REPORT

(IN PART)

OF THE COMMISSIONERS

APPOINTED BY THE LEGISLATURE OF MARYLAND,

TO REVISE, SIMPLIFY AND ABRIDGE

THE RULES OF

PRACTICE, PLEADINGS, FORMS OF CONVEYANCING,

AND

PROCEEDINGS

OF THE

COURTS OF THE STATE.

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REPORT ON

PRACTICE AND PROCEDURE,

PREPARED BY

WILLIAM PRICE.

To The Honorable

THE GENERAL ASSEMBLY OF MARYLAND:

The subjoined Report, in part, of the Commissioners appointed to revise, simplify and abridge, the Rules of Practice, Pleadings, Forms of Conveyancing and Proceedings of the Courts of this State, is respectfully submitted to the Legislature.

WM. PRICE,
SAMUEL TYLER,
FREDERICK STONE,
Commissioners.

ADVERTISEMENT.

THE undersigned having by arrangement with his colleagues prepared the subjoined Report, desires to be considered solely responsible for the views it contains and the changes it recommends; all of which he respectfully submits to the consideration of the Legislature.

In the preparation of the Report, except in that part of it which treats of the Criminal Law, the undersigned pursuing the strict tenor of his commission, has confined his labors to the practice of the Courts, and to subjects connected directly with the practice. The reasons for his departure from the same course in regard to a portion at least of his proposed changes in the Criminal Law, he has stated in the Report itself, and hopes they will prove satisfactory.

In all the reforms thus attempted by him, he has been guided solely by his own ideas of what those reforms ought to be. His views may prove acceptable to the Legislature, but as there is a possibility that they may not be approved, he purposes to rest on what he has done, rather than proceed further under which may turn out to be a mistaken view of his duty. Whenever he shall receive from the only authority competent to pass upon his work, the assurance that his labors are neither unacceptably nor unprofitably employed, he will be prepared to go to work, with all diligence and alacrity, in the execution of his task.

WM. PRICE.

CUMBERLAND, *Dec.* 15, 1854.

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PRELIMINARY REMARKS.

THE consent of the Judges is necessary to the success of any attempt to reform the system of procedure in the Courts of the State. Should the Judges determine at once to meet the views of the Legislature and people of the State, by construing the rules of a written code according to their plain, common sense meaning, and in the spirit of amelioration and reform in which they are promulgated, the present attempt to improve the law in all that relates to its administration, will succeed, as on the contrary it must inevitably fail, if the Judges determine to regard each rule as a special command, and their power as limited by its letter. In the administration of the written law, Courts are prone to consider themselves as charged with a mere duty of interpretation, and to regard a question arising upon the construction of a statute as one of mere words. In one case, an English Judge of eminence declared, that if a statute were set out in pleading, though unnecessarily, and misrecited, he would hold the party to half a letter, and treat the variance as fatal.

Judges, as a general rule, are bad reformers. They look upon every change as a project of dangerous tendency, and obdurately defend every antiquated abuse and absurdity which continues to disgrace our jurisprudence. Edward the First, under the auspices of the Lord Chancellor Burnell, passed the statute of Westminster the first, itself a code, but he could not venture to abrogate the absurd and impious practice of trial by battle in civil suits. There were, says Lord Campbell, sincere and respectable men of those times, who would have stood up for ancestral wisdom, and would have asserted that England owed

all her glory and prosperity to trial by battle in civil suits, and that to abolish it, would be impiously interfering with the prerogative of Heaven, in awarding victory to the just cause. The most the King could venture to do, was to release the defendant's champion from the oath, which was always false, that he had seen seizin given of the land, and that his father when dying, had exhorted him to defend the title to it. And this barbarism continued to be a part of the English law until the year 1819, when Lord Chancellor Eldon, to the amazement of the House of Peers and of the whole realm, moved the second reading of a bill sent up from the Commons to reform the practice.

In the year 1815, Sir Samuel Romilly sent up from the House of Commons, a bill to subject free-hold lands to the payment of simple contract debts, for the purpose of preventing this fraud among others, that a man might borrow £100,000 to buy an estate, and dying, leave it unincumbered to his son, without a shilling of the debt being ever paid. But Lord Eldon rejected the bill after a long speech, in which he considered it contrary to ancestral wisdom and subversive of the Constitution, under which England had so long flourished. In 1813, Sir Samuel had introduced a bill, to repeal that part of the sentence for High Treason, which directed that the heart and bowels should be torn out of the offender's body while he was yet alive, and burnt before his face. But the bill was thrown out by a large vote. Garrow spoke against it, and such men as Lord Ellenborough and Lord Redesdale opposed it zealously. Garrow said, he would not vote for such a measure originally, but as it was a part of the law, he was against altering it. It was not until the reign of William IV, that Parliament could be brought to pass a bill, allowing prisoners on trial for crimes, the benefit of counsel to aid them in their defence, and then, according to Lord Campbell, it was opposed by nearly all the Judges of England. Of all the Chancellors of England, the great Bacon was the only man who seems to have turned his thoughts to important reforms in the law.

But it is not in England alone, that Judges adhere with such tenacity and so blind a reverence to every part of the system of

law which they find established. The same aversion to change no matter what the object of it, is equally characteristic of the Bench on this side of the Atlantic. In the case of Orme *vs.* Lodge, 3 H. & J. 83, the Court of Appeals refused to sanction an agreement of Counsel, by which a justification in slander was, by consent, to be taken in short, and reversed the judgment below, for want of such plea, as if the law made it obligatory on parties to plead specially, whether they desired to do so, or not. The act of 1763, ch. 23, abolished special demurrers, but the Courts continued to entertain special demurrers, and ultimately in 1832, determined, that their own practice in open violation of the act, had repealed the act. In 1785, an act was passed, allowing amendments to be made in all proceedings whatever, before verdict, so as to bring *the merits of the question* between the parties fairly to trial. In 1809 a law was passed, re-enacting the first act, word for word, a proof that the Courts gave but an unwelcome reception to the first act, as they did in fact to the last.

It is still the law of Maryland, that if a testator give his personal estate to a description of persons as a class, as for example, a gift by a father, "to his children," such of his children as happen to die during his life time, and their descendants, are excluded from all share of the gift, although the Legislature have made two serious attempts, the one in 1810 and the other in 1832, to change the law so that all might come in equally.

The act of 1823, ch. 172, which was intended to prevent the reversal of judgments of Justices of the Peace for any defect or omission in the proceedings, and to bring the matter in controversy to trial, according to the *very right* of the cause, has been utterly disregarded in practice, and the Courts have dealt even more sternly with those judgments, than before.

It was no doubt, owing to the impracticable disposition of the Judges, in reference to all questions of law reform, that the British Parliament, in the year 1830, conceived the plan of introducing extensive improvements into the system of procedure in the English Courts, through the instrumentality of the Judges themselves. In that year, a bill was passed, empowering the Judges, or any eight or more of them, including the Chiefs of

each Court, to make such general rules for regulating the proceedings of all the Courts, as they might deem proper. In pursuance of which authority, a few rules were promulgated in Trinity Term, 1831, relating principally to the forms of declarations and particulars of demand, and to the practice in the several Courts of law, and in them, fourteen Judges concurred. At Hileary Term, 1832, under the authority of the same act, all the Judges of the three Courts united in promulgating one hundred and seventeen other new rules, the main object of which was to render uniform the practice of all the Courts.

Various subsequent statutes were passed, all of which confided to the Courts themselves, the projection and promulgation of the contemplated reforms, and not only authorized, but required the Judges to make all such general rules and regulations respecting *pleading* and *practice*, as in their judgment should be necessary and proper: such rules and regulations to be laid before Parliament six weeks before they began to operate, and the authority thereby vested in the Judges, to continue for the space of five years, in which period, it was expected that all the required reforms and improvements would be accomplished.

But the plan of reforming the system of procedure, through the joint agency of the Legislature and the Courts, did not succeed. The Judges wedded to old forms, were opposed to all comprehensive changes in the law, and in the construction of their own rules, were even more nice and technical than before. Great complaints were made of the many minute questions and frivolous points of practice, constantly occurring in the Courts, under the working of the new rules, and the uniformity of process act. Able writers appeared in the public journals, recommending the formation of a new and comprehensive code, to be made imperative upon the Courts, and abrogating all existing rules of pleading and practice.

The result has been the appointment by the Crown, under the authority of Parliament, of various able commissions, for enquiring into the process, practice and system of pleading of the Superior Courts, as well at law as in equity, and the formation of a society for promoting the amendment of the law, comprising some of the ablest jurists and men most distin-

guished for character and talents of the kingdom, and a strong party in that country, at the present time, advocate the adoption of changes and innovations which may well be termed revolutionary, in all that pertains to the administration of justice. They propose that all controversies, whether of legal or equitable cognizance, under the present system, be referred to the same tribunal, and subjected to the same form of procedure. The Parliament, at its last session, upon the recommendation of the law commissioners, abolished all the forms of actions, and pruned from the system of pleading all merely formal technicalities, and reduced its forms to the greatest possible simplicity. But at the same time, the distinctive features of pleading to special issues of law and of fact, has been carefully preserved, as indispensable to the due administration of justice in English Courts of law.

Changes so bold and sweeping as those advocated by the party we have spoken of, have not been contemplated in Maryland. All the New Constitution intends is, in its own language, to *revise*, to *simplify*, and to *abridge* the rules of practice, pleadings, forms of conveyancing and proceedings of the Courts of *record* of this State, the word *record* being omitted in the resolution of the Legislature, passed in reference to this provision of the Constitution. No commission has gone out yet to pull down and destroy. The essential elements of a system of pleading must be preserved. Nor is it perceived, as long as the trial by jury continues to hold a place in the administration of justice, how an intention to strike down all the rules of pleading at a blow, leaving in its place a perfect blank, can be seriously entertained any where. The allegations of the litigant parties must be put into such form as to ascertain with precision, what are the disputed facts, and reduce them to plain questions for juries to decide, or trial by jury must be abolished altogether.

In the preparation of the proposed changes, no agency of the judiciary has been provided for, but when the report of the Commissioners has been approved by the Legislature, either in whole, or in part, it will remain for the Judges to put their construction upon it. To construe and apply a law, im-

plies nearly as much power, for good or for evil, as to make it. A reform of the law projected by Sir Samuel Romilly, would have been curtailed of half its beneficence, if interpreted and administered by such a Judge as Lord Ellenborough.

The changes now projected are purely statutory, but it ought to be considered, that the want of success attending legal reforms, after they have reached the Courts heretofore, has arisen from the isolated character, in most instances, of the reforms themselves. A single rule has been altered, without the alteration of any other rule with which it stood associated: and the change in many cases, instead of an improvement, has been a glaring incongruity—a new patch on an old garment. When the alteration is of a single rule, the Courts are compelled to force it into harmony with the surrounding doctrine, which has not been altered at all, and this is at times a more difficult task than is generally supposed. And it explains how it happens, that with all the particularity of language employed by the Legislature, the intended change is not effected at last. An example of this may be found in the act of 1832, ch. 295, already alluded to, which recites that doubts had been entertained whether by the act of 1810, ch. 34, to prevent the failure of a legacy by the death of the legatee in the life-time of the testator, it was necessary that the legatees should be specifically named in the will, provides that no such legacy shall fail to take effect, in the case referred to, because the legatees are not specially named, but that every such legacy shall take effect, whether the legatees are actually named, or mentioned, or described, or in any manner referred to, or identified as legatees, yet the Court of Appeals held, that the legacy in that case, should fail of taking effect, because the legatees were not specifically named. 1 G. & J. 328. Although this decision would seem to be directly in the face of the act, and no doubt was so, in reference to the intention of the Legislature, yet there is some show of reason for it in the fact, that the old rule of construction, that a gift to a class of persons, was intended for the described class, as it existed at the death of the testator, and not at the date of his will, was not expressly repealed by the act of 1832.

Instances, moreover, have happened where the Legislature, striking at one change, have missed their object, and effected others not intended, but which the Courts have had no choice but to carry out. Again, the Legislation of this State has been merely occasional, and therefore crude and immature. In England, no statute affecting the jurisprudence of the Country, or the administration of justice in any of its branches, is ventured upon, without obtaining before-hand, through a committee raised for the purpose, the advice and assistance of the sages of the law. Here, on the contrary, nothing is done upon prior examination, and the consequence is, that when done, it is either unwise in itself, or it is crude and indigested. If a lawyer loses an important cause, he naturally persuades himself, it was owing to a defect in the law, which as soon as the opportunity occurs, he procures to be corrected. In some cases it is discovered, that causes pending in Court could be carried through successfully, if a certain alteration could be made in the existing law, and the desired alteration is forthwith obtained. Many important changes have owed their origin to motives such as these, or at all events, not more respectable than these, and it is by no means wonderful that such legislation should fail to command the respect of the bench.

But the reforms now proposed are more extensive, as well as more systematic, than any hitherto attempted in Maryland. They extend to the whole and to every part of the modes of procedure in all the Courts of the State. The great object is, to render pleading and practice as concise and as simple, as shall be found to be consistent with an intelligent and healthy administration of justice. In the interpretation of the new system, and in its application in practice, to the concerns of society, all merely technical—and especially all historical rules of construction will, of course, be discarded. To say, that a rule of property or procedure must have a particular meaning, because a certain state of things, out of which it grew, existed in the times of the Edwards and the Henrys, is a mode of reasoning, which can have no application to the new system, but which has perpetuated most of the barbarisms of the old.

It has not been the aim of the Commissioners, therefore, to give more in any case than the naked rule, without attempting to provide for all the diversities, ramifications, expansions, qualifications, conditions and exceptions to it, as they ought to be applied to all future combinations of circumstances, in the business of life—a task which it is believed no human intelligence could accomplish. The duty of applying each rule to the cases for which it was intended, and of preventing its application to cases for which it was not intended, under any and all future circumstances, must be left to the sound discretion of the Courts, guided as they must be, by the light of reason and the great principles of natural justice, the foundation at last of every enlightened system of jurisprudence.

The Commissioners, following the example of those to whom similar duties have been assigned in other States, have given their own explanations of existing evils, and of the remedies they propose for them. These, in some instances, may be more elaborate than the occasions might seem to call for, but when the changes proposed are important, and especially when they have reference to matters with which the public mind has long been familiar, the Commissioners entertain the hope that they will be indulged with a full hearing.

FUNDAMENTAL RULES OF INTERPRETATION.

1. THE rules hereinafter contained, are to be interpreted and applied to future cases, as rules of the common law of Maryland, and not as rules of mere positive or statute law. They are to be deemed as in affirmance of what the common law is, and not as containing provisions in derogation of that law, and therefore subject to strict construction.

2. Consequently, they are to furnish the rules for decisions in Courts of justice, not only in cases directly within their terms, but indirectly and by analogy in cases where as a part of the common law, they would and ought to be applied by Courts of justice in like manner.

3. In all cases not provided for by the rules, or governed by the analogies therein contained, the existing law of Maryland is, to furnish the rules for decision.

The Commissioners had already concurred in the principles of interpretation here given, as essential to the success of the proposed reforms in the law, when they had the gratification to find that the same views precisely were entertained by the late Judge Story, who in a report to the Legislature of Massachusetts, in the year 1836, upon the expediency and practicability of reducing to a written code, the common law of that State, lays down for the guidance of the Courts, the three fundamental rules, from which the above are taken nearly word for word. (See Story's Life and Let-

ters, Vol. 2. p. 247.) The Commissioners feel the greater confidence in the conclusions to which their own reflections had brought them, from being thus enabled to recommend them, upon the authority of that illustrious jurist.

4. Expressions or provisions in the singular number, may comprehend a plurality of persons and things, and those in regard to males may comprehend females within the same reason.

THE LAW OF EVIDENCE.

THE rules of evidence constitute a very important, perhaps the most important branch of the practice of the Courts. They are the means of collecting, sifting and assorting the materials upon which Courts and juries act, when engaged in the administration of justice. The forms of procedure and the rules of evidence are alike in this, that they do not of themselves constitute law, but rather the machinery to facilitate the use of it. And it is believed that more will be done to simplify and improve the practice of the Courts, by the change of a few of the principal rules of evidence, than could be effected by the same amount of change in any other branch of the law.

The proposed rules are couched in the most general terms, all exceptions and inflections being left to be supplied by the Courts.

1. Nothing more than the substantial facts, necessary to constitute the cause of action or defence, need be proved in any case.

It is a leading rule of evidence, that all allegations in pleading, material to the issue joined between the parties, must be substantially proved. And if this were the whole of the rule, it would be sensible and satisfactory. But the materiality of an averment depends in many cases, not upon the character of the averment itself, but upon the manner in which it is stated in pleading. And where from the manner of stating a fact, or series of facts, an immaterial, is converted into a material allegation, the whole statement must be proved, unless it is made under a *videlicit*. In plainer terms the rule is this. A party is not required to adduce proof of more than the material facts of his case, unless he has, in pleading, alleged facts which are immaterial, and which he might have omitted, in which case he must prove even the immaterial facts, unless again he has laid the immaterial facts under a *videli-*

cit. That is, unless in stating them he has used the words "to wit." This will be regarded as a notice, that although he has chosen to state facts which are not material, he is nevertheless not to be held bound to prove them. This jargon will appear still more strange from a few examples.

Matters of description, particularly of written instruments, are required to be strictly proved, because they are said to concern the identity of the thing itself. But allegations of time, place, quality, quantity, and value, when not descriptive of identity, are immaterial. Now an allegation that a bill of exchange was *made* on a certain day, is not descriptive, and strict proof according to the precise day laid, is not necessary: but an allegation that a bill *bore date* of a particular day, is descriptive, and must be proved as laid.

The rule is, that a *videlicit* will not dispense with exact proof in an allegation of material matter, but if the traverse is of a collateral point in pleading, then all formal matter becomes descriptive, and strict proof is required. It will not do to say "to wit" in such a case.

The same rules prevail in criminal prosecutions. An indictment for perjury, must state truly the term of the Court when the offence was committed, but an indictment for a false answer in chancery, need not state truly the term in which it was filed. In the one case, the evidence must conform strictly to the charge, in the other, it may vary from it. In an indictment for murder, a charge of a wound with a sword, will be supported by evidence of a wound with an axe, for it is not descriptive. In a prosecution for passing a counterfeit bank note, it will be sufficient to lay it as a note of a certain bank, but if the name of the officer who signed it is stated, though unnecessary, it must be proved. An indictment for stealing a *black* horse, is not supported by proof of a horse of any other color. The color becomes descriptive if stated, but not descriptive if all mention of the color be omitted.

The rule that matter descriptive, especially of a written instrument, is material, is of very extensive application, and is made the test of the necessity of proof, and of the extent to which proof is required, of all matters alleged in pleading. But the great difficulty seems to be, in ascertaining what is descriptive and what is not. That which is held to be purely descriptive in regard to one subject-matter, is under circumstances almost precisely similar in regard to other matters, determined to be clearly the contrary. The distinctions are not merely so nice that few minds can appreciate them, but are contradictory in themselves.

2. I matters of description, it shall be sufficient if the identity of the written instrument, or other subject-matter of evidence, appear substantially in proof, and the question of materiality shall not depend upon the mode in which matter may be stated in pleading, but upon the nature of the thing itself.

3. No action upon a contract shall fail by reason of any disagreement in matters immaterial between the allegations in the declaration and the proof, but in all cases where the contract stated, and that proved, are in substance the same, or where it is apparent that the plaintiff upon the proof adduced, could recover by amending his declaration, the Court shall permit the trial to proceed and the case to be disposed of, unless the Court shall be of opinion that to do so, would operate as a real surprise upon the defendant, in which case, the plaintiff shall be required to amend, and the cause shall be continued upon the usual terms.

In actions upon contracts, the entire consideration must be stated and the entire act to be done in virtue of such consideration, together with the incidents of time, manner and circumstances, and the proof must conform to the whole statement. If the statement be, that in consideration of £100, the defendant promised to go to Rome, and also deliver a horse to the plaintiff, and the plaintiff should fail in proving that part of the statement in relation to the delivery of the horse, the action must fail, because the contract stated is not proved. If however, he had omitted in his statement the latter branch of the promise he might have recovered, although it had appeared in proof, that the delivery of the horse was a part of the promise, because, as the authorities say, it would be a mere case of *redundancy* in proof. If the proof go beyond the statement, showing that there are parts of the contract which are not alleged, at all, it is mere redundancy in the proof, and the plaintiff may recover, but if the statement go beyond the proof, the action must fail, because the plaintiff has not proved all he has alleged, although what he has proved, exhibits an entire equal and

valid contract, fair in all its parts, and showing an undoubted right in the plaintiff to recover. Why is the variance fatal in the one case and not in the other?

4. No person shall be disqualified to testify as a witness by reason of any interest he may have in the result of the suit or controversy; or in any question involved in the same; or in the record as an instrument of evidence; but the objection of interest whenever it may exist may still go to the credit of the witness.

The rule which shuts out the testimony of all witnesses having an interest in the suit, is perhaps, the most fruitful of all sources of embarrassment to Courts and Juries. It comprises the great mass of the law of evidence which relates to its competency. Volumes have been written upon it. It has been the cause of a greater number of bills of exceptions, motions for new trials and appeals—of more cost, vexation and delay, than any other one rule connected with the administration of justice. And if it were at most but probable, that the law, by its abrogation, would not lose more in morality, than it would certainly gain in simplicity, there would be sufficient reason for lopping it at once, with all its distinctions, limitations and exceptions, from the system. There is, however, no reason to apprehend any other than beneficial results from the abrogation of this rule. It has been rescinded in England, and according to the universal opinion of the profession in that country, the rescision has worked admirably, and has been mainly instrumental to the discovery of truth, and no reason is perceived why the same change should not be followed by the same results here.

The rule itself declares that a witness is incompetent to testify in a cause who is interested in its result. It must be some legal, certain and immediate interest, in the event of the cause itself, or in the record as an instrument of evidence in support of the claims of the witness in a subsequent action. This disqualifying interest must be real and not merely apprehended, the test being the actual existence of the interest, and not the mere opinion of the witness himself as to whether he has an interest or not. A party having an interest in the result of the cause without knowing it, is dismissed from the stand as unworthy to testify—one who believes he has a large stake depending on the issue of the trial, but who in

fact has none, is allowed to be sworn and to be heard by the jury. The interest must be in favor of the witness to disqualify him, for a person will be heard to swear against his interest, as he will where his interest is balanced, or equal on both sides.

One exception to the rule is in the case of a criminal prosecution, where the witness is entitled to a reward upon conviction of the offender, or as owner to a return of the property stolen. The exception is made, we are told, upon considerations of public policy, the public having an interest in the suppression of crime and the punishment of offenders, as if there were no danger of a witness perjuring himself because the public were anxious for a verdict of guilty. In such a case the law must take it for granted before the trial, that the accused is guilty, and to deprive him of all chance of escape, is willing to draw the evidence necessary for his conviction from a source, which in other cases it denounces as polluted and unworthy of belief.

Another class of excepted cases are those of agents, carriers, factors, brokers, and servants, when offered to prove the making of contracts, the receipt or payment of money, the receipt or delivery of goods, and other acts within the scope of their employment. These exceptions are also founded, it is said, upon considerations of public necessity and convenience—for the sake of trade and benefit of commerce. But where is the difference in morals between public and private necessity in such cases? Why should one citizen lose his cause by the exclusion of his only witness, because his is a solitary case, while others standing in the same category precisely, are permitted to violate the rule because they are a numerous class? Surely vice by wholesale is not less odious than when presented in single doses. A rule wise and salutary in itself, ought not to yield to the mere number of the temptations to its violation.

Another exception is of the case in which the witness has acquired an interest in the result of the cause since the party became entitled to his testimony, in which case the law ordains that he shall be sworn in spite of his interest. He is certainly just as likely to be tempted by an interest acquired in this, as in any other manner; and it is anything but a satisfactory answer to say, that he had no right to place himself voluntarily in that predicament.

These distinctions and exceptions overlay the rule or so confuse its boundaries as to render it extremely difficult to comprehend, much less to approve, the moral foundations on which it rests. It

supposes that the influence of money is the only influence to be guarded against in the administration of justice. It closes the lips of the most honorable man in the community, if he have a stake to the amount of a dollar in the event of the suit, while it hears without distrust, the heir apparent to the largest estate in the land, swearing in support of his ancestor's title. The strongest imaginable bias resulting from friendship or hatred, from the ties of consanguinity or from the domestic or social relations, are supposed to be incapable of corrupting the integrity of the witness—a parent may testify for his child, or the child for the parent, the brother for the sister, or the servant for his master, even a wife has been held admissible as a witness against a prisoner, though she believed that his conviction would save her husband's life. But let money depend upon the result, no matter how small the amount, and the case is altered, for as a general rule, the integrity of the human race is incapable of resisting the temptation of a single dollar.

But, is it true, as a general rule, that men are unable, even upon their oath in Court, in the face of the community in which they live, to withstand the influence of money? Do they in their daily business transactions, judge each other by a standard so degrading? Far otherwise! Statements are made every day and every hour by men, in their infinitely multiplied dealings with each other—made under all conceivable influences of feeling, of prejudice, of passion, of pecuniary interest; and it is one of the results of experience, to teach us exactly what degree of credence to attach to them, under any and all circumstances. All that needs be said, therefore is, let the jury do the same thing. Give them all the facts, let them hear every man who has anything to say on the subject. They are not bound to believe him, nor to give to his testimony a particle more weight than it is entitled to. In the excepted cases already referred to, in which agents, carriers, factors and others are constantly and as a matter of course, sworn in cases where their interest in the result is direct and palpable—even in the case of the informer who appears upon the stand to compel his neighbor to pay a fine, that he may pocket the one half of it, juries experience no embarrassment in perceiving where the truth lies. We hear no complaints in these cases, and it is believed that justice is about as impartially administered in these as in other cases.

5. Either party may examine the opposite party as a witness in the cause, to whose testimony no greater effect shall be allowed than to the testimony of other witnesses; and either party may have process to compel the attendance of the opposite party as a witness, or a commission to take his testimony if absent from the state.

It is not proposed to go the length of admitting the evidence of parties to the record as volunteer witnesses in their own behalf, as has been done in England by the Stat. 14 & 15 Vic. ch. 99. Apart from the seeming indecorum of permitting parties to come upon the stand and swear through their own accounts and claims and complaints, it is believed that such a rule must operate unequally and tend to defeat rather than promote the ends of justice. An intelligent, shrewd person, especially if a little roguishly inclined, must have a great advantage in swearing over a man slow of comprehension and ignorant of the forms and usages of business. The disparity would be still greater, when an idiot, lunatic, or person non compos mentis, or a woman, or an executor, guardian or trustee who might be ignorant of the facts, was a party to the suit. Nor would it do to apply the rule at all, when one party was in Court ready to swear, and the other was dead, or unable to attend, or indeed in any case where the story on one side would be heard, and not on the other. It has long ago passed into a proverb, that one story is very good until the other is heard, the true meaning of which is, that no man can be trusted in a controverted matter, to tell his own story, and it is believed that with all the precautions the Courts might devise to prevent it, a vast amount of perjury would follow the establishment of such a rule.

It would seem from the extreme caution of the Courts, in giving effect to the statute of Victoria above referred to, that the English Bench have not been able to contemplate the effects of the innovation in that country without evident misgivings as to its expediency. Lord Campbell established the rule at once, that every plaintiff or defendant who is to be called as a witness, must be kept out of Court from the commencement of the case until he is put into the box, and again leave the Court as soon as he is examined.

But the rule here proposed, of permitting one party to a suit to call up the other party and examine him before the jury, is a differ-

ent matter altogether. Indeed the rule as recommended has existed for ages, in those tribunals which are known, par excellence, as Courts of Equity, where, contrary to the practice at law, the parties' plaintiffs, as well as defendants, may reciprocally require and use the testimony of each other, upon a bill and cross bill for the purpose, and where the answer upon any matter stated in the bill, and responsive to it, is not only evidence in his favor but conclusively so, unless it is overcome by the testimony of two opposing witnesses, or one witness corroborated by facts and circumstances.

It is esteemed a great advantage to be a defendant in a Court of Equity instead of a plaintiff, simply because as a defendant, the party is entitled to the benefit of his answer—that is to say, is entitled to the privilege of being a witness in his own case, and the still greater privilege of having a weight attached to his testimony, equal to that of two disinterested opposing witnesses.

But the principle which duplicates the weight of a man's evidence because he happens to be swearing in his own case, is founded upon no satisfactory reason. If two respectable men as witnesses in a cause, make variant and contradictory statements on oath, it is the province of the jury to reconcile them if they can; if not, to decide between them without discrediting either, by referring to the surrounding circumstances and the intrinsic probabilities of the case, and this the jury must do, and in the same manner precisely, whether one of these witnesses be a party to the suit or not. It would certainly be a strange anomaly, that in the case supposed, the Court should instruct the jury to find one way, and that in their opinion the wrong way, because one of the witnesses was a party to the suit, and therefore to be counted as two witnesses. It is a strange principle which refers the force of evidence arbitrarily to the number of witnesses by which it is proved. If forty witnesses swore in succession to the same fact, and one witness contradicted them, the jury might well find with the one, without giving any reason for it. Any rule prescribing beforehand an artificial standard by which to measure the force of testimony, is not only unwise, but contrary to the whole theory of the trial by jury.

The chancery rule, so far as it permits one party to put the other to his oath, is a good one, and ought to be transplanted into the Courts of law. For apart from its efficacy as a mean of ascertaining the truth in Court, it cannot fail to operate most beneficially also, in preventing many fraudulent and oppressive suits from being

brought into Court. If a party who is about to put upon the docket a suit to recover, for example, a debt which he knows has been paid, or to enforce a claim which to his own knowledge is without foundation, is told by his counsel, that he may at the trial be called by the defendant upon the stand, and put through a searching examination, the probability is, that in the greater number of such cases, the party would first postpone and ultimately abandon altogether the idea of bringing the suit.

Upon the whole subject the true doctrine seems to be—1. No person shall be a voluntary witness in his own case. 2. If either party chooses to make a witness of his adversary, there is no reason why he should not be permitted to do so. 3. No artificial weight should be given to the evidence of a witness because of his being a party on the record, any more than in the case of a witness who is not a party.

6. No person shall be rendered incompetent as a witness by reason of his having been convicted, or convicted and sentenced for an infamous or other crime; nor shall the validity of any last will and testament, be affected or impaired, by the same being attested by any person thus convicted, or convicted and sentenced.

The rule of evidence which destroys the competency of a witness who has been convicted of an infamous crime, ought to be abrogated. As the rule now stands it is understood to exclude a witness so convicted, only within the jurisdiction where the conviction was had. It has been held upon great consideration, that a conviction and sentence for a felony in any one of the United States, did not render the party incompetent as a witness in the Courts of another State; and the reason seems to be that the disqualification is part of the punishment, and therefore not entitled to any extra territorial effect. It has been held moreover, that in cases where the incompetency clearly exists, a pardon or the infliction of the punishment restores the competency, except when the disability is annexed to the conviction of a crime by the express words of a statute, in which case the disqualification remains.

Would it not be a better rule to receive the witness in all cases, and allow the objection to go to his credit? In support of the existing rule it is said to be inconsistent with the interests of other

persons, and with the protection which is due to them from the State, that they should be exposed to the peril of testimony of persons regardless of the obligation of an oath. But if the reason be good at all, it ought to be good to the full extent of the evil. If the community is entitled to protection against the evidence of persons convicted of infamous crimes, it ought to have that protection against all persons so convicted, and it is most unwise to limit the prohibition to those convictions which have taken place within this or that particular jurisdiction. Certainly it cannot be said, that a man's life, liberty, or property would be put in peril by the admission of a witness whose conviction had taken place here, but that the peril ceases to exist the moment it is shown that the conviction was had elsewhere.

But the worst feature of the rule is, that a pardon restores the competency, and permits the witness to be heard in Court. Whether therefore, a jury are to be permitted to hear what a witness has to say, and to believe him or not, accordingly as they may think him entitled to credit, is made to depend upon the will of the executive in granting or refusing to grant a pardon. If the Governor says "yes," the fact can be proved—if "no," the fact is suppressed. Between parties litigant, to destroy by the interposition of an arbitrary rule, the evidence of a fact on the one side, is to make a fact on the other side, which may be equivalent in many cases to giving the verdict to the party least entitled to it.

But it is said that the disqualification of the witness is a part of the punishment of his crime. And upon whom does the punishment fall? What are we to say in the case of a will, where from the legal turpitude of one of the witnesses, all the devises it contains of real estate are destroyed, while the dispositions of personalty remain unaffected, and as a consequence one class of the objects of the testator's bounty are disappointed, while another class are enriched. In such a case there is a punishment no doubt, and a very heavy one, but it falls upon persons innocent of all offence.

The true principle is this—that the examination of a witness in Court is the privilege of the party who calls him. The facts of which the witness is the depository, are the property of the party litigant. So much so, that if a party loses his case by the wilful absence of a witness whom he has summoned, he may bring suit against the witness, and make him pay the damage. To refuse to testify in Court is a contempt of the Court's authority, for which the witness may be punished summarily by fine or imprisonment, or both.

The cause of justice is best promoted by throwing the doors of competency and admissibility wide opon, and giving to the jury all the information within the reach of the parties, leaving the jury the right to judge of weight and credibility under all the circumstances presented to their view.

7. All witnesses, by whomsoever summoned or examined, shall be deemed and treated as standing indifferent between the parties, and either party to a suit or controversy, shall be at liberty to impeach or controvert the testimony of any witness, whether summoned or examined by himself or by the opposite party.

In the trial of causes in Court it is not unusual to hear it debated before the jury, whether a witness belongs to the one party or the other. An exaggerated value is given to a fact if proved by the witness of the opposite side, while the same fact if sworn to by the party's own witness, is nothing more than was to have been expected, and is then simply a fact in the cause. If one party in the progress of the trial, finds it necessary for the purpose of proving some incidental fact, of which he may have no other evidence, to call up a witness summoned by the other side, the party thus calling him is immediately notified, that now the witness is his own, and then all the facts which the witness was expected by the party summoning him to prove, are brought out, and commented upon before the jury, as proved by the witness of the opposite party, who is told that he cannot impeach his own witness. The altercations upon these questions become at times so animated as to require the interposition of the Court's authority to settle them, by determining whose witness he is.

The existing rule is stated by an able writer thus:—When a party offers a witness in proof of his cause, he thereby represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces, and having thus presented them to the Court, the law will not permit the party afterwards to impeach their general reputation for truth, or to impugn their credibility by general evidence tending to show them to be unworthy of belief. For this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him.

But is it true that a party by merely calling a witness upon the

stand, thereby represents him as worthy of belief? A party having a suit in Court expects to sustain it by the witnesses whom he adduces for the purpose. This expectation is founded upon what the witnesses have told him themselves, or from what he has learned they will prove through others. He may be acquainted with their characters, or he may not; but he does not by merely summoning them into Court intend to represent their characters as either better or worse than they really are. A mere summons is no certificate of character, and if a witness has given out that he will prove one thing, and coming upon the stand proves another and a different thing, he has no right to complain if he is told of it in open Court, or if the truth will justify it, if his character is impeached by general evidence tending to show him unworthy of belief.

The spirit of the rule is objectionable, as it implies that a man's witnesses are either his partisans or his retainers, or at all events that he may treat the witnesses of the opposite party as enemies and wage war upon them, but that his own are entitled to his protection. The true rule is the one here recommended which regards the witnesses by whomsoever summoned, as standing indifferent between the parties, leaving their weight with the jury to depend upon their standing in the community, and their deportment in the cause.

It is believed that all rules, giving an artificial or merely arbitrary force to evidence, are hurtful and ought to be abolished.

8. It shall be the right of either party to a cause, to demur to the evidence, by calling upon the Court to declare what the law is, upon the admission of the facts, which admission shall be of the facts, and not merely of the evidence adduced to prove them.

9. When the evidence is circumstantial, or vague and uncertain, the admission shall extend to every fact which the evidence conduces to establish in the one case, and to the facts in controversy as if distinctly proved in the other. And when a fact which is proved tends to the proof of another fact, the last fact shall be admitted, but no person shall be held to

the admission of strained or unnatural inferences from facts.

10. The party who demurs to the evidence, shall not be deemed to have waived or abandoned the evidence offered by himself; but the same shall form a part of the case, for the judgment of the Court.

11. No party demurring to evidence shall be estopped, in any other suit or proceeding, or in subsequent stages of the same suit or proceeding, from alleging and proving the truth to be different from the facts admitted.

12. When all the facts are admitted, and distinctly reduced to writing, there shall be, in the discretion of the Court, a joinder in the demurrer by the other party, and thereupon the cause shall be withdrawn from the jury, and so entered of record, and upon such demurrer, the Court shall give judgment.

13. After the judgment is rendered by the Court, the damages, if such judgment be for the plaintiff, and the case be one sounding in damages, or where the damages are unliquidated, shall be assessed by a jury upon a writ of enquiry. If the demand be of a sum certain, or the character of the case be proper for it, the damages may be assessed by the Court.

A demurrer to evidence is a proceeding, by which the Court is called upon to declare what the law is, upon the facts *proved*, as a demurrer to the pleadings is a proceeding, which refers it to the Court, to declare the law upon the facts *alleged*. In the case of a demurrer to the pleadings, all that is *stated* by the opposite party, is admitted to be true, and the Court is required to say, whether upon such *statement*, the party is entitled to maintain his action or defence. In a demurrer to evidence, the admission is, of the truth of what the party has *proved*, and upon *that*, the Court is required

to say, whether he has maintained his cause of action or defence. In the one case, the cause is taken from the jury, and referred to the Court, upon the admission of the truth of all the party has alleged in pleading, in the other, upon the like admission of all he has adduced in evidence. Yet the latter species of demurrer,—so identical with the other in principle, has never been considered allowable under the practice of this State.

It does not seem to be right, however, that if with the admission of the truth of all the facts proved by his adversary, the law is clearly in favor of a party, he should still be compelled to go before a jury, and incur the risk of their finding a verdict against him. In every such case, it is presumed the Court would not hesitate to grant a new trial, and if the Court have the opportunity, as it would have, by a demurrer to evidence, of taking the case from the jury before-hand, it is better it should do so. The truth is, that if there is no case proved, there is nothing for the jury to try.

In this State, where the Courts never charge the jury upon the law of the case, unless called upon to do so, and then only in reference to distinct questions, raised by counsel, and submitted upon prayers in writing, trial by jury is more precarious, and wild and startling verdicts of more frequent occurrence, than in those States where the jury, as a matter of right, have the advice and assistance of the Court, upon the whole law of every case submitted to them. There is no reason why a party should be compelled to expose his cause to these hazards, when the law, all the facts being admitted, is clearly with him.

It seems to be supposed by some, that a demurrer to evidence is an encroachment upon the rights of juries, but it is not perceived that juries have any rights in the case. It is their duty, when a cause is submitted to them, to try it. But they have no *right* to try it, until it is submitted to them.

The almost universal mode of taking up a case from the inferior Courts of law, to the Court of Appeals in this State, is by bills of exceptions, in the preparation of which, it is usual to reduce to writing, all the testimony adduced on both sides, and then to raise the questions of law for the decision of the Court, by prayers based upon the evidence thus detailed. With this mode of practice, a demurrer to evidence would harmonize perfectly. The bill of exceptions, for example, sets out the testimony, and then prays the Court to instruct the jury, should they believe that certain facts

are established by this testimony, that their verdict must be for the plaintiff or defendant, as the case may be. The Court may grant or reject this prayer, but in either case, the jury are left in the undisturbed cognizance of the facts. They may admit the law as the Court has declared it, but negative the facts upon which the opinion of the Court was based.

But the Court may, and in practice very often does reject just such a prayer as the one supposed, upon the ground, that the evidence adduced is not legally sufficient to warrant the jury in finding the state of facts assumed, as the basis of the prayer. Now this, when it occurs, is to all purposes as far as it goes, a demurrer to evidence. The Court looks at the evidence, weighs and compares it, and declares distinctly, that there is no proof in the case, of which the jury are authorized to take cognizance, and the case is taken from the jury because the party has utterly failed in his proof.

The difference between a demurrer to evidence, and the rule of practice alluded to, is, that the demurrer covers the whole case, whatever the character of the proof may be, whether strong and conclusive, or the contrary, and proposes to take the case from the jury, upon the ground that the law upon the facts proved, is against the party; while under the rule the case is not permitted to go to the jury, on account of a failure in the measure and quantity of proof. The theory of the demurrer is, that the jury are not to find the facts, because the facts are all admitted; and the Court, as in the case of a special verdict or case stated, is fully competent to announce the legal result of those facts. The theory of the rule of practice is, that no case has been proved, and that the Court has the authority to say so.

The practice of taking cases to the Court of Appeals, exclusively upon bills of exceptions, and limiting the scope of revision to the points appearing by the record to have been raised and decided below, is liable to serious objection; and in the proper place a procedure of greater simplicity, affording an unrestricted opportunity in the Appellate Court for a review of all the questions of law involved in the controversy, and without giving to either party the power of defeating justice by resorting to frivolous objections, will be recommended.

It is proper to say, that a demurrer to evidence is inadmissible in practice, without a full admission, by the party demurring, of all the facts, as well as all fair inferences from the facts. The Court

cannot investigate and settle disputed facts; nor can the opposite party be deprived of any presumptions which he might hope to persuade the jury to draw from his proofs. The party demurring must therefore submit to the disadvantage of making all these admissions. But if he is willing to make them, there is no reason why he should not be permitted to do so.

14. If the Court shall overrule the demurrer, the case shall be tried before a jury, upon such issues as may be joined between the parties. But the questions of law raised by the demurrer shall be considered as reserved for revision by the Court of Appeals, should the cause be taken to that Court.

15. A person engaged as counsel in a case, who shall be examined as a witness therein on behalf of his own client, shall thereupon retire from such case and cease to take any part therein as counsel. But this rule is not to preclude counsel trying a cause, from proving facts incidental to the trial, such as the loss of a paper, service of notice to produce, the handwriting to a paper, and the like.

It is now pretty generally regarded as exceedingly unbecoming in a person engaged as counsel in the trial of a cause, to appear as a witness in behalf of his own client, especially if the object of his testimony be to detail conversations between himself and the opposite party; and in a recent case in England a new trial was granted for this reason alone. Men are usually restrained by the obvious impropriety of appearing in the same trial in the double capacity of advocate and witness, from coming to the book until the necessities of the cause become very urgent. When, however, the position of the case is seen to be critical, and the chances of success are about equally balanced—when anxiety on both sides is wrought up to the highest pitch, and each party is straining every nerve for the victory, then it is that some one of the counsel steps upon the stand, to throw the weight of his oath into his client's side of the scale; and it is precisely then that no man ought to trust himself to swear at all. To hear his position in the cause, and the powerful influ-

ences under which he swears, commented upon, and his right to be believed compared with that of other witnesses of high character, is an ordeal which no man of proper delicacy would willingly encounter, and the spectacle never occurs without serious damage to the character of the profession.

Such testimony is at best but one-sided and without even the semblance of mutuality; for a person engaged as counsel, never chooses to be sworn as a witness, unless when his evidence is in favor of his own client. If it happen to be the other way, he takes good care to keep it to himself.

In all such cases the party should refrain either from being counsel or from being a witness. If it be known before-hand that his evidence is likely to be important, the dignified and honorable course is, to stand aloof from the trial, and have no concern with it as counsel, and his testimony is then given without bias or partiality of any kind. He keeps back nothing lest it may affect injuriously the side he favors, but discloses all he knows, let it affect whom it may. If, however, the importance of his evidence is only discovered during the progress of the trial, let him retire from the case the moment he is called to the stand.

16. Whenever testimony taken under a commission is suppressed, or the commission or return thereof set aside, for any irregularity or omission in the commission or the proceedings under it, the Court may, in its discretion, continue the cause, and if necessary may withdraw a juror for the purpose.

If a witness who is summoned in a case fail to attend, a continuance is granted as a matter of right, to give the party an opportunity of procuring his attendance at the next Court, upon his showing to the Court, by his own oath, that the facts he expects to prove by the absent witness, are material and competent evidence, and that the failure of the witness to attend, was not owing to his own negligence. In the case of a commission to take testimony, however, the practice is different. The only opportunity afforded the party, for testing the validity of the commission, or the regularity of the proceedings under it, and of course for determining whether the evidence returned is to be heard by the jury or not, is after the jury are sworn. The Court cannot look at the commission and

return, and pass upon their validity, before the jury are empannelled, and if when the testimony is offered, some frivolous objection is made to it, and the objection is sustained by the Court, and the whole of the testimony taken under the commission, suppressed, no continuance can then be had, and the party is compelled to proceed with the trial, under the disadvantage, it may be, of having the essential proof of his case shut out. And this always happens, when the party's diligence in procuring his testimony, is established beyond all doubt by the fact, that his commission is returned, and his testimony actually in Court, and when the importance of the testimony can be seen by an inspection of the return. Under the same circumstances, therefore, a party is entitled to his continuance, if his cause is to be proved by witnesses attending in person, but *is not* so entitled, if his proof is by testimony taken under a commission. The above rule will, it is believed, place the party upon the same footing in the one case, as in the other.

17. A commission to take testimony, may be returned under the hand of the commissioner, and may be directed to the Court, or Clerk of the Court issuing the same, and if the testimony shall appear to have been fairly and fully written down, no formal defects or omissions in the caption, or other parts of the return, nor in any of the proceedings, under the commission, shall vitiate the proceedings or return.

Until the reign of William IV., there was no power *at law* in England to compel consent to a commission, or to the examination of witnesses upon interrogations, though the Court could put off the trial, at the instance of the defendant, if the plaintiff would not consent, and if the defendant refused, the Court would not allow him to sign judgment as in case of non-suit. The only mode of obtaining the desired testimony in such case was by an expensive proceeding in Chancery.

In Maryland, the power to issue a commission to take testimony, was conferred upon the Courts of law, as far back as 1773. The Courts of the State, however, cannot be accused of any disposition to favor dangerous innovations in the law; for they have invariably, upon the slightest technicalities, and after the jury have been sworn, suppressed entire commissions, containing frequently, the

whole proof on one side of the cause, and leaving the controversy to be decided upon the uncontradicted and unexplained proofs of the other side. The party thus condemned without a hearing, and perhaps soundly rated for what his testimony, if heard, would have fully justified, would no doubt carry home with him a very exalted opinion of the venerable maxims of the law.

A curious instance of the hypertechnical propensities of our Courts, is to be found on this very subject, of commissions to take testimony. The act of 1773 above alluded to, prescribes no form of proceeding under these commissions, but simply declares, that the Courts of law shall be governed by the rules in force in the High Court of Chancery upon that subject. Now the High Court of Chancery, of Maryland, derived its practice from the English Chancery. But the practice in England has been to examine witnesses under a commission in secret. The witnesses are taken into a private room, either before examiners in London, or before commissioners, if in the country, when the interrogations are propounded, and the answers written down at length. When all the testimony is taken, the depositions are engrossed in skins of parchment, by the Clerks, who have been sworn to secrecy. After which the commission, interrogations and testimony, are folded up so that no part of the writing can be seen, and tied up with tape, at the crossings of which the commissioners *sign their names and set their seals.* The package thus closed and sealed, is returned to the six Clerk's office, where it remains until an order of publication passes, when the seals are broken, and the contents of the depositions are made known to the parties to this suit.

It is evident, therefore, that the words in the commission, authorizing the commissioner to take the testimony, and directing him when taken, to send it to the Chancery Court, "closed up under his seal," mean nothing more than that the envelope shall be well secured with wafers or sealing wax. Yet, in the State of Maryland, where the examinations are conducted in public, and where the parties and their solicitors always attend to take part in them, the commissioner is directed to make his return under his hand and seal, as if he were executing a Deed, and the Court will not be satisfied unless the commissioner has added a circumflex to his name in the inside of the envelope, or signed his name on the outside of the package, adopting the wafer or sealing wax as his seal.

The extreme technicality of the practice in this instance, is the

more ridiculous, that the publicity of the examinations with us, renders the mandate to return the commission, closed under seal, altogether inapplicable and unmeaning, and even if the same secrecy were required here as in England, a mere seal to the man's name in the inside of the cover, would be but a sorry contrivance, to prevent the depositions from being seen and read, before publication.

18. Upon the return of a commission to take testimony, the Court, if in session, or the Judge, out of term-time, may remand the commission to the commissioner, to correct errors, or supply omissions, and if the commission is not then returned in time for the trial, the cause may, at the discretion of the Court be continued.

19. The fact which a witness swore to on a former trial, may be proved in any subsequent trial of the same case, between the same parties, or their privies, provided such witness be dead, or gone to parts unknown, or if the residence of the witness be known, provided he evades the process of the Court, and refuses to testify, or answer interrogatories.

20. When the testimony of the witness in the former trial, was of the declarations or admissions of either of the parties to the suit, or their privies, or of conversations between the parties, the testimony of what such witness swore to, must be confined to his very words.

The propriety of this rule is believed to be obvious. The language of parties, or their mere words, must always depend upon "the uncertain testimony of slippery memory." They are liable to be misapprehended, or their testimony, even if rightly understood, to be forgotten. But when they come to us at second-hand, or consist of what one man remembers another man declared, that a third man said, the reasons for distrust and caution are greatly enhanced. The chances that mistake or misapprehension may have intervened, are just doubled. Still the evidence of the first witness is, and

ought to be admissible, and it would not do to say, that the party should lose his case, and all the valuable rights involved in it, by the accident of the death, removal, or wilful absence of his witness. The medium prescribed by the above rule, is believed to be the just one. If he can prove the words of the witness, in the former trial, let him do so, and let the jury judge of them in connexion with the circumstances of the case—if he cannot, the testimony ought to be excluded.

21. The record of the judgment, verdict, or determination, upon the merits in a former trial of the same right, fact, or question, between the same parties, and when the object of the second suit, is to litigate again, the right, fact or question so decided, shall be conclusive evidence of all matters put in issue, and tried in the former suit.

22. It shall not be necessary in any case, to plead an estoppel, but the matter of the estoppel may be given in evidence.

23. When the issue or matter to be tried in the second suit, is not the same as that already tried and decided in the first suit, but collateral in whole, or in part thereto, the record of such former determination, may be evidence, though not conclusive evidence between the parties.

24. Recitals in deeds and other writings, shall not be conclusive, but only prima facie evidence of the things recited, and no person shall be estopped by any such recitals to prove the truth.

25. The indorsement by the Clerk on the back of a deed or other instrument of writing, of the time it was received to be recorded, shall be evidence of such time, as well as such receipt, and the copy from the record book of the usual entry of such time and

receipt, shall be evidence both of the receipt and the time, in like manner as the original indorsement.

26. A judgment of a Court of another State shall have the same effect as evidence in this State, as in the State where it was rendered. But the jurisdiction of the Court rendering such judgment, or of fraud or irregularity in obtaining it, shall be open for examination in the Courts of this State; and unless it shall appear from the record of such judgment that the defendant appeared to the suit and contested the claim, right, or demand, or that he had an opportunity of so doing, such judgment shall be deemed a nullity.

27. Private writings under seal, shall not be evidence of higher dignity, than the same writings would be without seal. Nor shall a seal import a consideration, nor operate to extinguish parol contracts or considerations—nor shall recitals in private writings under seal, have any effect beyond the effect of the same writings without seal. But nothing in this rule shall alter the law in respect to official seals, or in respect to conveyances of real estate.

The seal of the common law was an impression upon wax or wafer, or some other tenacious substance, capable of being impressed. In the Eastern States, sealing in the common law sense of it, is requisite to the validity of a deed, but in the Southern portions of the Union, a scroll or circle of ink, the shape being immaterial, is held to be a valid substitute for a seal. Chancellor Kent takes exception to this practice, and complains that it is destroying the character of seals, and in effect, abolishing them, and with them the definition of a deed or specialty, and all distinction between writings sealed and writings not sealed. (4 Com. 452.) And in this view of the matter, Maryland has sinned most deeply, for while most of the States in which the substitute is received in lieu of the impression upon wax, it is held to be necessary that the deed or contract should import upon its face that it is made under seal,

or contain some expression signifying an intention to adopt the scroll for the seal, yet in her Courts the scroll itself makes the deed. Her Courts in truth, in their irreverence for the "usages and records of all antiquity, sacred and profane," have gone so far as to hold, that a scroll to the name of one obligor, and no scroll to that of the other, is the deed of one and the simple contract of the other.

Maryland has perhaps gone further than any other State, to destroy the true character of seals, but the misfortune is, that her innovations have been in the wrong direction. She has elevated instruments virtually without seals, to the dignity of deeds and specialties, instead of bringing them down to the same level—that of a mere paper-writing. A contract reduced to writing, its terms and stipulations plainly stated in the language of the parties, is the best evidence of their intent and meaning. A seal adds no sanctity to such an instrument, which it does not possess without a seal. Who supposes that he is performing a more solemn act by adding to his name a scroll, or an impression upon wax if you will, than by signing his name without the affix? In reality, the seal is not in one case out of ten, the addition of the party, but of the scrivener, who prepares alike the instrument, the wax or wafers, or scrolls, leaving the party nothing to do but to sign his name in the right place.

Why then should the same instrument *with* a seal, require the lapse of twelve years to bar it by limitations, and *without* a seal, be barred by three years? Why should the general issue to the one be required to be pleaded on oath, and to the other be received without oath? Why should the sealed instrument extinguish all contracts not under seal, though made with equal solemnity, and upon considerations equally honest—a rule, which in its practical operation always disappoints the expectations and defeats the understandings of both parties to the instrument.

28. The inspection of a paper produced on notice, by the party requiring its production, shall not make the paper evidence, if it would not be evidence without such inspection.

The mere production of a paper upon notice to produce, does not make it evidence, unless the party calling for it inspects it, in which case it is made evidence for both parties. And the reason

given for the rule is, that it would be an unfair advantage to enable a party to pry into the affairs of his adversary, for the purpose of compelling him to furnish evidence against himself, without at the same time subjecting him to the risk of making whatever he inspects, evidence for both parties.

This is a singular mode of settling the moral conditions of a great rule of law. It is more like the game of chance, in which the party making a false move, is compelled to put up his forfeit. A party supposes that a paper in the possession of his adversary, may throw some light upon the matter in dispute, and he calls for the production of that paper. Why should his mere inspection of the paper when produced, make it evidence, if it would not be evidence without such inspection? Can the duty of the jury to find a just verdict, be affected by the party's reading or refusing to read a paper handed to him at the bar.

It must not be overlooked that the party who is required to produce the paper may do so or not, as he pleases. The only consequence of his refusing to produce is, that the other side become entitled by such refusal, to adduce secondary evidence of the contents of such paper. And if after such evidence is produced, the party notified to produce shall prefer that the paper itself shall go to the jury, rather than the evidence of its contents he adduces the paper voluntarily. If he considers that the paper would hurt him more than the evidence, he withholds the paper, and he forfeits nothing for taking these chances. The existing rule is therefore, at least wanting in mutuality.

29. An account made by a party, charging himself with certain items on one side, and discharging himself in whole or in part, by credits on the other, shall be received as a whole or not at all. If any part of the account be evidence, the whole shall be.

30. In actions for libel and slander, a plea of justification, if the defendant shall fail to establish it, shall not be of itself proof of the malice of the matter charged as defamatory, but the jury shall decide upon the whole case, whether such plea was, or was not, put in with malicious intent.

31. Where in actions for defamation the pleas of justification and not guilty are both put in, the defendant may prove any mitigating circumstances to reduce the damages, whether he succeed in proving the justification or not.

32. Proof that the matter charged as defamatory was reported or published by others, and especially if the defendant at the time of uttering the words, or as part of the libel, give the statement as upon the authority of others, may be received in mitigation of damages; and the jury shall decide upon the whole case, whether or not the defendant was actuated by malice.

33. Proof of prior reports, or declarations or publications of others, may be received in mitigation of damages, and such proof need not be confined to general character, but the specific reports, declarations or publications may be given in evidence.

34. In actions for defamation, the defendant may in mitigation of damages, prove the declarations or publications of the plaintiff concerning the defendant, and that whether such declarations or publications are actionable or not.

By the common law, anything tending to disprove malice, and even the truth of the charge itself, might be given in evidence under the general issue, in mitigation of damages; but this good old rule was abrogated by a decision of the twelve Judges, first announced in Underwood *vs.* Parks, 2 Strange, 1200; by which it was ruled, that *for the future*, the defendant in an action of slander, should not be permitted to prove the words *to be true*, but that the truth of the words should be pleaded. Another new rule engrafted upon this innovation soon followed, namely, that the putting a plea of justification on the record, was a re-publication of the slander, in itself *conclusive* evidence of malice, which necessarily

precluded the defendant from alleging a want of malice, or from showing any circumstances in mitigation of damages.

As might have been expected, the distinction between the character of the proof, admissible under the respective pleas of justification, and not guilty, soon came to be very embarrassing. Cases frequently arose in which the defendant from an imposing array of circumstances, or from reports current in the neighborhood, and generally believed to be true, or from the assurances of those in whom he had confidence, not only believed, but had good reason to believe the charge, when he uttered or published it to be true: but when sued for the defamation, what was he to do? He could not plead justification, because he had no knowledge, and never pretended to have any knowledge of the facts. Least of all could he prove them to be true. While under the general issue he was told, that he might give evidence to show that he believed the charge to be true, provided it had no tendency to prove it to be true, or in the language of Selden, J., in Follet *vs.* Jewett, Law Register for August, 1854, "he may, if he can, show that he believed it to be true, but cannot show that he had the slightest reason to believe it to be true. This is mockery."

Under the general issue, the defendant may give in evidence such facts and circumstances, as show a ground of suspicion of the truth of the matters spoken, not amounting to a justification, or proof of the plaintiff's guilt, in mitigation of damages, (6 G. & J. 413.) That is to say, he may show anything short of a justification which does not necessarily imply the proof of the charge, or tend to prove it true. 7 Com. 613. The distinction is so attenuated, as to amount to no distinction at all.

The Courts having once determined that the defendant should only be permitted to prove the truth of the charge, by way of a separate defence, and in justification, were certainly true to their own logic in refusing to receive evidence *tending* to prove the truth of the charge. But with the rule which deduced malice from the falsity of the charge, and the rule which permitted the plaintiff to superadd proof of express malice, and the rule refusing to allow any thing short of a justification to be spread upon the record, together with the rule prohibiting the defendant from pleading the absence of malice in mitigation with the still further rule which prevented him from giving it in evidence without being pleaded, all the benignity of the Courts seemed to be reserved for plaintiffs, and all their frowns for defendants, in actions for defamation.

The rule prohibiting the defendant from giving in evidence, either in mitigation of damages, or explanation of his conduct, the fact that the plaintiff had been in the habit of defaming his character, must be regarded as any thing but just and reasonable, and yet there are few rules of law more pertinaciously adhered to by the Courts. In a late case, the parties were engaged in a paper war of a most unsparing character, and the Court refused to permit a publication of the plaintiff of but a day or two before the appearance of the alleged libel, to go to the jury, the judge declaring that it had nothing to do with the case. Surely when a man by his own abusive language brings a libel or slander upon himself, the jury are entitled to know the fact.

The changes in the law of defamation here proposed, are intended to restore the good sense and simplicity of the common law, which has been sadly mutilated by the Courts. They have been adopted in substance in Massachusetts, act of 1826, ch. 107, in New York, Code, sec. 165, and in Maryland, the Courts have struggled, though with but partial success, to break through the trammels imposed upon them by a few early, but unwise decisions. See the cases of Davis *vs.* Griffith, 4 G. & J. 342, and Boteler *vs.* Bell, 1 Magruder, 173.

35. In actions for defamation, the defendant may prove in mitigation of damages, that subsequent to uttering the words or publishing the libel, he retracted the charge or imputation, or acknowledged he had been mistaken, or offered to apologize, or that the words were not spoken in earnest, or circumstances which induced him erroneously to make the charge, or he may show the general bad character of the plaintiff in respect to the matter imputed, and the jury shall allow to all such proof the weight to which they may think it entitled.

36. It shall be the privilege of every man to avoid his own deed or contract, by proving that at the time of making it, he was *non compos mentis*, greatly intoxicated, or from any cause, mentally incapable of exe-

cuting a valid deed or contract, and that whether the deed or contract was obtained from him by fraud or not.

If a man happen to be deprived of his reason, and during the period of his insanity, is made to sign a deed for the whole of his estate, he will not upon the return of his reason, be permitted to deny his deed, because the law has ordained that no man shall stultify himself.

By the common law, insanity was a sufficient plea to avoid a man's own bond, and there is a writ in the register, for the alienor to recover lands aliened by him during his insanity. But in the time of Edward III, a scruple began to arise whether a man should be permitted to blemish himself, by pleading his own insanity. And in the reign of Edward VI, the rule was solemnly adopted by the judges, that no man should be heard to stultify himself. What the law at the present day in England is, it is difficult to say. Mr. Justice Littledale held as clear law, that a deed, bond or specialty, may be avoided by the plea of insanity, while Lord Tenterden decided, that no man can be suffered to stultify himself, unless it can be shown that he was imposed upon in consequence of his imbecility, in which case it is submitted, the contract would be avoided on account of the fraud, and not of the lunacy.

37. In expounding a special verdict or case stated, the Court shall not be confined to the naked facts found or stated, but may draw such reasonable inferences therefrom, as may be necessary and proper in its judgment, to get at the facts intended by the parties. And defects in the statement or verdict may be aided by facts appearing elsewhere upon the record.

38. Either party shall be at liberty to exhibit to the jury diagrams for illustration.

39. Either party to a controversy pending in any of the Courts of this State, may take the testimony of a witness residing within this State, and out of the county in which the controversy is pending, before a

Justice of the Peace of the place or county in which the witness resides, or at any other place which may be agreed upon by the parties, upon giving twenty days notice to the opposite party or his counsel.—Provided, that if the opposite party or his counsel shall be present at the examination of the witness, all proof of notice shall be thereby dispensed with.

The reason why a commission cannot be sued out as of right, to take the testimony of a witness residing within the State is, that such witness may be summoned to testify in the cause, no matter where he may reside, if it be within the State. But in practice it is almost impossible to procure the attendance of a witness, residing in a distant county, and the power of the Court being inadequate to punish him for a contempt of its authority, the consequence is, that if the witness chooses to attend, the party gets the benefit of his testimony, otherwise he is compelled to go to trial without it. A suit against the distant Sheriff for not serving or returning the process, or against the witness for treating it with contempt, are remedies of little or no value to the suitor. What does a man in Somerset care for a summons from Allegany? And is it altogether reasonable to expect him to travel such a distance, at his own expense, to testify in a cause in which he has no interest? The particular mode provided for taking his evidence is not so important, as that the power of taking it should exist; for when it is known to the opposite party, that he can gain nothing by refusing his consent to some mode of taking the testimony, it will be almost as of course that it will be taken by agreement, either by commission or otherwise.

