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FROM THE
BRIGHT LEGACY

One half the income from this Legacy, which was received in 1830 under the will of

JONATHAN BROWN BRIGHT
of Waltham, Massachusetts, is to be expended for books for the College Library. The other half of the income is devoted to scholarships in Harvard University for the benefit of descendants of

HENRY BRIGHT, JR.,
who died at Watertown, Massachusetts, in 1806. In the absence of such descendants, other persons are eligible to the scholarships. The will requires that this announcement shall be made in every book added to the Library under its provisions.
that partial consideration for a promissory note could not be shown in reduction of damages (Noble v. Smith, 264); that the estate of a mortgagee in the mortgaged premises was attachable after condition broken (Symmes v. Hall, 318; Hooten v. Great, 243); that while a grantee of land in open possession under his deed, nothing passes by a subsequent deed by the grantor to a third person, though recorded before the first. (Anon., 370.) In Hone v. Lovejoy, 257, it is judiciously determined that a captain in the militia is a "gentleman by office, and if sued by the addition of yeoman," may abate the "writ." The court took a distinction between gentleman by courtesy and reputation, and seemed to be of the opinion that, if a man was a gentleman by courtesy, "yeoman" was not his due addition.

The appendix upon the Writs of Assistance is prepared with great thoroughness and labor, and in no treatise before, we believe, has this subject received so much attention. Discussing it from a historical point of view, and in the light of precedent, if the author comes to a conclusion upon the validity of these writs as variance with views commonly entertained, it is not for the want of learned and careful research and an examination conducted with signal clearness, vigor and skill. In another appendix, a valuable discussion upon the powers and rights of juries is presented.

We commend the volume to the profession, as a valuable law book; and to the general reader, as a monument of history too important to escape his notice.

There is a singular quaintness to these early cases. They are quaint with the habits of the olden time; but fresh, and "in point," by the vigorous principles of the common law which never grow old. Nor is which give a volume of reports set, "many a wise saw and modern instance," left out. The cases to which the reader will turn with the interest are those of the Writs of Assistance, which were argued twice by the highest ability that could be brought to bear on either side. Thanks that here are preserved authentic and contemporaneous reports of this great contest before the forum, on which the destinies of the colonies art. Of interest and importance also are the cases the notes bearing upon slavery in Massachusetts and in England, pp. 36-33 and 94-38; the repeated charges of the Chief Justice (Hutchinson) to the grand juries upon the subject of libel, with which he seems to have opened every term of the court; the account of the destruction of the Chief Justice's house, and his appearance in court, and pathetic appeal; of the shutting up of the courts, when Adams and Gridley and Olin (with tears) argued for their opening; the Berkshire affair, and many other matters and cases of a public nature with which the volume is filled. It is also interesting to observe in what questions of a purely legal nature the law in Massachusetts now is opposite to that of 1770. Thus the doctrine then was that a sale of goods, unless by sample, implied a warranty that they were merchantable (Baker v. Trevisker, 4); that a new trial would not be granted where there was evidence on both sides (Angier v. Jackson, 84); that a promissory note given for a debt was no payment (Petersall v. Ap-
REPORTS OF CASES
ARGUED AND ADJUDGED IN THE
SUPERIOR COURT OF JUDICATURE
OF THE
PROVINCE OF MASSACHUSETTS BAY,
BETWEEN 1761 AND 1772.

BY JOSIAH QUINCY, JUNIOR.

PRINTED FROM HIS ORIGINAL MANUSCRIPTS IN THE POSSESSION OF
HIS SON, JOSIAH QUINCY, AND EDITED BY HIS GREAT-
GRANDSON, SAMUEL M. QUINCY.

WITH AN APPENDIX
UPON THE WRITS OF ASSISTANCE.

"Many records have in long process of time been lost, and possibly the things themselves forgotten at this day; which yet, in or near the times wherein they were made, might cause many of those authoritative alterations in some things touching the proceedings and decisions in law; the original cause of which change being otherwise at this day hid and unknown to us."—Hale's History of the Common Law.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1865.
Entered according to Act of Congress, in the year 1865, by
LITTLE, BROWN, AND COMPANY,
in the Clerk's Office of the District Court of the District of Massachusetts.

RIVERSIDE, CAMBRIDGE:
PRINTED BY H. O. HOUGHTON AND COMPANY.
PREFACE.

THE name of Josiah Quincy, Jr., as a patriot, is well known to those who are familiar with the provincial history of Massachusetts. But of Josiah Quincy, Jr., as a lawyer, of his professional labors and acquirements, and his position at the bar, nothing can now be known except by his immediate descendants. He was a jurist as well as a patriot; and his love of his profession for its own sake was only surpassed by his devotion to the cause of his country.

The manuscripts here published are in the possession of Hon. Josiah Quincy, the son of the reporter, now in his ninety-third year. It is needless to say that they are now offered to the profession merely as matters of legal and historical curiosity and interest; the only other ante-revolutionary reports which have ever been published in this country being 1 Harris and McHenry, Jefferson, and 1 Dallas, pp. 1 to 29.

These manuscripts consist of three volumes; one with paper covers, (from the original color of which it is referred to as "Red Reports," ) and two others bound in parchment, and numbered "3" and "4." The first two volumes of this set are missing, and were probably destroyed in a fire by which the reporter's law library was lost. The Middlesex cases reported between pp. 318 and 340 are contained in the fragment of another volume apparently just commenced, but not in the handwriting
Preface.

handwriting of Josiah Quincy, Jr. Whether in these cases he employed an amanuensis, or whether the volume is the work of another reporter, cannot now be known, as the first pages were unfortunately destroyed by one ignorant of their value. All the others are in Quincy's own hand, the reports at the first term having been taken while he was yet an undergraduate in college. The first set of foot-notes, to which reference is made by asterisks, &c., are the original notes of the reporter; those referred to by numerals are by the editor, as are also the marginal notes. The "Records" referred to in the margin are those of the Superior Court of Judicature, and are to be found in the Clerk's Office of the present Supreme Judicial Court. The notes and Appendix to the celebrated case of the "Writs of Assistance," and the notes relating to Slavery in Massachusetts and in England, are the work of Horace Gray, Jr., Esq., of the Boston Bar.

This volume is printed verbatim et literatim from the manuscript, and, as the reader will see, in some places partakes more of the nature of a private journal than of that of a volume of law reports. It had been my intention to give an outline of the history of the Province during the period which it embraces, as well as some biographical sketches of the most distinguished of those whose names are mentioned, but that the breaking out of the war in which the country is still involved has suddenly called me from the profession to more engrossing duties, which allow neither time nor opportunity for the completion of the task proposed. For all other omissions of whatever the preface should explain or supply, I must ask the reader to accept the same excuse.

SAMUEL M. QUINCY.

Port Hudson, La., Feb. 9th, 1864.
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August Term
II Georgii Ter. in Sup. Cur.

Present:
The Honourable
Thomas Hutchinson, Esqr., Chief Justice.
Benja. Lynde,
John Cushion, Esqrs., Justices.
Peter Oliver,

Poor vs. Dougharty.

The Defendant Dougharty loft some Goods, which he suspected Poor had stolen; upon which Complaint was made to a Justice of the Peace, who heard their several Stories, and ordered Poor to Goal for further Examination. Poor was again examined, but Dougharty not appearing, was discharged, and suffered to go without Day. The Justice kept no Record of any Part of the Transaction. The present Action was commenced by Poor vs. Dougharty for false Imprisonment. The Justice was offered as a Witness to prove the Facts alleged, and objected to, for that whatever came before him was Matter of Record, for a Justice's Court is a Court of Record, and that no Parol Evidence
August Term 2 Geo. 3.

1762.

POOR v. DOUGHARTY.

Evidence can be given of that which is Matter of Record. For this was cited 2 Lilly, 419; Wood's Inst. Com. Law, 82.

Messrs. Otis & Thacher. It was said contrary, that though it be Matter of Record, yet, if it is not recorded, then the Justice may be called. The only Rule being that you shall produce the best Evidence you can. Now as Poor is unable to produce Record, not through any Default of his own, he may be allowed to produce Parol Evidence. That if a Record is burnt, they may swear Witnesses to prove the Fact which had been recorded, and this within the same Reason. Authorities cited: 1 Salk. 14; 1 Strange, 691; Viner, Tit. Evid. 56; 7 Mod. 169; 2 Show. 145.

Mr. Gridley. It was said further, for the Defendant, what is in Court must be proved by Record, what is in Pais by Witnesses; Anything which passes before a Court is not Matter of Fact, but of Record.

The Court (1) upon this Point ruled unanimously, that the Justice should not be sworn to Anything that came before him judicially. (2)

Then

(1) Under the Provincial Government, the Superior Court of Judicature consisted of five judges, and was held for all purposes by a full bench. All jury trials were conducted in the presence of the full Court, and not less than three judges were competent to preside. Anc. Chart. 330. 9 Pick. 569.

(2) S. P. Sayles v. Briggs, 4 Met. 421. There the justice was offered to prove facts of which he should have made a record. Mr. Justice Hubbard says: "It is argued that this testimony should be received from necessity,
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Then the Justice's Mittimus was produced as Evidence. The Mittimus, as a Mittimus, was allowed by the Council for the Defendant. But the Recital of the Fact contained in it was excepted to, and the Exception was ruled by the Court to be good.

It was then debated whether the Mittimus was to be given to the Jury or not, as one Part of it was legal Evidence and the other not — on which the Court was divided. (3)

It was then debated whether it must go in, as the Court was divided upon it, or be taken out, upon which they were also divided, and the Case was adjourned for a full Court. (4) At February, A. D. 1763, the Mittimus was admitted: Oliver & Cushing against; Ch. Juft., Lynde, & Russell for it.

necessity, as there is no way by which the plaintiff can obtain redress; and that this is the best testimony which now exists. But it will be productive of less mischief for an individual to suffer from the neglect or misfortune of an officer in not making a judicial record, than to establish a precedent that the record itself, or a part of it, may be proved by parol. It has been argued that the record may be presumed to be lost. The rules which apply to the admission of testimony to prove the contents of a lost record, or to the introduction of minutes by which the record may be extended, have no real bearing on a case like the present, where no such loss ever took place, and no such minutes were ever made." See also Kendall v. Powers, 4 Met. 553; Wells v. Stevens, 2 Gray, 115; Tillotson v. Warner, 3 Gray, 574.

(3) In Commonwealth v. Wingate, 6 Gray, 485, the Court allowed a complaint in evidence to go to the jury, although the record of the conviction of the defendant was upon the same paper — the jury being instructed that such conviction could not be considered as evidence.

(4) The effect of a division is to incapacitate the Court from taking any action whatever on that point. 3 Chit. Prac. 10. 12 Co. 118. 1 Salk. 15. Goddard v. Cuffin, Daveis, 381. And the burden being on the
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Baker vs. Frobishcer.

Rec. 1762.
Fol. 387.

For selling the Plaintiff unmerchantable Soap.(1)
It was said there was no express Warranty at the Time of the Sale. But 2d Lord Raymond, 1120, was cited contra. And the Justices were of the Opinion that every Man is bound to see his Goods are merchantable at the Time of Sale. (2) But Evidence being brought to prove that the Plaintiff's Wife, who was the Contractor, saw a Sample of the Soap, the Jury were directed to find Costs for the Defendant.

Ingraham vs. Cook.

Rec. 1762.
Fol. 388.

In this case, Ingraham, the Plaintiff, indorsed the Writ. It was urged by the Council for the Defendant, before the Trial, that Ingraham was gone in the party offering the paper, it would seem that a divided court would have no power to admit it.

(1) The declaration in this case alleged that the defendant, a soap-boiler, "deceitfully contriving to defraud" the plaintiff, delivered him "unmerchantable soap of flinking material," and "falsely affirmed the same to be good and merchantable."

(2) The opposite doctrine now prevails—all such cases being held to be within the principle of caveat emptor. Winsor v. Lombard, 18 Pick. 60. Mixer v. Coburn, 11 Met. 559. But the rule intimated above seems once to have been assumed in Massachusetts. See Oliver v. Sale, post—Osiis, arguendo: "The rule of merchandise which obliges the vendor to answer for what he sells with merchantable, is confined to manufactures of the country, which a man must be supposed to know the quality of."
in the Army, had no Estate, and could not answer the Costs. It was said contra, that a new Indorser is never ordered but in the Case of absconding insolvent Debtors, and that the Plaintiff was in the Pay of the Government. But the Court ruled, that a new Indorser ought to be found in every Case where it could be made to appear to the Court that there was Danger the present Indorser could not answer Costs. But a Witness was produced who knew the Plaintiff to have a considerable Sum of Money at Interest; upon which the Motion was silenced.


THE Question was, whether Interest or Depreciation ought to be allowed by a Factor after any

(1) The Prov. Sts. of 1 Geo. 1 and 1 Geo. 2 (Anc. Chart. 406, 466) provided for the indorsement of all writs by the plaintiff or attorney, but contained no provision for finding a new indorser in any Case. The St. of 1754, c. 28, provided in addition, that where the plaintiff was not an inhabitant of the State, he should procure a sufficient indorser who was, and also that where the writ was indorsed by plaintiff's attorney, if such attorney was shown to be of insufficient ability, a new indorser should be ordered. This act was repealed by St. 1833, c. 50, which contains the provisions substantially reinserted by the Rev. Sts. c. 90, § 10, (Gen. Sts. c. 123, § 20; c. 129, § 29;) viz., making the indorsement a condition precedent only where the plaintiff is not an inhabitant of the State, and giving the Court discretionary power to require it wherever it appears reasonable. But it seems that mere poverty of the plaintiff will not be considered sufficient cause for such requirement, in the absence of vexation or oppression. Per Shaw, C. J., 21 Pick. 213. An indorser will be required where the plaintiff removes from the State during the pendency of the action. 8 Mass. 272. 1 Gray, 114. But the removal of a foreign plaintiff into the State does not have the effect to discharge the indorser. 8 Met. 149.
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*NEWMAN*

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*HOMANS.*

any Period, otherwise than upon an Action of Account, in which he shews at what Time he received Pay for the Goods. (1)

The Court was of Opinion, that after a reasonable Time he ought. (2)

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**Zuill v. Bradley.**

The Plaintiff sues Bradley by the Name of Daniel Bradley, of Haverhill, &c., Trader.

Upon which the Defendant pleads as follows:

"And Daniel Bradley, junior, of Haverhill, &c., Innholder, whose Body was attached by this Writ, comes and says he is the same Person who was sued by the said John Zuill by the Name of Daniel Bradley, of Haverhill, &c., Trader. And the said Daniel Bradley, junior, says this Writ ought to abate, because he says that at the Time of the Purchase thereof there were two Men in said Town of Haverhill known by the names of Daniel Bradley and Daniel Bradley, junior, and that he hath been always"

(1) It appears by the record that this was *indebitatus assumpti* for money had and received. The declaration alleged a promise to pay, with interest, to which the defendant demurred in the Court of Common Pleas, and the demurrer was sustained. In the Superior Court this decision was reversed, and the case went to a jury.

(2) S. P. *Dodge v. Perkins*, 9 Pick. 368. Where a factor, having received money, unreasonably neglects to inform his principal, he is liable for interest for the time of such unreasonable delay.
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"ways called and known by the Name of Daniel
"Bradley, junior, and not by the Name of Daniel
"Bradley only, as in this Writ is supposed, and that
"the said Daniel Bradley, senior, is his the said Dan-
"iel Bradley junior's Father, and all this the said
"Daniel Bradley, junior, is ready to verify; where-
"fore he prays Judgment of this Writ that it abate,
"and for his Costs.

"2. The said Writ ought to abate, for that he the
"said Daniel Bradley, junior, was at the Time of the
"Purchase of this Writ, and still is, an Innholder, and
"not a Trader, as in this Writ is supposed, and this
"he also is ready to verify; wherefore he prays Judg-
"ment of this Writ that it abate, and for his Costs."

O. Thacher.

To which it was objected, that there was a Du-
plicity which destroyed it, for that he pleaded, that
his Name was Daniel Bradley, junior, and not Dan-
iel Bradley only, and also that he was an Innholder
and not a Trader; and Mod. was cited. But it was overruled. (1)

(1) The Court would seem to have held duplicity to be no objection
to a plea in abatement. The case of Truelien v. Secomb, Carth. 7, 8,
seems to countenance such a view, but the mistake is explained in
Steph. Pl. note (56). See also Bac. Ab. Abatement, (P); and 5 Pick.
223, where the objection of duplicity was overruled on the ground that
one of the allegations was surpluse. It has been held in the Superior
Court of Suffolk, that under the Practice Act of 1826, an answer in
abatement may be objected to for duplicity, on motion. 20 Law Rep.
463. And this on the ground that the answer is subject to the same
rules against duplicity as was formerly the plea. But before the Prac-
tice Act, duplicity could not be taken advantage of. St. 1836, c. 273,
§ 3. 1 Cuff. 137. And by § 13 of the Act, "different consistent de-
fences may be stated in the same answer."
Upon a full Hearing, it was ruled, that as they were in the same Town, and Father and Son, it was a Misnomer sufficient to abate the Writ. (2) Cb. Jusf. doubted of the Words "there were." He thinks that the Latin Word "habentur" is of greater Extent, but supposes it is not sufficient to make it bad. (3)

Blower verf. Campbell.

The Defendant was named in the Writ, Blacksmith, to which he pleaded he was a Nailor, and not a Blacksmith, and therefore prays Judgment for the Abatement of the Writ.

It was replied that Blacksmith was a general Name, including many Species, of which a Nailor was one.

The Defendant's Council answered that they were so distinct that the one knew Nothing of the other's Business, and a Forger, Gunsmith, &c., might as well be called Blacksmith.

(1) "It seems to be only in the case of a father and son of the same names, that the addition is required to be stated in a writ where the son is made defendant." Kincaid v. Howe, 10 Mfæ. 204. See also 5 Dane Ab. 705. To the point that "junior" is no part of a man's name, but an addition used to describe and designate the person, see 1 Pick. 388; 15 Pick. 71; 17 Pick. 300.

(2) It appears, however, by the record, that the judgment was finally given "on the second exception," perhaps on account of the Chief Justice's doubt on this point.
The Court were unanimously of the Opinion that the Writ was good, but for different Reasons; some because the Defendant had at certain Times done some Articles of Blacksmith's Work; others for the Reason aforesaid.

Jones v. Belcher.

DEBT upon a Bond given here, which it was suggested was for a Debt due in England. Moved that English Interest only should be paid. Cases in Eq. 288, cited.

But the Court were of Opinion, as the Bond was given to a Person here, (not the Creditor in England,) and the Debt was become his, New England Interest ought to be granted. (1)

Minot v. Prout.

DEBT upon a Bond. Defendant pleads as follows: "The said Timothy comes and defends

(1) This is according to the general rule of computing interest according to the lex loci contractus. Winthrop v. Carleton, 12 Mass. 4. Van Hemert v. Porter, 11 Met. 210. But where interest is given as damages, the lex fori prevails. Barringer v. King, 5 Gray, 9, 12. Eaton v. Mellus, 7 Gray, 566.
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"fends, &c., and prays Oyer of the Condition there-.
"of, and the same is read to him in these Words:

"The Condition of the aforesaid Obligation,
"&c., (this Condition as usuall,) which being read
"and heard, the said Timothy faith that the said
"Christopher his Action aforesaid against him the
"said Timothy ought not to have and maintain,
"because he faith that the said Timothy, on the
"Day of the Date of the said Obligation, and col-
"lateral thereto, at Boston aforesaid, made and exe-
cuted to the said Christopher a Deed of Mortgage
"of a Messuage and Land, situate, &c., which
"Mortgage was executed to the said Christopher
"to be a collateral Security for the Payment of the
"Sum in the Condition aforesaid mentioned and
"the Interet thereof, and afterwards, viz., at Bos-
ton aforesaid, on the 13th of December, 1758, he
"the said Christopher by his Deed, sealed with his
"Seal, assigned and conveyed the said Mortgage,
"as well as the Obligation now sued on, to one
"William Brown, of, &c., and the said William
"afterwards, viz., the same Day, made his Election,
"and for the Non-payment of the said Sum en-
tered on the said mortgaged Premises, and became
"feised thereof in his Desmesne as of Fee, and still
"holds the said mortgaged Premises; and all this
"the said Timothy is ready to verify, wherefore he
"prays Judgment if the said Christopher his Action
"aforesaid against him the said Timothy shall have
"and maintain.

"O. Thacher."

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To which the Plaintiff replied: "And the said Christopher faith, that for Anything above alleged, he the said Christopher ought not to be barred from having and maintaining his Action aforesaid, because protesting the said William Brown never made any Election as he the said Timothy above suppose eth for Plea, the said Christopher faith that the said William Brown did not enter into or upon the said mortgaged Premises for the Non-payment of the said Sum mentioned in the Condition aforesaid, and the Interest thereof, as the said Timothy in his Plea aforesaid hath alleged, and this the said Christopher prayeth may be inquired of by the Country.

"R. Dana."

Upon Demurrer, Exception taken to the Replication, that it was a Negative Pregnant. *Dott. Placitandi*, 256, cited: That either the whole Plea should have been traversed, or he should have set forth the particular Matter. *Cro. James*, 559.

*Contra*. They having demurred to our Replication, on that Demurrer we may take Exception to their Plea, which if bad we need not answer their Exception to our Replication. Their Plea is insufficient; for though he had entered upon the Mortgage, yet that is not conclusive that the Bond may not be sued.

Upon this it was largely debated whether a Mortgage being sued and entered upon, the Bond could have Effect, and *e contra*.

Ruled
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\textit{Ruled} unanimously, that it could, and that the Plea is bad. (1)

\textit{Bond to be chancered next Term.} (2)

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\textit{Dudley} v. \textit{Dudley.}

\textit{Rec.} 1762.
\textit{Fol.} 415.

Devise as follows: "I give to my Son W. my new Farm in R., " from whence he shall annually supply and bring Home to his Mother her Firewood during her Life." " I also give him my Farm of 1000 Acres

\textbf{T}HE late Governour Dudley, by his Will, devised as follows:

"I give my Wife One Hundred Pounds per Annun, to be paid quarterly during her Life by Paul Dudley my eldest Son, out of the Iffues and Rents of my Estates herein given him.

"I give to my Son, William Dudley, my new Farm in the Woods in Roxbury, containing 150 Acres with the Woodland there, purcahased of Devotion Craft, from whence he shall annually supply...

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(2) A bill in chancery was accordingly filed praying that the penalty "be chancered down to the sum of one penny." But the Court gave \textbf{£}176 10s.

(3) This was a review of a "plea of partition" brought by the younger children of William Dudley, against Thomas the eldest son. The special verdict found that the premises were the same called by the testator his "farm of a thousand acres at Manchaug," that William died intestate, and that Thomas then entered on the premises; "if therefore the said William, by force of the will aforesaid, took an estate in fee simple in the thousand acres aforesaid, then they find for the defendants costs; otherwise they find for the original defendant and now plaintiff."
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"supply and bring Home to his Mother her Fire-
wood during her Life.

"I also give him my Farm of one 1000 Acres
"at Manchaug and Three Hundred Pounds toward
"building him an House.

"I have already disposed in Marriage of my
"Four Daughters, and paid them what I intended.

"I further give each of them 1000 Acres, to be
"taken out of my 6000 Acres in the Town of Ox-
ford; and to my Nephew Daniel Allen, and my
"Niece Ann Hilton, 500 Acres, out of the same.
"Dividend, to be equally divided between them;
"all those Lands to descend to the Children sev-
erally, and the Heirs of their Bodies.

"To my eldest Son Paul I give the Inheritance
"of all my Hous’es and Lands in Roxbury, Oxford,
"Woodstock, Newtown, Brookline, Merrimack, or
"elsewhere, all my Stock, Debt, Money, and all
"Estate belonging to me whatsoever, except as
"above set down. And my Will is that my Lands
"descend after the Manner of England forever; to the
"Male Heirs first, and after to the Females. If either
"of my Sons die without Male Issue, his Brother and
"his Male Issue shall inherit the Lands herein be-
quathed," &c.

The Question in this Case was, whether William
Dudley took a Fee Simple by his Father’s Will.

Mr.
Mr. Otis for the Fee Simple. (4) The Words upon which I suppose they build their Fee Tail are these, "If either of my Sons die without Male Issue, his Brother," &c. There are no Words precedent to these which can be supposed in the least to favour that Opinion, but on the contrary are inconsistent with it; he must have intended to have given him a Fee in the 1000 Acres, or his End, which was to build him an House, could not be answered, for £300 can't be supposed any way sufficient, and therefore we must suppose he designed William should sell the Land; and it is Law and Reason that a special Devise should take Effect, which could not otherwise, a general Clause notwithstanding, nor is the Law to be wrested in favor of such Estates; for however Estates Tail were once favoured and praised, as in the Statute De Donis, yet Ld. Coke tells us they were convinced of their Mistake, and exclaims in pretty full Terms. Co. L. 20. Wood, Inst. And here the Reason is greater than in England, for here all Estates are partable. (5)

Nay I don't think the Words give even Paul an Estate Tail. The Intention of the Tefator is one of the grand Principles, and shall not be counteracted, and it is to be favoured as far as possible consistent with the Rules of the Common Law; and unless there are some operative Words, Fee Simple must

(4) The MS. report of the arguments in this case bears evidence of being the original minutes taken in court. A little confusion, and an occasional defect in grammar, are thus accounted for.
must be supposed to be given. Now here are no express Words in Favour of a Fee Simple. "And "my Will is that my Land descend after the Man-
ner of England forever, to the Male Heirs first, "and after to the Females, &c." I think it mani-
fest his Intention was, that they should descend ac-
cording to the Common Law, which knows no
Estate Tail; and that being his Intention, the Law
will not admit an Inheritance contrary to the known
Law of the Country; and this being contrary to the
Law descends as a Fee Simple, and the Word "Male
Heirs, &c." shall be attributed to Unskillfulness.

Mr. Kent for the Tail. Mr. Otis can't suppose an
Estate Tail can't be made in this Province, so we
need only inquire into the Testator's Intention.
Cites 3 Salk. 394. Fisher vs. Nichols, of the favourable
Construciton of Wills. In Paul's Gift there was
nothing enjoined him, but annual Payments which
the Profits would secure. "To William I give
"Manchaug Farm, and £300 towards building him
"an House," they are evidently separate. He gives
him Manchaug Farm, and moreover I give him
£300 towards building him an House. To Paul
he gives the Inheritance of his Land, &c.; this Word
is used in Tails. Vid. Cases in Eq. Abr. 178, 179.
1 Salk. Tit. Devise, 234.

The Court asked, as there had been no Authorities
yet produced on the other Side, whether it would
not be more regular to have them read now, before
the Council in Favour of the Tail closed. Upon
which Mr. Gridley produced his Authorities. 1 Inft.
9 b, any Estate charged is a Fee Simple. 2 Peere
Wms.
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Wms. 673. Siderfin, 312. Moore's Rep. 53. Viner, Tit. Devife, 82. 3 Mod. 82.

Mr. Trowbridge for the Tail. In his first Devife to his Wife, he gives her £100, for Paul to pay out of the Rents and Issues of his Estate, which evidently exclude from his Intention to give Paul a Fee Simple; so in the Gift of the Wood it is idle to say that is greater or anything near equal to the yearly Rents of the 150 Acres. And as to the Manchaug Farm and £300; it is true £300 would not build him an House at Roxbury, but does it appear that he meant so? Perhaps, and most probably, he intended on the Farm at Manchaug.

Ch. Juft. The words are build him an House; not an House simply, but him, one whom he knew was to live at Roxbury.

Trowbridge continues. The first Words in a Will may direct, but the last shall control, and this is the Difference between Wills and Deeds. The Devife to his Cousinz is in these Words, "to descend to the Children severally, and the Heirs of their Bodies." A Fee Tail may descend. If in the first Words he intended a Fee Simple, in the last he altered his Mind, and intended to control the first. "If either die without Male Issue, then," &c. — either. A Devife of this Sort is as great an Estate Tail as can be given, and the Word Body shall be supplied. Lilly, Tit. Devife. 6 Coke, 16, Collier's Cafe. Ventris, 230. Hawk. Abr. 17. Had he designed it should descend as Fee Simple in England, it would have descended.
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descended to the Daughters of William before the Sons of Paul, &c., but here it is otherwise.

Mr. Gridley for the Fee. The Intent of the Devisee is the only Thing your Honours will govern yourselves by, (Vid. Peere Wms. ut supra,) and that Intention is to be spelt out by little Hints, by other Devises, &c. Viner, Tit. Devise, 182. Notwithstanding 'tis a Devisee he says 'shall descend.' He designd William should sell, and he must sell, and that gives a Fee Simple, as much as express Words. He designd William should live in Roxbury, and £300 is not sufficient to build him an House there, a Dwelling House. The Law takes Notice of the Rule of Grants, Words in the Beginning and End refer to the Whole. Sid. ut supra. It is not—I give 1000 Acres, I give him £300 towards building him an House, but they are so coupled as to be the same; I give him 1000 Acres and £300 towards building him an House. Vid. Moore's ut sup. (Cb. Juss. In the Authority you cite, they were each equally applicable to the Purpofe, here not: Land does not seem so much so as Money.) In this Country we make our Real Estate almost Personal Estate by Act of Parliament, and our own Acts; besides, Gov. Dudley did not perhaps leave a Sufficiency in Money. The Word descend I grant is used in Tails, but when it is used, there we always use the proper express, Words of Tail; here it is—shall descend to him—not the Heirs of the Body, &c. Estates Tail can never be supposed by a Devisee after the Manner of England, for being a minor Estate should have been mentioned in express Words. Supposing the Females deceafe, there is no
no further Devise, if it is a Tail. The Law of this Province forbids his giving it as the Law of England: But if he meant so, it could not be Tail, for it is the Common Law. I imagine Governor Dudley thought that was the Manner of England, that the Sons of the other should take exclusively of the Daughters of the other, and the Will is inaccurate throughout as to the Daughters. Shall what is understood be set aside by one insensible Expression?

It was moved by Mr. Kent, and seconded by Mr. Troubridge, that they might be heard again before Judgment, and the Court thinking it a Matter of Nicety and Consequence, desired a further Argument, and continued it to the next Term for Judgment. (4)

Mr. Otis. The single Question is, whether these Words, "I also give him my Farm of 1000 Acres at Manchaug and Three Hundred Pounds to build him an House," compared with the whole Will, make a Fee Simple or a Tail. The Words of Acts executed in the Life are to be "to Heirs forever," in a Fee Simple, "Heirs of the Body" general, Male or Female, in a Fee Tail; greater Indulgence is to be given to Will.

I shall endeavour to show that from this Clause by itself, or considered with Respect to the others, it must

(4) The report of the case accordingly breaks off at this point in the MS., and is resumed between the cases of Gardner v. Purrington and Rogers v. Kenrick, decided at the next term. For convenience, however, it is printed as a whole.
must be the Intention of Dudley to give his Son a Fee Simple; and separately considered, there could be no Doubt; but 'tis the Clause "after the Manner of England, &c." which causes it. The Question will be whether the last Words create a Tail in any, even to the Estate given Paul, and if it does, whether they extend through the Whole. Ld. Hobart says the two great Principles upon which all Devises hang, are the Intention of the Testator, which shall be indulged as far as the Rules of Law admit.

I think the Consideration of the Intention, is the most rational Way of judging of any Will; and I think whoever does that will think any Estate Tail remote from the Testator's Intention. The first Words are only an Inheritance according to the Intent of the Common Law; his Intent was, I allow, to make a Common Law Descent, Spite of the Province Law,—to cut off his Daughters only. We shall consider how far this Intent is to be indulged. No Man shall create an Estate contrary to the Laws of his Country; we know none according to the Course of the Common Law. As for the other Words of the Will, Manchaug Farm is given for such a Purpose, as could not be answered by such an Estate as they contend for; he has it given to build an House, which he could not do, if he had only his Life in it. Co. Lit. 9, b. It is an old Principle, that paying is an Argument that the Land shall go. It has been said that a Devise of Woodland formerly in this Country conveyed a Fee Simple, and that it has been adjudged so; any Words that can amount to an Intent that the De-

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visee shall have the Advantage of the Whole of it, shall have a Fee; it is not the first or last Part of a Will that shall stand, but the Whole together. Viner, 324, Tit. Devise. If he intended he should reap the same Benefit, as he would if it had been a Fee, it shall be. Viner, 224, 13. Will to be taken altogether. Ibid. 182, 11, 12, 13. His Intent being contrary to Law, first Devisees take a Fee Simple. Ibid. 229. Swin. 165, 141. Entails disfavoured.—No Tail unless the first Words give a Fee Simple; none where it is given in any such Manner. The first Words may be controuled, where it is a plain Fee Simple, here it is not; he tries to invent a new Conveyance, his Words are apt to convey according to the Law of England; he must either give it according to the Custom of the Country, or in Fee Tail general or special. An implied Estate Tail has never been raised when the first Words were to give an Estate unknown to the Law of the Country. No Testator was ever interpreted to mean to give a Tail because that came nearest to his Intention.

**Mr. Gridley's Authorities:** Sid. 312—Rule that first and last Words relate to the whole; middle to the middle only. Moor, Cafe 153, p. 52. Plowd. Comment. 540. Viner, Tit. Devise, 182, 11. 3 Lev. 111. 4 Mod. 154. 3 Lev. 125. 3 Mod. 182. Styles, 276, 392.

**Mr. Auchmuty.** I shall consider this by looking into the Words of the Will, collect the Intent, and compare it with the Rules of Law.—“His Brother and his Male Issue shall inherit.” These Words
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are descriptive of an Estate Tail, and no other. The first Words are liable to be restrained, controlled, or defeated by the last; if a last Word contradicts the first, the last shall stand. 1 Lilly, 449. Co. Lit. 112, b. The Words relate as well to William as Paul. Cro. Ja. 448. This is a Case Mr. Otis said could not be found. Cro. Ja. 695, Chadock v. Cowley. It seems absurd that an express Estate may be controlled by latter Words, and yet that where there is no certain Estate given by the first Words, that they shall not; I should think they might a fortiori. 9 Coke, 128, Sunday's Case. 1 Ld. Raymond, 185, Baker vs. Wall. Ib. 568, Nottingham vs. Jennings. Comyns, 539, Brice vs. Smith. I cite these to show the first Words need not be express, and that the last shall explain the first. I utterly deny that the giving Woodland could by Law give a Fee; but if that be the Case, when the Testator afterwards explains his Meaning, that must cause it to be otherwise. As to the Practice of the Court, the Rules of Law by being recollected would destroy it. I believe no Practice agreeable to that Rule of Woodland can be brought, and if there can, not where there are other such Words as are here.

As to the House, it does not appear that it was to build an House at Roxbury; he was at that Time building an House there, and the devise, which takes no Effect till the Death of the Testator, might be some Years off. — Could he not have passed it by Deed, had that been his Intent? It is much more rational to conclude, that, as he had given him a Farm, he intended he should live there, therefore gave him £300 to build him an House there,
there, to encourage the Settlement: There are two Tracts given William and Paul much in the same Words. I can't find any Reason why they should be confined to Paul; all the Lands therein bequeathed, in Case one died without Issue Male, are given to the other; he designing to entail all his Lands to the Survivor of his Sons, and his Male Issue, he has done it. I agree he intended to exclude the Daughters; could he then think he was giving a Fee Simple, when he expressly excludes them? He has not given a general Estate Tail, but confined it to Male Issue—They say he is making a new Estate, I say he has made an old one. In the Case of Raymond, 'tis said he intended an Estate Tail, because the Daughters were excluded. Take it as a Tail, all Purposes will be answered, the Daughters will be excluded, the Heirs Male will have it; and 'tis a Tail with Crofs Remainders, all which he seems to have had in View. The Heir-at-Law is favoured—so he is here: As to the paying, it is not always denotive of a Fee: The Wood is out of Roxbury, what is that to Manchaug? He has given that Farm, and ordered that Wood to be furnished; there is a Difference where a Sum in gros is ordered, and where an annual Sum not exceeding the Rents. Co. Lit. 9, b. There is an Authority that says, where he gives it specially, it is not an Inheritance. 2 Bacon. William could not be a Lofer by such a Payment. Gilbert cites Cro. Eliz. 498. If the Devisor orders A to pay B a Sum in gros, this gives a Fee, though not even then, I suppose, if he afterwards explains it otherwise. As to the Authorities of Viner, they relate only to the Construction of Wills, which we agree with them:
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As for the Case from Moor, of the Coats, (5) they were to be paid forever: It would be inconsistent, but that as the Incumbrance was perpetual, the Estate should be perpetual also. The other Moor Case is only that all Parts of a Will are operative, we agree to it, if they can be reconciled. How can it be supposed the Land as well as £300 are to go towards building him an House?—the other Words of the Will dispose of the Land otherwise, this is in Answer to the Grammar Case (6); Plowden's Case is only the Say of Council. Moor's Case of the Item (7) is answered by Cro. Ja. 695. The Intention of the Will can be no otherwise answered than by Tail;—if a Tail not an Iota is lost.

Mr. Trowbridge. We all agree that the whole Will is to be taken together; that if the first Words are doubtful, the last may explain them, but if the first are express, the latter shall not controul them. It must be absurd to suppose that the Farm as well as Money was given to build an House; in some Cases the Item may couple, in some not. 5 Co. 7, Wyndham's Case; 6 Co. 61, Catesby's Case. That the Word "and" is to be governed according to the Subject-Matter.—If there is any particular Estate limited, paying does not make a Fee. 1 Vent. 227. Gilb. Law of Devises. Comyn's, 539, Brice vs. Smith. Those Lands which he gives his Daughters, he expressly entails, so he does what he gives his Cousinz, and uses the Word descend as he does here; as for the Word Inheritance, an Estate Tail is

(5) Erroneously cited; the "Case of the Coats" is Smith v. Tyndal, 2 Salk. 685.
(6) Sid. 312.
(7) Moore, case 153.
is as much an Inheritance as a Fee Simple. As for the Manner of England, I deny that he meant Common Law, he only intended it should be partable as here; If his Intent could not be answered according to the Rules of Law, the Law will mould it into such one, as is most agreeable to his Will and Design.

Mr. Gridley. The Intent of the Devisor shall be the Pole Star of the Will, and then every Iota shall have its Force, if it can consistent with the rest. I agree that the Subject-Matter must govern in all Cases; the Subject-Matter here is a Supply to William to build him an House. With Regard to Mr. Trowbridge's Authorities, I see not how they are applicable; the first is a Common Law Conveyance, to be judged by Common Law Maxims, to be taken most strongly against the Grantor; here the Intent of the Devisor is to be pursued;—If the £300 is given for the House, the Lands are given; they are tied by an indissoluble Band, and can't be separated, but by a Violence upon Common Sense. The Moor Case has Item, here is none. We must consider of our Country and Real Estate here: To a Person unacquainted with our Estate, this might seem strange, but to us who know Real Estates are liable for the Payment of Debts, and are by Act of Parliament made Chattels Real, for the Payment of Debts,(8) that they are almost the only Things we have to trade upon, and that they continue in a Family scarce over three Generations, 'tis not strange they should be put upon the same Footing with Personal Estate. In this I take it, both must be supported

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supposed for the same Purpose, it is a Construction arises from the Necessity of the Thing, and the Nature of Real Estate here. As for the Objection against our Construction, that it is uncertain how long he would live; there was an House for Paul, and one designed for William; if there was none erecting, 'twas for one hereafter to be built, if one was built, to finish it or to reimburse him. As for the after Words; whether they shall destroy the Force of the First — the Words "after the Manner of England," — it being unlimited, it must be Common Law; who would suppose Tail Male to mean the Manner of England?

"The Heirs Male, and after to the Female;" the whole Complexion is to the Creation of a new Estate; this last ought to be wholly laid aside, this extraordinary, impossible Clause.

If this Clause operate at all, it can't take to the Manchaug Farm; if that can be satisfied elsewhere, it need not be applied here; let it go to the Roxbury Lands. 9 Mod. 154, Adams vs. Clark.

The Chief Justice delivered the Judgment of the Court in Favour of the Fee Simple. (9)

(9) This judgment is recorded as of September term at Worcester, but the entry bears evidence of having been inserted at a later date. The decision was undoubtedly given, as here reported, at February term in Suffolk. It also appears that "immediately upon entering up this judgment, the said Thomas moved for an appeal to his Majesty in Council, which the Court did not allow." The Province Charter provided for an appeal to the King in "personal actions" only. Anc. Chart. 32.

It is to be regretted that we have no means of ascertaining on what ground this decision was given. If the Court were satisfied that the
Jackson verf. Foye.

MRS. JACKSON was upwards of thirty Years a Tenant to Mrs. Foye, paid her Rent without any Deduction but for Repairs, which were often made. A. D. 1758 they settled Accounts, and Mrs. Jackson, owing Mrs. Foye, gave her a Note of Hand on Interest. The present Action was brought by Jackson against Foye for half the Rates for Twenty Years.

The only Question was, whether these Settlements, that Note of Hand given, when, if the Rates had been reckoned, there would have been a Balance due to Jackson, amounted to Evidence of an express Contract.

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The land, as well as the money, was given "toward building the house," it was evidently excepted from any operation of the subsequent general clause. But if the effect of that clause became necessary to be considered, a more difficult question must have arisen. The words directing a decent "according to the manner of England," &c., seem clearly to intend a common law decent, in opposition to the law of the Province. But the words which immediately follow, "If either of my sons die," &c., would seem to import an indefinite failure of issue, and to give the brothers estates in tail male general, with crofs remainders, also in tail male.

Abbott v. Essex Co. 18 How. 302. Hall v. Priest, 6 Gray, 18, and cases cited. The question cannot be better settled than in Mr. Otis's words, ante, p. 20 — "Can an implied estate tail ever be raised, when the first words give an estate unknown to the laws of the country?" In the case of Banister v. Henderson, post, 131, Mr. Auchmuty says that "the point of charge had weight" in this case. This seems hardly probable, as one was directly on the rents and profits, and the other a charge of wood to be furnished from the land itself. See 24 Pick. 139. And even a personal charge of a sum in crofs will not enlarge a clear estate tail, though only arising by implication. 2 Jarman on Wills, (1st Am. ed.) 172. 5 T. R. 535. 2 B. & Ad. 318.
The Court (Justice Russell dissenting) gave it to the Jury as their Opinion, that it did, and directed them to give the Defendant Costs, which they did. (1)

**Winfall v. Hall.**

**PLAINTIFF** and Defendant had formerly submitted Matters in Controversy to certain Referees, who had reported thereon. This Action was brought by Winfall vs. Hall to recover the Costs upon that former Suit, for though the Referees had reported that they should bear the Costs between them, yet Winfall alleged that it was upon a Promise of Hall to bear the whole Costs. (2) To verify this he offered the Referees as Evidence. But the Court ruled unanimously that they could not by parol Evidence controul the Report which was of Record. (3)

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(1) This decision was under the following provision contained for many years in the annual tax acts of the Province: "Saving all contracts between landlord and tenant, and where no contract is, the landlord to reimburse one half of the tax fet upon such houses and lands." See post, Drumple v. Clark. The same provision in substance is contained in Rev. Sts. c. 7, § 8, by which the tenant was authorized to retain half the taxes out of his rent, unless there was an agreement to the contrary. By Gen. Sts. c. 11, § 9, he may so retain the whole taxes or recover the same by action.

(2) This is inaccurately stated. The declaration alleges that the promise by the defendant, but for which "the referees would have awarded the plaintiff costs," was, never to enforce a certain other judgment for costs previously recovered.

(3) Arbitrators cannot by parol testimony contradict their formal award in writing. 10 Met. 433. 4 Cush. 317, 399.
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Sayer v. Thorp.
Rec. 1763, Fol. 17.

Whether the Owner and Hирer of a Vessell can join in an Action of Trespass for running away with the Vessell — quare?

THE only Question of Law in this Case was, whether the Owner of a Vessell and the Person who hired and freighted her could join in an Action of Trespass for running away with the Vessell. (1) It was not doubted that they might both have their Actions, (2) but whether they could join was the Doubt. It was said on one Side, that Tenant

(1) There are several depositions on file in this case, from which it appears that the ship Prosperous was employed in freighting wood on the Chignecto River, Nova Scotia, for the use of Fort Cumberland, and that the party who ran away with her were deferring soldiers of the fort. The defence was, the consent or connivance of the master, who was alleged to have been paid for a similar use of the ship on a former occasion, and to have induced the attempt by telling the soldiers that there would be no resistance, and that they were fools to stay in so bad a place after their time was up. And in his own deposition he acknowledges having found forty-one dollars in his cabin, which he was told the soldiers had left, and which he was induced to put in his chest. There appears also among the papers a printed proclamation by Governor Pownall, bearing date March 17, 1759, and reciting that his Majesty, having determined to make a general invasion of Canada, called upon his faithful and brave subjects of New England for assistance; and that the Province, having resolved to raise a number of men, "have made provision for the levying and support of such to the first day of November next, said men to be then dismissed." The words here in Italic are underscored, showing that the paper was offered to prove that the soldiers' term of enlistment had expired before the running away with the vessel. See 3 Hutchinson's Hist. Mass. 79. The verdict was for the defendants.

(2) It was formerly held that both owner and bailee might maintain trespass, but that a recovery by one should oust the other of his right of action. Bac. Ab. Trespass, C. 2. It has been since decided, that general ownership, without either possession or right to possession, is not sufficient. Ward v. Macaulay, 4 T. R. 488. Muggridge v. Eveleth, 9 Met. 333.
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ant and he in Reversion of a Freehold shall never join; and on the other, that it would be a Cause of multiplying Actions. The Parties agreeing, this Point was not determined.

Mr. Gridley in this Argument said: Trespass and Debt are the two great Actions on which the Fullness of Evidence is required, and are Actions of the highest Nature.

Oliver v. Sale.

OLIVER sues the Defendant for selling him two free Mulattos for Slaves. (1) There was no Bill of Sale, but only several Receipts of Money for two Negro Boys sold & delivered. It was suggested on the other Side that the Defendant sold them not as Slaves, but only his Right, if he had any, in them. (2)—The Case was thus argued. Mr.

(1) The declaration was for deceit, in selling the mulattos to the plaintiff as slaves, knowing them to be free.


Slaves
Mr. Thacher, for Plaintiff. I think from the Words of the Receipt it may be learnt what was his Intent. Sold & delivered conveys the Property; and as he had really no Right to a Day's Service in the Lads, as they were free, he could not pass any Property

Slaves were admitted to be church members at a period when church members had peculiar political privileges. 2 Winthrop, 36, & Savage’s note. Anc. Chart. 117. 1 Bancroft’s Hist. U. S. 360. Slaves were sometimes required, sometimes prohibited, to serve in the militia. 3 Mass. Col. Rec. 268, 397. 4 Ib. pt. 1, 86, 357. Journals Mass. Prov. Congress, (ed. 1838,) 29, 303, 553. They were enlisted in the army in the Old French War. 4 Mass. Hist. Coll. 123, 203. 98 Mass. Archives, 123. They were competent witnesses, even in capital trials, e. g. in the trial of the British Soldiers in 1770, (ed. 1770, p. 311,) and in suits of other slaves for freedom, as appears by the files of court.

The right to marry was secured to them in 1705 by Prov. St. 4 Anne. Anc. Chart. 748. The subsequent records of Boston and other towns show that their banns were published like those of white persons. In 1745, a negro slave obtained from the Governor and Council a divorce for his wife’s adultery with a white man. Jethro Boston’s Case, 9 Mass. Archives, 249. In 1758, it was adjudged by the Superior Court of Judicature, that a child of a female slave, “never married according to any of the forms prescribed by the laws of this land,” by another slave, who “had kept her company with her master’s consent,” was not a bastard. Flora’s Case, Rec. 1758, fol. 296. And the wife of a slave was not allowed to testify against him. MS. note by John Adams of Caesar v. Taylor, in Essex, 1772, (Rec. 1772, fol. 91,) in the possession of Hon. Charles Francis Adams; which also shows that the defendant in an action of false imprisonment was not permitted under the general issue to prove that the plaintiff was his slave.

Such actions, called “suits for liberty,” were common as early as 1765. 2 John Adams’s Works, 200. The latest instance of a verdict for the master is believed to have been in 1768. Newport v. Billing, Rec. 1768, fol. 284. But the case of James v. Lechmere, in Middlesex, a year later, which has been often spoken of as having determined the unlicensed use of slavery in Massachusetts, is shown by the records and files of court to have been brought up from the inferior court by sham demurrer, and, after one or two continuances, settled by the parties. Rec. 1769, fol. 196. The case mentioned by Dr. Belknap in 4 Mass. Hist. Coll. 202, as “the first trial of this kind,” may have been that of Margaret v. Muzzy, which was a writ de bonâ replegiando, filed out and tried in Middlesex in 1768, and on review in 1770, in which, as appears by the
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Property in them, and therefore must be supposed to have sold them as Slaves, or meant from the first to have defrauded.

