act is done by virtue of the power, but it is sufficient if it can be done *only* in virtue of it; for the purpose of the act can only be explained by resorting to the power, *Ibid.*

3. Where an Executor hired Negroes to the Defendant, he cannot refuse to restore them at the end of the term upon the ground that they belonged to a Legatee, to whose Legacy the Executor had assented....*Dinwiddie* v. *Carrington*, 469

4. Where a person accepts a Lease, neither himself nor those claiming under him, can say that the Lessor has no right to recover the Rents and Profits....*Sacarissa* v. *Longboard*, 455

Evidence.

1. In an Action by the Father for the Seduction of his Daughter, her Examination taken before two Magistrates under the Act of 1741, is not admissible Evidence against the Defendant to prove the Fact....*M'Parland* v. *Shaw*, 102

2. But it is competent for the Father to give in Evidence the Dying Declarations of the Daugh-

ter, wherein she charged the Defendant with being the Seducer, *Ibid.*

3. A Certificate of a Clerk of a County Court in Virginia that a person became naturalized in that State by taking the oath, which Certificate is further attested by the presiding Magistrate of the same Court, is proper Evidence of the Naturalization....*Teare* v. *White*, 112

4. In an Action brought against a Constable for neglect of Duty, whereby the Plaintiff lost the amount of a Judgment which he recovered of L, it is essential that the Plaintiff prove his account against L....*Parker* v. *Wood* 248

5. Parol Evidence cannot be received to contradict, vary, or add to a Written Instrument; but to explain or elucidate it, it may be received.....*Clark* v. *M'Millan*, . . . 65

6. Therefore where the Defendant gave the Plaintiff a Writing not under Seal acknowledging the sale of a Note of Hand and the receipt of part Payment, and that the balance was to be paid when the money was collected; the plaintiff was not allowed to prove by parol that the Defendant, at the time of contract promised to commence an action within ten days against the payers of the Note, *Ibid.*

7. Presumptive Evidence ought not to be erected on surmise, but on a solid foundation, and is only created when the circumstances are such as to render the opposite supposition improbable: it ought also to be stronger to defeat a right than to support it.—The facts from which a presumption is deduced, ought to be consistent with the proposition they are intended to establish....*Lenox* v. *Greene & al.* - - 281

8. Where the acts of a person can be given in Evidence for him, his declaration in relation to such acts are also proper Evidence, as in the case of a claim, demand or tender.... *Shenck* v. *Hutcheson*, - *Page* 432

9. The Interest to disqualify a Witness must exist at the time of Trial, and if before then the Witness removes, the Interest, or does all he can to remove it, his competency is restored..... *Perry* v. *Fleming*, 458

10. If a Witness deposits a Release in the Clerk's Office, the Plaintiff being absent, it will restore his competency in a case where he was beneficially interested in the recovery, *Ibid.*

11. A Grant can never be presumed, unless the party claiming the benefit of such presumption, proves the actual possession of the Land....*Cutlar* v. *Blackman*, - - 567

12. Parol Evidence cannot be received to prove the contents of a Written Contract, unless it be first clearly proved that the Writing is lost by time or accident....*M'Farland* v. *Patterson*, - - 619

13. Where a Trustee has a Legal Interest in the Estate, but is in all other respects nominal, he cannot be examined at Law as to the merits or design of the Deed, but may in Equity....*Hawkins* v. *Hawkins*, 627

14. The Rule of admitting Hearsay to prove the Boundaries of Land, must be confined to what deceased persons have said; for if they are alive at the time of Trial, though out of the State, their Depositions ought to be procured.... *Gerow* v. *Meredith*, 635

15. A Presumption in Law arises from the payment of the last Instalment upon a Bond that the preceding ones have been paid, provided it has been made in the manner and at the time contemplated by the parties; *secus* it is a presumption that the parties are acting under a new agreement.....*Ward* v. *Green*, 198

16. Parol Evidence cannot be re-

ceived to contradict the Records of a County Court confirming the Report of a Jury who laid out a Road.....*Cline* v. *Lemon*, *Page* 439

See *Probate* 1.

Equity.