40. Upon the application of any party to a suit pending in any Court of law of this State, upon the oath of himself, or of some other person in his behalf, stating that books, papers, or writings, containing evidence which he is advised is material for him in the trial of the said suit, are in the possession or power of the opposite party, or of one or more of them, as the case may be, who, after notice and request, have re-

fused or neglected to deliver, or permit the same to be used as evidence, and stating moreover on oath as aforesaid, the contents of the said books, papers or writings, as nearly and with as much particularity, as the same can be ascertained or recollected; the Court shall thereupon lay a rule upon the party, to bring the said books, papers or writings into Court, by a certain day in the said rule to be named, and upon failure to comply with the said rule, the contents of the said books, papers or writings, so stated on oath, shall thereby become full proof of such contents, not to be contradicted or explained otherwise than by the production of the said books, papers or writings in Court. Provided, that if upon the production and inspection thereof, the Court shall be of opinion, that the said books, papers or writings, are not competent or admissible evidence, they shall be withdrawn, and not be received as evidence for either party. The party considering himself aggrieved, to have the right of appeal from such decision of the Court.

The Act of 1801, ch. 74, sec. 6, has not been found as useful in practice as it ought to be. The penalty for the failure to produce under that act, is a judgment of non-suit, if the books or papers are called for by the defendant, which is all right. But if they are called for by the plaintiff, and are not produced, he is entitled to a judgment by default against the defendant, and must then take out his writ of enquiry, and prove his damages before the jury, and *here* the books and papers may be as nccessary to him as at first, but the proceeding under the act is exhausted, and he has no means within the power of a Court of law, to compel their production. By that act also, the motion to compel the production of the books or papers, is required to be made "at the first Court after the appearance Court"—and if not made at that Court—neither before nor after it—the remedy under the act is gone. It is probable that the second Court was named, because it was the imparlance Court, and enabled the party by making his motion then, to be ready with

the evidence at the third or trial Court. But the imparlance Court being now abolished, the fitness of that portion of the arrangement has been destroyed. The act of 1801 also provides for the case of a bill of discovery, which is unnecessary. When such a bill is filed, the Court entertaining it, may prescribe the terms of the production and use of the papers.

41. A release of one joint obligor, promissor or contractor, or of one joint trespasser or wrong-doer, shall not operate to discharge the entire liability of the other parties jointly liable, but shall only discharge the liability of all to the extent of the aliquot portion of the party released, regard being had, in ascertaining such portion, to those only who are solvent.

A release of one joint contractor is a release of all, because the obligation or duty of each, is for the whole liability and for every part of it. It is therefore considered as but the result of legitimate reasoning, that the release of one party, shall be a discharge of the entire contract. And so it is held, that if a party release one, his remedy against all is gone.

The release also of one joint tort-feasor, operates in law as a release of all, though the reason for this is not so obvious as in the case of a joint contractor. But whether it be the case of a joint contract or a joint wrong, the release of one should not enure to the benefit of all, nor of any beyond those named in it. A party otherwise disposed to agree with his adversary, should not be restrained from releasing one or more, by the fear that the liability of all the rest would thereby be discharged. As on the other hand, each of the parties liable, should be permitted to make his own peace separately, if he can do so.

The discharge of all the parties jointly liable, by the release of one of them, never occurs, that it does not operate beyond the intention of the party making it. This is apparent from the fact, that he has released one, and has not released all. It is beyond doubt moreover, that had he known that by releasing one, he discharged all, he never would have released any. It is believed moreover, that no instance of the release of one party, and the discharge of all, ever occurs, that it does not operate as a surprise upon all, affected either immediately or consequentially, by the

release. The party making the release, is surprised that its effect should go so far beyond his intention, and the parties not named in it, are surprised at their sudden discharge from all liability, without any trouble, agency or expense to themselves.

The law in reference to joint wrong-doers is more anomalous and unsatisfactory even, than it is as applied to joint contractors. A party once bound as a joint tort-feasor, who is perfectly solvent and able alone to meet the damage, is in great danger in many cases of being compelled to pay for all. If a judgment have gone against all, himself included, he may from the absence of the others, or from their having no property within the bailiwick, or from the caprice or ill-will of the officer in levying the execution upon his property, and not upon that of the others, be forced to pay the whole amount. And if so, he cannot call upon the others to contribute, for the law does not allow of contribution among wrong-doers.

42. A plain mistake in a written instrument, whether the same be under seal or not, may be shown in a Court of law, and such instrument corrected, and effect given thereto by the jury or the Court, as the case may be, according to the true intention of the parties. Provided, that the subject-matter of the mistake be such, as that the Court or jury may give effect to the instrument in its corrected form, by a general verdict or judgment.

Two persons, the principal and his surety, executed their bond to a third, for "three hundred and ten"—omitting the word "dollars" by mistake. Suit was brought in the County Court, upon the supposition, that the omitted word might be supplied at law, but the Court said "No, we have no power to correct the mistake. You must go to a Court of Equity." He then filed his bill, praying that the bond might be corrected, and the defendant decreed to pay the money. A decree was passed, according to the prayer of the bill, thereby sustaining the principle, that Equity alone, had power to correct such a mistake. (Newcomer and another *vs.* Kline, 11 G. & J. 457.)

From the different constitution of Courts of law and of equity, it is not doubted that the jurisdiction over mistakes in deeds and contracts, is properly confined to Courts of Equity. But in refer-

ence to the simple cases comprised under the proposed rule, there is no reason why the Courts of Equity should be troubled with them, still less why the party should be put to the delay and expense of filing his bill for relief, in a case in every other respect proper for adjudication in a Court of Law. The rule contemplates cases about which there could be no difficulty in any Court; and which, therefore, would be as appropriate to one jurisdiction as another.

The rule proposed, limited as it is, to such mistakes as may be corrected without specific relief; and to cases in which the correction of the mistake will be included in a general verdict or judgment, will be confined in its operation in the Courts of Law, within safe and proper boundaries, leaving the Courts of Equity in possession of all that is substantial and necessary in their jurisdiction in reference to mistakes. If a deed forming a link in a chain of title is to be reformed by the execution of a new deed, or if a contract is first to be corrected and then a specific execution of it decreed, or if in correcting the mistake the Court is called upon for relief, in its character prospective, and in the meantime parties to be restrained by injunction, recourse must be had to a Court of Equity, as being in such cases alone competent to afford adequate relief. But if a suit at law is for the recovery of a sum of money, or of a tract of land, or a specific chattel is to be recovered, and the correction of a mistake in any instrument offered in evidence by either party, can only effect the verdict or judgment by varying the amount recovered, or by determining whether the party shall recover or not, a Court of Law is just as competent to correct the mistake as a Court of Equity.

43. The Court shall have power in its discretion in all cases where testimony is objected to, to permit the testimony, notwithstanding the objection, to go to the jury, reserving to the party objecting, the right to move for a new trial, upon the ground that the evidence was incompetent or inadmissible.

This rule prevails in England and many of the States of the Union, and is believed to be a very good one. It affords the Court and the counsel an opportunity to examine the law with care, and saves an appeal with the attendant delay and costs, in all cases in

which the Court shall grant the new trial, as well as in those cases where upon examination, the party be satisfied that the new trial has been rightfully refused.

The rule proposes an important innovation in the practice of our Courts, and should be maturely considered before it is adopted. But from the best consideration the Commissioners have been able to give it, they think it ought to be adopted. Being left in the discretion of the Court, it will of course, be sparingly applied, if found not to work well in practice.

THE LAW OF LIMITATIONS.

THE plea of limitations is held to belong to the remedy and not to the right, for the reason, that if a party cannot recover, because a certain time has elapsed since his cause of action arose, it is, that his remedy is barred, and not that his right is gone. Limitations appertain therefore, to the practice of the Courts, and there is, perhaps, no branch of the practice in Maryland, in a more confused and unsatisfactory condition, or that more imperatively requires to be carefully revised and re-cast.

1. The right to recover in ejectment, shall be barred by an adversary possession of twenty years, before the commencement of the suit, and in ejectment, limitations need not be pleaded.

What shall constitute an adversary possession, will be fully explained, when we come to treat of the action of ejectment. In the meantime it is proper to observe, that ejectment is not among the actions enumerated in the statute 21, Jac. I ch. 16. But as this form of remedy depends upon the right of entry, the suit cannot be maintained after that right is gone, and it is in this way that the statute operates to bar the remedy, and that the plea of limitations becomes unnecessary. The plaintiff must have a right of entry, when his action is brought, otherwise he becomes a trespasser when he enters to make the lease to try the right. To show that he had such right, he must prove a possession in his lessor within twenty years.

If however, the fictions in ejectment, as is expected, shall be abolished, this reasoning may become inapplicable. It is therefore deemed advisable, to provide a limitation for the action of ejectment, and to provide also, that limitations as heretofore, need not be pleaded. The *right of entry* is therefore not named in the

above rule, which is purposely couched in the most simple and inartificial language. The rule it is believed, is so framed, as to preserve in every respect, the old principles of title, and at the same time, to quiet the possessions of those, who have held lands, under a claim of title for twenty years.

2. All actions upon covenants securing or affecting the titles to, or incumbrances upon lands, of which there were breaches at the time of the making such covenants, shall be barred by a lapse of twelve years from the time of the action accrued.

This rule will apply to covenants of seizin, of good right to convey, and against incumbrances, which are personal covenants not running with the land, or passing to the assignee. For if it turn out that the party had no seizin or right to convey, or incumbrances at the time were existing against the land, there is a breach as soon as the deed is executed. The lapse of time required to create the bar, is the same as that prescribed by the existing law. There seems to be some little discrepancy in the fact, that twenty years possession is required to bar an outstanding title, while in case of eviction, the remedy over, is gone after a lapse of twelve years. Such however, has always been the law of Maryland, and as no inconvenience seems to have arisen from it, the Commissioners have seen no good reason to alter it.

3. All actions upon covenants of warranty, or other covenants assuring the titles to lands, and which run with the land, shall be barred by the lapse of twelve years, from the eviction of the grantee, or of those claiming under him.

4. No judgment, recognizance, nor other debt of record, shall be good and pleadable, nor admitted in evidence, after the debt, or thing in action, hath been above twelve years standing, and where the judgment, recognizance or debt of record, is payable by instalments, the limitation shall be twelve years as to each instalment.

5. All proceedings to enforce the payment of money due on mortgage, shall be barred by a lapse of twelve years.

There is no statutory bar in Maryland to proceedings upon a mortgage, lapse of time only operating to create a presumption of payment, release or other satisfaction, and twenty years continued acquiescence by the mortgagee, being required to raise such presumption. But a mortgage is after all, only a security for a debt, and as debts of the highest dignity are barred by a lapse of twelve years, there seems to be no reason why the security should last so much longer than the debt itself.

6. All actions upon testamentary and administration bonds, upon the bonds of guardians, the official bonds of clerks, registers and other officers, except sheriffs, shall be barred by the lapse of twelve years from the time the cause of action accrued.

Testamentary and administration bonds, and those of guardians are barred by the lapse of twelve years *from the passing of such bonds;* all other bonds to be affected by this section, are barred after the debt or thing in action, has been more than twelve years standing. A new rule is therefore introduced only in reference to the bonds of executors, administrators and guardians. In regard to these, it is believed the change will be a wise one. When an executor or administrator settles an account with the Orphans' Court, and declares a dividend or distribution, the cause of action will accrue to the creditor or distributee, from the date of the account, and the twelve years be reckoned from that period, instead of from the passing of the bond under the present rule.

The same rule will prevail as to the bonds of guardians. These bonds will run longer against the parties and their sureties, than under the existing law, but they will be compensated for the change, if the Legislature shall agree with the Commissioners, in the propriety of repealing the savings in favor of infants, *feme coverts* and others, as provided by existing statutes.

7. All the savings or exceptions in favor of persons under the age of twenty-one years, married women, insane persons, and persons imprisoned or beyond

seas, contained in the various acts of limitation of this State, and in the statute of 21 James I, chapter 16, are repealed.

This section proposes a very important change in this branch of the law, and the Commissioners beg leave to submit their views in reference to it, somewhat at length. The saving clauses of the different statutes now in force are, 1. Of the stat. 21, Jac. I, c. 16, which, after prescribing a limitation of twenty years to a right of entry, reserves to persons under the age of twenty one years, *femes covert*, persons *non compos mentis*, imprisoned or beyond seas, the right to sue within ten years after coming of full age, discoverture, coming of sound mind, enlargement out of prison, coming into the State or death. 2. Of the act of 1715, chap. 23, which after prescribing the limitations of one and three years, to the respective classes of actions, enumerated in the second section, reserves to all persons under the disabilities mentioned in the statute of James, the right to sue within the respective times therein limited, after the disabilities removed. The sixth section of the same act, prescribes a limitation of twelve years to bonds, judgments, and other specialties, the bar to attach after the debt or thing in action *has been more than twelve years standing*, with a reservation of a right to sue within five years after the impediments removed. 3. The act of 1729, ch. 24, in reference to testamentary and administration bonds, makes the limitation twelve years *after the passing of such bonds*, with a saving of six years after impediments removed.

There is no act prescribing in terms, a limitation to the bonds of guardians, but the act of 1798, chap. 101, sub chap. 12, sec. 4, declares, that the bond given by a guardian, shall be recorded and shall be subject to be put in suit, and be, in all respects, on a footing with the bond of an executor or administrator, and it has been held, that this language made the limitation prescribed for the bonds given by executors and administrators, applicable to that of a guardian. 4. The act of 1729, ch. 25, makes five years the limitation to a sheriff's bond, the time to be reckoned *from the passing thereof*, with a saving of five years after impediments removed. 5. By the act of 1765, ch. 12, where the debtor is out of this State, limitations not to run against the creditor until the return of the debtor into the State.

It is proposed that all these saving clauses shall be repealed, and that no distinction be made in favor of infants, married women, insane persons, persons beyond seas, which means out of the State, or persons imprisoned.

If a perfect right to sue in their own names, and without technical obstruction of any kind, be given to infants, *femes covert*, and persons *non compos*, they will require no more indulgence in respect to them, than other persons—certainly no longer indulgence than the period required to create the statutory bar. Twenty years to bring an ejectment, twelve years to sue upon an official bond, and six years as to common contracts or evidences of debt, furnish opportunities sufficient for all persons, under all circumstances, to assert their rights. Without any savings, these periods are long enough for the married woman, her husband and friends—the infant, his guardian and relatives—the *non compos* with his trustee, to think over their legal rights, and make up their minds to put a suit upon the docket. But with the savings in favor of these persons under existing statutes, the time consumed in asserting their claims, is out of all reason tardy and vexatious. A life-time may pass before the liability to be harrassed with a suit is extinct.

A married woman may live half a century, after her cause of action arises—the same may be the case with the *non compos*, and even then, six or ten years are to be added to these long and weary delays. If an infant be one year old at the time his right accrues, twenty years must elapse, or it may be thirty years, before the right is gone.

It is a strong objection to these savings, that their object is not consistent with itself. If an infant die at the age of twenty, leaving children, they are not to receive the same indulgence as their parent, because by the construction put upon these statutes by the Courts, one disability is not to be added to another. But is not infancy the same in its helplessness, and in its need of protection, whether it belong to this generation or the one which precedes it? Is the infant father to be entitled to the indulgence, simply because he is an infant, and the same indulgence to be denied to his son, an infant also? If the rule be good to any extent, it ought to be good to the whole extent.

The rule however, which forbids the cumulation of disabilities, is as a rule of construction, founded on the reason, that to pile one disability upon another, is carrying the indulgence too far. But

the concession that the rule may be carried too far, and that the allowance of the privilege to one infant, which had been previously allowed to another, is an instance of carrying it too far, is all the argument requires, to prove that the whole thing is wrong in principle. For apart from the consideration already adverted to, that if justice demands the immunity for one infant, justice cannot deny it, under similar circumstances to another, it is plain that if one infant can do without it, another can also do without it. We see it every day, that those who come to ask this privilege in the second degree, are told by the law, to go and prosecute their rights, within the time originally limited, or forfeit them. We hear of no inconvenience—no injustice worked by the discrimination. And if one infant can get along without this extraordinary immunity, all can do without it.

The same reasoning applies equally to coverture and insanity of mind. If a second disability supervening before the removal of the first, is to be disallowed, why not disallow the first also?

These savings or special privileges, which the law grants to particular classes of persons, work injustice, it is believed in all cases, where they affect the interests of persons beyond the immediate parties, and it is a sound rule in morals, that justice to one party, ought never to be granted, at the expense of injustice to another. There is one class of cases, where the consequences of these immunities fall with peculiar harshness, not to say iniquity, upon the rights of innocent persons, and that is, where the liability ultimately reaches a surety. For while the surety, who in an evil hour put his name to a bond, is unconsciously getting together the means for the subsistence, of his own family, his principal it may be, is wasting his substance, or dying, it is distributed among his children, and scattered to the four winds. Or the surety himself dies, and the property left for *his* children, is taken from them to make good the indulgence which the law in a spirit of ill-judged kindness, has bestowed upon the children of others.

The effect of these savings is the *production* of stale demands, coming frequently to light when least expected, and falling upon the innocent and the helpless, at a time when they are least able to bear them. But this is not the worst of the evil. Events fade from the memory of witnesses—they pass from the minds of the parties themselves. Receipts are lost, vouchers mislaid, transactions forgotten. And in many instances, in addition to the hardship of seizing upon the estate of one man, to make good the

delinquency of another man, is to be added the iniquity of seizing it, to make good what has already been accounted for.

In reference to the disability of *imprisonment*, there is practically at the present day, no necessity for it. It was copied into the act of 1715, from the statute of James, itself a copy in this respect, of the statute 32, Henry VIII, and though there may have been originally some good reason for such an immunity, in behalf of persons imprisoned, there is no such reason now. Very few cases are to be found in the reports of its practical allowance, and this provision of the statute may be regarded as inoperative, from their being no cases for it to act upon.

The savings in behalf of persons beyond "seas," contained in the acts of Assembly above enumerated, were repealed by the act of 1818, ch. 216, while those contained in the statute of James, probably from inadvertence, were left untouched by the act of 1818. As these, however, relate exclusively to the right of entry into lands, the result is, that the only savings now existing in Maryland, in favor of persons "beyond seas," are those of persons residing out of this State, and claiming titles to lands within it.

"Beyond seas," in some of the States, has been construed to mean "out of the United States," but the more general interpretation is "out of the State." The term "beyond seas," is a quaint and antiquated expression, and requires that some one should tell us what it means. In these days, however, of travel by steam, and of telegraphic communication, persons residing in different hemispheres, are in fact nearer together, than those living in remote counties of the same State were fifty years ago. And persons residing out of the State, or "beyond seas," are in truth entitled to no more indulgence than those living within its borders, or even within the same town or county.

Upon the whole it may be remarked, that there is no distinction between a voluntary and an involuntary disability, and that a person laboring under either, may bring his suit, and assert his right in Court, none of the statutes having ever been construed to prevent it. It is submitted therefore, that all savings ought to be abrogated.

8. If a party liable to an action be out of the State, at the time of the action accrued, limitations shall not begin to run in his favor until after his return to the

State,—provided the plaintiff have notice of such return, and a full opportunity to bring the suit.

9. Trusts shall not be exempted from the bar of limitations, whether the controversy be between cestui que trust and trustee or not, or whether the remedy be at law or in equity; but all suits to enforce the performance of a trust, in whatever Court the same may be prosecuted, or whoever may be the parties thereto, shall be barred by a lapse of twelve years from the time the right to commence proceedings accrued.

To exempt a trust from the bar of the statute, three things must concur. 1. It must be a direct trust. 2. It must be of the kind belonging exclusively to the cognizance of equity. 3. The question must arise between trustee and *cestui que trust.*

The most common example of a direct trust, is the case of an executor or administrator, or guardian. Yet we have seen that the act of 1729, ch. 24, makes the lapse of twelve years from the passing of their bonds, a protection against suit upon them.

Another example is the case of bankruptcy. The statute does not run against the creditor of a bankrupt, the commission constituting a trust for all creditors. The assignees are the trustees.

The Court of Appeals have held, that whether a trust be of such a character as to exempt it from the plea of limitations, depends upon the question, whether the fund can be recovered by action in a Court of law. 3 Gill, 166. Now in all the cases alluded to—in that of the executor or administrator—in that of the guardian, and the insolvent's trustee, there is a remedy at law upon the bond, and limitations is a bar to that remedy.

Limitations is a bar to a suit on the bond of a trustee, to sell the lands of a deceased person. 3 H. & J. 538. Also to the bond of a legatee to an executor to refund. 6 H. & J. 293.

It appears, therefore, that in regard to all those trusts which gave origin to the rule exempting trusts from the bar of limitations, the legislation of this State, for more than a hundred years, had subjected those very trusts to the bar. The original act of 1715, ch. 23, made limitations a full defence to all bonds or other specialties,

and there being no enumerated exceptions, the cases in which bonds were required by law, to secure the faithful performance of trusts were necessarily included. But a doubt having arisen whether the Legislature intended to make mere lapse of time, a bar to all remedy, upon the bonds of executors and administrators, being cases of trusts, the act of 1729, ch. 24, was passed for the purpose of removing that doubt, and it declared that the original act did cover those, as well as other bonds. And at this day, it is conceived that all bonds, by whomsoever given, except bonds to the State, for debts or duties due to the State, are within the bar of limitations, and that the rule which keeps alive the remedy against a trustee, for all coming time, has been substantially repudiated in Maryland.

The rule excepting trusts from the operation of the statute, is merely technical. It is hard to perceive the good sense of it. A party having a claim, for the recovery of which, his remedy is exclusively in equity, is not, therefore, to be exempted from the observance of that reasonable diligence, which the law wisely exacts from all those whose claims are legal and cognizable at law. And yet this is the bald and naked reason given for the rule. Surely a remedy in Chancery is still a remedy, and the neglect to pursue it, is neglect still—certainly as much so as where the remedy is at law. Besides, the implication of the rights of innocent third persons, having no notice of a sleeping demand, withheld for a long period of time, which always works injustice, and is one of the great considerations upon which the policy of limitations is founded, is just as apt to occur in the one case as in the other, and perhaps more so.

10. All remedy for rent, whether by distress or action, shall be barred by a lapse of six years, from the time the rent became in arrear.

The existing remedies for rent, are by action of debt, or covenant, or assumpsit for use and occupation, or by distress. Debt and covenant are barred by the lapse of twelve years, assumpsit by three years, but against the remedy by distress, limitations do not run at all. 1 Gill, 57.

By the statute 8 Ann, ch. 14, a distress may be taken within six months after the expiration of the term, provided the same tenant is in possession, and the landlord's title continues. The law is

understood to be this, that a distress lies at any time during the term, and for six months thereafter. So that in the case of a term for twenty years, a distress may be levied during the last year of the term, and for six months afterwards, for rent in arrear of the first year. If, however, an execution be levied upon the goods of the tenant, at the suit of a stranger, property to answer one year's rent only, is to be left on the premises, for the benefit of the landlord.

In some of the States, the right to distrain for rent has been abolished, as savoring too much of feudal severity and dependence. The above rule, however, does not propose to interfere with the rights or liabilities of landlord and tenant, except so far as the right to recover rent in any form, may be affected by time.

11. All actions upon promissory notes, single bills, bonds, or other contracts in writing, for the payment of money, whether the same be under seal or not, shall be barred by a lapse of six years, from the time of action accrued. And when a contract is for the payment of money by instalments, the limitation shall be six years as to each instalment.

This rule proposes to abrogate the distinction between a sealed and an unsealed instrument, for the payment of money, so far as they are effected by limitations. It changes the old rule by adding three years to the limitation allowed upon a simple contract debt, and takes off six years from that allowed upon a money bond, or other specialty, and prescribes one rule for all. The new rule supposes, that if six years be time enough to allow a party for prosecuting his remedy upon a simple contract, twelve years is more than sufficient for a suit upon a paper, differing in nothing from the other, except that there is a scrawl to it. It assumes that if a party be chargeable with negligence, in delaying suit beyond six years upon the one, no reason exists why he may delay for any period short of twelve years, without the imputation of negligence upon the other. It substitutes one rule in the place of two, and to simplify the law, is to improve it, even when there is no good reason, as there happens to be in this case, to recommend the change.

12. All contracts of indemnity, whether under seal or not, shall be barred by a lapse of six years, from the time of the damnification.

13. All actions or proceedings to obtain contribution as between co-sureties, shall be barred by a lapse of six years, from the time of the payment by the party seeking contribution, but no co-surety shall be rendered liable to a claim already barred by limitations, by the voluntary payment of the claim, so barred by another co-surety.

14. All actions upon verbal contracts or promises, book-debt, or account—all actions of replevin—all actions for trespasses to real property—all actions against sheriffs or other officers, for false returns or other malfeasances, when the suit is not upon the official bond, shall be barred by a lapse of three years.

In the case of French *vs.* O'Neal, 4 H. & McH. 401, it was held, that limitations could not be pleaded to an action against a sheriff, for an escape. And the Court of Appeals at Dec. Term, 1851, decided upon the authority of that case, with strong doubts of its correctness, however, as a construction of the act of 1715, that limitations were not a good plea to an action against a sheriff for a false return. It certainly never was intended by the Legislature, that sheriffs should be placed without the pale of all limitations; for by the act of 1729, ch. 25, suits upon sheriff's bonds are limited to five years, instead of twelve, the period prescribed to actions upon all other bonds. The rule established by these decisions is the more anomalous in practice, that, when the choice is given to the party, he may, by sueing on the official bond of the officer, allow him the protection of the statute, but may deny him that protection by electing to sue him in case. It is an objection to the rule, if there were no other, that it is with the plaintiff to say, whether the defendant is to have such protection or not.

It will be seen, moreover, that a distinction is made between contracts and promises in writing, and those which are merely

verbal, making six years the limitation to the one, and three years to the other. The considerations which recommend this distinction are obvious. To suffer solemn contracts to rest exclusively upon the recollection of witnesses, is a very loose way of doing business. It is not an uncommon spectacle, where such a case becomes a matter of contest in Court, to see one set of witnesses swearing in support of the contract, and another against it. Some inducement should be held out to parties, to reduce their engagements to writing, and the distinction alluded to, will, it is believed, furnish that inducement.

15. All actions upon sheriffs' bonds, shall be barred by the lapse of five years from the time of the action accrued.

The act of 1729, ch. 25, sec. 3 and 4, makes five years from the passing of such bonds, a bar to actions upon them. The above rule, without changing the term, makes limitations run from the time of the action accrued. This change is recommended by considerations, which have been adverted to in another place.

16. All actions upon foreign judgments, the judgments of the Courts of other States, or of the territories of the United States, shall be barred by a lapse of six years from the date of the judgment, or if there be a stay of execution, from the expiration thereof, unless any such judgment shall have been rendered upon open account, or other cause of action not reduced to writing, in which case, the action shall be barred by a lapse of three years.

A bond or other specialty is barred by a lapse of twelve years, a simple contract debt by a lapse of three years. But the judgment of a Court of a sister State, is in this State only a simple contract debt. If, therefore, a party having a debt due him on bond, which is good here for twelve years, sue upon his bond, and recover judgment in Pennsylvania, the bond becomes merged in the judgment, and the judgment is barred by a lapse of three years. The discrepancy is corrected by this rule, making the bar of a

foreign judgment to depend upon the bar of the cause of action on which it is founded, as if that cause of action were the subject of the suit here.

17. All actions of slander, or for libel, all actions of assault and battery, all actions for false imprisonment, or for malicious prosecution, all actions for wrongs, shall be barred by a lapse of one year from the time of action accrued.

18. The State shall be barred of her remedies by lapse of time, in the same manner as individuals are.

The maxim of *nullum tempus occurrit regi*, is an incident of the personal perfection which the law attributes to the sovereign, under favor of which, it is assumed, both, that he can be guilty of no negligence, and that he is always "busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects." We have no such standard of perfection here, and if we had, those who are charged with the administration of our government, being merely human, might fail to come up to it. But the doctrine of *nullum tempus* prevails here as it does in England, and the State may therefore postpone at her pleasure, the assertion of her right by suit, for months, for years, and even for generations. It is at her own choice to delay as long, or to act as promptly as she pleases.

The whole doctrine, however, is wrong, and is attended with evil consequences both to the State and the citizen, while no compensating benefit is perceived to flow from it to either. It renders public officers negligent of their duty, to give them an unlimited time for the performance of it. That which may be done at any time by one generation as well as another—if ever done at all, is rarely done within a reasonable time—on the contrary, if those charged with the duty of collecting the dues of the State, know that this duty is to be performed within a period limited by law, to allow that period to pass without making the collection, or at least bringing the suit, would be a palpable non-feasance, for which the officer would justly incur public censure.

There is nothing in the idea that such a restriction upon the State, would be inconsistent with her dignity. The restriction, it

must be remembered, is self-imposed. Besides, the State is now limited to a certain period, in her power to make laws. The Legislature is compelled to adjourn on the 10th of March, whether its business be finished or not. And in this it never was supposed there was any impeachment of the State's dignity.

But the evils to the citizen in these long delays, are in the certainty with which they arrest the sale and improvement of property—in the vast enlargement of the demand by the accumulation of interest—in the loss of evidence—but more than all, in the hardship they bring in the end upon innocent families and third persons.

19. A mere acknowledgment that a debt once existed, and has not been paid, or an admission that a debt is still due, shall not be sufficient to revive a debt once barred by limitations. But a debt so barred, shall not be revived, except by a distinct and unequivocal promise to pay the same. And in all such cases, the suit shall be upon the original cause of action.

20. A new promise reviving an old debt, if verbal, shall be barred by a lapse of three years, if in writing, by a lapse of six years.

21. No promise by one joint promissor, obligor or contractor, shall revive a debt or liability, or prevent the bar of limitations from attaching, in respect to any co-obligor, promissor or contractor. Provided, that if any co-obligor, promissor or contractor, is compelled, by suit commenced before the bar of limitations has attached, to pay the debt or damage, or any part thereof, his claim for contribution shall be good for six years from the time of such payment.

It has been a subject of regret, among the ablest jurists, that a simple acknowledgment of the existence of a debt, should have been deemed by the Courts, a constructive promise to pay it. But the doctrine once established, became the foundation of a vast accumulation of disorderly adjudications, of which the ten proposi-

tions announced in Oliver *vs.* Gray, (1 H. & G. 204,) are but an inadequate sample. The latitude of construction became so wild at one period, that the slightest acknowledgment, out of which the keenest ingenuity could extract the admission of an existing debt; even a statement by the defendant in conversation, that he had formerly contracted the debt, *but should not pay it*, was construed into a new promise, sufficient to take the case out of the statute. This is not expounding the law, but making it. It is proposed, therefore, to bring the Courts back to the plain and obvious intention of the law-makers, and while as a principle of construction, a new promise founded upon the extinguished consideration, shall be recognized as binding in law, yet the promise shall be one, which the party intended to make, and not an undertaking fastened upon him, by the superserviceable ingenuity of Courts, however distinguished for their learning and weight of authority.

The case of Whitcomb & Whiting, (Dougl. 652,) decided by Lord Mansfield in 1781, has fettered the common sense of both sides of the Atlantic, for the best part of a century. And the Court of Appeals of Maryland, in Ellicott *vs.* Nichols, (7 Gill 85,) have by no means removed the objections to the principle of the leading case. That principle was this: that a promise by one of several drawers of a joint and several promissory note, takes it out of the statute of limitations, as against the others. In Parkham *vs.* Raynal, (2 Bingh. 306,) it was held that the fact of one of the defendants being a surety, made no difference, and in Jackson *vs.* Fairbank, (2 H. Bl. 340,) where one of two joint makers of a promissory note, became bankrupt, and the payee having proved under the commission received dividends, the receipt of the last dividend being within six years before the commencement of the action, was held to take the case out of the statute, as to both makers. Thus the English doctrine, originating with Lord Mansfield, makes one man liable upon a promise made by another, without his privity or consent, next it raises such promise from the most casual statements by which no promise was intended, and lastly it creates a promise out of the acts of strangers, in which neither of the parties to the instrument, united or acquiesced, by thought, word or deed.

The question to be disposed of, however, is this: Shall a man be bound by a promise which he never made, and to the making of which he never gave either authority or consent? The Court of Appeals in their last decision already alluded to, say, that the

doctrine of Whitcomb & Whiting, deciding as it does, that the promise of one of several joint contractors, before the bar of limitations attaches, shall bind the others, is right, or as they express it, is the true and correct doctrine. And adopting the language of Lord Mansfield, the Court declare, that part payment of the debt by one, is payment for the benefit of all, the one acting virtually as agent for the rest. But with all due deference to the high authority of the Court of Appeals, and the still higher authority of Lord Mansfield, it is submitted, that whether the payment or the promise by the one party, be made before or after the statutory bar attaches, it is still the payment or promise of the one man, made without the consent, or even the knowledge of the other, and therefore ought not, either in law or morals, to be binding on him. The idea that the one who pays or promises alone, is virtually the agent of the rest, to say nothing of the probability that he is a worthless rogue, whose promise on his own account, is wholly without value, but who is bribed to involve innocent men in a liability which he has no means of meeting himself, is merely fanciful. It repeals the statute, and substitutes a rule which has no moral foundation to rest upon. The rule is wrong throughout—the text and the gloss are all wrong.

The sound doctrine is that proposed, which disaffirms the right of one joint contractor to bind the others by any promise or engagement in which they do not expressly join, but which reserves the right of contribution even after the bar of limitations has attached, if before that period, either of the parties liable has been sued, so as to arrest the further running of the statute as against him. No effect is permitted to be given by this regulation, to one man's promise, as against any other man, but it simply provides, that where a recovery is had againt one, in a suit which, at the time it was instituted, was binding upon all, his right of contribution against all, shall be kept alive after the statutory bar has attached, as between the creditor and the rest.

22. Limitations may be pleaded to a set-off, provided limitations have been pleaded to the plaintiff's demand, but not otherwise, and in all cases where limitations are so pleaded by both parties, time shall not run against the set-off after the commencement of the suit.

The object of this rule is to place both parties upon an equal footing. If the defendant has not chosen to avail himself of limitations against the plaintiff, or if his plea has been shut out by the rules of Court, the plaintiff ought not to be permitted to plead limitations against the defendant's account in bar. But when the defendant's plea has been regularly filed, and he also pleads a set-off, the statute ought to cease running against the set-off, at the commencement of the suit, when it ceases running against the plaintiff's cause of action.

23. Limitations shall not run against the creditors of a deceased debtor, during the delay occasioned by the settlement of the personal estate in the Orphans' Court, nor pending proceedings in equity, to subject his real estate to the payment of his debts.

Limitations as to claims against a fund, brought into Court under a creditor's bill, run up to the time the claim is filed. But as a decree for the sale of lands to pay debts, cannot be passed until the personal property is shown to be insufficient, the creditor is subjected by law to the very delay, which operates to defeat his claim. The act of 1849, ch. 224, it is true, to meet this inconvenience, allows eighteen months in addition to the period of limitation now established by law, but the time allowed ought to be sufficient to cover the delay occasioned by the proceedings to exhaust the personalty, and then limitations ought not to run after the filing of the creditor's bill, that being the commencement of the suit against the realty.

24. Proof of fraud shall exempt a claim or right from the bar of limitations, but limitations shall only begin to run from the discovery of the fraud by the plaintiff, the fact of the plaintiff's notice or knowledge of the existence of the fraud, to be submitted to the jury, under all the circumstances of the case, or to be determined by the Court in like manner, when the case is tried and disposed of, without the intervention of a jury.

25. In all cases where a right has accrued, or an injury been done to a party, who is ignorant of the right or injury, limitations shall not begin to run against him, until he is affected with notice or knowledge of the right or injury, the fact of such notice or knowledge to be determined by the jury, or by the Court when the case is tried or disposed of, without the intervention of a jury, by a consideration of all the circumstances of the case. Provided, that in no case, except where fraud is established, shall more than half the time required by law to bar the cause of action in controversy, be allowed the party for the discovery of such right or injury, and provided further, that in no case, shall less than one year be allowed him. Nothing herein contained, to affect the titles to land in ejectment.

The range of cases in which a party can well be supposed to remain, beyond a very short time, in ignorance of a right accrued, or an injury done him, must, from the nature of things, be small. He could not be ignorant of an assault, or false imprisonment, for any length of time, and but for a very short period, of the debauching a daughter, or wife, or of the running down his carriage on the highway, or his barge on the water; of verbal slander he may remain ignorant for a short time, though not of libel in any of its forms. He could not well remain ignorant of the obstruction of water rights, or of lights, nor of the interference with any of his more immediate and necessary comforts.

Of rights arising out of all his commercial, and most of his other contracts, he could not be unaware, but there is a class of contracts, in reference to which, ignorance may well exist, and that is, in regard to breaches of covenants of seizin, of good right to convey, and against incumbrances. If there happen to be no good title or existing liens at the time of the conveyance, the covenant is broken the moment it is made. But the great probability in all such cases is, that the grantee was ignorant of the breach, it being unreasonable to suppose that he would purchase and pay for a clear title, if he knew there was no seizin or no right to convey,

or for property free from incumbrances, if he was aware of its being covered with liens. Cases have happened, and may well happen again, where the breach, existing at the time of the conveyance, was not discovered by the purchaser, until after all remedy on his covenant, was barred by lapse of time. Whether this inconvenience will be as likely to occur in respect to the covenant against incumbrances, will depend upon the disposition which is made of the savings, contained in the acts of limitation now in force.

The covenants of general and special warranty, and for quiet enjoyment, are prospective in their nature, it is true, and breaches of them arise from the ouster or eviction of the covenantee. But it not unfrequently happens that the land sold is in wood, and part of it being covered by the elder titles of the neighboring proprietors, an actual ouster existed at the date of the conveyance, of which the grantee was wholly unapprised. Here is the case of a breach of a prospective covenant, the moment it is made, which would not be discovered until a survey came to be made, of the tract purchased, and also of the adjoining tracts, which might not happen until after the lapse of the twelve years, when both the land and the remedy on the covenant, would be gone from the grantee.

There can be no injustice done to the covenantor by the proposed rule, as the circumstances raise a very significant implication of bad faith against him, the great probability being, that he knew of the breach at the time he entered into the covenant.

But apart from special circumstances or individual cases, it seems to be just as a general rule, that when a right has accrued, or an injury done to one who is ignorant thereof, limitations ought not to begin running against him, until he is affected with knowledge of the right or injury. The principle is not now for the first time introduced, though it does not seem to be clearly defined in this State. See 6 G. & J. 92; 7 H. 42; 8 H. 467; 9 H. 460; 4 G. 185.

26. All debts of an insolvent debtor, who has obtained his final discharge under the insolvent laws of this State, shall be barred by the lapse of ninety days from and after the date of such discharge.

This rule is new, it is important, and requires explanation. The clause in the Constitution of the United States, which inhibits the

States from passing laws impairing the obligation of contracts, in its application to the power of the States to pass insolvent laws, has been the occasion of a series of decisions in the Supreme Court of the United States, by which the power of the States over that subject, even in the absence of a uniform bankrupt law provided by Congress, has been cut down to a mere power of releasing the person of the debtor from arrest. It is unnecessary and would be unprofitable to review these decisions in detail. Their result stated in general terms is, that a discharge under a State insolvent law, will not extinguish the remedy of the creditor against the future property of the debtor, unless the debt was contracted after the passage of the act,—within the State granting the discharge,—and between citizens of that State. As the decisions now stand, the State insolvent laws lawfully apply to all contracts made within the State, and between citizens of the State. They do not apply to contracts made within the State, between a citizen of the State and a citizen of another State. They do not apply to contracts not made within the State.

The claim therefore of one citizen against another citizen of this State, who obtains his discharge under its insolvent laws, is released, and the future property of the debtor, unless of the description which is exempted from the operation of these laws, is protected for the debtor's own use. But a creditor, who is a citizen of another State, is wholly unaffected by such discharge. The debt may have been contracted within the State, both parties looking to the laws of the State to enforce its payment,—no matter,—such creditor may sue, after the discharge is obtained, and in defiance of it, obtain judgment and issue his execution against the debtor's property, as fast as he acquires it, whilst the domestic creditor—our own citizen, is compelled to stand back and refrain from all proceedings against the debtor,—such domestic creditor being alone barred by the discharge.

It may be, that when the Supreme Court shall come to dispose of the only question in reference to the validity of the State insolvent laws, which is yet left open, the creditors of our own and of other States, may be placed upon a footing of equality, the discharge granted by the State having no effect upon either. That is to say, instead of a partial, there may be a total destruction of the State insolvent systems.

The Constitution declares, that no State "shall pass any law impairing the obligation of contracts," which means, say the Supreme

Court, that no State shall pass an insolvent law, or to state the proposition as limited by the present state of the decisions on the subject, no State shall pass an insolvent law effectual to discharge debts due from the citizens of one State to the citizens of another State.

It is inconceivable that the framers of that instrument, could have meant to deny a power to the States, which no Christian community would be willing to live without. And however ably the illustrious and revered jurist and patriot, who delivered the opinion of the Court, in Sturgis and Crowningshield, may have reasoned to show, that the provision of the federal Constitution in question, was *not* intended to prevent the States from making paper money, or worthless lands, or other property of no use to the creditor, a tender in payment of debts, yet it may be insisted without presumption, that he has failed to show, that the inhibition *was* intended to forbid the passage of insolvent laws, releasing the future acquisitions of the debtor. There are some things so plain, that the most humble intellect may pronounce upon them with as much confidence as the greatest mind of the age. And this seems to be one of them. For it cannot be, that the Convention should have inserted a prohibition in the Constitution intended to cover one half of the disputed power, leaving the States free to exercise the other half, without mentioning the power at all; for the doctrine is, that the person of the debtor, and so much of the obligation of the contract as resolves itself into his personal responsibility, may be released, and that the inhibition only extends to his future acquisitions of property.

It is furthermore manifest, that the framers of the federal Constitution, had no intention to deny this power to the States, from the fact that they have invested Congress with the power of passing just such laws, restricted only by the proviso, that they shall be uniform. Did those framers mean to say, that a power which was deemed wise and salutary and beneficial in the hands of Congress, was to be regarded as vicious and hurtful and fraudulent in the hands of the States? Did they intend that if Congress refrained from exercising the power, the power should not exist? Is there any motive which can be imagined, as operating upon the minds of the Convention, when this clause was made a part of the Constitution, that is not fully answered and gratified, by leaving the power in the hands of the States, as long as they exercised it discreetly and wisely, but reserving to Congress the right to inter-

fere by a uniform system, obligatory upon all the States, whenever from their own vicious legislation, such interference became necessary?

There was nothing adversary or controversial in the purposes of that Convention. The men composing it came up from the States of the *confederation*, for the purpose of forming a compact of *union* and of *government*, so blended together, as best to ensure the protection and safety of the whole. Bound to each other by the strong ties of a common history and a common destiny, they met for the purpose of reasoning together as to the best means of securing the safety and happiness of all. There was no mysterious meaning in the provision in reference to the obligation of contracts. Its object was simply to protect the citizens of each State, against the contingency of vicious or dishonest legislation, by any or by all of the rest. Such things might happen, and whenever they did happen, might occasion irritation and ill-feeling among the States. It was therefore wise to provide against them by a stipulation to which all could appeal, should the occasion arise to render any appeal necessary.

That the power of the States to pass laws for the past and prospective relief of insolvent debtors, or their apprehended disposition to exercise such power, could have been regarded with jealousy or distrust by the Convention, or that the passage of such laws could have been deemed by such a body of men, to be within the contingency of vicious or dishonest legislation—as if a man's inability to pay his debts, no matter how the inability came upon him, were a heinous crime, about which the Convention would stop to stipulate for their respective States, as for the recaption of a person held to labor or service in one State, escaping into another,—is hardly at this day a supposable case. To meet the question then fairly and broadly, when a citizen of a free country finds himself involved in debt, beyond all hope of redemption—when after all his property is exhausted, his debts are still too heavy to be borne, is it considered dishonest, or immoral, or improper in any sense of the term, for the State to say to such a man, "give up all you possess, to be honestly divided amongst all your creditors, and you shall have a discharge which shall stay their hands in future, and secure the fruits of your labor for the use of yourself and family?" Did the Convention deem the rights of property—of mere dollars and cents, so far above all other rights, so paramount to the liberty of the citizen, as to make

it a subject of solemn covenant between the States, that a man once indebted, should remain so until he worked himself out, unless Congress saw fit to provide the means of his relief?

If the question had been propounded to the Convention—"what are the States to do with their insolvent debtors?"—it is impossible to doubt that the answer would have been—let the States provide for their relief, upon conditions such as they shall deem just to the creditor and humane to the debtor, and if the several systems of the States shall be unreasonably variant—or if they shall clash in their provisions, or work together unequally or unjustly, then let Congress by a uniform system, correct the evil. And accordingly, to Congress was given express power to pass "uniform laws on the subject of bankruptcies throughout the United States." The term "uniform" is in opposition to something not uniform, and the words "throughout the United States," import that all other systems wheresoever established, shall yield to such uniform system, as may be provided by Congress.

But the morality of the question may be worthy of a moment's thought. When a man is inextricably involved in debt and embarrassments,—when all his means and all his credit are both gone, and he is still deeply in debt—what is he to do? Is he to labor and labor on to the end of his life, for the benefit of others? Is he to condemn his wife to want, and his children to penury, ignorance and vice? The answer is, that he cannot, he will not, and he ought not to do any such thing. His own household, no matter what may be said of the obligation of contracts, have the first claim upon him,—a claim founded upon the most sacred of all his duties, that of affording the means of subsistence, of moral and religious culture, to those to whom he has given existence. It is proclaimed by a higher than all human authority, "that if any provide not for his own, and specially for his own house, he hath denied the faith, and is worse than an infidel." And the precept of divine truth is that alone which the insolvent will obey. He may be watched and pursued by grasping creditors—his little earnings may be seized as they come to light, and taken from him, but one thing is certain, that he will do business in the name of another, if he is not permitted to do it in his own. This is his last resort. Nature is stronger than any law emanating from human authority, and it is idle to attempt to enforce laws in opposition to all our natural feelings and instincts.

We have all read in our youth, of the old Heathen law of the

Twelve Tables, which ordained, "that if a person has been condemned to pay a debt, and can find no security, his creditor may carry him home, and either tie him by the neck, or put irons on his feet, provided his chains do not weigh over fifteen pounds. The creditor may keep his debtor prisoner for sixty days. If in this time the debtor does not find means to pay him, he that detains him shall bring him out before the people three market days, and proclaim the sum of which he has been defrauded. If the debtor be insolvent to several creditors, let his body be cut in pieces on the third market day; or if his creditors consent to it, let him be sold to foreigners beyond the Tiber." Such ideas of the rights of creditors, and of the crime of being in debt, have never prevailed, it is believed, in any Christian community, nor ought we, in the absence of their own words to that effect, to impute to the framers of the federal Constitution, sentiments in reference to debtors, which savor in degree of the old Heathen spirit.

But after all, of what practical importance was the supposed prohibition upon the States? What was the real value of the rights to be preserved? How much consideration was it worth? For let it be observed, that it was not the full and certain payment of his demand, that was to be secured to the State creditor, but the mere *spes recuperandi*—the hope or chance of screwing something from the future earnings of the debtor, to be applied in dribs, from month to month, or year to year, towards the payment of the old debt. The right was in truth not worth the trouble of the pursuit. In England, where the rights of property are guarded with so much jealousy, that it was made a capital offence to steal to the value of five pounds in a dwelling house; and where a provision once passed the House of Commons, to punish with death the bankrupt, who gave a false account of his property, the whole system of bankruptcy, from its origin to the present day, has failed to secure over five per cent. to creditors. In this country, the distributions in insolvency are believed to be much less.

On this side of the water, property is not regarded as the great and only good, and a man is here a noun substantive. We have discarded the law of primogeniture and entails, and the other contrivances to prevent the alienations of estates. The property accumulated by each succeeding generation, is divided and scattered at its close, by our statutes of distributions. It is no part of

our policy to encourage the acquisition of overgrown wealth, and continue it forever in the same hands. As a general rule, every member of the community has to begin life without much assistance from those who have gone before him. The law admits moreover, that an honest man may, by misfortune, by the arts and the rogueries of others, by accidents over which he has no control, be deprived of his property and reduced to poverty, with a load of debt outstanding against him, which he can never hope to pay. And we deem it but just and humane and christian to say, that he shall not for his misfortunes alone, be sold to barbarians beyond the Tiber. We make no other conditions with him, than that he shall give up all he has, be it much or little, which his creditors are to take, and let him go free. If he falls in the race, we do not pass by on the other side, but raise him to his feet and give him a fresh start. We are not willing therefore, without stronger reasons than any we have seen, to admit, that we have tied up our hands against the exercise of these, our own cherished principles of policy—that we have denied the faith, and are worse than infidels.

The matter is however decided, the States cannot, and Congress will not provide a system of bankruptcy. And the enquiry is, what are the States to do? It is certain that they cannot countervail the decisions of the Superior Court by any direct legislation, because the Constitution of the United States is what that Court declares it to be—the supreme law of the land. But there is one thing the States can do—they can pass laws declaring, that all debts of insolvent debtors, who have obtained their discharge, shall be barred by a lapse of one month, or other short period, after the date of such discharge. And that is all they can do. Acts of limitation do not belong to the right, but to the remedy, which the States may mould according to their own ideas of propriety.

The Legislature of Maryland have in fact, already taken this view of the subject, for two days after the decision in Sturgis and Crowningshield, and while the case of McMillan *vs.* McNeill, was pending, they passed the act of 1818, ch. 216, repealing all the savings in the various acts of limitations in favor of persons beyond seas, except the savings in the statute of James, relating to the right of entry, the omission of which was no doubt an oversight. The view of the Legislature was, as those who were members of that body at the time, will well remember, that as the decisions of the Supreme Court had conferred upon persons be-

yond the limits of the State, privileges which did not belong to its own citizens, it was but right to annul all extra-territorial immunities, already existing under our own laws.

The Commissioners, while they have discussed the important subject under review, with the freedom which became their position, and the high responsibility it imposes, have done so they hope, with the high respect which is due to a tribunal, so distinguished for learning, talent and patriotism, as the Supreme Court of the United States.

27. No debt released by a discharge under the insolvent laws, shall be revived, unless by a promise in writing.

28. Upon a contract made, or to be performed in another State or Country, by a person then residing therein, no action shall be maintained after the right of action thereon, is barred by the laws of such State or Country.

This provision is taken from the new code of Virginia, and seems to be just in itself. It can only operate to control the question of limitations, when the *lex loci contractus* makes a shorter period a bar than the *lex fori*. If the latter be the shorter period, it will be seen at once, that the provision must be practically inoperative.

29. When the plaintiff's right to sue is suspended by an injunction, issued by a Court of Equity, the statute shall not run during the period of such suspension.

30. If the person liable to be sued, shall go from the State before the cause of action shall be barred by limitations, the time of such absence shall be excluded in the computation of time necessary to create the bar. Provided that a mere occasional absence shall not be within the meaning of this provision.

31. No proceeding shall be instituted to question the legality of any marriage, whether the same be void or voidable, or to affect either directly or indirectly the right to dower or curtesy, as derivable from such marriage, or the descent of the real estate, or the distribution of the personal estate; after the death of either party to such marriage. And any suit or proceeding which may have been instituted for such purpose, and pending at the death of either party to such marriage, shall be thereby immediately abated. And the rights of distribution and inheritance shall be the same as if such marriage were legal. And the issue of such marriage shall be regarded as born in lawful wedlock.

The marriage of persons related within the Levitical degrees, or laboring under certain disabilities or incapacities, are not *ipso facto* void, but voidable only by sentence of separation: but the marriage of a person having a husband or wife living at the time, is to all intents and purposes void. Marriages merely voidable by the existing law, can only be drawn in question during the lifetime of the parties, and any suit commenced for this purpose, and pending at the death of either husband or wife, shall at once abate. But the rule is different where the marriage was wholly void, in which case let the proceeding be commenced when it may, the second marriage is a nullity, and the issue are bastardized; and the object of the proposed rule is, to put both classes of cases upon the same footing.

If the peace of families requires that there should be a limitation, after which no proceeding should be instituted or maintained, to disturb the validity of the marriage, or the right to property derivable from it, in the one case, there is the same reason for the limitation in the other. Whether therefore, the marriage be void or voidable, the rule should be the same, and that for the reason, that to carry the punishment in either case, beyond the death of the offender, is to visit it upon the helpless and the unoffending. The children possessed no means of averting the crime of their parents, and it would be a harsh measure of justice to deprive

them of their legitimacy and their property, at the same time, not for their own sins, but for those of others.

Besides, if a question as to the validity of the marriage is to be made at all, let it be made during the lifetime of the offender, and while he is above ground, to meet it face to face, and not be kept back until the party who probably knows most about the facts, and could best defend himself against the accusation, is dead, and his sins are then brought in judgment against his children. Again, if the party is notified of the charge during his life, he may avert the consequences of it to his children, so far at least as their right to his property is concerned, by making a will.

It sometimes happens that a man from the other side of the Atlantic, having left a wife, and it may be, a family of children behind him, marries here, where he has another family of children, who are reared in the belief that they are born in lawful wedlock. The mother never suspects that she is his kept mistress, and her children all bastards. They may have accumulated property, and gathered around them all the comforts of life, when the father dies, and immediatcly thereafter, a son of the first marriage appears, and claims the right to administration, and to all the real and personal property. And his claim under the existing law is irresistible. The very case has happened.

32. The right to recover mesne profits, shall be barred by the lapse of three years from the accrual of the right, and limitations shall cease to run against the claim for mesne profits, after the institution of the ejectment suit.

Originally the land was rccovered, and damages for its detention, in the same action, but in the modern action of ejectmemt, the plaintiff being a fictitious person, it becomes a necessary result of that contrivance, that the damages shall be fictitious also. There does not seem to be the same reason, nor indeed any good reason for the rule, which forbids the institution of the action for mesne profits until after the recovery in ejcctment. It cannot be because being an action of trespass, the plaintiff must be in possession before he can maintain it. If this were the reason the action could not be commenced until after a writ of *habere facias possessionem* executed, and it has been decided in Maryland, that the suit for

mesne profits may be brought, pending a writ of error. Nor indeed could the action of ejectment itself, be maintained consistently with such a reason, for the plaintiff is always out of possession when he brings his ejectment.

Trespass for mesne profits is one of the fruits of the fictions in ejectment. But if a fictitious party shall be enabled to recover the land and hand it over to the real party, is there any good reason why the same fictitious party should not recover the mesne profits and hand them over in the same manner.

By the existing law, the action of ejectment is an essential part of the remedy to recover mesne profits, yet limitations run after the commencement of the ejectment, and are only arrested by the trespass for mesne profits. The proposed rule will make the law consistent, even should the fictions in ejectment, contrary to the expectation of the Commissioners, be retained by the Legislature.

It is doubted by some, whether there is any limitation in Maryland, to the action of trespass for mesne profits. Certainly no such bar is to be found in the act of 1715, ch. 23, nor as it is believed, in any decision of the Court of Appeals. The plea of limitations to this action is given however, in the books of forms, and the general opinion of the profession seems to be, that the right to put in such a plea some how exists. The rule above proposed will therefore settle the law, in accordance with the general opinion.

33. When judgment for the plaintiff, in any suit or action, which was commenced before the bar of the statute had attached, shall be arrested, or from any other cause the plaintiff shall be driven to a new suit, it shall be lawful for the plaintiff to commence a new action, within one year after such arrest of judgment, or other cause of failure, of the first suit.

The fourth section of the statute of James, giving liberty to a party, whose suit, though brought in time, was rendered fruitless by arrest of judgment, or reversal upon writ of error, to bring a new suit within one year, seems never to have met with acceptance in this State. Luther Martin once commenced such a new action, but the Courts refused to entertain it. It is probable that under our new system of pleading and practice, there will be little,

if any occasion, for such a provision, but it will do no harm to have it in readiness, in case it shall be wanted.

34. The exception contained in the act of 1715, chapter 23, of "such accounts as concern the trade and merchandize between merchant and merchant, their factors and servants," is abolished, and there shall be no difference, so far as they may be affected by lapse of time, between the accounts and dealings of merchants, and those of other people.

The exception referred to, which is copied into the act of 1715, literally from the statute of James, has been the subject of discussion on sundry occasions, in the Court of Appeals. It has been decided, that a defendant cannot avail himself of it, unless by making it a subject matter of defence in pleading, but to what particular cases the exception was intended to apply, has not been clearly settled, and it is believed, is not at this day understood. It is proposed therefore, to abolish it altogether.

35. The provisions of this act shall not effect any causes of action existing at the time of its passage, but shall apply to future causes of action exclusively.

THE ACTION OF EJECTMENT.

In remodeling the action of Ejectment, the object will be to simplify the procedure, without disturbing in any respect, the law regulating the titles to real estates.

1. All fictions in the action of Ejectment are abolished.

To maintain the action of Ejectment, the plaintiff is required to make out four points before the Court, namely, title, lease, entry, and ouster, of which the three last named are mere fictions. How this remedy came to be compounded of these senseless fables, is well explained by Blackstone and other elementary writers, whose account of it need not be repeated here. It is sufficient to say, that the fictions in Ejectment do not tend to elucidate or strengthen any matter of right involved in the controversy, but on the contrary, as far as they have any effect, it is to defeat justice rather than to promote it. That they are at least useless, is confessed by the consent rule, which obliges the defendant, as the condition upon which he is permitted to appear in Court and defend his right, to admit the truth of the plaintiff's allegations of lease, entry and ouster, in order that the plaintiff may not be put to the proof of a long narrative, no part of which is true in point of fact.

Every practitioner who has had much experience in the trial of Ejectment suits, well knows the astonishment which the copy of a nar in Ejectment, when served upon a plain, unlearned man, never fails to create in his mind. He reads it over and over, then lays it aside, to think what on earth it can mean. Again he returns to it, when the complaint about "force and arms," that is to say, "sticks, staves, clubs, fists and knives," again meets his eye and only increases his bewilderment. "And who are John Doe and Richard Roe?" he asks. "I never heard of the gentlemen before, so help me! And Mr. John Doe signs himself my loving

friend!" He next shows it to his wife, and they hold a family council over it, the result of which is, that he mounts his horse and hastens to see his lawyer, who solves the mystery by informing him, that it is nothing more than a suit against him for a small piece of land.

There are those who say, that the remedy by Ejectment is now well known, its principles well settled, its fictions do no harm, therefore let it alone. The answer is, that if they do no good, they do harm for that reason alone. But it cannot be said, that they do no harm. They complicate the remedy, they interpose difficulties which in many cases obscure the right, and in all cases occasion cost and delay. They introduce a jargon into the administration of justice, which should be conducted in plain English, that every man may understand it.

It is to the fictions in Ejectment, that we trace the anomalies by which that form of action is characterized. The action for mesne profits is one of these anomalies, and it arises in this way. The Ejectment itself is founded on a supposed trespass, but as both parties, plaintiff and defendant, are ideal persons, it followed that the damages must be ideal, or merely nominal also. Hence a suppletory remedy became necessary to enable the real plaintiff after he had succeeded in recovering his land, to obtain compensation for its detention, otherwise he could not obtain damages at all. This remedy is what is technically known as the trespass for mesne profits. That it should be by an action of trespass is another anomaly, for trespass lies by a party who is in, against one who is out of possession, but this remedy reverses the rule, and enables the party who is out, to maintain trespass against him, who is in possession. In the action for mesne profits, the judgment in the Ejectment is conclusive evidence of the right to recover. It is not necessary to wait for the execution of a *habere facias possessionem.*

It is another anomaly arising from these fictions, that a judgment in Ejecment is not final of the right adjudicated, as it is in all other cases. The plaintiff, as often as he is defeated in one suit, may bring another. He has only to change the names of his ideal parties, to continue bringing new suits for the same land, until he is stopped by an injunction from chancery. But there is no reason why one action should be necessary to recover the thing, and another to recover damages for its detention and use. There is no reason why a solemn adjudication of the disputed right, all parties

having had a full and fair opportunity of contesting it, should not be final in a land trial, as it is in all others. There is no reason why limitations, in respect of the mesne profits, should not be arrested by the institution of the Ejectment suit, instead of the trespass for mesne profits, the controversy for the land and the damages being virtually the same.

It is a mistake however, to suppose that the fictions in Ejectment are always mere ideal contrivances. In the action for mesne profits, the plaintiff can recover only from the making of the demise laid in the declaration in the Ejectment, and if he claim profits prior to that time, the defendant may controvert his title, notwithstanding his recovery in the Ejectment. The time therefore, of making the demise is matter of substance, not form, while the demise itself is a mere fiction. But the demise must also be laid *after* the lessor's title accrued, because at the trial he must show such a title as would enable him to make a lease, and hence it is usual, when there is any uncertainty about the proof of the plaintiff's title, to add several counts or demises, so varied as to meet the several phases in which the title may appear by the proof. But again, if the demise expire during the pendency of the suit, the plaintiff cannot recover his term, without procuring it to be enlarged by the Court.

Again, the evils arising out of the learning of *joint* and *several* demises, are perhaps more embarrassing to the pleader, and productive of more cost, vexation and delay to the parties, than any we have alluded to. And the difficulty is not in the questions of title, but in the complications of mere form, arising from the one fiction of the lease in Ejectment. The act of 1833, ch. 276, allowing amendments of the declaration, so as to bring the true merits of the controversy fairly to trial, and authorising a recovery upon a joint demise, without regard to the title shown at the trial, has removed some of the evils complained of, and provided the means of obviating others not actually removed, but the act, while it concedes the necessity of reform in this form of action, is but a mere palliative, and comes far short of an adequate remedy for the disease.

It cannot be said therefore, that these fictions do no harm. In the ordinary, and every day exigencies of an Ejectment suit, we see that they are treated as real transactions. They dispose of the substantial rights of the parties, by creating the necessity of amendments, by postponing the trial, by causing delay and vexa-

tion, and by burthening innocent parties with costs. There is but one simple and certain remedy for these evils, and that will be found in the abrogation of the fictions in Ejectment.

Fictions belong to the cruder and more primitive ages of the law. They are suitable to a condition of society, in which men are but half civilized, where mystery is regarded as wisdom, and the ordeal, the corsnet or the duel is the received method of proof. It was so with the old Romans, where in an action to recover land, the plaintiff, according to Gibbon, touched the ear of his witness, then seized his adversary by the neck, and implored in moving terms, the aid of the bystanders. The two parties then grasped each other's hands, as if they stood prepared for combat. All this was preparatory to a trial before the Prætor, who seeing their condition, commanded them to produce the subject matter of their dispute. They then went away together, but soon returned with a clod of earth, which they cast at the Prætor's feet, to represent the field for which they contended. Certainly all this was quite as respectable as our own fables of lease, entry and ouster.

The most determined concession to mere form on record is, the stat. 4 Ann, c. 16, sec. 10, which enacts, that the omission in a declaration of the common pledges to prosecute, shall not be deemed a defect in pleading, unless specially assigned as cause of demurrer. The real pledges had long been dismissed, and John Doe and Richard Roe had been substituted in their place. The substance was gone, the shadow only remained, and the Parliament of Great Britain could not venture to dispense with the shadow, if its retention were insisted upon by the defendant to the suit. It would be difficult to find a parallel to the legal bigotry, which, while it admits the thing to be useless and unnecessary, yet insists upon retaining it as cause of special demurrer.

One reason why the progress of improvement in the law is so slow, and undertaken generally with so much timidity, is because of the inherent difficulty of the task. The statute for substituting a deed in the place of fines and recoveries, which was prepared by Mr. Brodie, has been pronounced by a judge, no less competent than Lord Campbell, to be one of the most wonderful efforts of the human mind.