Ch. 74.⁠ Everything which is bought is sold.

Witnesses were produced who were present at the Time of the Sale, and heard Defendant say they were Slaves.

Mr. Otis, for Defendant. I hold in the Cafe of a Negro, there should be an express Warranty of their Freedom, and that the Rule of Merchandize which obliges the Vendor to answer for what he sells without Warranty is confined to Manufactures of the Country which a Man must be supposed to know the Quality of; but in this Cafe it is impossible in most Cafes to know whether they are free or not.

Ch.

the depositions on file, there was much conflicting evidence, and the plaintiff prevailed. Rec. 1768, fol. 311; 1770, fol. 216. Slavery was certainly recognized by law in Massachusetts after this; for in May, 1771, Hutchinson wrote to Lord Hillborough, "Slavery by the Provincial laws gives no right to the life of the servant; and a slave here is considered as a servant would be who had bound himself for a term of years exceeding the ordinary term of human life; and I do not know that it has been determined that he may not have a property in goods, notwithstanding he is called a slave." 77 Mass. Archives, 159, 160.

Slaves convicted of theft were sentenced, like other persons, besides being whipped, to pay treble the value to the owner of the goods stolen, and, if unable to do so, were ordered to be "disposed of in service" for life, or for a term of years, "for payment of the same." Hercules & Sharp-er's Cafe, Rec. 1757, fol. 54, 55; Docket of February term, 1757, in Suffolk, ad finem. Jeffs's Cafe, Rec. 1771, fol. 35.

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Oliver v. Sale.

Cb. Juf. Is there not as palpable a Fraud, when a Man sells a Negro as a Slave whom he knows to be free, as when he sells a Bag of Feathers and assures them to be Hops? That he knew them to be free they must prove, or do not support their Declaration. (3)

Mr. Otis offered a Deposition lodged in the Case to be read.

Mr. Thacher demanded, as the Witness was there in Court, she might be examined orally. (4)

Court ruled, that when Depositions come up in the Case they may be first read. (5)

(3) According to the rule now settled in this country, it seems that the scienter would be unnecessary — the vendor being liable on the implied warranty of title in the sale of a chattel. Coolidge v. Brigham, 1 Met. 547.

(4) Among the papers in this case are the depositions of Anna Bill and Lydia Whitaker, one of whom was undoubtedly the witness "there in Court." The depositions are substantially similar, and the following is an exact copy of that of Lydia Whitaker:

"Lydia Whitaker of Lawfull age testifies & says that she was at the house of Capt. John Sale when Mr Nath'l Brown & Mr John Oliver came to buy two of his negro boys & Capt. Sale told them that he would not sell them for Slaves because he understood they were to be free after some time, & he would only sell his right & title in them, & Mr Oliver said he would run the risk of their ever getting free.

her

"Lydia X. Whitaker mark"

"Sworn before the Court in Oct'ry 1761

"At. Middlecott Cooke Cler."

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Mr. Otis. When the Apprentice's Indentures are assigned, he may properly be said to be sold, but 'tis no Argument of his Slavery.

The Evidence being clear that Sale had said he would not sell them as Slaves, and told Plaintiff so when they were sold, the Court directed the Jury to find Defendant Cofts.

N. B. In Aggravation of Damages, had they found for the Plaintiff, Mr. Teacher said: "Oliver by selling these Boys for Slaves exposed himself to a Writ of Replevin, upon which if Sheriff returns 'They are Esquired,' there shall go a Capias in Witternam, and his own Body shall be subjected to Confinement till they are produced."

Hallowell v. Dalton.

This Case was a Review of an Action brought by Dalton against Hallowell. The only Question of Law was, whether after Bond given to review, before the Service of the Writ, there can be said to be so much of Suit depending, and so much of Parties, as that a Justice may, out of Court, take the Evidence of Men going to Sea, according to the Province Law 7 W. 3, c. 11. (1) Ruled, there is.

† If this is returned non est invent., a Capias shall issue against the Defendant's Goods and Effects.

(1) This law provided for the taking of affidavits of "witnesses in civil causes,"
Gould _versus_ Stevens.

This action was an Attachment against Stevens as Executor of Somebody, a Debtor of the Plaintiff's. Plea in Abatement was made, that by the Law as Executor he should have been summoned, and not his Body or proper Goods attached. The Replication to this was, that though he was named Executor in the Writ, he was not appointed by the Testator, but was Executor of his own Wrong.

Mr. Thacker. The Province Law 2 Ann. c. 5, (1) directs the Manner of Suits against Executors and Administrators. Executor of his own Wrong takes the Duty and the Burden, he is by Wrong in the same Manner as if by Right, and is answerable no further than as Effects come to his Hands. The Common Law is the same with the Province Law.

Mr. Sewall, _contra_. An Executor in his own Wrong cannot maintain an Action certain. He is not favoured as Executor by Right. 4 Wm. & Mary, c. 2. 1 Salk. 297. 2 Ventris, 179. The Law knows Nothing of them but to restrain and punish them.

Judgment that the Writ abate.

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Memorandum. (1)

JAMES OTIS, Edmund Trowbridge, Jeremy Gridley, Richard Dana, Benjamin Kent, Daniel Farnham, John Worthington, James Otis, junr., James Putnam, Joseph Hawley, John Chipman, Oxenbridge Thacher, Robert Auchmuty, Sam'1 White, James Hovey, Samuel Fitch, Jonathan Sewall, William Cufhing, Robert Treat Paine, William Pynchon, William Read, Samuel Swift, Joseph Dudley, Benja : Gridley, Samuel Quincy, and John Adams, having been called by the Court to be Barristers at Law, the following Gentlemen, viz., Edmund Trowbridge, Jeremy Gridley, Benjamin Kent, James Otis, junr., Oxenbridge Thacher, Robert Auchmuty, Samuel Fitch, Jonathan Sewall, Robert Treat Paine, Samuel Swift, Samuel Quincy, and John Adams, Esquires, appeared accordingly this Term in Barristers' Habits. (2)

(1) As this memorandum closes the record of the term on the Suffolk docket, it is here inferred, although not a part of Mr. Quincy's reports.

(2) John Adams was sworn on the 14th of November, 1761. Rec. 1761, fol. 239. In a note to his diary at that date he says: "About this time the project was conceived, I suppose by the Chief Justice, Mr. Hutchinson, of clothing the judges and lawyers with robes. Mr. Quincy and I were directed to prepare our gowns and bands and tie wigs, and were admitted barristers, having practised three years at the inferior courts according to our new rules." a John Adams's Works, 133. See also Adams's Letters to Tudor, 10 lb. 233, 245.
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III Georgii Ter. in Sup. Cur.

Present:

The Honourable

Thomas Hutchinson, Esqr., Chief Justice.
Benja: Lynde,
John Cushing, (Esqrs., Justices.
Chambers Russell,
Peter Oliver,

Wrentham Proprietors verf. Metcalf. (1)

It was moved that some of the Proprietors should be admitted Witnesses in this Case, who were not of the Committee who brought this Suit. 2 Lev. 231,* was cited, where Scroggs, Ch.
Jusfl.

* Quere of this Case. Theory of Evid. 105, 106, and 2 Lilly’s Abr. 702. 1 Str. 575, 1069. Vid. 2 Lev. 236. 2 Sid. 109. 1 Vern. 154.

(1) This was an action of ejectment, originally brought in the Inferior Court against Joshua Daniels, who suggested that he held the premises by deed of bargain and sale with warranty from Jonathan Metcalf, whom he prayed might be vouched in to defend the suit, and who was subsequently admitted for that purpose. In the Superior Court the case was entitled as above.
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Curri. says, “that it ought not to be a general Rule that Members of Corporations shall be admitted or denied to be Witnesses in Actions for or against their Corporations: But every Case stands upon its own particular Circumstances, viz., whether the Interest be so considerable as by Presumption to produce Partiality or not.”

In this Case at Bar it was objected that they were liable to Costs, and might each Member be taken for the Whole. A Guardian not admitted in Evidence in Favour of his Charge.

Ruled, that they be not admitted in this Case. Ch. Curri. doubted whether in any Case, where the Interest was ever so small, if they were direct Plaintiffs they should be admitted. (2)

(1) The general rule seems to have been that only members of public or municipal, religious, and charitable corporations were competent witnesses in suits where the corporation was a party or interested. 1 Greenl. Evid. §§ 331, 333. The St. of 1792, c. 32, provided for the admissibility of members of any “town, district, precinct, parish or other religious incorporate society.” Counties, school districts and mutual insurance companies were afterward added to the list. Rev. Sts. c. 94, § 54. St. 1850, c. 34. By the practice acts of 1851 and 1852, all incompetency from interest was removed, except in case of parties to suits; and finally, by Sts. 1856, c. 188, and 1857, c. 305, parties themselves have been admitted. Gen. Sts. c. 131, §§ 13, 14.
Derumple v. Clark.

This action was brought by the Tenant against the Landlord for the recovery of half the Taxes, upon the Province Law called the Tax Act. (1) This case was said to differ from the case of Jackson v. Foye, (2) tried before this Court in August Term last, as in that case Jackson had been Tenant to Foye so many years, there had been many settlements,—whereas here Derumple had been Tenant only five or six years. The Rent had been paid, but there had been no regular methodical settlement.

Mr. Auchmuty, for Plaintiff, urged, that the Law was very express and particular—“Where no Contract is, the Landlord shall reimburse the Tenant half the Taxes,” so that the Payment of the whole Rent is no Argument of a Contract to pay half the Taxes, for the Tenant by the Law is not to keep back his Rent, but to have the Taxes reimbursed, which is an Argument that the Whole is first to be paid. I can have no idea of an implied Contract in this case; the Law evidently points out an express one.

Mr. Thacker, for Defendant. It has been the uninterrupted Custom of this Town for the Tenant to pay the whole Taxes, and though this Law is of very

very antient Date, (3) we find no Action on it till 1752; so that it always suppos'd that such a Contract is made. The Words of the Law are not—where no express,—no written,—no verbal,—but "where no Contract is." And I think the continual paying of Rent for several Years without any Demand of a Deduction, and several Receipts having been given by the Plaintiff to the Defendant in full of all Accounts, are full Evidence that such was the Intention and Meaning of the Parties, which is a sufficient Contract. To have this Point called in Question would be big with the greatest Inconveniences. If Landlords who from Year to Year have received their whole Rents, and given Discharges for them, are to be called to account for many Years' Taxes, it would be productive of an ample Harvest of Suits, of which perhaps our Brotherhood might reap the Gleanings.

Mr. Auchmuty. As to the Custom of the Town; if there had been no Law, that might have been an Argument of some Weight; but the Law is express, and shall any pretended Custom control it? As for the Consequences they must not be considered—if it is Law, it is Law, &c.

(3) The earliest statute provision that we find on this subject is in the Prov. St. of 4 W. & M. in 1692. By this act however, as by the Gen. Sts. of 1860, c. 11, § 9, the landlord was to pay the whole taxes in the absence of any particular agreement. The first provision for a contribution was in the Prov. St. of 6 W. & M. in 1694, and is as follows: "The fermer or occupier of any houses or lands, being assized for the same in his occupation, to be reimbursed the one half of what he shall so pay toward the said assessment by the landlord or lessee where there is no particular contract to the contrary, and shall be allowed to discount the same out of his rent." The last clause was omitted in subsequent acts. *Aute*, p. 27, note (1).
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Justice Oliver. As for the Custom of the Town, I can't think it of any Weight; but as the Law says "where no Contract is," you must confine it to an express Contract. I see no essential difference between this and the Case of Foye & Jackson, and can't but think the Evidence you have is a Presumption of a Contract so strong that you must find for the Defendant.

Justice Russel. I think the Law evidently means an express Agreement. However, I don't think we have here any Evidence of an implied Agreement, or any Agreement at all.

Justice Cushing. If there be Anything to show the Intention of the Parties, I hold that Evidence of a sufficient Agreement within the Sense of the Law; and that the Intention of these Parties was that the Tenant should pay the Whole, may be collected from the Evidence joined to the Custom of the Town.

Justice Lynde. I always thought that the Intention of this Law was not to affect the Taxes in such Towns as this, but merely where Farms are let to the Halves, where the Benefit of the Estate being divided, 'tis but just the Charges should be divided too. I think the Custom of the Town is a great Thing, and that the Parties are to be supposed to intend according to the Custom. I think the Evidence sufficient to prove a Contract within the Intendment of the Law.

Cb. Juf. You are to go according to Law and Evidence.
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Evidence. Where the Law is in any Case doubt-
full and the Equity of it plain, you should verge
towards Equity. Custom shall not be placed in
Opposition to Law, but it may be a Circumstance
going to interpret the Intention of the Parties. I
see Nothing to distinguish this from the Case of
Jackson v. Foye.

Verdict for Defendant.

Daniels vers. Bullard.

A DEPOSITION was offered; the Caption
imported that the Witness was immediately
going out of the Country, and therefore the oppo-
site Party not notified. Ruled bad.

Barnes vers. Greenleaf.

THE Question in this Case was, whether Mr.
Wheelwright should be admitted as a Wit-
ness. The Action was brought against Greenleaf
(Sheriff) for an insufficient Service of a Writ upon
which the Return stood thus: "I have attached the
Defendant, and taken Mr. Wheelwright's Word
for his Appearance." (1) Mr. Wheelwright was
offered

(1) The return as set forth on record is as follows:
"Suffolk &. Boston, June 17, 1763. I attached the body of the
6
within
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1763.

Barnes
v.
Greenleaf.

maintain no
Action on
such Promise;
and such Per-
son is there-
fore a com-
petent Witnes-
s for the Officer
in an Action
for the insuffi-
cient Service.

Elwell
v.
Pierson.

Rec. 1763.
Fol. 56.

Devise of
Land as fol-
Awards:

“Also where-
as it is ex-
presed that
my Son shal-
have this my
Living to him
and his for-
ever, my Will
and Meaning
is, and I do
hereby ap-
point my
Grandson R.,

offered to prove that at the Plaintiff's Consent the
Prisoner was dismissed. He was objected to, be-
cause 'twas said the Sheriff would recur to him, if
he lopt in this Action. But 'twas answered, there
could be no such Recourse, for the Sheriff deviating
from the Path of his Duty must expect the Conse-
quence. (2) He was admitted and sworn.*

Elwell vers. Pierson.

(From Essex.) (3)

THE Question in this Case was, whether Sam-
uel, Son of the original Devisor, took an Estate
Tail,

* Vid. 4 Bac. Ab. 463, 463, top. (4)

within named Thomas Carnes, and Nathaniel Wheelwright Esq. gave
his word for his appearance at Court.

Benja: Cudworth,
Deputy Sheriff.”

(2) S. P. Denny v. Lincoln, 5 Mafs. 385. In that case the officer
forbore to arrest, upon a promise by a third party to deliver the debtor
to him at a day named. Parsons, C. J. "It is to be regretted that
officers having a plain path before them will not pursue it. If they
deviate from it, it must be at their own peril, and they cannot protec-
t themselves against the damages arising from a breach of official duty
by any collateral stipulation for indemnity." See also 4 Mafs. 370.
But taking receipts for property attached, or notes in consideration of
forbearing to attach, is consistent with the officer’s duty. Fryer v.
Clark, 19 Pick. 329. And such receptors has been held incompetent
through interest. 23 Pick. 56.

(3) The estate sued for is described as "a neck of land in Glocester
Harbour now called Pierson's Neck."

(4) Bac. Ab. Sheriff, O.
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Tail, and if he did, whether the Plaintiff is sole Heir in Tail of Samuel, being eldest Son of eldest Son all along.

The Words of the Will are these: "I give to "Samuel Elwell the House I now live in," &c.

Afterwards: "I give all my said Housing &c. "expressed, to him my said Son Samuel, and his "Heirs forever, provided that my said Son shall "maintain Myself and his Mother during our Lives "with sufficient and convenient Maintenance."

Afterwards: "Also whereas it is above expressed "that my Son Samuel shall have this my Living "above said to him and his forever, my Will and "Meaning is, and I do hereby appoint my Grand- "son Robert, Son of said Samuel, to be the next "immediate Heir unto this my Living after his "Father, my said Son Samuel, to enjoy the same to "him and his Heirs forever. And in Case that said "Robert do die without Heir, it shall then fall to "the next eldest of my Grandsons surviving, and so "in like Case of Mortality one from another to the "next eldest of my Grandsons surviving."

Mr. Thacher for the Tail. It is objected that there were but two Witnesses to the Will. At that Time the Law required but two. The Statute of Frauds was never supposèd to extend here, till we made a like Law here. (5) Vid. Old Colony Laws, 158.

158. (6) The Question is, whether Samuel took an Estate Tail, by the Words of the Will. Great Condescension is given to Wills, and Words, which in Acts executed in the Lifetime would not make Estates Tail, will make them in Wills, because Testators are supposed to be inops confilii, and Lord Holt observes that there were no such Conveyances at Common Law, but by Statute. The Testator’s Intent is to be the Rule of Construction, if agreeable to Rules of Law. The first Devise is an Inheritance; then he explains his Grandson Robert to be the next immediate Heir of his said Son Samuel; he does not retract, but only directs how that Inheritance shall go. The Intent appears from this also—He says, the next eldest Brother shall inherit for want of Heirs; now he could not die without Heirs, while he had any Brothers, whence it appears he excluded Brothers from his Idea of Heirs in this Case, and so could only mean Heirs of the Body. There is a Difference between the Remainder over being given to a Stranger, and to one of Kin; in the first Case it cannot be explanatory of what Heirs are meant; in the last it is. 9 Co. 128, Sunday’s Case. Cro. Ja. 415, Webb & Hearing. Id. 448, King vs. Rumball. Id. 695, Chaddock vs. Cowley. 1 Ld. Raym. 569, Nottingham vs. Jennings. Comyns, 539, Brice vs. Smith. Ld. Talbot, 1, Tyte vs. Willis.

The only Question remaining is, whether this Estate Tail first vested in Samuel the Son, or Robert

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The Grandson; I think in Samuel, first, because Samuel had an Inheritance by the first Words; Secondly, because the Testator appoints Robert his next immediate Heir; this is surely showing how the Inheritance shall be limited, and it is as it would be limited by Law, supposing it an Estate Tail. The Inheritance of Samuel shall by no means be taken away, if the Will can be construed otherwise, as in this Case the Words do not make an Estate for Life only, but a Limitation.

Mr. Gridley. The Question is, whether Samuel took a Fee Simple or Tail; the first Words of the Will give him a Fee, but afterwards say Robert shall be his Heir: We all agree as to the Fee—we say the other Words shew the Intent. If Samuel had a Fee, he could convey it, and Robert would not be his Heir; in the second Place, every Word shall be operative if possible; whereas on their Supposition the last Words are of no Force. Robert on their Supposition should take only as the Law gave him, and Robert took as a Purchaser, which he could not do unless Samuel took an Estate for Life: If a Fee, he could not—if he took a Fee, the last Words go for Nothing.

Auchmuty against the Tail. Their Authorities do not reach this Case, the Intent of the Testator is to be followed, but the Intent must be clear and must be agreeable to the Rules of Law. The Fee is at first plainly given; and where an express Estate is given, nothing by Implication shall take it away. 1 Salk. 236, Popham vs. Banfield. Cro. Cha. 368, Spirit vs. Bence. 6 Co. 16, Wild's Cafe. Where
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an Implication affects an Heir at Law, that Implication must be very strong. 2 Bac. 66, Tit. Devise.

I'll consider the Force of the Words in the Will, and whether those Words operate so strongly as to turn the plain Fee Simple into a Tail. If Robert died and left Issue, well—but if not, then to the next eldest Grandson, which is not the Course of Tails; so that the Testator's meaning cannot be collected from these Words; and if a Man shall try to make such an Estate as the Law never made, I take it to be utterly void. I shall show the Words, pointing out the next immediate Heir a meer Nul- lity. The Grandson of an younger Son may be an elder Grandson than those of an elder, which is not agreeable to Tail.

Ch. Juft. Quere—Whether the second Son of an eldest Son may not be called an elder Grandson, than an elder Grandson of a younger Son?

Mr. Auchmuty. This with vulgar Minds would not be a natural Thought. I think if he has any Estate, it is a Fee Simple. Cro. Jam. 590, Pells vs. Brown. (This Case he largely compared with the Case at Bar.) The ordering him to maintain his Mother amounts to his ordering him to pay her a Sum in Gros, which is allowed to cause a Fee Sim- ple. 2 Bacon, 54. (7) 3 Rep. 31, a. 1 Lill. 451. The true Distinction is between a Sum to be paid out

(7) Bac. Ab. Devise, C.
out of the Rents, and a Sum in gross, which may be greater. But supposing the Case to be doubtful, as they are the Plaintiffs, I take it to be incumbent upon them to make out a clear Title.

Mr. Gridley. 2 Bacon, 62. (8) With Regard to the Dierison of the Heir, that is not in this Case to be considered—if it is the Mind of the Testator, that is the Rule. By the first Part Samuel was to have had a Fee Simple, but so as not to exclude Robert; 'tis plain he intended Robert should have the Estate. Samuel must either have a Fee Simple, Tail or an Estate for Life: If for Life, how is it to him and his Heirs?—if in Fee, what has Robert? The last Clause confirms my Opinion, it must be supposed that by eldest Grandson he intended Grandson by Samuel; this is the natural Course, that if Robert died, it should go to the Brothers of Robert, other Children of Samuel.

Ch. Juß. Is it not better first to make it an Estate Tail in Samuel, that it should rather go to these, than other Grandsons, than because it is thus divided, that therefore it is an Estate Tail?

Mr. Gridley. Cases in Equity, 184, Case 28, Shaw vs. Weigh. Cro. Cha. 57. As for the Case Pells & Brown, here is nothing like a Limitation; Upon his Supposition it tends to such a Perpetuity as the Law abhors, it should have been “if Samuel die without Issue;” here it is “if Robert.”

(8) Bac. Ab. Devise, D.
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1763.

ELWELL
v.
PERRIL.

With Regard to the Maintenance, if there is a Doubt, what the Estate is, it shall be a Fee Simple, but never was any Maintenance construed to make a Fee Simple, when a clear Tail was: Maintenance in some Tails is good.

The Court chose to consult upon the Matter, and so Judgment was adjourned to August Term, where the Chief Justice delivered the Opinion of the Court, which he said was unanimous that Samuel by the Words would have taken a Tail; but that the Burden and Duty of Maintenance made it a Fee Simple. (9)

Ruflel verf. Oakes.

(From Middlesex.)

THIS was an Action of the Case on a Note of Hand which was indorsed to the Plaintiff, and appeared to have been paid before the Indorsement. The Question was, whether the Plaintiff should recover in this Action or be barred by the Payment. (1)

Mr.

(9) It would seem, however, that the Court must have considered the intent of the teflato to be doubtful, as otherwise it would be difficult to answer Mr. Gridley's position that "never was any maintenance construed to make a fee-simple when a clear tail was." 2 Jarman on Wills, 179.

(1) It appears by the declaration that the note in suit bore date, October 19, 1759, and was payable on demand to one James Webber or
Mr. Trowbridge for Defendant. Strange, 674. It is always held when payment is once made, a promise is of no force. Lucas, 287. (2) After the promisor had once received it he could not recover himself; he cannot give a greater power than he has himself. Skinner, 410. In a Declaration on inland Bills 'tis said "then wholly unpaid." 2 Show. 495.

Mr. Gridley. This case must appear evident on our side to any person who is at all acquainted with the nature of bills of exchange. To pay him or his order, is there any interest to transfer? Is not the interest gone? The indorser is guilty of a fraud against the indorsee, who has his action for it. There is an entire difference between this and in case it had not been paid till after the indorsement, for by this the property is changed and in the indorsee. Trade would be rendered very precarious, if such negotiable notes can't be discharged but by taking up of the note.

Mr. Kent. Cunningham on bills of exchange cites Comyns. It was formerly settled law that the consideration should not be called in question — they are upon the same footing as inland bills.

Ch. Juß. If this action should be barred, it seems

order, and by him indorsed to the plaintiff. The question of law was raised by a special verdict, which showed that the plaintiff took the note by indorsement on the 4th of August, 1761, after it had been paid, but without knowledge of the payment.

(2) — v. Ormiston, 10 Mod. 287.
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seems to me that one half of the Trade must be extremely precarious, for it rests upon such Bills, whose Credit must be destroyed. It destroys the Distinction between Notes negotiable and not.

**Jufr. Russell.** There is no Difference between them till the indorsement.

Judgment was rendered at Cambridge in August Term, 1763, for Defendant.* (3) Ob. Jufr. differ-
tiente.

* Qu. If the Reason of the Judgment in Strange, 1155, would not have been pertinent in this Case. Vid. Salk. 344; Carth. 356; L'd Raym'd, 87.


The case on the next page, argued and decided at August term, 1761, seems to have been copied into the book here from notes taken at that time. That the notes were Quincy's own appears from the memorandum prefixed to the argument of Otis, post, 551 and at the end of the case in the MS. is a reference to "Law File C," which probably contained his original notes, now lost. It seems strange that this argument should not have been mentioned by the historians. Even John Adams, who was admitted to the bar only four days before, (ante, 35,) and to whom we are indebted for a report of the first argument upon Writs of Affiance in February 1761, (post, 469,) does not appear to have left any notice of this one, except in a letter of October 4, 1780, to Mr. Calkoon, in which he says that the question was solemnly and repeatedly argued before the supreme court by the most learned counsel in the Province." 7 John Adams's Works, 367. But Adams's diary contains only one entry between his admission and June 5, 1762. 2 John Adams's Works, 133, 134. And his autobiography and his letters to William Tudor were written many years afterwards. Vid. post, 409, 417. Hutchinson, having received his instructions from England since the first argument, (post, 415, note,) probably considered the second argument a mere form. For copies of the papers, and other information about the Writs of Affiance, see Appendix I.
August Term (1)
Georgii Ter. in Sup. Cur.

Paxton's Case of the Writ of Assistance.

CHARLES PAXTON, Esq., applied to the Superior Court for the Writ of Assistants, as by Act of Parliament to be granted to him.

Upon this, the Court desired the Opinion of the Bar, whether they had a Right and ought to grant it.

Mr. Otis & Mr. Thacher spoke against.

Messrs. Gridley & Auchmuy (2) for granting it.

Mr. Thacher first read the Acts of 14 Car. 2, ch. 22, and 7 & 8 of Wm. & Mary, upon which the Request for this Writ is founded. (3)

Though this Act of Parliament has existed 60 Years, yet it was never applied for, nor ever granted, till

(1) August term 1 Geo. 3, which was adjourned without day on Thursday, November 19th, 1761. Rec. 1761, fol. 239. The argument and decision, here reported, were made upon Wednesday, the 18th of November. Boston Gazette of November 23, 1761.

(2) Auchmuy was soon after appointed Advocate General, in the place of Otis, who had resigned to avoid arguing for these Writs. Walfburn's Jud. Hist. Msrs. 185, 186.

(3) Sts. 13 & 14 Car. 2, c. 11, § 5; 7 & 8 W. 3, c. 22, § 6; quoted in Gridley's first argument, p91, 480, 481.
till 1756; (4) which is a great Argument against granting it; not that an Act of Parliament can be antiquated, but Non-user is a great Presumption that the Law will not bear it; this is the Reasoning of Littleton and Coke. Knight Service, p. 80, Sect. 108. (5) Moreover, when an Act of Parliament is not express, but even doubtful, and then has been neglected and not executed, in such a Case the Presumption is more violent.

Ob. Justice. (6) The Custom House Officers have frequently applied to the Governour for this Writ, and have had it granted them by him, (7) and therefore, though he had no Power to grant it, yet that removes the Argument of Non-user.

Mr. Thacker. If this Court have a Right to grant this Writ, it must be either ex debita justitia or discretionary. If ex debita justitia, it cannot in any Case be refused; which from the Act itself and its Consequences, he argued, could not be intended. It can't be discretionary; for it can't be in the Power of any Judge at discretion to determine that I shall have my House broken open or not. As says Juft. Holt, "There can be no discretionary Power whether a Man shall be hanged or no." (8)

He moved further that such a Writ is granted and must issue from the Exchequer Court, and no

(4) Paxton's case, August term, 1755; 407, 402-404, & notes.
(5) Co. Lit. 81 a, 81 b. S. P. 11 Met. 291.
(6) Hutchinson, appointed November 13th, 1760. Post, 410, 411.
other can grant it; 4 Infl. 103; and that no other Officers but such as constitute that Court can grant it.

Skin. 671; Holt, 63; 12 Mod. 109, 157; 1 Carth. 395; 1 Salk. 63. The decision in that case was, that a conviction of manslaughter and allowance of benefit of clergy were a bar to an appeal of murder by the heir of the deceased; and that the defendant was entitled to be allowed his clergy at once, without waiting for the trial of the appeal, on which, if convicted, he might be hanged. S. P. 3 Inst. 130; Smith v. Taylor, (1771) 5 Bur. 1778.

Benefit of clergy does not appear to have been allowed in the Colony of Massachusetts. 1 Hutchinson's Hist. Mass. (3d ed.) 398, note. At a later period, it was allowed in the Province in cases of manslaughter and burglary. Trial of the British Soldiers, (ed. 1770) 209. Wallburn's Jud. Hist. Mass. 194. But it was not settled to what other crimes it extended. Resolution of General Court in February, 1768, 14 Mass. Archives, 507. 2 John Adams's Works, 534. Opinion of Trowbridge on "Benefit of Clergy respecting Rape," Keith MS. No. 11. (Fid. post. 473.) It was abolished here by St. 1784, c. 56.

Benefit of clergy in Massachusetts.

The appeal of death was by Lord Holt "esteemed a noble remedy, and a badge of the rights and liberties of an Englishman." Rex v. Toller, 1 Ld. Raym. 557; 12 Mod. 375; Holt, 483. See Barrington on Sts. (5th ed.) 27. In the early part of the last century in England, persons who had been acquitted on indictments for murder, were often tried, convicted and executed on appeals. Kendall on Trial by Battel (3d ed.), 44-47. In 1770 its abolition was suggested in the House of Commons, but not pressed. 2 Cavendish Debates, 13. 20 Howell's State Trials, 716. An appeal of murder was brought in England as lately as 1817, but defeated by the appellant's declining to accept the wager of battel. Abford v. Thornton, 1 B. & Ald. 403. Such appeals, as well as all trials by battel, were then abolished by St. 59 G. 3, c. 48.


The English Sts. of 9 H. 3, c. 34, & 6 Edw. 1, c. 9, concerning appeals of murder, were in force in the Provinces of Pennsylvania and Maryland. Report of Judges, 6 Binn. 599, 604. Kilty on Maryland Sts. 141, 143, 158. It is said that no such appeal was ever brought in Pennsylvania. Roberts on British Statutes in Pennsylvania, 59, 60. But in Maryland in 1765 a negro was convicted and executed upon such an appeal. Sooper v. Tom, 1 Har. & McHen. 227. The St. of 9 H. 3 was expressly adopted in South Carolina in 1712; and Mr. Cooper, the state editor of its statutes, doubts whether trial by battel and appeal of death were not both still in force there in 1837. 2 Sts. at Large of South Carolina, 401, 403, 715.

Appeal of murder in the other Colonies.

On the debate in the House of Commons in 1774 on the bill "for the better administration of Justice in Massachusetts Bay," a clause suspending

In Massachusetts Bay.
it. 2 Instr. 551. That this Court is not such a
one, vid. Prov. Law. (9) This Court has in the
most solemn Manner disclaimed the Authority of
the Exchequer; this they did in the Case of Mc-
Neal of Ireland & McNeal of Boston. (10) This
they cannot do in Part; if the Province Law gives
them any, it gives them all the Power of the Ex-
chequer Court; nor can they chuse and refuse to
act at Pleasure. But supposing this Court has the
Power of the Exchequer, yet there are many Cir-
cumstances which render that Court in this Case an
improper Precedent; for there the Officers are
sworn in that Court, and are accountable to it, are
obliged there to pass their Accounts weekly; which
is not the Case here. In that Court, there Cases
are tried, and there finally; which is another Diver-
sity. Besides, the Officers of the Customs are their
Officers, and under their Check, and that so much,
that

suspending the appeal of murder was vigorously assailed by Dunning,
Burke, Fox, and others, and withdrawn. 17 Parl. Hist. 1291, 1292,
1296. And Mr. Kendall thinks, it existed in the Colonies. Kendall,
248, 249, 272. But Mr. Dane says, the appeal of felony did not exist
here. 7 Dane Ab. 336. And see Constitution of Massachusetts, c. 6,
art. 6; Declaration of Rights, arts. 12, 15; U. S. Constitution, amend-
ment 5.

Trial by battel.

In England, the last joinder of issue for trial by battel was on a writ
of right in 1638; but the judges deferred the combat from time to
time for error in the record until 1641, when the House of Commons,
upon the petition of the tenant, "ordered a bill to be brought in to take
away trial by battel." Claxton v. Lilburne, 2 Rutherf. Hist. Coll. 788,
790; 3 Ib. 356. Commons & Lords Journals 1620–1641, quoted in
Kendall, 135, note. 3 Bl. Com. 337 & seq. But no such bill was
passed in England until 1820, ut sup. This mode of trial is not suppos-
hed to have been introduced in America, unless in South Carolina, ut sup.
Pyft. 178. 3 Willan's Works, 142. 3 Dall. 350. 2 Sumner, 68.

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that for Misbehaviour they may punish with corporal Punishment. 3 & 4 Car. 2, § 8. (11) 7 & 8 W. & M. does not give the Authority. (12) (Mr. Otis was of the same Side, but I was absent, while he was speaking, most of the Time, and so have but few Notes.)

Mr. Otis. 12 Car. 2, 19. (13) 13 & 14 Car. 2, p. 56. Let a Warrant come from whence it will improperly, it is to be refused, and the higher the Power granting it, the more dangerous. The Exchequer itself was thought a Hardship in the first Constitution. Vid. Rapin, Vol. 1st, p. 178, 386, 403, 404. (14) Vol. 2, 285, (15) 375. (16)

(11) St. 13 & 14 Car. 2, c. 11, § 8.
(12) St. 7 & 8 W. 3, c. 22, § 6.
(13) St. 12 Car. 2, c. 19, pe7, 395, note.

(15) Where Rapin says, that in 1619 the privy council of Charles 1 gave orders, "impowering the officers of the customs to enter into any ship, vessell, or house, and to search in any trunk or chest, and break any bulk whatsoever, in default of the payment of customs. But besides that this had never been praftized before, another inconvenience arose. These officers, under colour of searching, used many oppressions and roggeries, which caufed the people still the more to exclaim." See also 1 Rushworth's Hist. Coll. 665, 668, 669; 2 lb. 8, 9.

Before writs of assize were issued in Massachusetts, the officers of the customs, "merely by the authority derived from their commissions, had forcibly entered warehoufes, and even dwelling-houses, upon information that contraband goods were concealed in them." But "the people grew uneafy under the exercise of this asfumed authority," and resented or fued the officers. 3 Hutchinson's Hist. Mass. 92.

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It is worthy Consideration whether this Writ was constitutional even in England; (17) and I think it plainly appears it was not; much less here, since it was not there invented till after our Constitution and Settlement. (18) Such a Writ is generally illegal. Hawkins, B. 2, ch. 1, Of Crim. Jur. (19) Viner, Tit. Commision, A. (20) I Inft. 464. (21) 29 M. (22)

Mr. Auchmuty. Bacon. (23) 4 Inft. 100. From the Words of the Law, this Court may have the Power of the Exchequer. Now the Exchequer always had that Power; the Court cannot regard Consequences, but must follow Law. As for the Argument of Non-user, that ends whenever the Law is once executed; and this Law has been executed in this Country, and this Writ granted, not only by the Governor, but also from this Court in Ch. Justice Sewall's Time. (24)

Mr. Gridley. This is properly a Writ of Affiants.

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(17) An indication of the position, more distinctly stated in Otis's first argument in February, 1761: "An act of Parliament against the Constitution is void." Vid. post, 474, & Appendix I, J.
(18) Qy. Whether Otis here intended to deny that Acts of Parliament bound the Province. See Appendix I, J.
(19) *Hawk. c. 1, §§ 7, 8.
(20) "If commission issues to take J. S. and his goods, without indictment, or suit of the party, or other process, this is not good; for it is against the law."
(21) Probably I Inft. 272 b, note to Lit. § 464: "The surest construction of a statute is by the rule and reason of the common law."
(22) Probably c. 29 of Magna Charta: "Nullus liber homo capiatur, vel imprisonetur," &c. 2 Inft. 45 & seq. See Appendix I, E.
(23) Bac. Ab. Court of Exchequer.
(24) 1755-1759, post, 403-406.
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_ants_, not Assistance; not to give the Officers a greater Power, but as a Check upon them. For by this they cannot enter into any House, without the Presence of the Sheriff or civil Officer, who will be always supposed to have an Eye over and be a Check upon them. Quoting History is not speaking like a Lawyer. If it is Law in England, it is Law here; it is extended to this Country by Act of Parliament. 7 & 8 Wm. & M. ch. 18. (25) By Act of Parliament they are entitled to like Assistants; (26) now how can they have like Assistants, (26) if the Court cannot grant them it; and how can the Court grant them like Assistance, if they cannot grant this Writ. Pity it would be, they should have like Right, and not like Remedy; the Law abhors Right without Remedy. But the General Court has given this Court Authority to grant it, and so has every other Plantation Court given their Superior Court. (27)

_The Judges_ were unanimously of Opinion that this Writ might be granted, and some Time after, out of Term, it was granted. (28)

(25) St. 7 & 8 W. 3, c. 22, § 6.
(26) Altered in the MS. from "Assistance" to "Assistants." The words of St. 7 & 8 W. 3, c. 22, § 6, are "like assistance."
(27) But it is said that in other colonies the writs were refused. 7 John Adams's Works, 267. 4 Bancroft's Hist. U. S. 431, note.
(28) Judgment was given at the conclusion of the argument on the 18th of November, 1761. Boston Gazette of November 23, 1761. And it appears by the court files that the writ was issued on the 3d of December, 1761. See App. I, C.

For a report of another case of public interest, decided soon after, to which Paxton was a party, see Province of Massachusetts Bay v. Paxton, App. II.
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Ruddock verf. Gordon.

Ruddock was a Collector of Taxes in the Town of Boston, and brought his Action, which was Trespass upon the Case, for the Defendant's Tax, upon a general Indebitatus Assumpsit.

There were three Exceptions to the Writ, and Pleas in Abatement. First, to the Looseness of the Account, which was only in general for Tax for the Year 1761; and 'twas said that the Account was Part of the Declaration, and that the Action would not be a Bar to another which might be brought hereafter for each Tax in particular. Secondly, that the Collector has no Right or Authority to bring such Actions, the Law having pointed out another Way, viz., by Distress. Thirdly, that if any Action lay at all, it should be Debt, and not Case. (1)

(1) The Rev. Sts. c. 8, § 15, provide that in certain cases the collector "may maintain an action of debt or assumpsit." And by the St. of 1859, c. 171, the right of action is extended to all cases of a neglect to pay for the space of one year after the tax has been committed to the collector. Gen. Sts. c. 12, § 19.
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It was answered to the first, that in the Town of Boston all the Taxes were made up together, and that Tax was a Noun collective, including all, and would be a Bar; that as for the Collector's Right of bringing this Action, that ought to be considered upon the Merits and not in Abatement; and as for its being Debt, it is merely a Matter in Pais.

The Court ruled unanimously, that the Objection to the Collector's Power is not Matter of Abatement, but to be try'd upon the Merits. (2) But the Opinion of the Court being asked by both Parties upon that Point, the Court were of Opinion that they had no such Power, and that this Action can't be supported. (3)

Gardiner vers. Purrington.

This is an Action of Trover brought to the Inferior Court in Suffolk for a Quantity of Timber cut in the County of Cumberland.

(1) The general principle has sometimes been stated to be, that a perpetual disability in the plaintiff is to be pleaded in bar, but if only temporary, then in abatement. 5 Dane Ab. 693. But this rule has many exceptions; and it seems to be now settled that a perpetual disability, which forever destroys the plaintiff's right of action, is pleadable either in abatement or bar. (Langdon v. Potter, 11 Mass. 313,) the rule that a plea in abatement must give a better writ having so many exceptions that it can hardly be called a general rule of law. 6 Pick. 369.

(3) S. P. Graps v. Steffon, 8 Met. 393. "A collector of taxes cannot maintain an action to recover them in any case besides those in which an action is given to him by Rev. Sts. c. 8, § 15." See also 6 Mass. 44.
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The Question was, whether the Title of Land can be given in Evidence in Trover in another County than where the Land lies.

1 Bacon, 35; 1 Salk. 290, Brown vs. Hedges; Mod. Cafes, 322, Walrond vs. Van Mofes, (1) were cited in Favour of the Action; and it was said by the Council on this Side, that the giving Title under this Action did not bar or affect an Action of Ejectment brought in the County where the Land lies.

Gridley. There is no special Pleading in Trover, except a Release, which admits the Conversion. The Title is often given in Trespass where the Possession is not clear, 'tis what the Law calls incidental; yet 'tis necessary in Trespass; just so in Trover. The Man cuts down the Timber—I may bring Trespass; so I may Trover. The Timber is mine after it is cut down; the Tort never shall give him Property. It is mine in the Timber as it is mine in the Tree, and I may bring my Action: Now how can I prove my Property, unless I can give my Title in Evidence? When the Possession seems mutual, it can never be determined, and though my own, (the Thing may be,) if I may not be admitted, I may never recover my own. In the Admiralty, many Things that are not naturally within its Jurisdiction may be tried there. Difference between an Inconvenience and a Mischief—whenever the Law has once considered of this, it vanishes;

(1) Anon., cited in Walrond v. Van Mofes, 8 Mod. 322.
vanishes; in determining what is an Inconvenience, the Law is settled.

_Just. Russell._ Whether this Case is not different from the Case of Mod. Cases, (2) where it was admitted for the Inconvenience, and is it not the same in Effect as if the Title was determined?

_Cb. Just._ Whether it will not operate against another Rule of Law about Titles of Land coming in Question in another County?

_Auchmuty._ The Title is not determined.

_Cb. Just._ As my Brother Russell observes, is it not the same Thing? It is not whether Trover is a transitory Action, (3) but whether that which is of the Nature of a real one shall be given in Evidence.

_Mr. Gridley_ cites Styles, 331.

(2) The case cited in Walrond v. Van Moses, _ub. sup._, is as follows:

"Nota. At the trial of this case a cause was cited that trover lay in England for timber taken away and converted in Ireland; and this was by the opinion of the late Chief Justice Holt, though it was objected that it might bring the title of lands in Ireland in question, which could not be tried here; but he answered that as trover was a transitory action it might be brought here for a conversion in Ireland; nor shall any incident question which may arise on the same bar the plaintiff of such action; for if it should, then a person being in England can have no remedy here when the defendant is guilty of a trover in Ireland, and comes from thence into this kingdom."

(3) Trover for cutting down trees is a transitory action. Steph. Nisi Prius, 2695. Brown v. Hedges, _ub. sup._ So also an action of trespass de bonis aportatis for burning down a small house erected for a temporary purpose, and without a cellar. 15 Pick. 156.
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Mr. Kent. 1 Bacon, 32. Mod. Cases, . A personal Action may grow into a real one as here. 1 Lilly, 20.

The Court were of Opinion that the Cases cited in Favour of this Evidence respected only Cases of Necessity, and where they could not be tried in the same County, which not being the Case here, they determined that in this Case it could not be admitted. (4)

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Rogers v. Kenwrick.

(From Barnstable.)

THIS Action was Debt upon an Arbitration Bond. No Award pleaded. Award was read as follows: "We do determine and settle the northwest Corner Bound as settled by us is an Heap of Stones," &c., "which appears to be the reputed known N. W. Bound for many Years, and nothing appears

(4) Actions, personal in form, which involve or bring in issue the title to land, have been held to become thereby real, within the meaning of the statutes concerning coits and the jurisdiction of justices of the peace. 4 Pick. 169 10 Pick. 473. But the point here decided appears to be, not that the action becomes local, but that the title to real estate in another county shall not incidentally be given in evidence to support a transitory action which might have been brought in that county. This seems a difficult position to support, as the title to the land is only offered as a means of proving a right to possession of the trees when converted, on which latter point alone is the judgment conclusive.
appears but was always so,” &c., “and that the said Kenrick pay,” &c. (1) Now ’twas answered by

Mr. Paine. That the Arbitrators had taken upon them to determine a Title of Freehold, and therefore the Arbitration void and no Award. Where the Right of Freehold is in Debate, the Property cannot be transferred by an Award; the Arbitrators only are in Stead of the Parties, and can do no more than can be done by them. Now the Parties themselves cannot pass corporeal Inheritances without solemn Livery. 1 Roll. Abr. 242. 14 H. 4, 19, 24. 9 H. 6, 6. 3 H. 4, 6. 11 H. 4, 12. Keilw. 99. 1 Leon. 228. 1 Roll. Abr. 244. 1 Bacon, 132. But if Condition of the Obligation is to stand to Award of Arbitrators, who award the Land to one, and that the other shall release, who does not, the Penalty of the Obligation is forfeited, but if no Act to be done by the Party, as releasing, is awarded, it is not forfeited though the other do not convey to him a good Title. (2)

Mr. Otis, contra. I grant the Award to be void if

(1) The replication further alleged that the defendant had not kept up to the tenor of the award, but had broken over the line by cutting wood on the land of the plaintiffs. And among the papers on file appeared the deposition of Jonathan Kenrick, sealed up and directed, “For the Clerk of y* Superior Court of Judicature” &c. This being opened by the present Clerk of the Supreme Judicial Court, it appeared that the deponent testified to seeing the defendant “cutting wood about six rods to y* weftward of y* range that was settled by y* arbitrators.”

(2) Among the papers on file appears one which would seem to have been part of Mr. Paine’s brief, since it contains the above argument and list of authorities almost verbatim; the whole being taken from Bac. Ab. Arbitrament, A.
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If the Arbitrators have determined the Freehold; but here they have not, they have only determined the Line; the real Boundary is but a mathematical Line without Breadth or Thickness, the settling that does not affect the Freehold. 1 Bacon, Tit. Arbitra. I think then a Bond conditioned to abide by such Award is good, and the Award good, and if not complied with, the Obligation should be forfeited.

Paine. When they settle the Line, they say to whom the Land on each Side belongs. They have awarded Nothing to be done; they should have ordered Releases.


Cb. Juft. very warmly against the Determination.*

* Quere, if this Case is not agreeable to Law? Vid. Vol. 1, (4) p. 18, and the Authorities there cited.

(3) S. P. Jones v. Boston Mill Corp. 6 Pick. 148. Goodridge v. Duf
tin, 5 Met. 363. In this case the previous decision in Whitney v. Holmes, 15 Mass. 152, was partially overruled, and the rule stated by Mr. Justice Hubbard to be, that an award which settles a boundary, "although it will not have the direct effect of conveying lands, will yet conclude the parties from disputing the title or boundary which is distinctly settled by the award, and that it shall operate by way of estoppel." See also Searle v. Abbé, 13 Gray, 409.

(4) This volume is milling. Many other references to milling volumes are omitted. See Preface.
Gridley v. Balston & al.

Baltimore and others were Executors of Palmer of London, who was Agent for the Plaintiff in his Lifetime. A Ship was consigned to Palmer by the Plaintiff, but Palmer died before her Arrival or Knowledge of it. The Executors undertook the Business and transacted it, and are now sued as Executors to Mr. Palmer for Breach of Trust. (1)

The Question was, as Consignment was made in Mr. Palmer’s Life, and the Executors prosecuted it, whether they should answer as Executors, and Palmer’s Estate be liable in their Hands. 2 Bacon, 144 (2)

It was said, if the Breach of Trust was in Mr. Palmer—being a Tort, it dies with him; if not, he can’t be chargeable.

On the other Hand that it was but a Continuance of the same Affair, and they acted in his Stead. Viner, Tit. Executor, P. 4, Plea 39, 43. 1 Lill. 778, Let. H. Dyer, 324.

(1) The declaration alleged that the testator, being factor of the plaintiffs, procured insurance on the freight of the plaintiff’s galley from Jamaica to London; that when she arrived the testator died; and that the executors undertook to settle and manage the said trust, but managed it ill, and “perfunctorily acted with great negligence” in settling a leakage of sugars.

The Court unanimous that these Authorities are not in Point, and the Action will not lie.

Brown vers. Culnon.

(From Middlesex.)

UPON a special Verdict, which was: "The Jury find that the Overseers of the Poor in the Absence of the Defendant and without his Request advanced for the necessary Support of the Defendant's Wife and Children a certain Sum, and if by Law the Plaintiff as Treasurer of the Town ought to recover the same back from the Defendant, they find for the Plaintiff — otherwise, for the Defendant."

 Judgment that the Defendant is liable. (1)

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Dunten verf. Richards.