1. A Creditor or next of kin cannot without special circumstances, call upon a Debtor to the Estate; but a Bill will be entertained for both against all persons in possession of the Fund who have not paid for it a valuable consideration....*Blanchard's Heirs* v. *M'Laughan's Administrators*, 402
2. The Jurisdiction of this Court over Trusts can only be taken away by showing a complete Execution....*Jordan* v. *Jordan's Executors*, 409
3. Equity will consider a person who enters upon the Estate of an Infant and continues the possession, as a Guardian to the infant, and will decree an Account against him.....*Parmentier* v. *Phillips*, 411
4. Even where the Title is purely legal, and the Complainant is put to his election to proceed at Law or in this Court, where the Bill is filed for Land and the mesne profits, he may proceed at Law for the Possession and in Equity for the Account, *Ib.* 412
5. An equitable Right in Land is subject to Execution and Sale, and a Bona Fide Purchase is not liable to pay the Balance of the Judgment, where the Land sells for less, although the Execution issues at the Suit of the legal owner, and the equitable owner is insolvent...*Deaton* v. *Gains* 620
6. A Court of Equity still retains its Jurisdiction in cases of contribution of one Surety against others, notwithstanding the Statutory Jurisdiction given to Courts of Law....*Shepherd* v. *Monroe*, 624

See *Administrator* 7. *Action* 13.... 1, 2, 3. *Costs* 4. *Practice* 5, 6. *Trust*.

F.

Ferry.

1. Individual interest ought not to be sacrificed but for the purpose of advancing a clear and unequivocal Public Benefit....*Beard* v. *Merrill*, 69
2. Where an antient Ferry has been established and duly kept, the Court will not erect a new one unless it be evident that the Public sustains an inconvenience from the want of it; but the Public Faith pledged to the first Grantee ought not to be violated upon a speculative possibility of general convenience, *Ibid.*

Fraud.

1. A prior voluntary Conveyance shall prevail against that of a subsequent purchase, unless the latter is fair and honest....*Squire* v. *Riggs*, 274
2. Thus where A, in consideration of Blood conveyed his Land to his only Child, and afterwards for a valuable consideration sold the same Land to B, but with the intention of defrauding his Creditors, in a Suit by the Child against the Purchaser under B, with Notice, Judgment was rendered for the Child, *Ibid.*
3. Inadequacy of consideration, embarrassed circumstances in the Alienor, his remaining in possession of the Land after the Sale, the secrecy of the transaction, form a combination of presumptions indicative of Fraud ....*Darden* v. *Skinner*, 279

G.

Gift.

1. Since the Act of 1806, a Written Transfer is necessary in all Cases where Slaves are given..... *Cotton* v. *Powell*, 462
2. The 3d section of the Act of 106 relates to adverse Claims..... *Drew* v. *Drew*, 437

I.

Indictment.

1. Where there is one continuing transaction, though there be several distinct asportations in Law, yet the party may be indicted for the final carrying away, and all who concur are guilty though they were privy to the first or intermediate acts.... *State* v. *Trexler*, *Page* 94

2. The snatching a thing unawares is not considered a taking by force; but if there be a struggle to keep it or any violence done to the person, the taking is a robbery, *Ibid.*

3. An Indictment cannot be supported which charges a person with stealing a thing destitute of both intrinsic and artificial value....*State* v. *Bryant*, 269

4. Therefore an Indictment was quashed which charged a person with Larceny in stealing *one half Ten-Shilling Bill of the Currency of the State*, *Ibid.*

5. Where a Slave is convicted of Horse-stealing, the punishment is for the first offence whipping and the loss of ears; for the second, death....*State* v. *Levin*, 270

6. Judgment will not be arrested because the *Venire* returned the Superior Court consisted of forty instead of thirty Jurors; nor because one of the Grand Jury was on the Coroner's Inquest....*State* v. *M'Entire*, 287

7. Indictment for Malicious Mischief will not lie where the Defendant took a Mare from his Corn Field, where she was damaging his growing Corn, to a secret part of the County, where he inflicted the wound with a view of preventing the repetition of the injury....*State* v. *Landreth*, 446

8. An Indictment will lie against the Commissioners of Fayetteville for not repairing the Streets ....*State* v. *Commissioners*, 617

9. It is necessary to prove that an Overseer of the Road was served with Notice of his Appointment ten days before he is liable to be indicted....*State* v. *Everitt*, *Page* 633

10. Where in an Indictment against a Register, the Jury find that he took more than the Legal Fees, but not corruptly; such finding is equivalent to a Verdict of Acquittal....*State* v. *Bright*, 634

11. A person may be indicted for stealing a runaway Slave, knowing him to be run away, and whom he belonged to....*State* v. *Davis*, 291

12. Judgment will be arrested where the property stolen is laid as belonging to a deceased person, *Ibid.*

JURISDICTION—See *Abatement* 7.

JUDGMENT—See *Error* 1.

Indorsement.

1. Where a Note was endorsed in the following manner "Pay the Contents to W or his Order for Value received, with recourse to me at any time hereafter, without further Notice," it was held that a Cause of Action accrued against the Indorser from the return of an Execution against the Drawor, by which nothing was made....*Wistar* v. *Tate*, 602

Insolvent Law.