2. The action of Ejectment shall be commenced by a writ in the following form :

——— County (or City) to wit:

State of Maryland, to the Sheriff (*or other proper officer*) of ——— Greeting:

You are hereby commanded to summon (*here insert the name of the defendant*) of —— County (*or City*) to appear before the (*here insert the name of the Court,*) to be held at —— in and for (*here insert the name of the County or City*) on the —— day of —— next, to answer an action of Ejectment, at the suit of —— (*here insert the name of the plaintiff.*) And have you then and there this writ.

Witness the Honorable ——— ——— Judge of the said Court, the —— day of —— in the year, &c.

——— ——— Clerk.

3. Before issuing the writ, the plaintiff or his attorney shall deliver to the Clerk, to be by him filed in the cause, a titling in the following form, or to the like effect:

——— ——— Plaintiff.
vs.
——— ——— Defendant. } Ejectment.

To ——— ——— Esquire, Clerk of (*here insert the name of the Court.*) Issue a writ of Ejectment in this case. (*Here insert the date of the titling.*)

——— ——— Plaintiff, or Plaintiff's Attorney.

Under the existing practice, the declaration is the first process, and occupies in the record the place of the writ, for which reason it was not, prior to the act of 1833, ch. 275, amendable, except in the one particular of an enlargement of the demise. The tenant in possession, upon whom notice has been served of the imaginary case entered upon the docket, is permitted to appear upon terms of receiving a new declaration, and confessing the lease, entry and ouster. In this way, a second cause is in effect, put upon the record, which is the one to be tried. The second declaration is but seldom filed in practice, although the Court of Appeals in a late case, seemed to consider it essential. 9 Gill, 245. All these anomalies, with the useless forms depending upon them, will be swept away by the simple abrogation of the fictions, and the record in an Ejectment suit commencing with the writ, made to conform to all other records.

4. The mode of appearing to an action of Ejectment, shall be by delivering to the Clerk a memorandum in writing, in the following form, or to the like effect:

——— ——— Plaintiff.
vs. } Ejectment.
——— ——— Defendant.

The Defendant ——— ——— appears by ——— ——— his attorney, (*or in person.*)

Entered the ——— day of ———

(Signed)

——— ——— Defendant's Attorney, (or in person.)

The practice in reference to the appearance of parties by their counsel, is very loose, and gives rise to frequent, and sometimes to very unpleasant difficulties. And this happens more frequently when there are a number of parties, plaintiffs or defendants, on the record, when the order of the Attorney to the Clerk to enter his appearance being general, he is necessarily understood to represent the whole number on one side or the other of the suit, when in fact, he was employed by, and only intended to appear for a part. Mistakes or misapprehensions in such matters, become the more serious, that a party is bound by the acts of an attorney professing to act for him, whether he employed the attorney or not. But the rule will be especially proper in Ejectment suits, in which it is proposed to permit the appearance of parties interested in the subject matter in controversy, either as plaintiffs or defendants, after the suit is brought, when it will be essential that the record shall show the manner of the appearance, by whom entered, as well as the time of entering it.

5. Every person having a legal subsisting interest in the premises claimed at the time of the commencement of the action, and a right to the possession, or to some share or interest in, or portion thereof, whether divided or undivided, shall be entitled to maintain the action of Ejectment.

This rule proposes to change the old principle of Maryland Ejectment law, which requires the plaintiff to have the legal estate in the land, both at the *commencement* and at the *trial* of the suit:

differing therein from the English rule, under which it is sufficient if a right to the possession exist at the time of the demise laid in the declaration; and differing also from the rule in most of the other States, in which it is generally required of the plaintiff to show a title at the commencement of the suit. The proposed change is recommended by the simple consideration, that if a person having put an Ejectment suit on the docket, shall choose to dispose of his right to the land pending the controversy, and enter the suit for the use of his grantee, there is no reason at the present day, why he should not be permitted to do it. If he may do so before he brings suit, may he not for the same reason, do the same thing afterwards?

6. A married woman may bring Ejectment, in her own name, or at her election, in the names of herself and husband, and she may cause herself to be made a party plaintiff or defendant, either in conjunction with, or without her husband, to an Ejectment suit already pending. And in all cases she may appear by attorney, but in no case shall her suit be abandoned, or her name entered to a pending suit, either as plaintiff or defendant, stricken out, without her consent.

The repeal of the savings in favor of *femes covert*, contained in the various acts of limitation, should the Legislature adopt the views of the Commissioners on that subject, will render it very proper, that every technical difficulty or embarrassment should be removed out of her way, whenever she chooses to assert her rights in Court. Let her send for her attorney, and give her own instructions. If her husband refuse her the use of his name, or the benefit of his protection in Court, let her proceed without either. A woman is not the less aware of her rights, or of her claims to property, or of the necessity of prosecuting or defending them, because she happens to be married. It would indeed be a hard case, that being unable to proceed without the consent of her husband, she should be barred by lapse of time, because she did not proceed.

The new Constitution, as well as the legislation of this State, both before and since its adoption, secure to the married woman the enjoyment of her own property, and have curtailed the power

of her husband over it. These innovations, although to a certain extent they are wise and proper, may nevertheless be carried too far. But to whatever extent they may go, they furnish in that degree, additional reasons for giving the wife the most unobstructed access to the Courts.

7. An infant or insane person may bring Ejectment in his own name, and without a next friend, guardian or trustee, and the estate, property, rights and credits of such infant or insane person, shall be subject by fieri facias or attachment, for all costs incurred by him in any such action. And an infant or insane person may be sued in Ejectment, and may cause himself to be made a party plaintiff or defendant, to any Ejectment already pending. And the Court shall allow to counsel prosecuting or defending for such infant or insane person, a fair compensation for services rendered, for which the property of such infant or insane person shall be answerable.

An infant under the existing laws, may bring Ejectment, may enter to avoid a fine, may give notice to quit, and in some cases employ an attorney. It is proposed however, to repeal the savings in their favor, in the various acts of limitation, as well as those in favor of insane persons, and it is proper therefore, that no difficulties should exist in their appeals to the law, in all cases where it may be proper. It is supposed that all persons in their condition, have their friends and relatives, who when they know it to be necessary, will take good care that their rights shall not be forfeited by mere delay. It is the knowledge that infants and insane persons are not bound to proceed, and that their rights are saved if they do not choose to proceed, that occasions the great and unreasonable delay, which never fails to take place in the institution of all proceedings in which they are concerned, and which so much increases the hardship upon others, when their rights are enforced against them.

The power of the Court to compensate counsel, will of itself go very far to prevent loss to the infant or insane person, from the repeal of the savings in their favor. It will only be necessary to

speak to counscl, and if they have valuable rights, those rights will assuredly be taken care of.

In reference to costs, the present practicc requires that an infant or insane person shall sue by *prochein ami* or trustee; not because the infant or insane person have no capacity to sue alone, but because they cannot be permitted to sue without putting upon the record some name with their own, to be good for the costs. In other words, he is required to give security for costs. But is this altogether just? A resident adult, no matter how poor or how worthless he may be, is permitted to sue as a matter of right, without security for costs. It may bc said that the reason for this is, that the adult has a capacity to contract and incur liabilities, which the infant or insane person has not, but if both are equally poor, what is the value of the promise or liability of either? And why require the one to give security as a condition to his right to sue, and permit the other to sue without security? But the provision making the property of the infant or insane person, when he has any, liable for costs, places him and thc adult in all respects, upon thc same footing. Each will pay costs if hc have the means, without the means neither will pay them.

8. The right of the parol to demur is abolished.

The *parol demurrer* is a plea in suspension of the action, and occurs when an action of debt is brought against the infant heir, or a real action against the infant, in either of which cases, a suggestion is made of the non age of the defendant, and a prayer that the proceedings may be stayed until he is of full age, when it is said, the *parol demurs.* "This plea it is believed," says Bouvier, "is unknown in this Country." It is so far however, from bcing unknown in this State, that it is expressly given by the act of 1785, ch. 80, sec. 2. If the savings in limitations are rcpealed, the quaint old rule of *parol demurrer* ought not to be left standing the only remnant of its class.

9. The action may be brought by one or more tenants in common, or joint-tenants against their co-tenants, and it shall be sufficient for the plaintiff to prove an ouster, or an actual denial by the defendant, of the plaintiff's right, or acts equivalent thereto, to maintain the action.

10. The action may be brought in the County (or City) where the lands or some part of them lie.

11. The declaration in Ejectment shall be in the following form, or to the like effect:

State of Maryland, —— County (*or City*) to wit:

—— —— by —— —— his attorney (*or in proper person,*) sues —— —— for a tract (*or piece or parcel*) of land, lying in —— County (*or City*) (*or lying partly in —— County or City, and partly in —— County or City,*) called —— containing —— acres, (*and describing the land with all convenient particularity,*) to which the plaintiff claims title, and the plaintiff claims —— dollars, for the rents and profits thereof.

—— —— Plaintiff's Attorney (*or Plaintiff.*)

12. Want of reasonable certainty in the description of the property in the declaration, shall not be cause of demurrer, but shall be ground for an application to the Court for better particulars of the land claimed, which the Court shall have power to order in all cases.

13. Particulars when ordered, may be furnished in the following form, or to the like effect, viz:

—— —— Plaintiff.
vs.
—— —— Defendant.

} Ejectment in the Circuit Court for —— County. —— Term ——

This action is brought to recover (*stating the premises fully and accurately,*) situate in —— County.

—— —— Plaintiff (*or Plaintiff's Attorney.*

Plots having ceased to be part of the pleadings in Ejectment, it is quite necessary that the declaration should contain a precise description of the property claimed, in order to a full and fair trial between the parties—and that the verdict should describe with precision the property recovered, to enable the Sheriff to deliver possession under the *habere facias.* In cases of judgment by default, or general verdict, for plaintiff, a description of the lands recovered, must be found in the declaration, otherwise the judg-

ment might be void for uncertainty. In cases of difficulty, plots for illustration will still be resorted to, for the purpose of certainty in the description of the lands in controversy.

14. Any person not named in the writ either as plaintiff or as defendant, shall by leave of the Court, be allowed to appear, and prosecute or defend the suit, on filing an affidavit, showing that he is in possession of the land, or of some part thereof, either by himself or his tenant, or that he hath some right to the premises, not inconsistent with that of the plaintiff or defendant, with whom he proposes to unite, which right or title may be affected by the result of the suit.

The statute of II Geo. 2, ch. 19, permitted the landlord to make himself a defendant to an ejectment brought against his tenant. And the word "landlord" in the statute was extended by construction, so as to include all persons claiming title consistent with the possession of the occupier. Thus a mortgagee, an heir who had never been in possession, and a devisee in trust, have been permitted severally to appear and defend. But a person claiming in opposition to the title of the tenant in possession, as the defences would necessarily clash, has not been permitted to appear.

That the statute of George was a wise law as far as it went, is proved by the great expansion it underwent by construction in the hands of the Court. And there is no reason to doubt, that the same privilege of coming in and appearing to the suit, may be extended to the side of the plaintiff with equal benefit. It is proper to remark, that by the recent common law procedure act in England, the privilege of appearing is still confined to defendants. The above rule therefore, so far as it proposes to extend the privileges to plaintiffs is, like the statute of George, at the time it was passed, purely experimental.

15. The Court shall have power to strike out, or confine appearances, claims and defences, preferred or set up by persons not original parties to the suit.

This is a power which the Court always exercised over the proceedings in Ejectment, in reference to defendants. The extension

of the same power, however, to the appearance and claims of plaintiffs, will be a necessary consequence of the adoption of section 14.

16. In case no appearance shall be entered by the defendant, within the time appointed by the rule of Court for that purpose, or if an appearance be entered, but the defence limited to part only of the lands mentioned in the declaration, the plaintiff shall be entitled to judgment for the land, or for the part thereof to which the defence does not apply.

17. The plea to a declaration in Ejectment, shall be in the following form, or to the like effect, viz:

—— —— by —— —— his attorney, (*or in person*) says, that the plaintiff hath not title to the said land and premises, (*or if the defence be limited to a part, to such part as the defence may describe.*)

—— —— Defendant's Attorney, (*or Defendant.*)

18. The entry of new parties to a pending Ejectment, shall not make new pleadings necessary, but the case may be carried through upon the pleadings between the original parties.

19. A deed or other paper-title for a part of a tract of land, without describing the part intended, shall, if the grantor or devisor had good title to a part of such tract, be good to vest the title in the grantee or devisee, to such part or quantity of the whole tract, as may best agree with the intention of the parties, as the same may be shown by extrinsic evidence and circumstances; and a deed or other title-paper for the whole of a tract of land, when the grantor or devisor had good title to a part only of such tract, shall be good to vest the title to such part, in the grantee or devisee.

A deed for a part of a tract of land, without any other description, is held to be void for uncertainty, because a part may be any part, it may be much or little, covering nearly the whole tract, or but an inconsiderable portion of it. It cannot be located, and therefore is not recoverable by suit.

It was supposed at one time, that if a man seized in fee of a part of a tract of land, and in the actual possession of it, his title-papers showing that he held that part by metes and bounds, should make a conveyance merely describing it as a part of the tract, such conveyance ought to be held to apply to the part of which he was so seized and entitled. And that which was uncertain on the face of the deed, might be rendered certain by the facts existing outside of the deed. But the Courts have said no, the deed must speak for itself. The party must be able to find his land, and identify it from the face of his deed, and extrinsic circumstances cannot be resorted to, to help it out. And under the statute of frauds, the doctrine is no doubt sound and correct.

But if a man seized of a part of a patented tract of land, his possession being co-extensive with his title, and his title-papers describing the part he holds by metes and bounds, convey the whole tract, comprising that part which his title does not cover, as well as that which it does, such conveyance, the Courts say, is not void for uncertainty. Now the question is, why should the deed be void in the one case, and good in the other? In either case, the grantor intends to convey the part which he sells, and to which he has title; in neither case is that part described in the deed. The grantee has in either case alike, honestly purchased and paid for a particular piece of land, and there is no difference or misunderstanding between him and the grantor, as to the identity of the land. Yet in the one case, the deed conveying *part of the tract*, intending the part actually bought and sold, is void, and in the other, the deed conveying *the whole tract*, intending the part so bought and sold, is good—the extrinsic circumstances in both cases being the same precisely.

20. A mortgage or deed of trust, to secure the payment of money, which is silent as to the possession, shall not be deemed a sufficient title, before the day of payment mentioned therein, for the recovery of the land from the mortgagor or grantor.

Upon a mortgage, or deed of trust in the nature of a mortgage, which is silent as to the possession, the mortgagee may bring his Ejectment the day after the deed is executed, and turn the mortgagor out of possession, before he is in default. This result is no doubt produced by sound legal reasoning, but it never happens that it does not violate the intention of the party making the deed.

21. A vendor shall not recover against his vendee, lands sold by such vendor to such vendee, when there is a writing stating the purchase and the terms thereof, signed by the vendor or his agent, and there has been such payment or performance as would in Equity entitle him to a conveyance of the legal title without condition.

The course which the vendee, under the existing law, would have to pursue to prevent his being turned out of possession, would be to submit to the recovery against him at law, then to file his bill in Equity, stating the agreement and his performance of it, and praying that the vendor may be compelled by a decree of the Court, to execute a deed to him for the land, and that his hands may in the meantime be stayed by an injunction, from proceeding to execute his judgment at law.

How strange these things work. One Court issues its mandate to another Court, forbidding the latter to proceed in a suit already pending before it, and clearly within its jurisdiction. Yet the Judge who issues the mandate, may be the very Judge to whom it is sent, and who is bound to obey it. But stranger still, the Court now assuming this supremacy, is on other occasions compelled to acknowledge its incompetency to decide a question of law, which question it propounds to the other Court, requesting to be informed what the law is. And stranger than all, the Judge who propounds the question, as the head of one Court, answers it as the head of another Court.

We do not propose to correct these anomalies in all cases, nor to say that it would be wise to do so, if we could. What we propose is, that in the particular case mentioned in the rule, relief shall be afforded at law, without resorting to a Court of Equity. That relief is all comprised in the simple act of denying the right of the party to recover, and there the matter ends. See what is said, ante page 50, rule 42.

22. The payment of the whole sum, or the performance of the whole duty, or the accomplishment of the whole purpose, which any mortgage or deed of trust may have been made to secure or effect, shall prevent the grantee from recovering at law by virtue of such mortgage or deed of trust, whenever the defendant would in Equity be entitled to a decree, revesting in him the legal title without condition.

A legal title and an equitable right to land are very different matters. Both may confer a full, absolute, and undisputed right to the property, but the one constitutes a title, the other no title at all. A man may have purchased and fully paid for a farm, and obtained possession of it, and yet the very man who sold it to him and received the money for it, may admit all these facts, and in the face of them bring suit for the land, and recover it. The reason is, that an equitable title cannot be noticed in a Court of law, and can be entertained only in a Court of equity. And what appears inexplicable to the unlearned is, that it is only in a Court of equity, where this equitable can be converted into a legal title, after which the party may go back to the Court of law, to defend his possession.

But the dry legal title, without any beneficial interest in the property, ought not to prevail even in a Court of law, against the complete ownership, in equity though it be. A mortgage being a mere security for a debt, ought to be considered as extinguished for all purposes, the moment the debt is paid.

It is proper to say, that the two preceding sections are borrowed from the new code of Virginia, and the Commissioners, considering them right in themselves, do not hesitate to recommend them to the favorable consideration of the Legislature.

23. A defendant in Ejectment shall in no case, be permitted to defeat the plaintiff's action, by showing an outstanding title in a stranger.

The rule of law which declares that a plaintiff must recover upon the strength of his own title, and not upon the weakness of that of the defendant, is founded upon the further rule, that a party in possession of land, is presumed to be the owner until the

contrary is proved, and the whole theory is traceable to the exaggerated importance which the law in all periods of its history, has attributed to the actual possession of the premises. It is but a continuation, under other forms, of the ancient theory of conveyance by feoffment, according to which an estate of freehold was considered as vested in the feoffee, though there was none in the feoffor, and that it was the livery, and not the charter, that worked the transfer of the fee. A party in possession was supposed to have got there by all the solemnities of an actual corporeal investiture, which invested his possession with a sanctity, that nothing but direct proof of title could dispel. And the reasons which uphold a defence by an outstanding title at the present day, are the same, though mitigated in degree, which in the language of Chancellor Kent, gave such "tremendous effects" to the ancient disseizins; which fortified the possession acquired by violence and wrong against the demands of the lawful owner, and which by the mystery of a descent cast, tolled his entry.

An uncompromising hostility to innovation, seems at all times to have animated the English property lawyers, and impelled them "to stand watchful and intrepid sentinels over the ancient jurisprudence." No matter what meliorations are projected, or by whom, their bigotry has been eternally at work to disfigure and mar them, with the semi-barbarous usages and doctrines of the past. As often as a new rule has been adopted, the old and exploded reasons have been at once invoked to fix its construction, and to frustrate as far as possible, its usefulness.

Possession at the present day, is very properly regarded as *prima facie* evidence of title, but the whole object of this rule is to keep the peace, and to prevent men from asserting their claims to property by violence. In a question however of title, between man and man, neither party is placed at disadvantage, by the accident of being out of possession. It is never adverted to as even an element of the right, for the simple reason that it may have been acquired by force, by stratagem or by fraud. Always saving and excepting however this one rule, which permits a defence by outstanding title, which stands out by itself as a glaring discrepancy upon the system.

Lord Mansfield, who lived a century before his time, puts a question, which goes at once to the bottom of this whole doctrine of the outstanding title, (1 T. R. 760 note,) and it is this, "Whether,

supposing a title superior to that of the plaintiff, exists in a third person, who might recover the possession against him, it lies in the mouth of the defendant to say so, in answer to an Ejectment brought against himself, by a party having a better title than his own?" In still plainer terms, an Ejectment is brought against a party for a tract of land, who is permitted as a legal and sufficient defence to the suit to say, "It is true your title is better than mine, for I have no title at all. I am a mere intruder, but there is another party who has a better title than you have, and therefore you cannot recover against me." Is such a rule, no matter how old it may be, nor how many venerable sages of the law may have stamped it with their approbation, worthy of respect?

Every one is ready to ask the question, the moment this doctrine of the outstanding title is propounded to him, why is it that the stranger stands aloof with his better title? Why does he not bring his title into Court, and recover his land? The answer is, that in nine cases out of ten, he holds the mere barren legal title, without any portion of the beneficial ownership. His name has been used in some trust or mortgage, as part of the legal form of passing or pledging the land, and the probability is, that the same reasons which prevent him from bringing suit now, will continue to prevent both him and his heirs from doing so, to the end of time. The effect of the rule therefore is, to enable a trespasser to hold the land, against a better title in the plaintiff, and a still better title in a stranger, without color of title in himself. There needs be no privity, no connection of any sort, between himself and the party with the better title, nor any authority to use such party's name as a means of resisting the title of the plaintiff. On the contrary, should the stranger appear in open Court, and expressly forbid the use of his name or title in the pending controversy, the case would be all the same. The plaintiff would lose his suit and his land, with all the costs, and the defendant would go out of Court in a coach and four.

To the rule which permits a defendant to protect his possession by showing an outstanding title, there are numerous exceptions which on the whole, circumscribe its operation within rather narrow bounds: but to examine these in detail, so as to ascertain the cases to which the rule is still applicable, would occupy more space than is consistent with the character of these notes. There is one of these exceptions however, which may deserve a passing notice. It has been held by the Supreme Court of New York,

C. J. Kent delivering the opinion, that a mere intruder who enters upon the possession of another, will not be permitted to protect himself under an outstanding title in a stranger, and that against such a person, the plaintiff having shown a possession of eight or ten years, under a claim and color of title, should be entitled to recover. (Jackson *vs.* Harden, 4 John, 209.) The same doctrine has been recognized in Pennsylvania, (Woods *vs.* Lane, 2 S. & R. 53,) and perhaps in other States. These decisions are certainly founded upon the plainest dictates of justice and common sense, but upon principle, it is conceived they cannot be law. Every Ejectment includes a trespass, and any defence which would protect a defendant from the recovery of damages, in an action of trespass *Quare clausum fregit*, must protect his possession in Ejectment. In Maryland, they cannot be the law, for the additional reason, that as a general rule, a plaintiff in Ejectment must begin by showing a grant for the land by the State, and although there are exceptions to this rule, yet the case of an intruder is not one of them. It is true, that the act of 1852, ch. 177, dispenses with the *proof* of the patent, but at the same time it expressly declares, *that a patent shall always be presumed*, in favor of the party showing a title otherwise good. The *patent* is therefore not dispensed with, but is supposed still to exist, as the foundation of the plaintiff's title. But why is it, that the plaintiff is required to show his patent? It is simply because, until it is shown, there is an outstanding title in the State. The old doctrine, therefore, remains unchanged by this act, and it is still the law of Maryland, that a mere trespasser, who enters upon another's possession, or who obtains it by stratagem or fraud, may protect himself in such possession under an outstanding title in a stranger.

The defence itself is said to be *stricti juris*, that is to say, it is not favored in law. It is another instance, therefore, of a rule of law, which the Courts at the time they enforce it, are compelled to disapprove. And it is this fact which has given use to the long list of cases which have been excepted from the operation of the rule. But let any one consider carefully the cases to which the rule is still held applicable, and then consider those which the Courts have exempted from its operation, and it will be seen that the one class are in every respect, better entitled upon principles of justice, to the exemption than the other. An Ejectment is brought by a purchaser at Sheriff's sale, or by a party whose possession has been invaded by a mere trespasser, or by a plaintiff

against one who has accepted the possession at his hands, and the plaintiff is told that such a defence shall not stand in his way. Then with what show of justice can the same Court pass to a case, when the plaintiff's right is plain and conclusive, and where the defendant is without color or pretence of title, and yet the plaintiff is denied the privilege which has been granted to others, not more meritorious than himself, and is turned out of Court with the loss of his land, and is burthened with all the costs. Why aid one set of suitors to recover, upon proof confessedly short of that required by the rules of law, and exact from another set the fullest proof and that to the letter? Certainly, if the rule be a good one, it ought to apply equally to all cases; if not a good rule, it ought to apply to no case.

24. In all cases where both the plaintiff and defendant claim under the same grant, deed, will or other title, or by descent from the same ancestor, and possession of the land has been held for twenty years, under that right or title, it shall not be necessary for either party in deducing title, to go beyond the right or title, thus common to both.

To make out a regular chain of title, from the patent or original grant of the State, is becoming more difficult every day, from the simple efflux of time. But is there any reason, where an undisputed possession for twenty years has accompanied the right to go back for an hundred years, or it may be more, in order to commence the title at its source?

25. The conveyance by a plaintiff in Ejectment, of the land for which the suit is brought, while the suit is pending, shall not abate the suit, but the same may be entered for the use of the grantee, and prosecuted for his benefit.

This rule, it will be perceived, abrogates a well settled principle of the Ejectment law of Maryland, namely, that the plaintiff must have a legal estate in the land, as well at the trial, as at the commencement of the suit. But no good reason is perceived, why

the Courts of law should be able to notice and protect an equity in other cases, and not in Ejectment. It will not tend in any degree, to complicate the trial, and certainly the defendant can claim no merit to himself, from the fact, that the plaintiff has transferred his right to the disputed land, to another.

26. A deed or conveyance of land, by a party who is out of possession, shall not for that reason, be held void, nor shall any deed, or other title-paper, be deemed void, or its validity in any manner affected, for champerty or maintenance.

A party may have a good title to a tract of land,—it may be his property in the fullest sense of the term, but if he have been turned out of possession by a wrong-doer, he cannot transfer his right to another. To permit him to do so, would be champerty, or selling a law-suit. He may go to law for it himself, but no other man can do the same thing, upon the same title. This is a part of the same doctrine, which declared that a chose in action, as a bond, note, or other evidence of debt, was not assignable, it being thought in ancient times, to be a great encouragement of litigiousness, if any man could make over to a stranger, his right of going to law. At this day, however, the law regulating the assignment of choses in action, particularly that branch of it denominated the law merchant, has grown up into a vast system of itself. The policy of the age is, to free the transactions of commerce, and the dealings of men with each other, as far as possible, from all artificial shackles. The only remnants of the old doctrine of champerty and maintenance, now remaining in the system, are the two cases of a deed for land, by a party out of possession, and the assignment of a covenant after it is broken, because then, it is held to be a mere right to go to law. The same covenant before breach, is not deemed a chose in action, and therefore properly assignable. The act of 1829, ch. 51, enabling the assignee of a judgment, bond, or other obligation for the payment of money, to bring suit in his own name, may be regarded as a legislative opinion very decidedly against the old doctrine, which prohibited the assignment of a *chose in action*. And in Cresap *vs.* Hutson, 9 Gill, 269, the Court of Appeals seem to entertain doubts whether the conveyance of land, by a party out of possession, is after all, a void conveyance.

27. An exclusive possession of land, by cultivation and user, and by marked and visible boundaries, with a claim of title thereto for twenty years, shall extinguish the title of the State, and confer a good title upon the holder.

Something like this was intended by the act of 1818, ch. 90, but the meaning of that act is obscure. A plain rule like the above, in addition to the merit of its being easily understood, is the just rule. All the good lands of the State have been long since appropriated. It is only the refuse lands—the poor hills and mountain sides, that remain yet unpatented. And if it be found here and there, that some needy citizen has squatted upon the ungranted territory of the State, it will be found also, that he can extract but a scanty living from the soil, and it would be wrong to disturb him, the more so, that in nine cases out of ten, it would be for the benefit of the land-jobber and speculator.

28. An exclusive and uninterrupted possession of land, with a claim of title, but without right, for twenty years by actual enclosure, shall be sufficient to bar the recovery of the lawful owner, and shall also confer a title upon which Ejectment may be maintained. General acts of user and ownership shall not be sufficient.

The Court of Appeals, by a series of decisions, have settled the law as expressed in this rule. (Casey's lessee *vs.* Inloes, 1 Gill 500; Cresap's lessee *vs.* Hutson, 9 Gill 269.) It has been said that in the case of Brooke *vs.* Neale, which came before the Court of Appeals in 1829, it was decided, that an exclusive possession of twenty years, without actual enclosure, was a bar to recovery in Ejectment. (Dorsey on Ejectment, 40 note.) But in the same book and page it is also said, that in the case of Bowley's heirs, *vs.* Deadie's heirs, the Court at the same term held, that an actual enclosure was essential to the creation of the bar. These decisions cross each other, and it may be well questioned, whether a possession without right, was ever held in Maryland, to bar the title of the true owner, without actual enclosure.

The act of 1852, ch. 177, however declares, that actual enclosure shall not be necessary, but that acts of user and ownership, other than enclosure, may be given in evidence to the jury, to prove possession. The act is very meagre and loosely drawn, and should the Legislature hereafter determine to adhere to its principle, it will be necessary not only to remodel it, but to settle its details with care. From the best consideration however, which the Commissioners have been able to give the subject, they incline very decidedly to the opinion, that the true rule is the one declared by the Court of Appeals, and that it would be unwise to change it.

The subject of possession is intimately connected with the leading principles upon which the land titles of the citizens depend, and one objection to the change proposed by the act of 1852 is, the great difficulty of perceiving beforehand, how far it is to extend. There is danger that, while intent upon this particular alteration of the law, we may unsettle other principles and rules, which we would be most unwilling to disturb.

The great principle lying at the foundation of the whole system of modern conveyancing is, that a party receiving a good title for a tract of land, is by virtue of his deed, placed at once in constructive possession according to his right. And one legitimate consequence of this rule is, that any one who enters without right, upon such constructive possession, is to be confined to what he has appropriated by actual enclosure. Duncan J. who was a ripe, and very able property lawyer, thus lucidly explains this whole subject. "Constructive possession always accompanies the right. The right always draws to it the possession, and it there remains until seized by the wrong-doer, whose possession is strictly *possessio pedis*—who must be confined to what he has grasped—his real and actual possession. Beyond that, no length of time will protect him, because, beyond that, the owner's possession has never been changed." (Miller *vs.* Shaw, 7 S. & R. 129.)

It is unnecessary to advert to the changes produced in the system of conveyancing in England, by the stat. 27 Hen. VIII. c. 10, or to the effects of that statute, upon the transfer of lands in this country, at the present day. But certainly, if the principle that a good title draws to itself the constructive possession, be worth preserving, it is at least of doubtful expediency, to place the intruder and the trespasser upon a footing of perfect equality with him that has the right, by giving them a constructive possession also, of lands, of which the true owner has never been dispos-

sessed? We know, as the law now stands, the effect and the value of a deed of bargain and sale. We know that it draws to it the possession of the land, if the land be an hundred miles away, and we never saw it, and never intend to see it. But we do not know what is to be the effect of a rule, which virtually emasculates that deed, and which declares, that a purchaser for valuable consideration, shall have no advantage in our Courts, over a tort-feasor.

It is proper to remark in this place, that *mixed possession* is a term, which can have no place in a system where actual enclosure is essential to bar the right. *Mixed possession* is described in some of the earlier cases, (Davidson's lessee *vs.* Beatty, 3 H. & McH. 621; Cheney *vs.* Ringgold, 2 H. & J. 87,) before the law of adverse possession was settled upon its present sound basis, by the Court of Appeals, as a conflicting possession by two persons of the same land, the one by title, the other by wrong, the legal possession of the whole in such case, being in him who has the right. But it is no part of the law as now established, that the actual possession of a part of a tract of land, is at all necessary to give to him who has the title, the constructive possession of the whole. On the contrary, the possession which in law always accompanies the right, accompanies it just as effectually without actual possession of a part, as with it. In Cheney *vs.* Ringgold, the Court, while they speak of mixed possession, expressly decline deciding whether enclosed possession is essential to create the bar. But if enclosure had then been held essential, as it has frequently been since, any reference to mixed possession would have been unnecessary and unmeaning. If however, the law is to be so changed, as to give to general user and ownership the effect, that properly belongs to an actual appropriation by enclosure, it may and probably will, become important to engraft anew upon the system, the doctrine of mixed possession, with its appropriate limitations and distinctions.

29. When such adversary enclosed possession hath passed in succession, through a number of persons, either with, or without writing or deed, from one to another, the recovery of the true owner shall be barred in the same manner, as if the possession had been for the whole period in one person, instead of

several, provided the aggregate continuance of their possession has been for twenty years, and provided the series of successive holders all claim under the same right.

It has been decided by a County Court, that where sundry persons have held possession consecutively of the same piece of land, the joint possessions of all amounting to twenty years, the defendant or last holder, could not avail himself of the possessions of those, who were prior to him in point of time, without showing a deed from each to the one next to him, through the whole number of holders. There may be this use in a conveyance, that it designates the limits of the claim by possession, either by course and distance or otherwise, but actual enclosure, should that be made essential, will secure the same object with greater certainty.*

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* NOTE.—The following are submitted as alternative rules for those numbered 28 and 29 in the text; should the Legislature reject the principle, requiring an enclosed possession to create the bar, and prefer that of general user and ownership, as already imperfectly established by the act of 1852.

28. An exclusive possession, with a claim of title, by user and acts of ownership for twenty years, of a tract, piece or parcel of land, the limits of which possession are marked by visible and definite boundaries, whether with, or without enclosure, shall be deemed an adversary possession, and shall not only bar a recovery in Ejectment, but shall confer a title, upon which Ejectment may be maintained.

One serious objection to a right growing up by adversary possession without enclosure is, that it is not open, continuous, and undisguised, but the very acts of ownership, by means of which a party successfully takes away the lands of another, may have been clandestine, and for a long period, purposely kept from the eye of the lawful owner. At the trial of the case, the witnesses in proving the user and ownership, either deal in vague generalities, or their proof of the acts, showing the holder's possession, are so disconnected and indefinite, that the mind can draw no safe conclusions from them. They swear that a tree was cut at one point, a different tree at another, and the boundaries of the possession

30. No possession having its origin in contract, or otherwise held in subordination to the title of the true

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are then made out, by drawing a line from one tree to the other. And the trees after all, may have been cut on rainy days, when no one was about to witness the trespass. If the holding is bounded by a stream of water, a public road, a bluff of rocks, or any natural object, marking to the eye a division of the territory, the evil of uncertainty in the claim, is in a great measure removed. But general user being necessarily shown, by separate and disconnected acts, and not continuous and obvious, like an enclosure, it seldom, if it ever can be proved, so as to leave the mind from all misgivings about the honesty of the claim.

29. When such exclusive and adversary possession, hath passed in succession, through a number of persons, each conveying to the next in succession, by deed regularly executed, acknowledged and recorded, and containing a definite description of the land, the recovery of the land by the lawful owner shall be barred in the same manner, as if the possession had been for the whole period in one person, instead of several, provided, the aggregate of the whole series of possessions, shall have continued for twenty years.

30. Where two parties are in mixed possession of the same tract, or parcel of land, the one by title, the other by wrong, the constructive possession of the whole, shall be in him who has the right; but in cases of mixed possession, an actual enclosure of the possession of him who is in by wrong, for twenty years, shall be essential to bar the recovery of the lawful owner. And such enclosed possession, when it is sufficient to bar the right, shall be sufficient also, to confer a title, upon which to maintain the action of Ejectment.

31. The rule of law, that in the absence of an adversary possession for twenty years, in a stranger, a good title to land shall draw to it the constructive possession, is not intended to be affected, by anything herein contained.

owner, shall be deemed adversary, but from the time such contract or title has been so openly repudiated, as that a jury may find a knowledge or notice of such repudiation, by the true owner.

The merit of this rule will be, to render the law a little more certain and definite, than we now find it in the books.

31. An actual entry before action brought, shall not be necessary in any case, to maintain Ejectment.

There are some cases, as for example, where a power is reserved to re-enter for breach of a condition in a lease or grant, in which an actual entry would be necessary to enable the plaintiff to maintain his action, were it not for the consent rule, and the confessions of lease and entry, which is held to dispense with the proof of the entry. It is but prudent therefore, while abolishing the fictions in Ejectment, to dispense with the actual entry, which these fictions alone had rendered unnecessary, but which in principle, have been considered an essential pre-requisite to the bringing of the suit.

32. When land is unoccupied, or the possession vacant, a party claiming title thereto, who enters and holds the same, shall be deemed in possession, according to his right.

It seems agreed, that an Ejectment brought on a vacant possession, is the only case in which an actual entry and lease sealed upon the premises to the plaintiff, together with his ejection therefrom, by a real person, is necessary to the maintenance of the action, and the reason is, that there is no one to enter into the consent rule. But why in such case, should any action be necessary? If the party claiming the land, finds no one in possession, why not take possession himself? Why bring suit when there is no one to sue? "Every one," said Lord Kenyon, "that has a right of entry, may enter peaceably, and being in possession, may retain it, and plead that it is his soil and freehold." (7 T. R. 431.) And the opinion is entertained by Mr. Chitty, that actions of Ejectment are frequently resorted to, when they are unnecessary, and that the owner of land, who is kept out of possession by a wrong-doer, may rightfully obtain possession through the agency

of a tax-gather, authorised by a warrant to break open doors, or even by stratagem. (1 Chit. Gen. Pr. 646.) However this may be, when the possession is vacant, and the claimant may enter without a breach of the peace, it seems strange that an action should be deemed necessary.

33. When the beginning, or other boundaries of a tract of land, have been destroyed, or no proof thereof can be had, the party shall not thereby lose his land, but shall be permitted to establish his beginning or boundaries by reputation in the neighborhood, by his own holdings and possessions, and those of the persons under whom he claims.

The regulations established by Lord Baltimore, for the purpose of selling out his lands to settlers, as they reached his colony from abroad, furnish the rules for the ascertainment of titles in Ejectment, at the present day. It was necessary that his Lordship, at a time when his domain was a wilderness, should establish certain rules as to the location of his grants, as they issued from his land office. Every settler who obtained a patent, and had it located, was entitled to the means of defending his land against all subsequent settlers, under junior grants. It became therefore, a principle in the Ejectment law of the Province, and subsequently of the State, that each party, plaintiff and defendant, in showing his claims and pretensions, should prove the true location of his tract, that is, how and where it was originally run out, by proving its beginning and calls.

But now, after the lapse of a century and more, after the original forests have been removed, the face of the country opened and cleared—when the whole surface is brought into cultivation, the original locations all effaced, and farms divided without reference to the tracts of which they are composed—when the witnesses who could once have proved the beginning trees, and the calls are long since dead, and other generations have passed away since they lived; the rules and regulations which were very proper for the settlement of a new country, have become, by the efflux of time and the change of circumstances, extremely inconvenient in practice, and impossible in many cases, to be carried into effect.

34. Every tenant upon whom any writ of Ejectment shall be served, shall forthwith give notice thereof to his landlord, or his agent or attorney, under penalty of forfeiting the value of two years rent of the premises, to the landlord, to be recovered by action at law.

See the stat. 11 Geo. 2, ch. 19, sec. 12, of which this is in substance a re-enactment.

35. Whenever a landlord or lessor hath right, according to the lease or agreement, to re-enter for the non-payment of rent, he may bring an Ejectment against the tenant or lessee, or any person claiming under him as assignee or otherwise, for the recovery of the demised premises, and upon its being made to appear that the rent was due, and that the landlord had right to re-enter, and that no sufficient distress was to be found on the premises, the landlord shall, at the first term of the Court, after the institution of his suit, be entitled to a verdict and judgment for the recovery of the said demised premises. Provided, that if at any time before execution, on such judgment executed, the tenant or person claiming under him, shall pay to the landlord, the full amount of the rent in arrear, together with his costs of suit, the said judgment shall be deemed satisfied, and further proceedings thereon, shall be discontinued; but if the tenant or other person claiming under him, shall permit the execution to be executed, without paying the rent, and costs of suit, and without proceeding in Equity for relief, within six months after such execution executed, the tenant or other person claiming under him, shall be barred and foreclosed from all relief or remedy at law, or in Equity, other than by appeal to the Court of Appeals.

36. In case the tenant, or other person claiming under him, shall proceed for relief in Equity, he shall not have, or continue any injunction against the proceedings at law, unless within sixty days, next after full answer shall be made by the landlord, to such bill in Equity, bring into the Court of Equity such sum of money as the lessor in his answer, shall swear to be due, over and above all just allowances, and the costs in the suit in Equity, there to remain, until the hearing of the cause, or to be put out upon good security, if the parties agree thereto.

37. If the tenant, or any person claiming under him, shall at any time, before the execution in the Ejectment suit shall be executed, pay to the landlord or his attorney, or pay into the Court, all the rent in arrear, together with the costs of suit, then all proceedings in the Ejectment shall cease and be discontinued. And if such lessee, or those claiming under him, shall upon such proceedings, be relieved in Equity, he shall have, hold and enjoy the demised premises, according to the lease or agreement thereof made, without any new lease or agreement. And if such relief shall be obtained in Equity, after execution in the Ejectment suit has been executed, the said Court of Equity shall adjust and settle the compensation, due to the lessee by the landlord, for the time the premises have been held and enjoyed by him, upon principles of equity and justice.

38. Where the term of any tenant, holding under a lease or agreement, for any number or term of years certain, or from year to year, or at will, shall have expired, or been determined by regular notice to quit, either by the landlord or tenant, and the tenant, or

any one holding under him, shall refuse to deliver up possession, after demand made in writing, and signed by the landlord, his agent or attorney, and served personally upon, or left at the dwelling house, or usual place of abode of the tenant, or person holding under him, and the landlord shall proceed by action of Ejectment, for the recovery of the possession of the premises, it shall be lawful for the landlord, at the foot of the writ in Ejectment, to address a note to such tenant or person holding under him, requiring him to find such bail, if ordered by the Court, and for such purposes as are hereinafter specified. And upon the return of the writ and notice, and the filing of the declaration of the landlord, whether the tenant, or person holding under him, shall appear to the suit or not, and upon the Court being satisfied of the service of the writ and notice, and upon the landlord producing the lease or agreement, or some counterpart or duplicate thereof, or upon proof of the letting, if the same were by parol, or upon the Court being satisfied of the said letting, either by writing or parol, and that the premises have been actually enjoyed under such lease, agreement or letting, and that the interest of the tenant, or other person holding under him, hath expired, or been determined by regular notice to quit, and that possession hath been demanded in manner aforesaid, it shall and may be lawful for the Court, at the instance, and upon the motion of the landlord, to lay the tenant, or person claiming under him, under a rule to show cause, within a time to be fixed by the Court, why he should not enter into a recognizance by himself and two sufficient sureties, in a reasonable sum, to be fixed by the Court, conditioned to pay the

costs and damages, which shall be recovered by the landlord, and the Court, upon no good cause being shown, may make the rule absolute, and order the tenant, or person holding under him, within a time to be fixed by the Court, to find such bail, and upon neglect or refusal to do so, and upon no good excuse for not doing so, the Court shall give judgment for the landlord, for the recovery of possession of the demised premises, and no appeal by the tenant, or person holding under him, shall operate as a supersedeas of the execution of such judgment and delivery of the possession to the landlord. Provided, that either party shall have a right to a trial by jury, of the facts in controversy, if he shall so desire.

39. Upon the trial of the Ejectment, the Court shall permit the landlord, after proof of his right, to recover possession of the whole, or any part of the demised premises, to go into evidence of the mesne profits thereof, which may have accrued from the day of the expiration, or determination of the tenants, or other persons interest in the same, down to the time of the verdict in the cause, and the jury shall give their verdict upon the whole matter, both as to the recovery of the whole, or any part of the premises, and also for the mesne profits found by the jury, and the landlord shall have judgment both for the recovery of the premises, or the part thereof, and also for the mesne profits found by the jury. Provided, that nothing herein contained, shall bar such landlord from recovering the profits which shall accrue, from the day of the verdict down to the day of the delivery of possession of the premises recovered in the Ejectment.

40. Nothing herein contained shall prejudice or affect any other right of action or remedy, which a landlord may possess, either for the recovery of rent, or of the demised premises.

The act of 1793, ch. 43, gives the landlord a remedy to recover the possession of lands, let for a term of years, or at will, by a trial before two Justices of the Peace and a jury *in pais*. But the remedy, even in the cases to which it applies, is ill contrived, and frequently fails from omissions in matters of form, or the jury are persuaded that the case is a hard one, or being informed that the tenant is poor, and has a family of small children, permit him to retain the possession. Or if the landlord succeed in getting the verdict, a writ of *certiorari* is in readiness, to arrest the proceedings immediately after the verdict, and remove the whole case into Court, for trial there. It is better therefore, to provide a prompt and simple remedy for all cases, and let that commence in Court at once.

The preceding six sections are borrowed from the English common law procedure act, (15 and 16 Vct. chap. 76,) omitting many of the details which are deemed unnecessary. In England, under the procedure act, there are no pleadings in Ejectment. The suit is brought by writ, which contains a description of the property, to which the defendant appears and takes his defence, either for the whole or part of the premises, by a notice. The Commissioners prefer the procedure they have recommended, as more simple and less embarrassed with forms.

41. The purchaser of land sold under execution, may maintain Ejectment for the land so purchased by him, upon showing the judgment or decree upon which the execution issued, the seizure of the land by the officer, the execution and sale to the plaintiff; and the deed of the officer or his return of the execution, shall be sufficient proof of the sale. In the absence of a deed, or proper return of the execution, a memorandum in writing of the sale, containing a proper description of the land, shall be sufficient proof

of the sale. Provided, that nothing herein contained, shall apply to a case where the defendant in the Ejectment was in possession of the land, under a claim or by a title independent of, or in hostility to that of the defendant in the execution, under which the land was sold, and purchased by the plaintiff.

42. Every fair legal intendment shall be made in favor of the title of a purchaser, under a judicial sale, who has paid his money upon the faith of such purchase.

43. In all cases where land is sold under execution, and the defendant in the execution, or other person holding under him, by title subsequent to the judgment or decree, shall be in actual possession of the land, and shall fail or refuse to deliver possession to the purchaser, the Court from which the execution issued, may at any time within three years after the sale, on the application of the purchaser, and upon no good cause being shown to the contrary, issue a writ of *habere facias possessionem,* commanding the Sheriff or other proper officer, to deliver the possession of the said land to the purchaser. Provided, notice in writing of his intention to apply to the Court for such writ of *habere facias possessionem,* be given by the purchaser to the defendant, or other person concerned, at least twenty days before the term at which such application shall be made.

The act of 1825, ch. 103, giving the Courts power to issue a *habere facias possessionem* without a previous judgment in Ejectment, is limited in its operation in respect to time. By the express terms of the act, the notice is to be given to the defendant, twenty days prior to the term succeeding that, to which the execution is returnable, at which term the application for the writ is to be made. If therefore, the property should not be sold under the

execution, until after such succeeding term—which often happens, and most frequently at the instance of, or through indulgence to the defendant—or if, after a motion to set aside the sale, the case is taken to the Court of Appeals—the time in either of these cases, for obtaining the *habere facias* will have passed by, and the purchaser is driven to his Ejectment. There is no good reason for confining the remedy to this narrow point of time, for if it be right for the Court to order a *habere facias* at the term named in the act, it cannot be wrong for the Court to do so, at any other term within the period allowed for taking out execution upon a judgment.

The remedy however, has been objected to as too summary, and as allowing two executions—first a *fieri facias*, and then a *habere facias*, upon the same judgment, and that too a judgment in debt, assumpsit or case. But there is nothing in the objection, for in an Ejectment by the purchaser of land under execution, there is no investigation of title. The whole enquiry is limited to the seizure, the sale and the description of the land, and this the Court is just as competent to conduct under one form of enquiry as another.

44. A purchaser from a trustee, appointed by a Court of Equity, to make sale of land, may as against any party to the proceeding in Equity, under which the sale was made, maintain his Ejectment for the land, by showing the decree of the Court, and the deed of the trustee, or if no deed be made, the report of the trustee, and final ratification of the sale by the Court, and the payment of the purchase money, of which the receipts of the trustee shall be *prima facie* evidence. If the possession of the land be in a stranger to the proceeding, and under a title independent of the parties thereto, the plaintiff shall make out his title as in other cases of Ejectment.

45. In all cases where land is sold by a trustee, appointed for that purpose by a decree of a Court of Equity, and all, or any of the parties to the suit or

proceeding in which such decree was passed, or any person holding under them or any of them, by title subsequent to the filing of the bill, or the institution of such proceeding in Equity, shall be in the actual possession of the land, and shall fail or refuse to deliver possession thereof to the purchaser; then upon the petition of the purchaser, praying to be put into possession of the land, and upon its appearing to the Court, that notice of such petition has been served upon the party in possession, or left at his place of abode, at least twenty days prior to the hearing of the matter of the petition, and upon no good cause being shown to the contrary, it shall be lawful for the Court to issue a writ of *habere facias possessionem*, commanding the Sheriff or other proper officer, to deliver possession of the land to the said purchaser.

The mode of compelling the delivery of possession, to a party entitled to it under proceedings in Chancery, was established in the case of Garretson *vs.* Cole, (1 H. & J. 370,) as far back as the year 1797, to be first a mandatory injunction, and in case of disobedience to that, a *habere facias possessionem*, and that has been the practice ever since. The mode here recommended is believed to be more simple and convenient.

46. The verdict in Ejectment, where it is for the plaintiff, shall specify the interest recovered in the premises, whether undivided or separate—and either for the whole, or a part of the premises, against all or a part of the defendants, and against whom, whether they sever or join in their defence. When it is for a less quantity than that claimed and described in the declaration, it shall describe the part recovered, with all convenient certainty.

See ante section 13, and the remarks upon it.

47. The judgment for the plaintiff shall be, that he recover the possession of the premises, according to the verdict, if there be one, or in case of a judgment by default, or upon demurrer to the whole declaration, according to his claim in his declaration, or if the judgment be upon the demurrer, to part of the claim set forth in the declaration, it shall be for such part as shall be ruled good, in which case the Court may order the plaintiff to file further particulars of the land claimed, so as to render the judgment certain.

48. The Court shall have power, upon the appearance of a defendant, against whom a judgment by default has been entered, to open the judgment at any time within three terms succeeding the term at which the same was rendered, and admit the defendant to make defence to the Ejectment, upon his showing to the satisfaction of the Court, that he was taken by surprise, and that he is prepared to show a good title to the premises; and if possession have been already delivered to the plaintiff, the Court, in case the defendant shall prevail in the suit, shall have power to order a restitution of the premises.

49. A judgment in Ejectment shall be final and conclusive of the rights of the parties, as in other cases.

50. The process to deliver possession after a recovery in Ejectment, shall be a *habere facias possessionem*, which shall describe the premises according to the verdict or declaration, or particulars of the land, as the case may be.

51. The writ of *habere facias possessionem*, may issue at any time within three years from the date of the judgment of any Court of Common Law, or the

decree of any Court of Equity, or from the judgment or decree of the Court of Appeals, or in case there be a *cesset executio* entered on the record, from the expiration thereof.

Under the present system, if the plaintiff having recovered his judgment in Ejectment neglect to sue out his *habere facias* within a year thereafter, he must bring his *scire facias* as on all other judgments, otherwise the Court will award a writ of restitution, *quia erronice emanavit.* The act of 1823, ch. 194, is limited by its very terms, to writs of *fi. fa.* and *ca. sa.*, the *habere facias* being a *casus omissus.*

52. If the officer exceed his authority, and deliver more land than has been recovered, or land not mentioned in the proceedings, the Court shall have power, on motion, to order a restitution.

53. The officer to whom the writ of *habere facias possessionem* is directed, if so required in writing by the plaintiff, shall withhold his return thereof, during the period of three years after the date of the judgment, or the expiration of the *cesset executio*, if there be one, in order that the plaintiff may, by a renewal of the writ or otherwise, have the full benefit of his judgment.

It was formerly the practice in England, well established as it would seem from the books, that if the plaintiff were turned out of possession, after the execution of the writ of *habere facias*, the Sheriff could reinstate him under the old writ, if before the return day, or the plaintiff might renew the writ if ousted after the return day. Nothing could be done under the old writ, after the return day had passed, it being then *functus officio;* nor could the writ be renewed after one *habere facias* was returned and filed, because it then appeared of record, that the plaintiff had had the benefit of his suit. It was also well settled, that the writ was only returnable at the option of the plaintiff, and that the Court would not, at the instance of the defendant, direct the writ to be returned. (See Bac. Ab. Tit. Eject. G. 3.) But this doctrine was all overturned

by the Court of Common Bench, in the case Doe dem. of Pate, *vs.* Roe, 1 Taut. 55, decided in 1807, in which it was held that after the Sheriff "had given possession," the plaintiff could not have another writ. "An alias," say the Court, "cannot issue after a writ is executed. If it could, the plaintiff by omitting to call on the Sheriff, to make his return to the writ, might retain the right of suing out a new *habere facias possessionem*, as a remedy for any trespass, which the same tenant might commit within twenty years next after the date of the judgment."

Of the two rules, the old one is considered the best. It is the more likely to ensure to the plaintiff the fruits of his judgment, and more convenient in practice. And as the power is given to the plaintiff, to issue an original *habere facias*, at any time within three years, it is not deemed a very dangerous extension of that power, to enable him at the same time, when this has been sent out and executed, to withhold the return of it during a like period, in order to a renewal of the writ, should the conduct of the defendant, or those in combination with him, render it necessary.

54. If after the possession is delivered to the plaintiff, under the writ of *habere facias*, or the agreement of the parties, the plaintiff is turned out of possession, either by the defendant or a stranger, it shall be the duty of the officer, under the same writ, if applied to before the return day thereof, or under a new writ, if after the return day of the old writ, to reinstate the plaintiff in the possession of the premises. And the plaintiff may renew the writ of possession as often as may be necessary, to secure to him the full benefit of his judgment. Provided, he has directed the officer to withhold the return of the first writ.

If after the writ is executed, the plaintiff is turned out of possession by the defendant, he may have either a new *habere facias*, or an attachment to restore to him his lost possession, or to punish the party for the wrong. But if the plaintiff be turned out by a stranger, after execution fully executed, he is put to another action, or an indictment for a forcible entry. No good reason, however, is perceived, why a stranger should be permitted to frustrate the

process of the Court more than the defendant. Besides, the defendant may effect his object by concert with the stranger.

55. When the recovery in the Ejectment has been for any part less than the whole, either undivided or in severalty, and the plaintiff having been put in possession of such part, under the writ of *habere facias*, or the agreement of the parties, or otherwise, shall oust the defendant of the whole, or of any part to which he may not be entitled under the recovery, the Court shall have power, in a summary way, upon affidavits, to restore the defendant to his possession, whether the defendant has been so ousted before, or after the return day of the writ, but within three years from the date of the said recovery.

When the plaintiff has recovered a part, for example, one-sixth of the land demanded, and the Sheriff has delivered him that portion, and the plaintiff after the return day of the writ, hath ousted the defendant of the whole, the Court cannot restore the defendant in a summary way, but it is otherwise if there be an actual ouster before the return day, (2 Bin. 450.) But if the plaintiff who gets into possession by the assistance of the Court, and in virtue of its process, shall pervert the Court's authority, to the purposes of wrong, it should be in the power of the Court to restrain and even to punish him, as well after, as before the return day of the *habere facias*. Under the zigzags of the present system, there is almost as much difficulty in obtaining the fruits of a judgment, in Ejectment, as in obtaining the judgment itself.

56. Where the judgment in Ejectment is for the plaintiff, either upon the verdict of a jury, or on demurrer, by default or otherwise, the damages to which he may be entitled for mesne profits, shall be assessed under a writ of enquiry, to be executed at the bar, or if the parties shall so agree, they may be assessed by the Court; unless the defendant shall file

his petition, to be allowed for improvements, as hereinafter provided; and the action of trespass for *mesne profits* is abolished.

57. Any defendant against whom a judgment or decree hath passed for land, may at any time before the execution of the judgment or decree, present a petition to the Court rendering or passing the same, stating that he, or those under whom he claims, while holding the premises under a title believed by him or them to be good, have made permanent improvements thereon, and praying that he may be allowed for the same, over and above the value of the use and occupation of the land; and thereupon the Court may, if satisfied of the probable truth of the statement, suspend the execution of the judgment or decree, and empannel a jury, or send issues to a Court of Law, to be tried by a jury, as the case may be, to assess the damages of the plaintiff, and the allowances to the defendant, for such improvements.

58. The jury in assessing such damages, shall estimate against the defendant, the clear annual value of the premises during the time he was in possession thereof, (exclusive of the use by the defendant of the improvements thereon, made by himself, or those under whom he claims,) and also the damages for waste, or other injury to the premises, committed by the defendant; but the defendant shall not be liable for such annual value for any longer time than three years before the institution of the suit, or for damages for such waste or other injury, before the three years, unless when he claims for improvements as aforesaid.

59. If the jury shall be satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good, under which he or they were holding the premises permanent and valuable improvements, they shall estimate in his favor, the value of such improvements, as were so made before notice in writing of the title, under which the plaintiff claims, not exceeding the amount actually expended in making them, and not exceeding the amount to which the value of the premises is actually increased thereby, at the time of the assessment.

60. If the sum estimated for the improvements, exceed the damages estimated by the jury against the defendant, they shall then estimate against him for any time before the three years, the rents and profits accrued against, or damage for waste or other injury, done by him, or those under whom he claims, so far as may be necessary to balance his claim for improvements, but in such case, he shall not be liable for the excess, if any, of such profits or damages, beyond the value of the improvements.

61. After setting off the damages assessed for the plaintiff, and the allowances to the defendant for improvements, if any, the jury shall find a verdict for the balance, for the plaintiff or defendant, as the case may be, and judgment or decree shall be entered or passed for the same, according to the verdict.

62. Any such balance due to the defendant, shall constitute a lien upon the land recovered by the plaintiff, until the same shall be paid.

63. If the plaintiff has only an estate for life in the land recovered, and pay any sum allowed to the de-

fendant for improvements, he or his personal representative may recover, at the determination of his estate, from the remainder man or reversioner, the value of the improvements, as they then exist, not exceeding the amount so paid by him, and shall have a lien therefor on the premises, in like manner as if they had been mortgaged for the payment thereof, and may keep possession of the premises, until it be paid.

64. Nothing herein contained shall extend or apply to any suit, brought by a mortgagee, or his heirs or assigns, against a mortgagor, or his heirs or assigns, for the recovery of the mortgaged premises.

65. When the defendant shall claim allowance for improvements, as before provided, the plaintiff may, by an entry on the record, require that the value of his estate in the premises, without the improvements, shall also be ascertained, and the value of the premises in such case, shall be ascertained as it would have been, at the time of the enquiry, if no such improvements had been made on the premises by the defendant, or any person under whom he claims, and shall be ascertained in the manner herein before provided, for estimating the value of improvements.

66. The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered, or decree passed, on the assessment of the value of the improvements, in person, or by his attorney in the cause, enter on the record, his election to relinquish his estate in the premises to the defendant, at the value so ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein, at the commencement

of the suit, provided, he pay therefor the said value with interest, in the manner the Court may order it to be paid.

67. The payments shall be made to the plaintiff, or into Court for his use, and the land shall be bound therefor; and if the defendant shall fail to make the payments, within or at the times limited therefor, respectively, or in case the defendant in person, or by his attorney in the cause, shall enter upon the record, a suggestion to that effect, the Court shall order the land and premises to be sold, and shall appoint a trustee for the purpose of making the sale, and the proceedings of the Court, in the appointment of the trustee, and also as to the course and manner of his proceedings, in making the sale, shall conform as nearly as may be, to the practice in such cases, in the Courts of Equity of this State. And the proceeds of the sale shall be brought into Court, to be divided under the Court's direction, between the plaintiff and defendant, according to the principles herein before contained. Provided, that if the nett proceeds be insufficient to satisfy the said value and interest, the defendant shall not be bound for the deficiency.

68. If the defendant, or his heirs or assigns, after the premises are relinquished to him, and he has paid the assessed value of the same, or any part thereof, be evicted thereof, by force of a better title than that of the original plaintiff, the person so evicted may recover from such plaintiff, or his representatives, the amount so paid, as so much money had and received by such plaintiff, for the use of such person, with lawful interest thereon, from the time of such payment.

The first eight of the preceding sections in regard to allowances for improvements, are taken from the new code of Virginia, into which they were copied substantially from the statutes of Massachusetts and New York. The four last of these sections were introduced into the Virginia code, by the joint committee on revision, from which they have been borrowed by the Commissioners, with such modifications however, as were necessary to render them suitable to the system of practice prevailing in Maryland. They are founded in natural justice, and it is hoped will prove acceptable to the Legislature and people of this State. They accord to the plaintiff in Ejectment, who has recovered his judgment, his land at its enhanced value, with the profits of it, so far as that enhancement is due to the general improvement and appreciation of property in the country, but they withhold from him the fruits of the labor and expenditure of others, and to these it is conceived, he has no legitimate title. It is one of the sad consequences of the great delays of parties, in asserting their claims to property, that innocent persons have to suffer for it. It was not long ago, that a claim was made to a large portion of the City of Louisville. More recently, a person set up a title to a part of the City of New Orleans, and but the other day, a suit was decided in Pittsburg, involving the title to land, upon which three hundred houses had been erected. The fact that such extensive improvements were made on the land, is of itself sufficient proof that the outstanding claim was both stale and hidden, and not to be discovered by ordinary diligence. When such claims succeed, they enrich one, or at most, a few persons, without merit, while they rob great numbers of persons, including the helpless and unprotected, who have been guilty of no fault or delinquency of any kind, of their only means of subsistence. The truth is, that old, stale and hidden claims, even where they are just, but rarely succeed, and it is believed, that under the regulations here recommended, they will have a better chance of success than they ever had.

69. The Courts shall have power for the regulation of their own proceedings, in carrying into effect the details of the provisions herein contained, to adopt all such rules of practice, as they may deem necessary and convenient for that purpose.

THE LAW OF ATTACHMENT.

The theory of the proceeding in attachment is, that the defendant, by reason of his residence beyond the limits of the State, or of his having absconded with intent to injure and defraud his creditors, cannot be arrested, and process against his property is given, for the purpose of compelling him to appear to the suit. It is substantially a sequestration, intended to bring a non-resident or fraudulent debtor under obedience to the law. Hence it is settled, that if the defendant *was* a resident of the State, in the one case, or *had not* absconded in the other, at the time of suing out the attachment, he may by plea, or upon motion, show the fact, and the attachment will be quashed, as having been improvidently issued.

The attachment and the capias both go together into the hands of the Sheriff,—the one against the property, the other against the person of the debtor. If the Sheriff seize both, and return the attachment, "attached as per schedule," and the capias, "cepi," the attachment does not fall as of course, because at the time it issued, the defendant may have been a non-resident, or may have actually absconded, and afterwards changed his mind. Both returns, therefore, may stand well together, and the officer having both the person and the property of the debtor, so returns his process, that the Court may deal with either, or both, according to law.

The defendant, however, cannot appear to the writ without bail, if cause of bail appear on the proceedings, and cause of bail must appear, if the acts of Assembly have been complied with. At this point, however, the acts of 1834, ch. 79, and 1839, ch. 39, come into view. They provide, in substance, that no attachment, either against a non-resident or absconding debtor, shall be dissolved, unless the defendant shall give bond to the plaintiff, in such security as the Court shall approve, to satisfy any judgment that may be recovered in the case. These acts formed a marked epoch in the

history of the attachment law of Maryland. Their effect is, to convert that which was before a mere distringas, to compel the defendant to appear, into a substantive action *in rem*, to enforce the payment of the debt. The attachment is no longer a mere subsidiary process to bring the party into Court, but an independent remedy, by which the property is seized and sold for the payment of the plaintiff's claim, and in most cases, the last thing the plaintiff desires is, the appearance of the defendant to the suit.