(From Cambridge.)

PLAINTIFF was an Apprentice bound by his Guardian to the Defendant, who covenanted among other Things to pay the Plaintiff £80 (1) at the Expiration of the Time of his Service. This Action was Covenant broken. Oyer of the Indenture, upon which Defendant pleads that Plaintiff was not capable of serving him as he covenanted, and that in Consideration thereof the Guardian had released the Payment of the £80. The Question was, whether the Guardian had Authority to make such Release.

(1) The declaration alleged that the plaintiff bound himself with the content of the guardian, and that the defendant covenanted to dismiss him at the end of the term "with two suits of apparell, one for the Sabbath and one for every day, and to give him eighty pounds in bills of public credit of the old tenor, or the value thereof in such money as shall then be current," which value was alleged to have been £10 13s. 4d. The plea set forth that the defendant was deceived and imposed upon by the guardian in binding the minor, whom he found deficient in understanding, and not capable of learning or serving him, wherefore he insisted that the apprentice should be taken back, and, after much dispute and controversy, it was finally agreed that the master should release all demands on account of the impostion, and that the guardian should release the £80 as aforesaid, which was accordingly done. To this plea there was a replication in writing, as on file, concluding to the country," and rejoinder, after which the case was sent to a jury, who found for the plaintiff "three pounds money damage and costs." The case was continued for argument on the special plea, and judgment was finally entered for the full amount of £10 13s. 4d. It would seem that this argument must have been on a motion for judgment non obsante veredicto, but as all the Middlesex files of court for 1763 are missing, no information can be obtained except from the record.
It was said by the Plaintiff that Guardians have no Right to release or give Discharge but for Sums received. Moore, 852, White vs. Hall.

On the other Hand, the Guardian was a Party by their own shewing, and released no other Contract than he made himself.

Court were unanimously of Opinion that the Guardian had no Right to Release. (2)

(1) From the pleadings in this case it would seem that there was no attempt to affect the guardian with any liability on the covenants of the indenture, but that the master's claim was on the ground of deception and imposition in inducing him to enter into it. See Blunt v. Meckler, 3 Mafl. 218. In that case it was held, that where a ward binds himself with the assent of his guardian, the words describing his duties are not the covenants of the guardian, though he signs and seals the indenture. But in an indenture between father, son, and master, under 5 Eliz. c. 4, the father is answerable in covenant for what is to be performed by the son. Com. Dig. Covenant, A 3. Doug. 518. 8 Mod. 190. 3 Dane Ab. 588. Whether a father or guardian liable on a broken covenant for service would have any power to release the master from a covenant beneficial to the minor, is not here decided. It is a general rule that contracts beneficial to the ward cannot be avoided by the guardian. See 13 Mafl. 240.
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III Georgii Ter. in Sup. Cur.

Present:
The Honourable
Thomas Hutchinson, Esqr., Chief Justice.
Benja: Lynde,
John Cuthing,
Chambers Russell,
Peter Oliver,

Baker v. Mattocks. (1)

The Question in this Case was, whether Estates in Tail are partible in this Province, by the Province Law.

(1) Formedon in the defender. The declaration alleged a gift in tail to Samuel and Constance Mattocks, and a descent according to the form of the gift to Samuel, the son of the donees, and to the said Samuel's eldest son, who died leaving the plaintiff and another daughter, who died leaving a son, who died without issue, "after whose death the whole right to the demanded premises came to the plaintiff according to the form of the gift." The special verdict found that Samuel, the grandfather of the plaintiff, made a deed of the premises to the defendant, one of his younger sons, and that there were many other descendents who had descendents.

The Prov. St. of 4 W. & M. by which Lands descend to all the Children, and which empowers the Ancestor to convey or devise them at his Pleasure, does not extend to Estates Tail, but leaves
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Mr. Fitch in Favour of the Partability. The Design of the Province Law (2) was to alter the Common Law Descent. All Estates Tail at Common Law were Fee Simple conditional. Co. Lit. 20 a. 'Tis the Statute of Westminster that forms Estates Tail. This Statute does not alter the Course of the Common Law Descents, it only limits them. Co. Lit. 19 a. Co. Lit. 110 b. This is the Case of Gavelkind Lands. Vin. Tit. Gavelkind, B.

Justice Russell. The Common Law never took Place with Regard to Gavelkind Lands, but the Common Law takes Place here unless in Case of particular Estates.

Mr. Gridley. The Tail is only cut out of Fee Simple,
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Simple, it is only excluding others to whom it would otherwise descend.

Mr. Thacher. But for the Province Law, neither Fee Simple or Tail would be partable. The Question then is, whether this Law is extended to Estates Tail; by this Law, every Person shall have Right of Disposition, and if no such be made, then follow the Rules of Descent. 'Tis certain the Legislature had Fee Simple only in Contemplation; both would have gone according to the Common Law of England, but our Fee Simple is by this Act taken out of that Course, while the Fee Tail is not. The Statute of Westminster left Gavelkind as it found it. Lilly, 648. 'Tis otherwise with Regard to our Province Law, which shall alter no further than its Design to alter.

Mr. Otis. The Manner of Succession, if traced to its Original, is merely arbitrary; the Law of Nature is a Stranger to it; by that, no Man has a Right to more than his Life. States have an undoubted Right to settle it as they please: I say this in Answer to the Argument of the Natural Right of Descent to all the Children alike. When once any State has settled the Course of Descents among them, 'tis of great Importance that the Principles should be kept to. The Method of Descent in England to the eldest Son is 700 Years—nay, as old as the Common Law itself. I conclude that before the Conquest the Right of Primogeniture did not take Place; somewhere between William 1 and Henry 1 it arose, but that does not affect the Case; it is now, and long has been so settled. Now as the Province
Province Law has altered this Rule of Descent with Regard to the Fee, the Question is, whether of Consequence it has alter'd the Course of Tails. No Statute can alter the Course of the Law further than the express Words of the Statute. Viner, Tit. Tail. It has been doubted whether any Alteration at all by our Province Law is good; it has been determin'd to be good at Home in the Case of Fee Simple, and for the Reason given in our Law, which does not hold with Regard to Tails.

*Mr. Gridley.* The Question is, whether as Fee Simple is partable by Custom or by Law of the Land, Tail is not also partable; that is the Case in the Custom of Gavelkind. Fee Simple contains in it Fee Tail, which is a Part of it; as it was in the Fee Simple, so must be the Course of Descent in the Fee Tail. Heirs in Fee Simple are Heirs in Fee Tail; only certain Heirs are excluded, cut out, and 'tis an universal Interpretation of these limited Estates, that they should follow the Rule of Fee Simple. Now shall we take the Course of our Estates Tail from our own Fee Simple, out of which they are created, and interpret the Rule of their Descent by it, or to interpret our Tails shall we have Recourse to the Fee Simple of England to judge of our Tail?

*Justice Oliver.* Till the Statute *De Donis*, Tails were Fee Simple Conditional; by that, Estates Tail were created. We brought over both the Common Law and Statute with us. (3) This Law of ours relates

(3) S. P. 1 Masl. 60, 61. 2 Masl. 534. 8 Pick. 316. 13 Met. 68.
relates particularly to Fee Simple, and I think does not affect Estates Tail, but leaves them as in England. I am against the Partability.

Justice Russell. The very Intent of Tails was to secure Estates in Family, and keep them together. The Intent ought to be observed, but would be destroyed by such a Construction of the Law. I am therefore against the Partability.

Justice Cushing. This Point is of great Consequence to the Province, and it would be attended with great Difficulty at this Day to determine, that Estates Tail were partable, the general Tenor having been otherwise, yet if the Law is plain, as I hold it is, I don't see how it can be help'd. If there was no other than Fee Simple intended by the Prov. Law; yet as it was there settled, who were Heirs, that settled Estates of Inheritance, all being made out of Fee Simple, and being a Limitation, not an Alteration. This is the Manner of Construction of the Law at Home: Where Fee Simple is partable, so are Estates Tail; and where Fee Simple descends to the eldest Son, so does Tail.

Justice Lynde. Had there been no particular Law of our Province, I should have thought Fee Simple and Tail would have gone alike, but now I think by our Law, Fee Tails are exempted and left at Common Law. Fee Estates only are directed to descend to all the Children, and with Reason. It seems directly against the Reason and Intent of Estates Tail that they should be partable, and that they
they are not made partible by this Law, is my Opinion.

_Cb. Justice._ It seems evident to me that it is the Spirit of the English Law, that all Inheritances should follow the Method of Fee Simple: If it was now a thing intirely upon the Law I should not have the least Difficulty of thinking Fee Tail, as well as Fee Simple, was partible; but it has been so long thought otherwise here, and this has been the uninterrupted contemporaneous Exposition of the Law, and many Judgments of Court founded on it, that it creates a great Difficulty, and I am glad that the Point is determined without me, for how such a Custom can prevail against plain Law, I doubt. (4)

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Scollay _vs._ Dunn.

_DUNN_ brought a Libel in the Admiralty against Scollay, for that he was a Mate on board a Vessell of Scollay's, which was taken, and ransom'd by the Master, and Dunn went as an Hostage. He was

(4) Judge Trowbridge, in an opinion given upon the will of Shute Shrimpton Yeomans, who died in 1769, (for an opportunity of examining which we are indebted to Edmund Trowbridge Dana, Esq.,) took the same view of the law as the Chief Justice and Justice Cushing in this case. But the law in this State has since been settled in accordance with the decision of the majority of the Court. Corbin v. Healy, 20 Pick. 516. Wight v. Thayer, 1 Gray, 284, 286. It was not until after the Revolution that the provisions for barring entails by common deed of warranty were enacted. St. 1791, c. 60. And even at the present day this cannot be done by will. Gen. Sta. c. 92, § 1. 6 Gray, 24.
was long Prisoner, and at last released by the Money raised by some of his Friends, and now returned to Boston. Libels against Scollay and others, Owners of the Vessel. A Prohibition was granted, and the present Question was, whether the Prohibition stand or a Consultation ordered; The Point was, whether the Proceeds in the Admiralty against the Owners' Persons was good. (1)

(1) The writ of prohibition is addressed "to Chambers Russell Esq., Judge of our Court of Vice-Admiralty, Charles Paxton Esq., Marshal, Andrew Belcher Esq., Registrar, and all the officers of said Court." The libel is alleged to have set forth as follows: "That the libellant was mate of the brigantine Peggy belonging to John Scollay and Thomas Fletcher, and Isaac Freeman was master of her, and that she was taken on the high seas as prize by a private French ship of war called the Entreprenante, belonging to Monseur Bouteiller at Nantes, and that the said Isaac ransomed her and her cargo for 5000 livres, to be paid in six months, and that the said John, at the said Isaac's request and direction, became hostage for securing the payment, and was by Peter Thibaut, the French captain of said ship, carried to Nantes," &c., "and that the libellant was finally obliged to pay the sum of £213 10s. of his own money to obtain his liberty." The petition further alleged that "the brigantine was not then here, and that the said Court of Admiralty could not award any process against her, and that the libellant did not allege that she ever came to the petitioners' possession, or that they ever agreed to the said contract of ransom, but that the design of the libellant was to make the petitioners' persons and estates liable for the default of the master, whereof they were wholly unknowing." After reciting the petition at length, the writ concludes as follows:

"We therefore willing to maintain the Laws and Rights of our Judicatures and Courts of Record, and being unwilling our liege people with delays to hurt, Command and firmly Enjoin you that you meddle not further in the said Plea or Cause, nor molest or cause to be molested the said John Scollay and Thomas Fletcher or either of them in the Cause aforesaid in the said Court of Vice Admiralty neither attempt or presume to attempt anything more therein: Until our said Justices have advised and consulted therein at our Superiuor Court of Judicature Court of Aflixe, and general Goal Delivery to be holden at Boston, within and for our County of Suffolk on the third Tuesday of Feb-ruary instant, when and where you the said Chambers Russell and the said John Dunn or any other persons may be present, if you or they please.
Mr. Auchmuty for the Jurisdiction. The first being taken upon the High Seas, Facts arising afterwards in Consequence in the Body are within the Jurisdiction of the Court of Admiralty. Masters may make Contrasts that bind the Owners. Mollay, B. 2, C. 1, § 10; Ch. 2, §§ 14 & 16. Ib. B. 2, Ch. 2, § 2. Hardres, 183, Sparks vs. Stafford. In Salkeld the Case is not so well reported as the same in Mod. Rep. 'Tis unnecessary to set forth Order to redeem; as the Master may justify throwing over Goods in Case of a Storm to save a greater Loss, so may he redeem, as otherwise the Whole would be lost. 2 Ld. Raym. 931, Trauter vs. Watson. As for the Case of Johnson vs. Shippin in Salkeld, that the Master by his Contrast cannot make the Owners liable, 6 Mod. 79 is the same Case, and not so reported, besides there the Contrast appeared to have been made at Land; as for the Vessel's being lost, 'tis of no Avail—the Owners must be bound instantly or not at all; if the Master has a Right to bind the Owners by his Contract, they are bound, and the Contract cannot be rescinded but by the Parties, and not depend upon such a Contingency as the Arrival of the Vessel.

Mr. Gridley. If the Admiralty has Jurisdiction of the Principal, it has of the Incidents; if of the Thing, it has of the Person; as in the Case of Damage

"plea to show forth and maintain if you or they can, that the aforesaid
"Plea or Cause is cognizable in the said Court of Vice Admiralty.
"Witnes, Thomas Hutchinfin Esq. at Boston this twelfth day of
"February in the third Year of our Reign Annoque Domini 1763.
"NATH'L HUTCH, Cler."
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age done by one Ship against another. Molloy, B. 2, C. 2, p. 2.

Thacker. Whether the Owners must answer in their Persons for the Act of the Master at Sea, of which they were utterly unknowing, is the Question; I take it not the Owners personally, for the Thing itself is bound. Every Ransom is a new Purchase, and if the Owners are liable in this Case, they would be liable if the Master had contracted with the Captors for another Ship, and sent an Hoftage as a Pawn.

Ch. Justice. It differs from a new Purchase, for a new Purchase from an Enemy is void; 'tis a Redemption, a Saving it from being the Enemy's Property.

Thacker. If the Vessell be liable for the Ransom, and the Master may retain her for the Ransom Money, then she can't remain so absolutely the Owner's Property as she was before the Capture. 2 Ld. Raym. 932, Tranter vs. Walfon.

Ch. Justice. The Question seems to me to be, whether the Contract of the Master upon the High Sea is the Contract of the Owner; and whether, if it is, there is any Instance of Suit in the Admiralty against the Persons of the Owners.

Otis. The very Idea of Hypothecation is that the Master may bind the Owners, so far as that Interest of theirs goes, with what he is interested. Molloy, 15, 2, Ch. 11, § 11.
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It is now settled that Owners shall not be liable for the Barratry of the Master further than the Ship and Freight. 7 G. 2.

The Power of the Master is confined to the Ship and Cargo. Holt's Reps, 48. Viner, Tit. Court of Admiralty. The Case of Hardres is consistent with the above Rule.

**Gridley.** There are some Things though transacted upon the High Sea are not of a Maritime Nature, are not within the Jurisdiction of the Court of Admiralty. Things of a Maritime Nature transacted at Sea are undoubtedly within its Jurisdiction. So there are some Things of a Maritime Nature, though not transacted upon the High Seas, that are within the Jurisdiction of the Admiralty; such are Wages of Seamen. There is Nothing that Owners are not liable for, which is necessary for the Support of the Voyage; it is no Argument that because the Vessel is liable, the Owners are not also; Vessel, Master, and Owners are all liable for Wages. Viner, Tit. Hypoth. 329, bot.

**Otis.** This is Nothing but Hypoth. Viner, Tit. Mariner, 236; Tit. Master of a Ship, 348.

**Mr. Justice Oliver** delivered his Opinion in Favour of the Jurisdiction of the Admiralty.

**Justice Lynde.** I take the Affair of Ransom to be a Matter upon Sea, and therefore if the Libel was on the Ship or Cargo, I should hold it good; but
but as it is not, I cannot but be for the Prohibition standing.

Chief Justice. Ransom as far as it respects Master and Hostage maritime, so far as Owner and Master does not appear to be a Contract upon the High Seas. None of the Authorities maintain the Jurisdiction in this Case; and where it is doubtfull, I think 'tis a Rule that common Jurisdiction ought to be maintained, and that the Admiralty Jurisdiction ought to be made plain and clear, which I think is not the Case now.

Prohibition stands. (2)

Mr.

(2) There cannot be much doubt that the contract between the owner and the hostage who pawns himself for the ransom, is maritime, and within admiralty jurisdiction. See the cases cited above; also 3 Doug. 166; 1 Ld. Raym. 22. The conclusion arrived at by Mr. Justice Lynde is, that although the contract be maritime, yet that only the remedy in rem can be sought in the admiralty. The opposite doctrine may now be considered as established in this country, "if indeed," as says Mr. Justice Sprague, (21 Law Rep. 605,) "anything as to admiralty jurisdiction can now be deemed settled." See Andrews v. Wall, 3 How. 573, Story, T. — "Over maritime contracts the admiralty possesses a clear and established jurisdiction capable of being enforced in persona as well as in rem." New Jersey Steam Navigation Co. v. Merchant's Bank, 6 How. 393, Nelson, T. — "If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship; it cannot be confined to one of the remedies on the contract, when the contract itself is within its cognizance." Also De Lovio v. Boit, 2 Gallis. 462; Clerke's Praxis, Tit. 1. But that it was once so confined to one remedy in some cases by the English law, see the differenting opinion of Mr. Justice Johnson in Allegre v. Ramsay, 12 Wheat. 614. The resolutions of 1632 gave the admiralty jurisdiction in rem, but not in persona, over contracts for "building or mending, faving or necessary victualling of a ship." And Mr. Justice Johnson, ub. sup., contends that the only influence of admiralty jurisdiction in persona upon contracts was for seamen's wages, which was allowed on the principle of communis error.
Mr. Gridley then claimed an Appeal to the King and Council: Reason of Government requires that they should have Power of final Judgment in Cases of Importance; at Home, in Case of Ejectione Firma on a Leaf, Appeal lies.

Auctunty. This is a Matter that deserves Appeal. Vaughan Rep. 290, 402. That Writs of Error lie in all inferior Dominions, Ib. 418. Admiralty Jurisdiction is expressly excepted from our Charter; (3) and if no Appeal lies in this Case, it seems to me that Exception is of no Value. 1 Peere Wms. 330, Christian vs. Corren.

Mr. Thacher. The last Clause of the Charter relative to this Matter of Appeals seems evidently explanatory.

error facit jus. But see 3 Burr. 1740, where Dunning, arguendo, “admitted that actions had been brought in the admiralty by the hostage against the owners who refused to ransom him.” Also 5 Rob. 104, where it is stated that in suits for ransom on the part of the enemy, “proceedings were always carried on against the owner in the name of the hostage suing for his liberty.” Whether the claim of the hostage against the owners is in the nature of salvage, and therefore dependent on the safe arrival of the vessel, or whether, as argued here, the owners are bound instantly by the act of redeeming her from her present peril — querc. A recapture of a ship from the enemy or from pirates is salvage. The Trelawney, 4 Rob. 227. And where the poisseon has been parted with for the benefit of the owner, proceedings in personam may be sustained. The Hope, 3 Rob. 216.

(3) “Provided always, and it is hereby declared, that nothing herein shall extend or be taken to erect or grant or allow the exercise of any admiral court, jurisdiction, power or authority, but that the same shall be, and is hereby referred to us and our successors, and shall from time to time be erected, granted and exercised, by virtue of commissions to be issued under the Great Seal of England, or under the seal of the high admiral, or the commissioners for executing the office of high admiral of England.” Province Charter, Anc. Chart. 36.
explanatory of the first, (4) the Matter in Difference only is what is to be considered in giving Jurisdiction, and not the Suggestion of Damages.

Otis. It appears to me that by the plain Construction of the Words of the Charter, the Matter in Difference must necessarily be £300. Courts have constantly denied Appeals where there has been no Judgment for more than that Sum; this has been the contemporaneous Exposition of it.

Gridley. The Charter should be liberally construed in Favour of Appeals. I hold, this Court, by the Clauses in our Charter relative to this Matter, is to judge of the Limitations of Appeals. "In all Matters deserving the same," are the Words upon which my Opinion is founded. It seems to be settled that the Subject has a Right in all Causes to appeal; therefore even the King cannot abridge it. "All Matters deserving the same" ought to have a liberal Construction in Favour of the Subject. "We think it necessary that our Subjects should have Liberty of Appeal to us in all Cases that may deserve the same." The Construction, the Gentlemen on the other Side would give, seems to be providing Appeals only for the Defendant; upon their

(4) "And whereas we judge it necessary that all our Subjects should have liberty to appeal to us, our heirs and successors, in cases that may deserve the same, we do by these presents ordain, that in case either party shall not rest satisfied with the judgment or sentence of any judicatories or courts within our said province or territory, in any personal action, wherein the matter in difference doth exceed the value of three hundred pounds sterling, that then he or they may appeal to us, our heirs and successors, in our or their privy council." Province Charter, Anc. Chart. 32.
Principles, a Demurrer being to the Declaration, and Judgment against the Plaintiff, how can he ever appeal?

Justice Oliver. I take the first Clause in the Charter relating to Appeals to be only introductory to the second, and that there can be no Appeal where the Matter in Difference is less than £300; and upon that second Clause I am against granting an Appeal in this Case.

Justice Cushing. I take, the second Clause is explanatory, and so I am against it.

Justice Lynde. With Regard to the first Clause, it appears to me to be only introductory, and therefore on that I am of the same Opinion; as to the second I am doubtful, but as I am in general against Appeals, I am against it in this Case.

Chief Justice. First, whether the Subject Matter comes within the Clause of the Charter relative to Appeals, as it is an Affair begun in the Admiralty and brought here only by Prohibition; and for this we must look into the Charter, which entirely reserves and excepts it, and 'tis by a subsequent Act we have any Right to issue Prohibitions to it; (5) and

(5) The Province Law of 11 W. 3, which gave the Superior Court general jurisdiction "as fully and amply to all intents and purposes whatsoever as the Courts of King's Bench, Common Pleas and Exchequer within his Majesty's Kingdom of England, have or ought to have," Anc. Chart. 331. "The rights of the courts of common law within the Province of the Massachusetts to restrain the excesses of the Admiralty Jurisdiction, are not derived from their charter, but from subsequent
and if we have any Right to judge, I think it is the
same as if the Matter came originally before this
Court. Under the old Colony Charter, there was
no Mention of Appeals; this was Objection against
that Charter. One while in the Quo Warranto,
that Clauze in the new Charter was looked upon as
a great Priviledge; (6) had it stood without any
Claue, all Causes would have been appealable: I
take it therefore to be a Priviledge in our Charter;
"all Causes which deferve it," is explained to be
above £300, but should it be admitted to be within
the Discretion of the Court to grant Appeals, whether
less or more, I should be against it, in Favour of
Priviledge. As for this Case, whether it exceeds
£300 or no, there is the Difficulty. I am consid-
ering the Allegations, &c., in Favour of Appeal.(7)

sucbsequent laws of the Province, confirmed afterwards by the Crown."
Dummer's Defence of the New England Charters, (Boston ed. 1745.)
26.

(6) Under the Colony Charter no appeals to England were allowed.
See the remonfrance of the legislature to the Long Parliament—"We
have not admitted appeals to your authority, being assured they cannot
stand with the liberty and power granted us by our charter." 1 Ban-
croft's Hist. U. S. 444. Afterwards in the reign of Charles 2, the
colony "joined issue with the King by denying the right of appeal."
2 1b. 74. And this was one of the principal causes of the sucbsequent
issuing of the Quo Warranto, by which the charter fell.

(7) The appeal was not granted.

On a sucbsequent page in the MS. is the following memorandum:"
"Dunn v. Scollay, Cae of Hoitlage & Ranfom: Authorities in Favour
of the Plaintiff were Molloy, (Old Edit.) 205 § 10, 212 § 14, 213 § 14.
Molloy, (New Edit. 1744.) 338, 237, 81 244, 5. 2 L'd Raymond,
93 1; Lord Holt's Opinion relied on; Sea Laws, 128. In Favour of
the Defendant were 2 Chancery Cafes, 239; 1 Salk. 35; 3 Bacon,
593, 595."
MOTION was made for a new Trial. This Cause was from Middlesex. It seems the Jury gave a Verdict for Damages in Favour of Jackson, original Plaintiff, contrary to the Mind of the Court.

Trowbridge. When the Jury give a Verdict against Evidence, the Court may grant a new Trial. That Jury are not absolute Judges of Evidence and Damages, see Holt's Rep. 701, 702, Ash v. Lady Ash. Jurys are to try Causes with the Assitance of Judges. Lucas's Cases of L. & Eq. 202. (1) Mistake of Judge or Jury good Cause for new Trial. Strange, 1105. Ibid. 584. Evidence doubtfull no new Trial should be granted, but here 'twas against direct Evidence. New Trial granted after Trial at Bar, is conceded. This Case is not like Ejectment—he may have a new Ejectment; not so here.

Auchmuty. If ever any Case was excepted from new Trials, this is. Trial at Bar is more favoured than Trial otherwise, because of its Solemnity. I confesse I wish for a Power in the Court to fet aside Verdicts, but not for an unlimited one. This Case was not against Evidence. I allow there was Evidence against Evidence; and two Verdicts, though no Rule of Controul, is yet of some Weight. (2)

Strange,

(1) 10 Mod. 202, The Queen v. Helfson.
(2) S. P. 7 Masl. 301. 9 Masl. 450. 18 Pick. 15. 8 Gray, 46.
Strange, 1105. Evidence doubtfull. Ibid. 1142. Salk. 648, Sparks vs. Spicer. The Court is not to be Judge of the Law and Fact too absolutely; if it should be, it takes away all Verdicts but such as are agreeable to the Mind of the Court. It would be opening a Door to great Inconveniences to the Subject, even if Attaints did not lie; but here Attaint lies. (3)

Ch. Justice. Are you not agreed, that, were it evidently against Law and Evidence, there the Court may grant a new Trial, but not where there is Evidence on both Sides. (4)

Trowbridge. It can never be supposed that a Verdict will be given against direct Evidence, without Shadow of Evidence to support it. This differs from the Cafe of Fuller & Clark at Cambridge — there was plainly Evidence against Evidence. I hold, this Court always have Right to grant new Trials when they think Injustice like to be done.

Justices Oliver, Cushing, Russell & Lynde against a new Trial, because the Court were not clear in the former Trial.

(3) It seems however that attaints had long been obsolete. See 1 Bl. Com. 390 — "The attaint is now as obsolete as the trial by battel which it succeeded, and we shall probably see the revival of one as soon as the revival of the other." But in Atfield v. Thorton, 1 B. & Ald. 460, wager of battel was sustained by the Court in 1818.

(4) See 20 Pick. 289, Shaw, C. J. — "For a long time it was considered that a new trial could only regularly be granted, where the verdict was without evidence or against the whole evidence. It has however been extended to cafes, where the verdict is clearly against the weight of evidence, although evidence was given on both sides."
1763.

POOR v. DOBLE.

Rec. 1763.
Fol. 113.

An Action on the Case for a Rescue cannot be brought in a County where the Conspiracy to rescue, but not the Rescue itself, took Place. One Judge differing.

POOR brought an Action against one Jutfham, and, it being suggested to the Admiralty that Jutfham was on board a Vessell in the Harbour, the Writ was committed to a Water Bailiff, who entered the Vessell and took him. Doble interposed, went up to Boston, and upon his Return forced the Defendant Jutfham from the Officer and carried him off; upon this the present Action was grounded. There were several Exceptions in Abatement of the Writ taken. The first was, “Not within the Jurisdiction of the Court;” it was said they conspired at Boston, but the Act was done below.(1)

(1) The declaration set forth the original cause of action, the purchase of the writ, and the subsequent issue of a warrant from the Court of Admiralty, by virtue of which the deputy marshal “went on board the same Pompey, being then within the jurisdiction of the said Court of Admiralty, and there found the said Samuel Jutfham and him detained as a prisoner till he should convene him to justice or deliver him to the sheriff of this county or his deputy, that the said writ of attachment might be duly served on him.” And it was further alleged that the defendants having conspired and agreed to rescue the prisoner, “in pursuance of the said unlawful conspiracy and agreement,” “procured a boat at Boston and went down to the said Pompey, then lying at anchor in Nantasket Bay, so called, about a quarter of a mile from the shore,” that they rescued the prisoner, forced the officer to return to Boston without him, and the Pompey to put to sea and carry him off, “whereby the plaintiff hath wholly lost the benefit of the writ of attachment and his debt aforesaid.”

The defendants pleaded in abatement “that the said Patrick hath not in said declaration shown forth that the cause of the said action arose within the county of Suffolk;” and the writ was abated “upon the first exception.”
Mr. Thacker, in support of the Writ said, that the former Writ was said to be purchased in Boston, Complaint made there, Warrant procured there and Contrivance there.

Cb. Juft. If Conspiracy be in one County and Rescueous in another, could the Courts in both have Jurisdiction?

Mr. Gridley. Jurisdiction of inferior Courts must be shewn. This is a Court of a limited Jurisdiction; they have shewn the Conspiracy to be within, but 'tis the Rescue, and not Conspiracy, which is the Cause of Action.

Writ abated, 3 vs. 1. (2)

(2) It appears to have been assumed that a civil action for a rescue was local, and could only be brought in the county where the cause of action or some part thereof arose, and the decision was simply to the point that a conspiracy alone within a county was not sufficient to authorize the action to be brought there. No question of admiralty jurisdiction could have arisen, because even if a ship "in Nantasket Bay a quarter of a mile from shore" was not infra corpus comitatus, (12 Met. 387,) yet of torts upon the high sea the common law had concurrent jurisdiction.

For a somewhat analogous decision in a case in which the locality of the tort was the limit of jurisdiction, see Adams v. Haffard, 20 Pick. 127, where it was held, that an imprisonment on shore, in pursuance of orders given on the high sea, did not constitute a cause of action within admiralty jurisdiction.

This was for the same Cause, and the Declaration was the same.

First Exception was, that it was not alleged in the Declaration that they set forth to the Admiralty that Jutsham had absconded and concealed himself on board some Vessel from the Service of the Writ.

Second Exception. They have not alleged that the Admiralty had Jurisdiction of the Matter of said Complaint. Given up.

Auchmuty. These Pleas are all negative; they find Fault with this, but do not point out a better. Pleas must be certain—not supported by Argument or Implication. 3 Doct. Plac. 54.

Gridley. They are defective in a material Point in their Declaration, your Honours will not support it; our first Plea being over, and having been argued upon in Substance, they are too late to take Exceptions to this.

Auchmuty. The first Plea had no Exception to Form, but Substance; they are all separate and distinct. All they verify is, that we have not done so and so—they do not verify it to be necessary. As for considering these Pleas as Special Demurrers, I think it cannot be intended here. He must conform to Rules of Abatement, and cannot avail him-
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Self of what he might upon Special Demurrer; in Demurrer it might have been final against them, but in Abatement they plead over.

Fitch. Abatement is regularly to the Writ; Exceptions to Form of Declaration is by Special Demurrer. Here they are generally taken in Abatement, not at Home, therefore we ought not to be taken up for conforming: However there are Instances of the like Pleas in Abatement; Lilly Ent. p. 9, Tit. Abatement; and many other Instances in Special Demurrer where the Plea is negative without pointing out a better. Lilly, Tit. Demurrer, 106, 186. (1)

Gridley. These Pleas are in the Nature of Special Demurrer, but according to Custom we have concluded in Abatement. When we have said that there is an Omission, do they say Anything new? Will your Honours go on with a Writ materially faulty, because we have not pointed out?

Otis. They might have demurred, but have chosen Abatement, and so have entitled themselves to all the Disfavour of Abatement.

Ch. Juff. Plea in Abatement must be to the Writ, not Declaration. (2)

Otis.

(1) See 6 Pick. 369, Wilde, J.—"The exceptions to this rule [that the plea must give a better writ] are so numerous that it can hardly be called a general rule of law."

(2) A plea in abatement which concluded to the writ and declaration has been sustained, on the ground that so much of the declaration as
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1763.

Oti. They may plead Matter of Fact in Abatement.

Exception not well taken.

Another Plea in Abatement was that they had not alleged the Admiralty to have had Jurisdiction of the Matter of the Complaint. Salk. 404, Tit. Jurisdiction.

Fitch. They have not alleged they had any Caufe of Complaint to the Admiralty. Hobart, 129.

Auchmuty. We have set forth that he was concealed within their Jurisdiction. (3)


DOAKS was indicted before the Sessions for keeping a Bawdy House, found guilty there and fined; from thence she appealed, and it appeared that Part of the Time she was indicted for, she was only a Lodger, and not Mistres of the House.

The King's Attorney offered to give Evidence of some Acts of Lasciviousness before the Time in which would be necessary to make a perfect writ, is a part of the writ, and may be excepted to in abatement. Illey v. Stubbs, 5 Mas. 385.

(3) The second exception was given up, and the case entered "Neither Party."
which she was proved to have been Mistress of the House. He said it was by Way of Inducement, but the Court ruled, that no Evidence before ought to be admitted.

He likewise offered to prove her of general ill Character, but the Court, on that Point too, ruled, that he could not enter into that, before the other Side attempted to support it. (1)

The Jury, by Direction of the Court, brought in their Verdict "Not Guilty."


GAY was indicted for assaulting and beating the Sheriff in the due Execution of his Office. The Cafe appeared to be this: Gay by Virtue of the Province Law relative to Highways, 5 W. & M. c. 8, & 11 G. i. c. 3, (2) was warned to mend the Highways, and upon Complaint to a Justice that he had neglected his Duty therein, the Justice made out a Warrant to bring Gay before him to answer for

(1) S. P. Commonwealth v. Hardy, 2 Mafs. 318, Parsons, C. J. — "It is not competent for the prosecutor to go into this inquiry until the defendant has voluntarily put his character in issue."

(2) The provisions of these statutes are that in case of neglect "upon complaint and proof thereof before the next justice of the peace, without reasonable excuse made, and allowed by such justice, he shall caufe to be levied of every such offender's goods the sum or penalty of two shillings and sixpence," &c. Anc. Chart. 168, 440.
for the Neglect. Dean, the Sheriff, having the Warrant, took Gay, who rescued himself and beat the Sheriff. The Question was, whether that Warrant should be given as Evidence of Dean's Right to take Gay, the Assault being confessed and justified.

**Otis.** The Justice had no Right to issue a Capias in this Case, and if so, Dean made the first Assault. A Warrant from an inferior Court is less respected than from a superior, yet even a Warrant issuing from this Court, illegally, would be a Trespass in the Person granting, and also in the Person executing it. It falls within that Rule, that the Officer executes at his Peril. This Court will not issue previous Process against the Body, when Execution can only go against the Goods; this is the Reason why original Summons issues against Executors and Administrators and Trustees of absconding Debtors. Difference between this Case and that of Assessors who have Authority of the Person. (3) Every Officer is bound to know what is within the Jurisdiction of the Court. Hawkins's Plea, 81. (4)

**Thacher.** The Justice has a Right to convene, and this Capias issued for that Purpose, &c.

*Warrant not admitted,* (5) 3 Judges against it, 2 doubtful. In Consequence of this,

*Defendant acquitted.*

N. B.

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8 Met. 102.
(4) 1 Hawk. c. 10, § 4.
(5) An illegal warrant is a justification only when regular on its face, and
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N. B. Mr. Thacher says that in a Cafe at Barnstable (Mayhew & Wadsworth,) the Ch. Just. held, an irregular Warrant might be admitted in Justification of the Officer, and that the Court were wrong in the Cafe of Gay on the other Side. (6)

and apparently within the jurisdictiion of the court or magistrate issuing it. Fisher v. McGirr, 1 Gray, 45. Clark v. May, 2 Gray, 410, 413.

(6) The case referred to is Cornelius Bassett v. Wadsworth Mayhew & al. May Term 1763, which was an action of trespass for shooting the plaintiff, a deputy sheriff, in the leg, while he was endeavoring to arrest the defendant by virtue of the following warrant:

"Dukes County is: To the Sheriff of said County, his Under Sher-
riiff or Deputy, Greeting. Whereas Robert Allen of Chill-
[seal.] mark in said County, Gent. Has this Day appeared before
the Justices of our Lord the King at His Majesty's Court of
General Sefi's of The Peace, and made Complaint That he being in
the Execution of his office as Coroner, at the House of Zacheus
Mayhew Esq in Chillmark in the County aforesaid: Lawfully au
thorized by a Mitimus to carry one Jerufha Mayhew to his Majesty's
Goal in Edgartown in said County, he was there oppose in his said
Office by one Wadworth Mayhew of said Chillmark by violently
seizing the body of the said Jerufha & holding her, and Prevented his
Carrying said Jerufha to his Majesty's Goal: Which Doings of said
Wadworth is Contrary to Law, &c. These are therefore in His
Majesty's Name, To Require You or Either of You forthwith to
take the Body of the said Wadworth (if he may be found in your
Precinct), Against all Opposition to enter any House where you shall
suspect him said Wadworth to be, & to bring him forthwith before
the Justices of Our Lord the King at his Majesty's Court of Gen-
Seft's of the Peace now Sitting in Seft's at Tilbury: So that he may
be Dealt with According to Law in the Premises. Hereof fail not
& make Return of this Writ with your Doings therein into f'd Court.
"Dated at Tilbury The 26th Day of Octo. Anno Dom. 1762 & In
the Third Year of his Majesty's Reign.

"Per Order of Court

"James Athearn Cler."
August Term

IV Georgii Ter. in Sup. Cur.

Present:
The Honourable
Thomas Hutchinson, Esqr., Chief Justice.
John Cushing, Esqrs., Justices.
Peter Oliver,

1764.

Allison
v.
Cockran.

Rec. 1764.
Fol. 103.

TROVER* for a Negro. (1) The Administratrix of one Cockran, (Father-in-Law to the Defendant.)

* Qy. if this Action is well brought, for Trower lies not for a Negro.

(1) In 1677, the Court of King's Bench, consisting of Rainsford, C. J., Twisden, Wilt & Jones, JEsqs., expressed an opinion that trover would lie for negroes, who had been found, by special verdict, to be "infidels," and "usually bought and sold in America," [or, as other reporters have it, "in India,"] "as merchandise, by the custom of merchants." Butt's v. Penny, 3 Lev. 201; 3 Keb. 785; Freeman. 453. But the record shows that the negroes in that case were "in India," 20 Howell's State Trials, 52; and the decision, as reported by Freeman, was put
Defendant, deceased, was offered as an Evidence to prove the Sale from Allison to the Father.

Ruled

upon that ground only — "Held per Curiam, that although by the law with us a man cannot have an absolute property in the body of another yet the custom of India concerning buying and selling of slaves being found, a trover and conversion would lie well enough." Freeman. 453. This does not appear to have been known to the successors of those judges, (Freeman's Reports not being yet published,) when they "denied the opinion in the case of Butts & Penny." 2 Ld. Raym. 1275.

In the same court in 1680, Dolben, J., said that trover, brought by one tenant in common "for half a negro," "has been allowed." 2 Show. 177. But it does not appear where that negro was. The decision referred to may have been in Butts v. Penny, ab. sup., which is reported by Keble as "trover of 10 negroes and a half;" 3 Keb. 783; (although the record of that case only mentions ten; 30 Howell's State Trials, 51, note 1) or, more probably, the case thus quoted in the Court of Chancery in 1687: "Mr. Sergeant Maynard's case was cited, who recovered a debt contracted here against the executor of an owner of a plantation in Barbadoes, and by his advice an action of trover was brought, and judgment obtained for the fourth part of a negro." 1 Vern. 453.

In 1692, Lord Holt, & Rokeby & Turton, J.J., (three of the four judges who afterwards decided Chamberlain v. Harvey, infra,) joined in an opinion, given to the King and Council, that negroes were merchandise in the colonies. 1 Burge Col. & For. Laws, 736, note.

It is said to have been afterwards adjudged in the Common Bench that trover will lie for negroes. Gelly v. Cleve, (1693,) 1 Ld. Raym. 147, ex rel. Place. 3 Lev. 337. But it must be presumed that those negroes too were in the colonies: for if they were in England, the decision is inconsistent with a series of cases in the King's Bench, (cited in Quincy's note, supra, 94,) by which it was very soon afterwards established as the law of England, that "as soon as a negro comes into England, he becomes free; one may be a villein in England, but not a slave." 2 Salk. 666; Caf. temp. Holt, 495.

In those cases, it was held, that trespass would not lie for taking a negro in England, without declaring (as in the case of the taking away of any other servant) per quod servitutum amissi; Chamberlain v. Harvey, (1696,) 1 Ld. Raym. 146; 3 Ib. 129; 5 Mod. 182, 186; Carth. 397: Nor indebitatus aestumpti for the price of a negro, without averring that at the time of the sale he was in a country by the laws of which he might be sold as a chattel; Smith v. Brown, 2 Salk. 666; Caf. temp. Holt, 495: Nor trover. Smith v. Gould, (1706,) 2 Ld.
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1764.  

Allison v. Cockeran.

Ruled by the Court, (after hearing the Arguments of Messrs. Gridley, Otis & Auchmuty, pro & con,) that Administrators

Ld. Raym. 1374, 2 Salk. 666. That the conversion alleged in the last case was in England is manifest from the grounds given for the decision by Lord Holt — "The common law takes no notice of negroes being different from other men. By the common law no man can have a property in another, but in special cases, as in a villein," &c. "There is no such thing as a slave by the law of England." 2 Ld. Raym. 1374, 1375. The statement at the end of Salkeld's report of this case — "the Court seemed to think that in trespass quare captivum faun cepit the plaintiff might give evidence that the party was his negro and he bought him" — appears to be an unwarranted inference of the reporter, inconsistent with Lord Raymond's report, and with the case of Chamberlain v. Harvey, ub. sup.

There is no English adjudication since, which conflicts with these decisions of Lord Holt. In Pearne v. Lisle, (1749,) Ambl. 75, Lord Hardwicke refused a writ of ne exeat against one who owed the plaintiff for the hire of certain negroes, upon the ground that it was a legal demand on which the defendant might be arrested at law, saying: "As to the nature of the demand, it is for the use of negroes; a man may hire the servant of another, whether he be a slave or not, and will be bound to satisfy the master for the use of him." This passage accords with the suggestion in Chamberlain v. Harvey, ub. sup., that trespass per quod servitum amfit might be maintained in England for enticing away a slave; and conclusively shows that, even if the writ of ne exeat had been granted, the case would have involved no decision of the question of what property one might have in a negro. The additional remark of the Lord Chancellor — "I have no doubt that trover will lie for a negro slave; it is as much property as any other thing" — is therefore wholly extrajudicial; and is moreover accompanied by a misrepresentation of the grounds of Lord Holt's decision, and by a manifest desire to confirm the opinion given by Lord Talbot and himself in 1739 as attorney and solicitor general, in favor of holding slaves in England, of which Lord Mansfield said that it "was upon a petition in Lincoln's Inn Hall, after dinner; probably, therefore, might not be taken with much accuracy." Lofft, 8; 20 Howell's State Trials, 70.

Lord Hardwicke's opinion on this subject has never been recognized as law by any court in England. In 1762, a bill in equity, filed by an administrator to recover back money given by his intestate to a negro who had been brought to England as a slave, (which was apparently founded on the supposition that the negro was still a slave, and therefore incapable
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Administrators could not be Witnesses, except when the Estate is insolvent.

Messrs.

incapable of receiving a gift,) was disnissed by Lord Northampton, who said: "As soon as a man sets foot on English ground, he is free; a negro may maintain an action against his master for ill usage, and may have a 

babein corpus if restrained of his liberty." Stanley v. Harvey, 2 Eden, 127.

It appears by Granville Sharp’s MS. that Lord C. J. Wilmot, in 1768, held, that a female negro slave, married in England to a negro man who had also been brought from the West Indies as a slave, could not be carried back without the consent of the husband; and that Lord C. J. De Grey, about the same time, more than once expressed the opinion, that there could be no property in the person of a slave by the law of England. Sharp’s Memoirs, (2d ed.) 75, 110. The same book contains a full account of Lord Mansfield’s evasions of a decision of the general question in the case of Rex v. Stapleton, in 1771. Ib. 81, 89-92.

It is clear from these authorities, (without relying on the case of the Russian Slave in 1569, mentioned in 2 Rulw. Hilt. Coll. 468,) that Lord Mansfield’s reluctant discharge of the Negro Sommerfett in 1772, (Loftt, 17-191 20 Howell’s State Trials, 79-83,) was but a re-affirmance of the law of England, as previously determined by Lord Holt and other eminent judges — notwithstanding the subsequent statement of Lord Mansfield, in The King v. Thomas Ditton, (1785,) 4 Doug. 301, that "the case of Sommerfett is the only one on this subject," and the assertion of Lord Stowell, in the case of the Slave Grace, (1827,) 2 Hagg. Adm. R. 106, 114, that Lord Mansfield, in Sommerfett’s case, "made a change in the law." For an examination of some of the obiter dicta of Lord Stowell, see 20 Law Rep. 99, 105-107. That learned civilian does not manifest any knowledge that one of his predecessors, Sir George Hay, almost as soon as Sommerfett’s case was decided, twice held, upon full argument, that, before as well as since that decision, negroes could not lawfully be held or sold as slaves in England. Cary v. Crichton, (1773,) in the Prerogative Court; Rogers v. Jones, (1776,) in the High Court of Admiralty; both reported in Granville Sharp’s "Just Limitation of Slavery," (London, 1776,) App. 10 & 11, pp. 77-86.

Sir William Blackstone’s oscillations in this matter are too characteristical to be passed by, notwithstanding the length to which this note has already extended. In the first edition of his Commentaries, published in 1765, founding himself upon Lord Holt, ("Salk. 666,") he wrote: "This spirit of liberty is so deeply implanted in our Constitution and rooted in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and, with regard to all
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Messrs. Otis & Gridley, Council for Defendant, said it was universally known that the Estate of Cockran, the Father, was insolvent, and appealed to the Chief Justice (who was likewise Judge of Probate) (2) for the Truth of their Suggestion.

The

all natural rights, becomes eo instante a freeman." In his third edition, published in 1768, after the question had begun to be re-agitated in England, he altered the last clause of his statement to this: "and so far becomes a free man; though the master's right to his service may probably still continue." Against which Quincy has written, in the margin of his copy, "Curious!" In the fourth edition, published two years later, "probably" was substituted for "probably." 1 Bl. Com. 127. After the passage had assumed this shape, Hargrave truly said of it, "There appears to be somewhat of very subtle distinction, if not rather of contradiction." 30 Howell's State Trials, 30, note.

Trespass will lie in England for taking slaves on the high seas, or in a country where slavery is not prohibited by law, from one who is not prohibited by the laws of his own country from trading in slaves. Madrazo v. Willes, (1820,) 3 B. & Ald. 353. Baron v. Denman, (1848,) 2 Exch. 167. But the commander of a British vessel is not liable to an action for refusing to deliver up to their master slaves who have escaped from a foreign country where slavery is recognized by law, and got on board his vessel, and are unwilling to return. Forbes v. Cochran, (1834,) 2 B. & C. 448; 3 D. & R. 679.

By the English authorities, therefore, the right to maintain trover for a negro would seem to depend upon the question whether he may be held and sold as a chattel by the law of the country where his master's possession of him is interfered with. The fact suggested by Hargrave, arguendo, in 30 Howell's State Trials, 33, that "the master's power over the slave doth not extend to his life, and consequently the master's property in the slave is in some degree qualified and limited," would seem to be no valid objection to the maintenance of the action; for trover lies by one who has any special property in a chattel, with the right to immediate possession. 2 Saund. 47, & note.

At the time of the trial of the case here reported by Quincy, negro slaves were held and sold as property in Massachusetts. Ans. 29, note (2) to Oliver v. Sale, and authorities there cited. And in 1763 trover had been maintained in this court for a negro. Goodspeed v. Gray, in Barnstable, Rec. 1763, fol. 47. But it has been said, that in Connecticut, while slavery existed there, trover would not lie for a slave. Reeve Dom. Rel. 340.

(2) By the Province Charter the jurisdiction in matters of probate
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The *Ch. Jufl.* said that from the Accounts given him of the Estate, and from his own Knowledge, he had no Manner of Doubt but that the Estate was insolvent; yet as the Commissioners had not made Report, there was no legal Evidence of the Insolvency. And the *Court ruled*, that the Administratrix of Cockran the Defendant's Father should not be sworn. (3)

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Hanlon verf. Thayer.

THE Plaintiff (Hanlon's Wife) (1) brings Trower against Thayer (a Sheriff) for attaching her Apparel. (2) There were two Questions in this

was vested in the Governor and Council as a civil law court, who appointed judges of probate in each county as their delegates or substitutes. Anc. Chart. 32. Governor Pownall's Message to the Council in February, 1760, App. III. 3 Hutchinson's Hist. Mass. 454, note. 2 Mass. 154. 3 Cush. 541. 21 Law Rep. 78, 79.