1. A Creditor who is a Citizen of this State may attach the property of his Debtor found here, though such Debtor is a Citizen of N. York, and by an Insolvent Law of that State his property has been assigned for the general benefit of all his Creditors....*Bizzell* v. *Bedient*, 254

Interest.

1. A Guardian is accountable for Interest on the accumulated balance of Principal and Interest annually, after deducting the necessary expenses of his Ward ... *Branch* v. *Arrington*, 2[illegible]

Indian Title.

1. The Grant made by the Governor in 1717 to the Tuscarora Tribe of Indians is absolute and unconditional, and does not require the residence of the Indians upon the land....*Sacarusa & Longboard* v. *The Heirs of William King*, *Page* 151
2. The Proviso in the Act of 1748, c. 3, § 3, being in derogation of rights actually vested in the Plaintiff cannot be regarded.—
3. But if the Assembly of 1748, could rightfully superadd the condition contained in the Proviso, subsequent Legislatures had an equal right to modify or abrogate it.
4. And the Acts of 1778, c. 16, and of 1802, make a different appropriation of the Land on the happening of either of the events mentioned in the Act of 1778 from that made by the Act of 1748.

L.

Legacy.

1. The Executors assent to the first taker is an assent to all the subsequent takers of a Legacy limited over by way of remainder or executory Devise.....*Dinwiddie's Exors.* v. *Carrington*. 369
2. But this Rule does not prevail where after the death of the first taker, the Executor has a Trust to perform arising out of the property, which therefore must be subjected to his control, *Ibid.*

Letter of Guaranty.

1. Where the Defendant undertakes in a Letter to the Plaintiff that he will guarantee any Contract which F shall make with him for a vessel and cargo, and F makes a Contract for the same, but does not comply with it, the Defendant became pledged to the same extent that F was bound, as soon as the Plaintiff parted with his property....*Williams* v. *Collins*, 584
2. For it was the Defendant who was principally relied on, and it was incumbent on him to guard against F's failure; and to hasten the Plaintiff or provide for his own safety, *Ibid.*
3. The Guaranty made by an Indorsor is a conditional one;—here it is absolute. The undertaking is that F *should* comply, not that he should be *able* to comply, *Ibid.*

Limitation of Suits.

1. It is a fixed rule of property that the possession under a colour of Title, to enable a person to recover in Ejectment, must be a continual one of seven years..... *Jones* v. *Kidley*, 397
2. Where a Mortgagor is permitted to remain in possession of the Land, and after the Mortgage is forfeited he sells to another, who has no Notice and who together with his Alienees continue in possession for seven years, that amounts to a Title....*Baker* v. *Evans*, 614

N.

New Trial.

1. The Court may award a New Trial in an Action of Slander where the Jury acquit the Defendant against Evidence, and in a case where exemplary damages ought to have been given.... *Harker and wife* v. *Reavis*, 276
2. Where, in an Ejectment the Plaintiff's Counsel struck out from the Docket the appearance and plea entered for the Defendant, in consequence of his having failed to give Bond for the Costs, and then obtained possession under a Writ, the Court ordered a New Trial upon the Defendant's making an Affidavit that he would have given Security for the Costs had he known it to be necessary, and that he believed he had a good title to the land....*Beamer* v. *Pilley*, 444

See *Will* 5. *Practice* 7.

NUISANCE—See *Abatement* 11.—*Action* 4.

Notice.

1. A Notice to take Depositions on one of 3 days which are specified, where the Witness lives in Georgia, is sufficient....*Harris* v. *Peterson*, *Page* 471

P.

Practice.