Again, the Constitution abolishes imprisonment for debt, and the effect of that provision, but for the acts of 1834 and 1839, would have been to destroy the whole efficacy of the remedy by attachment. Bail was the means by which the imprisonment of the body, as the final result of the suit, was secured, but where there is no imprisonment for debt, there can be of course, no bail. In the state of things supposed, therefore, there being no longer any necessity of giving bail, the attachment would have been dissolved, and the goods released, by the simple order of an attorney to enter his name to the suit. If these acts, therefore, had not been on the statute book, when the Constitution went into operation, an act containing similar or equivalent provisions, must have been passed to preserve the whole proceeding by attachment from destruction. It may be remarked moreover, that if the attachment had not been converted into a regular action *in rem*, by the legislation referred to, it is certain that the same result would have been brought about a few years later, as a necessary consequence of the abrogation of imprisonment for debt.

Recurring for a moment to the theory of the attachment, it is worthy of remark, that in form, it is separated into two proceedings—the attachment and the action—the one against the goods, the other against the body. And from the character of this arrangement alone, the inference is almost a necessary one, that the two proceedings were designed to be in the alternative, and that in no event was the plaintiff to be entitled to two judgments in the same suit. The attachment being a mere distringas to compel an appearance, whenever its object was accomplished by an appearance, the attachment fell to the ground. There is, however, a *dictum* of the Court of Appeals, in Barr *vs.* Perry, 3 Gill, 326, to the effect, that the plaintiff may prosecute both proceedings and obtain judgment in each, but upon what principle, it is respectfully asked, can this be so? Why is it that the goods are ever *condemned?* Simply, because the distringas has failed to bring the body into

Court, that the action may be prosecuted against it. To condemn the goods, which supposes the party to be absent, and to render judgment against the person, which supposes him to be present, and to do all this in one and the same case, involves an elementary incongruity, which there is no power in logic to reconcile.

Such is the present state of the attachment law, the acts of 1834 and 1839, and the new Constitution, all considered. The plaintiff, by force of the attachment, acquires a lien upon the goods or credits attached, the appearance of the defendant having no effect upon the attachment, until the bond with approved security is filed, in which case, the attachment falls, and the goods are released, when the plaintiff has his bond and security in place of his lien. It is therefore, a substantive action by which the creditor is enabled to seize upon the property or credits of his debtor, and hold them or their equivalent, for the payment of his demand. It is to be treated therefore, not merely as the incident of a remedy, but as the remedy itself. And the question now presents itself, what alterations or amendments, either of its rules and clements, or of the mode of applying them, are required to render it a safe and convenient remedy, without being an oppressive one?

As already intimated in another place, it is very desirable that the proceeding by attachment should be emancipated from the trammels of the statutory law. The original germ of the foreign attachment was taken from the customs of London, which has been expanded from time to time, by a succession of statutes, beginning in 1692, and running through the whole course of Maryland legislation down to 1854, and in the construction of the system thus created, it has been required that all the proceedings must appear upon their face, to be within the special and limited jurisdiction thus conferred upon the Courts. Any departure from the strict line of proceedings marked out by the statutes, as it operates to deprive the Court of its jurisdiction, need not be pleaded or otherwise shown by way of defence, but may be brought to the notice of the Court, by motion to quash, or by demurrer; or if the objection be not taken in the Court below, it may, notwithstanding the act of 1825, ch. 117, upon appeal be assigned for error. All the nice technical learning, with which the decisions abound, and the numerous amendatory acts, intended to cure the defects thus arising, have grown out of the one principle, which regards the remedy by attachment as a special jurisdiction, limited by the words of the statute creating it. And it will be a great improvement in this

important branch of the law, to place it within the general jurisdiction of the Courts, requiring all objections to the proceeding to be made as defences by plea or otherwise, as in other forms of action, and declaring that all formal defects shall be cured, or formal omissions supplied by legal intendment.

It will be found necessary also, as a consequence of the abolition of imprisonment for debt, to strengthen the arm of the Court, and to guard the rights of creditors, against certain fraudulent abuses of debtors, now more than ever in their power, by enlarging the remedy by attachment, with special reference to such abuses.

1. The remedy by attachment shall be deemed and taken to be within the general jurisdiction of the Courts, and no attachment shall be quashed or defeated, by reason of any defect or omission of substance or form, but all such defects or omissions may be amended, according to the right of amendment already existing in other actions, by law, or cured or supplied by legal intendment.

The act of 1846, ch. 324, cures all defects in attachments then pending, and provides that the Courts shall allow all amendments in the affidavit, warrant, process or proceedings, so as to bring the pending cases fairly to trial upon their merits. The operation of the act begins and ends with the cases then on the docket, or which were sued out in 1845. All other attachments, both before and after the period named, were left to take their chances, and stand or fall, by their conformity to the stern rules of the attachment law, which were deemed good enough for all cases not covered by the provisions of the act.

It is provided by the act of 1832, ch. 280, sec 4, that no attachment sued out for any debt due to a minor, *feme covert* or lunatic, shall be quashed or set aside for any defect in matter of form. The implication is, that all other attachments may be set aside upon objections merely formal, and as an expression of the legislative will, it is a little singular. For if justice can be administered without regarding form in any one class of cases, it may for the same reason, be so administered in all. It is hardly seemly in matters relating to the administration of justice, to declare before-

hand, that one class of persons shall be favorites in Court, while all others shall be dealt with *stricti juris.*

2. Every person, partnership, firm, body corporate or politic, competent to sue or liable to be sued in any of the Courts of this State, shall be in like manner competent to sue out, or be subject to the remedy by attachment, as hereinafter provided.

To sue out an attachment is a privilege conferred by statute, upon certain classes of creditors, being citizens of some one of the United States, or of the Territories thereof, there being other classes of creditors to whom the privilege is not extended. Until of recent years, it was necessary that the plaintiff, seeking the benefit of the statute, should bring himself within its provisions, by describing himself upon the face of the proceedings, to be a creditor entitled to sue in this form. And although the privilege is now somewhat enlarged, and many of the nicer technicalities in the forms of proceeding dispensed with, yet the right to sue in this form is not a general right, and to enable a person who can sue in any form, to sue in this, is the design of this section.

By the attachment law as heretofore existing, many persons—more formerly than at present, were prohibited from suing out attachments, who were nevertheless liable to be proceeded against by attachment. This is not altogether fair, and its want of mutuality ought to be a sufficient objection, if there were no other, to the old rule.

3. The right to sue out an attachment shall exist as hereinafter provided, in every case of a debt, claim or demand, arising upon contract, where the contract itself ascertains the amount of indebtedness, or where the amount is capable of ascertainment by some standard, fixed by the contract sufficiently certain to be averred upon oath.

This rule is taken from the case of Wilson *vs.* Wilson, 8 Gill, 194, in which the Court says, that an attachment may be sued out, where the contract fixes the amount of the debt—or where it

furnishes the standard by which it may be fixed—or *where the jury by their verdict, may ascertain and find the amount.* The part of the opinion which is in italics is omitted, for the reason that it would authorize attachments, in cases of unliquidated damages, in the broadest sense of the term. For the jury need no standard whatever, in their ascertainment of the amount due. And certainly they may find the amount, when neither the plaintiff, nor any person for him, could aver the amount upon oath. And yet the case of Smith *vs.* Gilmer, garnishee, 4 H. & J. 177, comes very near a claim for unliquidated damages. The facts were, that Purviance, the agent and supercargo of Smith, applied in Amsterdam to Willink, the defendant, to furnish him bills on Batavia, which would yield him $30,000, of the currency of the United States. The bills were furnished, but in Batavia they produced only $22,500, by which means, his return cargo became short by that deficit, and the attachment was sued out to recover damages for the disappointment. The case was argued by the ablest men at the bar, of that day, but no objection appears to have been taken to the character of the claim. Should the Legislature be of opinion, that the rule should be as broad as that given by the Court of Appeals, it will be an easy matter to insert as a part of the rule, that member of the sentence of the Court's opinion, which has been omitted, viz. "or where the jury by their verdict, may ascertain and find the amount."

4. Upon the affidavit or affirmation of the attaching creditor, or of his agent, clerk, or other person having knowledge of the facts, that the defendant is justly indebted to the plaintiff in the sum of ——— over and above all discounts, and that he doth know, or is credibly informed and verily believes,

1st. That the defendant is not a citizen of the State of Maryland; or

2nd. That the defendant has actually run away or fled from justice, or removed from his place of abode, with intent to defraud his creditors; or

3rd. That the defendant is a corporation not chartered by this State; or

4th. That the defendant is a corporation chartered by this State, but that the President and Directors, or Managers, or a majority of them, are not citizens or residents of this State; or

5th. That the defendant so conceals himself that a summons cannot be served upon him; or

6th. That the defendant is removing or about to remove his property subject to execution, or a material portion thereof, out of the State, or out of the County in which he resides, not leaving enough to satisfy the plaintiff's demand; or

7th. That the defendant hath sold or conveyed, or otherwise disposed of his property subject to execution, or suffered or permitted it to be sold, with intent to defraud his creditors; or

8th. That the defendant is about to sell or dispose of his property subject to execution, or a material portion thereof with intent to defraud his creditors; or

9th. That the defendant purchased the goods, chattels or property of the plaintiff, for which the defendant is so indebted, and obtained possession thereof, by false pretences and dishonest misrepresentations; that the said debt is not due or payable according to the terms of the said purchase, but that the plaintiff doth verily believe, and hath good cause to think and believe, that the defendant, when the said debt becomes due and payable, will not have the means to pay it.

And upon every such affidavit with the cause of action thereto annexed, the Clerk of the Circuit or other Court of Law, from which the said attachment may be sued out, without any warrant therefor, from a Judge or Justice of the Peace, as hath been heretofore used and practiced in this State, shall issue an

attachment against the lands, tenements, goods, chattels and credits of the defendant, but in cases occurring under the ninth division of the enumeration herein contained, the attachment shall not effect any other than the goods or property, so fraudulently obtained from the plaintiff.

Those of the above provisions which are not contained in our own attachment laws, are suggested partly by the "Code of Civil Procedure of the State of Ohio," partly by the "Indiana Code of Pleading and Practice in Civil Actions," partly by the "Code of Virginia," and are in part, of the suggestion of the Commissioners themselves. The grounds of an attachment on warrant, by the existing laws of Maryland, are, that the defendant is a non-resident of the State, or, that being a resident, he has removed from his place of abode, with intent to injure and defraud his creditors, or under the act of 1832, ch. 280, that the defendant is a foreign corporation, or being a domestic corporation, a majority of the officers or managers thereof are non-residents. To these it is proposed to add the cases of a defendant concealing himself to avoid the process of the Court; of a defendant removing his property from the State or County, or conveying or disposing, or about to convey or dispose of his property, for the purpose of defrauding his creditors, and of the case of a party who obtains possession of property by purchase, by fraudulent misrepresentations and dishonest means, in which last case, although the debt may not be due, the shortest and best remedy for the party defrauded, is to enable him to retake his goods by attachment. And although to the mind of a critical lawyer, this may seem like an affirmance and a denial of the contract, in the same breath, yet the Courts will not permit any little incongruity in the adjustment of the remedy, to interfere with the great purposes of justice.

It will be seen at once, that these provisions enlarge very materially the grounds of the proceeding by attachment, as heretofore used in this State, but it must be remembered, that the abrogation of imprisonment for debt, has given great power to debtors. They may, in truth, pay or not, as they please, provided, they keep their means of payment out of sight, or do not exhibit them in any tangible form. And although there are perhaps few persons, who would desire to see restored the power of incarcerating

a fellow being for the misfortune of being in debt, yet it cannot be deemed either wise or just, to legislate exclusively for the debtor portion of the community. Such a policy tends to impair the moral sense of men in society, and to cramp the operations of business, by a universal laxity in the performance of contracts. Besides, it ought not to be overlooked, that most men are both debtors and creditors, and that whatever they may gain by an over indulgence to themselves in the one capacity, they lose by its correlative disadvantage to them in the other. It will be observed moreover, that in all that is additional to the old grounds of suing out attachments, the design is to enable the fair and honest creditor, to countervail the devices of dishonesty and fraud, and of this no man ought to complain.

The warrant of a Justice of the Peace, is deemed to be an idle ceremony. It can confer no authority upon the Clerk to issue the process of the Court, and with a Judge, if the law in the form of the oath has been complied with, the signing of such a warrant is a mere form. As long as it is required however, it will simply add to the chances of mistakes being committed in the proceedings, and therefore, on every account, it is proper it should be disused.

5. When the bond, bill, note, contract or other cause of action of the plaintiff, has been lost or destroyed, it shall be sufficient if the plaintiff, or other person for him, make oath or affirmation of such loss or destruction, and state as fully as he can do so, the contents of said lost or destroyed instrument.*

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*In some of the States, the plaintiff in every case of attachment, is required to give a bond, as in action of replevin. In other States, the necessity of the bond is limited to cases, where, by the attachment, it is intended to disturb some one's possession of personal property. The Commissioners do not recommend a bond in any case, but if one is required, they think it should only be under those heads which have been added to the existing law of attachment, and where the intention is to deprive the defendant or some other person, of the possession and use of personal property. The following section would meet that view of the case.

6. Whenever it is designed in cases occurring under either of the divisions, five, six, seven, eight or nine,

6. The oath or affirmation of the plaintiff may be made before a Justice of the Peace, of the County or City in which the attachment is issued, or of any other County or City of the State, with a certificate of the Clerk, in the latter case, of the Circuit or other proper Court, that the said Justice is duly commissioned and qualified. And where such oath or affirmation shall be taken out of the State, it shall be sufficient if made before, and subscribed by a Judge of a Court of record, the fact of his being such Judge, to be certified by the Clerk of the said Court; or made before and subscribed by a notary public, and certified under his notarial seal,—the seal in either case, to be sufficient proof of its own verity.

7. In every attachment there shall be inserted a clause, commanding the Sheriff to make known to each person, in whose hands or possession the property or credits are, to be and appear on the return thereof, before the Court, to show cause, why such property or credits should not be condemned, and

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as enumerated in section 4, that the Sheriff shall take possession of personal property, already in the possession of the defendant or other person, the plaintiff shall, at the time of suing out the attachment, give bond to the State of Maryland, with security to be approved by the Clerk issuing the attachment, in the penalty of at least double the amount of the claim sworn to, with condition to pay all costs and damages, which may be sustained by the defendant, or other person, by reason of the plaintiff's suing out and levying said attachment upon the goods of the defendant, or any other person, in case the plaintiff in the attachment, should not prosecute the same, against the said goods, with effect.

execution thereof had and made as in other cases of recoveries and judgments in Courts of record. At which return day, if the defendant shall not appear and enter into bond as required by law, nor the garnishee to show cause to the contrary, the Court shall and may condemn the property and credits attached and award execution thereof to be had and made as in other judgments, which judgment shall be sufficient and pleadable in bar by the garnishee, in any action brought against him by the defendant for the same.

8. The return of the Sheriff, verified by his affidavit, that he has made known to the party in whose hands or possession any property or credits have been attached, to be and appear before the Court, to show cause why the property and credits should not be condemned, and execution thereof had, shall be sufficient to bind the garnishee to appear, and it shall not be necessary to give the notice, and warn the defendant or garnishee to appear, in the presence of witnesses, as heretofore required by law.

9. With every attachment an action shall be instituted, and a declaration filed for the recovery of the plaintiff's demand, and the summons in the action, together with a copy of the declaration, shall be sent out at the time of issuing the attachment, to be served on the defendant, if he be found by the Sheriff, but it shall not be necessary to file a short note as heretofore required by law.

The copy of the short note to be set up at the Court House door, or served on the attorney of the defendant, if intended as a notice, is all useless machinery. A party whom the Sheriff cannot find in the County, is not likely to see such a notice during the short time it may remain posted up at the door of the Court House, and if

the defendant have counsel at the bar, the case will be more likely to meet his eye on the docket than elsewhere.

10. Upon the return of non est inventus to two successive summonses, in any action arising upon contract, where the contract ascertains the amount of indebtedness, or where it is susceptible of ascertainment by some standard fixed by the contract, it shall be lawful for the Court, having cognizance of the action, upon the plaintiff making such proof of his cause of action as the Court shall require, to award an attachment against the lands, tenements, goods, chattels and credits of the defendant, in which attachment the proceedings shall be the same, and judgment of comdemnation shall be rendered, and execution thereon had and made, as in other cases of attachment.

11. If the plaintiff, or any person for him, shall make oath or affirmation, that he verily believes, the person upon whom the attachment has been, or is about to be served, as garnishee, hath property belonging to the defendant in his possession, or under his care, and that he verily believes, that such person is about to remove the property from the said County, it shall be lawful for the Court, out of which the attachment issues, or for the Judge thereof, out of term time, to pass an order directing the Sheriff to take the goods into his possession, and hold the same, subject to be condemned for the use of the plaintiff. Provided, that if the garnishee shall give bond with good security, to be approved by the Court or Judge, to pay the plaintiff, in case the property shall be condemned, the full value thereof, or the amount of the attaching creditor's demand, then the property shall be restored to the garnishee.

12. If the plaintiff, or any person for him, shall make oath or affirmation, that he verily believes, the person upon whom the attachment has been, or is about to be served as garnishee, is indebted to the defendant, in any sum of money, and that he verily believes, that the garnishee is about to depart and remove from the County where he resides, it shall be lawful for the Court, or the Judge thereof, out of term time, to pass an order requiring the garnishee, within a certain time to be named in the order, to give bond with good security, to be approved by the Court or Judge, to pay to the plaintiff, in case the credit shall be condemned, the amount of the same, or of the judgment of condemnation, and in case of his neglect or refusal to give such bond, within the time limited by the order, the Court or Judge may award an attachment for the use of the plaintiff, against the property and credits of the garnishee, which attachment shall be proceeded in, and judgment of condemnation rendered, and execution thereof had and made, as in other cases of attachment. Provided, that in case of the failure of the plaintiff to obtain judgment of condemnation in the principal case, the property and credits of the garnishee shall be released, and the subsidiary attachment dissolved with costs.

In dealing with the garnishee in certain contingencies likely to arise in practice, the law must necessarily be very stringent. The alternative is between a stern rule, and an ineffectual rule, for it is very certain, that unless he is held to a strict accountability, he may put the law at defiance.

Yet to seize a man's body at the suit of one who is not his creditor, upon a debt contracted with a third person, and not yet due, and to compel him to give bail for his appearance at Court, there to answer interrogatories on oath, and render his body to prison, or pay the condemnation, is a proceeding by no means wanting

in energy. But such was the law of Maryland from 1795 until the adoption of the new Constitution. Now however, that imprisonment for debt, and with it, the entire machinery of arrest and bail, are abolished, in what manner is the property of the garnishee to be made to take the place of his personal responsibility, which can no longer be resorted to? If the above provisions appear to be harsh, they are certainly not more so than those which the recent fundamental changes have swept away, and the place of which they are intended to supply. And the Commissioners, from the best consideration they have been able to give the subject, are unable to perceive in what respect they can be mitigated, without destroying their efficacy.

In drafting these sections, the aim of the Commissioners has been to maintain, as nearly as might be, the parallel between them and the sixth section of the act of 1795, of which they are designed to be the equivalent. Should it be considered however, that the garnishee is entitled to protection against the possible abuse of the power thus placed in the hands of the plaintiff, a section may be inserted, requiring a bond from the plaintiff, according to the suggestion at page 135, in the note.

13. In all cases where an attachment is levied upon the interest of the defendant in the capital or joint stock, or debt transferable upon the books of any corporation, the Sheriff, at the time of such levy, shall serve a notice upon the President or other chief officer, or leave the same at the banking room, office, or place of business of such corporation, stating the amount of the plaintiff's claim, with the interest thereon, a copy of which notice, with the memorandum of the time and manner of the service thereof endorsed thereon, shall be returned with the attachment.

14. At the time of such service and notice, or at any time thereafter, before the return day of the attachment, the Sheriff may require from the President or other principal or chief officer, a certificate of the number of shares, or amount of transferable debt,

standing in the name of the defendant, on the books of the said corporation, at the time of such service and notice, and in case of refusal or neglect, for the space of twenty-four hours, to furnish such certificate, the Sheriff shall forthwith report such refusal or neglect to the Court, or to the Judge thereof, if out of term time, and the Court or Judge, may cause the President or other principal or chief officer to be brought before him, to be examined on oath, touching such number of shares, or amount of transferable debt, and the Court or Judge may cause the books of the corporation to be brought into Court or laid before him, and may punish the President or officer, as for a contempt.

15. When the Sheriff, by the means above provided, or otherwise, hath obtained satisfactory information of the number of shares, or amount of transferable debt, standing in the name of the defendant, on the books of the corporation, he shall, by schedule thereof, levy the attachment thereupon, or upon so much thereof, as may be sufficient to satisfy the claim of the attaching creditor and costs, and his return shall be conformably thereto.

16. If the officers and agents of the corporation, after service and notice as aforesaid, shall transfer, or permit the transfer by the defendant, of any stock or transferable debt, standing in his name as aforesaid, such corporation shall forfeit and pay to the plaintiff, the full market value of the stock or debt so transferred, at the time of such transfer, to be recovered by the plaintiff as for a tort. Provided however, that if a sufficiency of such stock or transferable debt, to pay the claim of the plaintiff and costs, be left, it shall not be unlawful for the defendant to transfer the residue thereof.

17. In case of condemnation and sale of the interest of the defendant, in the capital or joint stock, or transferable debt of any corporation, the tranfer thereof on the books of the corporation, shall be made to the purchaser thereof by the Sheriff making such sale, or in case of his death, by his successor in office.*

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* The substance of the act of 1832 is inserted in the text, because the Commissioners found that act upon the statute book, and considering the fact of its having remained there for more than twenty years unrepealed, and even unchanged, as some evidence of the public approbation of its provisions, though the probability is, that the act has never been practically applied to use in one instance, since its passage, they did not consider themselves at liberty to strike it from the attachment system, or to substitute any thing totally varying from it, of their own in its place. But as alternative provisions for those contained in section 14, 15, 16, and 17, in the text, and as embodying all that is really necessary in reference to the service of attachments on corporations, they have prepared the following sections, and presented them in the form of a note:

14. It shall be the duty of the President or other officer of such corporation, upon the demand of the Sheriff, to furnish a certificate of the number of shares of stock, or amount of transferable debt, standing in the name of the defendant, upon the books of the corporation, at the time of the service and notice as aforesaid, which certificate shall be returned by the Sheriff, with his schedule of the stock or debt. And the refusal or neglect of such officer, to furnish the certificate, shall be deemed and treated as a contempt of Court.

15. The service and notice as aforesaid, shall be taken and considered in law, as the levy of the attachment upon the interest of the defendant, as aforesaid, in the stock or debt of the corporation, and any transfer thereof by the defendant, or the officers after the levy, not leaving sufficient to pay the plaintiff's claim and costs, shall be deemed unlawful, and shall

The act of 1832, ch. 307, from which these provisions in reference to the service of attachments upon corporations, are in substance taken, is intolerably prolix and complicated, and withal needlessly harsh and distrustful of these institutions, whose charters being at all times within the power of the Legislature, is of itself a powerful restraint upon them. Apart however, from this consideration, it is believed that it will only be necessary to inform any of the corporate bodies of the State, of the duties which are required of them, to ensure from them and their officers, a prompt and respectful obedience to the laws.

18. To every attachment the garnishee may plead in behalf of the defendant, such plea or pleas, as the defendant himself could do, if he had been taken by the Sheriff under the summons, and had appeared to the action.

19. The plaintiff may exhibit interrogatories in writing, to be answered by the garnishee on oath in Court, touching or concerning the property or credits of the defendant, in his possession or charge, and by him due or owing, at the time of the service of the attachment upon him, or at any other time, and if the garnishee shall neglect or refuse to answer the same, within the time prescribed by the rules of Court for such purpose, the Court may adjudge that the garnishee hath in his possession, property of the defendant, or is indebted to the defendant to a value or amount sufficient to pay the claim of the plaintiff, with the interest and costs, and execution shall issue as in other

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pass no interest to the assignee thereof; and in case of condemnation of the interest in the stock or debt, the transfer thereof on the books of the corporation, shall be made to the purchaser, by the Sheriff making such sale, or in case of his death, by his successor in office.

cases of condemnation of goods or credits, in the hands of the garnishee.

20. The plaintiff may, in like manner, exhibit interrogatories to the President, or other chief or principal officer of a corporation, where the attachment has been levied upon the defendant's interest in the capital or joint stock, or transferable debt of such corporation, touching the number of shares, or amount of such debt standing in the name of the defendant, upon the books of the corporation, and in case of the refusal or neglect of such officer, being notified thereof, to answer the interrogatories within the time limited by the rules of Court for that purpose, the Court may proceed against the officer as for a contempt of Court.

21. In all cases where the garnishee shall truly disclose the property of the defendant, in his possession or charge, and the amount of money due or owing by him to the defendant, and shall obey the judgment of the Court, if there be one for the plaintiff, he shall be allowed his costs. And the garnishee may pay the money owing by him to the defendant, not exceeding the plaintiff's claim and costs, into Court, and such payment shall be a sufficient discharge of his liability to the defendant, for the money so paid.

The act of 1824, ch. 74, provides, that the garnishee may come into Court upon the return day, or within five days thereafter, and confess the amount of property or credits in his hands, and if the plaintiff, claiming a larger sum, will not take judgment for that amount, the garnishee shall be allowed his costs, unless, on the final decision, the plaintiff shall recover a larger amount than the garnishee so confessed. The above section however, contains the same provisions and something more, and is in other respects, a better rule.

22. When the attachment is laid upon a debt due the defendant, by judgment or decree, the garnishee shall, in no event, be liable for costs, but the costs to which, as garnishee, he would be liable in other cases, shall in the case herein provided for, be paid by the plaintiff in the attachment.

23. The following property and credits shall be subject to attachment and condemnation, viz: Lands, tenements and hereditaments; goods, chattels and credits; equitable interest in lands; debts due or owing by judgment or decree; or by deed of trust; or upon mortgage of real or personal estate or property; the interest of a partner in the partnership effects; surplus money arising from the sale of the debtor's property under execution, and remaining in the hands of the Sheriff; debts not yet due or payable; the interest of the defendant in the capital or joint stock of a corporation, or in the debt of a corporation, transferable on the books thereof; debts payable in work and labor, or in the delivery of property, or other thing of value.

And the following property and credits shall not be subject to attachment and condemnation, viz: Lands and tenements conveyed, or agreed to be conveyed bona fide and for valuable consideration, before the issuing of the attachment; moneys due or payable on judgments, decrees, bonds, notes, contracts, or other evidences of debt, or accounts, assigned for valuable consideration and bona fide, before the issuing of the attachment; money owing upon a negotiable promissory note, bill of exchange, or other commercial instrument, to the defendant as endorsee or holder thereof, but transferred by him for valuable consideration, in the due course of business, to a bona fide holder, with-

out notice of the attachment, after the issuing, or service thereof upon the maker or acceptor: money arising from the sale of the real estate of the defendant's wife; money in the hands of the trustee of an insolvent debtor; money paid into Court.

In the case of Somerville *vs.* Brown, 5 Gill, 399, the broad question was presented, whether an attachment laid in the hands of the maker of a promissory note, as garnishee, for the debt of an endorsee, then being the owner and holder of the note, and a judgment of condemnation in the attachment, will protect the maker (garnishee) in a subsequent action brought on the same note, by a subsequent endorsee, without notice? And it was held against the opinion of Dorsey J. that the garnishee was protected. The law, as established by this decision therefore is, that a party, who in the due course of business, pays full value for a note, and gets possession of it, containing upon its face no notice nor intimation, that any other person claims or can claim, any right or title to it, shall nevertheless, be compelled to yield his right to that note, and to the money due on it, to a general creditor of some prior holder, which creditor never saw the note, nor parted with a dollar upon the faith of it. The majority of the Court say, that the statute is imperative and they have no choice but to obey it; and if they had stopped there, the ground of their decision might have been satisfactory to most persons, but they go further, and institute an elaborate process of reasoning to show, that the statute is right upon principle, and ought to be strictly enforced. With great respect however, for that learned Court, the Commissioners conceive, that the statute upon principle is not right, and they have accordingly provided for its repeal in the specific case referred to. If they have a doubt upon the subject it is, whether it would not be wise to follow the example of Massachusetts, and exempt all commercial paper from the operation of the attachment laws.

24. The lien of the attachment, as between the attaching creditors, and as to the rights of third parties, shall take effect upon the property and credits attached, from the delivery of the writ into the hands of the Sheriff, who shall note upon the back of each

and every writ of attachment, the precise time of its delivery, so as to show the order in which several writs of attachment came into his hands. As against the garnishee, the lien shall take effect upon the property and credits in his hands or possession, only from the time of the service of the writ upon him, which time the Sheriff shall also specify in his return, but the attachment shall affect any property or credit, which came to the hands or possession of the garnishee, after such service, and before the return day of the writ. And no attachment laid in the hands of a consignee or factor, shall affect his lien.

This rule embodies the law as it may now be collected from the Maryland cases, although there is no decision in which it is laid down in terms. In one case it was held, that several writs delivered to the officer, at different times, took precedence in the order of their delivery. (2 H. & McH. 261.) In another case, it seems to have been understood as the law, that the Sheriff had it in his power, by levying the last writ first, to give priority to the junior attachment, but that he did so at his peril. (4 H. & McH. 335.) But if the rule be established as now proposed, that the lien shall attach from the delivery of the writ, then so far as the attaching creditors are concerned, the conduct of the Sheriff, in levying this or that writ first, can have no effect upon their rights, unless by a total neglect to make any levy before the return day, the writ shall become *functus officio*, in which case the attachment will be wholly fruitless.

It may be however, that the Sheriff shall note the time of the delivery of each writ into his hands, and still no question of priority shall be thereby settled. For if after the return day is passed, it is found that sundry attachments, all against the same person, and in the hands of the Sheriff at the same time, have been respectively levied upon different parcels or articles of property, or different credits, the whole number of the attachments must then be considered as distributively affecting each the property or credit upon which it was levied. This results from the principle, that the attachment is of no effect unless it is levied, and can only avail

to the extent to which it has been levied. The rights of the parties must therefore, to this extent, be in the power of the Sheriff.

No attempt has been made to lay down a strict and imperative line of duty for the Sheriff, under the circumstances supposed, on account of the difficulty of prescribing any rule which would be altogether free from objection. It often happens for example, that after sundry attachments have been issued and delivered to the Sheriff, a creditor coming last of all, lays his attachment upon some property or credit of the defendant, which he alone had discovered, and which all the rest had overlooked. In such a case, may the Sheriff lay this attachment alone, and refuse to lay any of the others, upon this property or credit, without exposing himself to liability to the prior attaching creditors? The Commissioners do not profess to decide this question, but they are by no means disposed to make a rule, rendering the Sheriff responsible in the case supposed, if he be not already so by law.

It is said, upon what authority it does not appear, that the goods and credits of a defendant, which came to the possession or hands of a garnishee, after the service of the attachment upon him, and before trial or judgment, are bound by the attachment in like manner, as those which were in his hands at the service of the writ. (Argument of Shaaff, 3 H. & McH. 574.) If such be the law, then it is certain, that after the return day, the attachment binds property upon which it was not levied,—that a garnishee is bound as to credits, which never came to his hands until after the writ was *functus officio*—that an attachment is just as good without a levy or service, as with it—and that the rights of the parties stand about in the same position, whether the Sheriff discharges or neglects his duty. But this cannot be the law. Attachments are like other writs. When the return day comes around, the Sheriff's authority is at an end, and he has then to inform the Court, by his return, what he has done under it. That return forms the record for future reference, in determining the rights of person or property, under that proceeding. The rules of law in reference to these matters, are plain, well defined and well understood, and the Commissioners do not propose to change them.

The provision allowing the attachment to bind property or credits, which reach the hands of the garnishee after the service of the writ, and before the return day, might upon principle, be objectionable, but the proposed rule is in conformity with the existing law of this State, and no practical inconvenience is believed to have grown out of it, and therefore, the old rule has not been disturbed.

25. The Sheriff in levying the attachment upon the goods of the defendant, shall be entitled to take the goods into his possession, only in cases where the defendant himself would be entitled, as a matter of right, to assume such possession. But where the defendant is a joint owner with others, of the goods, and the other joint owners are found in possession, or where the goods are pledged or hypothecated, or where those in possession are entitled as against the defendant, to retain the actual possession of the goods, the Sheriff shall lay the attachment upon the interest of the defendant in the goods, return a schedule thereof, and make known to those persons who are in possession of the goods, to appear at Court on the return day of tne writ, to be dealt with as garnishees.

What is said in the case of Van Brant *vs.* Pike & Ward, 4 Gill, 270, may be regarded as nearly equivalent to the above rule. Certainly the Sheriff can claim no right to the possession of the goods, superior to that of the defendant in the attachment. It is his right that is attached, and nothing more.

26. A seizure of the goods of the defendant, under the attachment, shall not be deemed valid, unless the Sheriff, at the time of such seizure, had the goods in his actual possession, or was in view of the goods having the power of taking the actual possession. And when the goods from their ponderous nature, are incapable of being removed, or can only be removed at great inconvenience, it shall be sufficient, if the Sheriff have them within his power and under his view, and return the same "attached as per schedule." And the Sheriff having once made a valid seizure of the goods, under one attachment, and having the goods by virtue of such levy, in his actual or constructive possession, need not make a new levy or seizure

thereof, under other attachments, against the same defendant, but may return such other writs "attached as per schedule."

27. To make a valid levy of an attachment upon real estate, it shall be sufficient for the Sheriff to take a description thereof, as full as conveniently can be done, and return the attachment, "attached as per schedule."

28. An attachment may be issued and levied or served on Sunday, if oath be made, that the defendant or some other person, is actually removing his goods or effects on that day.

A provision similar to this, is incorporated into the attachment laws of Virginia, Ohio and Indiana, and seems to be within the rule of necessity.

29. The Sheriff shall, in all cases, have leave to amend his return to an attachment, so as to make it conform to the truth.

30. Upon the appearance of the defendant to the summons, and upon his entering into bond with security to be approved by the Court, or Judge thereof, out of term time, to pay the plaintiff any judgment he may recover in the action, at any time before judgment of condemnation, or after condemnation, but during the same term at which condemnation shall be had, the attachment shall be dissolved, and the goods or their proceeds, or credits attached, shall be restored to the defendant, but no attachment shall be dissolved without such bond.

It is proper to remark, there are cases under the existing laws, in which a defendant may appear, notwithstanding the acts of 1834 and 1839, and dissolve the attachment, without bond; and

since the adoption of the new Constitution, without bail to the action. The act of 1834 applies to persons "not residing in the State;" the act of 1839, to cases where the plaintiff is a citizen, and the defendant was a citizen of the State, at the time the debt or damages accrued, upon which the attachment issues. In all cases not coming under these provisions, the attachment will be dissolved upon the simple entry of a common appearance for the defendant. The proposed rule will cover all cases.

31. The defendant may appear to the action or to the attachment, or both, either in person, or by attorney, without bond or bail, or condition of any kind; but the simple appearance of the defendant shall not dissolve, or in any manner affect the attachment or proceedings; and having appeared, the defendant may move to quash or dissolve the attachment, either for matter appearing on the face of the proceedings, or upon the allegation of facts *in pais*, in denial of the defendant's having been a non-resident of the State, or at the time the attachment issued, or in denial of any other fact alleged by the plaintiff, as the ground of suing out the attachment; and every such question shall be tried by the Court, upon affidavits, and a rule to show cause, and affidavits shall be admissible for both parties.

32. Any person or body corporate, claiming to be the owner, either in whole or in part, of the property or credits attached, may present such claim to the Court, in the form of a petition, and upon the answer thereto of the plaintiff, either denying the right set forth in the petition, or alleging matter in confession and avoidance thereof, an issue or issues shall be thereupon framed, under the direction of the Court, which, if of law, shall be tried by the Court,—if of fact, shall be tried by a jury, whether the defendant have appeared or not. And every such trial shall be had

before that of the attachment, and the claimant shall have the right to open and conclude. But it shall not be competent for the claimant to move to quash, or to make any objection to the proceedings in the attachment.

The appearance in Court of a claimant to the property, pending the attachment, is *ex gratia*, there being no provision in the acts of Assembly to authorize it. The mode however, in which, after coming into Court, he is to assert his right to the property, and have it adjudicated, is not free from embarrassment. The claim itself is a fact not apparent upon the face of the proceedings, and may, it is said, be asserted by a motion to quash, in which case the question of right will be tried by the Court, upon affidavits, or at the claimant's option, his ownership of the goods may be alleged by plea, when it must be tried by a jury, but that before the appearance of the defendant, to present his claim by plea would be very irregular, and cannot therefore be permitted. (Lambden *vs.* Bowie, 2 Mag. 339.) But to leave it with the claimant, to determine what shall be the mode of trial, and to make his determination binding upon the Court and the opposite party, is placing the rules of law upon a most uncertain and unsatisfactory basis.

The trial of such a case is always between the claimant and the plaintiff in the attachment, the defendant not being a party to the proceeding, and for that reason not bound by its result, but rarely gives himself any trouble about it. It is not perceived, therefore, that it can be more irregular to submit the question to a jury before, than it is after the defendant's appearance. The proposed rule is framed for the purpose of providing a plain and uniform mode of trial in the cases referred to, and for the more important purpose of preventing the debates and waste of time, which these questions, as often as they arise in Court, are sure to occasion.

33. The Court out of which the attachment issues, or the Judge thereof, out of term time, either before or after the return of the attachment, shall have power, whenever he may deem it expedient, to order a sale of any personal property, other than servants or slaves, levied on by virtue of the attachment, upon such terms

and notice of sale, as the Court or Judge may prescribe, and the proceeds of sale, after the payment of the expenses incident thereto, shall be paid into Court, and deposited to the credit of the suit, or with the consent of the parties, may be invested in some productive stock or fund, to abide the event of the suit.

34. The Judge of the Court from which an attachment has issued, may out of term time, either before or after the return day, upon the application by petition, of the defendant, hear a motion to quash the attachment, either upon objections apparent upon the face of the proceedings, or upon affidavits, upon the part of either or both of the parties, and from the decision of the Judge, an appeal shall lie to the Court of Appeals.

35. When the defendant is returned summoned, and appears to the action, but fails or refuses to give bond, so as to dissolve the attachment, it shall not be lawful for the plaintiff to obtain a judgment of condemnation in the attachment, and also a judgment in the action affecting the general property of the defendant; but the plaintiff may, in such case, have his election, which remedy he will take, and having made his election of one, the other shall be forthwith dismissed.

36. The plaintiff having obtained a judgment of condemnation, shall not take out execution thereon, until he has given, in the form of a recognizance, to be entered on the docket, good security approved by the Court, for the use of the defendant, to make restitution of the property or credits, or the value thereof, in case the defendant shall, within one year from the date of the condemnation, come in and make it appear, that the plaintiff hath been satisfied his debt or demand,

or shall otherwise in Court, discount or bar the plaintiff of the same, or any part thereof; but no such security shall be necessary in any case, where the defendant has appeared to the action or attachment, and has plead to the same, or moved to quash, or has had the opportunity of so doing; nor shall such security in any case be necessary, after the lapse of twelve months from the date of the condemnation. Nor in any case, where the attachment has been taken out, instead of any other execution upon a judgment.

37. Any person having obtained a judgment for money or damages, in any Court of law of this State, may, at any time within three years next after the date of such judgment, or after the expiration of the stay of execution, if one be entered on the record, whether the defendant be a resident of this State or not, instead of any other execution, and without those previous requisites, in other cases prescribed, take out an attachment against the lands, tenements, goods, chattels and credits of the defendant, to be laid, levied and returned, and upon condemnation obtained, execution to be had and made, as in other cases of attachment.

38. Any person having obtained judgment as aforesaid, may, in like manner, instead of any other execution, take out an attachment thereon, and cause the same to be directed to the Sheriff of any County, other than that wherein the judgment shall have been rendered, and laid upon any property or credits of the defendant, to be found in such County, which attachment shall be made returnable to the Court of such other County, and to the term thereof which shall happen next thereafter. And it shall be sufficient for

the plaintiff, to entitle him to the benefit of such attachment, to produce before such Court, a short copy of the judgment, with the certificate of the Clerk, and seal of the Court, before which the same was had.

39. An attachment may, instead of any other execution, be issued by any party having obtained a judgment in the Court of Appeals, either for the payment of money, or for costs, and directed to the Sheriff of any County or City of the State, the Clerk of the Court of Appeals sending therewith a short copy of the judgment, under seal, which attachment shall be returnable to the Court of such County or City, and to the term thereof, which shall happen next thereafter, and the same shall be proceeded in, as in other cases of attachment by way of execution.

40. The sale under execution, of the lands or goods of a defendant in attachment, or garnishee, shall be of an amount thereof, sufficient to satisfy the judgment of condemnation, and the residue of the property shall be returned to the defendant or garnishee. But when the property, whether real or personal, is not susceptible of division or separation, so as to make the amount of the judgment of condemnation, and no more, a portion thereof, as little beyond what may be sufficient to make the sum required, as practicable, shall be sold, and the surplus as aforesaid, restored to the defendant or garnishee. Provided, that where executions upon several judgments of condemnation, are in the hands of the Sheriff at the same time, the sale may be made to an amount sufficient to cover all, without a separate sale as to each.

41. Where any person claims to be entitled in Equity, to any money or property, from any person against whom, and for which, an attachment might be issued under the aforegoing provisions at law; or in any case where a Court of Equity could heretofore have issued a *ne exeat;* or where personal property bound by a trust, and proceedings are instituted to enforce the trust, and the party is about to remove with such property from the County where he resides, upon affidavit according to the nature of the case, it shall be lawful for the said Court of Equity, or the Judge thereof out of term time, in his discretion, to award an attachment against the specific property mentioned in such affidavit, or against the property and credits of the said defendant, as in case of attachments at law. And such attachments shall be executed in the same manner, and shall have the same effect as at law; but the proceedings thereon shall be the same as in other suits in Chancery: and the Court, or in vacation, the Judge thereof, may interpose by injunction, or by the appointment of a receiver, to secure the forthcoming of the specific property sued for, or so much other estate of the defendant, as will probably be required to satisfy any future order or decree that may be passed in the cause.

The writ of *ne exeat*, heretofore a most efficacious instrument in the hands of the chancellor, to prevent his authority from being treated with contempt, having been swept away by the abrogation of imprisonment for debt, the above is an attempt to give to the Courts of Equity, some equivalent for the loss of that power over the person. It is taken in substance from the Virginia Code, 603, sec. 11.

42. The Sheriff shall not be answerable in any case, in trespass or otherwise, for the seizure under attach-

ment, of personal property not belonging to the defendant, in case the owner of such property shall appear in Court, and assert his claim thereto, or having had notice of such seizure, shall fail to appear at Court and prefer his claim to such property.

This rule could only be in operation in cases where the defendant is entitled to take possession of the goods, against the party in actual possession. (See rule 25.) It can affect the owner therefore, only in those cases, where, having a full right to personal property, he permits it to remain out of his own possession. He cannot complain therefore, if in such particular case, he is required to appear in Court, and while the proceedings are pending, and in order that justice may be effectually administered all round, assert his title to the property. One fair opportunity of preferring his claim to property, is all that a reasonable man ought to ask.

THE CRIMINAL LAW.

THERE is no branch of the Laws of Maryland which has been so much neglected—which is in a state of such complete disorder, and of consequence so much in need of revision and amendment, as the Criminal Law. The only attempt ever made by the State to systematize any portion of its penal laws, dates back as far as 1809, and the statute then passed, commonly known as the Crimes Act, is but a mere catalogue of offences, referred to as already somewhere defined and described, with the annexation by the act, of the punishment due to each offence. In the whole list there is not one definition. For information in regard to the character, and the constituent elements of the various offences named in the act, recourse must be had to the repositories of the English criminal law, having none of our own; and we read from Coke and Hale and Foster and Hawkins; or from Russell and Starkie and Archbold, accordingly as the ancient or the more modern rule in England, may best suit the exigencies of the prosecution or the defence.

In the Courts of Maryland, any book professing to treat of criminal law, may be quoted, and relied upon in a criminal trial, and no authority or adjudication is so far binding, that it may not be disputed. First principles are not only debatable, but are frequently contested with determined zeal. Nothing is fixed and settled so as to be deemed beyond dispute; and one cause, perhaps the principal cause, of this condition of things is, the absence of an efficacious right of appeal in criminal cases. It is true, the right to sue out a writ of error is recognized, but owing to the power of revision by the Appellate Court, being limited to defects of form, and irregularities in mere matters of procedure, and owing in addition, to the inconvenience in practice, of obtaining the writ, it is a right, but seldom exercised. In the long course of fifty years, but six or eight criminal cases have found their way into the Court

of Appeals, and of these, only two involved questions of any importance. There being practically no right of appeal worth pursuing, the result has been, that the entire administration of criminal justice within the State, has devolved upon the inferior Courts, and these tribunals, each acting for itself, and in ignorance, or it may be, in disregard of the course of proceeding in all the rest, it were not strange if the course of criminal justice were different in them all, and certainly not more strange, if in none of them it was right.

Things were in this condition, when the Convention to reform the Constitution of the State, met in November, 1850. The power to try and condemn the citizen, vested exclusively in the inferior Courts—no settled code of criminal law to guide their decisions, and no right to have those decisions reviewed by a superior Court, it occurred to the mind of the Convention, that however wise and proper it might be, to have an improved system of laws, and a new organization of the Courts, for the trial of causes involving the right to a little property or money, yet that no Court at all was necessary to try a citizen for his liberty or his life, and accordingly it was ordained, as a part of the organic law, that in the trial of criminal cases, the Jury shall be the judges of law, as well as fact. The consequence is, that though the Judges still keep their seats on the bench, yet they merely act as moderators to preserve order, and questions which at times might task the powers of the best trained legal minds, are referred to men who never read a law book, and if they did, could not understand a word of it.

It is far from the intention of the Commissioners, to undervalue the great institution of trial by Jury; an institution, which, confined to its appropriate sphere of action, and kept in the precise place in our system, which it was designed to fill, cannot be too highly prized, or too jealously guarded. But the true point of its merits may be misconceived, and with the greatest respect for the intelligence and patriotic intentions of the Convention, the Commissioners are constrained to express the opinion, that the clause of the Constitution alluded to, is an instance of such misconception. And having said this much, they deem it both proper and becoming in them, to state their reasons for this opinion.

Trial by Jury in criminal cases, limited to its appropriate sphere, merit all the encomiums which have been passed upon it. The right of every freeman, accused of a capital, or otherwise infamous crime, to have the accusation put in a distinct and tangible form,

by the presentment or indictment of a Grand Jury—to be confronted with the witnesses against him—to have compulsory process for his own witnesses, and to the trial of his case where the facts arise, by an impartial jury of the vicinage, without whose unanimous consent he cannot be convicted; are rights which no citizen of this country would be willing to surrender upon any terms. It is to this mode of trial in *criminal cases;* to the protection which it affords against oppression, or the arbitrary conduct of Judges appointed by the crown, or even elected by the people, that the great charter, and most of our Anglo-American bills of rights, are understood to refer. "That no free man shall be seized or imprisoned, or exiled, or in any manner destroyed or despoiled, unless by the legal judgment of his peers;" are terms which can only apply to accusations and arrests for crime.

Trial by Jury in criminal cases, as handed down to us from our English ancestors, cannot well be improved. The number of twelve to constitute the panel—their unanimous consent in order to a conviction—no peremptory challenges on the part of the State—twenty peremptory challenges for the accused—no change of venue at the instance of the prosecution, by which a freeman is dragged from his own vicinage, and compelled to take his trial among strangers, are all essential features of that system, and cannot be changed without impairing the value of the system itself.

In reference however, to Jury trial in civil cases, the estimate of its value is to be determined by considerations altogether different. In a more primitive age, when all controversies in Court, resolved themselves more or less immediately into force, and when the principal occupation of Courts of Justice was, in affording protection to the weak, against the violence and rapacity of the strong—when all legal controversies were comparatively simple, the value of the right of trial by men of the vicinage, to whom all the parties, and all the witnesses were well known, can, even at this day, be well understood and appreciated. But after society has advanced so far beyond its primitive stages, that fraud and cunning have taken the place of open violence—when the increase of commerce, the improvement of the arts, and the infinitely diversified dealings of men, have complicated all the transactions of life, and rendered them to the ordinary understanding, difficult to be comprehended, trial by Jury, in civil cases, is not only of no value, but in the judgment of the best informed minds, a hindrance rather to the due administration of justice. Take the Juries as we ordina-

rily find them, and what do they know of an ejectment upon complicated locations? or of the validity of a will, as depending upon a question of sanity? or of a case of complicated accounts? or of a thousand other cases, that might be put? The application of the law to the facts, depends, at times, upon very nice distinctions, which are explained by the Court to the Jury, and nine times out of ten, the Jury do not understand a word about them.

The opinion generally prevailing seems to be, that every man has a right to trial by Jury, in all cases whatsoever. But this is a mistake. There is no such right in all civil cases, nor even in the greater number of civil cases. And although it is provided in one of the amendments to the Constitution of the United States, that trial by Jury shall be preserved in suits at common law, where the amount in controversy shall exceed twenty dollars—and by the present constitution of this State, that trial by Jury of all issues of fact in civil proceedings, where the amount exceeds the sum of five dollars, shall be inviolably preserved, yet it is every day's practice, that in Courts of Common Law, and upon issues of fact, the rights of parties are habitually disposed of, without reference to the amount involved, and without the intervention of a Jury. A demurrer disposes of a controversy before it comes to a Jury, by referring the whole matter to the Court—a motion in arrest of judgment, stops and annuls the proceeding, after the Jury have tried the case and found their verdict.

Observe again, after a Jury is empannelled and sworn to try a case, how strictly and watchfully they are dealt with. The law supposes them unfit to act alone, and therefore, it places over them the Court, to watch all their proceedings, to allow such evidence only, as it deems it safe and prudent to trust them with, to go before them, and to exclude all facts and statements calculated to mislead them. It requires also, that by the pleadings of the parties, the questions to be tried by the Jury, shall be reduced to their most simple terms, and after all, the Court instruct them upon the law, so as to leave them nothing to find but the naked questions of fact. They are then locked up in a room by themselves, with a guard placed at the door, who is sworn well and truly to keep the Jury together, without meat or drink—to suffer no person to speak to them, nor to speak to them himself, unless to ask them if they have agreed of their verdict, without the leave of the Court. And after all, their verdicts are frequently so wild

and startling, that the Courts are compelled to set them aside, and grant new trials, to prevent the grossest injustice.

These are the proceedings of the Common Law Courts of original jurisdiction, where alone the institution of trial by Jury is known; but there are other Courts and jurisdictions where Juries never come. The Courts of Equity having cognizance of all the heavier civil controversies, involving estates and interests much greater than all other Courts put together—the Orphans' Courts, through which all the personal estates of the entire community pass, once in each generation—the Appellate Courts, State and Federal, where all controversies, legal and equitable, are finally adjudicated, act independently of Juries. The Court of Appeals will dismiss an appellant from their presence, without deigning to look at his case, and that for the omission of some unimportant formula, the observance of which could have made his case neither better nor worse, in law or conscience, without ever thinking that such things as Juries are extant. A Court of Equity sends its mandate, in the form of an injunction, into a Court of Law, prohibiting both Court and Jury from intermeddling in a suit already pending before them. The same Court sends an issue of fact to be tried by a Jury, and afterwards sets aside the verdict, for no other reason, than that it is not satisfactory to the conscience of the Court. Trial by Jury therefore is, by no means, co-extensive with the jurisprudence of the State, even in civil matters, but, on the contrary, of the ground covered by the whole, it occupies but a small portion.

But the great objection to the institution is, the complexity of procedure, and the consequent cost, vexation and delay, it necessarily entails upon the system of which it forms a part. It is in vain to attempt to simplify the rules of pleading and practice of the Courts, except to a limited extent, while the great feature of Jury trial continues to be a part of the system. Abolish trial by Jury, and the common law procedure would at once be wonderfully simplified, as the change would disencumber it of all the existing rules and forms of pleading—also, of the entire mass of the law of evidence, together with a large portion of the rules of practice, all of which appertain to the necessities of Jury trials. Every one can understand, that a system of pleading, fitted to bring out the points of a case to the notice of a Court, need be very simple. The statement of the complaint on the one side, with the answer to it on the other, would be sufficient. And so of the

rules of evidence. Put a learned lawyer in the place of a Jury, let him hear and determine the facts as well as the law, and then all the nice distinctions, and entangled learning of the law of evidence, might at once be burnt. But as things are, one improper question put to a witness, leads to a bill of exceptions, an appeal, a reversal of the judgment, a procedendo, and another trial before another Jury, differing from the first trial only in the omission of the obnoxious question. In the meantime, the disposal of the case has been delayed one year or more, and the parties have spent the amount in controversy, in payment of costs and fees to counsel. But the expenses of the Jury system are not confined to what is paid by the parties to the suit, or the costs of appeal. The pay of the Jurors themselves, the whole amount of which can be seen by reference to the County levies, is very onerous. And yet these expenses are by no means as great, as those to which parties are subjected, by waiting during the terms of Court, until their cases are called up for trial in their turn, and the attendance of their witnesses in the meantime, to say nothing of their own expenses, and loss of time, until the cases are disposed of. A party may wait for a week, or two or more weeks, with all his witnesses in attendance, and at length, when his case is called, on account of the absence of one of them, the trial be put off to the next Court, and all the costs on both sides, thrown upon his shoulders. All these expenses, delays and vexations, are properly chargeable to the preservation of trial by Jury.

Nothing has been said of the possibility that a party may have a Jury packed upon him. And yet, among the objections to Jury trial, this is one which must not be wholly overlooked. Every man of experience at the bar well knows, that these things can be done, and sometimes are done, and that the trick is never discovered until the mischief is consummated.

Juries, moreover, whatever may be done to prevent it, will be subject to all manner of out-of-door influences. They suffer at times, the parties to pending disputes, to approach them, and make appeals to their sympathies. They have, moreover, their social predilections and prejudices—their political likes and dislikes, which they consider it not improper to indulge in the jury box. No man having a controversy in Court, unless it be a very plain case, if it is to pass the ordeal of a Jury, can ever feel perfectly safe until the trial is over. Persons going to Court with the most just and conscientious demands, are at times defeated, mulcted in

costs, and perhaps soundly rated by the opposing counsel, whilst cases the most unrighteous, are carried through in triumph. The very fact that a rogue may triumph in Court, carries many a rogue there, who, under a different system, would not dare to show his face in a Court house.

An opinion prevails to some extent in England, "that the vitality of trial by Jury is thoroughly exhausted; that it is ripe for destruction; and that when it has been destroyed, men will marvel, as they have done, in regard to many other worn out institutions, that they should have so long thought the welfare of the State depended on a thing so utterly without force." As a proof that public sentiment, both in England and this country, tends towards the abrogation of Jury trial, it is stated, and no doubt correctly, that in New York, under their new code, which gives the parties an election as to the mode of trial, twelve hundred and eighty-five judgments were rendered by the Court, in marine causes, *without*, against sixty-seven *with* Juries: and that, under the act of Parliament, organizing County Courts in England, Juries were demanded in three cases only, out of three thousand cases.

To the direct question then, ought the institution of trial by Jury to be abolished? We answer decidedly, no! As it has been preserved and cherished heretofore, it ought to be preserved and cherished hereafter, for all coming time: not for any merit it possesses as a juridical contrivance, for it has none, but on account of the benefits of which it is the parent, as a social and political institution. It is well remarked by Chief Justice Lumpkin, in his report to the Legislature of Georgia, on the subject of the amendment of the law, "that all men here are by birth-right, hereditary law-makers, and judges upon the reputation and lives, as well as arbiters of the property of their fellow citizens." And it is believed to be vital to our institutions, that while they are law-makers, they shall continue to be judges and arbiters also.

Every Court of original common law jurisdiction, exhibits the spectacle of a body of respectable citizens, taken from the mass of the people, to assist the bench and the bar in the administration of the law. A portion are set apart as the Grand Inquest of the County, assigned to enquire into all criminal violations of the law, breaches of the peace, and into those various transgressions which disturb the peace and good order of the community. The other portion constitutes the Petit Jury, who sit in judgment upon the property, the reputation and lives of their fellow citizens. Brought

as these men are, into direct communion with the Court and bar, addressed, reasoned with, appealed to, as judges of the facts, empannelled in a series of cases, one after another, all varying in their circumstances, and in the principles of law and morality applicable to each, they must necessarily, in returning to their homes, after such a tour of duty in Court, carry with them not only an insight into the manner in which the laws are administered, but a deep and abiding impression of the importance of maintaining a strict obedience to the law. Various and manifold are the lessons they take away with them, all conservative, moral, and obedient to lawful authority. These they teach to their sons and dependants, and to the extent of their influence, disseminate throughout the community. The next Court brings together another set of men in the same character, who, in their turn, pass through the same important tour of duty, and return also to the mass, to spread abroad the same conservative and moral lessons among the people.

Thus it is, that the law makes its own way into the hearts and affections of the people, and that men come to regard it, not as an authority placed over them, to pry out their liberties, and to punish their transgressions with stern and unbending rigor, but as their companion, protector and friend. M. De Tocqueville, who generally took very sensible views of what he saw in America, considered the institution of trial by Jury, as intimately concerned in the education of the people, and as the basis of their intelligence and manly independence of character. The remark is a very good one, as far as it goes, but there are other characteristics of the American people, of which this institution may be regarded as the basis, the whole scope of which this intelligent stranger did not understand. As the subject is one of great interest, we shall borrow an illustration of the view we take of it, from the annals of M. De Tocqueville's own country.

In 1792, the French people abolished their monarchy, struck off the heads of their king, their queen, and of all the royal family. Liberty descended upon them, like a benison from Heaven, and when it came they knew not what to do with it—what use to make of it. Knowing not how to act, they began at once to cut each other's throats. The king and royal family, the Gironde, the Cordeleirs, and the Mountain were all beheaded in turn. The axe was going all the time, and all these horrors were perpetrated in the name of liberty. The period termed the reign of terror, forms the bloodiest chapter in the annals of the human race. The nation

looked on, but could do nothing to stay the carnage, and France, passing in succession, under the rule of a Committee of Public Safety, a Directory, and a Consulate, found repose at last, under the military rule of the great Napoleon.

France had tried liberty, but could make nothing out of it. Her conquering armies overran Europe, subverting dynasties, deposing monarchs, and trampling crowns and diadems under their feet. But France had no power to govern herself. She could not live without a master. She found one, and was contented.

A half a century passed over, and France again abolished her monarchy, and tried liberty a second time, but with the like ill success. She has found another master and is again contented. That the French people have no capacity for free government, is a fact now that needs no confirmation.

In contrast with spectacles like these, observe the working of the spirit of liberty among the people of this country. Let but a handful of them be thrown together by accident, away beyond the outposts of civilization—in the depths of the untamed wilderness—in the wilds of California—on any spot of the whole earth where grass grows or water runs, and the moment their numbers are sufficient for the purpose, they go to work, as of course, and put together the frame work of a regular government. And that government works as efficiently and as smoothly from the start, as if it had been in operation for centuries. Every man here carries with him, wherever he goes, in his own mind, the essential elements of a well ordered system of free government.

Now, the great secret of American freedom lies in the maxim, that while the people are the source of all power, they exercise directly no power themselves. They put power in motion, and *then they obey it.* This is the great mystery which lies at the foundation of our free institutions. It is the whole story, and is told in a moment.

The fatal mistake of France, in both of her attempts to be free, was, in the supposition that the people could wield power with their own hands, and it resulted, as it must ever result, in the government of the mob, the worst of all despotisms. Had she known the one great principle, that the people cannot exercise power directly—that all they can trust themselves to do is, to put power in motion, and then obey it, her first effort to establish a free government in 1792, might have been successful. She might have turned her king loose, and touched not a hair of his head, and her people have remained free and safe.

The people of this great republic are not the less free, that they do not exercise the power they possess. They are absolutely sovereign. All power and authority belongs to them of right. But they part with it only, that it may react upon themselves, and it reacts through their functionaries of delegated power, every one of whom, from the highest to the lowest,—from the President of the United States down to the humblest tide-waiter,—from the Governor of a sovereign State to a constable, acts independently of popular control, during the continuance of his office. The people elect a Member of Congress, and their power ends at the ballot box, which is exactly where his power begins. He is then in office for two years, and the people have no power to control his action, or to revoke his appointment. The great American maxim is, obedience to all lawful authority, though that authority be an emanation from the sovereign will of the people; and this is the secret which the French people never can comprehend.

But now comes the question, whence do the people of this country derive their peculiar, and almost intuitive knowledge of the true principles of liberty? The answer is, they derive it from the jury box—from the lessons taught in our Court Houses—from the direct participation of the people in the administration of the laws, "as judges of the lives and reputations, and arbiters of the property of their fellow citizens," more than from all other sources put together. And it is extremely questionable whether any people can be prepared for the reception of popular sovereignty and equal rights, without a long previous familiarity with the institution of trial by Jury, or some equivalent institution, giving to the Courts and the people, a blended agency in the administration of the laws. That the French people are not so prepared, we have already seen, and what reason is there to suppose, that Germany, Italy, Spain, or any of the European States, could furnish the material of a better quality, for making freeman, than that of the little, turbulent, gunpowder communities, oddly enough called republics, of Central and South America? That the capacity to establish and enjoy the blessings of a rational and well regulated freedom, appertains to any race or lineage of men, other than the Anglo-Saxon, is yet to be proved. With that race it is traceable to the character of their institutions, and principally to the great institutions of trial by Jury. It is probable that Burke did not understand the full force and beauty of his own remark, when he said, that the soul of government was in the jury box. Certain it is, that history has furnished

many apt and impressive illustrations of its truth, which he did not live to witness.

Bold theorists may discourse about the abrogation of Jury trial, but such an experiment is not likely to be tried very soon in any part of this country, however radical and prone to change on many subjects, portions of our people may be. Improved and amended, the system may, and ought to be. Defects are known to exist in it, which bring reproach upon the institution, for which, however, the institution is not justly answerable, as all such defects are those merely of organization and arrangement, which may be corrected without difficulty. One essential regulation will be, to secure the selection and attendance upon our Juries, of the most intelligent, most upright and most independent men the community can afford; another very important matter will be to separate the selection of Juries from the politicians, if such a thing be possible. But whatever new regulations may be adopted, nothing certainly can be more unwise, than to bespeak for the system, even where best organized, a capacity for expounding and administering the laws; which it never was believed, or expected, or intended to possess. The surest way to bring the system into disrepute is, to heap upon it duties and responsibilities, for which it is assuredly incompetent. Jurors are not lawyers, and it is any thing but reasonable to expect from them, that knowledge of the laws, which none but lawyers can possess, and which, with them, it costs a lifetime of laborious study to attain. It is well remarked by an able English writer, that the true theory of trial by Jury is, that the trial be conducted by Judge *and* Jury, thus affording justice a double chance, by uniting the wisdom of a *fixed*, with the integrity of a *casual* tribunal, while it avoids, in a great measure, the inconveniences of both.