(3) It is not easy to see why an administrator, not a party to the suit, and without any beneficial interest in the trust fund, should not be a competent witness for the estate, without regard to its solvency or insolvency. 2 Stark. Evid. (2d Amer. ed.) 775. 3 Dane Ab. 420. 12 Mass. 358.

But it is probable that, in practice, administrators were paid by a commission on the amount collected, as was afterwards expressly provided by the Rev. Sts. c. 67, § 8 — which might require a release to make them competent witnesses. 11 S. & R. 208. 15 lb. 335. 7 lb. 116. See also 16 Mass. 118.

(1) Mark Hanlon was the plaintiff. The writ, however, was indorsed by Mary Hanlon, his attorney, who may have conducted the case, and thus occasioned the mistake.

(2) The common law proceeding by attachment was merely to compel the defendant's appearance where he failed to answer the summons. The Colony Law of 1644 gave plaintiffs the power to take out either summons or attachment in the first instance. Anc. Chart. 49. But the attachment
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1764.

Hanlon v. Thatcher.

this Case; one, whether, as the Apparell attached was the Property of Hanlon's Wife before the Intermarriage, it did not make a Difference in the Law from Cafes where Apparell after the Marriage came to the Wife; the other, whether the several Articles in the Schedule annexed were all necessary wearing Apparell.

Mr. Aubmuyt, taking no Notice of the first Question, endeavoured to prove the Apparell mentioned was necessary, by observing, what was necessary for one Station in Life was not so for another, and said the Law never meant the Word "Necessary" in its strictest Sense.

Mr. Chardon for Defendant. The Argument ab Inconvenienti is of very great Weight in the Law, and by admitting all these Things (in the Schedule) as necessary wearing Apparell, would be putting it in the Power of almost every Debtor to defraud his Creditor. (3) To explain and show the Sense in

attachment being discharged by an appearance, as at common law, or at most by a judgment, twelve hours before execution, it was afterwards provided in 1650 that goods so attached should "stand engaged" until the judgment should be satisfied. Ib. 51. By the Prov. St. of 13 W. 3, the duration of the liability was limited to thirty days after judgment. Ib. 367. Gen. Sta. c. 123, § 41. The chattels liable to attachment have always been held to be such only as may legally be taken on execution, and where this latter right is left at the common law, "so must the right to attach depend upon the common law." 6 Mafs. 244. By the Colony Law of 1647, officers were prohibited from levying execution on "any man's necessary bedding, apparell, tools or arms, neither implements of household which are for the necessary upholding of his life." Anc. Chart. 155.

(3) The schedule comprises earrings, necklaces, laces, ribbons, fans, &c.,
which the Law uses the Word Necessary, I cite 4 G. 2, c. 1. (4)

Mr. Gridley. Nothing is necessary in the Law but what is necessary to defend from the Inclemency of the Weather, (5) or necessary to the Degree: But before they can talk highly of Degree they must pay their Debts. If any besides what is barely necessary is allowed for Comfort, it is not the Law, but Humanity. The Law here wisely uses the Word Necessary, for the Boundary of Necessity is determinate, but Conveniency not,—Conveniency! What is convenient? &c. (a little Rhetoric and concludes.) Mr. Gridley also said: If a Judge of Probate grant to the Wife of an Intestate whose Estate is insolvent, two Beds, where one only was necessary, the other immediately became liable to be attached, and he cited Hardisty & Barney, (Comber. 356.) where Holt says if the Party have two Gowns, Sheriff may take one.*

Mr. Otis relied chiefly on the Evidence that proved Hanlon never bought or paid for a single Rag

* Qu. if 1 Inst. 351 b, top, would not have been a good Authority?

&c. There appears also a list of necessary articles which the defendant tendered back to Mrs. Hanlon before the date of the writ.

(4) Anc. Chart. 481.
(5) "1 Pr Glaphoes" (golofhes) and "1 Green Embrillo" appear upon the schedule, but were not among the articles tendered back as necessary. About this time, "Umbrillos" were first advertised in the papers, and were doubtless then considered articles of luxury. See Drake's History of Boston, p. 660.
Rag of his Wife's Cloaths, but that she brought all with her at the Marriage, and said it had been the Custom universally, never to take Cloaths so brought, for the Debts of the Husband.

Justices Oliver & Cushing both said the Case was very hard upon the Wife, who brought all these Cloaths at Marriage, yet "as they are personal Property, they become the Husband's on Marriage, and therefore liable."

Ch. Just. I should have been extremely glad if this Case had been argued a little more largely by the Gentlemen of the Bar, and more Authorities cited, in Matter of so great Consequence. I always took it to have been the Custom in such Cases as this, for the Wife to have her Cloaths; in Cases that have come before me as Judge of Probate I never knew it denied to the Wife where the Estate was insolvent. (6) In the Case cited (by Mr. G.) I suppose the Woman was a Party, and the Debt contrabed

(6) The Prov. St. of 9 Anne referred only "the necessary bedding, utensils and implements of household," where the estate was insolvent. Anc. Chart. 390. At common law, however, there seems to have been a question to what extent the widow's "paraphernalia," beyond necessary wearing apparel, was liable to creditors of the husband's estate. Bac. Ab. Baron & Feme, C. 3. 1 Dane Ab. 364. And the practice of allowing the widow her apparel in all cases was afterwards confirmed by Sts. 1783, c. 36; 1803, c. 93; 1816, c. 95. The Revised Statutes, c. 65, § 5, excepted from the inventory of the estate "all the articles of apparel or ornament of the widow, according to the degree and estate of her husband," "although his estate should be insolvent." The St. of 1838, c. 145, omits the limitation as to the husband's degree, and provides that the articles aforesaid shall be considered as exclusively belonging to the widow. Gen. Sts. c. 96, § 4.
contradicted by her; this alters the Case much, but yet I apprehend (here Ch. Jusf. makes an Apology for what follows) that this may be one of those Cases where the Justice says a Thing obiter, or suddenly; for one Gown can never be supposed sufficient—must she go naked when that is washing? Upon the Whole I think it would be very hard upon the Wife, should such a Precedent as this take Place, that her Cloaths which she brought in Marriage must go to discharge the Husband’s Debts. I should think it safer to verge towards Conveniency than to strain the Word Necessary. (7)

The Ch. Jusf. in the Course of this Case asked if it would not have been better to have brought Detinue.

N. B. The Jury found for the Defendant Costs.

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Adjourned to September 11th—and then met Chief Justice.

Lynde, } Justices.

Ruffell, }

(7) Somewhat similar opinions have been subsequently expressed. See 4 Cuth. 361, Shaw, C. J. — “This word is not used in its most rigid sense, as something absolutely indispensable, and without which a debtor cannot live.” And the exemption of “necessary wearing apparel” has been held to extend to cloth in the hands of a tailor. Richardson v. Bufwell, 10 Met. 306.
1764.

Rex
v.
Poursidorff.

Rec. 1764.
Fol. 125.

A Conviction of Petit Larceny and Judgment thereon do not destroy the Competency of a Witness.

INDICTMENT vs. Poursidorff for Stealing. A Woman offered as Evidence who at the same Term had pleaded guilty to an Indictment of the same Nature. (1)

The Attorney General objected to her, that she pleaded guilty to an infamous Crime, and therefore no Witness, and cited Hawkins's Pleas of the Crown, B. 2, ch. 33, § 129; ch. 37, §§ 48 to 53.

Mr. Kent for the Prisoner. Law of Evid. 145. Judge Raymond, 32. 2 Sid. 51. (2)

The Attorney General then moved for Judgment; and

Granted.

The Question then arose, whether, when there is a Judgment, and not an infamous Judgment, it bars the Person on whom Judgment is passed, from being a Witness.

Attorney General & Mr. Kent cited as above. Ch.

* It is the Crime and not the Punishment that makes a Man infamous. Theory of Evid. 107, 94.

(1) Rex v. Poursidorff & al., Rec. 1764, fol. 123.
(2) Where it is decided that a conviction without judgment thereon is not sufficient to disqualify a witness.
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Ch. Just. When the Crime is so great and of such a Nature (for Instance the Crimen Falsi in Law) as it is to be supposed that the Person guilty has lost all Sense of Truth, and would not hesitate at violating his Oath, in such Case no Doubt not to be admitted, but even where the Judgment is infamous, (as that a Person shall sit in the Pillory for writing a Libel,) yet if the Crime is not of such a Nature as the least to invalidate the Credit of the Witness's Oath, (as in the Case I mentioned, and that of the Witness now offered,) no Doubt they may be admitted.

Attorney General. Theft is infamous.

Kent. Petit Larceny is not.

Attorney General. There is no Difference between grand and petit Larceny.

Ch. Just. Do you suppose, Mr. Attorney, every Person convicted of petit Larceny at the Old Baily is ever after barred from being a Witness?

Attorney General. I don't know.

The Court unanimously held, No; (3) and ordered

(3) It seems to have been assumed that the conviction in this Case was for petit Larceny. But the only indictment against a woman for larceny, on the record of this term, is against Margaret Knodle, joined with Pourksdorff on a former indictment for grand larceny, to which she pleaded guilty. In either Case, however, the decision appears unaccountable, in view of the well-known rules of the common law on this subject, at that time unaltered by statute. A conviction of felony de-
the Witnesses to be sworn, directing the Jury to give what Weight they pleased to her Evidence.

This Evidence alone cleared Pourkídorff, by swearing she stole the Goods herself.

Present:

Ch. Justice, Judge Lynde, Cushing & Oliver.

Ballard verf. McLean.

THIS was a Writ of Review. McLean was called, of Milton, but it was fully proved that he did not belong to Milton. The Question was, whether, this being a Writ of Review, which issues out of the Clerk's Office, it should abate.

froyed the competency of a witness. Co. Lit. 6 b. And petit larceny was felony, although it did not produce a forfeiture of land. See 1 Hawk. (ed. of 1795) c. 36, § 6. But the punishment for grand larceny (burning in the hand) restored the competency of the witness (Com. Dig. Testimoigne — Witness A 3), while that for petit larceny had no such effect, for which reason it was subsequently provided in England by 31 Geo. 3, c. 35, "That no person shall be an incompetent witness by reason of a conviction of petit larceny."

Whether the distinction between grand and petit larceny was ever adopted or recognized in Massachusetts — quere. In Commonwealth v. Keib, 8 Met. 531, it was held that a conviction of larceny to the value of forty cents, before a justice of the peace, was sufficient to exclude the witness. And there can be no doubt that any conviction of larceny had this effect until all incompetency from crime was finally abolished by Sts. 1831, c. 233, § 97, & 1852, c. 312, § 60. Commonwealth v. Green, 17 Mass. 515, 537. Commonwealth v. Keib, ub. sup.
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Mr. Dana, in Support of the Writ, urged that the three Years (the Time limited by Law for bringing a Writ of Review) would expire before they could bring another Writ; and said further that the Defendant was late of Milton, and was called in the original Writ, of Milton, which caused the Mistake; and said it would be a great Hardship upon the Plaintiff, when it was no Fault of his, for the Writ issued out of the Clerk's Office, that he should be precluded from bringing his Review. Cited 2 Strange, 924, Cortis vs. Munoz.

Mr. Thacher, contra. Had he been named nuper, it might have done, but the Plaintiff has declared with Certainty. As to Writs of Review, they always have been and are subject to the same Rules with other Writs; and the Custom has ever been in this Court to show Writs of Review no more Favour than to other Writs.

Justices Lynde, Cushing & Oliver for abating it. (1)

Ch. Justice. Abstracted from the Custom, I see no Reason why it should abate.

(1) Where a writ of review was improvidently issued, without notice to the opposite party, the Court ordered a hearing, but refused to quash the writ, because, the three years having elapsed, the plaintiff would thereby lose his right to bring another petition. Clap v. Jofyn, 1 Mafl. 133. And in Breuer v. Sibley, 13 Met. 177, it is intimated that in case of review "it would be reasonable to restrict the defence to the merits."
August Term 4 Geo. 3.

1764

Present:
Ch. Justice, Justice Cushing & Justice Oliver.

Bromfield vs. Little.

In this Action was a general Indebitatus Assump-
fit on Account annexed. One Article was a
Charge of Interest.

The Council for the Plaintiff urged, that it was
a Custom of Merchants here to charge Interest after
a Year: (Several Merchants were sworn on this
Head, but they did not agree about the Time, nei-
ther whether they did or did not first inform the
Debtor.) The Justness of the Charge was argued
from the Charge of Interest after a Year, at Home.

In Behalf of Defendant, 'twas said, there was no
such Custom here at all; yet if it could be said
there was a Custom here to charge after Notice
either at or after Sale, certainly not before Notice.

Justice Oliver. Whether this is a reasonable Cus-
tom must first be considered. I think it is. I
think, too, it appears to be a Custom.

Justice Cushing. This Case is very different from
what it is at Home; 'tis there the universal Usage,
which makes it the Supposition of every Party at
first; and, as a Person purchasing Goods without
any special Promise is supposed to promise the Pay-
ment
ment of the Customary Price, so he is supposed to engage to pay the customary Allowance for Forbearance; but here, however reasonable it may be, it is yet otherwise, nor is it implied in the Contract.

Ch. Justice. This Case is of much Importance to the Community. 'Tis agreeable to natural Equity that Interest should be allowed; and I am glad it is growing into a Custom; but the Rule is that both Parties ought at the Time of contracting to understand it so, and I doubt whether it is so general as that it can be supposed in this Case.

The Jury did not allow Interest.

N. B. The Superiour Court now altered, and the Sitting, instead of being the third Tuesday of February and third Tuesday of August, is the second Tuesday in March and last Tuesday in August. March 12, A. D. 1765. (1)

(1) Prov. St. 5 G. 3, c. 6, Mafs. Perpet. Laws, 481.
March Term


Present:
The Honourable Ch. Just., Lynde, & Cushing.

The Charge to the Grand Jury by Ch. Justice.

To relieve the Oppressed, to guard the Innocent, to preserve the Order of Society, and the Dignity of Government is a noble Principle of the Mind. This is the Duty of every Individual of the Community, but is more particularly incumbent, Gentlemen, upon you, as the Grand Inquest for this County.

Our Business, Gentlemen, at this Time, is to distribute Justice, and to punish all Crimes and Offences. It is this latter Part of our Duty that you, Gentlemen, are to assist us in; to point out and bring forward all Crimes and Offences against the Tranquillity and Order of Society which shall by any Means come to your Knowledge.

But before I enter upon the particular Branch of your Duty, I shall observe, that it is a very common
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mon Thing in England to present Offences, when there is no Offender known, for wherever there is the one, there is always the other. Whenever there are any notorious Offences, as I observed before, in England, they always present them. I remember in particular (if it may be called an Offence) that at Middlesex, the Jury presented, that there was unnecessary Multiplication of licensed Houses, which tended greatly to the Destruction of the Health and Morals of the People. I do not mention this as the Case here, but only by Way of Example, to show, that wherever you find any notable Things done that are detrimental, or any Things neglected which ought especially to be done that are benefi- cial to Society, you have, Gentlemen, [a discretionary Power to present them.]

I would have you, Gentlemen, to enquire into the State of our Goal, for it has been represented, and I believe it but too true, that it is a most shocking, loathsome Place. For my own Part, when I have been obliged by the Nature of my Office to commit any of my Fellow Creatures, I could not help feeling for them, when I thought where I was sending them — a dark, damp, and pestilential Room — to such a Place to send our Fellow Creatures must cause the most tender and exquisite Sensations to Men of the least Sensibility or Humanity. I do not think there is such a Place for the Reception of Prisoners anywhere in the King's Dominions. I do not say this by Way of Reflection on the Gentlemen who have the proper Care of our Goal, nor upon the Sheriff* of this County, the Keeper

* Mr. Greenleaf.
Keeper of our Prison, who I know to be a Man of great Tenderness: But from whatever Cause, Gentlemen, it arises, whether from Neglect or a Misunderstanding among the Gentlemen whose Province it is to look after it, or any Cause whatever, 'tis your Duty to give your particular Attention to it. I remember, Gentlemen, a Cafe in some late Reports, of a Sheriff committing a Man to a new plaistered, wet and unwholesome Room, by which he was put into violent Fever and died; the Sheriff on this was committed, tried and hanged. Our Goal is not intended as a Punishment, it is only to keep Offenders for Trial, or after Trial till Sentence is fulfilled. Every Man in the Eye of the Law is presumed innocent till proved guilty. How prophesierous then, Gentlemen, is it to commit a Man to a Place, who whether innocent or not must run the Hazard of his Life—a Place which will bring a Man of the best Constitution in Danger of his Life; how long then will a Person of a weakly Constitution survive? I must, Gentlemen, repeat it again, this demands your peculiar Attention, and the Attorney General will give any Directions you may want.

A Government always thinks itself happy when the Grand Jury can find no Offenders to present.

This

(1) Quere, whether the Chief Justice had not in his mind the case Rex v. Illgins, 2 Stra. 882; I.d. Raym. 1574, where the warden of the Fleet Prison was indicted for the murder of a prisoner by confining him in a "new-built room, the walls being damp and unwholesome." The offence was held to be murder, but the prisoner was acquitted on the ground that it was the act of a deputy. A series of similar cases is reported in 9 Howell's State Trials, 240-234, but neither of them resulted in a conviction.
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This is not our Case. There has been a most scandalous and notorious Riot, not only against Common Law, [Natural Law, that is, the Law which every Man has implanted in him] but directly against a Law of this Province; (2) nay the Offenders had Notice of the very Law, and warned against a Violation of it; and I question whether there is any Law of this Province more universally known than this. For your Direction, Gentlemen—Riots, Routs, and unlawful Assemblies are where there are any Number not less than three, where they come with an Intent to commit some unlawful Act—if they take not one Step they ought to be punifhed for this Intent; if they move forward, it is a Rout; if they commit any one Act, it is a Riot; every Man ought to use his utmost Endeavour for the Suppression of such scandalous Breaches of the Public Peace; and I am informed that the Magistrates and others of this Town did their utmost to prevent that Inflush upon Government in this notorious Riot, but it seems all proved ineffectual—You cannot be insensible that I have Reference to that lawless Mob who assembled on the 5th of last November, (3) most atrociously broke the Peace, put

(1) Anc. Chart. 595. This statute was for the suppression of disorders caused by "tumultuous companies carrying about with them pages and other files through the streets and lanes of the town of Boston." See note (3) infra.

(2) The anniversary of the Gunpowder Plot, known as "Pope Day," had been for many years the occasion of an annual riot between the "north-enders" and "south-enders" in the town of Boston. Each of these rival factions celebrated the day by a procession carrying the effigies of the Pope, the Devil and the Pretender upon a platform, under which small boys, by means of rods connected with the figures, caused them to rise up and look into chamber windows as they passed.

1765.

CHARGE
TO THE
GRAND JURY.

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1765.

CHARGE
TO THE
GRAND JURY.

every Member of this Town in Confusion, and many in the utmost Hazard of their Lives; and I would mention for the Benefit of all present, as they are a pretty large Concourse of People, that Persons in general do not know what a Danger they run, in mixing in such a Mob; if there had been any Person killed, every Man there would have been liable to be tried for his Life, and by a rigorous Construction of the Law, might have lost it: It would have lain upon every Person to have proved how he came there and what was his Business; and every Person who could have been proved to have been aiding before the Fact, encouraging and assisting after it was begun, and actually doing, or protecting and screening after it was committed, must have come to his Trial, and for aught I see must have been convicted; for there are no Accentories in Murder; all are Principals.

There is another Offence— you have seen it in the public Prints— of Robbery on the Highway —

Money

The householders were called upon for contributions for the celebration under the penalty of broken windows; and the two processions, after parading the town, met in Union Street, where they fought for the figures, which were afterwards burnt, either on Copp's Hill or the Common, according as victory remained with the north or south end. See Drake's History of Boston, p. 651.

Before the next anniversary in 1765, the general indignation occasioned by the Stamp Act had caused a reconciliation to be effected, and both parties joined in the effort of a "Union Pope," together with several additional figures representing Tyranny, Oppression, Slavery, &c. Mass. Gazette, Nov. 7, 1765; Boston Evening Post, Nov. 11, 1765. The description of this celebration which appeared in both the above papers, concludes as follows:— "This Union and one other more extensive may be looked upon as the (perhaps the only) happy effects arising from the S——p A——t."
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Money demanded and actually taken; an Offence very heinous in its Nature, and very rare in this Country, and I hope it will be universally discouraged; and I question whether it is universally known, that by a late Law of this Province, it is Death to commit a Robbery on the Highway.

Another Offence— I take Notice of it with Pleasure—that was formerly very common, but has not of late been heard of among us—I mean the Forgery and Counterfeiting our Public Bills of Credit: The Rigour of the Law, the Severity with which this Court has adjudged in several signal Instances, their full Determination to persevere with the same Rigour in all similar Cases has happily been the Cause of its Suppression.

Yet there is another Kind of Forgery, very pernicious to the Commonwealth, which will come before you; the Forgery of Notes of Hand: You perceive, Gentlemen, what Confusion such a Practice must introduce, how wicked a Crime this is in its Nature, and how destructive its Consequences; on this Head I need say no more.

I will take up no more of your Time, Gentlemen. I will spare you, the Court and the Audience; only observing further that all Offences, from Murder, the highest of all Felonies, down to simple Felony, are subject to your Inquiry; yet though you should be satisfied that there have been a Number of these lesser Offences committed, as these come more immediately under the Cognizance of the lower Courts, you may omit taking Notice of such Misdemeanors,
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Misdemeanors, unless you should think there has been any gross Neglect in the Courts of Inferior Jurisdiction.

But before I leave you, Gentlemen, I would observe one Word more relative to your Duty. In the Petty Jury, Gentlemen, you are sensible that all must agree in the Verdict; but to every Indictment the Agreement of twelve only is sufficient. One other Point there remains, Gentlemen, for you to observe, and that is, you are to keep your own and the King's Council; this, Juries in general, disregarding their Oaths, do not, strictly enough, observe — nay, I myself have often heard that the Jury had found a Bill, long before it was published in Court. But, Gentlemen, even after that, you are not liberated from your Oaths — you are to keep the Names of the Informers, and Everything else that comes before you in your present Capacity, secret; and unless this is done how will Offenders ever be brought to Justice? An Informer comes, purely for the public Good, to reveal some gross Abuse of the Laws, and hoping he may do some Good, yet unwilling that he should be known to be the Person. Soon after it is blazed abroad that he was the Informer, and every Circumstance aggravated to make him odious; will he ever again hazard his Reputation — nay, even his Property? will not this deter many good Men from doing eminent Services to the Public? In Consequence of which many heinous Crimes will go unpunished, many wholesome Laws will be broken with Impunity. (4)

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(4) See John Adams's Diary, under the date of the following December.
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And finally, Gentlemen, I would observe, that though it may give you great Uneasiness to bring Offenders to Punishment, yet this, Gentlemen, should not prevent the Performance of what is incumbent on you as the Grand Inquest. 'Tis the Good of the Whole demands it; and that Self-Approval which always attends a Consciousnes of having discharged our Duty will ever be an ample Recompense.

I shall add no more; but only pray that Infinite Wisdom may direct you, and that the Supreme Fountain of all Goodnes may assist you in the Prosecution.

Present:
A full Court.

Whitney v. Whitney.

ASSUMPSIT on a Note. Note offered in Evidence to the Jury.

Mr. Adams (objected.) The Word Order is omitted; we take it to be an essential Variance. There is not a greater Difference between a Bond and

In a Declaration on a Note by the Payee, the Omission of "Order" is an immaterial Variance. Aliter, in a Declaration by an Indorser.

cember. — "Who has made it his constant endeavour to disconvene the odium in which informers are held? Who has taken occasion in fine-spun, speak and span, spruce, nice, pretty, easy, warbling declamations to Grand Inquests, to render the characters of informers honourable and respectable?" 2 John Adams's Works, 169.
and a Note, than between a Note negotiable, and not. Such kind of Variances are fatal. Vid. Fitzgib. 131, Baynbam's Case; Law of Evid. 191.

Mr. Auchmuty. The Note is, to pay Plaintiff Order: The or is left out. Where a Note is nonsensical we are not obliged to follow it. There can be no Doubt but whether this is Evidence to a Jury or not. In Favour of Justice doubtless it is. As to the Authorities the Gentleman cites—"a Note of a different Date," is a much stronger Case, for that is a totally different Note. Cites Trials per Pais. 399.

The Court ruled, that the Note should go in as Evidence, on another Point. That, as the Note had not been indorsed, the Omission of Order was immaterial—otherwise had it been indorsed. (1)

Cb. Jus. did not give his Opinion.

* Vid. the Case, Ruffell & Oakes. (2)

(1) S. P. Fay v. Goulding, 10 Pick. 122—"Per Curiam. As the action is brought by the payee this is not a material variance. If the plaintiff were an indorsee it would have been necessary to allege that the note was payable to the payee or his order."

(2) Ante, p. 50, where it is laid by Ruffell J. that there is no difference between notes negotiable and not, until the indorsement.
BANISTER V. HENDERSON.

Messrs. Dana & Gridley, for Banister.
Messrs. Auchmuty & Otis, (1) for Henderson.

Special Verdict.

THOMAS BANISTER, Grandfather of the present Demandant, made his Will the 25 January, Anno 1708-9, and after divers Legacies follows:

"Item, after my just Debts and Funeral Charges are paid, I give all my Houses, Warehouse, Lands, Mortgages, Bills, Bonds, Money, Plate, Debts, Wares, Merchandizes, both at Sea and Land, as also all Books, Bedding, Household Stuff, Horses, Cattle, and all that of Right any Ways belongs and appertains to me, whether named or not named, to my three Sons, Thomas, Samuel and John, to be equally divided among them in three equal Shares or Proportions, after my

(1) James Otis's will, made many years after, during the unfortunate condition of mental derangement in which his life ended, commences as follows: "In the name of God, Amen. — I, James Otis, being in no manner of fear of Death, though called by some the King of Terrors, and by old Bannister in his will, a sergeant — " Tudor's Life of Otis, p. 483. And in the will of Thomas Bannister, the testator in this case, of which a copy is on file, appears the following: " — "When Thou Jehovah shall send Thy inexorable sergeant Death to arrest this body, and carry it to that dark prison of the grave," &c.

"Had I but time, (as this fell sergeant, Death is strict in his arrest,)

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in Wedlock, I will their Share or Proportion to the surviving Sons or Son and their Heirs forever. Also a Legacy of £500 previously given to a Daughter was in a certain Event to be paid to my three Sons or their Heirs, to be equally divided among them as I have willed the reft of my Estate to be divided among them or the Survivors of them. Held, that the Brothers took an equal Tenancy in Common in Fee in the Real Estate, determinable on either's dying without Issue in the Life of some other Son, and an executor Devil over such Deceased's Share to the Survivor or

"my Debts, Legacies and Funeral Charges are paid, "and if either of my three Sons die without Heirs "lawfully begotten in Wedlock, I will their Share or "Proportion to the surviving Sons or Son and their "Heirs forever. And the Reason why I make my "eldest Son Thomas but equal with his Brothers "Samuel and John, is for these Reasons; first, he "hath had a considerable Share already, Secondly, "I have given his Son £500 if the Lord spare his "Life— I need add no more Reasons, but this— "they are all equally dear to me."

Afterwards: "I will to my beloved Wife Sarah "Banister, said Pew for her Life, to order who shall "fit with her in it, and untill my Grandson Thomas "Banister is of Age of twenty-one Years, if he liv- "eth to have Male Heirs, I give it to him and to "his Male Heirs lawfully begotten in Wedlock forever, "both Proprietorship and Pew, but if he dieth "without Male Heirs, I give it to the next Male "Heirs, and to descend to the next Male Heirs, with- "out any Alienation forever." (2)

In

(2) The special verdict further found that the three brothers entered under the provisions of the will aforesaid, that Samuel and John (who soon after died without issue) made a letter of attorney to Thomas, who conveyed the premises to Giles Dyer, who reconveyed to Thomas, who conveyed again to Dyer one moiety of the premises. Thomas died, leaving the demandant his son and other children. Dyer then made a deed of the whole of the premises to Samuel, who afterwards, together with Frances, the widow of Thomas and mother of demandant, conveyed the premises to Peter Luce, who conveyed to John Henderson, father of the tenant, after which Samuel died without issue. If the demandant was entitled to recover, the jury found for him possession of the whole, or one moiety, or any lesser part to which the Court decided that he was entitled. "But if he be intitled to no part thereof," then for
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Survivors, Hutchinson, C. J., & Oliver, J.,
diff.

If an Estate
Tail with
Crofts Re-
mainders,
whether Con-
veyances by
the Brothers
with Collat-
eral Warran-
ty would not
bind the
Issue, quare?

Under the
Province
Charter no
Appeal lies to
the King in
Council, in a
Real Action.

In settling the special Verdict, there were three Points the Parties could not agree on. One was, whether the present Demendant was legitimate; or, in other Words, whether Thomas and Frances Bannister, Father and Mother of the Demendant, were legally married.

Thomas and Frances Bannister came over from England, and lived as Man and Wife, both in Old and New England.

Mr. Auchmuty, again the Legitimacy of the Demendant. Had it been personal Estate, no Doubt common Report might have done to prove the Marriage, but here is a great Real Estate to be determined—shall common Fame be relied on in this Case? (3) No Certificate of the Marriage, the highest, the only legal Evidence. Had it been in a new Country where Records are not kept, there might have been some faint Colour for not producing a Certificate, but in England these Records are most strictly kept; for they know it is the only Evidence that will serve; the only Proof of the Legality of Marriage.

Mr.

for the tenant costs. That part of the case between the statement of the devise and Mr. Dana's argument is reported in the MS. as of the previous term, after the case, Rex v. Pourkisdorff. For convenience the case is printed as a whole.

(3) See Means v. Welles, 12 Met. 361, Hubbard, J.—"It was argued that mere cohabitation was not a species of evidence sufficient to sustain a writ of right. But we are aware of no distinction as to the amount of proof necessary to establish a marriage in any one case more than another, where marriage is a fact to be proved in order to sustain an action."

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1765. Mr. Gridley. In strictness of Law they ought to produce a Copy, and not a Certificate, though generally allowed. It has been said that a Certificate is the highest Evidence; but I say the Persons present at the Marriage is Evidence higher in its Nature—for how will that ever prove the Identity of the Persons? Cohabitation and universal Report have always been deemed sufficient Evidence, and I never in the Course of my Practice heard it denied before.

Cb. Jus. Have you no Authorities, Gentlemen?

Mr. Gridley. There is no Authority that the Sun shines.

Auchmuty. But there is Evidence.


Mr. Auchmuty answered, Favour was shown them.

Mr. Gridley. There shall be no bastardizing Issue after Death, is a Maxim of the Law.

Auchmuty. A Bastard can't be Heir till Death, and after Death Bastardy can't be proved.*

Jus. Russell only instanced in Quakers.

Jus. Lynde. I can't think a Certificate alone is Evidence, or the best—that is greater which Mr. Gridley

* Qy. if Cases in Time of Holt, 287, would not have been pertinent.
Gridley mentioned. Persons present at the Marriage can only prove the identical Persons. (4) Universal Report is, in my Opinion, sufficient Evidence, corroborated with other Circumstances, of the Marriage.

Ch. 9uß. From Thomas and Frances Banister living in Old and New England as Man and Wife, I think it may well be inferred they were so. (5) I am sorry for Want of Authorities, and that this Point was not left to the Court as well as the Rest; for it is not properly a Matter of Fact.

The second Point (Matter of a Person’s Death) was proved to Satisfaction.

The third, whether there was an actual Entry into the demanded Premises was given (in Effect) up; for a Devise vests the Estate immediately in the Donee; it does not mean an actual Seizin in Law, but Right to Seizin.

The Jury found the two Points in Favour of the Demandant.

N. B. The next morning Ch. 9uß. produced the following Authority from Burn’s Ecclesiast. Law, vol. 2d, p. 36. (6) Tit. Marriage: “The Proof “of

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(6) Burn’s Eccl. Law, Marriage, X. 5.
"of Marriage may be by Witnesses who were present at the Solemnization; by Cohabitation of the Parties; by publick Fame and Report; by Confession of the married Persons themselves, although their Acknowledgment might be only to avoid the Punishment of Fornication, and by divers other Circumstances which, if they amount to a half Proof, ought to be extended in favour of Marriage, rather than contrary to it. Wood, Civ. Law, "122."

Mr. Dana. The Demandant Banister demands by Force of the Will before me; his Pedigree is set forth in the special Verdict. I need not observe that the Intent of Testator is to be the sole Director for Construction of the Words, unless a new Estate is created contrary to Law. Now from the whole Tenor of the Will the Testator's sole Aim appears to be the keeping his Estate in his Family; and this Intention of his is the general Key to the Understanding the Will, and, if attended to, will show in the clearest Manner he designed an Estate Tail. He gives his Estate "to his three Sons Thomas, Samuel and John, and if either of my three Sons &c., to the surviving Sons or Son;" Samuel, (I can't imagine how he came to take it in his Head) supposing he had a Fee, conveys away this Estate; but if this is an Estate Tail, it wipes away all Conveyances whatsoever; for Estates Tail are inalienable, except by Fine and Recovery, and that reduces it to Fee Simple.

I am sensible when a Man gives all his Estate without any otherwise expressing his Intent, a Fee passes.
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passes.* 1 Salk. 239, Hopewell vs. Ackland. If the Testator had said no more than "I give all my Houses," &c., they would have had a Fee; but his Intent through the whole Will being not only to take Care of his Sons, but their Posterity—and though he gives all "to his three Sons Thomas, Samuel and John, to be equally divided among them, in three equal Shares or Proportions," yet he afterwards explains himself—"If either die without Heirs," and he then explains what Heirs, "Heirs lawfully begotten in Wedlock," then goes on—"I will their Share or Proportion to the surviving Sons or Son;" and though the Words following, "their Heirs forever," are not aptly expressed, yet they shall not vitiate, for his Meaning is evident from all the Words taken together, and his Intent shall take Effect.† Cites 1 Salk. 226, 227, Blisset vs. Cranwell, and 2 Vent. 285.

As to his willing "all to his three Sons to be equally divided among them," there are numbersless Authorities where the first Words give a Fee, by giving Lands to a Man and his Heirs forever, yet the after Words, explaining what Heirs he meant, make it a Tail. Nottingham vs. Jennings, 1 Salk. 233, as in our Cafe. Soulle vs. Gerrard, 1 Cro. 525. The after Expressions shew he meant Heirs lawfully begotten in Wedlock, and created a Tail: So in the Cafe last cited, the first Words shall be set aside, because contrary to his Intent. But full to

* Vide 3 Mod. 45, Reeves v. Winnington.
† Qy. whether 8 Rep. 95 b, would not have been a good Authority to this Point.
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to our Point is the Case of Chadock vs. Cowley, 2 Cro. 695. Here —

Mr. Otis. Are you not sensible, Sir, Lord Holt denies that Case to be Law?*

Mr. Dana. No: But if he does, he is not infallible: But the Authorities mentioned are sufficient. Cites 3 Lev. 70, Parker vs. Thacker, and 2 Cro. 415, Webb vs. Hearing — a Case in Point. It appears by all these Authorities, una voce, that Devisors' Intent shall govern, the Intent shall be collected from all the Words together; and though the same Words give a Fee, yet if other Words explain what Heirs he means, viz. "Heirs of the Body," or "Heirs lawfully begotten in Wedlock," it shall make a Tail; and in our Case it is a Tail with a Limitation over to "either of the Sons or Son," which the Law calls Cross Remainders. The Intent of our Grandfather was so fixed to keep his Estate in his Family, and to make a Tail, that he extends it even to Personal Estate, in which he is "against the Rules of Law," therefore we don't demand it;† but his Intent in this is strongly marked. "To the surviving Sons or Son." The Issue take, as much as if their Father had survived.

Authorities to support the Cross Remainders.

T. Jones,

* Qv. if Mr. Otis was not mistaken, and that he blended it with the Case of Hearn vs. Allen, 3 Croke, 57, which Ld. Holt seems to doubt of in the Case of Nottingham v. Jennings, 1 Ld. Raym. 570; and quv. if that Doubt of Lord Holt does not make against Mr. Otis?
† Qv. if the Case Nottingham vs. Jennings, 1 Ld. Raym. 570, would not be in Favour of the Demandant.
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T. Jones, 172, *Holmes vs. Meynel.* Thomas Raymond, 452. This last Case is full in Point. "As for Authorities, you cannot expect many in a Will; every Will stands upon its own Legs." Pollexfen, 425. (This Case enlarged upon, therefore look into it more especially.) Crofts Remainders may be by Implication. Dyer, 303, Tit. Devise. T. Jones, 172.

_Cb. Jufb._ But it must be express Implication. Is this so?

_Dana._ Yes. Vid. Dyer, 303. (This Authority much relied on.)

_Gridley._ Dyer, Saunders, &c.; four of them of the same Opinion, that Crofts Remainders may be between three. 1 Vent. 224, *Cole vs. Livingston.* By the whole Current of the Authorities, Crofts Remainders may be between three; our Case is much clearer than is common in these Cases "To the surviving Sons or Son."

_Cb. Jufb._ "And their Heirs forever."

_Dana._ I take it so: And he has shown what Heirs he meant; "Heirs lawfully begotten in Wedlock. The Expression "If either die," is an Answer to your Honour.

_Cb. Jufb._ Did the Testator intend a Tail to all of his Sons?

_Gridley._
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1765. Gridley. They took Tails with Crofs Remainders over.

Dana. On the Whole, the Testator's sole Intent plainly appears to intail his Estate; his Words aptly enough express his Intent; and, as it is consistent with the Rules of Law, it is the Business of the Law to fulfill that Intent.

Mr. Auchmuty. This is a Case of great Expectation and great Importance. We differ very much and very materially. In order to elucidate any Point in a Will, the other Parts connected with and referred to it must all be considered. Mr. Dana says the Conveyances will not hurt, but will all be "wiped away" if this is an Estate Tail: I say not.

Cb. Juft. What do you suppose can bar an Estate Tail?

Auchmuty. Conveyances with collateral Warranty.


Auchmuty. But first to the Tail. He has expressly given Money to go over as the other Estate: "My Will is that said Legacy of £500 be equally divided among my three Sons, Thomas, Samuel, and John, with the Rest of my Estate as hereafter is mentioned." And afterwards, if certain Things happen, "then I will the last mentioned Sum of £500 shall
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"shall at her Death be paid back again to my 3 Sons or their Heirs, to be equally divided among them, as I have willed the Rest of my Estate to be divided among them or the Survivors of them." Can his Intent be supposed a Tail, when he devises Monies to go as his other Estate? He very expressly intails his Pew, very trifling in its Nature, in the strongest Terms, which shews he was not ignorant of apt Words to make a Tail.

But to the Doctrine of Implication which the Gentlemen insist on. The Expressions to make a Tail must be strong and coercive. 2 Bac. 66. "No Words shall be construed to make a Tail without plain Implication." The Courts will never extend Implications, against Estates Fee, the noblest Estates, to Fee Tail, Estates of a much bader Nature. Wild's Cafe, 6 Coke, 16 b. To make Estates Tail "the Intent ought to be manifest and certain, not obscure and doubtfull." In the same Cafe: "The Intent, and not the Words only of the Devisor, ought to make it an Estate Tail, then this Intent ought to be manifest and certain, and so expressed in the Will;" and in our Cafe, as in Wild's, no such Intent appears. They have cited no Authorities, but where the Implication has been so strong that there was no avoiding the Construction. Cro. Car. 368, Spirit vs. Bence. In this Cafe, where the Intent is not very clear, the Court will not construe against the Common Law. I remember in Croke, Walmley said, Implication must be very strong to disinherit other

* Qu. Might this be Evidence of his strong Intent, as Mr. Dana hinted?
other Children, and to carry the Intent against the Rules of Descent. It is said also in 3d Mod., the Court will not puzzle themselves about the Intent of a Man who was perhaps sick and confused in his Senses at the Time of making the Will, but let it descend according to Law. 3 Mod. 104, Hanchet vs. Thekal.—"No Reason can be given why this Court should not construe Wills according to the Rules of the Common Law, where an Estate by Implication is so uncertain; for when Men are sick, yet have a disposing Power left, they usually write 'Non sense, and the Judges must rack their Brains to find out what is intended.'

You are sensible when there are pecuniary Legacies to pay, prima facie a Fee. What an Estate sooner they took, they had it charged with "Funeral Charges, Debts and Legacies," &c., many of which were very large. These and many other Things to be paid, no Personal Estate appears to be left where-with to discharge them—none found in the Verdict; thus by Reason of these Charges, it converts the Estate into a Fee. 1 Lilly, 451, 2. To the same Point is 3 Rep. 21, Borasen's Case.

Ch. Justice. The Books vary in that Point.

Auchmuty. Where there is a Sum in Gross, that creates a Fee, but where a Sum is to be paid out of the Annual Profits, that don't alter; that I take to be the Rule.* Your Honours remember the Case.

* Ry. if any Estate but an Estate for Life can be enlarged by any Charge. For it is Law that "no Estate shall pass by Implication of Law
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Case Etwell & Pierson, (7) and the Case of Dudley vs. Dudley. (8) This Point (of Charge) had great Weight, and justly, in those Cases.

The Words on which the Cross Remainders are founded are Fee Simple; for it is, in Case of Death and no Issue, to the Survivor and “their Heirs forever.” Had Banister the Grandfather intended a Tail, would he have used these Words,—especially when he so well knew the Words of Tail, as in the Case of the Pew?

Ch. Just. “Heirs lawfully begotten in Wedlock”—is that Tail or Fee?

Auctbuthly. A Fee; for if a Man will depart from the Rules of Law, his Estate shall go according to the Rules of Descent. But if there is any Doubt in this Case, it is at End: It is clearly then with us, both by the Principles of Law and Equity. 1 Lilly, 454. No Intent shall go against the express Words of the Deviseor; at this Rate from a Passage or two inadvertently written, shall go against the general Tenor and plain Words of a Will. 2 Bac. 68. To construe the Intent against the Words is directly against all the Books. The Courts have always detested Cross Remainders among more than two; I

Law against the express Limitation of the Party, altho’ the Limitation is void.” 2 Rep. 55 b, and so adjudged in the Case of Hog vs. Croffe, Cro. Eliz. 254. Idea—

Qy. whether the Case of Etwell (cited above) was not adjudged against Law.

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I would observe upon Raym'd that the Cases are different. In order to induce the Court to these Cross Remainders, Mr. Dana has observed that the Devisor's whole Intention was to keep his Estate in the Family. This is Implication upon Implication which no Lawyer ever heard of. This Intent is got by Implication, and Cross Remainders are built on that Implication: But the most natural Implication is, that he never intended a Tail at all. According to these Gentlemen's Way, you may add Implication on Implication in Infinitum, and we shall have no settled Rules of Law to go by. In all their Authorities, the Devise was only to two, with Cross Remainders over, but the Case they would extend it to, is among three; and the Reason is given—it is to avoid Confusion by splitting Estates into a thousand Parts, and to keep Peace among Men, from disputing about so many confused Cross Remainders: Besides, the Remainders cited in the Books are not founded upon Implication, but upon Certainty. Mr. Dana has said, there may be Words which import a Fee, changed into a Tail by after Words. Agreed; but no such Words here—nay, the after Words are, "their Heirs forever," a plain Fee. They can't produce a single Authority where the first Words controul the last; here the last Words are Fee. If any Parts clash, I can't help that; if a Testator will devise in such a Manner that there is no telling what Estate passes, it must pass according to Law. "Where a certain Intent may be collected, it shall be "construed according to that Intent, but where it is "uncertain, it is void. The Intent of the Devisor "must be collected upon plain Words, and not "upon Words which engender Confusion." And Walmsley
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Walmstey said, "It is a good Way when the Words "in a Will are ambiguous, so as the Intent may not "be collected, to expound the Will according to "the Law." Cro. Eliz. 742, Taylor & Ux. vs. Sayer. Is not the Intent here, at best, uncertain? Are the Devisor's Words plain? Don't his Words engender Confusion? Therefore by the laft and the other Authorities, the Intent void, and the Rules of Descent must be observed.

The laft Thing I shall mention, having already said enough, is the several Deeds from Samuel, John and Frances, the Warrantys of which are collateral, and therefore bind the Issue. Lit. §§ 709, 716, 717, with Coke's Commentary read at large. 1 Inst. 373 a, 375 b. 376 a. It is true there is a Statute about Warranties, but unless they produce, I shall not answer it.

Upon the Whole, Estates Tail are never implied except when the Intent is obvious—never have been, at Home or here. The Courts are very cautious how they give the Construction of Tail to Words in a Will, especially such Words as these; and I believe never known to extend them to create Cross Remainders among three. I shall not recapitulate my Arguments, but only observe that it will cause the utmost Confusion thus to eject People out of Lands they have for so many years quietly enjoyed; and now to turn them out upon so strained a Construction of Words inadvertently dropped in a Man's laft Illness, would be as much against Justice and Equity, as Law and Common Sense.

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Mr. Otis. The present Question arises on this Clause of Mr. Banister's Will: "After my just Debts," &c. In the Course of my Argument I shall examine what Estate the Brothers took, whether Tail or Fee. 2dly. If a Tail, whether with Cross Remainders over. 3dly. If Remainders over, whether the Remainders were in Tail or in Fee. 4thly. If a Tail with Cross Remainders in Tail, whether the Collateral Warranty will not bind the Issue.

The Terms Fee Simple, Tail, general and special, Cross Remainders, Executory Devise are well known, but yet as this Case depends pretty much on having clear and precise Ideas of them, your Honours will pardon me, if to refresh our Memories, I just run over the several Definitions.

(Mr. O. then gave the several Definitions of the above Terms, chiefly from Black. Anal. q. vid.)

Cross Remainders, as commonly spoken of, mean implied Remainders. I will for the present allow a Tail, their Whole depending on their shewing implied Cross Remainders rationally and legally implied. Hobart, 29, 34, Cowden vs. Clarke. Though the Intent of ye Devisor is justly called the Pole-Star of the Will, yet this is not the only Director; for this I cite the last Case. There are a Variety of Opinions on this Point, and that too among the most eminent Judges; some paying an unlimited Obedience to the Testator's Intention, and others as much slighting it. The true Medium, I take it, is laid down in this Case; "the Devise
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"Devise must be taken according to the Intent of "the Party Devisor," yet "such Intent must be so "express'd in the Will, that it may be certain to "the Court, and not against Law." Hobart, 32. All "the Vagaries of a diseased Mind are not to be at "tended to; yet the rational and legal Intent of a "Testator should be observ'd.

(Relative to the Cross Remainders, Mr. O. cited the following Authorities:) Viner, Tit. Remainder; the whole of this Chap. Here "Cross Remainders shall not rise between 3, unless the "Words do very plainly express the Intent of "the Devisor to be so;" "between 3 the Law "will not endure Cross Remainders, by Reason of "the Confusion which will ensue." "Two Cross "Remainders may well stand together, but three "cannot well stand together; for that would make "such Confusion as the Law abhors, and that was "the Reason of the Judgment in the Case of Gilbert "vs. Witty,* which Pemberton, Ch. 9 Jusf. said he took "to be sound Law. 2 Show. 139, Holmes vs. Meynill." And per Holt, Ch. 7. — "a Cross Remainder is an "awkward Sort of a Thing; the Case of Holmes vs. "Meynill† has prevail'd, and is not fit to be stirr'd "now;" "and Powell, 7. said that the Case never "went down with him, though affirmed on a Writ "of Error, and he has heard learned People speak "against it." — (And goes on, and finishes the Chap "ter, and reads the whole of the Cases cited above by "Viner and others.) Viner, Tit. Rem. M. p. 1, 2. "Ibid. Tit. Devise L. p. 1-6. 10 Rep. Seymour's "Cafe, 1 Inft. 1 b, (Fee Sim.)

From

* 2 Croke, 655. † 2 Show. 136.
From all these Authorities there may be such a Construction as is consistent with the Rules of Law, if it be construed a Devise in Fee with an Executory Devise over. These Authorities are against them directly: "3 Crofs Remainders cannot well stand together." "Between 3 the Law will not endure Crofs Remainders," and why? "Twould make such Confusion as the Law abhors:" they are never favour'd in Law — Holt much against them; they are never rais'd by Implication; "Crofs Remainders will not arise to more than 2 by Implication." Viner, Tit. Rem. X. p. 4. Notes, cites 8 Mod.* 260, Shaw vs. Weigh; T. Raym'd, 455, Holmes vs. Meynill. Besides from the plain Words, the whole Contexture and Tenor of this Will, 'tis plain he intended an Executory Devise over of the Deceased's Share to y' Survivors or Survivor; certain he never intended a Tail with Crofs Remainders over, — yet if there is the least Doubt, the Café is with us. But which is likeliest to get into the Head of a mere Layman — those Crofs Remainders, which these Gentlemen contend for, which, after they have got beyond two, have puzzled the wisest Heads in Europe, or that of an Executory Devise over, on a Fee determinable on either of his 3 Sons dying without Issue?