1. In considering the propriety of sustaining or dismissing a Certiorari, the Court will not notice Affidavits on either side, which have been made and sworn to since the Case was transferred to this Court....*M'Millan* v. *Smith* 77
2. Where a person applies for the extraordinary remedy of a Certiorari, he ought to show good reason why he did not avail himself of the ordinary remedy by Appeal, *Ibid.*
3. Where a Judgment is rendered on the first day of a County Court, and the Defendant makes no attempt to appeal, nor accounts for not doing so, a Certiorari ought not to be granted, and if granted, ought to be dismissed, *Ibid.*
4. Although a Suit has been depending for several Terms, yet if a party applies for the removal the first Term he becomes interested, and makes out a sufficient cause in other respects, he is entitled to removal....*Knowis* v. *Baker*, 98
5. Where a Bill in Equity is served upon a party who neglects to answer and the Bill is taken *pro confesso* and the cause set for hearing, after which he died, the Administrators shall be allowed to answer upon their making Affidavit that the Intestate for a considerable time previous to his death was reduced to such a state of mental debility as unfitted him for business....*Haywood* v. *Coman & al.* 116
6. But in such case the Complainant shall retain the Benefit of the Testimony taken without Notice, while the Judgment *pro confesso* was in force, *Ibid.*
7. Where a Cause is called in course on the second day of the Term and the Plaintiff not appearing, is nonsuited; he afterwards stated in an Affidavit that he had gone home the preceding night to procure the attendance of a material Witness, but who through illness could not attend, and that the Plaintiff could not reach Court in time—If in such case a New Trial is granted, it ought to be on the payment of all the Costs....*Williams* v. *Harper*, 401
8. Where a Petition is filed to set aside the Probate of a Will, it must indispensably be accompanied with an Affidavit....*Moss & Wife* v. *Vincent*, 414
9. And an Affidavit made before a Justice of the Peace of one County where the Petition is filed in another, is not sufficient....*Jeffreys & al.* v. *Alston & al.* 634
10. Where a Replication is filed to an Answer, the Complainant may have the Opinion of a Jury on the Facts at issue, and the regular course in such case is to set the Cause for hearing absolutely or with such provisions as the Court may direct;—but not to dismiss the Bill....*Marshall* v. *Marshall*, 455
11. If the Clerk of the County Court neglect to take a Bond from the party previously to issuing a Certiorari, the Court will not dismiss the Writ, but permit the party to file a Bond when the Record is returned to the Superior Court....*Rosseau* v. *Thornberry*, 442
12. Where the party has merits on his side, and discloses a case whence the inference is clear that he had no opportunity of making defence, the Certiorari ought to be sustained....*Dyer* v. *Rich*, 610

18. Where a Will is exhibited for Probate in a County Court from which there is an Appeal to the Superior Court, whence it is removed to an adjoining County where the trial takes place, & the Will is established, a Petition to rehear must be filed in the latter County; and a Petition filed in the first County was dismissed for that cause....*Harper* v. *Gray*, - *Page* 613

14. What description of Lands in a Declaration of Ejectment is certain enough to warrant a Writ of Possession....*Boyd* v. *Clark*, - - 622

15. A Certiorari will be granted where the Appeal Bond is not sent up through the omission of the Clerk or the person transacting business in his absence..... *Steele* v. *Harris*, 636

See *Costs* 6.

Probate.

1. Though the Clerk's Certificate of the Probate of a Will do not state that it was proved to have been executed by Two Witnesses in presence of the Testator, yet if upon Trial it is proved that in Point of Fact it was *so* executed, it is sufficien....*Ex'ors of Henry* v. *Ballard & Slad* . .

S.

Sheriff.

1. A Return upon a Subpœna made in the name of a person who subscribes himself D S, by which is understood Deputy Sheriff, is insufficient....*Holding* v. *Holding* - - - 410

2. The Court cannot judicially know a person deputed by the Sheriff to act for him, because his authority to act rests upon the private delegation of the Sheriff, *Ibid.*

3. The Return of a Sheriff is upon Oath and therefore concludes a party, but the Return of a person styling himself Deputy Sheriff has no greater verity than that of any private individual, *Ibid.*

Scire Facias.

1. Where a Scire Facias against a defaulting Witness omits to insert the sum which has accrued from the forfeiture, it is an incurable objection, 410

Slaves.

1. The Act of 1791 which gives a Penalty for harbouring and maintaining Slaves, is thus to be construed. Harboring means a fraudulent concealment;—and the maintaining also, must be secret and fraudulent....*Dark* v. *Marsh*, - - 249

2. General Expressions shall not render penal by construction, any Act which does not partake of the qualities of the Act specially set forth.

3. Therefore where the Defendant openly maintained Negroes claimed by the Plaintiff to whom he gave notice that he should retain them until recovered by Law, it was held that an Action under the Statute could not be sustained. *Ibid.*

T.

Trespass.

1. The Plaintiff in an Action of Trespass *quare clausum fregit*, must show that when the Trespass was committed, he had either actual or constructive possession of the Premises....*M'Millan* v. *Heffley*, 89

2. Constructive Possession exists only where the party claiming has Title to the Land and there is no one in actual possession, claiming under an adverse Title, - - *Ibid.*

3. Therefore where the Plaintiff purchased a Tract of Land sold under Execution on the 10th of November 1804, but the Conveyance was not made til the 18th July 1805, between which periods the Trespass was com-

mitted, it was held that the Plaintiff could not recover, *Ibid.*

Title.