It will be perceived, from what has been said, that although there are many good and wise provisions in the new Constitution, yet, in the judgment of the Commissioners, that which refers questions of law, as well as of fact, to the Jury, is not one of them. It is said however, by those whose opinions are entitled to the highest respect, that the meaning of the Constitution is not what it is supposed to be, and that it never was intended to take from the Court, its legitimate power of directing, instructing and controlling the Jury on matters of law. Professor Greenleaf, after referring to similar provisions in the statutes and Constitutions of several of the States, is of opinion, that their meaning is simply this: "that

the Jury are the sole Judges of all the facts involved in the issue, and of the *application* of the law to the particular case," but that "the weight of opinion is vastly against the right of the Jury in any case, to disregard the law as stated to them by the Court." (3 Greenlf. Ev. Sec. 179.) There could not be a stronger condemnation of the insertion of such a clause in the Constitution, than the difficulty which some of the first minds among us experience, in coming to the admission that such a clause really does exist. But the question at last resolves itself into one of fact, and a simple reference to the instrument, settles the fact against those who deny its existence. There it is, as plain as words can make it—"in all criminal trials, the Jury shall be the Judges of law as well as fact." Such language—so direct, so positive, leaves nothing for construction. It would imply a great want of respect for the intelligence of the Convention, to maintain that they had used language, the force of which they did not comprehend. We must, therefore, take the Constitution as we find it.

The Commissioners, believing that their labors could not but be acceptably employed in amending and consolidating the criminal laws of the State, and in correcting the anomalies existing in many portions of those laws, have not been deterred from making the attempt by the difficulty and responsibility of the task. They have endeavored to furnish the Juries that assistance and instruction, which the Courts have no longer the power to afford them, by presenting in plain and intelligible language, definitions of all crimes, from the highest to the lowest, with the circumstances by which they are either aggravated, extenuated, or justified by the law. They have endeavored to settle upon a satisfactory basis, certain general rules of criminal evidence, which were disturbed by the adoption of the new Constitution, and also to embody in simple rules, the leading principles regulating the application, and probative force of circumstantial evidence, the most difficult and unsettled branch of the criminal law. They have moreover, attempted to effect some improvement in criminal procedure. How far they have been successful in these efforts, it is not for them to determine. The result of their labors, such as it is, they submit to the Legislature and people of the State.

The Commissioners have a word to say upon the subject of punishments, not that they have any intention of proposing a new system, with all its details and conditions, but as connected with the definitions of crimes, and the administration of criminal jus-

tice, they deem the occasion quite appropriate for such suggestions as have occurred to them, in regard to the defects of the present system, which, in their opinion, are of a character to call loudly for revision and radical correction. What they mean to suggest is, that the whole subject may be thoroughly investigated, the facts ascertained, and those facts laid in an authentic form, before the people of the State, who have the power, and will not lack the disposition, to provide the remedy to whatever extent it may be found to be necessary.

The mode of punishment most in favor in this country generally, is that of the State's prison or penitentiary. It was conceived in a spirit of benevolence. The old modes of punishment were thought to be too severe and two humiliating. The idea of tying up a citizen to the whipping post, and cutting the skin from his back with a cowhide, or putting him in the stocks or the pillory, was considered as savoring too much of the savage state, and the plan of confinement in a large prison, called a penitentiary, was devised, as the name imports, that the evil disposed, by being treated kindly, with the benefit of good advice and religious instruction, might be brought to think seriously of their evil courses, and reform. The projectors of the system aimed to accomplish three great results—that the criminal should be reformed, that crime itself should be lessened, at the same time that the severity of punishments should be mitigated. The system has been in operation in this State, for more than forty years, and the results are, that it has failed in all the great objects of its institution. It has failed in the expected reformation of the offenders—it has failed in lessening the amount of crime, and it has failed more than all, in softening the rigor of punishments.

The Commissioners cannot name specifically the causes of these failures. All they propose to attempt is, to present such general considerations as, in the absence of more authentic data, may authorize the anticipation of more favorable results from a reconstruction of the system, than any which have yet been derived from it.

The end of human punishment is not the satisfaction of society, but the prevention of crimes. This is the doctrine of Paley, as it is of all the best ethical writers. Society has a right to protection against the repetition of the offence. If the effect of punishment be to furnish such protection, then the right of society to punish is derived solely from that consideration. Vengeance, retribution,

atonement, are terms which have no application to the subject. The mode in which punishment affords this protection, is specifically by force of the example. The admonition which every man is required to take to himself is,—"if you do the same thing, you shall be treated in the same way." Apart from the anticipated effect of the example, as we have already said, society is destitute of all right to punish. The injury arising fron the commission of the offence, whatever it be, is already sustained, and that injury can neither be removed nor palliated by the infliction of pain upon the offender. The authority to punish has regard exclusively to the *future*. It has no object in view which looks to the *past*.

It may be quite true in morals, as some writers insist, that society has no right to punish one man by way of example to another man, with whom he has no connexion, and for whose acts he is in no wise accountable. Of course no one supposes that an innocent man may legitimately be taken up, and made the subject of punishment, simply that others may have an example in his sufferings, to deter them from the commission of crimes. But society has the right to punish him for his own crime, subject to the condition however, that in doing so, it shall produce such an effect upon the minds of others, as well as upon his own, as shall operate to prevent the future commission of crimes.

The next step in the enquiry has reference to the amount or degree of punishment to be affixed to each particular transgression. And this is a point of no little difficulty. It is easy to state the proposition, but the difficulty lies in its application to the cases as they arise. The rule is very simple, that society has the right to inflict the exact amount of suffering which will best secure its future exemption from the commission of the offence, even should that amount extend to the life of the offender. Or to draw the illustration from the system of penitentiary confinement. If five years imprisonment will as effectually produce the desired effect as ten years, then, to sentence for ten years, would be a clear excess of five years beyond the measure of punishment due to the case, and this excess would be so much gratuitous suffering, inflicted without object, and therefore without authority.

To adjust a scale of punishments to a scale of offences, so as to assign to each transgression the degree of severity due to it, and no more—to lay down rules beforehand, which shall award to each individual offender, the infliction which shall be his exact due, according to the circumstances of his case—having regard to the

diverse characters, dispositions, propensities, passions, and moral culture of individuals—keeping in view, at the same time, that the great object is the prevention of crimes, and tempering the punishment in each case, by that consideration, is what no created intelligence can accomplish. The most that can be done by the law-maker is, to fix the scope of discretion to be entrusted to the Court in the administration of the law, by naming the maximum and minimum of penalty, provided for each offence. Within the range of that discretion, the power conferred upon the Court is, to make the law for each case as it arises; and that this power is given as of necessity, there being no help for it—is of itself, a confession of the extreme difficulty of dealing with the subject at all.

In the sound exercise of this discretion, however, the Court aims to do exact and even-handed justice, by weighing the circumstances of each particular case, and by discriminating between the characters, and ascertaining the personal attributes of the parties separately brought before them. But the real character of the transaction is, in many cases, not disclosed by the evidence—the parties themselves are unknown to the Court, and the result must be, that punishments are in some cases too heavy, in others too light, while in very few is the exact measure attained. It is easy to be seen therefore, that tho difficulties with those who administer the law, are almost as great as with those who make the law.

To devise a system which shall graduate the punishment throughout the scale, to the degree of actual criminality in each case, may be given up as impossible. The obstacles in the way are to be found in the limits which nature has placed upon the knowledge of man. And we might despair of projecting any scheme that would even approximate the true measure of justice, were it not in our power to supply, in the manner of executing the sentence of the Court, compensations in degree at least, for the mistakes made in passing it.

The compensations alluded to will be considered presently. In the meantime, the Commissioners desire to pause a moment, to consider in what manner the sentences of the law are carried out in these prisons. What is done with the condemned man, after he enters the portals of his prison-house, after the key is turned upon him, and he is securely lodged in the hands of his keepers, to do their will upon him, for five, ten or twenty years? Is there any portion of his punishment which is hidden from the public eye,

and which never finds its way to the public mind? Are there any corporal inflictions—any scourgings within those walls, of which the public know nothing, and which are intended to be a sealed book to the world?

The Commissioners have asked these questions with the intention of answering them according to the best of their information and belief. It is their belief then, that in these prisons, here and elsewhere, a system of tyranny and oppression prevails, alike enormous in principle, and detestable in practice. They believe, that laws are made by the interior authorities of these institutions—enforced in secret by the men who make them, without Judge or Jury, and even without trial—that men are made to bleed and faint under the lash, against whom the penalty of the lash never has been denounced, by any lawful authority.

The notorious Munroe Edwards, being detected in an attempt to effect his escape, was scourged with relentless severity. He afterwards devised, and partly executed, another attempt of the same kind, in which he was also detected; but the recollection of his former scourging, and the terrible thought that it was to be repeated, were more than his nature could bear, and he died in convulsions, induced by apprehension alone.

Now, it is altogether pertinent to ask, whether torture like this is any part of the penalty denounced by the laws of the land, against the offence of which the party was convicted? Is not the example of such a punishment lost upon society? And if so, where is the right to inflict it? Moreover, when a party has endured the penalty annexed to his offence, by the known law of the land, is it not an outrage to compel him to suffer any other extra penalty, unknown to that law?

If tortures like these are necessary to prevent crimes—if the evil disposed cannot be restrained by means short of such severity, then let them be inflicted openly, and by the only legal authority—by the Courts in the due administration of the public justice of the State. And then let all hands be piped to witness punishment, that all may have the benefit of the example. But it is not to be borne, that a tremendous authority like this, shall be entrusted to jailors and subalterns, to cut and slash according to their varying humors or caprices.

We have said that in the practical working of this system, the culprit is not reformed—his moral condition not improved. It would be marvellous if it were. Shut out from all the sympathies

of his kind—all his acts and motions under the vigilant eyes of his keepers—condemned to perfect silence in the midst of society—the scourge held over him all the time, and applied without mercy, for every fancied fault or for no fault at all—and this state of existence continued for five, ten, and even for twenty years, the marvel is, that there should be a power in human nature to stand it. It would be a greater marvel still, that he should fail to come forth upon the world at the end of his time, as many of them do, with a declaration of eternal war against all the institutions of society. What has society done for him, but to seize upon the best portions of his life, and render it a hell upon earth? Eighteen or twenty years taken from that portion of human existence, which comes after the age of discretion, and before the age of decrepitude, comprises all that life possesses that is worth living for. It covers the whole period of exertion, of hope, as well as of the enjoyment of life.

And what is to become of the youth, in which the man is not yet formed, when committed to a seminary like this? Perhaps, of all the public wants of the State, the greatest is that of an asylum for youthful offenders. Next to this, is a total re-organization of the whole penitentiary system. It ought to be divided into sections, and there ought to be no difficulty in constructing it upon such a system, as that the discipline of the various sections should be separately administered, the degrees of rigor and personal restraint diminishing in each successive section throughout the series, and the inmates promoted for good conduct, from one section to another, until all restraint should be at an end, and the party receive his liberty as the reward of his merit. The period of his discharge, under certain conditions, should be irrespective of the term of his imprisonment, and whenever his discharge became his due, according to the regulations to be established, he should have it. These are the compensations, (perhaps the word is not a good one, but it is the best we have at command,) to which allusion has already been made. It may be considered as proposing bold innovations upon the received notions of *punishment*, but this consideration will not, it is hoped, deter those who are responsible for the evils of the present system, from giving the subject a free, calm and serious consideration.

It will scarcely be denied, that there is something radically wrong in the organization now existing. Its vices have already been alluded to, and what change more rational or natural, than one that

substitutes for them, the reverse of those vices? If the system of mere brute force, by which the sense of character, the feeling of shame, and the great principle of self-esteem is destroyed, has failed to produce any thing but evil, then by a system of encouragement, lift up the heart from the depths of its degradation, and plant in it the blessed inspiration of hope. Look for a moment to the probable condition of the man, after he has undergone his punishment and comes out again upon the world. Will it not be some reason for society to respect even a convict—to take him by the hand and help him along in the world, if that convict shall be able to say, "I was sentenced for ten years, but at the end of five years was set at liberty for my good conduct!" Would not society feel safe against the future depredations of that man? And yet, how probable is the case, that that man, if confined under the present system—whipped and scourged and beaten, for ten years together, would come forth breathing vengeance against all mankind—ripe for every sort of mischief—ready to kill, burn, ravish and destroy? Surely, a State holding the high position of Maryland, might dedicate some portion of its talent for the investigation and ascertainment of the true character of existing evils, and set apart some portion of its means for their correction.

The Commissioners designed merely to call public attention to this very important subject, and having done so, they have nothing more to say.

CHAPTER I.

OF HIGH TREASON, AND OFFENCES AGAINST THE STATE.

1. The crime of High Treason shall consist only in levying war against the State, or in erecting or forming, or endeavoring to erect or form, by any revolutionary or forcible means, any new or independent government within the boundaries of the State, in hostility to the existing government. And whosoever shall be convicted thereof, upon the oaths of two witnesses, shall be punished with death.

Whether treason can be committed against a separate State of the Union, is a question upon which opinions are divided. It seems however, to be conceded by all, that the offence which would constitute it against one State, would constitute it against the general government, and that the crime against the part, is atoned for by punishment of the offence against the whole. Chancellor Kent seems to have entertained the opinion, that treason against a State, in its distinct capacity, is confined to cases in which open and armed opposition to the laws, is not accompanied with the intention of *subverting the government.* (1 Com. 403 note.) And if this view be correct, it leaves treason, as against the separate States, a very small spot of ground to stand upon: the better opinion seems to be, that levying war against one State, is levying war against all, and is a crime belonging exclusively to the general government. The statute laws however, of several of the States, provide for treason in the enlarged sense of the term, and the act of 1809 of this State, having provided a punishment for the offence, without defining it, the Commissioners have merely supplied the definition, and as the whole subject will, in all probability, sleep quietly on the statute book hereafter, as it has done heretofore, no great harm can be done, if that definition should not be strictly correct. Still, the doubt about its correctness, is not in the definition, but in the state of the law, upon the subject, as between the States separately and collectively.

It is deemed unnecessary to notice the crime of misprision of treason, which consists in concealing or keeping secret any treason already committed, or intended to be committed. It seems strange to denounce a penalty against a party for *keeping secret* an act of treason, consisting *in levying war*, or *in erecting an independent government* within the State. Where the crime consists as in England, in imagining the death of the king, there may be better reason for punishing such as keep the imagination secret.

2. Whosoever shall stir up, incite, or cause an actual insurrection or rebellion among any portion of the negro population of the State, shall suffer death.

3. A rebellion or insurrection within the meaning of the last preceding section, shall be a rising or assembling of negroes, either slave or free, or both, whether

armed or arrayed in a warlike manner or not, in order by force, to resist and overcome the law, or the authority of their masters.

4. Whosoever shall advise, encourage, or conspire with any other person, whether slave or free, to raise such insurrection or rebellion, when no such insurrection or rebellion shall take place, shall be confined for not less than two, nor more than five years.

5. Whosoever shall counterfeit the great seal, or the seal of any Court, or any other public seal of this State, or shall steal any of said seals, or shall falsely or corruptly affix any of them to any deed, paper, writing or document, shall be confined for not less than three, nor more than ten years.

6. Whosoever shall counterfeit any gold or silver coin, passing or in circulation within this State, or shall either pay, or tender in payment, any such counterfeit coin, knowing the same to be counterfeit, or shall aid, abet or command any other person, in the commission of either of said offences, shall be confined for not less than two, nor more than five years.

7. The term "confined," as herein used, shall be construed to mean, "shall be punished by confinement in the penitentiary of this State,"—and the term "imprisoned" to mean, "shall be punished by imprisonment in the County or City jail."

CHAPTER II.

OF OFFENCES AGAINST THE PERSON.

HOMICIDE.

1. Homicide is the killing of any human being.

2. When an injury is inflicted upon a child in the womb, such child is not to be deemed to be a human being, within the meaning of the last preceding section, unless such child be afterwards born alive.

3. The law takes no cognizance of homicide, unless death result from bodily injury, caused by some act or omission, as contradistinguished from death occasioned by any influence on the mind, or by any disorder or disease, arising from such influence.

4. A party shall be deemed to kill another person, although the effect of bodily injury inflicted by such party, be merely to accelerate the death of one, laboring under some disorder or disease, arising from some other cause.

5. A party shall be deemed to kill another person, when death is caused by disorder or disease, ensuing from bodily injury inflicted by that party, although death from that cause might, by resorting to proper means, have been prevented.

6. A party shall be deemed to kill another person, when death is caused by a disorder or disease, ensuing from bodily injury inflicted by that party, although such disorder or disease ensue through improper treatment, subsequent to the infliction of the bodily injury.

MURDER OF THE FIRST DEGREE.

By the act of 1809, ch. 138, all murder which shall be perpetrated by means of poison, or by lying in wait, or by any kind of wilful, deliberate, and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpctrate, any arson, rape, mayhem, robbery, sodomy or burglary, shall be deemed murder of the first degree, and the party convicted thereof shall suffer death. All other kind of murder shall be deemed murder of the second degree, and punished by confinement in the penitentiary, from five to eighteen years. This act is a literal copy of the act of Pennsylvania, in the construction of which, the late Chief Justice Gibson is reported to have held, in a case arising out of a quarrel, that a single moment's deliberation, was sufficient to constitute premeditation under the act, and bring the case within the statutory definition of murder of the first degree. And Chief Justice Hornblower in a charge to a Jury, after quoting the act of New Jersey, the same in words as that of Pennsylvania, said, that the statute in his opinion, *did not alter the law of murder in any respect;* and if there was a design and determination to kill, distinctly formed in the mind, at any moment before, or at the time the pistol was fired, or the blow struck, it was a wilful, deliberate and premeditated killing, and therefore murder of the first degree. That the premeditation necessary to constitute murder of the first degree, need not be for a day, an hour, or even for a minute. That murder of the second degree includes those cases of constructive murder, which are not accompanied with the intent to take life.

The eminent Magistrates to whom these opinions are attributed, and no doubt justly, are among those who have shed lasting honor upon the bench of our country, and no judgment deliberately expressed by either, ought to be lightly questioned. But mere authority, no matter how distinguished, must not be permitted to lead our minds away from the dictates of common sense, or the great principles of justice. At the risk therefore, of incurring the charge of presumption, we shall express our own free thoughts upon the subject, although the effect of so doing, may be, to dispute the soundness of the opinions of both these distinguished jurists.

Chief Justice Hornblower insists, with apparent earnestness, that the New Jersey act, in substance, if not literally the same with that of Maryland, has made no change in the law of murder.

Certainly it has made no change in the law of murder, and was never intended to make any such change. The legal definition of the crime was left, in all respects, as the act found it. The sole object of the act, in dividing murder into degrees, was, to apportion *the punishment* to the atrocity of the offence. The statute has added nothing to, it has taken nothing from the elements that constitute the crime. Its operation is upon *the punishment*—it was intended to operate upon nothing else. The law-makers by enumerating certain specified kinds of murder, and then adding to the cases enumerated, "any kind of wilful, deliberate and premeditated killing," intended to confine the crime of murder of the first degree, to the species of killing specified in the previous enumeration, which is intended to present merely instances of the character of killing intended.

If any doubt could exist as to the correctness of this interpretation, that doubt would be removed by the preamble to the third section of the Maryland act, which is also copied verbatim, from the statute of Pennsylvania, and recites that, "whereas the several offences which are included under the general definition of murder, differ so greatly from each other in the degree of their atrociousness, that it is unjust to involve them in the same punishment," it proceeds to enact, that murder shall be classified into the first and second degrees, as we have seen, the object being to set apart the more atrocious descriptions of the crime for the death penalty.

It is as difficult to conceive how the design of the Legislature can be misunderstood, as it is not to appreciate the humane object it intended to accomplish. Can the intention to take life, wilful though it be, but entertained for a moment only, and first conceived under the provocations, either just or unjust, of an existing quarrel, be placed in the same degree of moral depravity, with the fell purpose of the murderer, who lies in wait for a victim, that never gave him offence of any kind? Is it right or just, that the man, whose resentments have been stirred up from their deep foundations, and whose crime has been that he could not keep them in subjection, but who would shrink with horror, from the thought of robbery, or rape, or poison, be classed in the same category of crime with a monster like Crownenshield, who, in the thrilling eloquence of Mr. Webster, enters through the window, and with noiseless step, paces the lonely hall, half lighted by the moon, then winds up the ascent of the stairs, to the door of the chamber, then moves the lock by soft and continued pressure, till it turns on its

hinges without noise, then enters the room, the face of the innocent sleeper being turned from him, and the beams of the moon resting upon the aged temple, show him where to strike, when the fatal blow is given, and the victim passes from the repose of sleep to the repose of death, then raises the aged arm that he may not fail in his aim at the heart, and replaces it again over the wounds of the poignard?

To place a cold, case-hardened, hell-born miscreant, like this, by the side of one, who, in the heat of blood, aims a hasty blow at the life of his fellow, and who deplores it afterwards as long as he lives—to say that their offences do not differ in the "degree of their atrociousness"—that it is just and right to "involve them in the same punishment"—and that the Legislature never intended to make any discrimination between them, is to revive the old and long condemned doctrine of the Heathen Archon, who punished all crimes with death, the smallest, because they deserved it, and the greatest, because they could not be punished with more than death.

Murder of the second degree we are told, includes those cases of constructive murder, which are not accompanied with the intent to take life. The converse of the proposition must therefore be true, that all murder which *is* accompanied with the intent to take life, is murder of the first degree. The mere intent to take life entertained for a moment, for that is the doctrine, imparts to the case that degree of atrociousness, which, in the mind of the Legislature, merits the punishment of death.

Upon this theory, what becomes of such phrases in the act, as murder "perpetrated by means of poison?" or by "lying in wait?" or committed in the perpetration of "arson?" or "rape?" or "robbery?" or "buglary?" Are not these phrases deprived of all meaning, by the construction in question? What are we to do with them? Certainly, the meaning of the act would have been precisely what it is construed to mean, if it had simply declared, that "all murder which is accompanied with the intent to take life, shall be murder of the first degree." This is all the act does mean, say these eminent persons, and if so, then those pointed and significant phrases cited above, mean nothing. They are stricken out, or in reading the act, we are to skip them, which comes to the same thing.

But upon what authority are we told that murder of the first degree includes all cases accompanied with the intent to take life,

and murder of the second degree all cases unaccompanied with such intent? and that this is the true distinction between them. Where is the warrant for this line of separation between the two degrees? Certainly, there is no such warrant in the act itself. And is it not strange, that in the interpretation of a statute, so little open to misconstruction, and in the preparation of which, so much care appears to have been taken to prevent misconstruction, a meaning should be fixed upon it, which cannot be reconciled with it, but by striking out what the act does contain, and by inserting what it does not contain? There is no better interpreter in such cases, than the human heart, and that informs us what the statute ought to mean, and its own words construed by the aid of the plainest reason, inform us, that it does mean precisely what it ought to mean.

We have, however, a word or two more to say upon murder of the second degree, which according to the learned Chief Justice of New Jersey, is limited to those cases, where the killing was not accompanied with the intent to take life, or where the party killing did not intend to kill. It is clearly a case therefore, of an offence which the party did not intend to commit. According to Paley, and indeed, all the best ethical writers, as we have seen, the proper end of human punishment is not the satisfaction of justice, but the prevention of crimes. Now, if one man takes the life of another, when he did not intend to take it, the killing in such a case is an accident, and the point that requires explanation is, in what particular manner the punishment of an accident in one man, is to prevent the happening of a like accident to another, or to the same man? Every case of murder of the second degree, according to the doctrine under review, must be one in which the accused intended one offence which he did not commit, and committed another which he did not intend. And looking to the recognized foundation of human punishment, it might well be asked whether such a man is guilty of any offence at all? But waiving the question of the right to punish at all in such cases, can it be possible, that the Legislature intended to doom a fellow creature to a confinement in the penitentiary for eighteen years, for any merely accidental killing? or in any case, for an offence which the party did not intend to commit?

We conclude therefore, that the opinions of the eminent persons referred to, together with the decisions which in other States have followed in their train, have frustrated the intention of the law-

makers, as well in reference to murder of the first, as of the second degree. That they draw the line of division between these offences in the wrong place, and more than all, that they punish a man with death, when a much milder punishment was intended, and with a severity little short of death, when it is doubtful whether human tribunals have any valid right to punish at all.

No branch of the law reforms projected in England, seems to have attracted more of the attention of government, than that of the criminal law. The first report of the Commissioners appointed to enquire into the subject, was presented to Parliament on the 24th of June, 1834, and the same Commissioners made their seventh report of two hundred and eighty-three pages, folio, on the 7th of March, 1843. Another Commission appointed to enquire into the consolidation of the criminal statute law, made a report in July, 1835. In 1845, the whole subject was referred back by the House of Lords to the old Commissioners, with others added to their number, and by this Commission, four reports were made, the last of which was presented to Parliament in 1848. It forms a complete digest of the written and unwritten criminal law of the realm, and bills, drafted by the Commissioners, and intended to carry the system through Parliament, have at three separate periods—in 1848, 1849 and 1853, received the sanction of the House of Lords. The Digest thus matured, has been formed, revised and approved by some of the most eminent lawyers of the kingdom—among others, by Mr. Justice Wightman, Sir E. Ryan, Thomas Starkie, Esq. and Professor Amos. Also by the Lord Chancellors Lyndhurst, Brougham, Cottenham, St. Leonards and Cranworth, as well as by Lord Chief Justices Denman and Campbell.

Since the year 1848, all the proceedings had in England in reference to this subject, have been those pending before Parliament, and not yet finally acted on. The report of the Commissioners of that year, therefore, exhibits the result of all that has been done from first to last in that country, on the subject of criminal law reform, in a form more authentic and better matured, than any yet accessible to the public.*

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* When the subject was last before the House of Lords in 1853, the bill after being discussed and examined with great care, was reported to the House as revised and amended, but owing to the absence of the Lord Chief Justice, and the desire of some of the law Lords, to bestow some further consideration upon its details, the whole subject was further postponed to the next session, when,

The title of offences against the person, including the important subject of homicide, has been considered and matured with the greatest care, and is treated with marked ability. The report divides homicide into four grades, namely:

1. Murder, comprchending the more heinous descriptions of the offence, which is punished with death. 2. Extenuated homicide, embracing all cases of *wilful killing* below the guilt of murder, and comprehending every degree of criminality from it, down to the point where all criminality disappears. To these grades of the offence is annexed a scalc of punishments, varying from transportation for life, or for any term not exceeding seven years, to imprisonment for any term not exceeding three years, or even to a fine at discretion. 3. Negligent homicide, comprising those cases where the killing, though *not wilful*, is still criminal, to which is annexed a scope of punishment at the discretion of the Court, from imprisonment for any term not exceeding three years, to a pecuniary fine. 4. Justifiable homicide, at which point in the

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it is confidently expected, the bills will pass both Houses, and become the law of the land. In the meantime, it was thought desirable to have the opinions of the Judges upon the bills as reported, and the Lord Chancellor was requested to be the medium of communication.

The learned Judges, fourtcen in number, if we are correctly informed, were one and all opposed to the change. The bills submitted to them were, moreover, they said, so full of inaccuracies and blunders, that if they were to pass in their present shape, the due administration of justice might be seriously compromised.— Their comments were humorous, sarcastic, satirical, ironical and petulant, and a digest of the criminal law was condemned as a fanciful novelty. In reply to the answers of the Judges, C. P. Grcaves, Esq. Queen's counscl, and J. J. Lonsdale, Esq. Secretary to the Criminal Law Commissioners, both of whom actcd as the assessors to the Lord's Committee, addrcssed a letter to the Lord Chancellor, in reply to the Judges, and the answers and the reply have been laid before Parliament and the English public, and it scems to be universally conceded by the British press, newspaper as well as periodical, that the inaccuracies and blunders are all on the side of the Judges. The general belief in England seems to be, that the Digest will pass, and ought to pass, at the next session of Parliament, but what chance it is to have for a fair and impartial trial upon its merits, with the Judges opposed to it, to a man, is another question.

scale, all criminality disappears, and the accused is pronounced guiltless of all offence.

It is worthy of remark, that a large class of cases which, by construction on this side of the Atlantic, are held to be murder of the first degree, and punished with death, are by the proposed changes in the criminal law of England, denied to be murder at all; but, under the denomination of extenuated homicide, are to be punished by a sliding scale of penalties, extending from transportation for life, on the one hand, to a mere pecuniary fine on the other. It may be noted further, that what is by the same construction here, held to be murder of the second degree, and punished in some cases by confinement for eighteen years, and in none for less than five years, is in no case to be punished in England by more than an imprisonment for three years, and varying from that to a pecuniary fine.

The theory of the Report is, that although among the offences classed under the head of extenuated homicide, there may be cases meriting the punishment of transportation for life, yet there may also be cases of wilful killing, the class including no other, deserving no heavier infliction, than a mere pecuniary fine; it is held also by the Report, to be unjust to punish any case of negligent homicide, the killing in every such case being unaccompanied with the intention to take life, with a greater penalty than imprisonment for three years, while in many cases, a pecuniary fine is punishment sufficient. But is it not strange that here, where we boast so much of the ameliorations of our penal code, and are so prone to hold it up in triumphant contrast with the more bloody code of England, we have no penalties for homicide other than death and the penitentiary, and that the lightest infliction the law allows is an imprisonment for two years. And assuredly, it does not tend to lessen the regret which this state of things leaves upon the mind, to learn that the act, (1825, ch. 93,) forbidding a shorter imprisonment in the penitentiary than two years, was passed as a measure of State economy, and without reference to the question of its justice, or the contrary. The belief was, that the labors of a convict in the penitentiary, could not be made, remunerative to the State, under a service of less than two years, and upon the principle that in punishing a party for an infraction of the laws, the State was not bound to be at any expense, the law was passed that no man should go to the penitentiary for less than two years.

The public mind of this State has been so long accustomed to the reservation of the death penalty, for the more awful manifestations of human wickedness only, that a more comprehensive application of that penalty at this day, would not meet with acceptance from any portion of our people, and for this reason alone, if there were no other, a classification of the higher grades of homicide, like that recommended by the English Commissioners, could not be proposed for adoption in Maryland.

Crimes and punishments are the two principal things to be attended to, in the preparation of the penal code. Crimes may be described, and their minute differences set down in detail on paper, but punishments, as we have already seen, are not susceptible of being fixed in detail beforehand. And even were such a thing practicable, it is far from being certain that it would be desirable. In the administration of such a system, it would rest with the Jury to find the precise degree of the offender's guilt, and the punishment being already fixed by the code, nothing would remain for the Court to do, but ministerially to read to the offender, his punishment from the statute book. The ascertainment of the degree of the offence, would at the same time, ascertain the punishment due to it, and the effect of such a system would be, to give all power to the Jury, and no power to the Court.

The most that can be done in reference to a system of punishments, is to name for each subdivision of each offence, a maximum and a minimum, and then provide a discretionary power, to award to each separate case the exact penalty due to it, from the whole range between these extremes.

This discretionary power must be lodged somewhere, and it can only be entrusted with the Court, or with the Jury, or apportioned between the Court and Jury. But it is here again worthy of consideration, that as the scope of such discretion is enlarged, the effect is, to give power to the Court, while the restriction of that discretion, within narrower limits, has the effect of taking power from the Court, and transferring it to the Jury. A moment's consideration will render this perfectly plain. If, for example, to murder of the second degree, be assigned a scope of punishment from the maximum of twelve years in the penitentiary, to the minimum of a pecuniary fine, the only power the Jury can have is, to say guilty, and the Court take the whole range between these extremes, to award the specific penalty the party is to suffer. But if murder of the second degree be divided into two separate parts,

with a separate scope of punishment, one a harsh, the other less severe, assigned to each part, it is obvious, that the discretion of the Court, instead of ranging through a space, which was a whole in the first instance, is now confined to a space constituting but a part of that whole, and that it is with the Jury to designate the part within which the Court's power is to be exercised. Thus the crime of manslaughter is, by the code of New York, divided into four degrees, with a separate punishment for each degree, the object being, as there can be no other, to give the Jury a more enlarged, and the Court a more restricted control over the punishment.

Now there are considerations, which, in the apportionment of this power between the Court and the Jury, must not be overlooked. Juries in making up their verdicts, are governed more by their own notions of justice, than by the abstract principles of the law. And we must take Juries as we find them. If they happen to lean toward the accused, they will not, in general, convict him, no matter how clear the law may be, without some assurance that he will not receive beyond a certain maximum of punishment. Should the Court have the power to inflict a punishment, which, according to their notions, would be greatly beyond his deserts, and they have any reason to suspect the Court of a disposition to give him the full extent of the law, they will acquit, rather than place the accused in the power of the Court. This is the secret of most of the strange verdicts of acquittal we hear of, and the simplest mode to correct the evil, is to remove its cause, which is done by vesting in the Jury a reasonable control over the power of the Court, in the matter of punishment. We have spoken only of instances where the Jury leans to mercy, and the Court to undue severity. But the case may be reversed, and the Jury may be determined to convict against the law, the evidence, and the justice of the case. When this happens, the Court holds the corrective in its own hands, in its power to grant a new trial, and to give the accused another chance of justice, by submitting his case to a different Jury.

Keeping these considerations in view, the Commissioners have divided the subject of homicide into, 1. Murder of the first degree, comprehending the more atrocious kinds of killing, to be punished with death, except in cases of convictions upon circumstantial evidence, when a discretion is lodged with the Court, between death and confinement in the penitentiary. 2. Murder of the second

degree, comprehending those cases where the killing though less atrocious, is still more so, than in cases not deemed to be murder of either degree, the punishment to be from twelve to three years in the penitentiary. 3. Extenuated homicide, where the killing though still wilful, is mitigated more or less by the character of the provocation, or other accompaniments of the act, the punishment to be not more than three years in the penitentiary, or imprisonment in the county jail not exceeding eighteen months, or a pecuniary fine, which in effect, will be a graduated scale of from three years in the penitentiary, to no punishment at all. 4. Negligent homicide, comprehending those cases where the killing is unaccompanied with the intent to take life, the punishment not exceeding three years in the penitentiary, or eighteen months in the county jail, or fine. Negligent homicide is not inferior in guilt to extenuated homicide, but collateral to it, implying about the same amount of criminality, and meriting about the same penalty. 5. Justifiable homicide, comprising all cases, when, from whatsoever cause, the law is held not to be violated.

By this arrangement the whole subject of homicide is presented in its natural order, a scale of penalties is provided, by which the punishment due to each separate case, according to the real degree of its criminality, may be awarded without difficulty, and the power in regard to the application of the punishment, about properly apportioned between the Court and the Jury.

The severity of punishments generally, have been considerably reduced, by which arrangement, together with the other new features introduced into the system, it is believed the certainty both of conviction and punishment will be greatly enhanced. And the certainty of punishment is more efficacious in the prevention of crimes, than its severity.

1. Whosoever shall be convicted of murder of the first degree, shall be hanged by the neck until he be dead. Provided, that in every case of conviction of murder of the first degree, upon circumstantial evidence, the Court shall have the power in its discretion, to sentence the offender to be hanged, or to be confined for not more than twelve, or less than three years.

2. All homicide which shall be perpetrated by any cool, deliberate, and premeditated killing, such as by means of poison, by lying in wait, by imprisonment, or by any species of cruel or barbarous treatment, or in the commission of, or attempt to commit, any arson, rape, robbery or burglary, shall be murder of the first degree.

MURDER OF THE SECOND DEGREE.

1. Whosoever shall be guilty of murder of the second degree, shall be confined for a period not exceeding twelve years, nor less than three years.

2. It is murder of the second degree whensoever the killing though wilful, is not so characterized as to constitute it murder of the first degree, or extenuated homicide.

3. It is murder of the second degree whensoever the killing is wilful, and attributable to resentment or passion, occasioned by some affront or injury, but where such affront or injury is of a trivial character, or such resentment or passion insufficient to deprive the party of self-control.

4. It is murder of the second degree when a party seeks a provocation or affront as a pretext for killing.

5. It is murder of the second degree when, upon a sudden quarrel, parties fight and one of them is killed, if the death is caused in consequence of any unfair advantage taken, or unfair means used by the party killing.

6. It is murder of the second degree when a peace officer, or other person lawfully executing any writ, warrant or process, civil or criminal, or lawfully acting

in obedience to the command of a magistrate, or otherwise acting for the advancement of the law, or lawfully interposing for the prevention or suppression of any offence, is wilfully killed, if the party killing had notice, that such officer, or other person, purposed to act under such writ, warrant or process, or in obedience to such command, or otherwise, for the advancement of the law, or interpose for such before mentioned purpose.

7. It is immaterial in such case, that such writ, warrant or process is not sufficient in law, or such command unlawful, or the manner of executing such writ, warrant or process, or of acting for the advancement of the law, is unlawful, provided such officer or other person believed himself to be respectively lawfully executing such writ, warrant or process, or lawfully acting in obedience to such command, or otherewise, for the advancement of the law, and provided, the party killing had notice, that such officer or other person purposed to act under the authority of such writ, warrant or process, or in obedience to such command, or otherwise, for the advancement of the law.

8. It shall, in no case, be less than murder of the second degree, where the death was caused by means of a concealed weapon, which the offender either ordinarily or habitually carried about his person.

9. Provided, that no such aggravation shall be given to the degree of the crime, by reason of the instrument of death having been a concealed weapon, if such weapon were provided and carried by the offender, as a means of defence against expected or threatened violence from the party killed, or as a protection against any other external danger, which

the offender had good reason to believe and did believe, at the time of providing and carrying such concealed weapon, menaced his personal safety.

The habit of wearing concealed weapons, and using them just as occasion may require, is the great reproach of our country, and it is time that something should be done to suppress the evil.

It is the fashion to denounce the contests of the ring as brutal and savage, and all that, but, in our opinion, a boxer is, in every respect, a better citizen than the man who wears, as a part of his daily equipment, a revolver or bowie knife. The science of self-defence, as it is termed, if generally diffused through the masses, has a tendency to foster a manly spirit of self-reliance, as well as a detestation of all foul play, and in communities where the rules of the science prevail, such practices as gouging, or biting off the ear or nose, or using a knife or dirk, or any other concealed weapon, in a fight, are unknown. In the City of London the man who would kick another in a fight, or strike him while he was down, would be severely handled by the bystanders.

EXTENUATED HOMICIDE.

1. Whosoever shall be guilty of extenuated homicide, shall be confined for a period not exceeding three years, or imprisoned not exceeding eighteen months, or fined, at the discretion of the Court.

2. Homicide is extenuated whensoever the killing is wilful and not justifiable, but the act, from which death results, is attributable to a want of self-control, occasioned by an impulse of passion, arising from sudden and grave provocation, or by fear or alarm, which passion, fear or alarm, for the time suspends the power of self-control.

3. Homicide is extenuated although the offender by mistake or accident, kill not the person who offered the provocation, but some other person.

4. Homicide is extenuated where, upon a sudden quarrel, parties fight, and in the heat of blood one of them is killed, if the killing be attributable to want of self-control, caused by heat of blood and passion.

5. It is immaterial in such case, which of the parties offered the first affront, or made the first assault.

6. Homicide is extenuated whensoever the killing, though wilful, is occasioned by any act or conduct of the party killed, in consequence of which, the domestic peace of the party killing is invaded, as by the debauching of his wife, or the seduction of his daughter.

7. Homicide is extenuated whensoever the killing, though wilful, is occasioned by an affront or injury offered by the party killed, which affront or injury is of a character to inflict lasting disgrace upon the party killing, if not resented by him.

8. It is not necessary in the cases mentioned in the two last preceding sections, that the killing shall be in the heat of passion.

NEGLIGENT HOMICIDE.

1. Whosoever shall be guilty of negligent homicide, shall be confined for a period not exceeding three years, or imprisoned not exceeding eighteen months, or fined, at the discretion of the Court.

2. Homicide is negligent wheresoever the death is not wilfully caused, but results from want of reasonable caution in the undertaking and doing of any act, either without such skill, knowledge or ability, as is suitable to the occasion, or without due care taken to ascertain the nature and probable consequences of

such act, or when it results from the not exercising reasonable caution in the doing of any act, either as regards the means used, or the manner of using them, or from the doing of any act without using reasonable caution for the prevention of mischief, or from the omitting to do any act, which a person using reasonable caution would not have omitted to do.

3. Homicide is negligent whensoever death is not wilfully caused, but occurs in any sport, exercise, or amicable contest, if weapons, instruments, or means be used, which cannot be used without probability of causing grievous bodily harm.

4. Homicide is not negligent, but accidental, where death occurs in any sport, exercise or amicable contest, without intent on either side to cause, and without using weapons, instruments, or means likely to cause grievous bodily harm.

JUSTIFIABLE HOMICIDE.

1. Homicide is justifiable where the act from which death results is done in a lawful manner, in execution of a lawful sentence, by an officer, or other person lawfully authorized, to execute such sentence.

2. Homicide is also justifiable when a peace officer or other person duly authorized by writ or warrant to arrest, detain or imprison any party for any offence punishable with death, or upon any charge or suspicion of any such offence, or by reason of any indictment found against him for any such offence, or of any conviction of any such offence, or otherwise duly authorized by law to arrest, detain or imprison any party, by reason of any such offence committed, or by reason of

his conviction of any such offence, and using lawful means for the purpose, kills such party in case of flight, or (if such officer or other person have reasonable cause for believing, and believes that such party is consenting thereto) in case of his being rescued, in order in either case, to prevent his escape from justice, and because such officer or other person has reasonable cause for believing, and believes, that such party cannot otherwise be overtaken, or his escape from justice prevented.

3. Homicide is also justifiable when a peace officer or other person lawfully executing any writ, warrant or process, civil or criminal, or lawfully acting in obedience to the command of a magistrate, or otherwise lawfully acting for the advancement of the law, or lawfully interposing for the prevention or suppression of any offence, is unlawfully and forcibly resisted, and using no more force than he has reasonable cause for believing, and believes to be necessary to overcome such resistance, kills the person so resisting; or, being by reason of the violence opposed to him, under reasonable fear of death, if he proceed to execute his authority, and because he has reasonable cause for believing, and believes, that he cannot otherwise execute his authority and preserve his life, kills him who so resists.

4. A peace officer shall be deemed to be acting for the advancement of the law, not only whilst he is actually executing, or endeavoring to execute that authority, but also whilst he is proceeding to execute it, or is retreating, having executed, or being unable by reason of resistance, or other cause, to execute it.

5. Every writ, warrant or process which shall have been issued in the ordinary course of justice, from a

Court, or by a judicial officer having competent jurisdiction to issue the same, and which expresses either by name or description, the person by and against whom, and in substance some lawful cause for which the same is to be executed, shall be deemed to be a sufficient writ, warrant or process, within the meaning of the third section hereof.

6. It is essential to every justification of killing by a peace officer or other person, acting by virtue of any writ, warrant or process, or in obedience to the command of a magistrate, within the meaning of said section, that at the time such writ, warrant, process or command was executed, or attempted to be executed, the person resisting had notice, that the officer or other person executing or attempting to execute the same, purposed to act under such authority.

7. It is sufficient for such justification, that the officer or other person gave notice of the authority under which he purposed to act, without exhibiting it, where such authority is in writing.

8. It is essential to every justification of killing by a peace officer, acting for the advancement of the law, or interposing for the prevention of any offence, by virtue of his mere official authority, and without writ, warrant or process, that the person resisting had notice that such officer had such authority, and that he acted or interposed for such purpose.

9. It is not essential that the notice mentioned in the third and eighth sections hereof, should have been given in express terms; such notice may be presumed or collected as a matter of fact, from the terms used

by the officer or other person, or from other circumstances.

10. It is essential to every justification of killing by a private person, acting for the advancement of the law, or interposing for the prevention of any offence, of his own authority, that express notice should have been given to the party resisting, that such private person acted or interposed for such purpose.

11. Homicide is also justifiable where the party killing has reasonable cause for believing it to be necessary for preventing the perpetration of any offence, in respect of which, the punishment of confinement in the penitentiary for the period of ten years, or a higher punishment may be awarded, attempted to be committed by violence or surprise against the person, habitation or property, of the party killing, or of any other.

12. Homicide is justifiable also, where one in lawful defence of his person, repels force by force, and using no more violence than he has reasonable cause for believing and believes to be necessary for the purpose of self-defence, kills the assailant; or being, from the violence with which such assailant pursues his purpose, under reasonable apprehension of immediate death, and because he has reasonable cause for believing and believes that he cannot otherwise preserve his life, kills such assailant.

13. Homicide in self-defence is justifiable, although the party killing was guilty of an assault, or engaged in an unlawful conflict, which led to the homicide. The rule is subject to the following limitations :—

That the party killing did not either commence or provoke the attack, with intent to kill, or to do grievous bodily harm, or during the conflict, and before the necessity for killing arose, endeavor to kill, or to do grievous bodily harm;

That he declined further conflict, and quitted and retreated from it, so far as was practicable with safety to his life;

That he killed the assailant because he had reasonable cause for believing and believed it to be necessary so to do, in order to avoid immediate death.

14. Homicide is also justifiable where one in defence of moveable property in his lawful possession, repels force by force, and using no more violence than he has reasonable cause for believing and believes to be necessary, for the defence of such property against wrong, kills the wrong doer; or being, from the violence with which such wrong doer pursues his purpose, under reasonable apprehension of immediate death, if he persist in the defence of such property, and because he has reasonable cause for believing and believes that he cannot otherwise defend such property, and preserve his life, kills such wrong doer.

15. Homicide is also justifiable where one, in defence of house and land in his lawful possession, resisting a person endeavoring by force to enter into or upon such house or land, repels force by force, and using no more violence than he has reasonable cause for believing and believes to be necessary for the defence of his possession, kills the wrong doer, or being, from the violence with which such wrong doer pursues his purpose, under reasonable apprehension of immediate death, if he persist in the defence of his

possession, and because he has reasonable cause for believing and believes that he cannot otherwise defend his possession, and preserve his life, kills such wrong doer.

16. Homicide is also justifiable where one in lawful possession of house or land, after requesting another who has no right to be there to depart, upon such wrong doer's refusal so to do, is resisted in his endeavor to remove him, and using no more violence than he has reasonable cause for believing and believes to be necessary, for the removal of such wrong doer, kills him ; or being, from the violence with which such wrong doer resists being removed, under reasonable apprehension of immediate death, if he persist in his endeavor to remove him, and because he has reasonable cause for believing and believes that he cannot otherwise remove such wrong doer and preserve his own life, kills such wrong doer.

17. Homicide is also justifiable where a party who would have been justified, in self-defence or otherwise, in killing one person, by mistake or accident, and without negligence kills another person.

18. Homicide is also justifiable where death results from an act done in good faith, with the intention of affording succor or aid to any other person, by rescuing him from danger, or curing him of any bodily injury, or of any disorder or disease, or where death results from any other act, done with a view to the bodily safety, or health of any other person, without any intention in such case to kill or injure such person, provided that no unnecessary risk or peril be wilfully incurred; and provided also, that the act be not attributable to want of reasonable caution.

SELF-MURDER.

Self-murder is still retained, strange to say, in the catalogue of offences against the law of England, though no punishment is annexed to it, as none could be, but such as must fall exclusively on the innocent and unoffending. It has never had a place in the list of crimes recognized by the laws of this State, although the act of aiding and abetting the commission of suicide, is regarded every where as a high offence, and punished as such. The Commissioners have therefore prepared the following section to meet that case.

1. Whosoever shall procure, or promote, or be present aiding in or abetting the commission of self-murder, shall be confined for not less than two, nor more than seven years.

OF DUELLING.

1. Any citizen of this State who shall, either in or out of this State, fight a duel, and in so doing, either kill or inflict a mortal wound, of which the party shall die within twelve months, shall be deemed guilty of murder of the second degree, and confined for a period not more than twelve, nor less than three years.

2. Any citizen of this State, who shall be the second of either party in a duel, and be present as such, when such death or mortal wound is inflicted, shall be deemed an accessory before the fact, and confined for not more than five, nor less than one year.

3. An offender under either of the two preceding sections, may be prosecuted in the County or City where the death occurs, if it occur within this State, and if not, in any County or City in which the offender may be found.

4. Any person who shall fight a duel, though no death ensue, or send, or deliver a challenge, oral or written, to fight a duel, though no duel ensue, shall be imprisoned for not more than one year, or fined, at the discretion of the Court.

5. A combat by previous agreement or understanding, with any species of fire-arms, or with swords, bowie knives, dirks, or other deadly weapons, is a duel within the meaning of the provisions herein contained.

6. If any Judge or Justice of the Peace have good cause to suspect, that any persons are about to be engaged in a duel, he may issue his warrant to bring the parties before him, and if he think proper, may compel them to enter into recognizance to keep the peace, and shall insert therein a condition, that they will not, during the time for which they may be bound, be concerned in a duel, directly or indirectly.

The thirty-sixth section of the third article of the Constitution, disqualifies all persons fighting duels, and their seconds, for holding offices of trust or profit under this State. And the act of 1816, ch. 219, subjects all parties to duels, which shall result in death, their aiders and abettors, to confinement in the penitentiary for not less than five, nor more than eighteen years. Still duels are fought, and the parties permitted to escape with impunity, and the reason, as it is believed, is, that the penalties under the existing law are too severe. It is but another instance, therefore, to show, that if the severity of penalties goes beyond public sentiment, they cannot be enforced. The substance of the above sections is taken from the Virginia code, the provisions of which, in relation to this subject, the Commissioners like better than any they have seen.

OTHER OFFENCES AGAINST THE PERSON.

1. Whosoever shall unlawfully and carnally know any woman against her will and by force, or whilst she is insensible, shall be guilty of rape, and shall be hanged by the neck until he be dead, or confined for a period not exceeding twelve years, nor less than one year.

The penalty annexed to the crime of rape by the Report of the English Commissioners of 1848, is transportation for life, or for any period not less than seven years. There may be cases, however, where the death penalty would not be too severe. It is a crime from its nature admitting of great diversities in the degrees of its criminality, and a large discretion, therefore, in reference to the punishment, ought to be entrusted to the Court.

2. It is rape although the woman consent to carnal knowledge, if such consent be given through fear of death, or of grievous bodily harm.

3. A husband cannot be guilty of committing, by his own person, a rape on his wife; but if another person commit the offence, he may be liable as an accessory, or for being present, aiding or abetting.

4. Provided that no person shall be deemed to be a husband within the meaning of the last preceding section, where the woman shall have been compelled, or shall have been induced by fraud, to go through the ceremony of a marriage, and either such ceremony shall be a mere nullity, or the marriage shall, by reason of such compulsion or fraud, have been at any time before trial, declared to be void *ab initio*, by a Court of competent jurisdiction.

5. Whosoever, by pretending to be the husband of any married woman, or knowing that any married

woman believes him to be her husband, shall deceitfully and carnally know her, shall be punishable as for rape.

6. Whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years, shall be confined for a period not exceeding twelve years, and not less than one year.

7. Whosoever shall administer to, or cause to be taken by, any woman, any drug or other thing, with intent to render her insensible, or to produce in her an unnatural sexual desire, or such stupor as to prevent or weaken resistance, in order that, whilst in that state, he or any other person may unlawfully and carnally know her, shall be imprisoned for any time not exceeding two years, or fined, at the discretion of the Court.

8. Any, the least degree of penetration, although there be no emission of seed, shall be sufficient to constitute carnal knowledge.

9. Whosoever shall assault any woman, with intent to commit a rape, shall be imprisoned for any term not exceeding three years, or fined, or both.

The punishment annexed to this offence in England is, not exceeding three years imprisonment, or fine, or both, at discretion. By the act of 1809, it is punished by confinement in the penitentiary for not less than two, nor more than ten years. The scale of punishments provided by that act, seems to have been settled without reference, in many instances, to the principles of justice or reason.

10. Whosoever shall commit the crime of buggery, either with mankind or with any brute animal, shall

be confined for not less than one year, nor more than five years.

11. Whosover shall assault any person with intent to commit the crime of buggery, or shall offer, use or make any solicitation, persuasion, promise or threat to any person, whereby to move or induce such person to commit or permit such crime, shall be imprisoned for not more than three years, or fined, or both, at the discretion of the Court.

12. An infant under the age of fourteen years, shall be deemed incapable, by reason of impotency, of committing by his own person, either rape, or buggery, or of abusing any female under the age of ten years, or of an assault with intent to commit any of these crimes by his own person.

13. Whosoever shall, from motives of lucre, take away or detain against her will, any woman, in any wise entitled to any interest, legal or equitable, present or expectant in any property whatsoever, with intent to marry, or defile her, or cause her to be married or defiled by any other person, shall be confined for not more than five years, or less than two years, or imprisoned for any term not exceeding eighteen months.

14. Whosoever shall take away, or detain against her will, any woman, with intent to marry or carnally know her, or cause her to be married or carnally known by any other person, shall be confined for any period not exceeding three years, or less than one year, or imprisoned for any period not exceeding one year.

15. Whosoever shall unlawfully take, with or without her consent, any unmarried girl being under the

age of sixteen years, out of the possession, and against the will of her father, mother, or any other person having the lawful care or charge of her, shall be imprisoned for any period not exceeding three years, or fined, or both, at the discretion of the Court.

16. Whosoever shall unlawfully lead or take, or decoy or entice away, or detain any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with the intent to steal any article upon, or about the person of such child, to whomsoever such article may belong; or shall, with such intent, receive or harbor any such child, knowing the same to have been, by force or fraud, led, taken, decoyed or enticed away, as hereinbefore mentioned, shall be confined for any period not exceeding three years, or imprisoned not exceeding one year, or fined, at the discretion of the Court.

17. Provided, that no person who shall have, in good faith, claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue of the last preceding section, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof.

18. Whosoever shall maliciously kidnap, or forcibly and fraudulently carry out of this State, or cause to be so carried out of this State, any free person, or person entitled to freedom at or after a certain age, or upon a certain contingency, knowing such person to be free

or entitled to freedom, as aforesaid, shall be confined for any period not exceeding five years, nor less than one year.

19. Whosoever shall maliciously and wilfully, with intent to disfigure any person, cut or slit, or cut off, or by any means deprive, any person of any limb, feature or member, shall be confined for not more than five, or less than two years, or imprisoned for any period not exceeding eighteen months.

The act of 1809, after disposing of the different grades of homicide, awards the punishments to mayhem, tarring and feathering, cutting out the tongue, slitting the nose, ear or lip, cutting or biting off or disabling any limb or member, of malice aforethought, with intention to disfigure such person. But if there ever was a disposition in any portion of the people of this State, to commit any of the offences thus described, it is certain that such a disposition no longer exists. Perhaps no person now living, has ever seen a trial in Court for any one of them, with the single exception of mayhem. And even that offence, considered with reference to the reason upon which it was originally regarded as a separate crime, ought no longer to have a place in our penal code. The Commissioners have therefore ventured to drop the whole list as thus specifically described, and in lieu thereof, have prepared the above section, embracing in general terms, all offences of the same character.

20. Whosoever shall administer, or cause to be taken by any other person, any poison, or other destructive drug or thing, or shall, by any other means, manifest a design to kill, shall, in every case where, had the person against or with respect to whom such act or thing is done, been killed, such killing under the same circumstances, would have been murder of the first degree, be confined for any period not exceeding five years, or imprisoned not exceeding two years.

21. Whosoever shall, by any assault, or by any other means, manifest a design to kill, in every case where, had the person against or in respect to whom such act or thing is done, been killed, such killing under the circumstances, would have been murder of the second degree, be confined for any period not exceeding three years, or imprisoned not exceeding one year, or fined, at the discretion of the Court.

22. Whosoever shall wilfully commit any assault upon, or do any violence to the person of another, shall be imprisoned not exceeding eighteen months, or fined, or both, at the discretion of the Court.

23. Whosoever shall maliciously place, or throw in, into, upon, against, or near any building or vessel, any gunpowder or other explosive substance, with intent to cause any bodily harm to any person, shall, whether or not any explosion takes place, and whether or not any injury is effected to any person, be imprisoned for any period not exceeding eighteen months, or fined, or both, at the discretion of the Court.

24. Whosoever shall assault any person, with intent to commit the crime of robbery, shall be imprisoned for any period not exceeding two years, or fined, or both, at the discretion of the Court.

25. Whosoever shall be guilty of any unlawful restraint of the personal liberty of any other person, shall be imprisoned not exceeding eighteen months, or fined, or both, at the discretion of the Court.

26. Whosoever shall, by any means not hereinbefore specified, maliciously put the life of any person in danger, shall be confined for any period not exceeding

two years, or imprisoned not exceeding one year, or fined, at the discretion of the Court.

27. Whosoever shall, with intent to procure the miscarriage of any women, whether she be or be not with child, maliciously administer to, or cause to be taken by her, any poison or other noxious thing, or use any instrument or other means whatsoever, shall be imprisoned for any period not exceeding two years, or fined, or both, at the discretion of the Court.

28. Provided, that no person by reason of any act specified in the last preceding section, shall be punishable where such act is done in good faith, with the intention of saving the life of the woman whose miscarriage is intended to be procured.

29. An assault consists in an attempt, offer or menace, by gestures, unlawfully to cause bodily harm or to do any personal violence to another, by one who has the present ability to cause such bodily harm, or to do such violence.

CHAPTER III.

OFFENCES AGAINST THE HABITATION.

BURGLARY.

1. It is burglary where any person in the night time, by any of the means, or in the manner hereinafter in the next succeeding section is specified, effects an entry into a dwelling house of any other person, or into some inner part thereof, with intent to commit, or unlawfully effects an entry into any such dwelling

house, or inner part thereof, and commits therein the crime of theft or some felony.

2. It is an entry into a dwelling house, or any inner part thereof, within the meaning of the preceding section, if such entry be effected by any of the means, or in the manner following, viz:

1st. By breaking, displacing or opening any part of the walls, partitions, roof, ceiling or floor of any such dwelling house, or inner part thereof respectively, or any door, shutter, window, or other impediment, opposed to entrance into, and forming part of such dwelling house, or inner part thereof: provided, that nothing herein contained, shall apply to the opening or displacing further than it was before, and in the manner in which it was intended by its construction, to be opened or displaced, of any door, shutter, window, or other impediment, hereinbefore mentioned, being already partly opened or displaced.

2ndly. By means of violence, or threat of violence, to the person or property of any other, or by any other means of intimidation, direct or indirect.

3rdly. By means of any stratagem, trick or device, fraudulently practiced, for the purpose of obtaining admission, or by collusion or conspiracy with any servant, inmate or other person, unlawfully giving or facilitating admission.

4thly. By an entry into the chimney of a dwelling house, though no room, or other part of such dwelling house be entered.

3. The term "violence," as used in the last preceding section, shall be deemed to extend to violence, used under pretence of lawful claim, or of acting

under legal process, or any other lawful authority, or under any other pretence whatsoever.

4. The term "threat of violence," as used in the second section hereof, shall be deemed to extend to threat of violence, under pretence of lawful claim, or of acting under legal process, or other lawful authority, or under any other pretence whatsoever; and it is immaterial whether such threat be direct or indirect, or whether it be notified by words, gestures or signs.

5. Where an entry is effected upon admission unlawfully given, or facilitated by a servant, inmate or other person, such entry, so far as regards the fact of entry, shall constitute burglary, as well in such servant, inmate or other person, as in the party so admitted.

6. As regards the act of entry, the partial entry of any offender, or the introduction of any engine or instrument, or any part thereof, or the discharge of any missile, into any dwelling house, or any inner part thereof, shall be deemed to be a criminal entry, within the meaning of the first section hereof.

7. An entry into a dwelling house, or any inner part thereof, by any person having authority to enter into such dwelling house, or inner part thereof, respectively, shall not be deemed to be a criminal entry, within the meaning of the first section hereof.

8. An entry by an inmate of a dwelling house into any inner part thereof, and not made by virtue of any authority, trust or employment, is a criminal entry into such inner part, within the meaning of the first section hereof.

9. The term "dwelling house" as herein used, shall be understood to mean any fixed and permanent building, which, at the time of the offence had been used, and still was used or intended to be used, or was then used and intended to be afterwards used, either continuously or at intervals, for the purpose of lodging or dwelling therein by night.

10. The motive or object for using any fixed and permanent building, for the purpose in the last preceding section mentioned, shall not be deemed to be material.

11. The mere casual lodging or dwelling by night, in any fixed and permanent building, without the license or consent of the owner or occupier thereof, that such building should be used, either continuously or at intervals, for such purpose, does not constitute such building a dwelling house.

12. The whole of any fixed and permanent building, and when any such building is divided into distinct portions, the whole of any portion of any such building, the parts of which communicate internally with each other, and any part of which, at the time of the offence, had been and still was used, or intended to be used, or then was used and intended to be afterwards used, as mentioned in the ninth section hereof, shall be deemed to be a dwelling house. So also, the whole of any fixed and permanent building, or portion of any fixed and permanent building, being within the same curtilege as a dwelling house, and occupied therewith, the parts of which communicate internally with each other, and any part of which communicates with such dwelling house, either immediately or by

means of a covered and enclosed passage leading from the one to the other, shall be deemed to be part of a dwelling house, for any of the purposes hereof.

13. An inner part of a dwelling house consists of any room, chamber or compartment, being parcel of a dwelling house, but no cupboard, press, locker, chest, or other receptacle or repository, whether attached to the freehold or otherwise, shall be deemed to be an inner part of a dwelling house, for the purposes hereof.

14. A dwelling house is that of the party who, in his own person, or by that of any of his family, or of any servant, agent or other person, with his license or consent, occupies it as such. The rule is subject to the following distinctions:—

The ownership of a dwelling house shall, as regards the mode of occupation, be determined by the following rules:

1. When it is in the occupation of one person, it shall be deemed to be the dwelling house of such person.

2. When it is in the joint occupation of several persons, it shall be deemed to be the dwelling house of such persons.

3. When it is occupied as to several parts by several persons, then, in case such parts have an outer door and entrance in common, which are in the occupation of any one or more of such persons, it shall be deemed to be the dwelling house of such person or persons. And in case such outer door and entrance in common be not so occupied by any such person, or in case there be no such outer door and entrance in common, each

of the rooms or connected sets of rooms, so severally occupied, shall be deemed to be the dwelling house of the person so occupying the same. And in case two or more of such severally occupied parts have an outer door and entrance in common, but other such parts have separate entrances only, then if such outer door and entrance in common be occupied by any person or persons occupying any of those parts having such entrance in common, such two or more parts shall be deemed to be the dwelling house of such last mentioned person or persons, and any other part or parts so severally occupied, shall be deemed to be the dwelling house or several dwelling houses of the person or persons so occupying the same.

15. Whosoever shall commit the crime of burglary, shall be confined for a period not exceeding eight years, and not less than two years.

16. Whosoever shall burglariously enter into any dwelling house, or any inner part thereof, and shall assault with intent to murder any person being therein, or shall cause any bodily harm, or do any personal violence to any such person, shall be confined for any period not exceeding twelve years, nor less than five years.

17. Whosoever in the night time, by any other means or in any other manner than in the second section hereof is specified, shall effect an entry into a dwelling house of any other person, or into some inner part thereof, with intent to commit, or shall unlawfully effect an entry into any such dwelling house, or inner part thereof, and commit therein the crime of theft or some felony, shall be confined for a period not exceeding eight years, or less than two years.

ARSON, AND MALICIOUS BURNINGS.

1. Whosoever shall maliciously set fire to any dwelling house, any person being therein, shall suffer death by hanging by the neck, or be confined not exceeding twelve years, or less than three years.