Mr. Gridley. Do you think the Testator had a clearer Idea of an Executory Devise than Crofs Remainders?

Mr. Otis. Though there may be some Niceties in the Difference between Executory Devises and other

* Alias, Cases in Law and Equity.
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other Devises, yet the general Idea is much more likely to enter into a Layman's Head, than that of Cross Remainders.

'Tis manifest from the Words of the Will he intended Equality among his Children. "The Reason why I make my Eldest Son but equal with his other Brothers,"—"They are all equally dear to me:" Would what these Gentlemen contend for be consistent with this intended Equality? Would not ours? An equal Tenancy in Common being, as we say, devis'd in Fee, determinable on either dying without Issue in the Life of some other Son, and then an Executory Devise over of such deceased's Share to the Survivor or Survivors.

The Words in the Will do not make an Estate Tail. Hanchet vs. Thelwall, 3 Mod. 105, 6.

In Order to make this Will agree with their Scheme, they are obliged to have Recourse to double Implications; first an Estate Tail is to be implied and then Cross Remainders. "An Estate "by Implication was never thought of in a Deed, "nor in a Will, but in Cases of Necessity." Cases in the Time of L'd Talbot, 3, Glenorchy v. Bofuille. One would think this Rule would be sufficient to put an End to their Claim. But if they will have Implication, what so strong for a Fee, as Charges of "Debts and Legacies," &c. This Implication of a Fee is consistent both with Law and Equity— theirs directly against both. "A. devises his Brother, "Lands &c., and all his Personal Estate, deferring him "to pay his Debts and Legacies,—a Fee passes." 2 Ver-

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non, 687, Ackland vs. Ackland. 3 Cro. 58. 2 Strange, 1175, Barker vs. Suretees. Thus there was not even an implied Tail in the three Brothers; next there were no Cross Reminders: The Gentlemen can’t find I believe, if they examine all the Books from William the Conqueror down to this Time, where there are Cross Reminders by Implication, without an express Tail. There are no Cross Reminders between 3 Brothers to be found in any of the Books, not even that of Dyer, 303. That was nothing but Talk. (Mr. O. here expatiates on the aforesaid Passages of Viner.) But taking this Case of Dyer to have been adjudged (which is far from being certain), “It seem’d to the Court,” &c.

Mr. Gridley. Videbatur was always used by the Roman Judges, and is often in the Books.

Mr. Otis. Let it be so: It is well known there are obiter Opinions, which are properly enough expressed by “It seems,” yet are not to be relied on as Law. An obiter Opinion, I take it, is about a Medium between what the first Council in England say arguendo, and the solemn Judgments of the Court, after a full Hearing the Council. The Case of Dyer, 303, on which they bottom themselves is totally different from the Case at Bar; excepting this Case of Dyer it is settled that Cross Reminders shall not be among more than 2, and this Case being among 3, it falls to the Ground. 3 Leon. 115, Brian vs. Cawson, as cited by Viner, Tit. Rem. X. p. 5. 1 Leon. 166. Gilbert vs. Witty, Cro. James, 655. Roll. Abr. 835. Viner, Tit. Devise, Let. K. 4 Mod. 282. Cro. Jam. 590, Pells vs. Brown. (These Authorities
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 Authorities cited by Mr. O. to shew the Brothers took by Executory Devise.)

I shall now shew, if all the foregoing Points were against us, yet the Collateral Warranty binds the Issue, and therefore the present Demandant must fail; but before I enter on this, the Deeds must be looked into, and your Honours will there see how the several Warranties descend. It is incumbent upon me to shew that Collateral Warranty is a Bar, without Assetts, notwithstanding the Statute of Ann. 10 Rep. 95 b, Edward Seymour's Case. Lineal Warranty bars with Assetts, Collateral Warranty without; it may appear hard, but if the Reason is attended to, it will be cleared; it is for the Safety of Men's Estates, and that People should not be defrauded of what they bona fide bought, many Years after Purchase. And there are other Artificial Reasons, as no Man is presumed to disinherit his own Blood without leaving him greater Advancement, &c. 1 Inst. 373 a, b, 375 b, 376 a, &c. Viner, Tit. Voucher, U. b. 2, to U. b. 6. Holt, Ch. 7., said, "That the true Reason of Collateral "Warranty was the Security of Purchasers, and for "their Encouragement; as also for the establishing "and settling of such as were in by Title or Deficient "cafs, and this was the only Security such Persons "could have at Common Law; and because the "Estates of such Persons as are in by Title, are "much favoured in Law, these Covenants that were "for strengthening them were favoured likewise." Same Tit. U. b. 5. 12 Mod. 512. The Collateral Warranties which are made void against the Heir are those made by any Ancestor who has no Estate.
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Estate of Inheritance in Possession of the Lands. 4 & 5 Ann, ch. 16. Now, according to their own Supposition and the Special Verdict, the Ancestor making this Collateral Warranty had an Estate of Inheritance in Possession, and therefore does not come within this Statute; but I deny the Statute of Ann to extend here.

The Common Law and Policy of England have been, this 4 or 500 Years, tired of these intailed Estates; and therefore every legal Method has been prosecuted for their Suppression. Many have been the ill Effects felt both by State and Individuals, in Conveyance of these Estates; therefore so far from being favoured they have ever been discredited; and surely never was such an Estate as is here contended for, favoured — big with the greatest Confusion and Injustice — inconsistent both with Law and Common Sense. I therefore submit it to your Honours' Judgment, not doubting that Judgment will be rendered according to Law.

Mr. Gridley. "After my just Debts, &c., I give all," &c. "If either," &c., "to the surviving Sons or Son." The Question is, whether there was a Tenancy in Common in Fee, with an Executory Devise over, or a Tail with Cross Remainders: On the other Side they say, the first Words are Fee, and the after Clause, "If either die without Issue," makes an Executory Devise over: We say, if there were no more Words, a Fee, but the after Words make a Tail, and the last, Cross Remainders. When we read a Will, we aim at the Devisor's Intent; we aim at the general governing Idea of the Testator's Mind. If we enter
enter into the Will, you will find, that the grand and sole Object of the Devisor was the Emolument of his Posterity, and the Perpetuity of his Estate in his Family. Let us see, if we can't make such a System of Estate as will be consistent with the Law, and enforce the Testator's Intent; if it is possible it shall be done: But these Cross Remainders between 3 frighten the Gentlemen; no such Thing in the Books; no such Cross Remainders by Implication: We will see. The first Words, "All, &c." a Fee, the Words last, a Tail—as for "Heirs," the other Words shew what he means. "Heirs lawfully begotten in Wedlock." The Gentlemen talk of Implication upon Implication, and Implication upon that again; the Words by which the Tail is made are implied, but a necessary Implication. Heirs in general make a Fee, but he shews what Heirs he intended; "If either die, then to the surviving Sons or Son," this makes the Cross Remainders. The Sons Thomas, Samuel and John took Tails with Cross Remainders over, each upon the other: Upon John's Death, Thomas and Samuel were jointly seized of John's Part; upon Thomas' dying, Samuel and Thomas' Issue were seized together; and upon Samuel's Death, the Whole remained to the Father of the present Demandant. This was the Intent of the Testator, that the Brothers took Tails with Remainders, one upon the other. It is the Business of the Law to explain the Pregnancy of Exprefion, and when this Pregnancy is drawn out, this is the mighty Confufion, this is the terrible Bugbear. The Lawyers who talk of the Abhorrence of the Law, the Confufion, the Awkwardnefs, and I don't know what all, of Cross Remainders, were
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Mr. Auchmuty. I don't understand such Reflections.

Mr. Gridley. I meant no Reflection on you, Sir.

Mr. Otis. Mr. Auchmuty, I did not take Mr. Gridley intended to reflect upon us, but on all the Judges of England.

Mr. Gridley. What mighty Difficulty to former People I can't tell; 'tis very plain now. Cross Remainders may be among 2; why not 3? If John dies, then to Thomas and Samuel; if Thomas dies, then to Samuel; each have a Tail with a Remainder expectant upon the Death of the others dying without Issue. A Fee can't be limited upon a Fee — they strive hard for it in the Case of Devises, but then it was only for Years. "All the Candles burning at once," as one of the Judges * expressed it. Chadock vs. Cowley, Cro. Jam. 695. Dyer, 303. Here is one Acre to A. and the Heirs Male of his Body, another to B. and another to C. in like Manner. "And if they all die without Issue of their or "any of their Bodies or either of them," Remainder over; here are Cross Remainders among all the 3 Sons. Dyer, 303. The Darkness is here diffused from Cross Remainders, the Words, dying "without

* Twifden.
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without Issue" are directly against Executory Devises.*

Mr. Auchmuty has endeavour'd from several Charges to prove it a Fee. The Manner of Construction in Law is, reddendo Singula Singulis; every Thing must be rendered according to its Nature. An ample personal Estate was left—real shall never be taken in such Case. The Charge was personal, and not upon the Land: Besides, it does not appear that there was no personal Estate left; the Special Verdict ought to have set forth, there was no personal Estate left; this is not done, so that's at an End.†

It has been said, Devisor designed Equality—he did do Equality—all had Tails; the Event as to the Remainders was left to Chance.

I won't produce 20 Authorities where 1 is necessary; here have been numerous Authorities cited, to what Purpose I know not, unless Show.

Mr. Otis. You must allow Children a little Oftentation.

Mr. Gridley. I won't say the Case of Gilbert & Witty is not Law, but I will produce Jones to shew wherein

* It is said (in Carth. 310) that "It is a certain Rule that a Will shall never operate by Way of Executory Devise, if it may take Effect by Way of Remainder." Qy. if this Authority would have been impertinent.
† Qy. if personal Estate is not found in the Verdict, whether it is to be presumed. Vid. 3 Mod. 43, 46.
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wherein it is wrong; Dodridge was certainly wrong, when he said, no Crofs Remainders among 3. 7 Edward 6 (Year Book). Dodridge ought to have read this before he pronounced. It appears by this Book* that Dodridge was wrong, on whom the Gentlemen so much rely: 'Tis true I have not produced the Year Book, but I have produced Hobart, whom I can trust, for he was an Oracle of the Law. 2 Jones, 172, Holmes vs. Meynill. Pemberton too is with us, one of the Miracles of Mankind; he was not afraid of the Reveries of Sick Men; was not afraid of plaguing his Mind in finding out the Meaning of diseased Minds: He used the Affiduity becoming a Judge to get the Devisor's Intent, and when he had found it, he had it fulfilled. 'Tis not the Part of Judges to fife, but to enforce the Devisor's Intent; you had Crofs Remainders among 3 at the Common Law, and Dyer, 303, has carried them as far as 4. Mr. Otis says there was no Judgment in this Case. Dyer seldom uses more than "it seems;" this Mr. Otis knew: It is very strange Dodridge should say, no Crofs Remainders between 3, when here is 4, and I have shewn the Year Book; Dyer full with us, the greatest Judge that ever sat in the King's Bench,—as great in Law as Sir Isaac Newton in Mathematicks and Philosophy. Pollexfen, 413. So, taking these Authorities, we have 5 Judges against 3, Dodridge and other obscure Names.† Skinner Rep. 17. Ld. Raym'd, Meynill's Cafe. I have looked over all their Authorities,

* Hob. Rep. 34. "A Devise to 3 Brothers in Tail, and that one shall be Heir to the other, this makes Crofs Remainders." Hob. 34.
† Holt and Powell.
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ities, and these few I have selected as to the Point, and have observed on them what is necessary.

The Intent of the Testator is the only Rule, the only Director, whether that Intent is got by Imlication or otherwise: His Intent can't be fulfilled without Cross Remainders, and if Cross Remainders are good among 2, certainly among 3; they have been carried to 3, and even to 4, according to the Authorities cited; therefore as his Intent is with us, and the Law is with us, your Honours will give Judgment accordingly.

N. B. Mr. Gridley made an Excuse for not speaking to the Collateral Warranty, as it was a Point he did not think would be started, and therefore begged time to look into the Books. This Request was granted.

Afterwards Mr. Gridley spoke to this Point, of Collateral Warranty, and, as I heard, so conclusively that the Council for the Tenants waived the Matter.*

The Court desiring that a brief State of the Case, Baniéter vs. Henderson might be given in by the Council on both Sides, the following States were delivered to the Court.

The

* Sed quær., and see Dr. Sullivan's Lex., on the Laws of England, 182, 1, and qu. if y's Act of Parliament extends, or is binding here.
The State of the Cafe by the Council for the Tenant.

Banister’s Cafe.

Whatever Estate the Devisees took, was by Implication—not by express Devise.

Implication must be necessary, and not barely possible. 2 Bac. 66 (G). 6 Co. 17. Cro. Car. 368.

Intent to be collected from the whole Will—therefore the Devisees to the Grandson and the Daughter, as well as joining real and personal Estate must be considered. Also the Words in Remainder in the Clause now in Dispute.

From all which it appears, the Testator never meant to Entail; the Distinction between the Devise of the Pew and the Rest of the Estate proves the same Point.

The Remainder being an Express Estate in Fee, argues that the first Estate was also intended in Fee.

The Testator meant to convey an equal Tenancy in Common, in Fee, determinable on either’s dying without Issue in the Life of some other Son, and an Executory Devise over, of such Deceased’s Share to the Survivor or Survivors.

The Estate being subjected to the Payment of Debts and Legacies, is equal to being subject to Payment
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Payment of certain Sums; and the Estate being implied makes a Fee Simple. 2 Vern. 687. 1 Lill. 451, 452. 3 Co. 19, Boraston's Case. 1 Cas. Abr. Equ. 176, 9, 10, 12.

But if doubtfull, then Judgment must be for us, in Law and Equity; Law, that the Demandant clearly prove his Writ, and Cro. Eliz. 743—what Walmesley said; Equity—fairly purchased, long possessed, the Purchase Money used to support the Family.

To prove it no Tail, 3 Mod. 104; 3 Cro. 57; 2 Strange, 1172.

Granting for Argument Sake, that the first Words create an Estate Tail by Implication, yet the Remainders not crofs. Hob. 34. Vin. Tit. Devise, X. pl. 1, and Notes. Vin. Remainder, per tot; 2 Cro. 655. 2 Show. 139. 8 Mod. 260.

When John died, Tom. and Sam., expressly by the Devise over, became Jointenants in Fee of his Part; and on Tom.'s Death, all his Part of John's Third that was undisposed went to Sam., by Survivorship, and never can go back as a Remainder to the Heirs of Tom.

If Jointenants in Fee, there cannot be Cross Remainders of that joint Estate, for that would be limiting a Fee on a Fee at Large.

The Collateral Warranty binds. 1 Inft. §§ 709, 716. 1 Co. 63. 10 Co. 97. Vin. Tit. Voucher, U.
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What is the Distinction between a Collateral and Lineal Warranty is proved by 1 Inf. §§ 704, 705, & 717.

By the Council for the Demandant.

Case of Banister vs. Henderson.

Mr. Thomas Banister by his last Will devised (among other Things) £500 to his Daughter Mary Banister; but if she did not live to have Issue, then to be paid to his three Sons to be equally divided amongst them, as he had willed the Rest of his Estate to be divided among them, or the Survivors of them.

Item. He gave all his Houses, Lands, Mortgages, Bills, Bonds, Money, Plate, Debts, Merchandizes, both at Sea and Land; as also all Books, Bedding, Household Stuff, Horses, Cattle, and all that of Right any ways belonged or appertained to him whether named or not named to his three Sons Thomas, Samuel, and John; to be equally divided amongst them; and if either of his three Sons die without Heirs lawfully begotten in Wedlock, he willed their Share to the surviving Sons or Son, and their Heirs forever.

By this Devise the three Sons took an Estate in Common
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Common in Tail general in the Lands &c. devised, with Cross Remainders in Tail among them of each other's Shares.

First. By the Devise of all his Houses and Lands &c., and all that of Right anyways belonged to him, whether named or not named, a Fee would have passed to his three Sons by Force of the Words taken by themselves. Vid. 1 Salk. 239, Hopewell vs. Ackland, where Alleyn, 28, Wheeler's Case, and 2 Vent. 285, Willow's Case, are rely'd on; for the Words are as strong and comprehensive as those made Use of in those Cases, and must comprehend all his Estate, which alone would pass a Fee; and as by Devise of all his Lands an Estate for Life passed, the following Words, unless they comprehend his Estate in those Lands, must be useless.

Secondly. The following Words, “equally to be divided among them,” make them Tenants in Common of the Whole. Vid. 1 Salk. 226, Biffet vs. Cranwell.

Thirdly. By the subsequent Words—if either of his three Sons die without Heirs lawfully begotten in Wedlock, he wills their Share to the surviving Sons or Son, and to their Heirs forever—an Estate Tail general is created of their several Shares; for this shews the Intent of the Testator to be Heirs of their Bodies, by necessary Implication; so that Heirs here signifies the same as Issue; for they could not die without Heirs, living their Brother. Vid. Cro. James, 415, 416, Webb vs. Hearing.
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Fourthly. By these Words — if either of his three Sons die without Heirs lawfully begotten in Wedlock, he willed their Share to surviving Sons or Son, and their Heirs forever — Cros Remainers in Tail are created among them of their several Shares; for the Words “if either of them,” &c. make Cros Remainers, exprefs, and differs the Cafe from that of Gilbert & Witty. In 1 Vent. 224, Cole vs. Levington, per Hale, C. J. Vid. also Dyer, 303. Cros Remainers exprefs among four, exactly agreeing with the present Cafe. 2 Jones, 172, Holmes vs. Meynill, a Cros Remainder by Implication — whereas this exprefs, and consequently a much stronger Cafe.

In both the said Cafes the Cros Remainers vested in Tail, as well as the first Estate of each in their several Shares; and by the same Reafon and Law, they shall vest in Tail in the present Cafe; so that the Estate shall not revert till all the Sons are dead without Issue, and the whole Estate Tail entirely spent. And this is corroborated by the Limitation to the surviving Son as well as Sons, which plainly shows the Intent of the Testator was, that all these Remainers to each of the Sons, of the other's Shares, should vest in Tail immediately by the Devise; and this is perfectly agreeable to the Resolution in

* By the first and last Cafes in Cro. James, it appears it was not a Contingent Estate, but took Place immediately by the Devise.
in the above Cases, particularly that in Dyer, which corresponds exactly to it, and is full in Point; and this Construction renders the whole Devises in every Part of it perfectly consistent and agreeable to the evident Design and Intention of the Testator.

Upon the Whole, the Devises then as was observed at first will stand thus: To Thomas, Samuel and John, in Common in Tail general, with Cross Remainders in Tail to each of the others' Shares; so that when John died first without Issue, his Estate was entirely spent, and the Remainder of his Share came equally to Thomas and Samuel in Tail; when Thomas died leaving Issue, his Moiety descended to the Heirs of his Body in Tail, and also the Remainder in Tail of John's Moiety, which was vested in Thomas, descended upon the Death of Thomas to the Heirs of his Body in Tail; so that when Samuel died without Issue, his Moiety also came to the Issue of Thomas in Tail; and no Part of the said Estate so devised can revert to the Heirs of the Devisor till all the Issue of the Body of Thomas is entirely spent.

(Another State of Banister's Case which I received from Chief Justice Hutchinson, together with the foregoing State of that Case, by the Demandant's Council.)

Caze of Banister vs. Henderson.

The Testator devises all his Houses, Lands, &c., and all that of Right anyways belonged or appertained to him, whether named or not named, to his three Sons Thomas,
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Thomas, Samuel and John, to be equally divided among them; and if either of his three Sons die without Heirs lawfully begotten in Wedlock, he willed their Share to the surviving Sons or Son, and their Heirs forever.

It was argued for the Defendant, that this was an Executory Devise, &c.

In Answer to which, it was urged for the Plaintiff, that it is a settled and certain Rule of Law, that a Will shall never operate by Way of Executory Devise, if it might take Effect by Way of Remainder, viz., if there is a particular Estate sufficient to support it. Vid. Carthew, 310, in the Case of Reeve vs. Long; 2 Saund. 380, Purfoy vs. Rogers, at the latter End of the Case; 2 Bacon, 72, where these and several other Cases are cited.

By this Devise (as we shall shew clearly) an Estate Tail was created in the three Sons, of their several Shares; which is a particular Estate sufficient to support a Remainder; and therefore by the Rule, the Limitation shall take Effect by Way of Remainder, and cannot be construed an Executory Devise.

It is insisted for the Plaintiff, that, by this Devise, the three Sons took an Estate in Common in Tail general in the Lands devised, with Cross Remainders in Tail among them of each other's Shares.

To shew this, they observe —

First. By Devise of all his Land, and all that of Right
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Right anyways belonged to him, &c., a Fee would have passed to the three Sons, by Force of these Words taken by themselves; for this they rely on the Case of Hopewell vs. Ackland, 1 Salk. 239, where Alleyn, 28, Wheeler's Cafe, and 2 Vent. 235, Willow's Cafe, are rely'd on; for these Words are as full and strong as those made Use of in these Cafes, and must comprehend all his Estate.

Secondly. The following Words, "equally to be divided among them," make them Tenants in Common; for which Vid. 1 Salk. 226, Blisset vs. Cranwell.

Thirdly. By the subsequent Words — if either of his three Sons die without Heirs lawfully begotten in Wedlock, he wills their Share to the surviving Sons or Son, and their Heirs for ever. By the first Part of them, an Estate in Tail general is created of their several Shares: For this shows the Intent of the Testator to be, Heirs of their Bodies; so that Heirs here signifies the same as Issue, for neither could die without Heirs in the general Sense of the Word, living his Brothers. For this they rely on Cro. James, 415, 416, Webb vs. Hearing; Same, 448, King vs. Rumball; Same, 695, Chaddock vs. Cowley; 3 Lev. 70, Parker vs. Thacker; 1 Salk. 233, Nottingham's Cafe.

N. B. By the above Cafes of Webb & Hearing, and Chaddock & Cowley, and their Analogy to the present, it appears that this was not a contingent Estate, but took Place and vested immediately by the Devise.

Fourthly.
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fourthly. By the same words, also (the latter part of them), crofs remainders are created among the three sons, of their several shares. These words, "if either of them," &c., make crofs remainders express, (1 vent. 224, Cole vs. Livingston) and is not by implication, but as determinate as if crofs remainders had been drawn out at length. And this differs the case from that of Gilbert & Witty, produced on the other side. Vid. also, Dyer 303, crofs remainders in tail among 4, a case in point. Also 2 Jones, 172, Holmes & Meynill, where the case of Gilbert & Witty is questioned. Vid. Hobart, 34, which case, and that in Dyer, must have been overlooked by Justice Dodridge. He said, in Gilbert & Witty, that it would not be found in any book that crofs remainders could be between three.

It appears, also, by the limitation being to the surviving son as well as sons, that it was the intent of the testator that the last surviving son, the other two dying without issue, should take the whole. This could not take effect by any construction, but the above of crofs remainders in tail executed; but upon this construction, no part of the estate could revert to the right heirs of the deviseur, until all the sons were dead without issue, and the whole estate tail in each spent, according to the above case in Dyer.

Upon the whole, therefore, the devise stands thus: To Thomas, Samuel and John in common, in tail general; and if Thomas die without issue, the remainder of his share to Samuel and John in tail; and if Samuel dies without issue, the remainder
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remainder of his Share to Thomas and John in Tail; and if John dies without Issue, the Remainder of his Share to Thomas and Samuel in Tail.

So that when John died without Issue, his Share came to Thomas and Samuel in equal Moieties in Tail, with Cross Remainders in Tail between them of each other's Shares; and when Thomas died leaving Issue, his Share, and his Moiety of John's Share, came to his Issue in Tail; and when Samuel died without Issue, his Share, and his Moiety of John's Share, came to the Issue of Thomas in Tail.

The last Words, "then to the surviving Sons or Son, and their Heirs for ever," could not possibly make a Jointenancy in Fee, in Case of Death without Issue. The Survivor was to have the Whole, which might have been prevented by severing the Jointenancy; so that, to answer the Testator's Intent, a Remainder in Tail vested in Thomas upon Samuel's Estate in Tail in this Moiety; and so vice versa, and upon Samuel's Death, this Remainder came vested in Possession.

Judgment was afterwards rendered at Worcester Court for the Tenants: By the Opinion of Lynde, Cushing & Ruffell: Chief Justice & Oliver full in Favour of the Demandant.† (9)

* Qu. if 2 Black. Comment. ch. 20, pp. 302, 303, and ch. 23, pp. 381, 382, would have been impertinent in this Case.

(9) It is to be regretted that we have no means of ascertaining conclusively on what grounds this decision was given. The three points raised are briefly as follows: 1. Whether the words of the will created an
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an estate tail, or a fee with executory devises; 2. If an estate tail, whether crofts remainders can be created by implication among more than two; 3. Whether collateral warranty will bind the issue. Quincy states that the last point was given up by the tenant's counsel; and although it was inferred in his "state of the case," yet it not being mentioned in the others, would seem to show that it was, in effect, abandoned. As to the second point, it is true that most of the authorities at that day leaned strongly against the establishment of croft remainders among more than two. See 3 Bl. Com. 381, 2, cited by Quincy supra. But upon this ground alone, it is difficult to see why the demandant should not have had judgment for one third of the premises. And it was soon after established that croft remainders might arise among any number. Comp. 730. 2 East, 36. Hall v. Prift, 6 Gray, 18, in which last case they were established among eight. From these considerations, it seems to us more probable that the decision was given upon the first point; and we have, accordingly, so stated it in the marginal note.

But whether the point of collateral warranty was not well taken, quere. That the reporter so considered it, appears from his note, ante, 145, and his citation, supra, of 3 Bl. Com. 303, where it is laid down that collateral warranty is still a bar, "notwithstanding the statute of Queen Anne, if made by tenant in tail in possession."

Among the law papers of John Adams, for access to which we are indebted to the kindness of Hon. Charles Francis Adams, we find a copy of an opinion given in 1745, by the distinguished lawyer, John Read, upon a case which had arisen upon the same clause in the will, and in which some of the same questions were involved. That opinion is printed below. The case resulted in favor of the tenants; but it will be seen that Mr. Read's opinion coincided with that of the minority of the Court in Banister v. Henderson, viz., that the devise created an estate tail with croft remainders. It appears, also, that the point was raised which was afterwards decided in Baker v. Mattucks (ante, p. 69), viz., the partibility of estates tail; and that the opinion of Mr. Read, and also, it would seem, of Mr. Pratt (afterwards Chief Justice of New York), was in favor of the partibility, coinciding with that of the minority of the Court in Baker v. Mattucks, and with that of Judge Trowbridge. See ante, p. 74, note.

"Mr. Banister's Case v. Nat. Cunningham.

1695. The Province Law, p. 3, enacts that any Man Seized in Fee Simple of Land in this Province may dispose of it at Pleasure by Deed or Will; or it shall be Subject to a Division with his Personal Estate, viz., a double Portion to his eldest Son, and equal Shares to the Reef of his Children.

1708. Mr. Thomas Banister devised, among other Things, £500 to his Daughter, Mary Banister, but if she did not live to have Issue, then
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then to be paid to his 3 Sons, to be equally divided among them, as he had willed the Rest of his Estate to be divided among them or the Survivor of them."

Item. He gave all his Houses, Ware-houses, Lands, Mortgages, Bills, Bonds, Money, Plate, Debts, Wares, Merchandizes, both at Sea and Land, as also all Books, Bedding, Household Stuff, Horses, Cattle, and all that of Right any ways belonged or appertained to him, whether named or not named, to his Three Sons, Thomas, Samuel and John, to be equally divided among them; and if Either of his Three Sons dye without Heirs lawfully begotten in Wedlock, he willed their Share to the Surviving Sons or Son, and their Heirs for ever.

The Teflator died; then his Son John died without Issue; then Thomas leaving Issue, whereof the Eldest Son is since deceased without Issue; but there are now living John, Samuel Annesley, and Frances Wife of Wm. Bowen. The Teflator's Son Samuel, surviving his two Brothers, mortgaged 7 Acres of Pasture in Boston, Part of the Estate devised them, to Nathaniel Cunningham, and his Heirs, by Force whereof he entered and held it, and then the Mortgagor died without Issue.

Q. Is Nath'l Cunningham's Estate in this Pasture good, or not?

A. His Estate is void, for the Mortgagor had but one Half, and that in Tail, by the Devise above.

For the Devise above, giving all that of Right any ways belonged to the Teflator, gave every Parcell of his Estate, and all the Right he had therein, and is as large as the Expression in the Case of Hopewell vs. Ackland, 1 Salk. 239, viz.; "and whatsoever else I have not before disposed of;" and therefore would by itself pass a Fee Simple to the Three Sons.

And these Words added, "to be equally divided among them," would make them Tenants in Common of the Whole. 1 Salk. 236, Blisset vs. Cranwell. But by farther devising the Remainder to the Survivor, if either of his Three Sons dye without Heirs lawfully begotten in Wedlock, the Teflator createth an Entail of their several Shares. 1 Salk. 233, Nottingham vs. Jennings. Devise to his second Son to hold to him and his Heirs for ever, and for Want of such Heirs, then to his own Right Heirs—adjudged an Estate Tail; and the Word Heirs can import nothing more than Issue, for he could not die without Heirs, living Heirs of the Father.

Lastly, by devising the Share of such as dye without Heirs lawfully begotten in Wedlock, to the surviving Sons or Son, and their Heirs for ever, makes Cross Remainders among them. So that when John died first without Issue, the Remainder of his Share came equally to Thomas and Samuel in Tail; when Thomas died leaving Issue, his Moiety descend to the Heirs of his Body in Tail; and when Samuel died without
without Issue, his Moiety came to the Heirs of the Body of Thomas in Tail. a Jones, 172, Holmes vs. Meynell, on Cross Remainders by Implication, where Crooke, James, 655, Gilbert & Witty, is questioned. See Dyer, 303, Devise. Cross Remainders express among 3, as this Case is. And Mr. Samuel Banister's surviving both his Brethren doth not change his Estate, which was an Entail immediately by the Will, Remainder to Thomas and John, and the Heirs of their Bodies. Cro. James, 695, Chadock vs. Cowley. Therefore by Samuel's Death without Issue, his Estate is determined by the Death of John without Issue, and of Thomas leaving Issue, the Right to this Remainder, by Force of the Gift yeveith in Thomas's Issue in Tail, the Reversion to the Right Heirs of the Donor.

Wherefore the Heirs of ye Body of Thomas shall demand and recover the Pature of Mr. Cunningham by Force of the Devise aforesaid.

Q. 2. To whom doth this Pature fall, — to John the eldest Son surviving, or to the four Children of Thomas equally?

A. This Pature descends to all his Children equally as Coparceners by the Prov. Law, and they must join in Suit.

The Testator was Seized of this Pature as of an Inheritance descendent to all his Children as Coparceners as above, and therefore by giving it in Tail to his Sons and the Heirs of their Bodies, he could not alter ye Defeant, and make that descendent to the Eldest Son only, which was by Law descendent to all ye Children for —

1. The fullest Words of Limitation to make an Intail, as in a Gift to A. and his Heirs of his Body begotten, have no Tendency to alter the Course of Defeant, but only to limit whole Issue shall inherit, and so how long the Inheritance shall endure, and when that Issue is spent, the Estate reverts to the Donor. Lit. Ten. § 18, 19.

2. The Stat. of Welf. 2, c. 1, makes no Intail but of such Estates as were Fee Simple Conditional at Common Law, and confirms them according to the Will of the Donor, but makes no Alteration of the Course of Defeant. Co. Lit. 18, 19. Therefore Lands of Inheritance, whether intailed or not, always descended to the same Heirs. So Lands in Burrough English to the youngest Son. Co. Lit. 110, b. Lands in Gavelkind to all the Sons. Co. Lit. 175, &c.

3. If the Donor, intending by express Words to alter the Course of Defeants, gives Lands to a Man and his eldest Heirs females of his Body, or Lands holden in Gavelkind, to a Man and his eldest Heirs, he cannot thereby alter the Law, the Word Eldest shall be rejected, and all the Parceners shall inherit. Co. Lit. 27, § 31.

By ye same Reason and Law, this Pature, descendent to all his Children as Parceners in Fee Simple by the Prov. Law, now intailed descends to all the Children, and they must bring the Action.

Boston, December 19, 1743.

John Read.
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Or say,—
1. The Nature of an Intail consists in limiting what Issue shall inherit, and how long the Inheritance shall endure, before the Donor or his Heirs may enter as in their Reversion. Lit. Ten. § 18.
2. The Stat. of Donis conditionibus creates no Estate Tail but of such an Estate as was Fee Simple at the Common Law, and is descendlible in such Form as it was at the Common Law. Co. Lit. 19, Devent le dit Statute, &c. — the penultimate Sentence of the second Paragraph. Therefore Lands of Inheritance, whether intailed or not, always descend to y* Same Heirs in Either Cafe, Lands in Burrough English to the youngest Son. Co. Lit. § 165. Toutes les Terres ou Tenements. Lands in Gavelkind to all the Sons. Co. Lit. § 265.

N. B. This last was, I think, in Mr. Pratt’s Handwriting.

Rochester Proprietors verf. Hammond.

(From Plymouth.)

Pleas in Abatement.

THE Writ: Attach Nathan Hammond to answer the Proprietors of the common and undivided Land belonging to the Old Township of Rochester, in our County of Plymouth, in a Plea of Eje ctment, wherein they demand against the said Nathan Hammond Possession of 120 Acres of Common Land that lieth in a Tract of Land containing 210 Acres in Rochester aforesaid; the whole Tract being bounded as follows, &c.; and say that on the 20th of December, 1739, in a Time of Peace, in the Reign of our late royal Grandfather, George the 2d, that they, among other Common Lands in the said Old Township of Rochester, were seized of said 120 Acres of Land in their Demesne as of Fee,
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Fee, taking the Profits thereof to the Amount of £5 by the Year; and they ought to hold the same quietly; yet nevertheless the said Nathan Hammond has, within 20 Years last past, entered into the said Tract of Land, and now unjustly holds the Plaintiffs out of said 120 Acres of Common as aforesaid; and, tho' requited, refuses to deliver up the Possession thereof; to the Damage of the said Proprietors, &c.

Pleas: And the said Nathan Hammond comes and defends, &c., and saith the Plaintiffs' Writ and Declaration aforesaid is bad and ought to abate, for that the Proprietors therein demand against the said Defendant Possession of 120 Acres of Land, but have not therein set forth the Bounds of said Land, nor described the same with sufficient Certainty, as by Law they ought to have done; 2d, for that the Plaintiffs have not therein set forth that the Defendant ever ejected them from said Land, as they ought to have done; 3rd, for that the Plaintiffs have not set forth that they were seised of Land at the Time when the Defendant in said Declaration is said to enter into the same, as they ought to have done; and these Pleas the Defendant is ready to verify, and thereof prays Judgment.

R. T. Paine.

And the said Nathan comes and saith that he holds 98 Acres of Land within the Bounds set forth in the Plaintiffs' Declaration, by Virtue of a Deed of Bargain and Sale from his Father, N. Hammond, dated the 26th of March, 1734, who is since deceased, which Deed includeth a Covenant of
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of Warranty against all Persons, and that his said Father held the same by Deed of Bargain and Sale, dated January 30, 1699, of John Hammond, who is since deceas’d, and which last Deed contains a Covenant of Warranty general; and the said Nathan also faith, that he holds twenty-two Acres of Land within the said Bounds, of Joseph Jenkins of Edgartown, in the County of Dukes County, by a Deed of Bargain and Sale from him, with a Covenant of Warranty general, dated March 3rd, 1763, and therefore prays Process of this Honourable Court may issue to vouch in the Heirs of the said John Hammond and the said Joseph, to defend his Title to said Land.

R. T. Paine.

Mr. Paine. Your Honours will observe that there is not the least Certainty in their Declaration. No Bounds are set to the Land demanded, but only the Bounds are given of a certain Tract from whence they are demanded. Now in England you must set forth not only the Bounds, but also the particular Sort of Land, whether Pasture, Meadow Land or not. As in Saved’s Case, 11 Rep. 55. In this Case they have gone infinitely wide of the Mark. They have not told us whereabouts the Land they would eject us from lies; their Writ must of Consequence fail.

Mr. Otis. Your Honours will presume in favour of the Writ, if not express. The Lot from whence we demand this Land is clearly described; and we have set forth that we demand the southerly Part of a 210-Acre Lot. The Sheriff, when he
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gives us Possession, may assign to us the southernmost Part of the Lot, and Id Certum esset, quod, &c. But let the Sheriff give us Possession of the Whole, 'twill certainly be good for our Part recovered.

Mr. Gridley. They have failed in a material Point. No legal Judgment can ever be grounded on this Process. No Execution, which is the Fruit of Judgment, can ever be levied, should they recover; for a Sheriff shall not make that certain which his Precept has not made so.

Jas. Russell. If the Sheriff should lay out wrong, would not Hammond remain possess of the Whole?

Ch. Justice. 'Tis impossible for the Sheriff to lay out at all.

Unanimously abated. (1)


Life & Death.

T HIS Cause held from 10 in the Morning to 8 at Night, during which Time neither Judges or

(1) See Arwood v. Arwood, 32 Pick. 387, Wilde, J. — "When lands are demanded, the description of them must be so certain that sheriff may be delivered by the sheriff without reference to any description dehors the writ."
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or Jury departed. It turned chiefly on Matters of Fact; and the Arguments too prolix to give even a Summary. The Indictment was for Murther of a bastard Child. (1)

The Authorities on Behalf of the Prisoner were as follows: 2 H. P. C. p. 438, ch. 46, § 43, Tit. Evid. 1 & 2 Wm. & Mary, 2 H. P. C. 15 ch. p. 104, 105, § 61, p. 118. H. P. C. 428, Evid. § 5, 431. 1 Inst. 373. 1 Salk. 123. 1 Bac. 310, Bastardy. Kelyng, 32, an Authority much enlarged and insisted on.

No Authorities produced on behalf of the King.

N. B. It was ruled in this Cause, that a Certificate from a Minister in another Government, of the Marriage of two Persons, might be admitted to prove the Marriage, though the Certificate was without any Authentication from any Magistrate. The Reason for this Admission was, that this Court had no Power to compell any one in another Province to give Evidence in a Cause pending before this Court. In England it is otherwise, for a Latitute issues in similar Cases from the King’s Bench. However, the Ch. Justice seemed to doubt.


(1) It appears by the record that the prisoner was acquitted, the attorney general having agreed that she might give marriage in evidence, “tho’ she answers to an indictment wherein she has the addition of spinster given her.”
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1765.

Draper (1) verf. Bicknell.

(From Taunton.)

Special Verdict.

The Question in this Case was, whether a Man, having been only on the Alarm-Lift for a Number of Years past, could be from thence so transferred by a general Warning from a Sergeant, or Notification, as to make him liable to the Penalty of the Law for Non-Attendance. (2)

Mr. Otis. Every man is presumed, prima facie, to be on the Train-Band-Lift. 'Tis for him to show himself exempted; the special Verdict does not find any such Exemption. The Case is too plain to bear Argument.

(1) In the MS. this case is entitled "Clark v. Bicknell." Draper was "Clerk" of the company.
(2) The special verdict found as follows:—

"That in the year 1754, Japheth Bicknell, the plaintiff in review, was returned to the Governour as a soldier upon the Alarm-Lift of the Third Military Company in the town of Attleborough. That afterwards, in the year 1757, the said Japheth was duly warned to appear as a trained band soldier at what was called a little training, which preceded the General Muster of said Company, and also to appear at said General Muster; and that his name was called among the trained band soldiers at both training and General Muster, and that he did not appear at either. They further find, that some time before said little training, the Captain of said Company declared that the said Japheth should be upon the trained band lift; but whether such declaration was made before said warning or not, doth not appear. And if, upon the whole," &c.
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Mr. Trowbridge. 'Tis found in the Verdict that Bicknell had been on the Alarm-Lift. Now, will such general Warning at once bring him into the Train-Band-Lift? This, I take it, would be extending the Power of Officers beyond all Bounds. In such Case no Man is safe; for when a Man is on the Alarm-Lift, he is presumed exempted from Training. Now, after this, how unjust is it, by such a general Warning, to clap him on the Train-Lift and make him liable to so heavy a Fine! It is putting it in the Power of every Officer to distress his Neighbours, who from long legal Exemption have thought themselves not liable to be transferred without special Notice; and never was it till now pretended such Transfer could be made by such general

The notification to appear, of which a copy is on file, is as follows:—

"Mr. Japheth Bicknell,—

"You, being a Training Soldier in the Company of Militia, under "the Command of Capt. John Stearns, are hereby required in his "Majesty's Name to appear at your Colours upon Tuesday the 25th of "March next, at the Meeting House in the first Precinct, at nine "o'clock in the Morning, on the second Beat of the Drum, with Arms "complete, according to law; Whereof you are not to fail; it being "according to an Act of the Great and General Court or Assembly of "this Province requiring the same upon a penalty of paying the Sum "of twenty Pounds for Non-Appearence.

"Attleborough, February 1757.

James Pullen."

The act referred to was that of 1757 by which the Province provided for raising 1800 men to serve under Lord Loudoun against the French; and the muster, for non-attendance upon which so heavy a fine was imposed, was held for the purpose of raising the above force, "either by infillment or imprest." It appears by the papers on file, that the absent Bicknell was drawn for the expedition, but was afterwards excused on account of being "blind with the right eye."
general Warning. Your Honours will therefore be cautious how such an arbitrary and unjust Precedent is made.

Mr. Gridley. 'Tis by Martial Law that every Person is obliged by such Warning to attend, unless exempted. Some Exemptions are only temporary, and they have not shewn whether theirs is of this Kind or not. If they absent themselves without being legally exempted, they must bear the Consequences.

Judgment for the Plaintiff. (3)

(3) The action here reported appears by the record to have been "a plea of review of a plea of review of a plea of debt," — the second review "being authorized by an order of the Great and General Court." The case seems to have been obstinately contested through several years. On the first trial in the Inferior Court, the plaintiff had judgment. The defendant appealed and succeeded in obtaining a reversal. The plaintiff then brought his review, and obtained a second judgment. The subsequent history of the case is recited as follows, in the defendant's petition for the order abovementioned:

—— "Your petitioner manifestly made appear to this Honourable Court, by former petitions, the hardship of that judgment; and it appeared a subject worthy the justice of this Court to give him a new trial.

"Accordingly, in the year 1761, the Honourable General Court gave order for a new trial, and enabled your petitioner to bring a Writ of Review for that purpose.

"This writ being bro't to the Superior Court in Taunton, A. D. 1761, the defendant Draper pleaded in abatement thereto, that the pet'r did not name his action, a plea of review of a plea of review, &c. — for this exception the writ abated and the petitioner had new cost to pay to the adverse party.

"On representation of this matter to this Honourable Court, the petitioner obtained an order for another Writ of Review, and that the merits of the cause should be considered and determined. In this writ the petitioner took care to amend the fault found with his last Writ,
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Writ, and named his plea, a plea of review of a plea of review of a plea of debt; and, alas! even so he could not be right; for it was objected by motion that this Honourable Court's order authorized a writ of review of the action of debt, but not a plea of review of a plea of review, &c. So, on this motion the Court dismissed the writ and ordered the petitioner to pay costs.

Wherefore, the petitioner humbly prays an order may pass this Court to enable him to bring forward a new writ of review," "and that the merits of his cause may be at last determined."

The prayer of the petition was granted, and an order passed, by virtue of which was issued the present writ, to which the defendant again pleaded in abatement, "that if any order of the Great and General Court of this Province authorizes the plaintiff to bring this writ, a profert of ye copy of such order in Court is not sufficient, as in this writ, but such order and ye seffion wherein it passed ought to have been particularly let forth above, and that such order appears by record of ye fame Court." This plea, however, was overruled, and the case at last went to trial, and resulted in the special verdict and decision above reported.
August 27th, A.D. 1765.


There cannot, perhaps, be found in the Records of Time, a more flagrant Instance, to what a Pitch of Infatuation an incensed Populace may arise, than the last Night afforded. The Destructions, Demolitions and Ruins caused by the Rage of the Colonies, in general perhaps too justly inflamed, at that singular and ever memorable Statute called the Stamp Act, will make the present Year one of the most remarkable Æras in the Annals of North America. And that particular Inflammation which fired the Breasts of the People of New England in particular, will always distinguish them as the warmest Lovers of Liberty; though undoubtedly, in the Fury of Revenge against those who they thought had disclaimed the Name of Sons for that of Inflayers, and oppressive Taxmasters of their native Country, they committed Acts totally unjustifiable.

The Populace of Boston, about a Week since, had given a very notable Instance of their Detestation of the above unconstitutional Act; and had sufficiently
sufficiently shown in what Light they viewed the Man who would undertake to be the Stamp Distributor.* But, not content with this, the last Night they again assembled in King's Street, where, after having kindled a Fire, they proceeded, in two separate Bodies, to attack the Houses of two Gentlemen of Distinction,† who, it had been suggested, were Accessaries to the present Burthens, and did great Damage, in destroying their Houses, Furniture, &c.; and irreparable Damage in destroying their Papers.‡ Both Parties, who before had acted separately, then unitedly proceeded to the Chief Justice's§ House, who, not expecting them, was unattended by his Friends, who might have assisted, or proved his Innocence. In this Situation, all his Family, it is said, abandoned the House, but himself and his eldest Daughter, whom he repeatedly begged to depart; but, as he found all ineffectual, and her Resolution fixed to stay and share his Fate, with a Tumult of Passions only to be imagined, he took her in his Arms and carried her to a Place of Safety, just before the incensed Mob arrived. This filial Affection saved, 'tis more than probable, his Life.—Thus unexpected, and Nothing removed from the House, an ample Field offered to satiate, if possible, this Rage-intoxicated Rabble.

* Andrew Oliver, Esqr., Secretary of the Province, whose Loss was estimated by the Committee of the Council at £129, 3, 0 Sterling.
† Benja. Hallowell, Esqr., Comptroller, and Wm. Story, Esqr., Deputy Registrar of the Admiralty.
‡ The Loss of Mr. Hallowell was estimated by the aforesaid Committee at £412, 19, 1 Sterling, and Mr. Story's at £102, 1, 6 Sterling.
§ Thomas Hutchinson, Esqr., Lieutenant Governor of the Province.
ble. They beset the House on all Sides, and soon
destroyed every Thing of Value.*

Furor Arma ministrat.
V1RO.

The Destruction was really amazing; for it was
equal to the Fury of the Onset; but what above
all is to be lamented, is the Loss of some of the
most valuable Records of the Country, and other
antient Papers; for, as his Honour was continuing
his History, the oldest and most important Writ-
ings and Records of the Province, which he had
selected with great Care, Pains and Expense, were
in his Possession. This is a Loss greatly to be de-
plored, as it is absolutely irretrievable.

The Distress a Man must feel on such an Occa-
sion can only be conceived by those, who, the next
Day,† saw his Honour the Chief Justice come into
Court, with a Look big with the greatest Anxiety,
clothed in a Manner which would have excited
Compassion from the hardest Heart, though his Dress
had not been strikingly contrasted by the other
Judges and Bar, who appeared in their Robes.—
Such a Man, in such a Station, thus habited, with
Tears starting from his Eyes, and a Countenance
which strongly told the inward Anguish of his
Soul,—what must an Audience have felt, whose
Compassion

* The Loss sustained by the Chief Justice supposed to be upwards
£3000 Sterling.†
† Afterwards estimated by the Council Committee at £2376, 13, 4
Sterling.
‡ First Day of the Superior Court’s Sitting.
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Compassion had before been moved by what they knew he had suffered, when they heard him pronounce the following Words, in a Manner which the Agitations of his Mind dictated! —

1765.

DESTRUCTION OF THE HOUSE OF THE CHIEF JUSTICE.

August Term

V. Geo. 3 in Sup. Cur.

Present:
The Honourable
Thomas Hutchinson, Esqr., Chief Justice.
John Cushing, Esqrs., Justices.
Peter Oliver, Esqrs., Justices.

THE Chief Justice, addressing the whole Court, said, —

Gentlemen:

There not being a Quorum of the Court without me, I am obliged to appear. Some Apology is necessary for my Dress — indeed I had no other. Deficient of Everything — no other Shirt — no other Garment, but what I have on. — And not one in my
my whole Family in a better Situation than myself. The Distrefs of a whole Family around me, young and tender Infants hanging about me, are infinitely more infupportable than what I feel for myself; though I am obliged to borrow Part of this Cloathing.