1. Where Land was conveyed by A to B, by B to C, by C to D, and by D to E, each with Warranty, and F recovered the Land from E, who received the consideration money from the Representatives of C, and C's Representatives received the consideration money from the Representatives of B—In an Ejectment brought by the Heir at Law of B, it was held that he was not entitled to recover, as his Ancestor had conveyed the Land, and nothing descended to the Heir: That the repayment of the purchase money could not operate as a reconveyance....*Clayton and wife* v. *Markham*, 115

Trust.

1. Where a Deed not operating by way of Trust, contemplates the passing two legal Estates, one to succeed the other, the last Limitation is void....*Dowd* v. *Montgomery*, 100
2. Where a Suit is brought on a Note in the name of the person to whom it is made payable, but an Indorsement on the Writ states that the Suit is instituted for the use of A, and it is also shown by Affidavits that A has the beneficial interest in the Note, the Court will nevertheless permit the Attorney in Fact of the Plaintiff on record to dismiss the Suit....*Jones* v. *Blackledge*, 457
3. For Courts of Law ought to confine themselves to the consideration of Legal Rights, *Ibid.*
4. And where the Defendant showed that the Plaintiff had during the pendency of the Suit, sold the Bond to a person with whom the Defendant settled, and to whom he had made satisfaction, it was held that the Plaintiff on Record had a right to recover, ...*Arrington* v. *Horne*, 631
5. Where a Testator bequeathed to his Executors, after the death of his Sister, his Slaves, in Trust, to have them set free by the Laws of the State, and also devised and bequeathed to his Executors real and personal Property, for the use of his Slaves, it was held that such a Trust was void....*Haywood* v. *Craven's Executors*, 557
6. For the Law has prescribed one mode only, in which Slaves can be liberated, the principle and policy of which, can, by no construction, be applied to this case, - - - *Ibid.*
7. A charitable purpose under the Statute of Elizabeth, must be so described in the Will, that the Law will, at once, acknowledge it to be such.
8. Wherever the intention is to create a Trust, which cannot be disposed of, it reverts to the Heir at Law or next of kin. - - - *Ibid.*

See *Equity* 2.

W.

Will.

1. Though a Paper Writing be called a Deed in the body of it, and the party is advised to make a Deed, yet if the structure and operation of the Writing show it to be Testamentary and made with a view to the disposition of a man's Estate upon his death; it will enure as a Will....*Ex'ors of Henry* v. *Ballard & Slade.*
2. An infant under the age of 18 years, cannot dispose of his Personal Estate by Will.
3. The Common Law has fixed upon the age of 21 as the earliest period when the mind can judge with discretion; and the Rules established in the Ecclesiastical Court, allowing infants to make Wills sooner, have never been in force and use, in this State....*Williams* v. *Baker*, 599
4. Where a person makes a Will and dies and his Widow dissents, she is not entitled to a Year's Al-

lowance under the Act of 1796, c. 29.....*Collins* v. *Collins*, *P.* 417

5. Where on the Trial of the Issue *devisavit vel non*, the Will was attested by two Witnesses, one of whom was absent from the State, and whose credibility was impeached at the Trial so that the Will was proved only by the other, whose Testimony, if credible, the Court instructed the Jury was sufficient to establish the Will, although the absent Witness was proved incredible; the Jury set aside the Will and a New Trial was refused..... *Wright* v. *Wright*, 625

See *Probate* 1.

Witness.

1. Under the Act of 1792, c. 6, a subscribing Witness is not necessary to a Mortgage Deed of Slaves, where the contest is between the parties, or those claiming under them, and there are no conflicting Claims of Creditors or third persons....*Collins* v. *Powell*, 431

Words.

1. Where the Defendant uttered the following Words of the Plaintiff, "He, one of our little Chowan Justices of the Peace, was taken up a few nights ago playing Cards with Negro Quomana, in a rookery box, and committed to Jail, and remained there until next day nine or ten o'clock, and then was turned out and split for the Country." The Judgment was arrested, as they impute no crime which if true, would subject the Plaintiff to infamous punishment; and the Declaration did not charge that the Plaintiff was a Justice, or that they were spoken of him in relation to his Office....*M'Guire* v. *Blair*, 445

N. B. The Abridgment of the Acts of Assembly begins in the 1st Volume, at the Pages 114 and 400;—In the 2d Volume, at the Pages 125 and 474.

The British Statutes, in the 1st Volume, begin at Page 549;—In the 2d Volume, at Page 294.

ERRATA.

In the Index, page 642, bottom line of the 1st column, for "case of debt" read "case of tort." In the 648th page, 1st column and 14th line from the top, for "County" read "Country."