2. It is essential to a setting fire to any dwelling house, within the meaning of the last preceding article, that some part of such dwelling house should be actually burnt.

3. Whosoever shall maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down or damage, the whole or any part of any dwelling house, any person being therein, shall suffer death by hanging by the neck, or be confined not exceeding twelve years, or less than three years.

4. Whosoever shall willfully set fire to any barn or stable, any horses, cattle, or other living animals being therein, shall be confined not exceeding ten years, or less than two years.

CHAPTER IV.

FRAUDULENT APPROPRIATIONS.

THEFT, AND OTHER OFFENCES CONNECTED THEREWITH.

1. Theft is the wrongfully obtaining possession of any moveable thing, being the property of some other person, and of some value, with the fraudulent intent entirely to deprive him of such thing, and have or deal with it as the property of some person, other than the owner.

2. A person shall be deemed wrongfully to obtain possession of a moveable thing, within the meaning of the last preceding section, where he either takes such thing without the consent of the owner, or obtains possession of such thing by means of intimidation or deception.

3. Any act of taking by which a person has such possession of a moveable thing, as to be enabled, at his will, to lift, carry or otherwise remove it, or, where an animal is the subject of theft, to drive, lead or otherwise remove it, to any distance, however small, is a sufficient taking, within the meaning of the last preceding section.

4. It is not essential to constitute a taking within the meaning of the second section hereof, that the thing taken be removed from the place which it occupied when taken, or from any place of deposit in which it is taken, or to be freed from impediment to a removal, other than such as is mentioned in the last preceding section.

5. No taking by one who has the lawful possession of the thing taken, such possession being distinct from that of the owner, is a sufficient taking, within the meaning of the second section hereof.

6. The rule contained in the last preceding section, applies to carriers entrusted with goods to be carried, millers with wheat and other grain to be ground, artificers or workmen with materials to be wrought, hirers of goods, pawnbrokers and others, who, by virtue of any contract of bailment, or of any express or implied consent, or by authority of law, or by any other means, whether the owner has ever had pos-

session or not, have a lawful possession of the thing taken, distinct from that of the owner.

7. The rule contained in the fifth section hereof, does not apply to servants having the lawful custody or charge of any thing being the property of their master, to be exercised upon his premises or elswhere, under his superintendence or control, or to guests or inmates having the temporary use of plate or any other thing, or to artificers or workmen having the charge of materials to be wrought in the house or on the land of their employer, or to any case where a person has the bare charge or use of any thing, or where any owner employing, permitting or authorizing any other person to deal with any thing being his property, in his house or on his land or elswhere, for any purpose, subject to his own continuing possession and control, does not entrust him with any possession of such thing, distinct from his own.

8. A moveable thing shall not be deemed to be taken without the consent of the owner, within the meaning of the second section hereof, when it is taken with the consent of any person authorized to consent.

9. Where possession of a moveable thing is obtained by means of intimidation, it is theft, notwithstanding the consent of the owner or other person authorized to consent, to part with the entire property in such thing.

10. Where possession of a moveable thing is obtained by means of deception, it is not theft where the owner or other person authorized to consent, consents to part with the entire property in such thing.

11. It is immaterial within the meaning of the last preceding section, whether the owner or other person authorized to consent, consents to transfer the right of the property to the wrong doer, or to any other person.

12. Whether possession of a moveable thing be obtained by means of intimidation or deception, it is theft, notwithstanding the consent of the owner or other person authorized to part with the temporary possession only, of such thing; and it is immaterial whether such consent be to part with the possession for a definite or an indefinite time.

13. The term "intimidation" as hereinbefore used, shall be understood to mean violence or threat of violence, to the person or property of any other, or the accusing or threatening to accuse any person of any crime, in respect of which corporal punishment by imprisonment or otherwise, may be inflicted on a party convicted of such crime.

14. The term "moveable thing" as used herein, shall be deemed to extend to any thing parcel of or adhering to the realty, provided such thing be a thing severed from the realty, at the time when possession is obtained of it, although the severance of such thing was not effected till that time.

15. A moveable thing shall be deemed to be the property of some other person, within the meaning of the first section hereof, although the actual owner of such thing be unknown.

16. The rule contained in the last preceding section shall be deemed to comprehend waifs, estrays, treasure-trove and wreck.

17. A wife is not guilty of wrongfully obtaining possession within the meaning of the first section hereof, of any moveable thing which is the property of her husband.

18. Provided that no consent by a wife to the taking by, and no delivery by her to, any other person, of any moveable thing being the property of her husband, shall afford any excuse to such other person.

19. A moveable thing shall be deemed to be of some value within the meaning of the first section hereof, although it be of no saleable value, provided it be of any value whatsoever to the owner.

20. It is essential that the interest mentioned in the first section hereof, exist at the time of the obtaining possession; where it does so exist it is theft, although the thing be taken upon a finding or other casualty.

21. Where the obtaining possession of anything would otherwise amount to theft, it is theft notwithstanding the owner of such thing, knowing or believing a theft to be intended by any person in respect of it, voluntarily suffers such person so to obtain possession of it, provided such owner do not in anywise procure the doing of the act.

22. Neither the right of property, nor of possession in anything obtained possession of by theft, is in anywise altered thereby.

23. No restitution with the consent of the owner or otherwise, of a thing, possession whereof has been obtained by theft, shall absolve the offender.

24. Whosoever shall commit the crime of theft in respect of anything, shall be deemed to steal the same.

25. Whosoever shall commit the crime of theft, shall be confined for any term not exceeding two years, or imprisoned for not more than six months, or fined, at the discretion of the Court.

The crime of theft, without aggravation of any sort, is punished by the reported English code, by imprisonment for any period not exceeding two years, or fine, at discretion, or both, while by the act of 1809, the punishment of simple larceny is confinement in the penitentiary for not less than one, nor more than fifteen years. Fifteen years in the penitentiary for taking some small article of property! The penalty is sufficient for murder. What possible good can be expected from an incarceration of fifteen years, that would not be attained by the term of two years.

26. Whosoever shall commit any theft attended with any one of the following aggravations, viz:—

1st. With the violation of any repository or place of security, that is to say, with the breaking into or opening of any chest, drawer, box or other repository, containing the thing stolen; or with an entry into any building, yard or other enclosed place, where the thing so stolen is deposited, otherwise than by the ordinary doorway, gateway or entrance, the same being open; or with the breaking, severing, unloosing or removing of any artificial fastening, tie or impediment, intended to protect or secure the thing stolen.

2nd. The thing stolen being upon the person of any other party.

3rd. Acting in concert with any accomplice.

4th. The thing stolen being of the value of five dollars or more; shall be confined for any period not exceeding five years.

27. Whosoever shall commit any theft attended with the following aggravations, viz:

1st. The thing stolen being upon the person of any other party, or being in the presence and in the possession or under the care of any other party.

2nd. The means by which such thing is stolen being violence or threat of violence to the person of any party; shall be deemed to be guilty of robbery, and shall be confined for any period not more than eight, nor less than one year.

The punishment of robbery by the act of 1809, is comfinement in the penitentiary for not less than three, nor more than ten years, while the maximum punishment of simple larceny is, as we have seen, fifteen years in the penitentiary.

28. A thing shall be deemed to be stolen by means of violence to the person, within the meaning of the last preceding section, whensoever the theft is effected by doing any, the least injury to the person, or whensoever the act of taking is accompanied by any degree of force, employed for the purpose of overcoming resistance thereto.

29. The snatching or taking any thing suddenly or unawares from the person, without some actual injury to the person, or force employed for the purpose of overcoming resistance, is not a sufficient degree of violence to the person, within the meaning of the twenty-seventh section hereof.

30. It is not essential within the meaning of the twenty-seventh section hereof, that the violence to the person, by means of which possession of the thing stolen is obtained, should have been first used for the purpose of obtaining possession of it, provided such

violence be unlawful, and possession of such thing be given, or be suffered to be taken, to prevent the continuance of such violence.

31. A thing shall be deemed to be stolen by means of threat of violence to the person, within the meaning of the twenty-seventh section hereof, whensoever possession of such thing is obtained by any threat, menace, or other means calculated to excite apprehension of violence, present or future, to the person.

32. Whosoever shall rob any person, and at the time of, or immediately before, or immediately after such robbery, shall cause any grievous bodily harm to any person, shall be confined for any period not more than ten, nor less than five years.

33. Whosoever shall assault any person with intent to rob, shall be confined for any period not exceeding three years, or imprisoned not exceeding eighteen months, or fined, at the discretion of the Court.

The punishment of this offence in England is, imprisonment for any term not exceeding three years, or fine, at discretion, or both. By the act of 1809, the penalty is confinement in the penitentiary for not less than two, or more than ten years.

34. Whosoever shall commit any theft, when the means by which possession is obtained of the thing stolen, are either the accusing or threatening to accuse, or the knowingly sending or delivering any letter or writing, accusing or threatening to accuse any person of any treason or felony, or of any assault with intent to commit any rape, or of any attempt or endeavor to commit any rape, or of the crime of buggery, shall be confined for a period not exceeding six years, nor less than one year.

35. Whosoever shall steal, or for any fraudulent purpose destroy or conceal any last will, testament, codicil or testamentary paper, shall be confined for a period not exceeding three years, or imprisoned not exceeding one year, or fined, at the discretion of the Court.

36. Whosoever shall steal, or for any fraudulent purpose destroy or conceal any deed, mortgage, bill of sale, or other muniment of title, to the validity of which recording or enrolment is necessary, before the same hath been recorded or enrolled, shall be confined for any period not exceeding three years, or imprisoned not exceeding one year, or fined, at the discretion of the Court.

37. Whosoever shall steal, or for any fraudulent purpose destroy or conceal any deed, or muniment of title, to the validity of which recording is not necessary, or any bond, single bill, promissory note, bill of exchange, or other security or instrument for the payment of money, shall be confined for any period not exceeding three years, or imprisoned for not more than one year, or fined, at the discretion of the Court.

38. Nothing in either of the last three preceding sections contained, shall in any wise affect any civil remedy of any party.

39. Whosoever shall steal any horse, mare, gelding, colt, ass or mule, shall be confined for a period not exceeding eight years, or less than one year.

The punishment of this offence by the act of 1809, is by confinement in the penitentiary for not more than fourteen years, nor less than two years.

40. Whosoever shall steal any ship, sloop, or other vessel of seventeen feet keel or upwards, or any negro or other slave, shall be confined for any period not exceeding five years, or imprisoned for not more than one year.

41. Whosoever shall take or sell the planted oysters of another person, otherwise than from the natural beds or shoals in the channel of any river or creek, shall be imprisoned, not exceeding six months, or fined, at the discretion of the Court, or both.

42. Whosoever shall secretly take, or carry away, any tobacco plants, while growing, and attached to the freehold, shall be deemed to be guilty of stealing the same, and shall be imprisoned for any period not exceeding one year, or fined, at the discretion of the Court, or both.

43. Whosoever shall secretly take, and carry away, any Indian corn or maize, while growing, and attached to the freehold, to the amount of a peck, or more, shall be deemed to be guilty of stealing the same, and shall be imprisoned for any period not exceeding six months, or fined, at the discretion of the Court, or both.

44. Whosoever shall steal, cut away, or fraudulently remove any buoy, its mooring chain or other fixture, from any part of the Chesapeake Bay, or any of the rivers flowing into the same, shall be confined for not less than two, nor more than five years.

OBTAINING BY FALSE PRETENCES.

1. Whosoever with intent to defraud any other person of anything which is the subject of theft, shall obtain such thing from any other person by any false pretence, by which the owner or other person authorized, is induced to part with the entire property in such thing, shall be confined for any period not exceeding two years, or imprisoned not exceeding one year, or fined at the discretion of the Court. And in case the thing so obtained shall be of the value of ten dollars or more, shall be confined for a period not exceeding four years, or imprisoned not exceeding eighteen months.

2. A false pretence within the meaning of the preceding section, is a false representation of some state of things, past or present.

3. Any fraud or unlawful device, or ill practice in playing at or with cards, dice or other game, or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime or exercise, shall be deemed to be a false pretence within the meaning of the first section hereof.

4. It is not essential to constitute a false pretence, within the meaning of the first section hereof, that the pretence be made in express terms: it is sufficient if it can be implied from the act or conduct of the offender, provided such act be done or conduct be adopted, with intent to create an impression, which, if made by express words, would constitute a false pretence.

5. It is an offence within the meaning of the first section hereof, although such thing was obtained only

partly upon the credit given to such false pretence.

6. A mere false promise, whether written or oral, which the party making such promise, does not intend to keep, is not a false pretence, within the meaning of the first section hereof.

The act of 1835, ch. 319, defines certain false pretences, which it punishes by confinement in the penitentiary for not less than two, nor more than ten years. The penalty is excessive as usual, and the act is not only wanting in precision, but otherwise defective.

EMBEZZLEMENT.

1. Whosoever having obtained or being entrusted either solely or jointly with any other person or persons, with the distinct possession of anything, which is the subject of theft, from or by the owner, or some other person, under any trust, obligation or duty to return, deliver up or specifically apply the same, shall, in breach or violation of such trust, obligation or duty, wilfully misapply, misappropriate, conceal or otherwise wrongfully dispose of such thing or any part thereof, with intent to defraud the owner of the same, shall be deemed to be guilty of embezzlement, and shall be confined for any period not exceeding two years, or imprisoned not exceeding one year, or fined, at the discretion of the Court. And in case the thing or the part of such thing so embezzled, shall be of the value of ten dollars or more, shall be confined for a period not exceeding four years, or imprisoned not exceeding eighteen months.

The act of 1820, ch. 162, punishes the embezzlement of the money, goods, or commercial paper of any chartered bank of this State, by any president, director, cashier, servant, agent or clerk thereof, by confinement in the penitentiary for not less than five,

nor more than fifteen years. This is positively savage, and as might be expected, the law has very seldom, if it has ever been enforced.

2. It shall not be available by way of defence, to a person charged with embezzlement, that such possession as in the last preceding section is mentioned, was obtained by him under such circumstances and with such intention as to render him guilty of theft, provided that he shall not be punishable for both embezzlement and theft.

3. It is immaterial within the meaning of the first section hereof, whether any right to the possession of the thing does or does not continue to exist, at the time of the wrongfully disposing of such thing, or any part thereof.

4. Whosoever as an officer or agent of any public trust, or as president, cashier, or other officer or agent of any bank or other incorporated company of this State, having obtained, or being entrusted with, the possession or control of any thing which is the subject of theft, by virtue of his office, place or employment, who shall, in breach or violation of such trust, or the duties of such office, place or employment, wilfully misapply, misappropriate, conceal, or otherwise wrongfully dispose of such thing, or any part thereof, with intent to defraud the State, the bank, corporation, or other owner of the same, shall be deemed to be guilty of embezzlement, and shall be confined for any period not exceeding five years, or imprisoned not exceeding two years, or fined, at the discretion of the Court.

5. Nothing herein contained shall in anywise affect or lessen any civil remedy of any party.

CHEATS AND OTHER LIKE FRAUDULENT PRACTICES.

1. Whosoever by means of any false seal, signature, stamp, impression or mark, deceptively used in order to obtain undue credit as a certificate, warrant or test of the truth of the contents of any writing, or of the genuineness, quality or quantity of any thing, or by means of any machine, instrument or thing, artfully contrived and deceptively used, or by the false and deceptive use of any other instrument or thing, by sleight of hand or other device, or by any false personation, shall, in any sale, contract other dealing or transaction, defraud any other person, shall be deemed guilty of cheating, and shall be imprisoned for any period not exceeding two years, or fined, at the discretion of the Court, or both.

2. It shall be deemed a false personation within the meaning of the last preceding section, where a person shall falsely and deceitfully represent himself, or shall assume to be any other person, whether such other person ever existed or not, and in the former case, whether such other person be still living or not; or where a person shall falsely and deceitfully represent himself to be invested with or to occupy or possess any office, official character or station, or any other authority of a public nature, or to be or to have been the husband or wife of, or to stand or to have stood in any degree of kindred or relationship to any other person, or to be or to have been the widower or widow of any other person.

3. Whosoever shall, by any unlawful violence to, or restraint of the person of another, or by accusing or theatening to accuse any person of any treason or

felony, or of any assault with intent to commit any rape, or of any attempt or endeavor to commit, any infamous crime, compel or induce any person to execute, make, alter or destroy the whole or any part of any valuable security, muniment of title, or testamentary instrument, with intent to defraud or injure any person, shall be imprisoned for any period not exceeding three years, or fined, at the discretion of the Court, or both.

4. Whosoever shall publish or threaten to publish any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing of any matter or thing, touching any other person, with intent to extort any money or security for money, or any valuable thing, from such or any other person, shall be imprisoned for any period not exceeding eighteen months, or fined, at the discretion of the Court, or both.

5. Whosoever shall wrongfully and clandestinely take or remove anything which is the subject of theft, being in the lawful possession or custody of any other person, with intent fraudulently to deprive any other person of any security for any debt, claim or interest, or fraudulently to subject any person to any charge or claim in respect of the loss of such thing, shall, in case such taking be not by theft, incur the penalty which he would have incurred had he stolen the same.

6. Whosoever being an officer, clerk or agent of any joint stock or incorporated company, shall, with

intent to defraud any person, issue or cause to be issued, or sell or offer for sale, or otherwise dispose of, any share or shares in the capital stock of such company, beyond the number of shares authorized by the charter of such company or otherwise limited by law, shall be confined for any period not exceeding three years, or imprisoned for any period not exceeding eighteen months.

7. Whosoever shall, under or by virtue of a promise of marriage, seduce any woman and get her with child, shall be imprisoned for any period not exceeding three years, or fined, or both.

8. Provided, that every such offender shall be exempt from such penalty, or from so much thereof as shall not have been actually suffered by him, whenever he shall marry such woman, or shall be prevented from so doing, by her refusal to marry him.

9. Provided also, that such woman shall not be a competent witness in respect to such promise of marriage.

10. Provided also, that nothing in the three last preceding sections contained, shall affect any civil remedy of such woman.

RECEIVING OR UNLAWFULLY DEALING WITH PROPERTY STOLEN, EMBEZZLED, OR WRONGFULLY OBTAINED.

1. Whosoever shall wilfully and unlawfully receive or have in his possession or keeping, anything which shall have been stolen, or obtained by any false pretence, or which shall have been embezzled, knowing the same to have been so stolen, obtained or embezzled, shall be confined for any period not exceeding three

years, or imprisoned not exceeding eighteen months, or fined, at the discretion of the Court.

2. It shall not be available as a defence by any person charged under the last preceding section, with having anything in his possession or keeping, as therein is mentioned, to show that he, either alone or with any other person or persons, stole, obtained by any false pretence, or embezzled such thing, provided that he shall not be liable to any punishment exceeding that to which he would have been liable, had he been charged with having stolen, obtained by false pretence, or embezzled such thing.

CHAPTER V.

FORGERY, AND OTHER OFFENCES CONNECTED THEREWITH.

1. Forgery is the false making of any instrument, with intent to prejudice any public or private right.

2. The term "instrument" as used in the last preceding section, shall be deemed to comprehend any written instrument, and any character, figure, impression, device, or other visible mark or distinction, (whether it be made to appear upon any material, or in the substance thereof,) and also any type, dye, seal, stamp, plate, or other thing for making upon or in any material whatsoever, any impression, mark, or other visible distinction, used or intended as a mean, for authenticating the truth or genuineness of any fact or thing whatsoever.

3. The term "written," as used in the last preceding section, shall be deemed to apply whether the words or figures of the instrument, or any of them, be expressed at length or abridged, and whether they

be so expressed by means of writing, printing, or otherwise.

4. An instrument shall be deemed to be fasely made when it is not really the instrument or mean of authentication, for which it is intended to be taken, but is made with intent to obtain that credit which would be due to it if it were genuine.

5. A written instrument or other thing the subject of forgery, shall be deemed to be falsely made, where it is falsely made in any material part.

6. Any alteration of a written instrument in any material part, whether it be by addition, diminution, erasure, transposition, or any combination of any of these acts, or any other device or means whatsoever, with intent to prejudice any public or private right, shall be deemed to be a false making of the written instrument so altered.

7. If several persons shall make distinct parts of, or shall otherwise designedly contribute to the making of a false written instrument or other thing the subject of forgery, each of such persons shall be deemed to have falsely made such written instrument or thing.

8. It shall be deemed a false making of a written instrument, if the offender falsely make it in the name of any other person, real or supposed, although such name be the offender's own name.

9. It is not essential that the forged instrument should be such an instrument as would be valid if it were genuine, provided it be not illegal in its very frame.

10. Every written instrument shall be deemed to be an instrument within the meaning hereof, the terms of which, as explained by mercantile or other usage, are sufficient to make it operate as such instrument.

11. Where a statute prescribes a particular form as essential to a written instrument, the false making of an instrument in a different form, is not a forgery of an instrument within such statute.

12. If a statute prescribe the form of a written instrument already in use, but without making that form essential, the false making of such an instrument according to the ordinary, although not according to the prescribed form, is a forgery of an instrument within such statute.

13. It is not essential in any case where the forging of any instrument is an offence, that the instrument so forged should bear an exact resemblance to the instrument which it is intended to represent, provided it so far resembles it as to be likely to be mistaken for it, by any common observer.

14. Whosoever shall offer, utter, publish, dispose of, or put off any forged written instrument or thing, knowing the same to be forged, and with such criminal intent as is by law essential to constitute the false making of such written instrument or thing a forgery, shall incur the like penalties, as if he had forged such written instrument with the same intent.

15. The delivery of a forged written instrument or thing to any other person, with intent that it should be uttered by him or by his procurement, is a disposing of such written instrument within the meaning of the last preceding section.

16. Whosoever, knowing any written instrument to be forged, shall, with intent to defraud any other person, claim, demand payment of, receive or endeavor to have, any money mentioned in, or supposed or pretended to be due upon such instrument or any part thereof, shall incur the like penalties as if such offender had forged such instrument, with the same intent.

17. The term "person" as used in the last preceding section, or any other section hereof, relating to forgery or any offence connected therewith, by which any act done with intent to defraud or injure any other person, is made an offence, shall be deemed to include the State, or any body corporate, company or society of persons not incorporated, or any person or number of persons whatsoever, who may be intended to be defrauded, whether such body corporate, company, society, person or number of persons, shall reside or carry on business in this State, the United States, or elsewhere.

18. Whosoever shall commit the crime of forgery, shall be confined for any period not exceeding three years, or imprisoned for any period not exceeding eighteen months.

19. Whosoever with intent to defraud any other person, shall forge any note of any bank of this State, or of any of the United States, shall be confined for any period not exceeding five years, nor less than one year.

20. Whosoever with intent to defraud any other person, shall forge any muniment of title, or testamentary instrument, shall be confined for any period not exceeding five years, nor less than one year.

21. Whosoever with intent to defraud any other person, shall forge any deed, bond, writing obligatory, bill, note, undertaking, warrant, draft, order or other security for money, or for the payment of money; or any endorsement on, or assignment of any such security, or any instrument or writing, by whatsoever special name or description designated, which is in law an acceptance of a bill of exchange; or any acquittance or receipt, or accountable receipt, either for money, goods, or any valuable security, or any warrant, order or request for the delivery or transfer of goods, or for the delivery or transfer of any valuable security, or any certificate required by law, for the transfer of any stock or funds, or for the payment or return of any money; or any certificate, affidavit, affirmation, instrument or writing whatsoever, for or in order to the receiving or obtaining of money, goods or any other valuable security, shall be confined for any period not exceeding five years, nor less than two years.

22. That which would if written on the back of any written instrument, be an endorsement within the meaning of the last preceding section, shall be deemed to be an endorsement within the meaning of such section, although it be written on the face of such instrument.

23. To constitute a warrant or order for the payment of money, within the meaning of the twentieth section hereof, it is necessary that such warrant or order should be made in the name of, or should purport to be made by some person, having or claiming to have authority to direct the payment of the money therein mentioned or referred to, and that it should mention some payee by name, or other description.

24. It is not necessary that such warrant or order should purport to authorize the payment of any specific sum of money.

25. To constitute a warrant or order for the delivery or transfer of goods, or for the delivery of any valuable security, within the meaning of the twentieth section hereof, it is necessary that such warrant or order should be made in the name of, or should purport to be made by a person having or claiming to have authority to direct the delivery or transfer of such goods or security, and that it should be addressed to some person in possession of, or interested in such goods or security.

[1]The act of 1822, ch. 169, making it felony to forge any warrant or order for the payment of money, or delivery of goods or other valuable articles, is defective, both in comprehensiveness and precision.

26. It is not necessary to constitute a request within the meaning of the twentieth section hereof, that it should be addressed to any person by name or other description.

27. It is not necessary that such request as in the last preceding section is referred to, or that such warrant or order as in the twentieth section hereof is referred to, should specify by name, the particular goods or other property, authorized or requested to be delivered or transferred, provided such request, warrant or order, be expressed in terms intelligible to the person addressed.

28. It is essential to a receipt within the meaning of the twentieth section hereof, that it should import an acknowledgment by the person on whose behalf it

purports to be made or given, of his having received the money, goods, valuable securities, or other property therein specified or referred to, it is not sufficient that it merely imports the payment or delivery of such money, goods, securities or other property, to such person.

29. Whosoever with intent to defraud any other person, shall forge the common seal of any body corporate, company or society, which now is, or hereafter may be established by charter or act of Assembly of this State, or any writing under such seal, shall be confined for any period not exceeding four years, nor less than one year.

30. Whosoever with intent to defraud any other person, shall forge any policy of insurance, shall be confined for any period not exceeding four years, nor less than one year.

31. Whosoever with intent to defraud any other person, shall forge any manifest or note of any tobacco inspector, shall be confined for any period not less than one, nor more than four years.

There seems to have been a more than ordinarily rigorous determination to suppress this offence at the time of the passage of the act of 1801, ch. 63, if we are to judge from the punishment of the offence, which is, to be publicly whipped not exceeding thirty-nine lashes, or fined not exceeding $300, or hard labor not exceeding seven years, *or all of them.*

32. It is not essential to the crime of forgery, or of the offering, altering, publishing, disposing of, or putting off of any written instrument, that the same shall be expressed in the English language, but in all cases where any such crime would be complete, if such writ-

ten instrument were expressed in the English language, it shall be equally complete if the same, or any part thereof, be expressed in any language or languages.

33. Whosoever shall fraudulently engrave, or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any word, number, figure, character or ornament, the impression taken from which shall resemble, or apparently be intended to resemble, any part of any bank note, bank bill of exchange, or bank post bill, purporting to be the note, bill or post bill, or of any part thereof respectively, of any bank chartered by this State, or any one of the United States, or of any of the Territories thereof; or shall fraudulently use any such plate, wood, stone, or other instrument or device, for the making upon any paper or other material, the impression of any word, number, figure, character or ornament, which shall resemble, or apparently be intended to resemble any part of such bank note, bank bill of exchange, or bank post bill, shall be confined for any period not exceeding five years.

CHAPTER VI.

OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE.

CONTEMPTS AGAINST COURTS OF JUSTICE.

1. Whosoever shall assault any judicial officer whilst acting in his official capacity, or shall maliciously do any personal violence to any juror, witness or other person, in the presence of any such judicial officer, so acting in his judicial capacity, shall be imprisoned for any period not exceeding one year, or fined, at the discretion of the Court, or both.

2. Whosoever shall rescue, or endeavor to rescue any prisoner, being in the presence of any judicial officer, whilst acting in his judicial capacity, shall be imprisoned for any period not exceeding one year, or fined, at the discretion of the Court, or both.

3. Whosoever shall assault or threaten violence to any person, on account of any act or thing lawfully done or performed, or to be done or performed, by any person in reference to, or connexion with any judicial proceeding, or the execution of any process, shall be imprisoned for any period not exceeding one year, or fined, at the discretion of the Court, or both.

4. Whosoever shall be guilty of any contempt of any Court of justice, or any judicial officer, by uttering any insulting, opprobrious or menacing words, or by any acts or gestures, expressed, done, or committed in the face of the Court, or in the presence of any such judicial officer, whilst acting in his official capacity, shall be imprisoned for any period not exceeding one year, or fined, at the discretion of the Court, or both.

5. Whosoever shall, by force, or by violent or outrageous conduct, prevent, delay, or interrupt, or endeavor to prevent, delay, or interrupt the proceedings of any Court of justice, shall be imprisoned for any period not exceeding one year, or fined, at the discretion of the Court, or both.

6. It shall be lawful for any Court before which any criminal prosecution is under trial, or is about to be tried, to pass an order prohibiting the publication of its proceedings, pending such trial; and whosoever shall, in violation of such order, publish in the

newspapers or otherwise, the proceedings of such Court, in reference to such trial, or any part thereof, pending the said trial, whether the account of such proceedings be true or false, shall be imprisoned for any period not exceeding one year, or fined, or both, at the discretion of the Court.

7. If such publication shall be made beyond the jurisdiction of such Court, it shall be lawful for the said Court to issue its requisition for the party so offending, wherever he may be found within the State; and upon the presentation of such requisition to any Judge, within whose circuit or jurisdiction such offender may be found, and upon such reasonable proof of the violation of such order by the party charged, as the said Judge may require, it shall be his duty to cause such offender to be arrested by the Sheriff of the County or City, wherein the said party may be found, and by him conveyed to the Court issuing the said requisition, to be dealt with according to law.

It is very expedient at the present time, that the law on this subject should be settled, as an opinion seems to prevail in certain quarters, that there is no power in the Courts to forbid the publication of their own proceedings, either pending the trial or otherwise. We allude of course, to the idea recently announced for the first time in the newspapers, of the existence of some right, immunity or privilege, derived from, or in some way connected with the sovereignty of the people, and appertaining especially to the conductors of the press, to collect and disseminate information among the people, upon all possible subjects, which right, immunity or privilege is to be considered as paramount to all law, and not to be questioned by any Court, upon any pretence whatsoever.

If those who control the public press, can publish what they please—say what they choose to say, of any pending trial or of the parties connected with it; and if the citizen have in fact no

rights in the case, but must bow his head and submit in silence to the wrong, it is time he should know it. If, on the other hand, the whole assumption is founded in mistake, it is important to those interested, to be made aware of their mistake.

This right, or immunity, or privilege, or whatever it may be, is not claimed by the conductor of the press on his own account, but, as we are given to understand, it is something in the nature of a public prerogative,—a right of the great reading public, to be furnished with their supply of daily news, without let or hindrance of any kind. And certainly the editor cannot help it, if in attempting to punish him, we come into direct collision with the sovereignty of the people.

Now, if there be any unsoundness in the postulate, it is not in the conclusion sought to be established, for if it be a public right, it is unquestionably an unlimited right, because the Courts have no power to punish the whole public, or even that portion of it called the reading public. And therefore, upon the hypothesis assumed, taken as a whole, it becomes a right in the editor to publish any statement or series of statements, true or false, in regard to any pending prosecution or suit, civil or criminal, against the remonstrances of the parties, in defiance of the authority of the law, and the power of the Courts. But such a right cannot be assumed. The authority upon which it rests is to be shown whensoever, and by whomsoever it is claimed. Does such a right exist? That is the question.

We know that if the conductor of a newspaper published anything injurious to the character, or to the trade, business or profession of the humblest citizen—or any matter calculated to render him ridiculous or contemptible in public estimation, the publisher is liable both to a civil suit for damages, and to an indictment for the public wrong. There is no public prerogative to protect him in such a case. But why should there not be, if the main assumption be well founded? Certainly a party cannot be liable to a criminal prosecution, to say nothing of a civil suit, for doing that which the public have a right to say shall be done. This would be a right to publish, and no right to publish, at the same time.

It may be, however, that we have misapprehended the whole matter, and that the only immunity claimed in behalf of the press is, that there shall be no *imprimatur* laid upon it. That is to say, that there shall be no power in the Judiciary, or in any other department of the government, to say beforehand, what shall, or

what shall not be published by it. And that admitting it to be perfectly right to hold the press to a fair and legitimate responsibility for all publications of a libellous character, and also for all statements intended to influence the verdicts of juries, or to excite public prejudice for or against parties to suits or prosecutions, it is still maintained that we should be very careful while providing means to restrain the excesses of the press, we do not impair its liberty. And that both of these ends can only be accomplished by leaving it free to publish anything and everything, at pleasure, but reserving both to the public and to individuals, a proper measure of redress against it, whenever its liberty has been abused.

In this we think the question is stated fairly, and it only remains to be considered, whether the liberty of the press is in any way infringed, or the just claims of the reading public impaired, by the power, at all times heretofore, as we believe, claimed and exercised by the Courts, of prohibiting the publication of their proceedings, while particular cases are pending before them?

We shall understand the subject better, by adverting, for a moment, to the character of the occasions on which this power of the Courts is ordinarily exercised. A murder for example, turns up in the news of the day—the circumstances indicate either foul play or unusual barbarity in the act—the guilty agent is unknown however, and a mystery surrounds the transaction, and the public indignation is at once aroused, as it is natural and proper it should be, against the murderer. The next thing we hear is, that some party has been arrested and lodged in jail, on suspicion. The press now takes up the case. Letter writers come about, who collect all the floating gossip of the community. Facts are perverted, and things told as facts, which never had any existence. The person of the accused is particularly described, and it is declared that his very looks prove him to be the murderer. No fabrication is too gross, either for the conscience of the press or the public appetite, as how could it well be otherwise, where the reading public are so accustomed to wholesale accidents on railroads, and the bursting of steamboat boilers, by which men, women and children are killed and mangled by the score, so that a common murder, without some spice of the awful about it, is scarcely a readable item in the columns of any popular paper? The publisher in catering for the public appetite, cannot overlook the public taste, and the consequence is, that when the trial comes round, a state of public feeling has been produced, which is most unfriendly to the fair and

impartial administration of justice. And when the Jury is to be selected, every man who reads at all has made up his mind, and is compelled to disqualify himself on the *voire dire*.

During all this time the accused has perhaps remained in prison, consoled by the sympathy of his own family alone, and when he comes into Court to hear his charge and to meet it, it is to find that he has already been tried and condemned by the press.

But the evil does not stop here. As the trial proceeds, the testimony is taken down and published to the world, with comments tending to show that it is conclusive of the hypothesis of guilt. And the papers containing these reports, find their way into the Court House, where they continue to make their impression upon the minds of jurors and witnesses and the public, to the great scandal of the law, and the perversion of its justice.

Now, has the Court the power to say, that during the progress of the trial, the proceedings of the Court shall not be published in the newspapers? Has it the power to pass an order to that effect, and to punish those who violate that order? Before we answer this question, let us turn for a moment, to consider the nature of some of the powers which the Courts habitually exercise in reference to all public prosecutions, and which have never been questioned.

In every criminal trial the Jury are, by order of the Court, put in charge of a bailiff, who is sworn to keep them together in a room by themselves—to suffer no person to speak to them, nor to speak to them himself without the leave of the Court. And whosoever shall infringe this regulation, is punished promptly by fine or imprisonment. Again, upon the motion of either party, all the witnesses of the opposite party are taken into custody, and kept out of Court during the trial, and until they are separately called up to be sworn; the object being to prevent any witness when he comes upon the stand, from knowing what has been previously deposed to by any of the prior witnesses. Under this regulation every witness must tell his own story for himself, without suggestions from any of the others, and without the opportunity of avoiding contradictions of what they have sworn to, or in any manner of shaping his testimony so as to make it conform to theirs. It is regarded as a great security against combinations of witnesses, to fabricate a case, either for the prosecution or the defence, and whosoever violates this order, is brought up and punished for it.

We need go no further, for it will be seen at once, that the policy of the law in setting the Jury apart, as well as the precautions of the Court in impounding the witnesses, are set at nought, by the publication of the evidence and proceedings in the newspapers. For as certain as they are published, so certain will they be read by both jurors and witnesses. And the only remark which it is necessary to make upon this branch of the subject is, that if the Court have the power first to separate the Jury, and next to separate the witnesses from the mass of the community, it has necessarily the right to make the separation in both cases effectual, and may punish any one who may attempt to frustrate its orders.

Besides, it is not seemly that a case under trial, of great interest, and it may be of great difficulty, shall be taken up and discussed at length by the papers, before it has passed out of the hands of the Court. There is something extremely offensive in the idea, that the conductors of the press shall either dictate to the Court, or bespeak from it a particular judgment, before the Court has decided the case. And should an editor or publisher be brought into Court, to answer for a violation of its order forbidding the publication of its proceedings, it is by no means likely that the Court will delay its business to listen to any long harangue about the liberty of the press, or the claims of the reading public. For after all, the liberty of the press has nothing to do with the matter, and as to the reading public, who are they? Where do they live? What claim have they ever made to such an immunity? Who is to speak for them, and to say that in point of fact they make any such demand? We cannot recognise the editor or publisher as representing the reading public, for he may speak of the public when he only means to say a word for himself. But of what possible value can it be to the reading public or any other public, to have the imperfect or it may be the garbled statements, with the running comments of the press, to-day, instead of the authentic details, if the public then choose to have them, after the trial is over? To the public one case of murder is about equal to another. The notice in the papers of a party taken up for this, or any other heinous crime, attracts a momentary attention. That same attention is afterwards awakened, when it is seen that the same party is tried and convicted, and again that he is executed. It may be, in point of fact, that the wrong man has been caught and hanged. But what matters it to the public. To them the execution of one man or another—the right or the wrong man—is the same thing.

When the public hear that a murder is committed, and afterwards hear that some one has been hanged for it, the account with them is balanced, and they think no more about it But the great purposes of a Court are to do justice. And the Judge who shall permit the proceedings of his Court to be published against his own order, with impunity, is not fit for his place.

The act of 1853, ch. 450, prohibits the Courts from punishing for contempts, except for such as occur in their presence. It is believed, however, that the Legislature did not intend by the passage of that act, to license the improper interference by the conductors of the press, with the proceedings and authority of the Courts, and that the provisions contained in the above sections, will be considered as necessary exceptions to those of the act.

OFFENCES BY AND CONCERNING JUDICIAL, AND OTHER OFFICERS OF JUSTICE.

1. Whosoever being a judicial officer shall, contrary to his oath of office, or otherwise in violation of his duty as such officer, commit any excess of authority, with any corrupt or injurious intention, or abuse his authority by doing, or omitting to do any act or thing, wilfully and corruptly, or with the malicious intent to oppress or injure any other person, or wilfully neglect to execute his duty as such officer, to the hindrance of justice, shall be imprisoned for any period not exceeding two years, or fined, or both.

2. Provided that no judicial officer shall be criminally liable, in respect of any error in giving judgment.

3. Whosoever shall take or agree to take any bribe, given or offered with intent unduly and corruptly to influence his conduct as a judicial officer, arbitrator or umpire, or being a judicial officer, arbitrator, or umpire, shall corruptly agree with, or promise any other person, to make, pronounce or deliver, or omit to make,

pronounce or deliver, any judgment, decree, sentence, order or award, for or against any party, in any proceeding, civil or criminal, or in any reference or arbitration respectively, shall be imprisoned for any period not exceeding two years, or fined, or both.

4. Whosoever shall, by any means whatsoever, endeavor unduly and corruptly to influence any judicial officer, or any arbitrator or umpire, in his conduct as such judicial officer, arbitrator or umpire, shall be imprisoned for any period not exceeding two years, or fined, or both.

5. Whosoever shall, upon any record or paper for entering the judgment, decree, sentence, or proceedings of any Court of justice, or any official minute or memorandum thereof, wilfully make any false entry of any such judgment, decree, sentence or proceedings, or official minute or memorandum thereof, whereby any person shall or may be prejudiced, shall be imprisoned for a period not exceeding three years, or fined, or both.

6. Whosoever shall voluntarily suffer the escape of any prisoner who shall be in lawful custody, charged with, or convicted of any offence, the punishment whereof is confinement in the penitentiary, shall be imprisoned for any period not exceeding three years, or fined, at the discretion of the Court.

7. Whosoever shall voluntarily suffer the escape of any person who shall be in lawful custody, either charged with, or convicted of any capital offence, shall be confined for any period not exceeding three years, or imprisoned not exceeding eighteen months.

OFFENCES BY AND CONCERNING JURORS.

1. Whosoever having been empannelled or summoned to serve as a juror in any proceeding, shall take or agree to take, any bribe given or offered, with intent unduly and corruptly to influence his conduct as a juror, or shall agree with, or promise to any other person, to give, pronounce or deliver any verdict for or against any party, in any proceeding, shall be imprisoned for any period not exceeding two years, or fined, or both.

2. Whosoever shall, by any means whatsoever, endeavor unduly and corruptly to influence any person empanelled, summoned, or expected to serve as a juror, in any proceeding, in respect of his duty as juror, shall be imprisoned for any period not exceeding two years, or fined, or both.

3. The last two preceding sections shall apply, although the person so endeavored to be influenced, or taking, or agreeing to take any bribe, shall not be afterwards sworn, and although no verdict shall be given, and whether the verdict if given, be true or false.

4. Whosoever shall, by any indirect means or contrivance, procure himself to be returned, empannelled or sworn as a juror upon any trial, inquest or other judicial proceeding, with intent to procure a verdict, or any undue advantage for any person interested in such trial, inquest or proceeding, shall be imprisoned for any period not exceeding two years, or fined, or both.

5. Whosoever shall unlawfully prevent, or endeavor to prevent, any person lawfully summoned or other-

wise lawfully bound to serve as a juror, from serving as such juror, shall be imprisoned for any period not exceeding three months, or fined, or both.

6. Whosoever being a juror shall, by tossing up, drawing lots, or other mode of chance, or by any other means contrary to his oath, determine any verdict which he shall give, pronounce or deliver as such juror, shall be imprisoned for any period not exceeding one month, or fined, or both.

OFFENCES BY AND CONCERNING WITNESSES.

1. Whosoever being lawfully bound or required by recognizance, summons, or otherwise, to appear and give evidence as a witness, or to produce any writing upon any trial, or other judicial proceeding or enquiry, shall unlawfully refuse or neglect to appear, or to take such oath, or make such declaration or affirmation, as shall be required by law, or to answer all lawful questions, or to produce such writings as, upon such occasion, he shall by law be bound to produce, shall be imprisoned for any period not exceeding six months, or fined, or both.

2. The penalties of the last preceding section, shall not be incurred in respect of such refusal or neglect to appear, or to produce such writings, or to be sworn, or make such declaration or affirmation, unless the lawful expenses of the person so bound or required to appear, as therein mentioned, shall have been legally tendered to him, when such tender shall be required by law.

3. Whosoever shall unlawfully and wilfully prevent, or endeavor to prevent, any person lawfully bound or

required by recognizance, subpœna, summons, or otherwise, to appear and give evidence, or to produce any writing upon any trial, or other judicial proceeding or enquiry, from so appearing and giving evidence, or producing such writing, shall be imprisoned for any period not exceeding six months, or fined, or both.

4. Whosoever shall commit the crime of perjury, shall be confined for any period not exceeding five years, or imprisoned for not more than two years.

5. To the crime of perjury it is essential,—

1st. That an oath be lawfully administered by competent authority to a party, as a witness or deponent in some judicial proceeding, or on some other occasion, where an oath is imposed, required or sanctioned by law.

2nd. That the party swear affirmatively or negatively as to some matter, fact or thing, past or present, material to such proceeding, or on such other occasion, or to his belief as to such matter, fact or thing, knowing that which he swears to be false, or not knowing, or not believing it to be true.

6. Whosoever in any form which he admits to be binding on his conscience, shall have taken an oath to speak or to depose to the truth, shall (as regards the crime of perjury) be deemed to have been lawfully sworn.

7. A person shall be deemed to have admitted that an oath is binding on his conscience, by having taken it either in the ordinary form, or according to any particular form assented to by him.

8. It shall not be essential to the crime of perjury, that any deception shall have been effected by the false swearing, or that any injury shall have resulted from it.

9. Whosoever shall commit the crime of subornation of perjury, shall be confined for any period not exceeding five years, or imprisoned for not more than two years.

10. Subornation of perjury consists in wilfully procuring, or endeavoring to procure, any person to commit the crime of perjury.

11. Whosoever shall corruptly endeavor to procure any other person to give any evidence, which the party so endeavoring knows to be false, shall be imprisoned for any period not exceeding two years, or fined, or both.

12. The declaration or affirmation of any person authorized by law to declare or affirm, instead of taking an oath, shall have the same effect as regards the incurring of any penalties, in respect of perjury, as if the person making such declaration or affirmation, had been lawfully sworn.

13. Whosoever shall, by perjury or subornation of perjury, procure or endeavor to procure the conviction of any other person, of any capital offence, shall be confined for any period not exceeding five years, or imprisoned not exceeding two years.

14. Whosoever shall, by perjury or subornation of perjury, procure or endeavor to procure the conviction of any other person, of any offence punishable by confinement in the penitentiary, shall be confined for any period not exceeding three years, or imprisoned not exceeding one year.

15. Whosoever shall, by perjury or subornation of perjury, procure or endeaver to procure the conviction of any other person, of any offence punishable by imprisonment, or fine, or both, shall be imprisoned for any period not exceeding two years, or fined, or both.

OFFENCES BY OTHER PERSONS, TENDING TO DEFEAT OR PERVERT JUSTICE.

1. Whosoever shall resist, and either prevent or endeavor to prevent, the lawful apprehension of himself or any other person, for any treason, felony or misdemeanor, committed or charged to have been committed, or by reason of any indictment found against himself or against any other person, shall be imprisoned for any period not exceeding eighteen months, or fined, or both.

2. Whosoever shall rescue or endeavor to rescue any prisoner, being in lawful custody for any treason, felony or misdemeanor, committed or charged to have been committed by such prisoner, or shall aid or assist any such prisoner in escaping or endeavoring to escape from such lawful custody, shall be imprisoned for any period not exceeding two years, or fined, or both.

3. Whosoever shall rescue or endeavor to rescue any prisoner, who shall have been found guilty of any capital offence, or shall aid or assist any such prisoner in escaping or endeavoring to escape, or shall rescue or attempt to rescue any person convicted of any capital offence, going to execution, or during execution, shall be confined for any period not exceeding three years, or imprisoned not exceeding eighteen months.

4. Every person shall be deemed to be a prisoner in lawful custody, from the time of the arrest, surrender, detention, or retaking of such prisoner, so long as he shall continue to be under lawful restraint of his personal liberty, to the time when he shall be lawfully delivered by due course of law, and whether he shall be, during the whole or any portion of that time, in the personal custody of any officer of justice, or any other person, or confined within any jail, penitentiary, building, or other place of confinement, by virtue of some lawful authority.

5. Any freedom from actual custody or restraint, or from personal control for any space of time whatsoever, unlawfully obtained, shall be deemed to constitute an escape from custody.

6. Whosoever shall convey into any jail or other prison, wherein any prisoner shall be in lawful custody, any thing for the purpose of disguise, or any instrument or arms, with intent to procure or facilitate the escape of any such prisoner; or shall deliver or cause to be delivered, to any prisoner being in lawful custody, any thing for the purpose of disguise, or instruments or arms, with intent to procure or facilitate the escape of such prisoner, shall incur the same penalties which he would have incurred, had he aided or assisted such prisoner in effecting his escape.

7. Whosoever shall, pending any suit or prosecution, publish any statement concerning the same, with intent to influence the verdict of a jury, or to excite any public prejudice for or against any party to such suit or prosecution, shall be imprisoned for any period not exceeding six months, or fined, or both.

This provision is not to be deemed a contempt of Court, but more properly an attempt to defeat and pervert the public justice of the State. It is not a mere assault upon the dignity and authority of those appointed to administer the law, but an offence against the supremacy of the law itself. It must be brought therefore, to the notice of the Court, by presentment or indictment, and not by the summary process employed in cases of contempts.

8. Whosoever shall put or deposit any moveable thing in any repository or place, or on or near to the person of any other, or do any other act, with intent to create any false indication, or raise any false presumption of guilt, and thereby to prejudice any party on any criminal charge then made, or afterwards to be made against him, shall be imprisoned for any term not exceeding three years, or fined or both, at the discretion of the Court.

9. If two or more persons shall conspire falsely to charge any other person with any crime, or by means of false evidence to procure any other person to be convicted of any crime, every person so conspiring, if such crime shall be punishable with death, shall be confined for any period not exceeding five years, or imprisoned for any period not exceeding two years; if punishable by confinement in the penitentiary, shall be imprisoned for any term not exceeding two years, or fined, or both.

10. Whosoever, not being a party consenting thereto, shall conceal or keep secret the intention of any other person, to commit any capital or other felony, shall be imprisoned for any period not exceeding two years, or fined, or both, at the discretion of the Court.

11. Whosoever, knowing any other person to be liable to apprehension, in respect of any felony or

misdemeanor by him committed, or by virtue of any warrant to arrest him, or upon any charge, or suspicion of, or by reason of any presentment or indictment found for any felony or misdemeanor, shall, by the concealing of such other person, or aiding him in his flight from justice, or by any means other than resistance, prevent or endeavor to prevent the arrest of such other person, or shall facilitate or endeavor to facilitate his escape from justice, shall be imprisoned for any period not exceeding one year, or fined, or both, at the discretion of the Court.

12. Whosoever shall, by burying or otherwise disposing of any dead human body, when, by reason of a violent death or otherwise, a coroner's inquest ought to be held over such body, prevent, obstruct, or delay, or endeavor to prevent, obstruct, or delay the due taking of such inquest, shall be imprisoned for any term not exceeding six months, or fined, or both.

13. Whosoever shall unlawfully and without the license of any Court or other competent authority, compound any offence, shall be imprisoned for any period not exceeding one year, or fined, or both.

14. Compounding an offence consists in any agreement, promise, or consent for any reward, restitution or other consideration, to forbear to prosecute or to further prosecute an offender in respect of any offence, whether such offence shall have been actually committed or not.

15. Whosoever shall corruptly take, or agree or consent to take any money or reward, directly or indirectly, under pretence or on account of helping any person to any moveable thing, which shall by any

felony or misdemeanor have been stolen, taken, detained or converted, shall (unless the person so taking, or agreeing or consenting to take, such money or reward, shall cause the offender to be apprehended and brought to trial for the same,) be imprisoned for any term not exceeding three years, or fined, or both, at the discretion of the Court.

CHAPTER VII.

OFFENCES AGAINST THE PUBLIC PEACE.

1. If three or more persons shall assemble, or being assembled, shall continue together, with intent without lawful authority, to execute any common purpose with force and violence, or in so violent and tumultuous a manner, and under such circumstances as are calculated to create terror and alarm in the neighborhood, such persons shall be deemed guilty of an unlawful assembly, and each of them shall be imprisoned for any term not exceeding one year, or fined, or both.

2. The rule contained in the last preceding section, shall be deemed to be applicable where persons being assembled for any purpose, three or more of them, upon a sudden quarrel, agree to form themselves into a party, for the common purpose of mutually assisting one another, against any other or others of such persons, or where three or more persons being so assembled, suddenly agree to go together to execute any common purpose, with force and violence, or in such manner, and under such circumstances as are mentioned in that section.

3. Nothing in the first section hereof contained, shall be deemed to be applicable where three or more

persons shall assemble, or being assembled, shall continue together for the common purpose of assisting in the defence of the possession of the dwelling house of any person, against such as unlawfully endeavor or threaten to enter such dwelling house, in order to injure the person or property of any other.

4. Nothing in the first section hereof contained, as regards the assembling or continuing together of three or more persons, with intent to execute any common purpose with force and violence, shall be deemed to be applicable where such purpose is the doing of any act in good faith, in pursuance of an asserted claim of right, or in defence of any such claim, provided the number of persons assembling or continuing together, and the force and violence intended to be used, shall not be greater than are reasonably necessary for the doing of such act.

5. The rule contained in the last preceding section applies whether the claim of right be lawful or unlawful, and whether the act done in pursuance of such claim, be justifiable or not.

6. If three or more persons shall assemble, or being assembled, shall continue together, with such intent to execute any common purpose, as is essential to constitute an unlawful assembly within the meaning of the first section hereof, and shall use any endeavor to execute such purpose, such persons, although such purpose shall not be executed either wholly or in part, shall be deemed to be guilty of a rout, and each of them shall be imprisoned for any term not exceeding one year, or fined, or both.

7. If three or more persons shall assemble, or being assembled, shall continue together, with such intent to execute any common purpose, as is essential to constitute an unlawful assembly, within the meaning of the first section hereof, and shall, wholly or in part, execute such purpose with force and violence, or in so violent and tumultuous a manner, and under such circumstances, as are calculated to create terror and alarm in the neighborhood, such persons shall be deemed to be guilty of a riot, and each of them shall be imprisoned for any term not exceeding eighteen months, or fined, or both.

8. It is not a riot unless there be actual force and violence, or a manifest tendency thereto, as by carrying arms, or making use of menacing and turbulent language or gestures; but it is not essential to a riot that any violence to persons or property should be actually committed, in the execution or part execution of the common purpose.

9. It is not a riot when persons being assembled for any purpose, three or more of them happen, upon a sudden quarrel, to commit a breach of the peace, however violent, provided it be not in execution or part execution, of any such previous agreement to mutually assist one another, as is mentioned in the second section hereof.

The English distinctions between an unlawful assembly, a rout, and a riot, have been preserved. They constitute but different degrees of the same general offence, and although in many of the States, the offence of a rout has been merged in the other two offences, yet the Commissioners, finding the existing definitions of long standing, and well settled, could perceive no good reason for changing them.

10. If any persons to the number of twelve or more, being unlawfully, riotously and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by the Sheriff, or his under-Sheriff, or any Justice of the Peace of the County, or by the Mayor, or other head officer, or any Justice of the Peace of, or living in any city or town where such assembly shall be, by proclamation to be made in the form or to the effect, as is hereafter in the next succeeding section directed, to disperse themselves and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more, (notwithstanding such proclamation made,) unlawfully, riotously and tumultuously remain or continue together, by the space of one hour after such proclamation shall have been made, every such offender shall be confined for not more than three years, or imprisoned, not exceeding eighteen months.

11. The order and form of such proclamation, as is mentioned in the last preceding section, shall be as follows, or to the like effect, (that is to say,) the person authorized by that section to make such proclamation, shall, among the rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence while proclamation is making, and immediately after that, shall, openly and with a loud voice, make or cause to be made, proclamation in the words following, or to the like effect:—The State of Maryland charges and commands all persons being here assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, or they will incur the penalties against riotous assemblies.

12. Whosoever shall forcibly oppose or hurt, or in any manner hinder or obstruct any person lawfully making or endeavoring to make such proclamation, as in the last two preceding sections is mentioned, whereby such proclamation shall not be made, shall be confined for any period not exceeding three years, or imprisoned not exceeding one year.

13. If any persons to the number of twelve or more, being unlawfully, riotously and tumultuously assembled together, to whom proclamation should or ought to have been made, if the same had not been obstructed or hindered, as in the last preceding section is mentioned, shall, knowing of such obstruction and hindrance, continue together, and not disperse themselves within one hour after such obstruction and hindrance made, every such offender shall be confined for any period not exceeding three years, or imprisoned not exceeding one year.

In this Country, where no man is required to obey the law, whose consent has not been given either expressly or by necessary implication, to the enactment of the law, and where the great and vital principle lying at the foundation of all our institutions, as we have already had occasion to remark, is implicit and unconditional obedience to the law, there is less excuse for, and ought to be less toleration shown towards those who rise up in open defiance and contempt of its authority, than towards any other class of offenders. There is no greater mistake than to suppose that a disposition to disturb the public peace—to resort to mob violence, whenever and as often as any lawless purpose is to be effected, is but an excess of the spirit of liberty, and therefore to be treated with indulgence by the Courts. To preach such a doctrine is just as disreputable as to practice it; it is more akin to the temper of a slave, to show by his conduct, that he cannot be made to comprehend in what it is, that the true dignity of a freeman consists.

14. Whosoever shall forcibly and violently, or in such a manner and under such circumstances, as are calculated to create terror and alarm to the citizens of this State, make entry into, or unlawfully detain possession of any dwelling house, land or tenement, shall be imprisoned for any period not exceeding three months, or fined, or both.

15. If two or more persons shall fight together in a public place, in such a manner and under such circumstances, as are calculated to create terror and alarm to the citizens of this State, such persons are to be deemed to be guilty of an affray, and each of them shall be imprisoned for any period not exceeding three months, or fined, or both.

16. If two or more persons shall openly carry dangerous and unusual weapons in any public place, in such a manner and under such circumstances, as are calculated to create terror and alarm to the citizens of this State, such persons shall be deemed to be guilty of an affray, and each of them shall be imprisoned for any period not exceeding three months, or fined, or both.

17. It is not essential that any of the offences herein named, should be to the terror or alarm of all the citizens of this State; it is sufficient if they or any of them, be to the terror or alarm of a class or portion of those citizens.

CHAPTER VIII.

OFFENCES AGAINST RELIGION AND MARRIAGE.

1. Whosoever shall deny the Being or Providence of God, or shall utter contumelious reproaches of Jesus Christ, or shall profanely scoff at the Holy Scriptures, or expose any part thereof to contempt or ridicule, shall be imprisoned for any period not exceeding six months, or fined, or both.

2. Whosoever shall compose, print or publish any blasphemous libel, shall be imprisoned for any period not exceeding one year, or fined, or both.

3. Whosoever shall maliciously or contemptuously disquiet or disturb any meeting, assembly or congregation whatsoever, of persons assembled for religious worship, or shall in any way, disturb, molest or misuse any preacher, teacher, or person officiating at such meeting, assembly or congregation, or any person or persons there assembled, shall be imprisoned for any period not exceeding six months, or fined, or both.

4. Whosoever being married, shall marry any other person during the life of the former husband or wife, whether such second marriage shall have taken place in Maryland or elsewhere, shall be imprisoned for any period not exceeding two years, or fined, or both.

5. A person shall be deemed to be married, within the meaning of the last preceding section, although the marriage of such person be voidable by the laws of this State.

6. Provided, that nothing in the fourth section hereof contained, shall extend to any second marriage

contracted out of this State, by any other than a citizen of this State, or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years, then last past, and shall not have been known by such person to be living within that time, or shall extend to any person, who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence or decree of any Court of competent jurisdiction.

CHAPTER IX.

OFFENCES AGAINST PUBLIC MORALS AND DECENCY AND COMMON NUISANCES.

1. Whosoever shall maliciously publish any libel, expressing or signifying any obscene, lewd or immoral matter or meaning, tending to deprave or corrupt the morals of the people, shall be imprisoned for any period not exceeding three months, or fined, or both.

2. It is an obscene libel, within the meaning of the first section hereof, to publish in a newspaper or other periodical, or in handbills or other form, intended for circulation generally among the people, any proposed mode of preventing the consequences of sexual intercourse, or any proposed remedy or means of alleviation or cure, of any bodily or mental infirmity or disease, wherein, in the description of the disease or infirmity, or in that of the proposed remedy or alleviation, language of an obscene or licentious character, or immoral tendency, is used.

The act of 1853, ch. 183, was passed to suppress the evil, which has suggested the above section, but neither the newspapers, nor the authorities of the State, seem to have taken the slightest notice of the act, and now many of those journals, which otherwise, every good citizen would be pleased to welcome at his fireside, are so defiled by these filthy advertisements, as to be really unfit to enter his doors at all.

3. Whosoever shall be guilty of any open lewdness or indecency, in any public thoroughfare or place of public resort, or in view thereof, shall be imprisoned not exceeding thirty days, or fined, or both.

4. Whosoever shall keep a common bawdy-house, shall be imprisoned for any period not exceeding one year, or fined, or both.

5. Any house or place kept or used for the purpose of prostitution, shall be deemed a bawdy-house, within the meaning of the fourth section hereof. And any person who shall appear, act or behave himself or herself as master or mistress, or as the person having the care, government or management of any bawdy-house or place, shall be deemed to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not, in fact, be the real owner or keeper thereof.

6. Whosoever being a white person, shall intermarry with a negro or mulatto, shall be imprisoned not exceeding one year, or fined, or both.

7. Whosoever shall perform the ceremony of marriage between a white person and a negro or mulatto, shall be fined not exceeding two hundred dollars.

By the act of 1717, ch. 13, any white person intermarrying with a negro or mulatto, shall become a servant for seven years, and a free negro or mulatto intermarrying with a white, shall become a

slave for life. And by the act of 1715, ch. 44, those who join in marriage the persons described, forfeit 5000 lbs. of tobacco or $85. These connexions are certainly degrading, but only to the white person, and therefore, the punishment provided by the old law for the negro and mulatto, has been omitted; the same thing has been done in Virginia, and, it is believed, in other States, where their laws have undergone a revision.

A mulatto is the offspring of a negress by a white man, or of a white woman by a negro, according to all the best lexicographers. 7 Mass. 88. The statute of North Carolina, prohibiting marriages between whites and *people of color*, has been held to include in the latter class, all who are descended from negro ancestors, to the fourth generation inclusive, though one ancestor of each generation may have been a white person. 2 Kent's Com. 258 note. But the term *mulatto* when used in a highly penal statute, will be confined to its appropriate meaning, and will not include any but those in whose veins there is an equal mixture of black and white. If it be the will of the Legislature to enlarge the prohibition, so as to make it comprehend all persons of color, the section can be modified to suit that view, by the change of a single word.

8. Whosoever shall keep any common gaming house or place, shall be imprisoned for any period not exceeding one year, or fined not exceeding one thousand dollars, the one half of said fine to go to the informer, and the other half to the State.

9. Any house or place, kept or used for playing therein at any unlawful game, and where a bank is kept by one or more of the players, exclusively of the others, or the chances of any game played therein are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play or bet, shall be deemed a common gaming house, within the meaning of the last preceding section.

10. Any person who shall appear, act or behave himself, as the person having the care, government or

management of any gaming house or place, or who shall act as doorkeeper, guard or janitor of the same, shall be deemed to be the keeper thereof, and shall be liable to be prosecuted as such, notwithstanding he shall not be the real keeper thereof.

11. It shall be the duty of all sheriffs and their deputies, constables and bailiffs, to visit all such places as they shall have reason to believe or suspect to be, common gaming houses, and to give information thereof to the Grand Jury, which shall assemble next thereafter.

12. Whosoever, being in the occupation of any premises, shall knowingly permit any gaming house or place to be kept therein, shall be imprisoned not exceeding one year, or fined not exceeding five hundred dollars, the one half of said fine to go to the informer, and the other half to the State.

13. Whosoever, being a keeper of an ordinary or house of entertainment, shall permit unlawful gaming at his house, or at any outhouse appurtenant thereto, shall be fined not exceeding five hundred dollars, the one half thereof to go to the informer, and the other half to the State, and the said offender shall, in addition, forfeit his license.

The acts of Assembly in reference to gaming, are those of 1809, ch. 138, sec. 7; 1826, ch. 88; 1842, ch. 190, and 1853, ch. 265. It is notorious that the efforts heretofore made by the Legislature, to suppress illegal gaming, have been ineffectual, and it is owing probably to the circumstance, that in each instance too much has been attempted. General provisions in statutes, if well drafted, are more comprehensive, and not so easily evaded, as those which go too much into detail. The mention of several things is the exclusion of all things not mentioned, whereas, if the nature of the

thing intended be well described in general terms, it will include all things of the character described, according to the plain import of the language used.