Sensible that I am innocent, that all the Charges against me are false, I cannot help feeling:—And, though I am not obliged to give an Answer to all the Questions that may be put me by every lawless Person—yet I call GOD to witnes,—and I would not for a thousand Worlds call my Maker to witnes to a Falsehood,—I say, I call my Maker to witnes, that I never, in New England or Old, in Great Britain or America, neither directly nor indirectly, was aiding, assisting or supporting, or in the least promoting or encouraging what is commonly called the Stamp Act; but, on the contrary, did all in my Power, and strove as much as in me lay, to prevent it.—This is not declared through Timidity, for I have Nothing to fear.—They can only take away my Life, which is of but little Value when deprived of all its Comforts, all that is dear to me, and nothing surrounding me, but the most piercing Distrefs.

I hope the Eyes of the People will be opened, that they will see how easy it is for some designing wicked Man to spread false Reports, raise Suspicions and Jealousies in the Minds of the Populace, and inrage them against the Innocent—but, if guilty, this is not the Way to proceed—the Laws of our Country are open to punish those who have offended.
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1765.
ADDRESS OF THE CHIEF JUSTICE.

offended. — This destroying all Peace and Order of the Community — all will feel its Effects. — And I hope all will see how easily the People may be deluded, inflamed, and carried away with Madness against an innocent Man —

I pray GOD give us better Hearts!

The Court was then adjourned on Account of the riotous Disorders of the preceding Night and universal Confusion of the Town, to the 15th of October following.

— — —

Learn Wisdom from the present Times! Oh, ye Sons of Ambition! beware left a Thirst of Power prompt you to inflave your Country. Oh ye Sons of Avarice! beware left the Thirst of Gold excite you to inflave your native Country. Oh ye Sons of Popularity! beware left a Thirst of Applause move you groundlessly to inflame the Minds of the People. — For the End of Slavery is Mifery to the World, your Country, Fellow-Citizens and Children, — the End of popular Rage, Destruction, Deference and Ruin.

Who, that sees the Fury and Instability of the Populace, but would seek Protection under the Arm of Power? Who that beholds the Tyranny and Oppression of arbitrary Power, but would lose his Life in Defence of his Liberty? Who, that marks the riotous Tumult, Confusion and Uproar of a democratic — the Slavery and Diftr aft of a despotic State, the infinite Miferies attendant on both, but would
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1765.  

would fly for Refuge from the mad Rage of the one, and oppressive Power of the other, to that best Asylum, that Glorious Medium, the BRITISH CONSTITUTION! Happy People! who enjoy this blessed Constitution. Happy! thrice happy People! if ye preserve it inviolate. May ye never lose it through a licentious Abuse of your invaluable Rights and Blood-purchased Liberties! May ye never forfeit it by a tame and infamous Submission to the Yoke of Slavery and lawless Despotism.

"Remember, O, my Friends, the Laws, the Rights,  
"The generous Plan of Power, delivered down  
"From Age to Age by your renown'd Forefathers;  
"So dearly bought, the Price of so much Blood:  
"O, let it never perish in your Hands,  
"But piously transmit it to your Children.  
"Do thou, great Liberty, inspire our Souls,  
"And make our Lives in thy Possession happy,  
"Or our Death glorious in thy just Defence." (1)

(1) Addison—Cato, A& IV. Sc. 5.
The Charge by the Chief Justice given on the Adjournment. (1)

GENTLEMEN of the Grand Jury: We, as the Superior Court of the Province, are to carry the Laws into Execution, but in this we have Need of your Assistance. Your Business, Gentlemen, more immediately respects the Crown Law. It is my Duty to inform you what Steps you must take, and what Methods pursue. I have often, on these Occasions, gone into a distinct Detail of the several Branches of our Duty that more particularly fall under your Cognizance, and given special Definitions of those Crimes, Offences and Misdemeanours, concerning which the Grand Jury are to enquire: But now our Time is too far spent to allow of this; and indeed there is the less Need, as our present Crimes arise not so much from Ignorance, as other Sources. I shall therefore only just touch on such Definitions as I judge more especially necessary.

In general, Gentlemen, then, you are to enquire into all heinous Offences:—And these in general are those Crimes which hurt the Peace of the Community, and disturb the Order of Society. One of the most renowned Men and greatest Sages of the Law

(1) The adjourned sitting.
Law called himself the *Custos Morum*, as well as *Custos Legum*; and such, Gentlemen, are you; you are to see that the Laws are kept inviolate, and the Manners of the People unpolluted.

✓ You are to enquire into all Treasons; and you are not to think there can be no Treasons at this Distance from the Throne. Treasons may be committed here, as well as nearer the royal Person; and if, from our Distance, we are exempted from those more overt Acts of assaulting the Person of the King, yet Treason may be committed among us, by writing or speaking against our Sovereign's Right to the Throne, conspiring with others to levy War, and actually levying War against the King,* or the like.

You are to inspect all Felonies, Burglaries, Thefts, high-handed Assaults, Riots and other Disturbances: All Offences that more immediately respect the Morals of the People you are to enquire of; such as the denying the Existence of a God, Blasphemy, or attributing to God what is inconsistent with God, or denying what belongs, and is due to him, a Denial of the established Religion, all Profaneness, Lewdness, and those Crimes which a chaste Ear cannot bear the Recital of, — indeed, there is no Offence whatever but may come under your Cognizance.

*I*

*Qu.* Whether the Chief Justice had not in Contemplation the following, or some other similar Authorities: — If the Intention of riotous Assemblies is to redress Grievances of a publick Nature, and such Intention is executed, *it is a levying War against the King, and Treason.* Dalh. 313. 3 Inf. 9. Kel. 70, 76. H. P. C. ch. 17, § 25. H. P. C. ch. 65, § 6.
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I would especially mention one or two Crimes which demand your immediate Attention. Burglary, Gentlemen, by the Rules of the Common Law, is a forceable Entry into the House of another in the Night-Time, with an Intent to commit some Felony, whether such Intent be executed or not; and I would observe, that there is no Need it should be done secretly; it may be as well done when a great Number are present, as when there are but few. Riots is another very high Offence; this indeed does not strike the Mind with so much Abhorrence, as some other Offences do, yet on the Discouragement and Suppression of these, all Peace of Society depends. To prevent these, we must all lend our whole Assistance; for it is against the natural Light of Reason that such Offences should proceed with Impunity, and it greatly concerns every Individual to put a Stop to them. Such an Abhorrence has the Law, of Riots, that, if three or more assemble peaceably, and after, do some riotous Act, this is a riotous Assembly, notwithstanding they did not at first assemble in a riotous Manner.

[The Law is thus severe, because such Assemblies, when not restrained, generally resist all Opposition, and tend to the Subversion of all Government:] There is no knowing where they'll end. I shall not enlarge — indeed I may well be excused, being so much interested myself.

A sacred Regard, Gentlemen, is to be had to your Oaths. You are to present no one through Malice, and leave no Man unpresented, through Fear, Favour or Affection. Such a Situation are we in, at present, that 'tis very difficult to divest one's
one's self of all Connexions, and to preserve that Firmness of Mind, on which depends the Well-being of us all.

The Trust committed to you is very great and important. All Offences come under your Cognizance, and are to be presented by you before they can be punished. Sometimes Informations are filed by the Attorney General, and in certain Cases admitted, though we are very tender how these are indulged, as 'tis a Hardship on the Subject; and I think there is no Case, in which a Man shall be tried for Life on an Information.* The Life of a Man shall not be endangered, unless twelve Men of the Grand Jury shall say, he shall be put on Trial, and twelve more of his Peers shall all agree that he is guilty, before he shall lose his Life. This is a Privilege of which the Court is as tender as any of the Subjects, and therefore do not allow Informations, only in particular Cases, and those very seldom.—It is of great Moment that you be very diligent in your Enquiry.

One Thing more I would mention: You are obliged, each of you, not only to take Notice of such Offences as have been observed to you by the Court, or that shall be brought before you by the Attorney General, or others, but also of all those Crimes which come within your own Knowledge, or where you have sufficient Inducement to think Persons have been guilty of Crimes, which have not been brought

* Ry. One may be convicted of Felony on Indictment or Information by 5 Geo. i, ch. 4. Wood's Infl. 634.
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brought forward by any one. In such Cases, you ought to take Cognizance.

Further, Gentlemen, you will mind that Secrecy you are obliged by your Oaths to observe. This is not observed commonly so much as it ought, but 'tis absolutely necessary now. You may discourse among yourselves, send for particular Persons, and examine them; and, whether what they testify is sufficient to find a Bill, or not, you are to keep all in Secrecy. The Danger of revealing what may come before you at this Time is very obvious; 'twill not only prevent future Informations, but have a Tendency to countenance and increase Crimes which it nearly concerns all of us to suppress.

I shall only add, that you must use the strictest Impartiality through your whole Enquiry, and I pray God to direct you in it.

Pateshall *vers* Apthorp & Wheelwright.

*ACTION* upon an *Inimul Computassent*. It appeared that Wheelwright had made the Settlement, as joint Partner with Apthorp, and, on the Account so stated, the Company were indebted to the Plaintiff in a certain Sum, and that Wheelwright had given his single Note to balance the Company's
Company's Debt. The main Question was, whether this discharged the Company.*

An incidental Question was debated, whether Apthorp should be admitted to give Evidence, that, in this particular Transaction, there was no Privity between him and Wheelwright.

Mr. Auchmuty. One Partner can never be admitted to prove his Ignorance of his Partner's Transactions; for this would be to render all Transactions in Trade with Partners precarious and uncertain, and is directly against all the Rules of Law.

Mr. Fitch. The Insimul Computassent is signed only by Wheelwright, and not by Apthorp, and the sole Question is, if we may not prove Apthorp had Nothing to do with it.

Cb. Just. Is there not a previous Question, whether it is in the Power of one Partner, thus to charge another?

Mr. Fitch. We have an Authority to that Point. 1 Salk. 126, Pinkney vs. Hall. It is not in every Cafe that one Partner shall be bound down by the other's Act, so as not to shew he had no Concern in a certain Affair.

* Sqy. If these Authorities would not have been pertinent: 12 Mod. 537, 86, 406. Cunningham on Bills of Exch. 95, 96, 130, 151, 152. Vid. Noy, 140, Oldfield's Cafe; 5 Mod. 314; 1 Lutw. 466; 5 Co. 117; 4 Mod. 88; 2 Bac. Abr. 24; Str. 426; Burrow's Rep. 1 v. p. 9.
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Mr. Gridley. The Exception is this—that it is to no purpose to shew we had Nothing to do in this Matter, because Wheelwright has said, we had. Can it be imagined, that one Person has a Power by his Notes, his Bills, his Bonds, at his Caprice to charge his Partner? If this is Law, an End of Partnerships. The Authority we have produced is in Point. You shall not charge ad Libitum, but you may charge in the Affairs of the Partnership, and no further. Leap this Boundary—no End—no seeing to the End of the infinite Mischiefs which will flow in upon us. Shall one Partner's barely ordering certain Affairs into the Books, charge the other, and eftop him from Proof of his having no Concern? It can never be.

Mr. Auchmuty. Their Authority is not in Point, for it is founded upon the Custom of England.

Mr. Gridley. No: the Common Law.

Mr. Auchmuty. I take it to be only a particular Custom; but if on the Common Law, let us see if the Inconveniences which will flow from their Doctrine, will not exceed any which may happen on admitting our Supposition. If it is once known that a Man may thus slip his Neck out of the Collar, who will have Anything to do with Partners? But there is an Authority right under theirs, clearly with us.

Mr. Gridley. There the Transaction was in Partnership.

Mr.
Mr. Auchmuty. To extend their Authority as far as is contended, would be inconvenient with a Witness. Who, if there must be an Inconvenience, is to suffer?—One who relies on the Faith and Credit of the Copartners, or the Partners themselves who are thus solemnly united? Shall Apthorp be allowed to prove himself clear, when his Partner has declared, under his Hand, that he is jointly concerned?

Ob. Just. Suppose my Partner had charged me, by his Note of Hand—shall not I be admitted to prove that I had Nothing to do in that particular Transaction?

The Evidence was unanimously admitted, and the Chief Justice said, that Want of Clearness, or Ambiguity, ought not to be an Objection to Evidence, but the Jury should be left to judge.

On the main Question, it was insisted by Mr. Auchmuty, that the Note given by Wheelwright was no Payment, and consequently no Discharge of the Company. Words and Paper alone can never discharge a Debt without any Payment. Hob. 68, Lovelace & ux. vs. Cocket. Mod. Cases in Law and Equity, (1) 290, Springet vs. Chadwick. 1 Salk. 124, Clark vs. Mundal. A Contract remains in full Force till discharged, and blank Paper will not discharge it; they have given us no more. Nothing but a Satisfaction can discharge; not even a Bond, by different Parties (says Lord Hobart), shall discharge....

(1) 8 Mod.
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charge without Payment. And shall this Note discharge without Payment? Never! and why? "It is no Satisfaction actual and present, as it ought to be." Hob. ub. supra.*

Mr. Gridley & Mr. Fitch offered some Evidence to induce the Jury to think this was not a Partnership Affair, and therefore Wheelwright could not make Apthorp chargeable. Upon the main Point, Mr. Gridley said:

Mr. Gridley. The grand Question is, whether Apthorp stands indebted to Patehall, according to the Settlement here produced. This is an Infitim Computaffent, a particular Mode of Action. You must prove as you declare, or you must fail, as in the Case of a Bond.

This is an Agreement of the Parties, in which Patehall has balanced the Account. The Agreement of the Parties must be taken altogether. — No dividing — No, says the Law — no Partition of what a Man says. What does Wheelwright here say? Why, that he and Apthorp owed. — Yes: but in the same Breath he says that he has paid Patehall. There it ends. A Settlement is one undivided, indissoluble Thing; and the Law says, if you ground yourself upon it, you shall take it altogether, or discard it altogether. — But let us see the Law.

Their first Authority is of a Bond; nothing to the Purpose. But one Note may discharge another;

* Qy. If a L'd Raym'd, 928, &c., would not have been pertinent.
as where the Note is of later Date. The Custom of the Place must always be regarded; and it has ever been here held, however it may have been in England, that one Note would discharge another. It is every Day's constant Practice, to settle Accounts and give Notes in Discharge. And I appeal to you, Gentlemen of the Country, what Confusion would overwhelm us, if all Settlements should be thus wiped away, and made of no Value. What is Law? What is the whole Common Law? It is the General Usage. No Common Law found written, but handed down; and there is a Customary Law; and you, Gentlemen, know what has been the uninterrupted, unvarying Custom of this Country.

The Settlement is what it is; and you cannot vary from it; if you do, you make it what it is not. The Concession on one Side is, that Apthorp and Wheelwright are indebted; but the Concession on the other Side is, that it is paid by Wheelwright's Note. One Note may balance another, and surely then it may balance an Account. 6 Mod. 36.

The Sum of what is said is, that 'tis a Settlement. You must settle it as it is settled, or 'tis your Settlement—not ours. 'Tis like a Law, or a Will—you cannot alter or change it. You must take it as you find it. 'Tis as much a Concession in the Plaintiff, that the Note balanced the Account, as it was in Wheelwright, that the Balance was owing from the Company. Wheelwright said, there was a Debt due. Pateshall said, Wheelwright had paid it.

Oliver,
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Oliver, Justice. There are two Points. As to the first, it is pretty plain from the Evidence that Wheelwright and Apthorp were in Partnership. The only Question then is, if this Note was a Payment of the Company's Debt. I can't but think, as the Law stands, the Note was no Discharge of the Company.

Justice Cushing. I agree with my Brother Oliver in the first Point, but as to the chief Point, the Authorities produced don't seem to come up to the present Question. Equity seems in Favour of the Plaintiff; and I don't know that the Law is against him.

Justice Lynde. There is Evidence under Wheelwright's own Hand, that this Matter was in Company; but there is a greater Difficulty on the other Point. The Plaintiff acknowledges, by relying on this Settlement, that he received the Note, in full Satisfaction. A new Agreement is entered into; for he discharges the Company and takes Wheelwright for his Security.

One can't very well account for the Case in Hobart. It is quite extraordinary, that a Man should give a new Bond, and not take up the old. When Securities are changed, it seems to me that the old must be discharged.

Cb. Justice. The first Question I take to be, Partnership, or not. If one Partner receives Money, and carries it to the Company Account, clear Evidence that the Money was received in Partnership.
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The second Question is, whether the Note given by Wheelwright discharged the Company. Had the Note been from Wheelwright and Apthorp, I should have had more Doubt. The Plaintiff here gives Credit for Note of Wheelwright's. Now, whether the Contract with the Company can be supposed to continue, after Wheelwright had taken the Company's Debt upon himself, and Pateshall had received the Note as a Balance of the Company Account, I doubt.*

The Jury found for the Plaintiff.

Apthorp v. Pateshall.

Rec. 1766.
Fol. 9.

Afterwards, a Writ of Review being brought, the Cause was again argued, before the Chief Justice, Justice Lynde and Justice Russell.

Justice Russell was full with the original Plaintiff.

Lynde, Justice continued strongly of his former Opinion; and was strenuously in Favour of the Plaintiff in Review.

The Doubts of the Chief Justice were, on this Tryal, removed, and he said that, from the Authorities, it was very clear, that the Note was no Discharge of the Company.† (2)

† Qu. if these Authorities would not have been pertinent to the Point in Quelion: 3 Cro. 85, 86. 2 Cro. 650. 1 Mod. Rep. 221, 225. 3 Lev. 55. 1 Brown. 47.

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The Jury was of the same Opinion with the Jury upon the last Tryal.

Judgment being entered, Mr. Gridley moved for an Appeal Home, which, not being opposed, was granted.

Dunn v. Scollay. (1)

Case of Hostage & Ransom.

AUTHORITIES in Favour of the Plaintiff were, Molloy (old Edit.) 205, § 10, 212, § 14, 213, § 14; Molloy (new Edit. 1744) 358, 237–8.

(1) This action was first brought in the Court of Vice Admiralty, to which Court a prohibition was issued and confirmed, on argument, by the Superior Court. See ante, p. 74. The plaintiff then brought his action in the Court of Common Pleas, and recovered judgment for £700; from which judgment the defendants appealed to this Court. From the various papers on file, it appears that the case was as follows:

The Briggante Peggy, belonging to John Scollay of Boston, consigned to Wm. Sitwell, London, was, on the 26th October, 1736, taken at sea by the French privateer Entrepreneante, then returning from trading in negroes on the coast of Guinea. The captain of the Peggy drew a ransom bill on the consignor, and sent Dunn, the first mate, with the French captain as a hostage. The Peggy proceeded on her voyage, but again fell into the hands of the enemy, and was taken into Bourscaux, where the captain died in prison. Dunn in the meanwhile had been committed to the prison of Bouffay at Nantz, where he remained in a sick and destitute condition. Sitwell claimed that the underwriters should pay the ransom money for his discharge, but, as they refused, he wrote
In Favour of the Defendant were, 2 Chancery Cafes, 239; 1 Salk. 35; 3 Bacon, 592, 595. (2)

wrote to Dunn, that there was "no Way to compel them without Law, and that would be attended with great Uncertainty, as this, they say, is a Café has not been try'd" — and also that he was instructed by Scollay to settle without regard to the ransom bill. He did, however, allow Dunn 15. per day for his support in prison. In a letter from Scollay to Sitwell, after the former had heard of the first capture and ransom, he claimed that, as he had given the captain no orders to ransom the vessel, if taken, the money must be paid either by the insurers or the captain; but, as the latter might not be able to do so, if the ship were looted, he directed Sitwell to insure for Dunn's benefit the amount of the ransom money on the vessel and cargo, offering to be responsible himself for the premium. Before this letter was received, it is probable that news arrived of the second capture. Dunn remained in prison six years, and his final liberation is thus described in a letter from Sitwell:

"Jno. Dunn, ye was Freeman's Mate, has at length obtained his "Discharge. His Friends compounded ye Affair for about £200, and "have sent about a Subscription to raise ye Money. — I thought the "Affair would have ended here, but his Friends are of Opinion "ye ye Owners are liable to make good all Damages, & have advised "him to go over & endeavour to recover it. They have taken ye Opin-

ion of some of ye best Counsel here, wh are in his Favour. — How "your Courts may determine this Affair, if it should come to Tryal, I "know not."

From the authorities cited, it would seem probable that the case turned upon the question of the master's power to bind the owner by a contract of ransom, without special orders to that effect, and that the ruling of the Court was against the plaintiff, seems probable from the verdict, which was for the appellant, reversion of the former judgment and costs.

(2) This list of authorities was at first supposed to refer to the former case, and was accordingly printed in a note to page 83.
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Norwood _vers_ Fairservice.

NORWOOD brought his Action against Fairservice on an Indenture, for that Fairservice covenanted to pay £13, 6., 8. _per Quater_ for Rent of a Sand-Bank, and had not paid, &c. Defendant pleads, _Non dimitt._ The Plaintiff produces in Evidence, to support his Demand, one Part of the Indenture signed by the Defendant, wherein the Demise is acknowledged, and Payment of the above Sum per Quater is covenanted.

Mr. Auchmuty, for the Defendant, offered to give in Evidence to defeat the Demand, the other Part of the Indenture, signed by Norwood, wherein he demises as aforesaid, for the same Sum per Year.

Mr. Fitch, for Plaintiff, then suggested a Fraud in the Defendant, from whence this Difference arose, and prayed Judgment, whether this Indenture produced by Defendant should go in Evidence to the Jury.

Mr. Auchmuty. I take it, the Gentleman is too early in his Objection; for Fraud or no Fraud shall be try'd by the Jury, and not by the Court. It is a plain Matter of Fact, of which the Jury are the sole Judges. Besides, of what Advantage will it be for the Court to determine this Matter? The Jury, after all, will determine whether this Variance was made before, or since the Execution of this Deed; and will give what Credit they please to it;
so that for this Court to pass their Judgment will avail Nothing. Neither do I think the Court have any Right to determine this Matter; for 'twill be abridging the Priviledges of the Subject, to settle a Point which wholly lies with the Jury to determine.

In Answer to which, it was urged by Messrs. Gridley & Fitch, that it had always been the Custom of this Court to determine in such Cases. To which the Court agreed; and Justice Lynde said that he knew a similar Case of one Lanfon's, in Middlesex: But the Chief Justice answered, that he had always doubted in those Cases, but whenever they arose, the Court always affirmed the constant Practice, and so he was silent.

'Twas then further urged by the Plaintiff's Council, that this Practice was well founded, and the Reason of it was this, that Nothing should go to a Jury which would only tend to deceive and inveigle them; and that therefore when a Piece of Evidence was offered, on the Face of which Fraud appeared, the Court rejected the Evidence, as 'twould only tend to mislead. And, as to what Mr. Auchmuty had said, that the Court's Opinion would be of no Effect, 'twas answered, that, if the Court, upon Inspection, were of Opinion that the Indenture had been fraudulently altered, it was then not Norwool's Deed — therefore no Evidence. For Courts will never admit that to go in as Evidence, which, prima Facie, they judge a Fraud; and the Jury can't judge of that which is not admitted to go to them.
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Just. Oliver. This properly belongs to the Jury. I am for admitting it to go in.

Just. Cushing. The Jury is sole Judge of this; they must give what Credit they please.

Justise Lynde. As the Practice of this Court has always been otherwise, I am for viewing it.

Ch. Justise. I know the Custom has been otherwise, but, for my Part, I think 'tis Time it was altered—am for admitting it. (1)

Another Objection was then made on Behalf of the Plaintiff, against this Counterpart of the Indenture being Evidence: For that the Indenture declared on was the Defendant's Deed—had been produced, and, by being admitted, the Defendant was estopped to say the contrary; that, if the Counterpart produced by the Defendant should be admitted, it would prove Nothing against his own Deed.

Mr. Auchmuty. It has been said, we have admitted the Indenture produced was our Deed. So far from admitting Anything, we have denied their whole Declaration; for we have pleaded, Non dimisit. We could not possibly have been farther from admitting this Deed than by pleading as we have done.* Besides, our Part and theirs make but one Instrument;

* Sed wid. 4 Bac. Abr. 84.

(1) See Ely v. Ely, 6 Gray, 443; 1 Smith's Lead. Cas. (Hare & Wallace's notes) 961, 2.
Instrument; for in all the Books 'tis, Hac Indentura. They have declared on a certain Indenture, made between the Plaintiff and Defendant, which is not complete without our Part, for they have produced only one Part, and the other lays with us to produce.

Mr. Gridley. We have declared, that, by one Part thereof, signed by the Defendant, he, in Consideration that we had demised, &c., he covenanted, &c. He has pleaded, Non dimitt. To prove our Allegation, we have produced his Deed; and he is estopped to say the contrary, and offer in Evidence an Instrument that he says was signed by us.—What can it prove? That we did not demise? That is the Issue. And here is his Deed in which he acknowledges that we did demise, and that he covenanted as we have declared. 'Tis absurd to offer this Paper to defeat his own Deed. It can't be done.

Oliver, Juß. I think it can't be admitted.

Cushing, Juß. He is estopped, I think.

Lynde, Juß. I am very far from being so clear in it.

N. B. No Authorities were produced, and the Council on each Side acknowledged the Points were unexpectedly started.

The Chief Justice, who had been absent the whole Argument of this last Objection, came into Court soon
soon after this last Determination; upon which Mr. Auchmuty moved for his Opinion: But Mr. Gridley objected, his Honour not having heard the Argument, and the Ch. Justice said, he the rather declined giving his Opinion, as there was but 4 Judges present; and two being against admitting it, his Opinion would avail Nothing. But, on the State of the Case by his Brethren, he seemed inclined to admit the Counterpart of the Indenture to go in as Evidence.

Mr. Auchmuty then ordered a Review to be minuted, and said, if he was wrong now, he never was right in his Life.

At the next Trial, which I did not hear, the Court admitted the Counterpart of the Indenture to go in, as Mr. Auchmuty informed me. (2)

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Pond verf. Medway. (1)

(About an Highway.)

Ruled, on Argument, unanimously by all the 5 Judges,—That, on a Certiorari, no Evidence should be admitted, but what came up in the

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(1) The first judgment was reversed on the review.
(2) In the MS. this case is entitled Wrentham & Medway. The petitioners were “John Pond of Wrentham and others.”
the Case: (2) And the Council was not admitted to mention any Facts, but what appeared from the Record.

The Reason assigned by the Court was, that it would be Injustice to the Sessions to judge on Matters which from the Record returned, did not appear to have been before them.

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Watts *v.* Hafey.

**WATTS** sued Hafey upon a Mortgage, and Hafey was defaulted at the lower Court, but appealed. Judgment was entered up in the Inferior Court, agreeable to the Province Law, 10 Wm. 3, (1) reserving two Months.

Mr. Kent now brought a Complaint, praying that, as the two Months had already been allowed, Execution might issue in twenty-four Hours after Judgment. He urged, that in the Province Law the Words were, "in all Cases brought for Tryptal in the Superior Court," &c. Now, he said, this Action was not brought for Tryptal; for it was defaulted in the Court below, and therefore could not be try'd now. Besides, if Execution did not issue till

(3) S. P. Rutland *v.* Worcester, 20 Pick. 78. *Per Curiam,* "When the record is before the Court upon the return of the writ, the Court will look only at the record." See 10 Met. 319.

(1) Anc. Chart. 324.
till the Expiration of two Months, the Stamp-Act would take Place, and then Execution could not be had at all. Moreover, as the Equity of the Law had been satisfy'd, he prayed that Custom might not bar him, which had prevailed, because never before asked to be altered, and never before a like Reason for granting such a Request.

The Justices, Oliver, Russell, Cushing & Lynde said, the Usage had been uninterrupted, and the Construction of the Law thereby established; therefore they would make no Innovation.

Ch. Justice. All Cases brought to this Court are certainly brought for Tryal, let them come up how they will. Nolumus mutare Leges Anglia.

Tyler vers. Richards, Administrator.

INDEBITATUS ASSUMPSIT, for Boarding and Schooling Intestate's Son. Proof that the Intestate promised to pay honourably.

Mr. Auchmuty. This Action will not lye; they ought to have brought a Quantum Meruit. Law of Evid. 190.

Messrs. S. Quincy & Adams. It has always been the
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the Custom of this Court, to allow an Indebitatus Assumpsit to lye, if the Services alleged were proved to have been done. As every Man is supposed to assume to pay the customary Price. Assumpsit is always brought for Work done by Tradesmen, and is always allowed. The Price for Boarding and Schooling is as much settled in the Country, as it is in the Town for a Yard of Cloth, or a Day's Work by a Carpenter.

Mr. Auchmuty. It is high Time some Rule was settled by this Court in Relation to these Actions; For if a Quantum Meruit is not necessary here, 'tis necessary in no Case. The Practice has always been varying, the Court sometimes denying, and sometimes allowing such Proof, to support these Actions. But had Indebitatus Assumpsit been brought for a Yard of Cloth, and the Evidence had been a Promise to pay honourably, I'm sure 'twould have defeated the Action. My Lord Gilbert says, "Courts must go according to the Allegata et Probata." Now, what is alleged here? That my Client promised to pay absolutely so much. What is the Proof? That he promised to pay honourably. If this Proof is admitted, there will be an End of any Distinction between Indebitatus Assumpsit and a Quantum meruit.

The whole Court, absente Ruffell, were unanimous that this Evidence would not support the Declaration; on which the Plaintiffs discontinued, paying Costs.*

* Sed vid. the cause of Pyncheon vs. Brewster, post.
At the Close of this Term, the Chief Justice thus addressed himself to the Bar.

GENTLEMEN of the Bar: I cannot but with Pleasure observe to you the Harmony which has subsisted between all of you in our present Session, and that Unanimity and Order which has prevailed universally amongst us through this whole Term. I the rather observe this, because, in most Parts of the Province there has been great Disturbances. I thought this Notice justly due, and cannot but hope 'twill serve as a future Precedent to us all, and a good Example to the Community.

N. B. Through this Term James Otis, Jr., Esq., was absent at the CONGRESS, held in New York, relative to the Stamp-Act, which was to take Place the first of November next.
THE SUPERIOUR COURTS, in their several Circuits, having, for the Want of Stamp-Papers, done no Business, except barely opening the Court, and continuing all Matters over to the next Term, ever since the Stamp-Act was to have taken Place in the Colonies;—

The Town of Boston, at a Meeting on December the 18th, 1765, voted, that the following Memorial be presented to his Excellency the Governor, in Council. And that Jeremy Gridley, James Otis, Jr., and John Adams, Esqrs., be applied to as Council to appear in Behalf of the Town in Support of the said Memorial.

PROVINCE OF THE
MASSACHUSETTS
BAY.

To his Excellency the Governor in Council.

The Memorial of the Town of Boston.

Humbly shews,—

THAT your Memorialists, having a just Sense of the Value of the British Constitution of Government, under which they have enjoyed all
the Blessings of civil Life, cannot but be deeply affected, when the Channels through which these Blessings are derived to us are obstructed; which, at Present, is our unhappy Case. The Courts of Law within the Province, in which alone Justice can be distributed among the People, so far as respects Civil Matters, are to all Intents and Purposes shut up; for which your Memorialists apprehend no just and legal Reason can be assigned.

We have always understood, that the Law is the great Rule of Right, the Security of our Lives and Property, and the Best Birthright of Englishmen.

Under these Apprehensions, we make our humble Application to your Excellency in Council, with whom the Executive Power within the Province is constitutionally lodged, that you would be pleased to give such Directions, to the several Courts and their Officers, as that, under no Pretence whatever, we may be any longer deprived of this invaluable Blessing. And your Memorialists pray that they may be heard upon this most important Subject by their Council learned in Law.

And, as in Duty bound, they ever pray, &c.

Attest, W. C., Town Clerk.
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MEMORIAL OF BOSTON.

Council Chamber.

Present:
His Excellency
Francis Bernard, Esqr., Governour, &c.,
in Council.

Mr. ADAMS. Innumerable are the Calamities which flow from an Interruption of Justice. Necessity requires that the Doors of Justice should ever be open to hear the Complaints of the Injured and Oppressed.

The Stamp-Aét, I take it, is utterly void, and of no binding Force upon us; for it is against our Rights as Men, and our Privileggs as Englishmen. An Aét made in Defiance of the first Principles of Justice; an Aét which rips up the Foundation of the British Constitution, and makes void Maxims of 1800 Years standing.

Parliaments may err; they are not infallible; they have been refused to be submitted to. An Aét making the King's Proclamation to be Law, the Executive Power adjudged absolutely void.

The
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The Stamp-Act was made where we are in no Sense represented, therefore no more binding upon us, than an Act which should oblige us to destroy One Half of our Species.

There are certain Principles fixed unalterably in Nature. Convention and Compact are the Requisites to make any Law obligatory. That the Subject is not bound by Acts, when he is not represented, is a sound Maxim of the Law, and not peculiar to the British Constitution, but a Maxim of the antient Roman Law: “What concerns All shall be judged of by All.”

The only Reason of the Power of the Parliament in England is, because they are elected by the People, who, if their Liberties are infringed, have a Check at the next Election. Have Americans any such Check? Have they any Voice in Deputation? A Parliament of Great Britain can have no more Right to tax the Colonies than a Parliament of Paris.

This Act has never been received from Authority, therefore in a legal Sense we know Nothing of it.

The Necessities of Business, the Cries of the People, call aloud for Justice. It has become impossible to execute this Act, therefore, if it were binding, we are excused by every Law, human or divine, from a Compliance with it. Wood’s Inft. The King’s Writs are ex debito Justitiæ, and cannot be denied the Subject. And in Magna Charta,
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1765. charta, it is said, we deny no Man Justice, we delay no Man Justice. 2 Inst. ch. 29, p. 56. (1)

Mr. Otis (opened with Tears). It is with great Grief that I appear before your Excellency and Honours on this Occasion. A wicked and unfeeling Minister has caused a People, the most loyal and affectionate that ever King was blessed with, to groan under the most insupportable Oppression. But I think, Sir, that he now stands upon the Brink of inevitable Destruction; and trust that soon—very soon, he will feel the full Weight of his injured Sovereign's righteous Indignation. I have no doubt, Sir, but that the loyal and dutiful Representations* of nine Provinces, the Cries and Supplications of a distressed People, the united Voice of all of His Majesty's most loyal and affectionate British-American Subjects, will obtain all that ample Redress they have a Right to expect; and that e'er long, they will see their cruel and insidious Enemies, both at Home and abroad, put to Shame and Confusion.

My

* Alluding to the Transactions at the late Congress.

(1) See John Adams's Diary, December 20, 1765. "I grounded my argument on the invalidity of the Stamp Act, it not being in any sense our act, having never consented to it. But left that foundation should not be sufficient, on the present necessity to prevent a failure of justice, and the present impossibility of carrying that act into execution. Mr. Otis reasoned with great learning and zeal on the judges oaths, &c.

Mr. Gridley, on the great inconveniences that would ensue the interruption of justice." 2 John Adams's Works, 158, 9.
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My Brother Adams has entered so largely into the Validity of the Act, that I shall not enlarge on that Head. Indeed, what has been observed is sufficient to convince the most illiterate Savage that the Parliament of England had no Regard to the very first Principles of their own Liberties.

Only the Preamble of that oppressive Act is enough to rouse the Blood of every generous Briton. — "We your Majesty's Subjects, the Commons of Great Britain, &c., do Give and Grant" — What? Their own Property? No! The Treasure, the Heart's Blood of all your Majesty's dutiful and affectionate British-American Subjects.

But the Time is far spent — I will not tire your Patience. It was once a fundamental Maxim, that every Subject had the same Right to his Life, Liberty, Property and the Law, that the King had to his Crown; and 'tis yet, I venture to say, as much as a Crown is worth, to deny the Subject his Law, which is his Birth-right. 'Tis a first Principle, "that Majesty should not only shine in Arms, but be armed with the Laws." The Administration of Justice is necessary to the very Existence of Governments. Nothing can warrant the stopping the Course of Justice, but the impossibility of holding Courts, by Reason of War, Invasion, Rebellion or Insurrections.* 1 Inst. 249, a & b. This was Law at a Time when the whole Island of Great Britain was divided into an infinite Number of petty Baronies and Principalities; as Germany is, at this Day. Insurrections

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Infurrections then, and even Invasions, put the whole Nation into such Confusion, that Justice could not have her equal Courfe; especially as the Kings in antient Times frequently sat as Judges. But War has now become so much of a Science, and gives so little Disturbance to a Nation engaged, that no War, foreign or domestic, is a sufficient Reason for shutting up the Courts. But, if it were, we are not in such a State, but far otherwise; the whole People being willing and demanding the full Administration of Government. Vid. Bracton, 240.


"The Laws which forbid a Man to pursue his Right one Way, ought to be understood with this equitable Restriction, that one finds Judges to whom he may apply. When there are no Courts of Law to appeal to, it is then we must have Recourse to the Law of Nature," &c. Hugo Grotius, De Jure B. & P. Lib. 1, C. 3, § 2. Lib. 2, C. 4, § 9. C. 7, § 2, n. 2. C. 20, § 2, p. 4 & 5, with Mr. Barbeyrac's Notes. Code, Lib. 1, Tit. 9, De Jud. & Cal.

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I can't but observe that cruel and unheard of Neglect of that Enemy to his King and Country, the Author of this Act, that, when all Business, the very Life and Being of a commercial State, was to be carried on by the Use of Stamps, that wicked and execrable Minister never paid the least regard to the Miseries of this extensive Continent, but suffered the Time for the taking Place of the Act to elapse, Months before a single Stamp was received. Though this was a high Piece of Infidelity to the Interest of his royal Master, yet it makes it evident that it could never be intended, that if Stamps were not to be had, it should put a Stop to all Justice; which is ipso facto a Dissolution of Society.

It is a strange Kind of Law, which we hear advanced now-a-days, that, because one unpopular Act can't be carried into Execution, that therefore there shall be an End of all Law. We are not the first People who have risen to prevent the Execution of a Law; the very People of England themselves rose in Opposition to the famous Jew-Bill, and got that immediately repealed. And Lawyers know that there are Limits, beyond which if Parliaments go, their Acts bind not. 4 Inst. 122.

The King is always presumed to be present in his Courts, holding out the Law to his Subjects; and when he shews his Courts, he unkings himself in the most essential Point. 18 E. 3, ch. 1. 1 H. 4. 20 E. 3, ch. 2. 4 H. 4, ch. 1. Vattel, p. 20. And Magna Charta, and the other Statutes are full, "That they will not defer, delay or deny to any Man Justice or Right." "That it shall not be commanded
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1765.

Memorial of Boston.

commanded by the Great Seal, or in any other Way to disturb or delay Common Right.” The Judges of England are “not to counsel, or assent to any Thing which may turn to the Damage or Disherson of the Crown.” They are sworn not to deny to any Man Common Right, by the King’s Letters, nor none other Man’s, nor for none other Cause. Is not the Dissolution of Society a Disherson of the Crown? The “Justices are commanded, that they shall do even Law and Execution of Right to all our Subjects, rich and poor, without having regard to any Person, without letting to do Right for any Letters or Commandment which may come to them from Us, or from any other, or by any other Cause.” 4 Inst. 70. (2)

His Excellency the Governor. The Arguments made Use of, both by Mr. Adams and you, would be very pertinent to induce the Judges of the Superior Court to think the Act of no Validity, and that therefore they should pay no regard to it; but the Question with me is, whether that very Thing don’t argue the Impropriety of our Intermeddling in a Matter which solely belongs to them to judge of in their Judicial Department. And can it be proper for us to command them to act in any particular Way, relative to a Matter which is to come before them in their Judicial Capacity? especially, as from some of the very Authorities you have cited, it appears, that the Judges are to obey no Mandate, come it from whomsoever it will.

Mr.

Mr. Otis. Those Mandates spoken of in the Authorities, are such as are made to delay Justice, and command the Judges not to proceed. That very Thing, I take it, shews that Justice is never to be stopped, but that the Law shall always have its own Courfe. And surely your Excellency must see a great Difference between a Command in Delay of Justice, and one made in its Furtherance. There is certainly a very wide Distinction to be made, between saying, Justice shall stop, and a Command or Recommendation to the Judges, to proceed in the several Courts of Judicature, according to the Laws and Customs of the Country.*

Mr. Gridley. The Question now before your Excellency and Honours, is of great Consequence, of very great Weight. The Safety of the whole People, the Preservation of all Government is in Issue. All Laws are divided into public and private, criminal and civil. The Criminal Law is as free as ever; for the Act excepts Criminal Matters.

The Benignity of the Law says, if the Intention of the Party cannot operate one Way, it shall another. 'Tis so in all private Transactions:—How much more so in Things of a publick Nature! Though the criminal Law is free, yet there is such an intimate Connection between this and private Law, that the one cannot subsist without the other. Deprive me of the one, and 'tis worse

* Qu. if Foster's Crown Law, 269, might not have been argued upon by way of Analogy.
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worse than if you deprived me of both. My Property is invaded, but the Invader is no Criminal. Where then is my Remedy? He, who deprives me of my Remedy, deprives me of my Right. What shall be done? To shut up the Courts is a Renunciation of Government. What! shall I live in a Society, and yet have no Redress of my Wrongs? Shall I have no Remedy against him who has broken his most solemn Contracts and Engagements? Shall I bear the Insults of Insolence, and have no Recompence for my Damage and Sufferings as a private Individual? I have an Estate, but I have no Security. — Pursue the Thought, and it is dreadful. Hunger will break through a Stone Wall. Disputes, Animosities, Wrangles, Disaffections, Hatreds, Heart-burnings, Tumults, Confusions, — 'tis easy for the Imagination to trace the infinite Miseries which rush in upon us like an Inundation; — no Need to pursue it further.

What was the Law instituted for? For the Protection of my Person and Estate. Government is subverted if the Law is not open. 'Tis absurd to suppose that Society can take away from me my Right of Self-preservation as a Man, and not protect my Property as a Citizen. The People must return to a State of Nature. And I had much rather be a Barbarian of the Woods, than live in a State once under Government, but now reduced to Anarchy and Confusion. The Knowledge obtained in Society has only fitted them to execute their Perpetrations with more Dexterity, and rendered their Plots the more terrible.

But
December, 5 Geo. 3.

But let me put the Case, that all the Stamp-Papers had been destroyed by Tempest, or some other Casualty: The Courts in such a Case must have proceeded. There is now as much an Impossibility to use those Papers, as though they were all in the Bottom of the Ocean.

There is not a Syllable in the Act which has the least Aspect, that Courts should stop, if Stamps were not to be obtained. A Mulct is the Punishment for Non-use, — which shows that if a Person will submit to that, the End of the Act is complied with: But Impossibility in such Case would assuredly excuse: That the Law never requires Impossibilities is a Maxim of the Law.

Necessity demands Justice should have its Course. It is no Laches, no Default of ours, that the Act cannot be put in Force. The Innocent shall never be involved in the same Fate with the Guilty if it can be avoided. It is not in the Power of any one to obtain a Stamp-Paper. A Thing that is impossible is as though it were not. He who is a Citizen shall never be denied his Law.* (3)

* Ry. If Locke on Government, ch. 19, § 219, would not have been pertinent to the Question.
Ry. If the Authority from the Year-Book, 19 H. 6, p. 63, would not have been pertinent in the preceding Debate. — "The Law is the greatest Inheritance the King has, for by the Law He Himself, and all his Subjects are governed; and if there was no Law, there would be no King, nor Inheritance.

(3) The result of these arguments and the action taken by the Council in the premises will appear from the following record of a Town Meeting held on the 21st of December, 1765. Town Records, 1765, Fol. 670:

"3 o'clock P. M. Met according to Adjournment."
December, 5 Geo. 3.

1765.

MEMORIAL OF BOSTON.

"Mr. Adams again Reported — That the Honourable the Council had come into some Resolves relative to the Memorial of the Town to His Excellency in Council, a Copy of which had been handed him by the Deputy Secretary, which Resolves being read, it was Voted that the same be entered upon the Town Records — and they are as follows — viz. —

" At a Council held at the Council Chamber in Boston upon Saturday the 21st Day of December, 1765.

" The Board proceeded to the Consideration of the Memorial of the Town of Boston, and came to the following Resolves, viz. —

" That a Question in Law necessarily arises from said Memorial, namely, Whether the Officers of the Courts of Law can be justified in proceeding in their respective Offices with unstamped Papers, and it thereupon — Resolved that it is the Business of the Courts of Law to determine Points of Law, nor can the Board with any Propriety direct or advise the said Courts in such Judgments or Determinations, and in this particular point of Law under the present State of the Province the Board are desirous that the said Courts should be free in their Judgments, without any apprehension of censure from the Board. It is therefore further —

" Resolved, that the Subject-Matter of this Memorial is not proper for the determination of this Board, nor is it in the power of the Board to afford relief in the way and manner pray'd for, but the Board recommend it to the Judges of the Inferior Court of Common Pleas for the County of Suffolk to determine the aforesaid Point of Law as soon as may be, and to the other Courts within the Province to determine it at or before their respective Terms.


* Upon a Motion made and seconded — the Question was put. "Viz. — Whether the Town apprehend the above Resolves of Council in consequence of their Memorial to His Excellency in Council to be satisfactory — Passed in the Negative unanimously."

* Adjourned to Thursday next 10 o'Clock A.M.

" Thursday December 26th, 1765. Met according to Adjourn.*

The Town being acquainted by several Gentlemen present, that the Courts of Probate within this Province would be opened; that the Sheriff of the County of Suffolk had served, and was ready to serve all Writs brought to him, and that the Court of Common Pleas for said County next in course to sit, would meet & proceed to Business; and that Mr. Sheriff Greenleaf, and Mr. William Molineux could give the Town further satisfaction relative to these particulars —

" It was therefore Voted, that Mr. Sheriff and Mr. Molineux be desired to inform the Town respecting these Matters — Mr. Sheriff accordingly
January, 6 Geo. 3.

"accordingly declared that he had duly served all the Writts which had "been given him for Service to this Day — and Mr. Molineux that "having discoursed the Judges of the Inferior Court, he had no reason "to doubt but that the aforesaid Court would at their next Term pro- "ceed to Business as usual.

"Upon a Motion made and seconded — Voted that when this Meet- "ing be adjourned, it shall be to Thursday the 16th Day of January "next.

"Thursday the 16th of January 1766. Met according to Adjourn- "ment.

"Whereas the Inferior Court of Common Pleas for the County, "together with the Court of Probate, is now open, and Business going "on as usual — Voted unanimously that the Representatives of the Town "be and hereby are Instructed to use their utmost endeavours with the "General Assembly at the present Session, that Measures may be taken "that Justice be also duly administered in all the Counties throughout "the Province, and that enquiry may be made into the Reasons why "the Courts of Justice in the Province has been in any Measure "obstructed.

"It is further Voted unanimously that the Representatives be also "Instructed to use their Influence in the General Assembly that proper "enquiry may be made into the behavior of any Person, or Persons, "who by their misconduct have either contributed toward the Difficult- "ies we labour under respecting the Stamp Act, or have basely neglected "to use their upright and best endeavors to relieve us from those Diffi- "culties.

"Voted that the Thanks of the Town be, and hereby are given to "the Honourable James Otis, Esq., the Moderator of this Meeting, for "dispatching the Business thereof.

"Then the Meeting was dissolved."

Governor Bernard thus describes these occurrences in a letter to the Lords of Trade, dated January 18, 1766, for a copy of which with others we are indebted to the kindness of Hon. George Bancroft:

Gov. Bernard to Lords of Trade, Jan'y 18, 1766.

—— "They next began with the Courts of Justice, & for that pur- "pose presented a Memorial to the Governor and Council. This "Memorial was considered in a full Council of 15 & the prayer of it, "that the Governor & Council would give orders that the Courts "should be opened, was unanimously rejected. This resolution of the "Council was reported at a Town Meeting the same day & unani- "mously voted unsatisfactory. Nevertheless means were found that the "Courts of this County should be opened; the Judges as I suppose, sub-
January, 6 Geo. 3.

"mitting to the despotism of the people. It was then hoped that all
"things would be quiet; but no such thing: it was then inferred in this
"Town they should not be satisfied with their own Courts being opened,
"unless all the Courts of the Province, who tho' very much dissatisfied
"with the Stamp Act, would not proceed in open defiance of an Act of
"the Parliament, & a great part of the people were quite satisfied with
"waiting until the success of the last application to Parliament could be
"known. But Boston must govern the whole Province, & the Delin-
"quency must be rendered universal."

It will be remembered that Chief Justice Hutchinson had been also
Judge of Probate for the County of Suffolk. *Ante*, p. 98. Having
refused to open the Court or to allow any business to proceed without
stamps, he considered himself compelled either to resign or quit the
country, and chose the former alternative. 3 Hutch. Hist. Mass. 142.

On the 18th, the House of Representatives in reply to the Governor's
address at the close of the last session, presented a message to his Excell-
ency which was published in the Massachusetts Gazette of the 23rd, and
which contains the following language:

"The Courts of Justice must be open — open immediately; and the
"Law, the great Rule of Right in every County in the Province exe-
cuted — The shutting the Course of Justice is a Grievance which this
"House must enquire into — Justice must be fully administered through
"the Province, by which the shocking Effects which your Excellency
" appréhended from the People's non-compliance with the Stamp Act
"will be prevented."