The act of 1813, ch. 84, which declares that no money or other thing, either won or lost, by any species of gaming or betting, shall be recoverable by law, is believed to be too sweeping in its provisions. And the Commissioners intend, in the proper place to insert a section, enabling any person who has lost money or other valuable thing, at any *unlawful* game, or by any cheating at a *lawful* game, to recover the same from the winner, either as a small debt, or in Court, according to the value, leaving the act of 1813 to operate upon all cases where money or other thing of value is fairly lost or won at a lawful game. It is believed that one mode of preventing unlawful gaming will be, to deprive it of its gains, by enabling every one to recover back what he has lost.

14. Whosoever shall keep a disorderly house, shall be imprisoned for any period not exceeding sixty days, or fined, or both.

15. Any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, to the annoyance and disquiet of the neighborhood, shall be deemed a disorderly house.

16. Whosoever shall unlawfully disinter or displace any dead human body, or any part of any dead human body, which shall have been deposited in any church, church-yard, vault, or other burial place or cemetery, shall be imprisoned for any period not exceeding six months, or fined, or both.

COMMON NUISANCES.

1. A common nuisance consists in any unlawful act or omission, which injures or annoys, or tends to injure or annoy, the citizens of this State, in the enjoyment of any public right or privilege, or which causes or directly and manifestly tends to cause, any public calamity, mischief or disorder, or which causes or directly tends to cause, any common injury, damage, inconvenience or annoyance, to the citizens of this State, in respect of their habitations, personal safety, health, comfort or property.

2. It is not essential to constitute a common nuisance, that such act or unlawful omission as is mentioned in the first section hereof, should be to the injury or prejudice of all the citizens of this State; it is sufficient if it be injurious or prejudicial to a class or part only of those citizens.

3. Whosoever shall unlawfully injure or damage any jail, bridge, harbor, port, dock, quay, landing-place, market-place, road, weir, water course, spring, well, highway or other building, erection, or work whatsoever, or other matter or thing whatsoever, natural or artificial, lawfully used or enjoyed by, or being or intended to be, a safeguard or protection to the citizens of this State, or shall do any act whereby the citizens of this State are unlawfully hindered or prevented from, or obstructed in, the using or enjoying any of the matters or things herein before mentioned, or whereby the use or enjoyment of any of such matters or things, or of any right, privilege or advantage thereunto appertaining, is unlawfully diminished in value, or rendered less safe, secure or convenient, shall be

deemed guilty of a common nuisance, and shall be imprisoned for any period not exceeding one year, or fined, or both.

4. Whosoever shall unlawfully omit to construct or make, continue, support, repair, or prevent or remove injury or damage to, or obstruction of any of the matters or things, in the third section hereof mentioned, contrary to the duty of the offender in that behalf, by reason of inhabitancy, tenure, occupation or otherwise, whereby the citizens of this State are hindered or prevented from lawfully using or enjoying any of such matters or things, or whereby the use or enjoyment of the same is diminished in value, or rendered less safe, secure or convenient, shall (except where the enforcement of such duty shall be otherwise specially and exclusively provided for,) be deemed to be guilty of a common nuisance, and shall be imprisoned for any period not exceeding one year, or fined, or both.

5. Whosoever shall maliciously corrupt or defile the water of any well or spring, used and enjoyed by the public, shall be imprisoned for any period not exceeding six months, or fined, or both.

6. Whosoever shall, by setting up, carrying on or continuing any noxious, unwholesome or offensive trade, occupation, business, works or process, or by any other noxious or offensive means whatsoever, infect, corrupt or vitiate the air, or render it impure or unwholesome, or shall, by such or any other means, cause loud and continuous noises, and thereby occasion injury or annoyance to those dwelling in the neigborhood, in respect of their health or comfort, and convenience of living, or the value of their property,

shall be imprisoned not exceeding six months, or fined, or both.

7. Provided, that no carrying on or exercise of any trade, occupation or business, shall be deemed to be an offence, within the last preceding section, where such trade, occupation or business shall have been carried on or exercised in good faith, without any material increase, and without any indictment having been found, and duly prosecuted, for the space of twenty years, next before the commencement of any prosecution, under the last preceding section; or although such indictment shall have been found, if the party so prosecuted shall have been acquitted.

8. Provided also, that whensoever any defendant shall show that such trade, occupation or business, was once legally carried on or exercised by himself, or any other person, and has since been continued to be carried on, and that during the space of time specified in the indictment, such trade, occupation or business, has not been carried on or exercised in a manner or to an extent more detrimental or injurious than at such former period, when it was so legally carried on or exercised, such defendant shall be entitled to an acquittal, although it be proved that by reason of increase of resiants, or others resorting to the neigborhood, the carrying on, exercising or continuing such trade, occupation or business, has caused annoyance to the neigborhood which did not exist before.

9. Provided, that no act mentioned in the sixth section hereof, shall be deemed to be a common nuisance, in respect of the habitation, within the meaning of the first section hereof, unless the injury or annoy-

ance extend to the inhabitants of more than three dwelling houses at the least.

10. Whosoever shall unlawfully cause injury, annoyance or inconvenience, to the citizens of this State, using any public highway or thoroughfare, or frequenting any market or other place of public resort, in respect of their use or enjoyment of such highway, thoroughfare, market or place, shall be imprisoned not exceeding three months, or fined, or both.

11. Whosoever shall cause or suffer any bull, bull dog, or other ferocious animal, to go or be at large, without sufficient restraint by a chain, muzzle, or other security for the prevention of mischief, shall be fined; and in case any person shall be actually injured by such animal so being at large, shall be imprisoned not exceeding six months, or fined, or both.

12. Whosoever shall make or sell, or offer for sale any squibs, rockets, serpents or other fire-works, or any cases, moulds, or other implements for the making of any such squibs, rockets, serpents or other fire-works, or shall permit or suffer any squibs, rockets, serpents or other fire-works to be cast, thrown or fired from, out of, or in any house, lodging or habitation, or from, out of, or in any part or place thereto belonging or adjoining, into any public street, highway, road or passage, or shall throw, cast or fire any squibs, rockets, serpents or other fire-works in or into any public street, house, ship, river, highway, road or passage, shall be deemed to be guilty of a common nuisance, and shall be imprisoned for any period not exceeding three months, or fined, or both.

13. Provided, that notwithstanding any thing in the last preceding section contained, it shall be lawful for any artillery company or society of persons, lawfully met together for the use and exercise of arms, the troops of the United States, the militia or any volunteer company of this State respectively, to make and use any sorts of fire-works, in the exercise and practice of arms and warlike exploits only, in such manner as they or any of them might, but for the last preceding section, have done.

14. Whosoever, being an innkeeper, shall refuse to receive into his inn as a guest, such inn not being fully occupied at the time, any traveller, or to furnish him, or any servant or cattle, accompanying or conveying him respectively, with reasonable food or lodging, provided a reasonable price for the same be tendered, if demanded or requested to be paid by such innkeeper, shall be deemed to be guilty of a common nuisance, and shall be fined, at the discretion of the Court.

15. Provided, that nothing in the last preceding section contained, shall apply to any innkeeper who shall refuse to receive or furnish as therein mentioned, any person who shall be drunk, or conduct himself in an indecent or improper manner.

16. Whosoever shall be guilty of any other common nuisance, within the meaning of the first section hereof, which is not specially provided against, shall be imprisoned for any period not exceeding three months, or fined, or both.

17. No act, being a common nuisance, within the meaning of any section hereof, shall be deemed to be

justifiable or excusable on the ground that it is productive of some compensating convenience or advantage to the public.

18. Whosoever shall knowingly sell or supply on any contract of sale, or expose to sale, as for the food of man, any putrid meat, or other noxious or unwholesome food or provisions, shall be imprisoned for any period not exceeding one year, or fined, or both.

19. Whosoever shall maliciously expose himself or any other person, whilst laboring under any infectious or contagious disease, in any public thoroughfare, or other place of public resort, shall be imprisoned for any period not exceeding six months, or fined, or both.

CHAPTER X.

MALICIOUS INJURIES TO PROPERTY, AND OTHER LIKE OFFENCES.

1. Whosoever shall maliciously set fire to any church or place of religious worship, or to any mill, distillery, barn, meat house, tobacco house, stable, warehouse, coach house, outhouse, office, shop, granary, corn house, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be confined for any period not exceeding five years, or imprisoned, at the discretion of the Court.

The punishment of such of these offences as are enumerated in the act of 1809, is by that act death, or the penitentiary for not less than three, nor more than twelve years. The offences described by that act, are moreover oddly enough made to consist in the burning of any mill or other named building, *being empty, or having therein* any one of a very long enumeration of country produce and personal chattels and property. The list being quite as extensive as it could well be made, the wonder is, that the condition of the building whether empty or otherwise, should have been referred to at all. See the case of House *vs.* House, 5 H. & J. 125.

2. It is essential to a setting fire to anything, within the meaning of the first or any other section hereof, that some part of such thing should be actually burnt.

3. Whosoever shall maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or any goods on board the same, or any person that shall have underwritten any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be confined for any period not exceeding five years, or imprisoned for any period not exceeding two years.

4. Whosoever shall maliciously set fire to any stack or rick of wheat, rye, oats or hay, or to any pile, heap or quantity of timber, lumber or cord wood, shall be confined for any period not exceeding two years, or imprisoned not exceeding one year.

5 Whosoever shall maliciously set fire to any mine of coal, shall be confined for any period not exceeding three years, or imprisoned not exceeding one year.

6. Whosoever shall maliciously break down, cut down or otherwise injure or destroy, any embankment, lock, sluice, waste weir or other work belonging to any navigable river or canal, shall be confined for any period not exceeding two years, or imprisoned not exceeding eighteen months.

7. Whosoever shall maliciously pull down, or in anywise destroy any public bridge, or do any injury with intent and so as thereby to render such bridge or any part thereof dangerous or impassable, shall be confined for any period not exceeding three years, or imprisoned not exceeding one year.

8. Whosoever shall maliciously cut, break, bark, root up or otherwise destroy or damage, the whole or any part of any tree, sapling or shrub, or any underwood, growing in any ground, garden, orchard or avenue, adjoining or belonging to any dwelling house, (in case the amount of injury done shall exceed the sum of five dollars,) shall be imprisoned for any period not exceeding one year, or fined, or both.

9. Whosoever shall enter into any field, garden or other inclosure, and take therefrom any plant, fruit, or vegetable production, growing therein, or attached to the freehold, shall be imprisoned for any period not exceeding six months, or fined, or both.

10. Whosoever shall maliciously break down or otherwise destroy the dam of any mill head, shall be imprisoned for any period not exceeding one year, or fined, or both.

11. Whosoever shall maliciously kill any cattle, or cause any harm to any cattle, with intent to kill such

cattle, or render the same useless to the owner, either permanently or for a time, shall be imprisoned for any period not exceeding one year, or fined, or both.

OFFENCES IN REFERENCE TO RAILWAYS.

1. Whosoever, being a conductor, baggage master, engineer, engine driver or other servant, in the employ of any railway company, shall be found drunk while employed upon the railway, or shall commit any offence against any of the by-laws, rules or regulations of such company, or shall negligently or contrary to his duty, do or omit to do any act, whereby the life or limb of any person passing along or being upon the railway belonging to such company, or the works thereof, respectively, shall be or might have been injured or endangered, or whereby the passage of any of the engines, carriages or trains, shall be or might have been obstructed or impeded, shall be imprisoned for any period not exceeding two years, or fined, or both.

2. Whosoever shall maliciously do or omit to do any act, with intent to endanger, or tending to endanger the personal safety of any passenger, or person conveyed in or upon any carriage, car or engine, passing along any railway, shall be confined for any period not exceeding five years, or imprisoned not exceeding two years.

3. Whosoever shall maliciously do or omit to do any act, with intent to obstruct, or directly tending to obstruct the lawful use of any railway, shall be imprisoned for any term not exceeding two years, or fined, or both.

CHAPTER XI.

LIBEL.

1. A libel consists in—some matter or meaning hurtful to an individual or to the public, as in this chapter is defined, and expressed or signified by any written, printed, painted or other representations, characters or signs, or any effigy, dramatic performance or other visible device.

2. A personal libel is one which expresses or signifies any contumelious, defamatory or opprobrious matter or meaning, designed to insult any person, or to render him odious, contemptible or ridiculous, or to hurt him in his office, profession, trade or occupation, or to exclude him from the benefit and comfort of society, or to disgrace the memory of one who is dead, and thereby to excite any person to wrath.

3. Whosoever shall maliciously or negligently publish any personal libel, shall be imprisoned for any period not exceeding one year, or fined, or both.

4. Whosoever shall maliciously or negligently publish any personal libel, knowing the same to be false, shall be confined for any period not exceeding two years, or fined, or both.

5. The expression or signification of any matter or meaning, mentioned in the first section hereof, shall be deemed to constitute a libel, whether such matter or meaning be expressed or signified directly, or indirectly, and whether the application of such matter or meaning to persons or things, can be collected either from such libel alone, or from such libel by the aid of extrinsic circumstances.

6. Every person who shall, by composing, dictating, writing, or in any other way contribute to the making of any libel, shall be deemed to be the maker of such libel; and in case any libel shall be published, every maker of such libel, with intent to publish the same, and every one who shall, in any manner, contribute to such publication, shall be deemed to be the publisher thereof.

7. The exposing of any libel to the view of any other person, or the reading aloud the contents of any libel in the hearing of any other person, or otherwise dealing with any libel, whereby in any of such cases the matter or meaning of such libel is made known to any other person; or the sending, delivering, placing, or otherwise disposing of any libel, with intent in so doing to make known the matter or meaning thereof to any other person, shall be deemed to be a publication of such libel.

8. A publication is excusable where the act is done by a party ignorant in fact, of the matter or meaning of the libel, and acting with due caution, and having no reason for supposing or suspecting the matter or meaning published to be libellous.

9. Whensoever evidence shall have been given against any defendant, for the purpose of charging him with any act of publication by any other person, by his authority, it shall be competent to such defendant to adduce evidence to show that such publication was made either against his will, or without his authority, consent or knowledge, and that there was no want of due care or caution on his part.

10. A publication may be justifiable either absolutely or in a qualified manner, in respect of the occasion. The publication is justifiable absolutely where any thing is published by a party either in the Senate or House of Representatives of the United States, or in either branch of the Legislature of Maryland, or of any one of the United States, as a member thereof in the course of his parliamentary duty; or is published by a party as a judge, or as a grand or petit juror, in the course of his duty, or as a witness or deponent in any proceeding, by due authority, or as a petitioner to Congress, or to the Legislature of this or any other State of the Union, or as a party, suitor or prosecutor, or the agent of a party, suitor or prosecutor, in any Court of Justice, or where any matter is otherwise published in the usual course in any Court of Justice, or before any magistrate, constable or other peace officer, in his official capacity, or except as hereafter mentioned, where any fair report is published of judicial proceeding or enquiry, or where any statement is published of the result or fact found to be true, by means of any such proceeding or enquiry; or in general, when any communication required or allowed by law to be made, by any public officer, or other person, for the advancement of justice, is duly made.

11. Provided, that nothing contained in the last preceding section, shall extend to exempt any party from any penalty, in respect of any publication in a proceeding which is wholly extra-judicial, both as regards the mode of proceeding, and the jurisdiction of the Court; or to exempt any party from any penalties, in respect of the publication of any judicial proceeding or enquiry, which publication contains any seditious,

blasphemous, profane, impious, indecent or immoral matter, or in respect of any ex parte or preliminary proceeding, on any criminal charge, before any coroner, justice of the peace, or other such magistrate.

12. A publication of a personal libel is also justifiable absolutely, whensoever the matters charged in the alleged libel are true, and it was for the public benefit that the matters so charged should be published.

In regard to public men and measures, the license conceded to the press in this Couutry is almost unlimited, and suits arising out of strictures upon candidates for office, or the conduct of men in office, have been of rare occurrence in our Courts. But a personal libel upon private character is a different matter altogether, and there is no good reason for permitting a defendant under prosecution for such an offence, to allege, as a full answer to the indictment, as is done by the act of 1803, ch. 54, that the statement published is true, without requiring him to go further, and show that the public are to derive some benefit from the publication. The press speaks with ten thousand tongues, and it should not be permitted to publish to the world, the delinquencies of one man, and remain quiet about those of another, according to the suggestions of its own malignity or caprice. If all the misdeeds of individuals,—all neighborhood and village scandals were regularly published in the newspapers, no one could complain that his own case was not made an exception to the rule; but it is not every such case, nor even one out of every thousand, that is brought to the notice of the public through the columns of the press, and whenever any particular case is selected from all the rest for publication and exposure, it must be to gratify some revengeful and malicious motive in the publisher, and for that reason alone, he ought to be punished for it.

If, however, the Legislature should think otherwise, and consider that the truth of any scandalous matter ought to be a full warrant for its publication, the provisions of the act of 1803 can be restored, by striking out the last member of the concluding sentence of the above section.

13. It shall be lawful in any criminal proceeding, to be commenced or prosecuted for printing or publishing any extract from, or abstract of, such of the reports, papers, votes or proceedings of the Congress of the United States, or either House thereof, or of the Legislature of Maryland, or of any one of the United States, or either House of any such Legislature, may deem fit or necessary to be published, to give in evidence under the general issue, any such report, votes or proceedings, and to show that such extract or abstract was published in good faith, and without malice; and if such shall be the opinion of the jury, a verdict of not guilty shall be entered for the defendant or defendants.

14. A publication is justifiable in a qualified manner, in respect of the occasion, whensoever it is made in good faith, concerning any other person, for the benefit of any party or of the public, whether it be for the purpose of admonition or advice, or otherwise for the benefit of the party to whom, or by whom, or concerning whom it is made; or be made by petition or otherwise, with a view to the remedy, or prevention of any real or supposed grievance; or with intent to ascertain any fact, in the existence of which any party or the public has an interest, for the purpose of legal evidence or otherwise, and for the benefit of such party or of the public; or for the advancement of justice, or the prevention or redress of any public or private wrong; or with a view to the discussion of any acts, measures or proceedings affecting the public; or with a view to criticise works of literature, science, or art; or otherwise howsoever, where such party or

the public has an interest in the making or receiving such communication.

15. A party or the public shall be deemed to have an interest, within the meaning of the last preceding section, in the making or receiving any communication, not only when the communication is made in discharge of a legal or other duty, but also in all other cases where it may be necessary or expedient, in reference to the common convenience of society.

16. Provided, that no publication shall be deemed to be justified, within the meaning of the fourteenth section hereof, where the hurtful tendency of the matter published, or of the manner or extent of the publication, is greater than is reasonably necessary, in respect of such occasion.

CHAPTER XII.

CONSPIRACIES.

1. The crime of conspiracy consists in an agreement by two persons, (not being husband and wife,) or more than two persons, to commit any offence, or to defraud or injure the public, or any individual person.

2. It is immaterial to the crime of conspiracy, whether the causing such fraud or injury be the ultimate object of such agreement, or be merely incidental to that object, or to the means of effecting it.

3. Every agreement to defraud and injure the public, in respect of any property, or to endanger the public safety or peace, or to annoy or disturb the public in the enjoyment of any civil right, or to subvert

or deprave religion or morals, or to prevent, pervert, or obstruct the administration of justice, or to hinder or obstruct the due operation of any law, for the regulation of the State or condition of society, or to occasion any other public injury or nuisance, is an agreement, within the meaning of the first section hereof.

4. Every agreement with intent to injure or pre judice any other, in his person, reputation, office, profession, occupation, state or condition in society, or to injure or disturb him in the possession or exercise of any civil right, or to defraud or injure him in respect of his property, is within the meaning of the first section hereof.

5. It is not essential to the crime of conspiracy, as regards any fraud upon, or injury to the public, that the agreement should be injurious or hurtful to the public, in its aggregate capacity, or to all the citizens of the State; it is sufficient if it be injurious or hurtful to a class or portion only of those citizens.

6. Whosoever shall commit the crime of conspiracy, in case he shall conspire to commit a felony, or to defraud, or injure, or annoy the public, shall be imprisoned for any term not exceeding two years, and shall, in respect of any other conspiracy, be imprisoned for any period not exceeding one year, or in either case fined, or both.

CHAPTER XIII.

ILLEGAL VOTING.

1. Whosoever shall wilfully vote or offer to vote, at any public election, provided for by the Constitution and Laws of this State, or of the United States, not being a citizen of the United States, or being such citizen, not having resided twelve months within this State, and six months within the County or City, immediately next preceding the election at which he shall so vote, or offer to vote, shall be imprisoned not exceeding two years, or fined not more than five hundred dollars, nor less than fifty dollars, one half to the informer, and the other half to the State.

2. Whosoever shall give or offer any bribe, with intent unduly and corruptly to influence the vote of any legal voter of this State, shall be imprisoned not exceeding two years, or fined not exceeding five hundred dollars, nor less than fifty dollars, one half to the informer, and the other half to the State.

3. Whosoever, not being twenty-one years of age, shall vote or offer to vote at any such election, shall be imprisoned for any term not exceeding three months, or fined, or both.

4. Whosoever shall adduce before the judges of any such election, the certificate or other written evidence, of the naturalization of any other person, and shall either vote or offer to vote, as the person named in such certificate or other evidence of naturalization, shall be imprisoned for any period not exceeding three years, or fined not exceeding five hundred dollars, nor

less than fifty dollars, one half to go to the informer, and the other half to the State.

5. Whosoever shall unlawfully prevent or endeavor to prevent, any person lawfully entitled to vote at any such election, from voting, shall be imprisoned not exceeding three months, or fined, or both.

The new Constitution, (art. 1, sec. 2,) has superadded to the penalties provided by the act of 1844, ch. 309, against bribery and other offences at elections, that of disqualification to vote, or to hold any office of trust or profit in this State. Whether the penalties provided by the Constitution and the act, are both to remain in force, the Legislature must determine.

OFFENCES RESPECTING TELEGRAPHS.

1. Whosoever shall wilfully injure, disturb, cut down, or destroy, any post, pier, abutment or other fixture, or shall cut or displace any of the wires, or by any other means injure or disable the machinery of any line, or of any part or portion of any line of telegraph, shall be imprisoned for any period not exceeding one year, or fined, or both.

2. Whosoever, being either the clerk, operator, messenger, agent or servant, of any telegraph company or concern, shall wilfully divulge the contents, or nature of the contents, of any private communication, entrusted to him for transmission or delivery, shall be imprisoned for any period not exceeding three months, or fined, or both.

3. Whosoever, being the clerk, operator or agent of such telegraph company or concern, and employed in transmitting despatches thereby, shall wilfully and injuriously postpone one despatch to give place to another, shall be fined, at the discretion of the Court.

CHAPTER XIV.

DEGREES OF CRIME.

1. Crimes are of three degrees: Treasons, Felonies, and Misdemeanors.

1st. Treasons have been defined, ante 176.

2nd. Felonies are the crimes in respect of which offenders incur the penalty of confinement in the penitentiary.

3rd. All other crimes are Misdemeanors.

A felony is defined to be an offence which, at common law, occasioned a total forfeiture of either lands or goods, or both and to which capital or other punishment may be superadded, according to the degree of guilt. It was formerly necessary, in order to ascertain whether a party was entitled to any number of peremptory challenges in selecting his jury, and whether he was to go through the ceremony of arraignment, first to ascertain whether the offence of which he was accused, was of the degree of felony, as neither peremptory challenges nor arraignment appertained to any trials for offences below that degree. But the word being at the present day, significant of nothing now existing in our system, its origin or specific meaning is of no consequence.

With respect to the right of peremptory challenge, the act of 1809, ch. 138, declared that it should exist in all cases where the punishment awarded by law, without regard to the grade of the offence, was confinement in the penitentiary for five years at the least. But as there were *felonies*, to which a milder punishment than this was annexed, it was perceived, that by the operation of the act, a party might be tried for *felony* without the right to any peremptory challenges, and the act of 1846, ch. 45, was passed to restore this right to parties accused of offences of that grade. Thus the law stood until the act of 1841, ch. 162, was passed, allowing the right of peremptory challenge in the trial of all offences whereof the punishment is confinement for any period, in the penitentiary. In ascertaining therefore, at the present time, whether a party under indictment is entitled to his twenty peremptory chal-

lenges, no respect is had to the degree of the crime, for whether it be a felony or misdemeanor, according to the old distinctions, if the punishment is by confinement in the penitentary, the right exists.

In the legislation of this State in reference to crimes and punishments, it will be found generally, that whenever the penalty of confinement in the penitentiary has been annexed to any offence, that offence has, at the same time, been declared to be felony. This will be seen by a reference to the statute book, and the object seems to have been to annex to this punishment the incidents of arraignment, and of the right of peremptory challenge. In this view therefore, the above distinction between felonies and misdemeanors, harmonizes well with the laws now existing, while it possesses the additional merit of making the line of distinction between felonies and misdemeanors, so broad and distinct that no one can mistake it.

OF INCAPACITY TO COMMIT CRIMES AND DURESS.

1. No person shall be criminally responsible for any act or omission, who, at the time of such act or omission, is in a state of idiotcy.

2. No person shall be criminally responsible for any act or omission, who, at the time of such act or omission, by reason of unripeness or weakness of mind, or of any unsoundness, disease or delusion of mind, wants the capacity which the law otherwise presumes every person to possess, of discerning that such act or omission is contrary to the law of the land.

3. Provided, that no person shall be exempted from criminal responsibility, by reason of any temporary incapacity, which he shall have wilfully incurred by intoxication, or other means.

At first view this rule may seem unjust, for it is the act of getting drunk which, after all, constitutes the real offence of the party, and to vary the punishment according to the accidents of the crime

punishing the offender with death, or the penitentiary, or imprisonment, or fine, just as those accidents happen to be more or less serious, does not seem to be right. But the difficulty is, in declaring by law that intoxication shall constitute an exemption from criminal responsibility. Could the Legislature venture to place such an exemption upon the statute book? For apart from the danger that the incapacity itself may have been feigned, and apart from the difficulty where it is not feigned, of fixing by proof the degree in which it existed, there is something most unseemly in giving to such a vice the public sanction of the law. It is best therefore, to adhere to the old rule, and leave the mitigating circumstances, if any there be, to the consideration of the Court, in fixing the punishment.

4. Incapacity from unripeness of mind, as in the second section hereof is mentioned, shall be presumed to exist in the case of an infant under the age of eight years, and proof to the contrary shall not be admitted.

5. Incapacity from unripeness of mind, as in the second section hereof is mentioned, shall also be presumed to exist in the case of an infant of the age of eight years, and under the age of fourteen years, unless the contrary be proved.

6. Duress, inducing well grounded present fear of death, shall be sufficient to excuse a person acting under such duress from penal consequences, except in case of homicide.

7. No woman shall be liable to conviction in respect of any act of receiving her husband, or of receiving any other person in his presence and by his authority, or of harboring or concealing her husband, or any other person, in his presence and by his authority, or of aiding the escape of her husband from justice.

OF WILFUL, MALICIOUS, AND ACCIDENTAL INJURIES.

1. An injury shall be deemed to consist in any harm, damage, or other evil consequence, caused to any person or thing, or other subject matter of public or private right.

2. An injury resulting from an omission, does not subject the person causing it to punishment, unless such omission be unlawful, being a breach of some duty imposed by law, directly or indirectly. Such duty is imposed indirectly where the person omitting has, by his own conduct, rendered the doing of an act necessary for the prevention of injury.

3. An injury shall be deemed to be wilfully caused, whensoever the person from whose act or omission such injury results, either directly intending it to result from his act or omission, or believing that it was in any degree probable that such injury would result from his act or omission, incurred the risk of causing such injury.

4. An act shall be deemed to be maliciously done or omitted, and an injury shall be deemed to be maliciously caused, whensoever such act or injury shall be wilfully done, or omitted, or caused, respectively, without justification or excuse.

5. An injury shall be deemed to be negligently caused whensoever it is not wilfully caused, but results from want of reasonable caution, in the undertaking and doing of any act, either without such skill, knowledge or ability as is suitable to the occasion, or without due care taken to ascertain the nature and probable

consequences of such act, or when it results from the not exercising reasonable caution in the doing of any act, either as regards the means used or the manner of using them, or from the doing of any act, without using reasonable caution for the prevention of mischief, or from the omitting to do any act, which a person using reasonable caution would not have omitted to do.

6. Provided, that no person shall be punishable in respect of a negligent act or omission, who would not have been punishable had such act or omission been wilful.

7. An injury shall be deemed to be accidentally caused whensoever it is neither wilfully nor negligently caused. No person shall be punishable in respect of any accidental injury.

8. Provided, that where an injury which would have been wilful if caused to one person, shall, through mistake or by accident, be caused to another person, such injury shall be deemed to be wilfully caused to such other person.

9. Provided also, that when a person intending an injury to fall, or believing it to be in any degree probable that an injury will fall, on some other person, but not on any person in particular, causes such injury to any other person, such injury shall be deemed to be wilfully caused to the person on whom it falls.

10. An injury shall be deemed to be wilfully caused, although it take effect in a manner not intended or believed to be probable by the party causing it, provided it take effect on the person intended, or upon the person upon whom the party causing it believed it to be in any degree probable that such injury would fall.

CRIMINAL AGENCY AND PARTICIPATION.

1. Parties to a crime are either principals or accessories.

2. Every one is a principal in respect of a criminal act, who either does it or causes it to be done otherwise than by a guilty agent; or who is one of several who so jointly do such act or cause it to be done; or who is present aiding in or abetting the doing of such act.

3. A party shall be deemed to cause a criminal act to be done, within the meaning of the last preceding section, who wilfully causes it to be done by means of any mechanical device or contrivance, or by any innocent person, (whether such innocent person act unconsciously or under compulsion, or be or be not the person to whom injury is done,) or by such means contrived, and whether such party be present or absent, when the means used take effect, and although accidental circumstances conduce to render the means used effectual for the doing of the criminal act intended.

4. Where several distinct acts are essential to any crime, every one who, either singly or jointly with any other person or persons, does any of such acts in order to the commission of such crime, is a principal, within the meaning of the first and second sections hereof.—And where any injury is essential to a crime, and several persons wilfully cause that injury, either by joining in the same act, or by jointly or severally doing distinct acts, each of such person is also a principal, within the meaning of the first and second sections hereof.

5. Every one is a principal in respect of a criminal omission, who, being either directly or indirectly bound by law, either solely or jointly with any other person or persons, to perform any duty, unlawfully omits to perform that duty.

6. A party shall be deemed to be present aiding or abetting the doing of a criminal act, within the meaning of the second section hereof, who shall be near enough to lend any help to the person who does, or persons who do the act, or to encourage such person or persons with the expectation of help, and who shall, by consent or any other means, help or encourage such person or persons in the doing of such act.

7. Provided, that no person shall be deemed to be present aiding or abetting, within the meaning of the last preceding section, who, having agreed with any other person or persons to effect any criminal purpose, shall abandon his design, and so separate himself from such other person or persons, that there was not, at the time when the act was done, any engagement on his part for, or any reasonable expectation in, such other person or persons, of help from him.

8. Every one is an accessory in respect of a criminal act done, who, although not being present, within the meaning of the sixth section hereof, when the act is done, has, by commandment, advice, consent, aid, encouragement, or otherwise, directly or indirectly, or immediately or mediately, procured or promoted the doing of it by a principal offender.

9. Every one is an accessory in respect of a criminal omission, who has, by commandment, advice, consent, encouragement, or otherwise, directly or indirectly, or

immediately or mediately, procured or promoted the omitting by a principal offender to do the act, the omission to do which is criminal.

10. No person shall be deemed to have procured or promoted any criminal act or omission, who shall, previously to such act or omission abandon his design; provided, that previously to such act or omission, he shall countermand the criminal act or omission, and use his utmost endeavor to prevent the doing of such act, or to procure the due performance of the act, the omission to do which is criminal, and provided also, that the party guilty of such act or omission, shall know that such act or omission is so countermanded.

11. A party shall be deemed to have procured or promoted the doing of a criminal act, within the meaning of the eighth section hereof, although such act shall vary from that the doing of which such party shall have intended to procure or promote, provided the crime intended and the one perpetrated be substantially the same, and the person or thing against whom, or with respect to which, such crime is perpetrated, be the person or thing against whom, or with respect to which, such crime was intended, or although the person against whom such crime is perpetrated, be not the person against whom it was intended, if, by mistake or accident, the injury which constitutes the crime light upon a different person from the one against whom such injury was intended; so also, if the act done be a probable consequence of the endeavor to do that, the doing of which is so intended to be procured or promoted.

12. An accessory to a crime shall be deemed to be guilty of that crime; and every penal provision of the

criminal law of this State, in respect of any criminal act or omission, shall be applicable to accessories as well as to principals, as fully and effectually as if every such provision had, by express words, included accessories.

13. If several persons assembled together shall have united in a common design to execute any criminal purpose, or any purpose whatsoever by criminal means, and shall endeavor to execute such design, all shall be deemed to be equally guilty in respect of any act done by any one or more of them, in pursuance of, and in accordance with, such design.

14. Provided, that if after several persons shall have so united, as in the last preceding section is mentioned, any of them shall do any criminal act which is beyond the scope of such common design, such of them as shall not be privy or consenting to the criminal act so done, shall not be responsible in respect of such act.

15. Provided also, that where, after several persons shall have united in such common design, as in the twelfth section hereof is mentioned, any of them shall, before the accomplishment of their purpose, or of any criminal act done in furtherance of, and within the scope of such design, abandon such design, and withdraw from the further prosecution thereof, such person shall not, by reason only of his having so united with others, be responsible in respect of any criminal act done in furtherance of such design, after such abandonment and withdrawal, if, previously to such act, he shall use his utmost endeavor to prevent the doing of it.

16. Whensoever a person would himself be justified or excused, in the doing of any act, such justification

or excuse shall be deemed to extend to any person acting in his aid or assistance.

17. All the provisions contained in all the sections hereof, concerning acts done and their consequences, shall, so far as such provisions may be applicable, apply to unlawful omissions, and the consequences of such omissions.

18. Every provision of all the sections hereof, concerning the commission of an offence, shall be deemed to be applicable to offences consisting wholly or partly in some unlawful omission.

CHAPTER XV.

DEFINITIONS OF TERMS, AND EXPLANATIONS.

1. The terms following shall be understood as hereinafter defined, unless it be otherwise specially provided, or there be something in the subject or context repugnant thereto.

2. The term "grievous bodily harm" shall be deemed to signify any bodily harm, from which danger to life may reasonably be apprehended, or whereby any limb, member, organ of sense, or mental faculty, is permanently disabled, weakened or impaired, the mutilation of any part of the body, whereby permanent disfigurement is caused, the fracture or dislocation of any bone, or any bodily harm, whereby the person to whom it is caused is, during the space of twenty days at the least, in bodily pain, diseased, or unable to follow his ordinary calling or pursuits.

3. The term "writing" shall be deemed to include any material on which any words or figures, at length

or abridged, are written, printed or otherwise expressed, or any map or plan is described.

4. The term "muniment of title" shall be deemed to include any writing, as defined in the last preceding section, which is or shall be evidence of the title, or of any part of the title, to any real estate, or to any interest therein.

5. The term "testamentary instrument" shall be deemed to include any will, codicil, or other testamentary writing or appointment, as well during the life of the testator, whose testamentary deposition it appears to be, as after his death, whether the same shall relate to real or personal estate, or to both.

6. The term "moveable thing" shall be deemed to include money, valuable securities, muniments of title, testamentary instruments: And all animals, although they are usually termed wild animals, or animals feræ naturæ, which, at the time of any offence committed in respect thereof, are deprived of their natural liberty, and so confined in buildings, stalls, parks, cages, nets, ponds, or other enclosures, or in any other manner so reduced into possession, that they may be taken and used or disposed of at the will of the proprietor: Also all domestic animals, and all tame and reclaimed animals, known to be such, although they go abroad and return at pleasure; and also the eggs and produce of such animals, so reduced into possession, or so tamed and reclaimed: Also the bodies and all parts of the bodies of dead animals: Also all other chattels personal.

7. Where the term "night time" is used, that time shall be deemed to commence at nine of the clock in

the evening of each day, and to conclude at six of the clock in the morning of the succeeding day.

8. The term "bribe" shall be deemed to include any reward, benefit or advantage whatsoever, present or future, accruing or to accrue either to the party influenced or intended to be influenced, or to any other person.

9. The term "cattle" shall be deemed to include any horse, mule, ass, sheep, pig or goat, whatsoever be the age or sex of the animal, and also every bull, cow, calf and ox.

10. Whensoever words are used importing the singular number or masculine gender only, they shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals; and whensoever words are used importing the plural number, yet they shall be understood to apply to one matter as well as more than one, and to one person as well as more than one, as though the words had been used in the singular number, unless otherwise specially provided, or there be something in the subject or context repugnant to such construction.

11. All terms which have been once defined, shall, when used elsewhere, be understood in their defined sense.

CHAPTER XVI.

EVIDENCE IN CRIMINAL TRIALS.

The provision of the New Constitution, making the jury the judges of law as well as fact, in criminal trials, will be found, whether so intended by the Convention or not, to have enlarged considerably the scope of admissible evidence in those trials. For although conceding to the Court, since the new Constitution, as well as before its adoption, the right of sifting the evidence offered, and excluding such as may be incompetent or improper, yet the jury being now the sole judges of the constituent elements of the crime, that is to say, the sole judges in reference to the question whether or not any crime has been committed, or if committed, how far it has been justified, palliated or excused, the Court can have no power to shut out from the view of the jury any evidence, constituting the materials upon which their power to judge of the law, as thus understood, is to be based. In a case of murder for example, the Court cannot rule out any item of evidence, because in the opinion of the Court, it would not, if received, tend to prove the commission of the offence, or to justify, or palliate, or excuse it, if committed, as this would be a usurpation by the Court, of the power which is exclusively vested in the jury. The test of admissibility must therefore be, has the evidence any relation to the constituent elements of the crime? or to the aggravation or palliation of it? If it have such relation, it is admissible; its effect being exclusively for the jury. The reverse of this would be to say, that the jury should have the right to judge of the effect of the evidence, without having the right to hear it, and the Court should have the right to exclude evidence because of its effect, without the right to judge of the effect. One effect of making the Jury the exclusive judges of the law, as well as the fact, is to destroy their common law privilege of finding the facts specially, and of referring the questions of law to the Court. They cannot ask the Court to determine the law for them, that being precisely what the Constitution declares they shall determine for themselves. But there is no foundation for the opinion which we have heard suggested, that the right of the Court to grant new trials in criminal cases has been taken away, or in any manner abridged, as will be shown more fully in another place. Our concern at present is, with that effect of the Constitution which, during a

criminal trial, deprives the jury of the counsel and guidance of the Court in matters of law, and with the consequent duty of the Legislature to provide for them such counsel and guidance as may be supplied by plain rules, adapted to the various contingencies likely to arise in the progress of a criminal trial.

1. In the trial of criminal cases, all facts and circumstances which may throw light upon the question whether a crime has been committed, or if committed, whether it has been mitigated, extenuated, justified or aggravated, shall be submitted to the jury; nor shall the Court exclude from the consideration of the jury, any such facts or circumstances, upon the ground of their irrelevancy.

2. Whenever an objection to the admissibility of evidence shall depend upon the effect it may have in reference to the constituent elements of the offence, the evidence shall be admissible.

3. Whenever the nature of an act or transaction alleged to be criminal, is the subject of enquiry by a jury, all that was said or done by either party connected either directly or remotely with the principal act to be tried, shall be submitted to the jury.

4. There shall be no estoppels in the administration of the criminal law, nor shall any item of evidence be deemed so conclusive that the jury may not find against it.

5. All communications to ministers of the Gospel, made to them in their clerical capacity, by persons charged with the commission of crime, shall be privileged, and shall not be given in evidence against the persons so charged.

Confessions extracted from a prisoner by promises of favor, or by holding out to him the expectation that it may be better for him to confess, shall not be received in evidence against him. But confessions made to a clergyman, who visits the prisoner and the captive, for the purpose of affording him the consolations of religion, are not only admissible against the accused, but the clergyman himself may be called to the stand and required to divulge them. It is true that the witness when summoned into Court, may refuse to testify—that is to say, he may defy the Court's authority, and take the consequences, but is it just or proper to place him in a predicament in which his only choice is between going to jail for a contempt of Court, or betraying the confidence reposed in him, under circumstances of all others the most delicate and touching?

6. In prosecutions for the forgery of any note, bill of exchange, or post note of any bank of this State, or any one of the United States, or of any Territory thereof, it shall not be essential to produce the charter of such bank, but the production of such bank note, bank bill of exchange or bank post note, shall be prima facie evidence of the chartered existence of such bank.

7. A voluntary confession of guilt to be sufficient to authorize a conviction, should be full, consistent and probable.

8. The rule contained in the last preceding section, is subject to the condition that there is clear proof of the corpus delicti, independent of such confession.

9. Mere extra-judicial and casual observations are often made without serious intention; they are always liable to be mistaken, or not accurately remembered, and their meaning to be misrepresented or exaggerated. For these reasons they are deemed the weakest and most unsatisfactory of all evidence, and they become the more so when any considerable time has elapsed since their utterance.

10. A witness of medical skill may be called to give his opinion, as to the prisoner's insanity at the time he committed the act, but he cannot give his opinion of the criminality of the act, that being for the jury to determine.

11. A medical witness may give his opinion as to the insanity of the party at the time he committed the act, from the evidence he has heard at the trial.

12. A medical opinion is most valuable, when it is pronounced by a person who has had experience in the care and treatment of the insane, and who gives practical reasons, intelligible to the jury, for the formation of such opinion, and it is least valuable, when given by a person of no such experience, and who refers to the disquisitions of the learned, as the basis of his own opinion.

13. A medical witness may be called to declare his opinion, whether the alleged insanity is feigned or not, and the value of his opinion will depend upon the sufficiency of the reasons he gives for it, of which reasons the jury are the exclusive judges.

14. In all criminal trials the evidence in support of the indictment or charge, shall be fully given to the jury, by the prosecution in chief, and after the evidence for the defence is closed, the State shall be confined strictly to rebutting testimony.

15. In cases where the act alleged to be criminal, is not the principal or the entire matter of dispute, but where the whole or principal controversy turns upon the character of that act—that is to say, whether it is aggravated, extenuated, or justified, under the circum-

stances—the evidence of the State in reference to the character of the act, shall be given to the jury, before any part of the evidence for the defence shall be adduced.

The prosecutor has now the benefit of hearing the State's witnesses in their examination before the Grand Jury, and in consequence, the power of marshalling his witnesses for the trial in open Court. He has also the opening and conclusion before the jury, and with these advantages, it is extremely unfair to present but a part of the State's testimony in chief, and hold the strongest and most impressive items of proof in reserve, for the purpose of making the last impression upon the minds of the jury.

16. The evidence of an accomplice should be cautiously received by a jury, and his testimony ought not to be regarded as sufficient for a verdict to be founded upon, unless it is corroborated by other witnesses, or by circumstances proved by other witnesses.

17. The corroboration mentioned in the last preceding section, should be in such and so many parts of the accomplice's narrative, as may reasonably satisfy the jury that he has told the truth.

The rule in England is understood to be, that the nature of the confirmation required for the testimony of an accomplice, must vary according to the circumstances of each particular case, and that the effect of the testimony is for the consideration of the jury, aided in that consideration by the observations of the Judge. As in this State however, the jury must act generally for themselves, it has been considered proper to give them the advice to receive such evidence in all cases with caution.

18. The Court shall have power in all criminal cases, upon the application of the accused, and his making it appear that there are witnesses living beyond the jurisdiction of the Court, whose testimony is material to his defence, but whose attendance to testify in his behalf he

has been unable to procure, to issue a commission in the common form, to such person as the parties may agree upon, or as may be named by the Court, if they do not so agree, to take the testimony of such witnesses, upon interrogatories and cross-interrogatories, as in other cases. And the Court may, in its discretion, continue or postpone the trial, to afford the accused an opportunity to obtain such testimony. Provided the Court shall be satisfied that the purposes of justice require such commission to be issued.

The privilege of taking testimony on the side of the prosecution, under a commission, cannot be given to the State, on account of the constitutional right of every party accused of crime, to be confronted with the witnesses against him. But the State is amply compensated for the want of this privilege, by her power to bind under recognizance, the witnesses *against* the party charged to appear at Court, and not to depart therefrom without the leave of the Court, which right the accused does not possess. By the common law, a prisoner in a capital case had no right even to a subpœna for his witness, unless upon special order of the Court, and when they did attend they were not allowed to be sworn. The stat. 7, Will. 3, gave the like process of the Court to compel the witnesses for the defence to appear, as is usually granted to compel the appearance of the witnesses for the crown, but this statute applied only to cases of high treason, whereby corruption of blood might ensue. And the stat. 1, Anne, only provides that witnesses on behalf of a prisoner, in cases of treason or felony, shall be sworn in the same manner as witnesses for the crown, and it is by construction of this last statute, that process of subpœna is allowed to compel the attendance of the prisoner's witnesses in cases of felony. In prosecutions for misdemeanors, the defendant had, by common law, the right to subpœna his witness.

The stat. 11 and 12 Vic. c. 42, which was passed to reduce into one, all the previous statutes in reference to the duties of Justices of the Peace in criminal matters, provides that all witnesses for the crown shall give security to appear at Court and give evidence *against* the accused, and in default thereof shall be imprisoned and safely kept until after the trial of the accused party. And the act

of 1752, ch. 13, sec. 2, provides, that witnesses for the State imprisoned for want of security, shall be supported in jail at the expense of the public.

But no power is anywhere given to secure by any compulsory means, the attendance of the witnesses for the accused. Upon the whole, therefore, it is considered just and proper that if the testimony for the defence cannot otherwise be had at the trial, it shall be taken under a commission, as in civil cases. And this was certainly the opinion of Lord Mansfield, who quotes with approbation the case of a criminal prosecution of a woman who had received a pension as an officer's widow; and it was charged in the indictment that she was never married to him. She alleged a marriage in Scotland, but that she could not compel her witnesses to come up to give evidence. The Court obliged the prosecutor to consent that the witnesses might be examined before any of the Judges of the Court of Session, or any of the Barons of the Court of Exchequer, in Scotland, and that the depositions so taken might be read at the trial. And they declared that they would have put off the trial of the indictment from time to time, forever, unless the prosecutor had so consented. The witnesses were so examined before the Lord President of the Court of Session. (Cowp. 174.)

CIRCUMSTANTIAL EVIDENCE IN CRIMINAL CASES.

Circumstantial evidence results in presumption, which is defined by an able writer to be, a probable consequence drawn from facts, as to the truth of the fact which is the subject of enquiry, but of which fact there is no direct proof. This probable consequence is that which is to convict the accused, if he be convicted at all.—The species of evidence termed presumptive produces its effect by mental association. The mind is required to pronounce upon a fact which is hidden from its view, the existence of which it is compelled to affirm from other facts which are disclosed to view. Where the evidence is direct, the fact sought is the fact proved; where it is circumstantial, the fact sought is the fact inferred.

The difference in probative force between the two kinds of evidence, is considered by Mr. Best to be this, that in cases of direct proof the chances of error are two, namely, that the witnesses are mistaken, or that they are dishonest. In cases of circumstantial evidence the same chances of error exist, while another chance is added, namely, that the inferences from the facts may be fallacious.

It would seem, therefore, to be the opinion of this writer, that these chances separately considered, are about equal, and that in circumstantial evidence the liability to error is greater than that in direct proof, only by the numerical difference which exists between three and two. But this statement is not accurate for the reason, that inferences from facts are more numerous and diversified than the facts themselves. In direct proof the fact to be proven is one; in presumptive evidence the allowable inferences from the facts proven are many, from which *one* is to be pronounced by the jury to be the only true inference, and the chances that the one so affirmed to be true may be an error, is in proportion to the greater or less number of inferences, of which the facts in evidence are rationally susceptible.

It may be remarked generally upon this species of testimony, that the facts may all be true, and yet the inferences—which inferences, it must not be forgotten, make up the whole case—may be utterly fallacious. Or the inferences may be just, but the facts from which they are deduced, mistaken or fraudulent. Or the facts may be false, and the inferences false. And these various contingencies are so many sources of error, to bewilder and mislead the jury, in the trial of cases depending on circumstantial evidence, which but partially exist in cases of direct proof.

It is by no means surprising, therefore, that in the earlier periods of the English criminal law, when the principles regulating the force and effect of circumstantial or indirect evidence were but little understood, and when the few rules that existed were themselves fallacious, a criminal trial should so frequently result in a judicial murder. It not unfrequently happened that men were convicted and executed, and it was afterwards discovered by the confession of the real offender, or other sufficient proof, that the sufferer was guiltless of all offence. It was to no purpose then to dishume the dishonored remains of the poor victim, and bestow vain and repentant honors upon the dead body. The mischief was done, the cruelty had been perpetrated, and there was no power in man to undo the iniquity, and restore the dead to life.

It was remarked moreover, as almost universally true, that these melancholy mistakes occurred in cases of circumstantial evidence, and the frequency of their occurrence led the Judges to pause and consider by what means so much injustice had been done; and how it was to be prevented? In this manner certain great maxims were promulgated by the Courts, as landmarks in the application of this

species of evidence. The Judges finding that they had been convicting innocent men of capital crimes, naturally endeavored by rules of their own, laid down from time to time, as a sad experience brought to light the imperfections of the old system, to prevent the recurrence of the like mistakes in future. These rules and maxims, growing up gradually as they did, out of the slow and painful experience of centuries, each generation of Judges revising and correcting the errors of the past, are at this day entitled, by the judicial dignity, the legal wisdom, the vast and varied experience employed in establishing them—by the amount of blood, and the still greater amount of human suffering they have cost, to the lasting veneration of every community, in which the principles of criminal justice are to be sought for in the common law of England.

Yet strange to say, in the practical administration of the criminal law, these great maxims are habitually disregarded. In the trial of a criminal case depending upon circumstantial evidence, they are cited by the defence, from the works of Bentham, Best and Wills, but the prosecutor who has the last speech, denies their authority, and the jury are left to settle the matter for themselves, according to their own notions of the general probabilities of the case.

Unfortunately the prosecutor denying the soundness of these rules and maxims, is not without the support of high authority among both Judges and writers of recent date. One eminent writer says, that "circumstances are inflexible proofs; that witnesses may be mistaken or corrupted, but things can be neither." "Circumstances" says Paley, "cannot lie." But may not the witnesses who prove the circumstances lie? May not the inferences deduced from the circumstances be fallacious? As we have already shown, when the proof is direct the case itself is the object of sense—when it is indirect or circumstantial the case is the object of mental association and deduction, and the vice in the opinions alluded to is, that they refer to the facts and circumstances, as if they constituted the direct proof of the crime, instead of the mere premises from which the crime, if proved at all, is to be deduced by way of mere inference. "It is astonishing" remarks Mr. Wills, "that sophisms like these should have passed current without animadversion."

Opinions of a similar character have been at times announced from the bench on this side of the water. C. J. Gibson, on the

trial of an indictment against a mother for the murder of her child, is reported to have told the jury:—"That circumstantial is in the *abstract* nearly, though perhaps not altogether as strong, as positive evidence—in the *concrete* it may be infinitely stronger." Again, "Indeed, I scarcely know whether there is such a thing as evidence purely positive." And again, "All evidence is more or less circumstantial, the difference being only in the degree." And again, "If the evidence in this case convinces you that the prisoner killed her child, though there has been no witness of the fact, you are bound to find her guilty."

Few legal readers will be able to peruse these remarks without feelings both of surprise and regret. Surprise that such opinions should be seriously entertained anywhere, and regret that they should come from a source so high as the late able Chief Justice of Pennsylvania. Let it ever come to this, that one species of evidence is just as good as another, and that the whole question resolves itself at last into the one, whether the jury are convinced—all rules framed to direct and regulate their enquiries being discarded—and in ninety-nine cases out of a hundred, the jury will hang the accused upon mere suspicion.

To say that all evidence is more or less circumstantial—that it is doubtful whether there is such a thing as evidence purely positive, and that the difference between them is only in degree, is to proclaim the most startling novelties—novelties as mischievous as they are startling. For apart from the difference in the probative force of the two species of evidence already noticed, there is an essential diversity in the scope and character of the defence, to a charge supported by circumstantial, from one sustained by direct proof. In a trial for murder for example, as every lawyer of experience knows, all reasoning ends where the evidence is circumstantial, precisely at the point where it begins if the proof is direct. In the one case there is seldom any dispute about the killing—in the other it is the great mystery to be solved.

Cases of direct proof are characterized by their own peculiar circumstances. For example, the accused walked half a mile after the provocation, to fetch his knife, with which he then stabbed the other to the heart; or after warm words, he drew his pistol and shot him; or he provoked the other to strike him, and during the fight stabbed him. And then the controversy is about provocations, and heated blood, and the power to retreat, and all the surrounding facts which go to aggravate or justify the act. Cases

of circumstantial evidence are characterized by a different class of circumstances, having no relation to the aggravations, the mitigations, the justifications, or the instrument of death, all of which mere qualifications of the act are hidden in mystery, and the great problem to be solved is the fact of the killing. A broader line of distinction cannot well be conceived than that which divides criminal trials depending upon direct, from those depending upon indirect evidence. It is true that in some cases the fact of killing may be deposed to by a single witness, and if he be a person of bad, or even of doubtful character, and there are no circumstances sufficient to prove the case, the prosecution should be abandoned. If, however, in such a case there be facts sufficient to exclude the hypothesis of innocence beyond a reasonable doubt, then it is a case of circumstantial evidence, the direct testimony being counted as nothing. But the great and essential difference between direct and indirect evidence, is neither effaced nor rendered doubtful by the occurrence now and then of a case of a mixed or undecided character.

The case of Professor Webster will serve to illustrate the difference of which we are speaking. Dr. George Parkman, a man of wealth, of the age of sixty, and extensively known, on the 23rd of October, 1849, in the crowded city of Boston, suddenly disappeared and was lost. On the afternoon of that day he was seen to enter the laboratory of Dr. John W. Webster, from which he never returned. Dr. Webster remained in his laboratory all that evening, and until late at night, with a bright light in the room, and a fire in an assay-furnace, in which a fire had never been kindled before.

We pause to observe that the sudden disappearance of a prominent citizen is a novel and impressive occurrence. That he should have been last seen to enter a certain office, and never to be seen afterwards; that the occupant of that office should remain in it at unusual hours, under lock and key, with a bright light in the room, are all independent facts not necessarily, nor even usually, known to accompany each other. And they create at once a well grounded suspicion against the tenant of that office.

But the case proceeds, and brings to light a human body, separated into different portions, and these separately concealed in different parts of the office and building. The right thigh, pelvis and left leg, are in one place. The bones of the head, neck, arms, hands, right leg and feet, partly calcined, are in another. The thorax and left thigh are in another place.

These separate parts when brought together, prove to be parts of the same body, and that body of the length and proportions of Dr. Parkman.

We pause again to remark that these additional facts are also all independent, and they are already forming a fatal circle around the accused, and all directly pointing at him as the guilty agent.

The case again proceeds, and discloses three blocks of mineral teeth, taken with the other remains from the assay-furnace. Fire had been at work upon them, the gold plate had disappeared, but the teeth were still found together.

A dentist of thirty years experience examines the teeth in the presence of the jury, and swears that they were prepared by him for Dr. Parkman. He produces the mould on which they were adjusted, and they fit it exactly. He knows his own work. Had made some repairs to the teeth about ten days before Dr. Parkman's disappearance, and declares that he cannot be mistaken.

The case however still proceeds. The sink in which part of the remains were found, is shown to be the sink of Professor Webster's private privy, the key to which ordinarily hung in a particular place. He now carried it, though unusually large, in his pocket.

The case is now made out against the accused. The mind is satisfied. The proof is full to overflowing. But the case still proceeds, and shows that Parkman was the creditor, Webster the debtor. The one urgent for payment, the other unable to pay. And the promissory notes of the accused, which were held by his creditor, are found in his own possession.

The case again proceeds, and exhibits a grapple, made by lashing fish hooks to a strong piece of twine, being just the sort of contrivance the homicide would want for the purpose of bringing up the remains from the sink, from time to time, as they were consumed by the action of alkalis and of fire. And both the twine and the fish hooks were proved to have been procured by Dr. Webster.

The case thus made out is reinforced by sundry facts of a corroborative character, among which is an anonymous communication to the newspapers, signed "Civis," the object of which was, to divert suspicion from the Professor, and fix it upon some one else. The communication being produced, is declared by adepts to be in a disguised hand-writing, but written in fact by Dr. Webster.

It will be remarked that all these facts are independent facts—not connected together by the relation of cause and effect, nor by

any other relation. It cannot be said, for example, that because Dr. Parkman entered that laboratory and never left it, therefore the professor would remain in it at unusual hours, under lock and key; nor that because he did so remain, a dead human body would be found in the premises; nor that because such a body was found, it would be cut into pieces, and each piece separately concealed.

And so passing through the whole series of facts it will be seen, that while each separate fact connects itself with the *factum probandum* by links of adamant, there is no connexion between the facts themselves, which again to a reasonable extent, are proven by separate witnesses.

The case is intensely dramatic, and the separate circumstances each following the other, in regular sequence and due order of time, to tell its own part of the story, furnish to the mind when put together as a whole, an assurance of the hypothesis of guilt, as full, complete and satisfactory, as any case on record.

Returning now to our object in citing this remarkable case, we observe that the whole mass of testimony adduced prove the killing, and there stop short. The instrument and manner of the death—the preceding, the accompanying and subsequent circumstances—the whole transaction, is shrouded in impenetrable darkness and mystery. There may have been a provocation or a blow. The Professor may have even had a struggle for his own life. His cutting up the body—his purloining his own promissory notes from the pocket book of the deceased, may have been no part of his original design, but thoughts which came to him after the fatal deed.

It is observable moreover, that in cases of homicide depending purely upon circumstantial evidence, the question of the killing is, in the majority of instances, necessarily made the great issue of life and death. The accused elects to make this issue. For if he discloses no part of the transaction—if he conceal at all, he must conceal every thing. There may be qualifying or mitigating circumstances, but if the principal fact be hidden from view, these must be hidden with it. To prove one fact of extenuation is a confession of the killing, and in coming before a jury, electing to leave it to the prosecution, to make out its case by facts and circumstances, if he is beaten he is hanged almost of necessity.

Now let it be supposed, that Dr. Webster after committing the fatal deed, no matter how, had proceeded into the street and pub-

licly said, "this man came into my office—insulted me grossly—I struck him a hasty blow with a grape vine bludgeon, which unfortunately caused his death." His case would thus have been made one of direct, instead of one of circumstantial evidence. Without any change in the mode of the death, or the degree of his criminality, we see that by simply regarding it as a case of direct proof, the entire moral complexion of the case is changed; the whole mass of testimony required in the former case is now thrown aside as of no account, and we begin the investigation at the precise point where it closed before. There being now no dispute about the guilty agent, our business is to enquire into the character of the act, in order to ascertain the degree of the prisoner's offence, and the punishment due to it. We see therefore, that a case of circumstantial evidence differs from one of direct proof, in the nature of the investigation, the delinquency of the offender, and even in the essential elements of the crime.

If the question is asked what is the criterion by which we determine whether a case belongs to one class or the other? We answer that it is determined by the character of the proof adduced of the principal fact—the killing, or identity of the guilty agent. If that fact be shown by witnesses who saw it, the case is, for that reason, one of direct proof—if the killing is to be collected by inferences from collateral facts, it is a case of circumstantial evidence. If the main fact be shown by direct proof, it does not make the case one of circumstantial evidence; either in whole or in part, that the nature of the provocation, and other extenuating circumstances are to be gathered from collateral facts. This is the distinction the law makes, about which we believe the authorities are all agreed.

To say therefore, that because a few incidents of the crime have to be gathered from circumstances, the crime itself being proved directly,—that all evidence is more or less circumstantial, the difference between the two species of proof being only in degree, is to annul in one breath all the great maxims devised by the wisdom of ages, for ascertaining the probative force of presumptive evidence. It is difficult to estimate the mischievous effect of a few careless sentences, falling from a Judge of great eminence, when they happen to be upon questions in reference to which the mind is prone to lean upon authority, rather than to rely upon the force of reason.

We have said that were the accused, being in fact the guilty agent, elects to make no disclosures, he stakes his life generally upon the issue. We refer to what *is*, not to what *ought to be*. For in every trial for murder upon circumstantial evidence, the principal points of enquiry are the same as in cases of direct proof, namely:—

1. Is the corpus delicti clearly proved?
2. Is the accused identified as the guilty agent?
3. What was the character of the act? Was it committed under circumstances of aggravation or extenuation, and in what degree?

The third point, which has respect to the degree of criminality that characterized the act, is apt to be passed over with but slight consideration, owing to the great and absorbing interest created by the second point, involving the question of the killing—or, owing more probably to the danger which the defence cannot but incur, where they deny the act by making a stand upon its character. To maintain that the accused had no hand in the death, and again to maintain that the killing was under many circumstances of mitigation, is to tread upon very dangerous ground, especially as each mitigating circumstance is an item of evidence to strengthen the hypothesis of the killing.

But the duty of the jury is not changed by the embarrassments of the defence. And if murder be classed into the first and second degrees, and extenuated homicide added to these, as already proposed, it will be impossible for the prosecution to ask for a conviction of the higher grades of the offence, without proof to warrant such a conviction. The burthen of proof is on the State, not on the accused. If a verdict of murder of the first degree is demanded, the State must show that the killing was perpetrated in such manner as to bring the crime within the definition of that degree. Circumstances may do this, but without evidence of some sort, such a conviction cannot be asked.

Now, when a case depending upon indirect or circumstantial evidence is presented to a jury, the prosecution asserting with great confidence, that the case has been proven, and the accused ought to be convicted—the defence insisting with equal confidence and sincerity, that the case is not proven, and the accused ought to be acquitted—the authorities adduced conflicting, each party reading the books supporting his own hypothesis—the Court having no power to interfere—and the jury in the dark, with no

guide to direct them, it is very proper that the rules which constitute the landmarks of this important branch of the criminal law, written out in plain language, and promulgated upon the authority of the Legislature, should be at hand, enabling either party to say, such is the law, and there is no escape from it.

The Commissioners have therefore made the attempt, very imperfectly it may be, to embody the true doctrines of this branch of criminal evidence, so far as they find them settled upon reason and authority, in rules as simple and as free from verbal niceties as is compatible with a clear statement of the whole principle in each case. The rules are by no means great in number, but cover nevertheless, it is hoped, the whole ground of difficulty and uncertainty, and together with the definitions of crimes and offences already given, will, it is believed, enable a jury to dispose of any case, arising under the criminal laws of Maryland, without serious embarrassment.

1. Circumstantial evidence is inferior in cogency and effect, to direct evidence, and greater prudence and caution should be observed in its application, as also in the results deduced from it.

2. In every criminal trial depending upon circumstantial evidence, there are three principal points of enquiry for the jury, namely:—

1st. Is the corpus delicti clearly proven?

2nd. Is the accused clearly identified as the guilty agent?

3rd. What was the character of the act? And in what degree was it justified, extenuated or aggravated?

3. The best evidence shall be adduced of which the nature of the case admits.

4. The burthen of proof is always upon the party who asserts the existence of legal responsibility.

5. The burthen of proof shall in no case be thrown upon the accused, and no defect or insufficiency in the

proof of the prosecution, shall be supplied by any probability that it is in the power of the accused to prove his own innocence, or explain the circumstances proven against him, by proof on his side.

6. The rule contained in the last preceding section, shall not be deemed to destroy or lessen the effect of the recent possession of stolen property, or other fruits of crime, as a circumstance, tending in connection with other facts and circumstances, to prove the guilt of the accused.

The books on criminal evidence give us rules as to the burthen of proof. A familiar instance of this in the old authorities, is that of a dead body, recently deprived of life, being discovered with a party by or near it, having in his hand a deadly instrument, in which case, as the books inform us, such party is thrown upon the proof of his own innocence, or the burthen of proof of his innocence is then cast upon him. Another instance is that of a party found in possession of stolen goods, recently after they are stolen. And here again he is required to prove that he came by them honestly. In these and other like cases, if the accused can exonerate himself he is acquitted, if not he is convicted and punished.

It requires however, but a slight consideration of these rules, to demonstrate their rank injustice, because, in either case, in the absence of exculpatory evidence, the conviction follows without any proof of the party's guilt. A man standing by the side of a dead body, with a deadly weapon in his hand, is no proof that he was the slayer. He may have been the friend of the deceased, and have drawn from the dead body the dagger which another may have driven into it. A thousand things might be true, each of which would be consistent with his innocence, and still the accused, whose statement is carefully excluded from the jury, unless it be against him, could have no power to prove one of them.

So in the case where stolen goods are found in the possession of the accused: such a fact is no proof that he is the thief. The real delinquent may have thrust them into his pocket, or thrown them into his window, to escape detection himself. The great objection

to such rules is, that they are artificial and arbitrary, and made to fit all cases alike. Whereas, every case ought to stand upon its own circumstances, and the fact of the proximity to the dead body, with the means of taking life, in the one case, or of the possession of the stolen goods, in the other, while they may be regarded as mere circumstances, and entitled to more or less weight, according to the complexion of the whole case, ought never to be regarded, standing alone, as proof of guilt. The force of the recent possession of stolen goods, as a circumstance, is greatly increased if the fruits of a plurality or of a series of thefts be found in the prisoner's possession, or if the property stolen consist of a multiplicity of miscellaneous articles, or be of an uncommon kind, or from its value or other circumstances, be inconsistent with, or unsuited to, the station of the party. Still the fact alone of the possession of stolen goods, or that fact with these or any of these concomitants, is but a circumstance, the weight of which is to be estimated by the force of the whole series of circumstances taken together, this being one of them.

The true, the humane, and the only just doctrine is, that criminality is never to be presumed, and that the whole proof of guilt must be made out by the prosecution, otherwise the accused is entitled to his acquittal. If the proof of a particular fact would free the accused from the imputation of guilt, and if that fact be peculiarly within his knowledge, and easily susceptible of proof by him, and he fails or declines to furnish such proof, his guilt, full proof of which being already adduced by the State, may the more justly be regarded as established. But this, it will be observed, still requires from the prosecution full proof of the party's guilt, without reliance upon the absence of proof on the part of the accused, as any part of the case which the State is to make out for herself.

Mr. Wills thinks that the possession of the fruits of crime, recently after it is committed, affords a strong and reasonable presumption that the party found in possession is the real offender, and refers to the account given in Genesis (xliv—5) of the discovery of the silver cup in the sack's mouth of the youngest of Joseph's brethren, to show that the force of this presumption has been recognized from the earliest times. But certainly the case of the silver cup, whatever evidence it may furnish of the juridical notions entertained at the time, does not support the doctrine in question; on the contrary, a more apt illustration of its fallacy could

not well be adduced. For the fact of the cup being found in the possession of the party was indisputable, and his inability to show that he came honestly by it equally so, and yet we know that the accused was innocent of all offence. But we have instances nearer at hand, of the danger of relying upon such a rule as proof of guilt. Sir Matthew Hale mentions the case of a man who was convicted and executed for horse stealing, on the strength of his having been found on the animal on the day it was stolen, but whose innocence was afterwards made clear by the confession of the real thief, who acknowledged that on finding himself closely pursued, he had requested the unfortunate man to walk the horse for him, while he stepped aside on a necessary occasion, and thus escaped. A very similar conviction is mentioned by Mr. Wills himself, as having occurred in 1827, in which, however, the fatal result was averted by the discovery, before the party's execution, that he had purchased the stolen goods from the real thieves, the day after the robbery. Another like case is spoken of by Mr. Best, as having occurred in Scotland about the same period. Such mistakes have occurred for the simple reason, that under such a rule they are likely to occur. It seems strange that notwithstanding the admitted infirmity of this rule, we should still find it upheld and promulgated as a test of guilt by the ablest writers—upheld by them while citing the instances of the sad results to which it leads. It is true the writers alluded to have surrounded the rule with certain precautionary exceptions, and after all, advise that it be applied with great caution, but a rule which requires so much caution, and which, notwithstanding all the caution that can be used, must result in convicting innocent men, cannot be a good rule.

In England many acts have been constituted legal presumptions of guilt by statute—the statutes themselves throwing the onus of rebutting such presumptions upon the party accused; such for example, as the making or possessing of paper, plates or dies, intended to imitate Exchequer bills; the possession of forged bank notes, or of marine stores, marked with the king's mark, and other acts of a like character. All of these acts, as they were found upon the statute book, are reported by the English Commissioners as part of their consolidation of the criminal law, but they have accompanied the report with a statement of their own marked disapprobation of such a rule.

The true rule after all, is given by Mr. Best, who says, that "it is in its character of a *circumstance*, joined with others of a crimi-

native nature, that the fact of possession becomes really valuable." And the Commissioners have aimed at giving to the fact of possession this simple effect and no more.

7. The mere conduct of a party—his being agitated or the contrary, when charged with the commission of a crime, can rarely, if ever, lead to inferences of his guilt or the contrary, since it is impossible to say, how men generally, still less how any particular man, ought to behave under such circumstances.

In one case, that of Mary Blandy, tried in 1752 for the murder of her father, a physician was allowed to state his opinion, that the agitation which the prisoner had evinced, proceeded from no concern for her parent, but from the apprehension of consequences to herself. It is really difficult to determine which was the most culpable, the physician who could have the temerity to swear to such an opinion, or the Court that could permit him to do so. Chief Justice Shaw, on the contrary, in his able charge to the jury in Dr. Webster's case, uses this language:—"With regard to the conduct of the defendant at the time of the arrest and since, it strikes us that not much can be drawn from it. Such are the various temperaments of people, such is the rare occurrence of an arrest for this crime, who can say how a man ought to behave? How can you say that he was too much moved or too little moved? Have you had any experience how you would behave in such a position?" The mere behavior of a party when arrested or charged, depends upon character, temperament, moral diathesis—it is different in different men, and in the same man at different times. It may arise from caprice—from false judgment as to the manner in which innocence ought to be evinced by the mere externals of conduct. The behavior ought to be natural, but the difficulty is in saying what is natural behavior for an innocent man, and again what is natural behavior for a guilty man. And yet a criminal trial rarely occurs, that this matter of behavior is not brought up for discussion before the Jury. If the accused was calm and unmoved at the time of his arrest or charge, the prosecution relies upon it as a proof of hardened guilt, while the defence insists with equal vehemence that it is a proof of innocence. If he was greatly agitated—if he turned pale—if he trembled and his knees smote together, it is a

certain sign with the prosecution that he is guilty, and just as certain a sign with the defence that he is not guilty. But the truth is it is no sign at all, and should be left out of the discussion. It does not properly constitute *a fact* in the case. It may do harm, but cannot do good.

8. The probative force of circumstantial evidence is in proportion to the number and concurrence of separate and independent facts and circumstances, all pointing to the same conclusion. And this force is still further augmented, if these separate facts and circumstances are proved by separate witnesses.

9. Where a number of independent circumstances all point to the same conclusion, the probability of the justness of that conclusion is not merely the sum of the simple probabilities composing the chain, but is the multiplied or compound ratio of them.

10. If the circumstances are not independent of each other, and all arise from one source, an increase in the number of the circumstances does not increase the probability of the hypothesis.

11. It is but a corollary from the rule contained in the last preceding section, that two or more circumstances connected together by the relation of cause and effect, or otherwise connected by natural or moral association, are to be reckoned in estimating their force as proof, as but one circumstance.

12. It is always unsafe to convict on the strength of a single circumstance.

It is said of the late Jeremiah Mason, that he once commenced an address to a jury in a capital case with these words :—"Gentlemen of the jury! You may think this man guilty. Even I may think him so. But the question is, is he proven to be guilty?" Mr. Mason was right in the doctrine which his words imply, for

certainly every jury is under oath to obey the rules of law, and if the conviction of an offender cannot be worked out by the application of those rules, he ought to be acquitted, no matter what the jury or the world may think of his case. But a jury, as times go, must be uncommonly intelligent, conscientious and staunch, to be safely trusted by an advocate with the expression of such a sentiment; the great danger being, that if, from vague suspicion or otherwise, they believe a party to be guilty, the rules of law, no matter how positive they may be, will form but a slight barrier to his conviction. And this particular rule, declaring it to be unsafe to convict upon the strength of one circumstance, will be disregarded as often as any other. It may happen that the one circumstance is a very strong one, but how strong soever it be, it is no more than one circumstance, and the law declares that alone to be an insufficient ground for conviction. But the jury are convinced, and what are they to do? If they say not guilty, it is to acquit a party whom they believe to be guilty. If they say guilty, it is to convict him against the rules of law. The probabilities are, that they will convict, and take the chances of hanging an innocent man. The rule is one which juries may be tempted to set at nought, but it is none the less a wise, safe and prudent rule, on that account.

It is the concurrence of many separate and independent circumstances, all pointing to the same conclusion, which constitutes their proving power, and all writers agree, that this proving power increases with the number of the independent circumstances, according to a geometrical progression. "Not to speak," says Mr. Bentham, "of greater numbers, even *two* articles of circumstantial evidence, though each taken by itself weighs but a feather—join them together, and you will find them pressing on the delinquent with the weight of a millstone." It is very clear that if the circumstances, while they are unconnected with each other, are still connected with the hidden fact, the improbability that these circumstances were fortuitous, increases not in a numerical, but in a multiplied ratio, with their number.

To ascertain therefore, the force due to one circumstance, we apply the same process of reasoning inversely. In the case of Dr. Webster there were nine independent circumstances, besides facts of a corroborative character. Now if we cancel any one of these circumstances, the effect is, to deprive the case not merely of the simple and separate support of that circumstance, but of the multiplied and geometrical force, which that one in combination with

all the previous circumstances, brought to the support of the hypothesis of guilt. And if this cancelling process is continued through the series or chain of facts, down to the first fact, which alone is left standing, it is evident, that by how much the proving power was increased by the addition of any or of all of these circumstances, by so much is it weakened by the removal of all or any of them from the case. And when at last, the evidentiary circumstances are reduced to one, it is like the rod which the poor Indian uses to direct him to better hunting grounds,—it will not stand alone, and is just as likely to fall in the wrong as in the right direction.

As this rule is a very important one, and may not in its practical application be duly appreciated, the Commissioners feel unwilling to dismiss it, without an attempt to explain its specific operation and effect.

When the whole evidence against an accused consists of but a single circumstance, the defect of proof will be found to consist in this, that the inferences deducible from that circumstance are at large, there being nothing to fix the mind upon any one inference, to the exclusion of all the rest. And the inferences which point to a party's innocence being greater in number, and each as probable in itself as the one which points to his guilt, the result is, that there is not only no adequate proof upon which to found a conviction, but the weight of the proof is in fact the other way.

If, however, we add another independent circumstance, not growing out of the first, but pointing with it to the same conclusion, we perceive the effect to be, not merely to strengthen the case against the accused by an additional item of proof, but to exclude from our consideration all the inferences deducible from the first circumstance, but the one which points to the party's guilt, and to direct our thoughts exclusively to that. And the first circumstance reacts in like manner upon the second, by limiting our view to the one inference, which we discover to be deducible from both.

And so by increasing the array of circumstances, their combined probative force will be found to consist not in the mere cumulation of circumstances, but in their reciprocal action and reaction upon each other; the effect of such increase being to limit our view to the one inference which is common to them all, the probabilities of the truth of the one inference increasing in a compound ratio with the number of the circumstances.

The subject will be better understood if we apply this reasoning to the facts of some particular case. And we take for the illustration the case of William Richardson, who was convicted upon a chain of circumstantial evidence, perhaps as full and satisfactory as any reported in the books. The case is the more interesting from its having furnished to Sir Walter Scott one of the principal incidents in Guy Mannering.

In the autumn of 1786, a young woman who lived with her parents in one of the rural districts of Scotland, was one day left alone in the cottage, her parents having gone out to the harvest field. On their return home a little after mid-day, they found their daughter murdered, with her throat cut in a shocking manner, the circumstances being of a character to exclude the presumption of a death by suicide.

Here then is the *corpus delicti* clearly made out. The next thing is to connect the murderer with it, and this we are to do by the force of circumstances. But it must not be overlooked that our purpose in analysing this case is to show, that out of the whole array of circumstances which were proved at the trial, and which produced the conviction of Richardson, no single circumstance standing alone, would be strong enough to furnish a legal or safe assurance of his guilt.

1. Richardson was absent from his work on the day and about the time of the murder, long enough to enable him to commit the act.

From this one circumstance the inferences are:—That he might have gone to the cottage and committed the murder. That he might have gone in the opposite direction and been wholly innocent of the murder. That he might have remained near the scene of his work the whole time. That he might have been employed in a thousand ways, all consistent with his innocence. There is nothing to limit our view to the first inference more than to any of the rest, and all we can say is, that he might have committed the murder, and this we could say without any proof at all.

2. On examination of the ground about the cottage, there were discovered the footsteps of a person who had seemingly been running hastily from the cottage. The prints of the footsteps were accurately measured, and an exact impression taken of them; and it appeared that they were those of a person who must have worn shoes, the *soles* of which had been newly mended, and which had iron knobs or nails in them.

At the funeral of the young woman all the men who were present, to the number of sixty, were called into a room, and the shoes of each taken off and measured. After going through nearly the whole number, one at length was discovered which corresponded exactly with the impression, in dimensions, shape of the foot, form of the sole, and the number and position of the nails. The shoe belonged to Richardson.

From this single circumstance the inferences are :—That Richardson was at or near the cottage at some time, for some purpose; or that some other person wearing his shoes, was there; and this a person intending to commit the act might do, to escape detection himself, and throw suspicion upon the owner of the shoes. That the footsteps may have been made by some other person, wearing his own shoes, but shoes like those of Richardson, it being proven that shoes of that description were generally worn in that section of country; the person who left the footsteps therefore, may or may not have been Richardson, or if Richardson, he may or may not have been the murderer.

3. The surgeons who examined the wound, were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the instrument in his left hand. And it was proven on the trial that Richardson was left-handed.

The inferences here are :—Not that the man who committed the act was necessarily left-handed, as a right-handed man may in the struggle have found it convenient to use his left hand. But if it were certain that the murderer was left-handed, we are not for that reason, to seize the first left-handed man we find, and hang him for the murder.

4. The footsteps were traced from the cottage by an indirect road, through a quagmire or bog, in which there were stepping stones. And it appeared that the person in his haste and confusion, had slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of his leg.

And the stockings of Richardson were found concealed in the thatch of the apartment where he slept, and appeared to be much soiled, and to have some drops of blood on them. On examining the mud or sand on the stockings, it corresponded precisely with that of the mire or puddle adjoining the cottage, and which was of a very peculiar kind, none of the same kind being found in that neighborhood.

The inferences here are:—That Richardson was at or near the cottage, and that he made haste to leave it. That he may have committed the murder, but the circumstance standing alone does not amount to proof of the fact. It would be anything but a safe rule which should declare, that when a murder was discovered to have been committed, any man who was found afterwards to have been near the spot, and to have made haste to get away from it, should be deemed to be guilty of the murder. An innocent person coming suddenly upon the dead body, immediately after it was deprived of life, might fear that if found in that situation, he would be suspected of the crime, he would fly and conceal all traces of his being there for that reason. Such things we know have happened, and may therefore happen again. The drops of blood on the stockings may have been the blood of man or of beast. They may, if ascertained to be human blood, have come from the party's own nose, as Richardson alleged was his case. The presence of blood in any form, is one of those facts which, without the aid of corroborating circumstances, are apt to mislead, but in reality do not afford any reliable ground for criminative inferences,—with such aid however, they are generally of terrible significance.

5. Upon opening the body, the deceased appeared to have been some months gone with child.

It came out that Richardson had been acquainted with the deceased, who was of weak intellect, and had on one occasion been seen with her in a wood, under circumstances that led to a suspicion that he had had criminal intercourse with her; and on being taunted with such connexion with one in her situation, he seemed much ashamed and greatly hurt.

There are no inferences to be drawn from this circumstance standing alone, sufficient to raise even a suspicion of guilt.

6. It was proved by the person who sat next him when his shoes were measured, that he trembled much and seemed a good deal agitated.

Here again the circumstance points to no reliable conclusion, being equally insufficient to direct suspicion against the individual, or to designate any particular crime. The same may be said of the false statement that he had not been absent all the day from his work.

But when all these circumstances came to be brought together, they produce in their combination an assurance of this man's guilt, as high as could result from a strong array of direct evidence.

Now as to the manner in which an array of independent circumstances produce conviction upon the mind. We have said that this conviction is effected by narrowing the scope of enquiry as we proceed in the investigation, and by limiting the mind to the consideration of that one conclusion, deducible from each circumstance, which we find to be deducible from them all. It is almost impossible to imagine any single circumstance, which, when standing alone, will not point to a variety of conclusions, and in such case it is equally impossible to select any one of these conclusions as the true one, rejecting all the rest. But if there be an array of independent circumstances, and there is one conclusion to which they all point, we are impelled by force of the coincidence alone, to rest upon this as the true interpretation of the facts. Both experience and reason assure us, that if a number of circumstances all follow each other in regular sequence and in proper order of time, and in relation both to the crime and to the guilty agent, all tell the same story, we may safely rely upon that story as true. And so great is the improbability that each and all the circumstances are to be explained upon one hypothesis, and yet that hypothesis not be true, that in relying upon such a conclusion we should not in a thousand instances be once led into error.

Let the reader now turn back to the circumstances proved on the trial of Richardson, as we have enumerated them, and he will not fail to perceive, that while in reference to each of these circumstances standing by itself, numerous inferences may be predicated, yet all may be so predicated with equal, or nearly equal confidence, and that what we want is something to aid us in selecting from the various inferences, the one which is true. And it is in the addition of a second or third, or a greater number of circumstances, that we are supplied with this identical want. From the fact that one inference which with others is deducible from the first circumstance, is also deducible with others from the next, and again from the next, and in like manner from each one throughout the whole series, the mind is led to discard all other conclusions, and rest satisfied upon that one which it perceives to be common to all the circumstances, which conclusion it affirms to be the true one, by force of the coincidence alone. It is contingent truth when we set out upon the enquiry,—it is truth divested of all contingency when we get through.

But we are not to forget that our business is with the probative force of one circumstance standing alone, which we have said can

in no case be sufficient to warrant a conviction. And we hope now to be better understood when we say, that when the whole proof consists of but one circumstance, the inferences are all at large—they look to all points of the compass, and the truth may lie in one direction as well as another. We may say in such a case, that the accused *may* be guilty, and that is all we can say. The law requires however, that to authorize a conviction we must be enabled to say, that the accused *must* be guilty.

13. No person should be convicted upon circumstantial evidence, where it appears to be in the power of the prosecution to produce direct evidence.

14. To authorize a conviction upon circumstantial evidence, the hypothesis of guilt ought to be established as morally certain.

15. The guilt of the offender is established as morally certain, when the known and ascertained facts so coincide and agree with the supposition that the disputed fact is true, as to render the truth of any other supposition, on principles of reason and experience, exceedingly remote and improbable, and morally, though not absolutely and metaphysically, impossible.

16. If any of the established circumstances be absolutely inconsistent with the existence of the disputed fact it cannot be taken as true.

17. If there be any reasonable doubt as to the reality of the connection of the circumstances of evidence with the factum probandum, or as to the completeness of the proof of the corpus dilicti, or as to the proper conclusion to be drawn from the evidence, it is safer to err in acquitting than in convicting; or, as the maxim is more properly expressed, it is better that ten guilty persons should escape, rather than one innocent man should suffer.

18. The corpus dilicti may be proved by circumstantial evidence, but it must be of a character to produce a moral conviction in the minds of the jury, equivalent to that which is the result of direct evidence.

19. In all cases of homicide by poisoning, there are two principal questions to be determined by the jury, namely:—

1st. Did the deceased die of poison?

2nd. Was the poison administered by the accused, or by his means?

20. It is not essential that the proof of the death having been caused by poison, shall be complete in itself; it may result from chemical tests, post mortem appearances, and the moral conduct of the accused, all united.

21. It is not essential that the particular poison which caused the death should be made out, it is sufficient if it be shown that the death was caused by some poison.

22. The prosecution should be required to produce chemical evidence of the poisoning, in all cases where such evidence was attainable, and wherever attainable, it should be of the highest character, which, under the circumstances, could conveniently be attained, and a jury should not convict upon inferior chemical evidence, where it was in the power of the prosecution conveniently to furnish evidence of a more satisfactory character.

23. It is essential that the whole evidence shall establish as morally certain, according to the definition of that term as contained in the fifteenth section hereof,

that the death was caused by poison, and that the poison was administered by the accused, or by his means.

24. In cases of infanticide, though the facts may justify extreme suspicion that the death was caused by intentional violence, yet experience having shown that such facts are in a vast number of instances consistent with a death resulting from innocent or accidental causes, the proof of the corpus dilicti should, in every case of infanticide, be of a character to exclude every other possible hypothesis than that of guilt.

Infanticide is treated as if it were a crime which a woman can commit, but of which a man could not be guilty. The sin, the shame and the penalty are all on her head. The world has conspired to make it so, and the law, in this respect, has followed the bad example of the world.

The statute of 21, James I, which made the concealment of the death of an illegitimate child by the mother, conclusive evidence of murder, unless she made proof by one witness at the least, that the child was born dead, was repealed by the statute of 9, George IV, after it had been permitted to run a career of cruel wrong for two hundred years. It is melancholy to think, that far from being a dead letter on the statute book, this inhuman law was, during that whole period, enforced by the bench, with the same stern disregard of human sympathy, as if it were a law made to punish the most atrocious malefactors, and vast numbers of women were hurried off to the gallows, for no other reason than that they were unable to prove their own innocence.

Apart from the consideration however, that the poor woman has a partner in her sin, but none in her shame or in her punishment, there are many reasons why we should deal tenderly with her even where her guilt is manifest. In the hour of childbirth, when the frame has been on the rack, and the mind is distracted with pain, who can tell whether the act was not caused more by frenzy than guilt?

But even if the act be wilful, it is no proof that the offender is to be classed with the most degraded or criminal of her sex. The female whose sensibilities are less acute, because they have not been refined by education or the character of her associations in

life, will hug her infant and her shame both to her bosom, and the thought will never enter her mind to destroy the one as a means of preserving the other. And we have to rise higher in the scale of being, and we hope also in the scale of virtue, to find the mother, who, to avoid the scorn of the world, and preserve even the semblance of a title to its respect, can be induced to lay violent hands on her own offspring. The struggle, when it comes, must be terrible between the fear of shame and the natural instincts of maternal affection, the strongest which are known to the human heart. But no tenderness is shown her on this account. Among some of the most enlightened nations of the world, it has been deemed wise to give to the parent the power of life and death over his own children. But it is man that makes the laws, and woman, whatever they be, is compelled to obey them.

CHAPTER XVII.

CRIMINAL PROCESS.

It is the purpose of the Commissioners to recast such portions only of the existing criminal process and procedure, as in their opinion require amendment, leaving the residue of both systems to remain as they are.

1. Whensoever any complaint shall be made before, or it shall otherwise come to the knowledge of, any Justice of the Peace, that any person has committed any criminal violation of the law, within the County or City for which he shall be commissioned, or that any person has committed any offence out of the jurisdiction of such Justice, but is now within it, he shall thereupon issue his warrant, and cause such offender to be brought before him, or before any other Justice of the Peace of the same City or County.

2. It shall be lawful for such Justice to issue his warrant as aforesaid, or any such warrant, on a Sunday as well as any other day.

3. Such warrant may be directed to the Sheriff, or to any Constable by name, or to all Constables of the County or City within which it is to be executed, and shall state in brief terms, the offence, with the name or other description of the offender, and command the officer to whom it is directed to apprehend the offender, and bring him before the said Justice of the Peace, or any other Justice of the said County or City, to answer the said charge or information.

4. Such warrant may be executed by apprehending the offender within the said County or City, or upon fresh pursuit, within any other County or City of this State, and no objection shall be taken or allowed to any such warrant, for any defect therein in form or substance.

5. If the offender shall not be found within the said County or City, it shall be lawful for any Judge of this State, upon being satisfied that the said warrant is genuine, to back the same by making and signing an endorsement thereon, authorising the execution thereof upon the offender, wherever he may be found within this State, and the said warrant so backed shall be a sufficient authority for all Sheriffs and other officers within this State, to arrest the offender, and to carry him before the Justice of the Peace who first issued the said warrant, or before some Justice of the Peace of the County or City wherein the crime may be alleged to have been committed. Provided that nothing herein contained, shall be construed to prevent or render illegal the arrest of such offender, upon fresh pursuit in any County or City of this State, without the warrant being backed by a Judge as aforesaid.

6. When the warrant is issued in a County or City other than that in which the charge ought to be tried, and the offender is apprehended in virtue thereof, the Justice of the Peace before whom the accused is brought shall, by warrant, commit him to an officer, whose duty it shall be to convey the party to the County or City in which such trial is expected to be had, and shall there take him before some Justice of the Peace of such last mentioned County or City, to be dealt with according to law.

7. Whenever a party is brought before a Justice of the Peace, in any of the modes hereinbefore mentioned, and the evidence adduced shall be sufficient, standing uncontradicted and unexplained, to raise a strong suspicion of the party's guilt, it shall be the duty of the said Justice to commit such party to the jail of the County or City, or other place of confinement, until discharged therefrom by due course of law.

8. Provided, that for any offences other than treason, murder, rape or arson, the Justice of the Peace of the County or City in which the trial of the said charge is expected to be had, may, in his discretion, admit such party to bail, upon his procuring such surety or sureties as, in the opinion of such Justice, will be sufficient to ensure the appearance of the accused at his trial.

9. And where any person has been so committed for any offence bailable by a Justice of the Peace as aforesaid, it shall be lawful, at any time afterwards, and before the first day of the term of the Court at which the accused is expected to be tried, for the Justice who signed the warrant of commitment, in his discretion to admit the accused to bail in the manner aforesaid.

10. If the said committing Justice shall be of opinion that the accused ought to be bailed, he may certify on the back of the warrant or commitment such his opinion, and the amount of bail which ought to be required, in which case it shall be lawful for any other Justice of the Peace of the County or City, to admit the accused to bail in the sum so endorsed.

11. In all cases where a person already in prison, shall be admitted to bail as aforesaid, the Justice so bailing shall lodge with the keeper of the prison a warrant of deliverance, requiring the said keeper to discharge the person so bailed, if he be detained for no other offence, and thereupon the said keeper shall forthwith set the said party at liberty.

12. When all the evidence offered before the Justice of the Peace shall, in his opinion, be insufficient to raise a strong suspicion of such person's guilt, he shall forthwith order the accused to be discharged.

13. Provided, that no Justice of the Peace shall admit any person to bail for treason, murder, rape or arson, nor shall any such person be admitted to bail, except by order of a Judge of some one of the Circuit Courts, or of the Court of Common Pleas, or Superior or Criminal Court of the City of Baltimore.

14. Any of the Courts of this State, or in vacation any Judge thereof may, in their discretion, admit to bail for any crime whatsoever, at any time before conviction.

15. When a Justice of the Peace has refused to bail, it is still in the power of the Court or Judge to

have the party brought up on habeas corpus, and to admit him to bail.

16. A Court or Judge, in acting upon the question of bail, may be influenced to bail or not, by the nature of the transaction, the character of the offence, the probability of a speedy trial or the contrary, the length of imprisonment of the party, either past or prospective, by the health and bodily condition of the accused, by the existence of disease or contagion in the community or the prison where the party is confined, and by any like considerations.

17. A party shall be deemed to be out on bail until he is put in charge of the jury empanelled to try him, at which time he shall be deemed to be surrendered into the hands of the Court, and his bail to be discharged; provided, that in case no verdict shall be rendered by any jury in his case, or in the event of a new trial granted him, it shall still be in the discretion of the Court, or any Judge thereof in vacation, to admit him to bail.

Opinions are divided in reference to the power to bail. It is maintained by some, that the Courts of law in term time, or the Judges thereof in vacation, may, in their discretion and according to the circumstances, hold to bail in all cases whatsoever, either before or after bill found. Others, conceding it to be a matter of discretion, deny that such discretion can be legally exercised in treason, murder and other enormous felonies, and in no case after bill found. There are still others who deny the existence of any discretion, and who hold broadly that bail is absolutely ousted in all the higher grades of offences, and in all offences high and low, after bill found. The four walls of a prison, as the phrase is, being the only legal security in such cases for the party's appearance. But the weight of authority is believed to be vastly in favor of the opinion, that the Courts or Judges may bail in any and every case before conviction.

In England all doubts on the subject have been removed, by the recent statute of 11 and 12 Vic. c. 42, by which many of the above provisions in regard to criminal process are suggested, and which provides, that *in all cases of felony, and in certain misdemeanors, a Justice of the Peace may take bail* at the time of the examination, or after commitment and before the term of Court when the party is to be tried. But that no Justice of the Peace shall bail for treason, nor shall any person charged with that offence be bailed, except by order of one of her Majesty's Secretaries of State, or by the Court of Queen's Bench at Westminster, or a Judge thereof in vacation. All offences are therefore bailable in England, and all offences except treason and some special cases of misdemeanor, are bailable by a Justice of the Peace, either before or after commitment.

By the code of Virginia, a County or Corporation Court may bail in offences not punishable with death or the penitentiary, or if so punishable, only in cases where the suspicion of guilt is but slight. But where the offence is so punishable, and there is good reason to believe the party guilty, he shall not be bailed by a Justice or Justices either in or out of Court. But a Circuit Court, or the General Court, or any Judge thereof, may admit any person to bail before conviction.

The Commissioners think however, that where the suspicion of guilt is but slight, the party should be discharged, and that the question whether the party is to be admitted to bail or committed, can only arise where the evidence against him shall be sufficient to raise a strong suspicion that he is guilty of the offence charged against him.

The duty of the magistrate in deciding questions of bail, is both delicate and responsible. To delay or refuse bail in a bailable case, is an offence by the common law, as well as by the statute West. I and the *habeas corpus* act of 31, Char. II. It is declared moreover, by both the old and the new Declarations of Rights of this State, that excessive bail ought not to be required, while on the other hand if the magistrate take insufficient bail, he is liable to be fined if the criminal doth not appear. 4 Bl. 297.

It is most proper perhaps, on the party's own account, that no evidence should be received on a question of bail, but that which is inculpatory, lest the decision should go forth and be received by the community as a trial of the case, and a decision upon the merits. If the decision be in the party's favor, and he is admitted to bail, it may possibly aid him on his trial. But if the decision should be

adverse, and bail be refused after a full hearing of all the party's witnesses, it will go abroad as full notice to grand and petit juries, to the press and the community, that the Judge has heard the case and passed judgment upon it. And the solemn opinion of a Judge, especially if he be a man standing high in the public confidence, may give an unhappy direction to public opinion, and public opinion has hanged many a man. The Commissioners have not thought it wise to limit the Judge or the party to inculpatory evidence. If the accused shall choose to take the risk of showing his whole case, he should be at liberty to do so.

CHAPTER XVIII.

HABEAS CORPUS.

1. The writ of habeas corpus shall be granted forthwith by any Circuit Court, or by the Court of Common Pleas, or Superior or Criminal Court of the City of Baltimore, or by the Judge of either of the said Courts in vacation, to any person who shall apply for the same by petition, showing by affidavit or other evidence, probable cause to believe that he is detained without lawful authority.

2. The writ shall be directed to the person in whose custody the petitioner is alleged to be detained, and made returnable as soon as may be, before the Court or Judge ordering the same.

3. The writ may be served on the person to whom it is directed, or, in his absence, on the person having the immediate custody of the petitioner.

4. If any person upon whom such writ is served shall, in disobedience thereof, fail to bring the body of the petitioner, with a return showing the cause of his detention, before the Court or Judge, for three days after such service, or when he has to bring the peti-

tioner more than twenty miles, for so many more days as shall be equal to one day for every twenty miles of such further distance, he shall forfeit to the petitioner three hundred dollars.

5. It shall be the right of the petitioner to controvert the truth of the return of such writ, or to aver any matter repugnant thereto, or in avoidance thereof, whereby it may appear from all the circumstances of the case, that there is not a sufficient cause for such detention. And the Court or Judge shall, either in behalf of the petitioner or the person making such return, issue subpœna or subpœna duces tecum and process of attachment if requisite to be enforced as the like process may be enforced in Courts of Law, in order to compel the attendance of witnesses or the production of papers before the said Court or Judge, that it may be determined from all the testimony adduced, including the said return, whether the petitioner shall not be forthwith discharged.

6. If it shall be made to appear to the satisfaction of the Court or Judge, that there is probable cause for believing that the person detaining the petitioner is about to remove him from the place where he is detained, or that he will evade or not obey the writ, the Court or Judge shall order to be inserted in such writ, a clause commanding the Sheriff to notify and serve the writ on the person to whom it is directed, and to cause the said person immediately to be and appear before the said Court or Judge, together with the petitioner and the cause of his detention, and the Sheriff shall, immediately upon the receipt thereof, execute the same, and carry the said person with the petitioner before the said Court or Judge, who shall proceed to

enquire into the cause of the detention, and to decide thereupon in the manner aforesaid.

7. If the Sheriff to whom any writ of habeas corpus may be delivered, shall neglect or refuse immediately to proceed to execute the same, or to bring before the Court or Judge the person to whom the same shall be directed, together with the body of the petitioner, he shall forfeit to the petitioner the sum of five hundred dollars.

8. The Court or Judge before whom the petitioner is brought, after hearing the matter, both upon the return and the other evidence adduced, shall either discharge or remand the petitioner, or admit him to bail, as may be legal and proper.

[a] The aforegoing sections will be found to contain the essential provisions of the acts of 1809, c. 125, 1813, c. 175, 1819, c. 137, 1826, c. 223, thrown however into a condensed, and it is hoped an improved, form.

9. Any person arrested and either imprisoned or held to bail, upon any criminal charge, who shall not be indicted at the term next succeeding his arrest, shall, if the accused be in prison, on the last day of such term, be let out on bail, and if such accused party shall not be both indicted and tried at the second term after such arrest, he shall be discharged from imprisonment or his bail released, as the case may be, unless it shall appear to the Court that material witnesses for the State have been enticed or kept away, or are prevented from attending by inevitable accident, or unless the delay have been occasioned at the instance and for the accommodation of the accused.

10. It shall not vary the effect of the provisions contained in the last preceding section, that the cause has been removed for trial to another county or judicial circuit. Provided, if the cause be so removed upon the suggestion of the accused, the time for the indictment to be found, and also for the trial to be had, as mentioned in said section, shall be extended for such length of time as shall be equivalent to the delay occasioned by such removal.

These latter provisions are suggested by the seventh section of the habeas corpus act of 1809, omitting, however, that provision thereof which requires a petition or prayer in open Court, the first days of the term, in order to make the law available to the party. It is impossible for any one to foresee, when the term commences, whether or not any improper delay is to occur during its continuance, in the proceedings of the prosecution. Yet the remedy of the accused in the event of such delay, is made by the act to depend upon his power to know beforehand that it will occur. Similar provisions exist in the laws of Pennsylvania and Virginia, and it is believed in those of many of the other States.

CHAPER XIX.

A CORONER'S INQUEST.

1. A Coroner's inquest shall not be taken except in cases where it may be necessary.

2. A Coroner's inquest is necessary whenever, upon the discovery of a dead human body, the cause of the death shall be unknown, and there is reason to believe that the death was occasioned by violence, or by the criminal act of some person unknown.

It is unnecessary when the cause of the death is known, or where, if unknown, there is no reason to

suspect or believe that the death was the result of violence or any criminal act.

3. In taking an inquest the points to which the attention of the Coroner and his jury shall be directed are;

1st. What was the cause of the death?

2nd. If there shall appear to be good reason to believe that the death was caused by violence, or by the criminal act of some person; then, who is that person?

4. In reference to the first point, the Coroner shall, if in his judgment the case shall require it, have power to summon to testify before the jury, the best medical and surgical witnesses within the reach of his process, and also to have the body or any part of it subjected to the best chemical tests which are attainable.

5. In reference to the second point, he shall examine all the surrounding circumstances, and all such witnesses as may have any knowledge touching the case; and the whole of the examinations shall be taken down in writing, and with the inquisition of the jury shall be lodged with the Clerk of the proper Court, to be laid before the Grand Jury at the term of the Court which shall happen next thereafter.

6. The Coroner shall have power to summon witnesses to attend before him, at such time and place as he may direct.

7. Where any person is charged by the inquest with the commission of the offence, the Coroner may issue a warrant for his apprehension, in the same manner as a Justice of the Peace, but such warrant shall be made returnable before a Justice of the Peace, and shall be proceeded in by him as in cases where a charge has been made before such Justice.

8. In cases where the Coroner shall think there is good reason for so doing, the proceedings before the inquest may be secret.

If the Question were asked, what is the use of a Coroner's inquest, it might be difficult to answer it. It was originally a proceeding had for the ascertainment of the rights of the crown, which became entitled to certain forfeitures called deodands in all cases of death by violence. But after all such barbarous exactions have ceased to be legal or respectable, or in a community where they never existed the public have but little interest in a Coroner or his jury. The inquest is called together generally when the public mind has been thrown into excitement by some sudden event, and in the contagion of such excitement, without anything like a calm investigation of the facts, and upon all sorts of evidence, legal and illegal, the jury say that the deceased came to his death by the hands of this man or that man, and the newspapers, upon the authority of what they choose to term a solemn verdict, proclaim it to the world that this man or that man has been guilty of an awful murder. The whole evidence, to aggravate the evil, is taken down and published, the public mind becomes fixed in the one idea of the party's guilt, and when the accused comes before a Court and jury to take his trial, it is to find that he has already been tried and convicted.

A Coroner's inquest never acquits. Their duty is, not according to the ancient theory of the proceeding, to ascertain the instrument of the death, and the value to which the crown has become entitled by the catastrophe, but passing over all such considerations, they go regularly to work to try the individual suspected, and just as regularly to find him guilty. Then let him prove his innocence if he can.

It is the duty of Justices and other conservators of the peace, to examine into the cases of individuals charged with or suspected of crime, and to commit for trial or discharge according to the character of the case. The duties of the Magistrate are the necessary and appropriate preliminaries to the trial of offenders, and they have this to recommend them, that if a man is not guilty, or the evidence not sufficient to warrant his detention for trial, he is discharged. But the Coroner's jury convict a man who is absent, upon evidence with which he is not confronted, and neither commit nor discharge him.

Still a Coroner's inquest may be of use when the question whether a death has been caused by violence, or by any unlawful means, or by casualty, is in doubt; and where, if a homicide has been committed, the guilty agent is neither known nor suspected. In such cases the Magistrate cannot act, for his business is to deal with those who are brought before him charged with, or under strong suspicion of crime. In such cases the Coroner and his jury may peradventure bring the crime and the perpetrator of it to light, so that the Magistrate may act upon the case.

There is but one crime, however, of which the Coroner has cognizance, and that is the crime of homicide, because anciently it was in cases of death by violence that the King was entitled to his forfeiture. With cases of treason, arson, rape, robbery, burglary and other heinous offences, the Coroner has nothing to do. The ordinary machinery for arresting offenders and bringing them to justice in such cases, is found amply sufficient. And the reason why we have the assistance of the Coroner and his jury in cases of homicide alone at the present day is, that in barbarous times the King was entitled to the instrument of death as his forfeiture, and the Coroner's business was solely to enquire of its value.

But if the proceeding is convenient to some extent, and for this reason should be permitted to escape the hand of reform, yet where the cause of the death is known, as where two fight in the public street and one of them is killed, of what earthly use is a Coroner and his jury? The Magistrate can do his duty in such a case, as well without the assistance of the Coroner as with it. Certainly the Coroner is not called upon to do that which the Magistrate is to repeat without variation after him. Both are not necessary to do the same identical thing.

CHAPTER XX.

OF SEARCH WARRANTS.

1. If there be complaint on oath that personal property has been stolen, embezzled, or obtained by false pretences, and that it is believed to be concealed by a person or by persons who shall be named, in a particular house or place, it shall be lawful for any Justice of the Peace, before whom such complaint and oath are

made, if satisfied that there is reasonable cause for such belief, to issue his warrant to search the house or place specified for such property.

2. Upon like complaint on oath, according to the nature of the case, the Justice of the Peace, if satisfied that there is reasonable cause therefor, shall issue a warrant to search specified places for the following things:

1st. Counterfeit or spurious coin, forged bank notes, and other forged instruments and writings, or any tools, dies, plates, materials or machines for making them.

2nd. Any book or other thing containing obscene language, or any print, picture, figure or description, manifestly tending to corrupt the morals of youth, and intended to be sold, loaned, circulated or distributed, or to be introduced into any school or place of education.

3rd. Any gaming apparatus or implements used, kept or provided for unlawful gaming, or in any place resorted to for unlawful gaming.

3. The warrant shall direct the officer to whom it is directed to seize such stolen property or other unlawful articles or things, and bring the same with the person in whose possession they may be found, before the Justice issuing the same.

CHAPTER XXI.

CHANGE OF VENUE.

1. In all presentments or indictments pending in any of the Courts of this State, the Judges thereof, upon suggestion in writing by the State's attorney or prosecutor for the State, or by the accused, as the case may

be, supported by affidavit or other proper evidence, that a fair and impartial trial cannot be had in the Court where the said presentment or indictment is depending, shall order and direct the record of proceedings to be transmitted to the Court of an adjoining County for trial, whether the said suggestion be made before or after issue joined, or whether such adjoining County be within the same judicial circuit or not.

The new Constitution (art. 4, sec. 28,) gives the right of removal in respect of criminal cases to an adjoining County, whether it be within the same circuit or not; adding however the proviso that the suggestion shall be made before or during the term in which the issue may be joined, "*and that such further remedy in the premises may be provided by law, as the Legislature shall from time to time direct and enact.*"

Some difficulty has arisen in regard to the meaning of this proviso, in reference to the extent of the power which was intended to be reserved by it to the Legislature. It has been supposed by some, "that such further remedy in the premises" means simply, that as far as the Constitution goes its provisions shall stand, and that the legislative power is limited to such remedies as are additional to those of the Constitution. That the removal must therefore take place before or during the term in which the issue is joined, and that a law authorizing a removal afterwards would be void. If this be the true meaning of the proviso it is an unfortunate one, because the necessity for removing a case is never so urgently felt as after a trial has been had, and the whole community, having heard all the evidence and the discussions upon it, have taken sides either for or against the accused. It is important therefore, that the power of removal in this one respect at least shall be changed, if the Legislature have the power to do so.

The question then is, has the Legislature such a power? We think it has, and that it was not the intention of the Convention to deny it this very power.

We think indeed the question has been decided. The act of 1804, chap. 55, sec. 2, itself a constitutional provision, provided that, upon suggestion, the record should be transmitted to the Judges of any County Court "*within the district for trial,*" and like the new Constitution it contained the proviso, "*that such fur-*

ther remedy may be provided by law in the premises, as the Legislature shall from time to time direct and enact." And the act of 1849, ch. 518, having provided that a case might be removed to any "adjoining *judicial district* for trial," the question came up for decision, whether the Legislature had not transcended its powers? In opposition to the law, the view was of course, that as the Constitution had expressly limited the right of removal to some other Court *within* the district, reserving to the Legislature the power to provide such "further" remedy as it might deem proper, it was not within the reserved power, but repugnant to it, to extend the right of removal to a Court *without* the district. That the effect of the act was to displace the remedy contained in the Constitution, and to put in its room another and a different remedy. But the Court held that the proviso had no such narrow meaning as the one contended for, but was "designed to confer on the Legislature the power to regulate at will, the subject of removals." 2 Mag. 274.

If the language of the proviso were, "that such remedy may be provided by law, as the Legislature may deem proper," the whole subject of removals would be, beyond question, within its power. The restriction, if there be one, is in the word "further." But the Court of Appeals have said that that word imports no restriction upon the legislative will; that the right of removal, as contained in the Constitution, was intended to stand until other and different regulations were made by law.

A law curtailing the right of removal would not be valid. This was decided in the case of The State *vs.* Dashiel, 6 H. & J. 268. The Legislature have no power to abrogate or narrow the right of removal, but it may extend or enlarge it. And this was the meaning intended to be expressed by the terms, "further remedy in the premises:" being equivalent to a power to enlarge the remedy, and remove from it all restrictions.

And this construction of the Constitution is the most appropriate to the character of the subject. It was intended to make the great right of removal a part of the fundamental law, by which the right itself should be placed beyond reach of the Legislature, reserving to that body the power to modify and enlarge the right, as experience should from time to time dictate as wise and proper.

2. Either party intending to remove the cause to another County for trial, shall make his suggestion,

supported by affidavit or other evidence, before any juror is sworn on the panel, and not afterwards.

3. The right of removal shall exist, notwithstanding anything contained in the last preceding section, in cases where the jury have been discharged on account of not being able to agree of their verdict, or where, from any other cause, no verdict is rendered, and also after a new trial has been granted after verdict.

In the case of Price *vs.* The State, 8 Gill, 295, the Court of Appeals held, that the suggestion by the Attorney General for a removal of the cause, did not come too late after eleven jurors were sworn, and the case was removed at that stage of the proceeding and tried in another County—and this too in a case of murder. The soundness of this decision, as a construction of the act of 1804, ch. 55, has been much doubted, and the Commissioners, with all the respect which they sincerely entertain for the late Court of Appeals, feel compelled to join in these doubts.

The true foundation of the right of removal is, that there may be public excitement or prejudice where the facts arose, to avoid the effect of which on the trial, the privilege of changing the venue is given to either party, upon his own suggestion and affidavit merely. But the vice of the decision in Price *vs.* The State is, that the power of removal is conferred by it upon either party, where no public excitement or prejudice is alleged or pretended, but where the sole object is to get rid of a jury, the complexion of which, after a part of it, perhaps the greater part, have been sworn, is not liked by the party making the suggestion.

Now that the power of removal ever was intended to be used as a means of objecting to a jury, and of setting aside a whole panel save one, for no other reason than that the party may not like it, we cannot believe. We cannot believe it, because the law has provided its own means of challenging and objecting to jurors and juries, and this is not one of them. The law declares that the accused in cases of treason, shall be entitled to thirty-five peremptory challenges, and to twenty in cases of felony. But was it ever intended that the accused should have all his peremptory challenges, and all his challenges for cause, and afterwards through

this right of removal, the further right of setting aside the panel, without giving any reason for it?

Let it be remembered that the State has no right of challenge except for cause; but that for cause, she may challenge the whole array or the separate jurors, and have triers appointed to determine whether they stand indifferent to the parties—or may examine each juror upon the *voire dire*. Beyond this the State has no right to interfere with the selection of the jury. Can it therefore be believed, that a power should be conferred upon the State which should override all the rights given to the accused—which should virtually confer upon the prosecution in the trial of criminal cases, rights which have always been carefully and jealously withheld from it, and all this by a law in which the power in question is not mentioned at all? The thing is impossible.

The decision referred to turns upon the meaning of the word "trial." The cause, it is said, is to be removed to another County *for trial*, and it must therefore be removed before the trial or any part of the trial is had in the Court ordering the removal. And the Court starting with this assumption, determine that the trial could not be said to have commenced until the whole panel was sworn. Therefore either party may remove at any time before the twelve jurors have been sworn on the panel. But this reasoning is merely fanciful, and the Court have resorted to meanings and distinctions which never were in the mind of the law makers.

If it had been proposed to the Legislature to pass a law, authorizing either party to remove the cause after all the jury save one had been sworn, and that the affidavit for the removal should conform to the fact "that the party did not like the jury so far as sworn," and prayed for the removal for that reason, it is not conceivable that one man in the Legislature would have voted for it. And yet this is the very thing which the law makers have been made to say by construction.

There is nothing said in any of the provisions on this subject, either legal or constitutional, in reference to the particular stage of the cause in which the removal shall be had. They simply declare that the cause may be removed to another County for trial.

If it were asked therefore, at what stage of the proceeding a party shall be held to have made his election to take his trial where the facts arose? what must be the answer? That he has determined his election when the Clerk has said to him:—"These good men that you shall now hear called, are those which are to pass

between the State of Maryland and you on your trial; if therefore you will challenge them or any of them, you must do so as they come to the book to be sworn, and before they are sworn, and you shall be heard." One man comes to the book—the prisoner says "swear him," and he is sworn. Has he made his election or not? Could he say to the Court I do not like this jury, and for the chance of getting a better one, will remove my cause to another County?

The construction referred to give this right to the accused. But it does more—it gives the same right to the State, to take chances for a better jury by breaking up the trial and running off to another County, the State having by law no right except for cause shown, to interfere in the selection of the jury at all.

CHAPTER XXII.

EMPANNELING THE JURY.

1. In trials for treason or felony, the question whether a juror stands indifferent to the parties, shall be determined in one of two modes:—

1st. By examination on the voire dire.

2nd. By triers.

2. When the juror is examined upon the voire dire he shall, before he comes to the book to be sworn in chief, be examined on oath as follows:—

1st. Have you any conscientious scruples in regard to capital punishment?

If the juror answer that he has, and that he would not convict a person of an offence punishable with death, he shall be deemed disqualified.

If he answer that he has no such scruples—or that although opposed to capital punishment he would nevertheless, should the testimony warrant it, convict a person of a capital offence, he shall then be further questioned:—

2nd. Have you formed or expressed any opinion as to the guilt or innocence of the accused?

If the juror shall answer that he has not, he shall be competent.

If he shall answer that he has either formed or expressed an opinion, he shall then be asked the further question:—

3rd. Are you conscious of any bias or prejudice on your mind, either for or against the accused?

If he shall answer that he is not, he shall be deemed competent.

If he shall answer that he is so conscious, he shall not be sworn on the panel.

3. Where either party shall elect to have triers appointed, he shall move the Court to that effect. Whereupon the Court shall, if no juror be sworn, appoint three persons as triers. If one juror be sworn, the Court shall appoint two persons who, with the one juror, shall be the triers. If two jurors be sworn, the Court shall appoint one person; and after three jurors are sworn, the Court shall appoint three persons from the number sworn, who shall be the triers.

4. The juror whose indifference is in question, shall be a competent witness before the triers.

5. The majority of the triers shall be competent to find the juror indifferent or the contrary.

6. There shall be no debate upon the evidence before the triers.

7. In no case shall triers be appointed after a juror has been examined on the voire dire.

The impartiality of a juror is tested in one of two modes. The one is by triers, the other by putting him upon his *voire dire* and taking his own oath for it. But it is not competent for a party to resort to both modes, for besides the great consumption of time it would occasion, the practice does not seem to be right or proper in itself, that a gentleman who comes into Court to take his part in the administration of justice, and who has no interest or stake in the trial, should be first put upon his oath as to the state of his mind in reference to the parties, and if his answers are not altogether acceptable, that witnesses should be called up to contradict his oath. The party ought to know whether he is willing to trust the juror on his oath or not. If he is unwilling to trust him, let him demand the appointment of triers. But when he elects to make the juror the judge of his own impartiality, the answers of the juror ought to be final. To take both chances, apart from its injustice to the juror, is more than the party ought to claim.

The principle of such a practice is wrong for another, and still more substantial reason, which is, that from the very nature of the interrogatories put upon the *voire dire*, it is impossible that any person save the juror himself shall be able to know whether he has told the truth or not.

He is asked whether he has formed or expressed an opinion? He answers that he has formed or expressed an opinion from newspaper accounts of the case. He is again asked whether he is conscious of any bias or prejudice upon his mind, either for or against the prisoner? He answers that he is not. Who can contradict him? To whom can it be known whether he speaks the truth or not? His own examination goes deeper than the investigations of the triers. He speaks of the state of his mind at the time he comes to the book: by what means are the triers to arrive at a knowledge of that subject matter. To prove that he has previously expressed himself in strong language, does not prove that he is not now speaking the truth; and it is therefore of necessity that when he is made the judge of his own impartiality, his answers must be final.

In England the mode of trying a challenge to the favor is by the appointment of triers. They do not swear a juror upon the *voire dire*. That is a proceeding purely American, but is believed to be a good practice.

8. Every person indicted for treason shall be entitled to thirty-five peremptory challenges, and every person

indicted for felony shall be entitled to twenty peremptory challenges.

9. It shall be the right of the accused first to determine whether the juror stands indifferent to the parties, either by triers, or upon the voire dire, and afterwards to exercise his right of peremptory challenge.

10. No challenge of a juror shall be allowed the State except for cause.

CHAPTER XXIII.

THE INDICTMENT.

1. If, in any trial for felony, any variance shall appear between the statement in the indictment and the evidence offered in proof thereof, in the name of the County or place, or in the name or description of any person, or other name or description whatsoever, it shall be lawful for the Court, if it shall consider such variance not material to the merits of the case, and that the accused cannot be prejudiced thereby, in his defence on such merits, to order such indictment to be amended, according to the proof, by the Clerk or other officer of the Court, in every part thereof which it may become necessary to amend, on such terms as to the postponement or continuance of the cause as the Court shall think reasonable. And after such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner as if no such variance had occurred. And thereupon such amendments shall be made by the Clerk or other officer, under the direction of the Court, by endorsement of the same on the said indictment.

2. In making out a formal record for any purpose after such amendments, such record shall be made out in the form in which the indictment was after the amendment was made, without taking any notice of the fact of such amendment having been made.

3. In any indictment for murder it shall not be necessary to set forth the manner in which, or the means by which the death was caused, but it shall be sufficient to charge that the accused did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased. And the jury may, upon such indictment, bring in a verdict against the accused for murder of the first degree, murder of the second degree, extenuated homicide, or negligent homicide.

4. In any indictment for forging, altering, stealing, embezzling, destroying or concealing, or for obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac simile thereof, or otherwise describing the same or the value thereof.

5. In all cases wherever it shall be necessary to make any averment in any indictment as to any instrument, whether the same shall consist wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac simile of the whole or any part thereof.

6. In any indictment for forging, altering, offering, disposing of or putting off, any instrument whatever,

or for obtaining any property by false pretences, it shall be sufficient to allege in the indictment and prove on the trial, that the accused did the act with intent to defraud, without alleging or proving the intent of the accused to defraud any particular person.

7. If, upon the trial of two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part of such property, the jury may convict such of said persons as shall be found to have received any part of such property.

8. Whereas it frequently happens that the principal in a felony is not in custody or amenable to justice, although several accessories to such felony or receivers at different times of stolen property, the subject of such felony may be in custody or amenable to justice. It shall, in all such cases, be lawful for any number of such accessories or receivers to be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

9. Several counts may be inserted in the same indictment against the same person, for any number of distinct acts of stealing not exceeding three, which may have been committed by him against the same person, within the space of six calendar months from the first to the last of such acts, and to proceed therein for all or any of them.

10. If, upon any trial for larceny, it shall appear that the property alleged to have been stolen at one time, was taken at different times, the State shall not,

by reason thereof, be required to elect, upon which taking it will proceed, unless it shall appear that there were more than three takings, or that more than six calendar months elapsed between the first and last of such takings; and in either of such cases, the State shall elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings.

11. In every indictment in which it shall be necessary to make any averment as to any money or any bank note, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note: and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved.

12. In every indictment for perjury, it shall be sufficient to set forth the substance of the offence charged, and in what Court or before whom the oath or affirmation was taken or made, without setting forth the particular proceeding or any part thereof, in which the oath or affirmation was taken or made, and without setting forth the commission or authority of the Court or person before whom such offence was committed.

13. In any indictment for subornation of perjury, it shall be sufficient to allege the offence of the person who actually committed such perjury, and then to allege that the defendant unlawfully, wilfully and corruptly did cause and procure the said offence in manner and form aforesaid to be committed.

14. No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," nor of the words "with force and arms," nor of the words "against the peace, government and dignity of the State," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or vice versa, nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name, nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of, or imperfection in, the addition of any person accused, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, or injury, or spoil, in any case where the value or price, injury or spoil, is not of the essence of the offence.

15. Every objection to any indictment for any formal defect apparent on its face, shall be taken, by demurrer or motion, to quash such indictment before the jury shall be sworn, and not afterwards; and every Court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment forthwith to be amended in such particular by the Clerk or other officer of the Court, and

thereupon the trial shall proceed, as if no such defect had appeared.

16. In any plea of former conviction or former acquittal, it shall be sufficient for the party accused to state that he has been lawfully convicted or acquitted, (as the case may be,) of the said offence charged in the indictment.

CHAPTER XXIV.

SOME MISCELLANEOUS RULES.

1. In the arraignment of the prisoner the Clerk shall say, "A. B. stand up and hear your charge," without requiring him, either in the arraignment or charge, to hold up his hand.

2. When, in a criminal case, the jury are kept together beyond the day on which they are empanneled, the Court shall direct the Sheriff or other proper officer to furnish the jury with suitable board and lodging, during the time they may be so confined, the expenses thereof not to exceed a dollar per day for each juror, to be paid by the proper County or City.

3. The oath of the bailiff to the petit jury in a criminal case, shall be as follows:—"You shall well and truly keep this jury together in some convenient room, without meat or drink, bed or bedding, except under the direction or permission of the Court; you shall suffer no person to speak to them, nor shall you speak to them yourself, unless to ask them if they have agreed of their verdict, without the leave of the Court. So help you God!"

CHAPTER XXV.

NEW TRIAL AND APPEAL.

1. The Courts shall have power in all criminal cases, including cases of treason and felony, to grant new trials, as well for errors of the jury upon questions of law as of fact, and for misbehavior in the jury, fraud in procuring the verdict, and because of material evidence discovered since the trial, but no new trial shall be granted when the verdict is one of acquittal.

By the law of England, and if the subject were carefully looked into, perhaps by the law of Maryland also, the power of the Courts to grant new trials in criminal cases, does not extend to cases of treason and felony, but is confined to offences of the grade of misdemeanor. (See 6 T. R. 619, 1 East. Rep. 143.) The reason for this rule is not given, and no satisfactory reason, it is believed, can be given for it: for certainly if the right to grant a new trial exist in any case, it ought to exist where the liberty or the life of a citizen may, in absence of such right, be unjustly and illegally sacrificed.

It has been made a question whether, since the adoption of the new Constitution, making the jury in criminal trials the exclusive judges of the law as well as fact, the Courts have any power to interfere with their verdict for error or mistake, merely in law. But no difficulty is perceived in the objection. The power of the jury to find upon the *law* since the new Constitution, is not more exclusive than it always was to find upon the *facts*, yet such exclusive power to find upon the *facts* never was supposed to be any objection to the power of the Court, to grant new trials for errors of the jury in judging of the facts. The doctrine of new trials has always conceded the exclusive power of the jury over the *facts* of the case, but it concedes also the power of the Court where injustice has been done by the mistake or misjudgment of the jury, in regard to the facts, to set the verdict aside and give the party a chance of another jury.

The existence of the power to grant new trials does not imply a right in the Court to *reverse* the decision of the jury. The verdict

is set aside because the Court think it decidedly wrong—but the Court cannot render such a verdict as it may think right. The Court simply says, that this verdict must not stand—and that is all it does say or can say. The Court can say this, where the verdict is wrong, on account of a misconception by the jury of the *law*, as well as for mistake of fact, and the fact that the jury are the exclusive judges of either or both, is no objection to the exercise by the Court of its power to grant new trials—that being a power simply to annul what has been done on account of a clear mistake or misconception of law or fact.

The constitutional provision rendering the juries wholly independent of the Courts, both in regard to law and fact, was only intended to regulate proceedings during the trial. It was not intended to compel the Courts to render judgment upon every verdict, whether the Court is satisfied with it or not. And certainly no citizen who is put upon his trial for a crime, will feel it to be an unnecessary assurance of his safety, that the Court shall be vested with a clear and well defined power, to set aside the verdict if it be against him, and grant him a hearing before another jury, if he shall be able to show that the verdict is clearly contrary to law, or founded upon an evident mistake of the facts.

Prudent men may well feel distrustful of a total prohibition of the interference of the Courts with the juries in criminal cases, and as, under the Constitution, there is no mode in which the corrective power of the Court can be exercised, except through the medium of new trials, the duty of the Legislature is the more urgent to regulate the whole subject of new trial upon an enlarged and well defined basis.

2. There shall be an appeal to the Court of Appeals as of right, from every decision of the Court refusing to grant a new trial, on account of error, misconception or mistake of the jury in matter of law, but no right of appeal shall exist upon the refusal of the Court to grant a new trial for error, misapprehension or mistake of the jury in matter of fact.

3. Either party shall be entitled to appeal from any decision of the Court upon demurrer, motion to quash the indictment or any count thereof, or in arrest of judgment.

4. A writ of error shall not be necessary or used in any case, and the proceeding to an appeal shall be as is hereinafter mentioned.

5. Either party alleging error in the decision of the Court upon demurrer, motion to quash, or in arrest of judgment, shall deliver to the Clerk a memorandum in writing, in form following, or to the like effect:

State, vs. A. B. } Indictment (*or presentment*) for ——— ——— (*Here state the offence.*)

The State (or prisoner or traverser as the case may be) says there is error in the decision of the Court, in overruling (or granting as the case may be) the demurrer, (or motion to quash, or in arrest of judgment, as the case may be) and for this he prays an appeal.

Signed A. B., Attorney for the State,
(*or C. D., for prisoner or traverser.*)

6. The accused, alleging error in the refusal of the Court to grant him a new trial, shall make out a bill of exceptions, in form following, or to the like effect:

State, vs. A. B. } Indictment (*or presentment*) for ——— ——— (*Here stating the offence.*)

At the trial of this cause, the State proved that (here state the facts connected with the point raised, and necessary to its elucidation in a general way, without stating the testimony in detail, or the names of the witnesses.)

And the accused proved that (state the facts as above.)

The verdict of the jury being against the accused, he moved the Court for a new trial, upon the ground that (here state the question of law in the decision of which the error of the Court is alleged.)

And the Court having refused to grant a new trial for the reason alleged, the accused prays an appeal, and that the Court will sign this his bill of exceptions.

The —— day of ——— 18

(Place of the Judge's signature.)

7. The Judge shall sign the bill of exceptions, provided the statement of the facts proved, and of the question raised and decided upon the motion for a new trial, are correctly set forth.

8. The appeal shall be prosecuted to the term of the Court of Appeals which shall happen next thereafter, or to the term of the Court of Appeals then in session, if conveniently may be.

9. The arguments of counsel in criminal cases in the Court of Appeals, shall be in print and in pamphlet form, unless the Court of Appeals, by special order, shall agree to hear the argument of any particular case ore tenus.

10. In all cases of appeal, the execution of the sentence shall be suspended, until the case has been decided by the Appellate Court.

11. The Court of Appeals shall give preference to appeals in criminal cases, which shall be heard and decided as soon as conveniently may be after the record is sent up, whether the appeal have been taken in term time or vacation of the Court of Appeals.

THE END.