And on the 24th, the House, probably in consequence of the votes
of the Town, passed the following resolve:

"Resolved that the shutting up of the Courts of Justice in general
"in this Province, particularly the Superior Court, has a manifest
"Tendency to dissolve the Bonds of civil Society, is unjustifiable upon
"the Principles of Law and Reason, dangerous to his Majesty's Crown
"and Dignity, and a very great Grievance to the Subject that re-
"quires immediate Redress; and that therefore the Judges and Justices,
"and all other publick Officers in this Province ought to proceed in the
"Discharge of their several Functions as usual."

This resolve was sent up for concurrence to the Council, where the
proceedings are thus described by Governor Bernard.

*Gov. Bernard to Lords of Trade, March 10, 1766.*

—— "The Council after a short Debate ordered it to ly on the Ta-
"ble; the House sent up a Message to desire they would pass it. The Council
January, 6 Geo. 3.

"Council resumed the consideration of it, and it having been said that it did not appear that the Judges would not proceed in Business at the usual Time, it was ordered that the Judges be desired to meet together, and after consideration to signify to the Council whether they intended to proceed in Business at the usual Time. The Judges accordingly met, and signified to the Council by Letter that it was impossible for them to determine absolutely what they should do at so distant a Time (5 Weeks); but they were of Opinion that if the Circumstances of the Province were the same at the Time of opening the Court as they were now, and the Lawyers should urge their proceeding, they should find themselves obliged to proceed. The Council voted this to be satisfactory and passed upon the Resolve by non-concurring it. The House sent down for the Judges Letters, and voted that the Information was unsatisfactory, and so the Matter ended. — In the first Debate upon the Resolve, the Lieutenant Governor bore a principal Part. In the next Boston Gazette came out a Letter signed Freeborn Armstrong, containing virulent Abuse of the Lieutenant Governor, misrepresenting what he said in the Council, and arraigning him upon the very Falsities of the Misrepresentation. This was a Breach of Privilege tending to overturn all Government by destroying a main Pillar of it — Freedom of Debate in Councils of State. Upon this Principle the Council were earnestly urged by myself and some of the most reputable of their own Body, to refer this in a Parliamentary Way. But it could not be obtained, — it was said that, if they committed the Printers, they would be rescued by the Mob, — that if the Author was discovered in Forn, as he was known to be a Member of the House (Mr. Otis) they should be involved in a Quarrel with the House; that this was not a Time to refer Indignities. So they contented themselves with vindicating the Lieutenant Governor's Character by a Publication of their own. Boston Gazette, Jan'y 27 & Feb. 3."

This reply was also published in the Massachusetts Gazette of January 30th, as follows:

"Province of Massachusetts Bay."

IN COUNCIL Tuesday the 28th Day of January 1766.

"Sixteen Gentlemen of the Board being then present, who had been likewise present on Friday the 24th Instant:

"A Paragraph in the Boston Gazette of the 27th Instant was read at the Board, containing a Resolve of the Honourable House of Representatives of the 24th Instant, respecting the shutting up the Courts of Justice in this Province and affecting That 'The Resolves was the fame Day sent up to the Hon. Board for their Concurrence when the Hon. Thomas Hutchinson, Esq., Lieutenant Governor, and Chief Justice"
January, 6 Geo. 3.

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"Justice of the Superior Court, who, on this Occasion also sits as President of the Council, a Place he has usurped, after engrossing all the Places of Honor and Profit in the Province moved to give it the go-by, saying it was Impertinent, and beneath the Notice of the Hon.

"Board, or to that Effect."

"Whereupon a Debate was had at the Board upon the said Paragraph; and the following Questions were thereupon put,

"Q. 1. Whether any Gentlemen present at the Board on Friday last heard the Lieutenant Governor express himself in the Manner mentioned in the Boston Gazette of Yesterday, viz. That the Resolve of the House was impertinent, and beneath the Notice of the Hon.

"Board, or Words to that Effect?"

"Is passed unanimously in the Negative.

"2. Whether the Words the Lieutenant Governor uttered in that Debate carried any Reflection on the Honorable House of Representatives?"

"Is passed unanimously in the Negative.

"3. Whether his Honor the Lieutenant-Governor hath usurped the Place of President of the Board?"

"Resolved, That when his Honor first took the Place of President of the Board, it was determined by the Resolution of the Board at that Time, after searching the Books for Precedents in the like Cases:

"And it was declared by some Gentlemen who were then present, that the Motion was made, and the Question determined by the Board, the Lieutenant-Governor himself being altogether silent on the Occasion.

"THE foregoing is a true Copy, and published by Order of the Board.

"Attest. A. OLIVER, Sec'y."
March Term

VI. Geo. 3.

THE Chief Justice, who was Lieutenant Governor of the Province, was not present through the whole of this short Term.

The Charge was given the Grand Jury by Justice Lynde, who touched upon Nothing but what related to Matters which were to come before them, as the Grand Inquest for the County.

But what and how the Business of this Term was transacted; together with the political Finesse of the Game that was played, must be left to be reported by another Hand, at a future Day. (1)

(1) See John Adams's account of this session given in his "Diary," under the date of March 11, 1766, in John Adams's Works, 189:

"11. Tuesday. Went to Boston. The Chief Justice not there; a piece of political finesse to make the people believe he was under the necessity of going a journey this week, but would be here by the next; was put about, while care was taken to secure an agreement to an adjournment for three or four weeks; so that Hutchinson is to trim and shift, and luff up, and bear away, and elude the blame of the ministry and the people. Cushing spoke out boldly and said he was ready to go on;"
March Term 6 Geo. 3.

1766.

Opening of the Court.

"on; he had no difficulty about going on. Lynde said, we are here.

"Oliver said, here am I in duefs, and, if I must go on, I must. Thus

"popular compulsion, fear of violence of the Sons of Liberty, &c., was

"suggested to be the only motive with him to go on."

We give also Governor Bernard's account of the proceedings, con-
tained in a postscript to his letter of March 10th, from which an
extra was printed on p. 212.

Gov. Bernard to Lords of Trade, March 10, 1766.

"P. S. Mar. 12. I have an opportunity to add an account of what

"has been done at the opening of the Superior Court, at the usual time,

"which was yesterday. It is usual for the Lawyers in a body to wait on

"the Judges on the first day of the Term before they go into the Court.

"At this meeting, the Chief Justice not attending, one of the Judges,

"Mr. Peter Oliver, said that he attended the Court according to his

"duty; that he understood that it would be expected, that he & his

"Brethren should proceed in business in defiance of the late Aët of Par-

"liament; that such proceeding was contrary to his judgment & opin-

"ion; & that if he submitted to it, it would be only for self preservation,

"as he knew he was in the hands of the populace, & therefore he pre-

"viouly protested that all such acts of his, if they should happen, would

"be acts done under duress. To which the other Judges assenting, it

"was proposed to each of the Lawyers singly, whether he desired that

"the business should proceed, contrary to the Act of Parliament: when

"every one of them answered in the Negative; even Mr. Otis himself

"who has for 4 months past been labouring indefatigably to bring about

"this particular mischief. But they said it would be proper to try a

"cause or two to quiet the people; accordingly one cause, which had

"been at issue before the Stamp Act took place, was tried and all other

"civil business was postponed to the middle of April, by which time

"they expect to know the determination of the parliament. So evident

"is it that this scheme, for obliging the Judges of the Superior Court to

"proceed in defiance of the Stamp Act, which has agitated the Gover-

"nor & the General Court at different times for 5 months past, was not

"calculated for the ease or convenience of the people who wanted no

"such expedient, but was contrived to oblige the Government to join in

"an insult upon the Parliament, or else to remain exposed to the resent-

"ment of the people for not so doing.

F. B.

"(Indorsed)

"Recd. May 19th } 1766.

"Read May 29th }
March Term 6 Geo. 3.

The adjournment was to the 29th of April, on which day the Court again met and again adjourned without proceeding to business. Adams's description of this meeting is as follows:

"29. Tuesday. At Boston. To this day the Superior Court was adjourned. Hutchinson, Lynde and Cushing were present. Two of the bar agreed to continue an action. Hutchinson leans over, and orders Winthrop to minute an agreement to continue. We will consider of it, says he. Another of the bar moved for a continuance, and no opposition. Hutchinson orders the clerk to enter it, motion for a continuance, &c. Then the Court went to playing off a farce, and trying to get a cause for the jury, but none was then ready. Then Hutchinson proposed, — 'What if we should adjourn to the first Tuesday in June?' . . . Thus the Chief Justice is now mustering up fortitude enough to make public, to manifest his desire to comply with the Stamp Act and to assist in carrying it into execution, in order to lay claim to the protection of the House of Commons, and to claim a compensation for his damages. . . . I said not one word for or against the adjournment; I saw the Court were determined before I came in, and they had no right to expect that I would fall in with that determination; and I had no disposition to foment an opposition to it, because an opposition made with any warmth might have ended in the demolition of the earthly house of his Honor's tabernacle." 2 John Adams's Works, 193, 4.

On the sixteenth of May, a copy of the repeal of the Stamp Act arrived in Boston.
August Term

VI. Geo. 3.

Charge to the Grand Jury by the Chief Justice.

GENTLEMEN of the Grand Jury: When we opened the Court in this Place, this Time Twelvemonth, the Disorders through the Continent, in general, were very great. Here, it was so great, that a Stop was put to the Courts of Justice, and this Court was adjourned to a distant Day, because it was not safe * to proceed. But, through the Favour of Divine Providence, we are now in a better State, and it may perhaps be prudent to say Nothing

* Qu. de hoc, & vid. the Votes of the Town of Boston, on the Day, to which the Chief Justice referred. (1)

(1) The following is a copy of the votes referred to, from the town records for 1765, fol. 647:

"At a legal Meeting of the Freeholders and other Inhabitants of the Town of Boston at Faneuil Hall, August 31st, Anno Domini 1765, —

"The Hon'ble James Otis Esq. was chosen Moderator."
Nothing of what is past. Disorders, arising from what was esteemed a Violation of our Right, had better be gone over in Silence; for it is difficult to draw the Line, where Duty ceases, and Opposition may begin. Yet, for Persons under Pretence of Rectifying publick Wrongs, to invade private Rights is highly criminal.

This Town is the first in the Province, and indeed generally takes the Lead through the Continent: I should therefore be culpable, did I not say Something respecting our future Conduct. Our Grievances being removed, it will be best for us to return to our usual Order. A Time, perhaps, will never arrive in the Life of the longest Liver of us, nor

"The Town having an utter detestation of the extraordinary & violent proceedings of a number of Persons unknown against some of the Inhabitants of the same the last Night — Vote unanimously that the Selectmen and Magistrates of the Town be desired to use their utmost endeavors agreeable to Law to suppress the like disorders for the future, and that the Freeholders and other Inhabitants will do everything in their power to assist them therein.

"VOTED, That the Inhabitants of this Town will be ready on all occasions to assist the Selectmen and Magistrates in the suppression of all Disorders of a like nature that may happen, when called upon for that purpose.

"VOTED, That the Thanks of the Town be, and hereby are given to the Honble James Otis Esq. the Moderator of this Meeting, for dissenting the Business thereof.

"Then the Meeting was dissolved."

The only mention of any further disturbance is by Hutchinson himself, who says that on the next evening an attempt was made "to collect the people together in order to further rapine; but a military watch having been ordered, and the Governor's Company of Cadets appearing in arms, and shewing great spirit, the mob was dispersed." 3 Hutch. Hist. Mails. 127.
nor of our Children's Children, when such an Attempt will again be made: And if not, why should we still continue those Broils and Animosities, which disturb our internal Peace and Tranquillity. Is it not better to go on, as formerly, with the Exercise of Government, than unnecessarily to provoke the Parliament of Great Britain to Acts, which otherwise might never be thought on?

As the Behaviour of this Town has great Influence through the whole Province, and, as I observed before, has its Weight through the whole Continent, this is the Reason, Gentlemen, why I mention Things of so general a Nature, and which do not so immediately relate to you; but you, Gentlemen, being returned from the Body of the County, may, in Respect to the Restoration of Harmony and Order among us, be extensively useful.

I do not know how it happens, but Disorders are seldom confined to one Point. People who begin with one View, seldom end there.

Every one must have observed, the Court I am ture have, through the Province, a general Disposition to Disorder, Confusion and Riot, Breaches of the Peace, and what is commonly called Mobs. Laws have been thought rigorous, hardly to be borne, which heretofore were never thought severe. The Minds of the People are disturbed, their Sentiments divided, but it is absolutely necessary for us to unite; and as our Interest is the same, so our Wills should be in Concert with Great Britain.
August Term 6 Geo. 3.

It is an old Maxim of the Law, Gentlemen, that the Laws may sometimes sleep, but they never die. It lays a great Deal with you, Gentlemen, to revive those, which are absolutely necessary for the Safety of the Community and good Order of Government; and I hope that you will set an Example to the Rest of the Province.

The Business that immediately concerns you, Gentlemen, respects the Crown Law; And you are sensible, Gentlemen, that there is a standing Grand Jury, which meet four Times a Year, and present all lesser Offences cognizable at the Sessions. Capital Offences, being extremely dangerous to Society, will demand your highest Attention. High Treason is another Crime which may be committed here, but in few Instances. I will mention some which I recollect. (Levying War against the King is High Treason; as where People set about redressing public Wrongs; this, Gentlemen, the Law calls levying War against the King; because it is going in direct Opposition to the King's Authority, who is the Redresser of all Wrongs.)

Counterfeiting the King's Coin is High Treason at Home, but we have not settled that Point here. We have a particular Province-Law, which makes it a lesser Offence; how far this will operate upon the Law of England, we have never determined; tho' there is no Negative Clause in our Act. (2)

Another

(1) Anc. Chart. 745.
August Term 6 Geo. 3.

Another Instance of High Treason here, may be committed by counterfeiting the King's Seal; but this has never yet happened. These are all the Instances of High Treason here, which now occur to me.

Homicide, Gentlemen, is another Offence which you are to take Notice of, and this, Gentlemen, may be done, either by shooting, striking, poisoning, or any other Way, however secret, by which the Life of a Man is destroyed. Homicide is either voluntary or casual: The former is Murder, the latter may be Manslaughter, Chancemedley, or otherwise, as the particular Case may happen.

Burglary is another Offence which will come under your Examination, and is, in the Law, defined, breaking open in the Night-time, and entering into any Dwelling-house with a felonious Intention, whether such Intention be executed or not. There has been a Difficulty in the Minds of Some, as to the felonious Intention; As where a Man enters without a felonious Intention, and afterwards commits a Felony, whether such an Offence come under the Denomination of Burglary. Now I would observe, that the only Rule of Law is, to judge of the Intention by the Act; and, this Rule adhered to, there can be no Difficulty.

Blasphemy, Gentlemen, is another Offence, and in the Law is a very high Crime, being of the most dangerous Nature; for it tends to the Dissolution of all the Ties of Government, and saps the very Foundation of Society.
August Term 6 Geo. 3.

I am desired to mention another Offence, which does not immediately relate to your Conduct. There has been of late, a great Number of Thefts and Robberies committed in the Day-time in many of the neighbouring Towns; particularly, I am informed, in Roxbury, Dorchester, Brookline and Milton: And an Offence which is of very dangerous Tendency, has been frequent, that in Law is called Theft-bote; where the Person robbed has taken back the Goods stolen, and received a Satisfaction in Order to a Concealment. Indeed I should give you this particularly in Charge, had I not great Reason to think the Instance I have a more immediate Reference to, was committed through pure Simplicity and Ignorance; but I hope this publick mentioning of it, will have the same Effect, and prevent the like Evil for the Future.

In a word, all high Crimes and Offences, all high-handed Riots, which any of you know, you are obliged by your Oaths to communicate to your Brethren, that they may judge of, and present them.

You must act, through the whole, with Impartiality, without Prejudice in Favour of, or against any One. You are bound by your Oaths to Secrecy, which Jurors do not always observe, not considering their Oath, and the Hurt they do the Community; and especially to Individuals, who, by their revealing Matters, which came before them, are rendered obnoxious to those whose past Offences have made them Criminals.

Gentlemen:
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1766.

Gentlemen: You, and we are all of us accountable to the Supreme Governor of the Universe, for our Conduct in our several Departments.


Indebitatus Assumpsit lies for Physicians' Attendance, Travel and Drugs. In Indebitatus Assumpsit the Plaintiff may recover a less Sum than that laid in the Declaration.

Indebitatus Assumpsit upon a long Doctor's Bill for Medicines, Travel into the Country and Attendance.

In this Case it was strongly urged by Mr. Adams for the Defendant, that this Action lay not, but that a Quantum Meruit should have been brought; and he relied much on the Case of Richards & Tyler, tried last August Term, q. v. p. 195.

But the Chief Justice said, that Boarding and Schooling were uncertain as to Price, and a Quantum Meruit must be brought; but that Travel for Physicians, their Drugs and Attendance, had as fixed a Price as Goods sold by a Shopkeeper, and that it would be a great Hardship upon Physicians to oblige them to lay a Quantum Meruit. And the Chief Justice, who alone summed up this Case to the Jury, said that the Custom here had always been in such Cases to lay an Indebitatus Assumpsit, though in

Qy. and vid. 3 Vol. p. 113, Dr. Holden vs. Day. Qy. Where is the true Boundary Line between an Indebitatus Assumpsit, and a Quantum Meruit, on this Side the Water?
August Term 6 Geo. 3.

in England it would not do; and that the Jury might, upon an Indebitatus Assumpsit, if they thought it reasonable, lessen the Charges in the Account. This was solemnly affirmed by all the five Judges, in the Course of this Debate, to be Law here; though it was not, in Great Britain.*

The Jury did, according as the Law was laid down to them, and struck off about £7 from the Account, lowering the Charges, probably, to what they thought "reasonable."

* The Resolution in this Case was denied to be Law by the whole Court, Ch. Juft. abente, in the Case of Leefiu & Glover, August Term, 1770. (1)

(1) We find a report of the case of Glover v. Le Tefiue among John Adams's papers, as follows:

"Glover vs. Le Tefiue, Aug. 1770.

"Indebitatus Assumpsit for Vilits and Medicines. The Question whether Indebitatus will lie, or Quantum meruit? — Ans. Indebitatus will not, because no Contract for a certain Price for the Vilits or Druggs. 2 Instructo Cler. 154, 'if one sue upon a Promiss to satisfye him for Work done, he must shew in his Declaration how much he de

served for his Work.' So if one sue for a Thing sold, where no Price was agreed upon, he must aver, and shew it to be worth so much.

"2 Instructo Cler. 151. Assumpsit for Wines sold and delivered — Note in the Margin. 'On this Count (Ind. Afs.) the Plaintiff must prove the express Price agreed on.' — Page 152. Note in the Margin.

"But on this Count (Quant. Mer.) the Delivery only is sufficient.'

"1 Salk 23, Hard's Cafe. Indebitatus Assumpsit will lie in no Cafe, but where Debt lies, &c. But see 1 Burrows, 374, Harris vs. Hunt"

bach. 2 Burrows, 1006, Mofes vs. Macfarlan, page 1008 — Ld. Mansf. 'The first Objection is, y an Action of Debt would not lie here; and no assumpsit will lie where an Action of Debt may not be brought.

"Some sayings at Nfst Prius reported by Note-Takers, who did not understand the Force of what was said, are quoted in Support of that Proposition. But there is no Foundation for it,' &c., An Action of Assumpsit will lie in many Cafes where Debt lies, and in many where it does not lie.' Slade's Cafe, 4 Co. 92.

29 "1 Fitzherb.
1766.

"1 Fitzherb. 119. 'A Writ of Debt properly lieth where a Man
oweth another a certain Sum of Money by Obligation or by Bargain for
a Thing sold, or by Contract, or upon a Loan made by ye Creditor to
ye Debtor,' &c.

"1 Mod. Ent. 299. There are two Sorts of Promises, express or
implied,—an express Promise is where a Person promises, ye he will
pay a Sum of Money, &c.

"At the Bottom, 5,—' An implied Promise is such as is raised by Im-
plication of Law upon the Nature of the Case, where a Man sells, and
delivers Goods to another, tho' he cannot prove an express Promise to
pay for them; and where the Price is not of ascertained Value between
the Parties, ye Law implies that the Defendant promised to pay for
such Goods, so much as they were worth; So if a Man sells another to
Work, and no Price is agreed, nor any express Promise to pay, the
Law implies that the Person who set the Man to work contracted with
him and promised to pay him so much as he deferred.'

"The Court unanimously adjudged, that Indebitatus Assumpsit would
not lie upon the Account in this Case, neither for Visits, Bleeding nor
Medicines, but allowed Plaintiff to file a new Declaration on Quantum
Meruit in Payment of Costs.

"A Tender may be pleaded to a Quantum Meruit. 5 Bac. Abr. 27.
1 Str. 576, Johnon vs. Lancaster.'

A declaration on an implied promise "is said to be in general assump-
sit: which is either indebitatus assumpsit, wherein the plaintiff generally
states that the defendant being indebted in a certain specific sum promised
to pay that sum, or upon a quantum meruit or quantum valebant." Lawes on Pleading in Assumpsit, 2. And it was formerly held that
under the former count, only the exact sum laid could be recovered, be-
cause otherwise "the same assumpsit was not found that the plaintiff did
declare upon." Bagual vs. Sackoverell, Cro. Eliz. 392. But in Thomp-
son vs. Spencer, 8 Geo. 3, it was held that the plaintiff might in such case
recover what was justly due. Id. (5th ed.) in nosis. It would appear
therefore that the decision in Pynchon vs. Brewster was in accordance
with the law of England, when overruled, in 1770, though not when
made in 1765."
August Term 6 Geo. 3.

Box & al verf. Welch & al.

INDEBITATUS ASSUMPSIT on Account annexed. The Plaintiff’s Book and Oath were offered as Evidence to the Jury, to which an Objection was made by Mr. Auchmuty — the Charge standing “Dr. J. W. & J. W. Jr.,” and not “J. W. & Co.”

Mr. Auchmuty. We never yet have extended the Rule of the Plaintiff’s Oath to his Book so far as this Case would carry it. The Oath of the Party is allowed in any Case only from Necessity. You must bring Proof of the joint Contract and Sale to both the Defendants, and then your Oath and Book will be good Evidence of this Charge. We admit the Plaintiff to his Oath, when the Action is brought against one, because he may come in and defend himself. He can never prove a Negative, viz’, that he did not contract. In the Case of known Partnerships, possibly, we may have gone so far as to admit the Plaintiff to his Oath, because here each usually contracts for the other, and the Contract of one for both shall bind both; but at this Rate it will be in the Power of any one to bind who he pleases.

Mr. Otis. ’Tis agreed, if the Charge was against one, the Plaintiff might be admitted to his Oath: Why not, when it is against two? Either of them may defend himself as well now, as when charged single. Any Evidence that would discharge in one Case, will in the other; and it has ever been the Custom.
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1766.

Box v. Welch.

Custom, as I conceive, in such Cases to admit the Plaintiff to his Oath.

Ch. Justice. Suppose, Mr. Otis, that you and I were charged together, — must not some Evidence be given of the Contract with both, before the Plaintiff can be admitted to his Oath?

Mr. Auchmuty. And if your Honour and Mr. Otis can be bound in this Manner, why not me and twenty more? If this Rule is established, some of your sharp Folks, who stick at Nothing, will never lose their Debts, — 'tis only clapping in one or two substantial Men, and your Debt's secure. Besides, if you admit his Oath, we can never prove a Negative.

Mr. Otis. Prove a Negative! He may prove Anything in Discharge, now, as well as when one is charged, and he never promised. As to the charging one, two or three, — you may charge three Million, and the Plaintiff's Oath and Book shall go in, as Evidence to the Jury, who will judge of that and all Circumstances. The most we have contended for in these Cases, has been, when the Charge was against A. B. & Co., we, I believe, may have gone so far as to make the Plaintiff show the Company, before we admitted his Oath.* But this is not our Case; we don't pretend a Company. The Charge in our Books stands against J. W. & J. W., Jr. We say they jointly bought these Goods, and that we delivered the Goods upon their joint Credit; and we offer our Oath and Book to support

* Quere.
August Term 6 Geo. 3. 1766.

support our Charge, the only Evidence that ever has been, or can be expected.

Four Judges against the Chief Justice, that the Plaintiff's Oath and Book should go as Evidence to the Jury, who would judge of all the Evidence with all the Circumstances.

The Plaintiff was sworn accordingly.

Apthorp & al vs. Eyres.

WHEELWRIGHT, one of the Plaintiffs in this Action, having died since the Commencement of it, a Motion was made, that a Minute should be made of Wheelwright's Death, because, should such a Minute be omitted, it would be Error. (1)

Mr. Fitch. I have a Deposition in my Hand, taken in perpetuum Rei Memoriam, which I offer to the Court as Evidence of Mr. Wheelwright's Death. This is Evidence to satisfy the Court, and not a Jury. If your Honours are satisfied of the Fact, whether by Attendance on his Funeral, or seeing his Corpse, or otherwise, you will order the Minute to be made by your Clerk.

Mr. Gridley. When we produce Depositions as Evidence to a Jury, we must proceed in a certain Manner.

(1) Tidd Prac. 1056, 1107.
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Manner in the Caption, according to the Province Law. All the great Courts at Home constantly produce Affidavits to such Points. Lilly, 44. Your Honours are as well satisfy'd as if the Deposition was taken according to the strictest Rules of the Province Law.

Mr. Auchmuty. Affidavits are received at Home when properly taken, but the Courts never receive them, when improperly taken. Will your Honours receive a Deposition in perpetuum, &c., which were never received at Home, or anywhere else, while the Person was living, and might be produced to give his Testimony vivâ Voce. What if your Honours were satisfy'd of the Fact?—will your Honours make Minutes in your Records from your own Knowledge? Your Honours would then be Witnesses, and not Judges.

Just. Oliver. They might have produced the Witnesses; I am therefore for not making the Minute, as there is no Evidence to the Court.

Just. Russell. If they could not easily have produced the Witnesses, I should have been for receiving this Evidence, but as they can easily produce him, I think they ought.

Just. Cushing. I think this is good Evidence to satisfy a Court, and better than ever I knew in a like Case.

Just. Lynde. I am for admitting this Evidence, for I am satisfy'd of the Fact.
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Ch. Justice. Certainly Courts are not tied up to such strict Rule in Admission of Evidence, as when it is to go to Juries. I am very full, that the Court have sufficient Evidence from this Deposition to satisfy them of Mr. Wheelwright's Death, and am for the Minute's being made.

Which was done accordingly.* (2)


(3) But see Coffin v. Abbot, 7 Mas. 215, where it was held, that on the hearing of a petition for review, depositions are inadmissible, unless taken with the same forms as if to be used in the trial of a cause.
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Charge to the Grand Jury by the Chief Justice.

1767.

BEFORE I say Anything to the Grand Jury, it is highly proper that I should take Notice of the Death of One of the Judges of this Court. I have no Talent for it, and am an Enemy to traduc- ing and vilifying the Characters of Men, when alive, and flattering them when dead. Yet Justice to Judge Ruffell obliges me to say Something of his Death. Every one who knew him in private Life, must acknowledge him a most amiable Man. I scarce ever knew his Equal. He might be truly characterized as a Lover of Mankind, and no higher Character can, I think, be given of any One. Nothing more need be said to recommend him, especially at this Time.

The several Posts of Honour which he bore, he sustained
March Term 7 Geo. 3.

sustained with Dignity. As a Legislator, I had an Opportunity to observe his Conduet, both as a Member of the Council and House of Representatives: And I know that he ever engaged on that Side which had Truth and Justice for its Support. As a Judge of the Admiralty, his Conduet was most unexceptionable: And I believe none of his Decrees, but met with universal Approbation, except at Times, when Party-spirit and Animosities ran high, and made it a Thing impossible, for any Judge, in any Department, to give Satisfaction. His Conduet in this Court — I appeal to the Gentlemen of the Bar — was such as pronounced him the Judge, and a Man of strict Integrity. Although we all have some Byafs, — 'tis impossible for human Nature to be without, — yet if he had any Byafs, it was ever in Favour of Virtue.

Justice has been done this worthy Character, already, in publick, in an unexceptionable and elegant Manner. (1) The best Use that we can make, is to follow his Path and imitate his Virtues; especially, as we all must shortly follow him to give our Account to the Judge of us all. — Now,

Gentlemen of the Grand Jury:

You are sent here from your several Towns, upon Business of great Importance to your Country. I will not go so largely and particularly into the Duty of Grand Juries in general, as many of you have been on Juries before, and most of you have been conversant with the Duty of your Office.

There

(1) Massachusetts Gazette, January 15th, 1767.
March Term 7 Geo. 3.

There is one general Observation I would make; that the End of Government is the Happiness of every Individual, so far as is consistent with the Good of the Whole. To attain this End is impossible without Laws, and their due Execution. 'Tis necessary that Laws should be established, else Judges and Juries must go according to their Reason, that is, their Will; and this is in the strictest Sense arbitrary. On this Reason, I take to be grounded that well-known Maxim, that the Judge should never be the Legislator: Because, then, the Will of the Judge would be the Law; and this tends directly to a State of Slavery. The Rules and Orders of a State must be known, and must be certain, that People may know how to act; or else they are equally uncertain, as if the Law depended upon the arbitrary Opinion of Another.

Let the Body of Laws be ever so good,—if they are not executed, 'tis worse than a State of Nature, because we guard ourselves in a State of Nature, and therefore are more secure than in a Society, where we depend on the Laws for our Protection, which are not put in Force.

There has been a Failure of Law amongst us, which has been very detrimental. Doubts and Differences in Opinion have been, which has caused a great Deal of Confusion. 'Tis to be hoped we are returning again to good Order. I wish the Laws to be put in due Execution for the publick Good, and am as much for the Liberties of the People, as any Man, so far as is consistent with the Welfare of the Community.
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In this Country we have always been happy in a good Set of Laws. The principal Crown-Law of this Province is grounded on our provincial Laws; where these fail, the Common Law of England is the Rule. The Principle of the Crown-Law is, establishing Punishment, not according to the Degree of moral Evil in the Offence, but according as the Crime affects the Peace of the Community.

There is a Difference between Peace, as used in the Common Acceptation of the Word, and Peace as it is used in a Law-sense. Offences which are much greater in their Nature, are punished in a much milder Manner, than Offences less heinous, which affect the publick Peace more.

I suppose there is no one whom Blasphemy does not strike with greater Horrour, than the Crime of Treason against the Prince; yet the latter is justly punished with Death, when the former is not, because it does not tend so immediately to destroy the Happiness of the State. Many other Things I might instance in, but this is sufficient. The Principle that the Law goes upon, is, that the Supreme Being will avenge his own Wrongs. I don't know a Nation in the World, that makes that Distinction between Murder and Manslaughter, which the English do. It was not made in this Country before the Charter; for our Forefathers founded their Laws upon the Law of Moses, which makes no such Distinction. This may properly be called the Benignity of the English Law.

(The Chief Justice then proceeded to charge the Grand
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Grand Jury relative to those particular Crimes, which it was probable would come before them, and then continued as follows:

I would now only add, Gentlemen, that you carefully observe the Oath of God which is upon you: It contains many good Rules for your Conduct, and lays you under the greatest Obligations to discharge your Duty with Fidelity.

All Crimes you have Cognizance of, from the highest to the lowest, though lesser Offences are commonly left to the Inspection of Justices of the Peace, and the Sessions. But, if they are negligent, it is your Duty to present all Offenders against the publick Peace, in the Common Acceptation of that Word.

I know that it is impossible for Men in any Society to be all of the same Mind. Doubts and Disagreements in Sentiment will arise; it is not only necessary, but useful; for by this Means, the Good of the Community is often attained, the most salutary Plans of Government adapted, and the whole Business of the publick Weal better executed.

But, because we do not think alike, because we disagree in our several Opinions, let us not slander and traduce one another's Characters. We might as well quarrel, and destroy Men for their different Looks, or Complexions. But to reproach and vilify each other in publick Print, is a Crime of a much higher Nature, and [it is more mischievous still, when it is pointed against all in Authority].—Shall
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Shall no one's Character be safe, because he does not think as we would choose?—For my Part, I know no more dangerous Symptom in any State, than when its Rulers are slandered, and the Authority of those who govern, is despised and trampled upon.>

I am sure I never promoted any such Spirit among us; and heartily do I wish, that I could help to restore the Peace of this Community. But I doubt whether there is any Room to hope, at this Time, any Good from my Recommendation.

I have known the Time, when a Man could not more recommend himself than by promoting Peace, Harmony and good Order; And there have been Times, when a Man might obtain greater Applause in promoting the Contrary, and stirring up Contentions, Divisions, Animosities and Faction.

But I know that it has been said by our Great Lord and Saviour, that "Blessed are the Peacemakers," and if I might obtain His Approbation, I am not anxious for any other Events.

Bromfield vs. Lovejoy.

PLEA in Abatement by Mr. Auchmuty, that the Defendant bore a Captain's Commission, and to a Gentleman by Office, and therefore, Yeoman, was not
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Bromfield vs. Lovejoy.

A Captain of Militia, commissioned by the Governor, is a Gentleman by Office, and if sued by the Addition of Yeoman may abate the Writ.

not his due Addition. Cited 2 Inf. 666, 668; 1 Inf. 66 a.

Mr. Otis. Lovejoy is certainly no Gentleman by Office; for no Commission from any Governor whatever, can make a Man Gentleman by Office. Lovejoy is then a Gentleman, if any Way, by Curtesy, or Reputation, and Gentleman, would be a good Addition, "but if he be named Yeoman, he cannot abate the Writ." Viner, Tit. Additions, C. pl. 29. p. 85. "Yeoman or Gentleman are Additions ad Placitum, and ad Libitum, are no Part of the Name, but Additions ad Libitum, as People please to call them." Viner, Ibid. pl. 33, 34.

The Court took a Distinction between Gentleman by Curtesy, and Reputation, and seemed to be of Opinion, that, if a Man was Gentleman by Curtesy, Yeoman was not his due Addition; aliter if Gentleman by Reputation only. In the present Case they were of Opinion, that Lovejoy was a Gentleman, both by his Commission and by Curtesy. Therefore they ruled, that the Writ abate, though they said it was a very great Hardship upon the Bar.∗

∗ Vid. 3 Bac. Abr. 618, where Brook, 44, is cited. Vid. 2 Ld. Raym'd, 849.
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Carpenter v. Fairservice.

Present:
All the 4 Judges.

ASSUMPSIT upon a Note of Hand, payable upon Demand. These Words "in one Month" were thus dashed out.

Mr. Auchmuty objected, that the Note thus erased did not support the Declaration; therefore not Evidence to support it; and prayed Judgment whether it should go in.

A Witness was sworn, who declared, he wrote the Note, and gave a Reason why those Words were inserted, and said they had, since the signing of Fairservice, been erased.

Mr. S. Quincy, to what Mr. Auchmuty had objected, reply'd, that the Jury were Judges of this Matter, and would determine whether the Rasure was before, or after signing.

The Point was not much laboured on either Side: And Justices Oliver & Lynde were of Opinion, that, as the Note did not support the Declaration, it should not go in as Evidence.

The Chief Justice & Justice Cushing were full for the Case, with all its Circumstances to be left to the Jury.
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Jury. And the Chief Justice said, that surely the Court could not determine the Weight of the Evidence of the Witness; but that the Jury are the sole Judges of the Credibility of this Witness, upon whose Testimony alone it rests, whether this Razure was before or after signing.* (1)

The Court being divided, the Plaintiff discontinued, paying Costs.

* Vid. Norwood vs. Fairservice, ante, p. 189.

(1) The question as to the time when an alteration of a written instrument was made, is for the jury. 6 Gray, 443. 20 Vermont, 305. 11 New Hampshire, 395.
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Thomas Hutchinson, Esqr., Chief Justice.
Benjamin Lynde,
John Cufhing, {Esqrs., Justices.
Peter Oliver,
Edmund Trowbridge,*
Jonathan Sewall, Esqr., Solicitor General.†

Present:
The whole Court.

The Charge of the Chief Justice to the Grand Jury.

GENTLEMEN of the Grand Jury: When I had Occasion last to speak from this Place to the Grand Jury, I made some general Reflections

* The late Attorney General. This was the first Time of his sitting as a Judge in the County of Suffolk. He was succeeded in the Office of Attorney General by Jeremy Gridley, Esqr.
† N. B. Mr. Sewall was the first Officer of the Kind ever known in the Province. He was, prior to this Appointment, made Special Attorney
Reflections upon the Nature and End of Civil Government. I then remarked, that it was essential to a Free People, that they should be governed by known and certain Laws.* From thence I took Occasion to observe upon a well known Maxim of Government, that the Person of the Judge and the Legislator should never be united in the same Person.—I don't know how it happened, but this Obsevation of mine was soon after remarked upon in the Papers,† and a Suggestion thrown out, that I had been, for a Number of Years past, acting in direct Opposition to this Principle of mine; and, in Violation of my own Conscience, had continued a Practice diametrically repugnant to my own Sentiments and Opinion. — This was a pretty Home Reflection. I should not have mentioned this Matter now, but from a firm and hearty Regard to my Country,—to show People the great Impropriety of such Reflections, and to let them know the Dangers

ny General, but this being disagreeable to Mr. Gridley, and carrying Something of an Absurdity in the very Term, he was translated to his present novel Office of Solicitor.

* Vid. ante, p 234.
† Bolton Gazette, April 27, 1767. (1)

(1) This paper contains a long political article on the then approaching election of Representatives, signed "Freeborn American." The passage alluded to is as follows:

"It is a doctrine lately advanced by an executive J—ge in a public assembly, and is manifestly agreeable to liberty and law, that a legislator and judge in the same person are incompatible with that freedom & independence necessary to an impartial administration of government; and yet this very J—ge for a long time was elected a legislator, and served as such."
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gers they are exposed to from countenancing such Reflections, and the Punishment those are obnoxious to, who publish Things of this Nature.

To suffer the Transactions and Opinions of the Executive Court to be illiberally animadverted upon is of the most dangerous Tendency to the Community:—For, if the Authority of the Executive Courts is brought into Contempt, what Mischiefs will not infect Society!

It is really amazing to me, how I could be misunderstood, unless through Willfullness, in a Matter, in which, if I had been attended to, it was evident I leaned quite the other Way. — For, at that very Time, I mentioned, as the Reason why the Judge and Legislator should not be the same Person, was because the Will of the Judge would then be Law, and that in such a Case, the Law would be uncertain, depending upon the arbitrary Will of another.

This I said, to elucidate the main Object I had in View, that the Laws of every State ought always to be fixed, certain and known; and that such Laws should ever be put in due Execution. — For, when the arbitrary Will of the Judge is the Law, the Laws will be perpetually fluctuating and uncertain, so that the Subject can never know what Laws to obey, nor the Executive Officer what Laws to execute. — The whole Tenor, Scope and Connexion of what I said, very plainly showed my Meaning. — But, because I advanced, that the Direction, Opinion and Will of the Judge should never be the Law
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Law — could it be reasonably inferred that the Judge should never participate in the Legislative at all? — could it justly be concluded that I meant, that a Judge should never share at all in making the Laws? It was very obvious my Meaning was directly the reverse.

It is very extraordinary to find the same Persons contending for an unlimited Freedom of Thought and Action, which they would confine wholly to themselves? We find one Side hardly allowed to contradict what the other advances, and not permitted even to reason, without being treated in the most abusive Manner, and vilified beyond all Bounds. — Nothing can be more unjust than this.

Pretty high Notions of the Liberty of the Press, I am sensible, have prevailed of late among us; but it is very dangerous to meddle with, and strike at this Court.

The Liberty of the Press is doubtless a very great Blessing; but this Liberty means no more than a Freedom for every Thing to pass from the Press without a Licence. — That is, you shall not be obliged to obtain a Licence from any Authority before the Emission of Things from the Press. Unlicenced Printing was never thought to mean a Liberty of reviling and calumniating all Ranks and Degrees of Men with Impunity, all Authority with Ignominy. — To carry this absurd Notion of the Liberty of the Press to the Length some would have it — to print every Thing that is Libellous and Slanderous
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Slanderous — is truly astonishing, and of the most dangerous Tendency.

To publish that a Man was a Bankrupt, a Villain or the like, would assuredly be liable to a civil Action, if not an Indictment. — To strike a Man in the King's Court will subject the Offender to the Loss of his Hand and Imprisonment for Life. — And yet, shall that same Court tolerate the grossest Abuse in the publick Prints, and let all Insults pass with Impunity? — Shall a Man be allowed to publish openly of an Executive Court, in Print, what he dares not charge a private Man with, in Conversation?

I don't give the Abuse in this Matter in Charge to you, Gentlemen, because I conceive that this Court have full Power to proceed in a much more Summary Way to execute Justice on the Offenders.

We often hear of very severe Strictures made upon the Conduct of Ministers of State in Great Britain; but we never hear of similar Reflections upon the Judges of Westminster Hall. — They would issue a Process for Contempt of the Court, and commit the Printer instantly, if he did not expose the Authors — and, if he did, very like, both Author and Publisher.

'Tis on the Dignity and Support of the Executive Courts that your own Liberty depends. Let the Respect due to these Courts be left, let their Dignity not be kept up, by a Support of Authority, and
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and all Order and Government will soon be at End. For what Order can there be in a Society where the Courts which are to carry the Laws into Execution are treated with a contemptuous Disrespect? — If such an unlimited Liberty is indulged and carried on, we shall soon approach near to that Licentiousness which is worse than Tyranny.

I would mention, in Order to show People the Hazard they run, in treating this Court abusively, and to caution all against a like Conduct for the Future, that we are not obliged to have the Matter presented in the first Place by the Grand Jury, then to have it left to a Petit Jury to be decided, before the Offence can be punished; but this Court may proceed in a far more summary Manner, to bring the Offender to Justice. — This Court will ever take proper Care to secure their Honour by keeping up their Authority.

I have said thus much, that a general Abhorrence of such gross Abuse may take Place for the Future, and every Thing of the like Kind hereafter be universally discountenanced among us.

(Here I was called out of Court: — The Chief Justice then, as I was informed, went on to hint, as some thought, at what Major Hawley had published in the Papers relative to the Berkshire Affair. (2) When I returned, the Chief Justice was passing very high Encomiums upon the Judges of England,

(1) See note at the end of the charge.
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land, and speaking upon those Judges who were guilty of Unfaithfulness, Bribery and Corruption. He said, —)

They must certainly be the most abandonedly wicked of all Men. — They deserve the worst Punishment, and I pray God they may always meet with it. — But I believe, whenever such Characters have appeared, of which, to the Glory of the English Nation, there have been very few Instances, they have never been attacked in the publick Prints.

(The Judge here charged the Jury about the criminal Affairs, which in this Court were numerous, and then concluded with saying, —)

We frequently hear Talk of Tumults and Disorders — but few know the Danger they run, in engaging in such Disorders. For, if a Man is attacked, upon any Pretence whatever, in his own House, whether it be to treat him contemptuously for the Diversion and Sport of those who assault him, or for whatever other Cause, if the Man who is thus befet kills any one or all of those who thus abuse him, he is only guilty of Manslaughter, for which he shall have his Clergy; whereas, if any one of the others should unfortunately happen to kill a Man, all those, who anyways assisted or abetted the Offenders, are every one of them guilty of Murder, and must suffer the Pains of Death.

Gentlemen of the Grand Jury: —

You must carefully attend to all the Obligations which
which you brought into Court with you, and, more especially, to that additional Obligation you are now under, by the Oath of God which is upon you. You are to inquire into and present all heinous and dangerous Offences. You are not to suffer yourselves to be guided or in the least governed by Hatred, Envy or Malice, or Favour or Affection.

Be careful to observe your Oath, and keep the Fear of God before your Eyes—I cannot end with a better Caution.

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Note.

The "Berkshire Affair" alluded to on p. 246 was the trial of Seth Warren, indicted with others for a riot and rescue of one Franklin, arrested on civil process, while the Courts were closed by the Stamp Act. Major Hawley was counsel for the prisoner; and from his account of the affair, published in the "Bolton Evening Post," July 6th and 23rd, 1767, we compile the following brief statement:

One Morse, a deputy sheriff of Berkshire, having arrested a prisoner on a justice's execution, he was refused by the defendant and others, "the said Warren and others declaring to the said Morse that it would be in vain for him to attempt to take any person from Laneborough to prison for debt, so long as prisoners when committed could not be allowed to have the liberty of the prison yard upon any terms, but must be kept in as close custody as felons, and until the Court should be open, and people should be admitted, by some course or process of law, to recover their dues as formerly. And, to be explicit, it appeared in evidence that the plain sense of what those persons at that time declared to Morse was, that they desired he would not attempt any more to take any person from Laneborough to goal on writs purchased or sued out before the first of November for debt, so long as they could not have their lawful right, viz., the benefit and privileges of the King's writs for the recovery of their just dues of those who were indebted to them; and that if he should attempt it, and should actually take, and arrest any person in Laneborough for that purpose, he might depend on it, that they would be resorted to — A noble resolution, worthy of
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"of every Englishman, and all who have the principles of a free govern-ment interwoven in the constitution of their minds." — "This resolution of the said Warren and others then together was, soon after the said 6th of November, communicated to several others of the inhabitants of Lanefborough, who, on consideration of the state of the province & country, judged the resolution reasonable & proper, joined therein, and agreed to abide by it." Afterwards, "at a raising in the said Lanefborough, when the greatest part of the men of that town were assembled, it was proposed to a considerable number of them, that all the inhabitants should join together, and stand by each other in preventing the officers from arresting and imprisoning any one of the town for debt, so long as the then present state of things, as to proceedings in law, should continue — several of the company to whom the proposition was then made expressed their approbation thereof — none of them objected to it. — In the evening, the company went to the tavern, where the same officer, aided by a posse, endeavored to execute a writ against one Franklin, then present, — a scuffle ensued, and the officer and posse were driven off. "The evidence that there was at the trial of this previous confederacy, and that Warren with the other persons charged acted pursuant to such confederacy in the refuge of Franklin, was what the attorney-general specially relied on in arguing the case, to show it was a riot, and to confute my hypothesis of its being but a sudden trepids and affray; and two of the Justices, viz., Judge Cushing and Judge Oliver, in delivering the case to the jury, specially observed and insisted upon it, that it was plain from the evidence that the assault, &c., was committed in consequence and pursuance of the previous agreement and confederacy above mentioned."
The Chief Justice did not give his opinion upon the circumstances in the evidence which showed it to be in execution of a previous confederacy, but, for reasons best known to himself, chose to make a different state of the case, which indeed was ingenious enough, but not altogether so pertinent and proper, because it was (as I humbly conceive) short of the evidence. — It is to be observed that the presentment charged the defendants with a riot, and the Court supposed the only doubt of the jury would be, whether the aforesaid facts, as they appeared in evidence, constituted a riot; and therein the Court supposed it was proper the jury should be determined by their opinion, and therefore particularly informed the Jury it was clearly the opinion of the Court that the facts proved constituted a riot, and that therefore the jury, in their opinion, could have no difficulty in finding Warren guilty according to the presentment." The jury were charged with the case at night. The next morning, "either before they delivered their verdict, or before sentence," the prisoner's counsel did suggest to the Chief Justice that it was clear from Hawkins' Pleas of the Crown, 1st Book, Chapter 65, Sect. 6, which section I turned to and he read, that, ac-
1767. "Cording to the evidence, the crime which the defendant had been guilty
of, (if of any), was High Treason; to which the Chief Justice replied,
"he was well apprized of what Hawkins said, and that he knew, if an
"assembly of men, combined for the purpose, should by force oppose the
"execution of one single statute, they would be guilty of High Treason,
"which most certainly is in general true, found doctrine and clear law.
"3 Inst. 9-10 — 5 Bacon’s Abr. 117 — Hawk. P. C. ubi supra — The
"same in Burn’s Justice."

Nevertheless, the prisoner was convicted of a riot, and fined three
pounds. In the article from which we quote, Major Hawley argues
with great force that the prisoner was either guilty of High Treason, or,
owing to the state of nature to which the closing the courts had reduced
society, of no crime at all, — judged merely by the light of reason. —
"But" (he says) "I think that the punishing him for a riot cannot be justi-
"fied upon any principle or hypothesis; for it plainly appears, that his
"conduct was either innocent and justifiable, or that he was guilty of
"the highest crime, viz., High Treason: And if it appeared to the court
"and the King’s counsel, that his crime was High Treason, which, I
"think, must have been the case on their principles, would it not have
"been more becoming the character of the firm and intrepid judge, to
"have advised that he should have been dismissed from the presentment
"of a riot, and charged anew, and brought to trial for his true offence,
"than without any intimation of his Majesty’s pleasure, to have pro-
"ceeded to convict him of a riot, and fine him in the sum of three
"pounds."

This article by Major Hawley was in reply to what he conceived to
have been a misstatement of the facts, by a writer signing himself
"Philanthrop," who habitually wrote in support of the government. See
Malcolm verf. Gleason.

A drew a negotiable Order upon B. B. accepted the Order, and after Acceptance the Order was indorsed over. The Question was, if the Indorsee could support an Action against B. (upon his Acceptance aforesaid upon the Presentment of the Order by the Payee) before personal Notice given B., of Indorsement.

Ruled, unanimously, by all the five Judges, on Argument, that the Action was well brought, and that Notice to B. of Indorsement was not necessary; for B. was liable to Indorsee in the same Manner that he was to Payee, on the Acceptance.

Gibbs verf. Gibbs.

Present:
The whole Court.

The Demandant counts as Heir in Tail under a Will.

Mr. Auchmuty objected to the Will going in as Evidence to the Jury, because the Will did not support the Declaration, as it gave only an Estate for Life to the Ancestor of the Demandant.

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The Court, after a short Argument, were unanimously of Opinion that the Exception was the first of the Kind ever made; that, if allowed, would destroy all Wills from being Evidence, as it would bring the real Point in (as they expressed it) upon a Side Motion, and would be subversive of the hitherto uninterrupted Course of Practice. The Exception being overruled, the Court said, the Will should go in, as Evidence to the Jury, who, upon finding the special Matter, would bring the Point of Law properly before the Court.

Hall verf. Miller.

THE Plaintiff brought Assumpsit to pay on Demand, upon Account annexed, (1) and gave in Evidence his Book, in which was a Memorandum of an Agreement made at the Day of Sale, that Months Credit was given the Defendant. The Time alleged in the Declaration, of the Defendant's being indebted, was, after a Lapse of the Months Credit. Now, the Question was, whether this Evidence supported the Declaration.

Mr.

(1) The sufficiency of the common form of declaration in assumpsit, upon account annexed, was questioned in the case of Rider v. Robbins, 13 Mass. 284, and it was there held to rest on immemorial practice. See 2 Mass. 398; also Dummer's Defence of the New England Charters, (ed. 1745.) 30, where a description is given of the early practice in the courts of law.—"If it be Matter of Account, the Account is annexed to the Writ, and Copies of both left with the Defendant."
Mr. Auchmuty urged, that this Evidence proved a different Contract from that alleged by the Plaintiff; for he declares upon a Promise to pay upon Demand, and brings in Evidence that the Contract was not to pay on Demand, but that a long Credit was given: And, though the Promise is not alleged to be upon Demand, till after the Time of Credit was elapsed, yet, that can never alter the Nature of the original Agreement. There never was a Promise to pay upon Demand, if we believe the Plaintiff's own Book; and the Proof varying from the Allegation, the Plaintiff must, in this Action, fail.

But it was answered, and Resolved by the whole Court, (unanimously) that the Promise to pay on Demand being laid after the Time of Credit was elapsed, was well supported by this Evidence; for, the Defendant having neglected Payment at the Time limited, after that Time past, the Law raises a Promise to pay on Demand, and the Plaintiff may then well declare so. And the Court relied on Gilbert's Law of Evid. 191, where "one brought "Assumpsit for £20, and gave in Evidence a Prom- "ise that if two would surrender their Right, he "would pay them £20 apiece, and that they did "surrender their Right, this is good Evidence to "support the Declaration; for the Promise is laid "absolutely in the Declaration, and the Promise in "Proof is upon Condition, yet, when that Condi- "tion is performed, the Duty becomes absolute, and "so is good Proof upon this Declaration."
Noble verf. Smith.

S. Quincy & for Plff.  
J. Otis & for De't.  
J. Adams  
R. Auchmuty

This Case was very largely debated by the Council on both Sides; and the Question was, if Evidence might be given to the Jury, of a partial Consideration of a Note of Hand, upon which the Plaintiff, Promissee in the Note, had brought his Action.

The Books produced by the Bar were, Trials per Patis, 408; Cunningh. Bills of Exch. 122, 141; 1 Salk. 25, Meredith & Short; 2 Ld. Raym'd. 1430, 1431; 1 Stran. 674; 2 Bac. 4; Gilbt. Rep. 154.

Trowbridge was for admitting the Evidence to go in, in Mitigation of Damages.

Oliver, Just. was against the Admission.

Cushing, Just. of the same Opinion.

Lynde, Just. was of Judge Trowbridge's Opinion, for Admission.

The Chief Justice acknowledged the Point was of considerable Importance, and not without its Difficulties on either Side. Many Mischiefs and Inconveniences,
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veniences, he said, might arise, upon the Refufal or Admiffion of fuch Evidence. On the one Hand, a Note to a considerable Amount may be obtained upon a very trifling Consideration: It seems hard that an Inquiring into the Consideration should be denied, and that Evidence should be refufed in Diminution of Damages. On the other Hand, People, upon a Settlement of Accounts, or Matters in Dispute, think themselves quite safe in taking a Note for the Sum due, and reasonably suppose all Necessity of keeping the Evidence of the Consideration at an End; it would be big with Mifchief to oblige People to stand always prepared to confef Evidence that might be offered to the Sufficiency of the Consideration. This would be doubly strong in Favour of an Indorfee. Upon the whole, as many more, and, I think, greater Inconveniences would naturally arise, if fuch Examinations into the Consideration of Notes were admitted. I am therefore againft it in this Case. (1)

The Council for the Defendant, upon this Resolution of the Court, given feriatim, confessed Judgment for the Sum sued for.*

* Vid. Styles, 58, Bruer & Sourmdwell, and 1 Vin. 332, bot., 332 top. Aftions (of Affumm.) (Y).

(1) The opposite doctrine has long been established. Parish v. Stone, 14 Pick. 210, Shaw, C. T.—" It seems very clear that want of consideration either total or partial may always be shown by way of defence; and that it will bar the action or reduce the damages, as it is found to be total or partial respectively."
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Curtis v.
Nightingale.

Rec. 1767.
Fol. 117.

Indebitatus Assumpsit for Money had and received to the Plaintiff’s Use. The Case was,—Nightingale, for a good Consideration, sold a Tract of Land to the Plaintiff, by Deed; and afterwards, the Plaintiff’s Deed being burnt before recording, the said Nightingale conveyed the same Land to another Person. The Plaintiff now brought this Action to recover back the Consideration Money.

Mr. Dana objected, that this Action would not lie, but that a special Action of the Case, upon the Fraud, should have been brought. 1 Salk. 22. Comb. 341. 2 Sraan. 916. 1 Bac. 167.

A Majority of the Court was of Opinion that this Action for Money had and received would not lie, and so directed the Jury, who found accordingly.* (1)  

N. B.

* Vid. 2 Ld. Raym’d. 1216, 1217.

(1) It was formerly the rule, that what was a tort in its inception could not be made the subject of an implied assumpsit. But many exceptions to this rule have been established. Where goods tortiously obtained or held have been sold by the wrong doer, the owner may waive the tort, confirm the sale and maintain assumpsit for the price received. 2 Ld. Raym. 1216 (cited by the reporter supra). Jones v. Hoar, 5 Pick. 385. Whether in a case like the one above reported the plaintiff would not have an election, either to consider the sale as rescinded, and recover his original consideration, or to treat the defendant as his agent in
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N. B. A special Action on the Case was afterward brought, and, on Demurrer to the Declaration, the Superior Court (March Term, Suffolk, 1768) gave Judgment in Favour of the Plaintiff, on the Authority of 10 Rep. 92, b. * (2)

* Viner, Evid. (T. b. 22) pl. 1, 3, & ye Note, & ye Authorities there cited. Ib. (T. b. 65) pl. 3.

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in the second conveyance, and recover the last received purchase-money — quare. On a subsequent page of the MS., this case is again reported, and the action is there stated to have been brought "to recover back the Consideration Money, either of the 1st or 2d Deed." By the record, however, it appears that the action was brought for the original price paid by the plaintiff.

(2) Doctor Leyfield's Case, where it is laid down that a deed casually destroyed by fire may be "proved in evidence to the jury by witnesses, that affliction be not added to affliction." The demurrer was evidently on the ground that the deed was not pleaded with a præfert. Formerly, in cases of a lost deed, relief could only be had in equity. Id. (ed. of 1816) in nōtis.
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The Charge given to the Grand Jury by the Chief Justice was as follows.

GENTLEMEN of the Grand Jury: At the Opening of the Court you are sensible that the Path of your Duty should be pointed out to you; and, in Order that you may have an Apprehension of what is incumbent on you, I shall endeavour to give you some Idea of those Principles, on which the Law is founded.

Our Ancestors, Gentlemen, when they came over to this Country, brought with them the Common Law of our Mother Country, (which is with great Propriety so called,) and, although their first Charter bound them down to make no Laws contrary to the Law of England, yet, from the Situation they were then in, and from their peculiar Circumstances, they
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they then apprehended they had a Right to adopt the Judicial Laws of Moses which were given to the Israelites of Old. They, at that Time, considered, not how Crimes affected the Peace and Harmony of Society, but, almost always adapted their Punishment to the real Guilt of the Criminal. Thus, they punished Adultery, with Death (1); Blasphemy, with Death (2); nay, they carried it so far, that a refractory, disobedient Child, if he continued obstinate and incorrigible after Admonition and Reproof, was punished by whipping very severely; and, if that Punishment did not reclaim or work some Reformation, he was put to Death (3) I can't but regret that we have departed so far from the Spirit of our Fathers, under the old Charter, as that a refractory, disobedient Child has become so common* among us as scarce to be noticed. I could mention many other Crimes and Punishments under the old Charter, all of which went on this same Principle I before observed.

Upon a Judgment given against the old Charter, the People could never obtain so great a Boon, as they thought their old Charter: Since, you are sensible,

* Eq. of the Justice of this Remark.

(1) Anc. Chart. 59.
(2) This act was passed in 1646, and by its terms was expressly extended to "pagan indians"—"albeit we compel them not to the Christian faith—nevertheless, the blaspheming of the true God cannot be excused by any ignorance or infirmity of human nature, the Eternal Power and Godhead being known by the light of nature, and the creation of the world." Anc. Chart. 61.
(3) Anc. Chart. 60.
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...sible, they appointed all their Officers, made all their Laws, without any Control from Home. At this Day, our Governour, Lieutenant Governour and Secretary are appointed from Great Britain, and our provincial Acts are all subject to a Negative from thence. We stand, therefore, upon quite a different Footing from our Forefathers, and the Principle of our Laws is very variant from that which governed them under the old Charter. [There were several Attempts made, since our present Charter, to enact Laws upon Old-Charter Principles; but they all failed, and the Laws were disallowed in Great Britain.]

The Principle of Law which now governs us, is to punish Crimes, only as they affect Society. From hence it is, we see, many Offences in England are punished, often in no Ways proportioned to the real Heinousness of the Crime:—Thus, to counterfeit a Shilling is a higher Crime than to kill one's Father. One is High Treason—the other is only Felony.

High Treason, Gentlemen, is the highest Offence our Law knows of, and is a Crime against the very End of Government, and tends to destroy its very Being. Moft of the Offences which amount to High Treason, we, here, by Reason of our Distance from the Person of our Sovereign, cannot commit; some we may, which, before I close, I may have Occafton to mention.

(Here the Chief Justice was concise upon the Articles, Felony, Burglary, Forgery, Arson, Sodomy and...
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and Theft; upon which last, he observed, that our provincial Law had reduced the Penalty so low, he wished the Government would, since the great Increase of that pernicious Crime, make some further Provision against it.)

Perjury, Gentlemen, is not, by the Law of England, or our Provincial Law, made capital, which has often excited my Wonder. There is no Crime I now think of, more pernicious to Society. Perjury, in a legal Sense, is a false Swearing in a Court of Record, in a Point material to the Issue. But that Man must be abandoned to all Sense of Religion, who can call his God to witness a Falsehood, even where, in a Law-Sense, it might not amount to Perjury. The lightest Punishment such a Man must expect to feel, is to be perpetually goaded with the Stings of his own Conscience. Surely, the Time or Place can be no Ways material in the Divine Mind, where a Man willfully swears a Falsehood. He, who can deliberately call his Maker to witness to a Lie, must live in Horror all his Days. I am sorry we have so much Reason to think this Crime is so frequently committed in our Custom-House Oaths.

There are a Multitude of other Crimes of the most dangerous Tendency, which strike the Mind of the Generality, when we hear Rumours of them, with no great Horror—yet are plainly introducive of the utmost Confusion into Society, destroy its Harmony, produce Bloodshed and Murder—in short, if allowed to increase, they must sap the Foundation of all Government. Such are Riots, Routs
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Routs and unlawful Assemblies. Yet, who would live in a State where he was frequently alarmed with Reports of the Kind? You, Gentlemen, who live in the Country, seldom hear of these Things, but we, who live in Town, see, feel and hear of them often — that there is a going to be a Rumpus, as it is called — a cant Word for a Riot. This excites no great Horror in our Mind; but if we were told, that such a Man’s House was to be destroyed—such a Man to be killed — it would fill us with great Dread of the Consequences. — Yet the plain natural Tendency of these Things is to this very End.

An Insult, only, may, at first, be designed to a private Person; but, when once an Assembly is gathered, any one of that Company who has a private Pique against any Individual, and has a Hand in the Lead, may easily draw such a Multitude to commit Crimes which, at first, they had not the least Intention to do; nay, would have shuddered at, if mentioned.

(Here the Chief Justice went into the well-known Law of Aggressors and Defenders in Riots and Assaults, and recommended to the Inhabitants of Boston a watchful Eye over their Servants.)

One other Offence, which tends much to disturb the Peace and destroy the Order of the Community, is that of Libelling.*

This

* If the Severity of the Law, touching Libels, as it hath sometimes been laid down, be duly weighed, it must strike both Houses of Parliament with Terror and Dismay. The Lords’ Protest, in November, 1763. p. 9.
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This Offence has increased very much, of late, and threatens the Subversion of all Rule among us. There are People who make it their Business to furnish the Press with the most scandalous and defamatory Pieces.

No Government,—in Europe, I am sure,—not one that is counted the most free, would have tolerated those libellous Pieces which we have seen in the publick Prints, within this Twelve-month past. These Publications have often brought to my Mind a Story I have heard of one Wilkes, of whom you all have heard—and whom, I am sorry to say it, some among us show too great a Desire to imitate. That Person was once asked, while he was writing, how far a Man in an English Government might go, in his Publications, and not come within the Laws of High Treason. To which he answered, he was just then trying how far he could go. These Authors among us seem to be trying the same dangerous Experiment. I will not pronounce those Authors guilty of High Treason; but I will venture to say, they come as near it as possible, and not come within it.

For these seven or eight Years, I have made it my constant Practice to read every Book upon the Crown-Law I could meet with; and I never yet read or heard, till of late, the Doctrine that some particular Person must be struck at—that Names of particular Persons were necessary—that the initial or final Letters must be inserted, in Order to make a Libel.

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This Notion which has lately prevailed seems to arise from a Mistake of some of our Books, where some defamatory Pieces have been adjudged Libels, because the Authors had put down the initial or final Letters of the Names of certain Persons. But, surely, it never follows from hence, that this is the only Way of making a Libel.

The Rule of Law is, that the Person libelled must be sufficiently marked out; for, if the Person is so fully delineated, that he is well known without putting his Name, it rather adds to the Heinoufness of the Offence, as it shows the deliberate Malice of the Author, and his wicked Endeavours to elude the Law.

Neither is it necessary to a Libel, that any Person at all be mentioned: As in a Libel against the Government, wrote in Queen Ann's Time, which contained a Defence of Hereditary Right, and a Denial of the Right of Parliament to fix the Crown where it then was. (1) So there may be a Libel upon Religion,—as I remember, when I was quite young, to have heard of one Woolston who wrote several Treatises against the Miracles of Our Saviour. (2) Thus, in publishing of a very obscene Book, as the Earl of Rochester's Works. And one Curl, I think, was condemned to the Pillory for a Libel of the same Sort. (3) The Duke of Wharton too, who wrote a Book called Ezeriph and Sophron, in which a Parallel was run between those two Characters,

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(1) *Dr. Sacheverell's Case*, 15 Howell's State Trials, 1.
(2) See 26 Howell's State Trials, 676.
(3) 10 Howell's State Trials, 153.
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acters, making Sophron, by whom was meant the Pretender, a very wise Prince, and Ezeriph, by whom was intended the King then on the Throne, a very weak and wicked Man. (4) In all these Writings and many more I might name, no Names were mentioned nor ever supposed necessary to make them Libels; but the Authors or Publishers were committed, and punished in the severest Manner.

And one Franklin, who wrote against Ministers, was imprisoned and punished; though it was objected, that there were Ministers of Religion, as well as State. (5) Nothing can be clearer, than that a Libel may as well be without a Name, as with one, and without any initial or final Letters. As painting a Sign, drawing a Man's Picture with a Gallows near it, or any other Way sufficiently descriptive of the Person intended.

I remember that Lord Talbot, one of the greatest Judges that ever sat on the English Bench, lays it down as the Rule of Libels, that, if, upon the Connexion and Comparing of the several Parts, and then taking the Whole together, the Person was plainly pointed out and easily known to every Reader, it was sufficient to constitute it a Libel. — It is enough if the Thing is obvious to a common Understanding.

I expect some will cry out, our Liberties are endangered — the Liberty of the Press is struck at — but

(4) 17 Howell's State Trials, 666, & note.
(5) 17 Howell's State Trials, 646.
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but let such People consider, that, if we may write, why not speak as freely of Men? Shall a Man print that, of the first Ruler of a State, which he will not speak of any one Man in the Community? Shall our first Magistrate be thus slandered with impunity in an infamous Paper?* — I believe I may say thus much, without incurring the Imputation of prejudging.

Formerly, no Man could print his Thoughts, ever so modestly and calmly, or with ever so much Candour and Ingenuousness, upon any Subject whatever, without a Licence. When this Reprisal was taken off, then was the true Liberty of the Preps. Every Man who prints, prints at his Peril; as every Man who speaks, speaks at his Peril. It was in this Manner I treated this Subject at the last Term, yet the Liberty of the Preps, and the Danger of an Imprimatur was canted about, as if the Preps was going under some new and illegal Reprisal. No Gentleman of the Bar, I am sure, could have so misunderstood me. This Reprisal of the Preps, in the Prevention of Libels, is the only Thing which will preserve your Liberty. To suffer the licentious Abuse of Government is the most likely Way to destroy its Freedom. — But shall a Printer be punished? — why, it is said, it is his Living. — Shall a Highwayman be punished? To rob is his Living. Shall a Thief? — to steal is his Living.†

* Vide the Supplement to the Boston Gazette, February 29, 1768, Boston Gazette, March 7, 1768, March 14, 1768. (6)
† Vide Kelyng, 23.

(6) See note at the end of this charge.
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Whence is it, that this Difference is made between him who robs me of my Reputation, and who takes away my Property? The former is the worst of the two.

You, Gentlemen, may be at some Loss, what is Evidence of publishing a Libel. I will briefly mention what is undoubted Law in this Case. A Bookseller having a libellous Book in his Shop to sell is full Evidence enough to you, Gentlemen, of the Publisher. To send a Libel about by one’s Servant to sell is Evidence also. Gentlemen, the general Rule of Law here takes Place, that who ever does a Thing by another, does it himself.

A Libel may be as well against a private Person, Gentlemen, as against one in a publick Station; and the Disturbances Things of this Sort are likely to breed, is very obvious to every Man; but the Consequences are infinitely more mischievous when the Chief Ruler is openly attacked. — There is no End to these Things.

But, it is said, if we have a bad Ruler, there is no other Means of Redress. This is a Mistake. To be sure the Chief Ruler of the Province is not to be brought into this Court to answer for any Misdemeanour: but we must seek Relief from Great Britain. (7) If our Governor acts in an illegal Manner, we have a good King, and can easily have him removed.

Upon

(7) For an article by Quincy on the liability of all officers to impeach- ment, and the causes therefor, published in the “Boston Gazette” of Jan. 4, 1768, see App. IV.
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Upon a just Complaint we may have a Governor ordered to Westminster and there tried and punished. We have seen Instances of this. But, I am sure, I do not believe our present Governor is deserving of such Treatment: I am myself fully convinced of his Uprightness and Integrity.

Judge Foster, who is one of the clearest and most accurate Writers I ever met with, upon the Crown Law, lays it down, that no Subject, in Society, has a Right to avenge his own Wrongs, but must seek his Redress in the Method the Laws of his Country allow. And if it should unfortunately happen, that any one Individual should be injured, or greatly wronged, by those appointed to rule over him, and the Laws of the Land afford him no Remedy, he ought patiently to bear his unhappy Lot; and it is incumbent on him to have Recourse to that Maxim, that Vengeance belongeth only to the Most High.

Gentlemen of the Grand Jury: You are to remember the Oath of God which is upon you. You are sworn truly to present all such Matters and Things

* Qu. if his Honour (the Chief Justice) don’t refer to Foster’s Crown Law, 296, q. v. And
Qu. if Judge Foster’s Words will bear the Construction (as here given) in its full Extent. (4)

(4) The passage referred to is as follows:

"No man under the protection of the law is to be the avenger of his own wrongs. If they are of such a nature for which the laws of society will give him an adequate remedy, thither he ought to resort: but be they of what nature soever, he ought to bear his lot with patience and remember, That Vengeance belongeth only to the Most High."
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Things as shall be given you in Charge.* — Go now and see how you can get over your Oath: —
Go now and see if you can avoid making a Presentment of those heinous Offences with which you
have now been charged. — In doing your Duty and in the Observance of your Oath, you may
cause a Clamour against you; Reproach may be thrown on you; you may be vilified and flan-
dered; — but remember your own Consciences. In the faithful Discharge of your Duty, you will
find, at least, the Approbation of a good Conscience.
You ought not, by any Means, to regard the Cen-
sure you may meet with, from the Performance of
your Duty as Grand Jurymen. Remember that
you and I are to give an Account to our God at
his awfull Tribunal, how we have discharged our
respective Duties, and of our Observance of the
several Oaths of God, with which each of us is
laid under the greatest Obligations. — I hope, Gent-
lemen,

* Ry. if the Words of the Oath will bear any such Construction; and see the precedent Words of the Oath in the Law-Book. (9)

(9) Prov. St. 4 W. & M. (ed. 1759) 26, where the oath of the fore-
man and other grand jurors is thus:

"YOU as Foreman of this Inquest for the Body of this County of
S. You shall diligently enquire and a true Presentment make
"of all such Matters and Things as shall be given you in Charge; the
"King and Queen's Majesties Counsell, your Fellows and your own, you
"shall keep secret; you shall present no Man for Envy, Hatred or
"Malice; neither shall you leave any Man unpresented for Love, Fear,
"Favour or Affection, or Hope of Reward: But you shall present
"Things truly as they come to your Knowledge according to the best of
"your Understanding. So help you GOD."

"The same Oath which your Foreman hath taken on his Part,
you and every of you on your Behalf shall well and truly
"observe and keep. So help you GOD."
tlemen, you will bear in Mind what I have now said, and pray that we may all finally be acquitted at the Bar of God.

N. B. The Grand Jury found no Bill for Libelling.

At the Superior Court held shortly after, at Charlestown, the Chief Justice, (as I was well informed,) in his Charge to the Grand Jury, gave a gentle Touch upon the Conduct of this (Suffolk) Grand Jury, in not finding a Bill, after such a Home-Charge.

2d. of some Points of Law laid down in the preceding Charge:— And vide Bollan on the Freedom of Speech and Writing upon Publick Affairs, p. 45, 46, 47, and onward.

Vide 2 Lord Raymond, 879.

Note.
The circumstances which gave rise to the alleged libel referred to by the Chief Justice were as follows: Hutchinson had been a member of the Council for some years before he became Lieutenant Governor. After receiving this appointment, though no longer elected to the Council, he continued to occupy a seat in that body, on the ground that the Lieutenant Governor possessed such a privilege ex officio. This claim was the occasion of a warm controversy between the House of Representatives and the Governor, the former asserting that it afforded "a new and additional instance of ambition and a lust of power" on the part of the Lieutenant Governor, which charge Hutchinson declares to have been the work of Major Hawley, in revenge for imagined ill-treatment in Court. 3 Hutch. Hist. Mfks. 175 (ante, p. 249, 50). The Governor represented the affair to Lord Shelburne, then Secretary of State, and received a reply, approving of his conduct, censuring the House in general, and several members...
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in particular. This excited much indignation in the House, who thereupon charged the Governor with misrepresenting the character of their members, and also prepared a letter to the Secretary of State, praying for an opportunity of vindicating themselves and their constituents.

It was at this time that the article in question appeared in the supplement to the "Boston Gazette" of February 29, 1768, referred to by the reporter, together with the two following papers, containing the proceedings of the Council and House, and other communications relating to the affair. The file of Boston newspapers for that year, from which we copy, is in the possession of the Massachusetts Historical Society, and contains many pen and ink notes, references, &c., by the original owner and compiler, Harbottle Dorr, a Boston merchant of the period. These we have enclosed in brackets where they occur.

From the supplement to the "Boston Gazette," Feb'y 29, 1768:

"Mesieurs Edes & Gill,

"Please to insert the following.

"May it please your ————, We have for a long time known your Enmity to this Province. We have had full Proof of your Cruelty to a loyal People. No Age has perhaps furnished a more glaring Instance of obstinate Perseverance in the Path of Malice, than is now exhibited in your ————. Could you have reaped any Advantage from injuring this People, there would have been some Excuse for the manifold Abuses with which you have loaded them. But when a diabolical Thirst for Mischief is the sole Motive of your Conduct, you must not wonder if you are treated with open Dislike; for it is impossible, how much soever we endeavour it, to feel any Esteem for a Man like you ———— Bad as the World may be, there is yet in every Breast something which points out the good Man as an Object worthy of Respect, and marks the guileful treacherous Man-hater for Disgust and Infamy. ————

"Nothing has ever been more intolerable than your Insolence upon a late Occasion, when you had by your Jesuitical Insinuations, induced a worthy Minister of State, to form a most unfavorable Opinion of the Province in general, and some of the most respectable Inhabitants in particular. You had the Effrontéry to produce a Letter from his Lordship, as a Proof of your Success in calumniating us. ———— Surely you must suppose we have loft all Feeling, or you would not dare thus tauntingly to display the Trophies of your Slanders, and, upbraidingly, to make us sensible of the inexpressible Misfortunes which you have brought upon us. ———— But I refrain, left a full Representation of the Hardships suffered by this too long insulted People, should lead them to an unwarrantable Revenge. We never can treat good and patriotic Rulers with too great
"great Reverence — But it is certain that Men totally abandoned to "Wickedness, can never merit our Regard, be their Stations ever so high.
"If such Men are by God appointed, 
"The Devil may be the Lord's anointed."

[By Dr. Warren.] A true Patriot.

[This was supposed to be a great Libel on the Governor: he recommended it to the House and Council to consider it. The Grand Jury were instructed to find a Bill, but they did not.]

Bancroft attributes the above article to Otis as "bearing the marks of his excited mind." VI. Bancroft's Hist. U. S. 131.

From the "Boston Gazette," March 7, 1768:

"Boston, March 3, 1768.

"Tuesday last his Excellency the Governor was pleased to send the "following Message to the Honorable His Majesty's Council:

"Gentlemen of the Council,

I HAVE been used to treat the Publications in the Boston-Gazette with the Contempt they deserve, but when they are carried to a "length, which if unnoticed, must endanger the very Being of Govern- "ment, I cannot confidently with the Regard to this Province which I "profess and really have, excuse myself from taking Notice of a Publica-
"tion in the Boston-Gazette of Yesterday, beginning at the top of the sec-
"ond Column of the second Page of the Supplement. I therefore con-
"sulted you in Council thereupon, and have received your unanimous "Advice that I should lay the said libellous Paper before your Board in "your legislative Capacity, and likewise before the House of Represent-
"atives.

"In pursuance of which Advice, I have ordered the Secretary to com-
municate to you the said libellous Paper, that you may take the same "together with all the Circumstances attending it, into your serious Con-
"sideration, and do therein as the Majesty of the King, the Dignity of his "Government, the Honor of this General Court, and the true Interest "of this Province, shall require.

"Council Chamber, March 1, 1768."

"In Answer to which, there being the full Number of the Council present "excepting three Gentlemen, the Board unanimously Voted the following "Address to His Excellency.

"To His Excellency Francis Bernard, Esq.; Captain General and "Governor in Chief, in and over his Majesty's Province of the Massa- "chusetts-Bay in New-England, and Vice-Admiral of the same."

"Th-"
The ADDRESS of His Majesty's Council of the Province aforesaid.

May it please your Excellency,

The Board have taken into serious Consideration your Excellency's Message of the first Instant, with the Boston-Gazette communicated therewith.

The Article in said Gazette, refer'd to by your Excellency, gave the Board a real Concern, not only as it is mischievous in its Tendency, but as it is a false, scandalous and impudent Libel upon your Excellency.

Altho' the Author of it may endeavour to screen himself by the Omission of a Name, yet as it refers particularly to a Transactio so lately had in the General Court, there is the highest Premption the Intention of it could be no other wise than to place your Excellency in the most odious Light.

Such an insolent and licentious Attack on the Chief Magistrate (the King's Representative in the Province) involves in it an Attack on Government itself; as it is subversive of all Order and Decorum; and manifestly tends to destroy the Subordination, that is absolutely necessary to good Government, and the Well-being of Society. It would have been flagitious at any Time, but being perpetrated while the General Court is sitting, and a Transaction in the Court the alleged Occasion of it, it becomes from these and other Circumstances, in the highest degree flagitious; and may justly be deemed, not only an Infringement the General Court; not only an Infringement upon the King's Authority, but the Dignity of his Government, but as it concludes with the most unwarrantable Profaneness, an Infringement upon the King of Kings.

The Board therefore cannot but look upon the said Libel with the utmost Abhorrence and Detestation: and they are firmly persuaded the Province in general view it in the same light: The Threats therefore implied in the said Libel cannot be the Threats of the Province, but of the Libeller.

The Board take this Opportunity, with one Voice to assure your Excellency that, to the utmost of their Power, they will always defend and support the Honor and Dignity of the King's Governor, and will be ever ready to do, in this Affair, as in every other, whatever the Majesty of the King, the Honor of the General Court, and the true Interest of this Province, shall require.

In COUNCIL, 3rd March, 1768.

Ordered unanimously, That the foregoing Address be presented to His Excellency the Governor, and that Samuel Danforth, Benjamin Lincoln, William Brattle, Thomas Hubbard, and Harrison Gray, Esqrs., be a Committee to wait on His Excellency therewith.

A. Oliver, Sec'y.
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"His Excellency was pleased to return the following Answer:

"Gentlemen,

"I. Thank you most heartily for this Address, in which you express so full and unanimous a Sense of your Duty to the King, and your Resolution to support his Government in this Province. For myself, I am so fortified in a Conscienofness of my own Integrity, which has bitherto defied the utmost Malice to impeach it publickly, that I am not to be moved by the impotent Attacks of an anonymous Libeller. I should not have taken Notice of the Libel in question, if I had not apprehended it pregnant with Danger to the Government. As you are of the same Opinion, I have only to assure you that I will at all Times most readily join with you in all proper Measures to maintain the Authority of the King, and promote the Welfare of the People, within the Province, committed by His Majesty to my Charge.

"FRA. BERNARD.

"Council Chamber,
"March 3, 1768.

"His Excellency sent the like Message to the House of Representatives as the preceding to the Council, mutatis mutandis, to which the House made the following Answer,

"In the House of Representatives, March 3, 1768.

"Ordered, That Mr. Hancock, Mr. Otis, Col. Ward, Mr. Spooner, and Capt. Bradford, be a Committee to wait on his Excellency the Governor, with the following Answer to his Message of the 18th Instant.

"T. CUSHING, Spk'r.

"May it please your Excellency,

"In Duty and great Respect to his Majesty's Representative and Governor of the Province, this House have given all due Attention to your Message of the 18th Instant. You are pleased to recommend to their serious Consideration, a publication in the Boston Gazette of Monday last as being carried to a length, which, if unnoticed, must endanger the very Being of Government. In this View, your Excellency, in the Notice you have taken of it, without doubt, acted considerately, with the Regard to this Province, which you profess.

"We are very sorry that any Publication in the News Paper, or any other Cause, should give your Excellency an Apprehension of Danger to the Being or Dignity of His Majesty's Government here. But this House, after Examination into the Nature and Importance of the Paper referred to, cannot see Reason to admit of such Conclusion as yours, Excellency has formed. No particular Person publick or private is named
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"named in it: And as it doth not appear to the House, that any thing
"contained in it can affect the Majesty of the King, the Dignity of the
"Government, the Honour of the General Court or the true Interest of
"the Province, they think they may be fully justifed in their Determin-
"nation to take no further Notice of it.*

"The Liberty of the Press is a great Bulwark of the Liberty of the
"People: It is therefore the incumbent Duty of those who are confi-
"muted the Guardians of the People's Rights to defend and maintain it.
"This House, however, as one Branch of the Legislature, in which Ca-
"pacity alone they have any Authority, are ready to discountenance an
"Abuse of this Privilege, whenever there shall be Occasion for it: Should
"the proper Bounds of it be at any Time transgressed, to the Prejudice
"of Individuals or the Publick; it is their Opinion at present, that Pro-
"vision is already made for the Punishment of Offenders in the common
"Courfe of the Law. This Provision the House apprehend, in the presen-
"ent State of Tranquility in the Province, is sufficient, without the
"Interposition of the General Assembly; which however, it is hoped,
"will, at all Times, be both ready and willing, to support the executive
"Power, in the due Administration of Justice, whenever any extraor-
dinary Aid shall become needful."

*"The Division upon this Question was 56 to 18. The Division in the
House upon this Message was 39 to 30."

From the same paper:

"Messieurs EDEN & GILL,

"Please to insert the following:

"MY first performance, has by a strange kind of compliment, been by some applied to his Excellency Governor Bernard.
"It is not for me to account for the construction put upon it. Every
"man has a right to make his own remarks, and if he satiﬁes himself,
"he will not displease me. I will however inform the Public, that I
"have the most sacred regard to the characters of all good men, and
"would sooner cut my hand from my body, than strike at the reputation
"of an honest member of the community: But there are circumstances,
"in which not justice alone, but humanity itself, obliges us to hold up the
"willain to view, and expose his guilt, to prevent his destroying the
"innocent. — Whoever he is whose conscience tells him he is not the
"monstor I have portrayed, may rest assured I did not aim at him; but
"the person who knows the black picture exhibited, to be his own, is
"welcome to take it to himself. — The Imputation of disaßefion to the
"King and the Government, brought against me by his Majesty's coun-
cil, I shall answer only by a quotation from the paper which they have
"been pleased to cenßure, where I say, 'We can never treat good and
"patriotic rulers with too great reverence.' In which sentence I hope"
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"the honorable Board will not say I have omitted to declare my sentiments of the duty which every good subject owes to his present Majesty, and all worthy subordinate magistrates. And I flatter myself, that the sentiments of the Board coincide with mine; if they do not, I must defer to them. — Their charge of profaneness, I humbly apprehend, was occasioned by their forcing a sense upon the two last lines, totally different from what I intended they should convey. — My design was to compare wicked men, and especially wicked magistrates, to those enemies to mankind the devil, and to intimate that the devils themselves might boast of divine authority to seduce and ruin mankind, with as much reason and justice, as wicked rulers can pretend to derive from God, or from his word, a right to oppress, harrow and enslave their fellow-creatures. The beneficent Lord of the universe delights in viewing the happiness of all men: And so far as civil government is of divine institution, it was calculated for the greatest good of the whole community: And whenever it ceases to be of general advantage, it ceases to be of divine appointment; and the magistrates in such a community have no claim to that honor which the divine Legislator has assigned to magistrates of his election. I hope the honorable Board will not condemn a man for expressing his contempt for the odious doctrines of divine hereditary right in princes, and of passive obedience, which he thinks dishonorable to almighty God, the common and impartial Father of the species, and ruinous both to Kings and Subjects; and which if adhered to, would dethrone his present Majesty, and destroy the British nation. The honorable Board is humbly requested to examine whether the above is not the most natural and obvious sense of the quoted lines: Certainly when I read them, I thought it the only sense; and I shall think myself very unhappy in my readers, should they generally put that construction upon them which the honorable Board have been pleased to adopt.

"I shall at all times write my sentiments with freedom, and with decency too; the rules of which I am not altogether unacquainted with. — While the Press is open, I shall publish whatever I think conducive to general emolument; when it is suppressed, I shall look upon my country as lost, and with a steady fortitude expect to feel the general shock!"

"A true Patriot."

"PRINTERS!"
"Insert the following!"
"A libel on a Lobster.
"
I hope none will be offended; but I really prefer a Crab to a Lobster."

"Libellus famosus.

"* See 5 Report. 115."
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"A Libel on Crabs.

"I care not a Farthing who is offended; I would not give one Lobster for Ten Crabs."

"Fameus Libellus.

"* See Westminster Journal."

From the "Boston Gazette," March 14, 1768.

"Mesieurs Edes & Gill, [Dr. Warren.]

"Please to insert the following:

"With Pleasure I hear the general Voice of this People in favor of freedom; and it gives me solid satisfaction to find all orders of unplaced independent men, firmly determined, as far as in them lies, to support their own RIGHTS, and the Liberty of the PRESS. The hon. house of Representatives have shewed themselves resolute in the cause of justice — The Grand Jurors have convinced us, that no influence is able to overcome their attachment to their country, and our free constitution — they deserve honor — But this is one of those causes, in which by doing as they have done, they really merit praise; yet the path was so plain, that to have done otherwise, would have rendered them ——— indeed!

"While this People know their true interest, they will be able to distinguish their friends from their enemies; and with uniform courage, will defend from tyrannic violence, all those who generously offer themselves volunteers in the cause of truth and humanity. But if ever a mistaken complaisance leads them to sacrifice their privileges, or the well-meaning efforts of them, they will deserve bondage, and soon will find themselves in chains.

"Every society of men have a clear right to refute any unjust aspersions upon their characters; especially when they feel the ill effects of such aspersions: And though they may not pursue the slanderer from motives of revenge, yet are obliged to endeavour to detect him, so he may be prevented from injuring them again. — This province has been most barbarously traduced; and now groans under the weight of those misfortunes which have been thereby brought upon it; we have detected some of the authors; we will zealously endeavour to deprive them of the power of injuring us hereafter. —— We will strip the perpetrators of their flings, & consign to disgrace, all those guileful betrayers of their country. —— There is but one way for men to avoid being set up as objects of general hate, which is, NOT TO DESERVE IT."

"A true Patriot."
"To the PRINTERS.

THERE is nothing so fretting and exasperating, nothing so justly terrible to tyrants, and their tools and abettors, as a FREE PRESS. The reason is obvious; namely, because it is, as it has been very justly observed, in a spirited answer to a spirited speech, "the bane of the People's Liberties." For this reason it is ever watched by those who are forming plans for the destruction of the People's Liberties, with an envious and malignant eye. If a villain is trained and held up to the public, rather than fail in the attempt to cast an odium upon the press, they will even own the character, and pronounce it a libel; for it is their absurd doctrine, the more true, the more libelous. It is not at all surprising, that your press is hated, and your paper branded with the name of 'infamous,' by some men: These are the men who formed and pushed to the utmost of their power, the late detested Stamp-Act: These are the men who have been forging chains and manacles; and when they could not, after the most impudent attempt, force them upon the people, have with intolerable insolence endeavored to pervert them until they had better put them on themselves: But your Press has founded the alarm; or to use the words of a minstrel, "rung the alarm bell:" Your Press has spoken to us the words of truth: It has pointed to this people, their danger and their remedy: It has set before them Liberty and Slavery; and with the most persuasive and pungent language, conjured them, in the name of God, and the King, and for the sake of all politerly, to choose Liberty and refuse Chains: Go on, for you have been already prosper'd. The People have listened with attention: They have pursued such measures as in spite of the slanderous tongues of their malicious enemies may and will be successful: While these measures have been taking, your Press has been incessantly calling upon all to be quiet; and patiently to wait for their political salvation — No MOB— No CON- FUSION — No TUMULTS — This has been the language of your — "infamous" Paper — Let this be the language of all — We know who have abused us — We owe them Contempt, and we will treat them with it in full measure: But let not the hair of their scalps be touched: The time is coming, when they shall lick the dust and melt away.

"Popular."

The next week's "Gazette," published March 16th, contains an account of the celebration of the anniversary of the repeal of the Stamp Act, (March 18th), and among the toasts drank at a dinner of fifty gentlemen at the British Coffee House, appear the following:

5. The Boston-Gazette and the worthy members of the House who vindicated the freedom of the PRESS.

6. The worthy and independent Grand Jurors."
Silvester Richmond, Esqr., Appellant,  

vers.

Benja: & Edward Davis, Appellees. (1)

THE Jury find specially: 1. That the Goods  
and Estate of Ebenezer Stetson were legally  
attached, on the third Day of May, by the Appel-  
lant, to answer the Demand of the Appellees against  
said Stetson.

2. That said Stetson doth not appear to us to  
be an absconding Debtor, till the sixth Day of said  
May.

3. That the Execution in the Case was delivered  
to the Appellant, before thirty Days after Judg-  
ment were expired.

4. That the said Appellees gave the Appellant  
no Orders, or Directions, concerning the attached  
Effects.

5. That, if the Appellant was held by Law to  
levy his Execution on said Effects, without any  
special Directions from the Creditors, the Jury find  
for the Appellees the Sum of £762. 7. 10, Money,  
Damage and Costs, otherwise they find for the Ap-  
pellant.

(1) This was an action originally brought against the appellant as  
sheriff, to recover damages for the default of his deputy in not levying an  
execution upon certain property of the judgment debtor, which had  
been attached on the writ.
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This Case was largely handled at the Bar, by the Council on both Sides. But, as the Arguments were all taken up by the Bench, we proceed to the Learned Argument of the puisne Judge.

The Writ of Execution, and the Officer’s Duty thereon, considered by Judge Trowbridge, in the Case of Davis & Richmond.

A common Judgment Creditor, in England, has his Election to sue out a Levari Facias, a Fieri Facias, Elegit, or Capias ad Satisfaciendum, but can execute but one of them at the same Time.

The Levari Facias commands the Sheriff, that, of the Lands, Goods and Chattels of the Debtor, he cause to be Levied, the Sum recovered, so that he have it in Court, &c., to be delivered to the Creditors.

The Fieri Facias commands the Sheriff, that he cause to be made, of the Goods and Chattels of the Debtor, the Sum recovered, and to have the Money in Court, &c., to render the Creditor his Debt, &c.

The Elegit commands the Sheriff to deliver the Debtor’s Goods and Chattels (except his Cattle of the Plough,) and half of his Land, at a reasonable Price and Extent, to hold untill the Debt is Levied.

The Capias ad Satisfaciendum commands the Sheriff to take the Debtor’s Body, and bring him into
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into Court, at the Return-Day, that he may pay the
Debt, &c.

All these Writs are directed to the Sheriff only,
and he only is to make Return thereof. Upon the
Levari Facias, the Money is to be levied by Sale of
the Goods and Chattels. Upon the Fieri Facias,
the Sheriff is to make the Money, by Sale of the
Goods and Chattels. Upon the Elegit, the Sheriff
cannot sell, but must deliver the Goods and Chattels,
and half the Lands to the Creditor, at the Value
put on them by a Jury of twelve Men under Oath,
and if there be Goods and Chattels enough to an-
tswer the Debt, &c., the Land is not to be extended.*
If the Debtor pays the Money, the Sheriff ought
not to sell the Goods on the Levari Facias, or
Fieri Facias, or deliver them, or extend the Land
on the Elegit. Though, by the Capias ad Satis-
faciendum, the Sheriff is commanded to bring the
Body into Court, yet, if he receive the Money of
the Debtor, and bring it into Court, or pay it to
the Creditor, the Court will excuse him.

A Common Judgment-Creditor here can have
but one Execution, and that is directed to the Sher-
iff, his Undersheriff, or Deputy; reciting the Judg-
ment, and commanding them, that, of the Goods,
Chattels, or Lands of the Debtor, they cause to be
paid and satisfied to the Creditor, at the Value thereof
in Money, the aforesaid Sums, and thereof also to
satisfy themselves for their own Fees, and, for
Want of Goods, Chattels, or Lands of the Debtor,
shewn.

* 3 Infr. 396.
shewn, or found, to the Acceptance of the Creditor, they are commanded to take the Debtor and commit him to Goal, and there detain him until he pays the full Sums aforesaid, with their Fees, or that he be discharged by the Creditor, &c., and to make Return of Doings, &c. The Officer is not commanded to Levy such Sum of Money, of the Goods, &c., and to bring it into Court, (as by the Levati Facias,) or to pay it to the Creditor, or to make of the Goods and Chattels of the Debtor, the Sums recovered, and bring the Money into Court, (as by the Fieri Facias,) or to pay the Money to the Creditor,—but is, of the Debtor's Goods, Chattels, or Lands, to cause to be paid and satisfied to the Creditor, at the Value thereof in Money, the Sums recovered, &c.; that is, to cause the Creditor to be paid and satisfied his Debt in the Goods, Chattels, or Lands of the Debtor, at a reasonable Price and Extent, as in the Elegit; and the Officer being also commanded for Want of Goods, &c., to the Acceptance of the Creditor, to take the Debtor and imprison him, shews that the Creditor has his Election to take his Satisfaction in the Goods, Chattels, or Lands of the Debtor, or to have his Body imprisoned until he pays the Money; and that he has no other Choice. He cannot oblige the Officer to take the Debtor's Goods, Chattels or Lands, and sell them, and thereby raise Money to pay the Debt; nor can he do it, without the Consent of the Debtor.

The Sheriff has no Right to take a Debtor's Estate and sell it, unless he is empowered by Law to do it; and neither the Common Law, nor any Statute or Law of the Province impowers him to do
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Of what Consequence will it be to the Creditor, whether Goods or Estate, tendered or found, was to his Acceptance, or not, if the Creditor was not to receive the Same in Satisfaction of his Debt, but the Officer was obliged to raise the Money by the Sale thereof? It should, in that Case, rather have been, to the Acceptance of the Officer, than the Creditor; but the Writ expressly makes the Debtor's being imprisoned or not depend on the Goods or Estate, tendered or found, being to the Acceptance of the Creditor, or not; or, in other Words, on his being content to receive the Same at the appraised Value, in Satisfaction of the Judgment.

There is neither Price nor Value mentioned in the Fieri Facias, nor the Levari Facias; nor was it proper for either to be inserted in either of those Writs, as the Estate was to be sold for the most it would fetch, be it more or less. Because, if either the Words, "at a reasonable Price," as in the Elegit, or "at the Value thereof in Money," as in our Writ, had been in the Levari Facias or the Fieri Facias, the Sheriff must have caused the Estate to be appraised, before he sold it for the most it would fetch, and made return thereof accordingly; and that

* 2 Inst. 396.
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that would have been attended with considerable Expense to no good Purpose, and for that Reason was not inserted in either of those Writs, upon which the Money was to be raised by the Sale of the Estate; but with great Propriety was inserted in our Writ, whereby the Creditor was to receive his Satisfaction in the Estate, if he pleased, and was not, by the Proceeds of the Sale of it.

The Words "to the Acceptance of the Creditor" were not in the Writ when it was first established, as it appears by the 4th and 5th of Wm. & Mary, c. 21, but were inserted by Force of that Act, on Purpose to give the Creditor the Election aforesaid, and to oblige the Officer to govern himself accordingly. The Clause of the Act to this Purpose is not in either of the last Impressions of our Laws, but is in the Province Law-Book printed in 1726, p. 35. The Words are these, viz., "And whereas, by the "Precedent or Form of an Execution, the Officer "is commanded for Want of Goods, Chattels or "Lands of the Debtor, to be by him shewn or "found, within the Precinct, to take the Body of "such Debtor and commit him to Prison: — It is "hereby explained, enacted and declared by the Au-
"thority aforesaid, that where Judgment is granted "for Money, or any particular Specie, the Creditor "shall not be compelled to take any other Specie, but "in every such Case, for Want thereof, the Officer "shall take the Body of the Debtor in Execution "and imprison him, unless such Creditor shall be "content to receive his Satisfaction in such other "Estate as may be tendered or found. And the "Words 'to the Acceptance of the said A. B.' shall "be
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“be supplied and inserted in the Writ of Execution, "to follow next the Word ‘Precinct.’"

Here is not the least Intimation given, that the Officer was to raise the Money by the Sale of the Debtor’s Estate; but, on the contrary, it plainly appears, that the Makers of this Act thought that, upon the old Writ, the Creditor was obliged to take his Satisfaction in such Estate of the Debtor as was tendered or found, or go without Satisfaction; which could not be the Case, if the Officer was obliged to raise the Money by the Sale of the Estate; and therefore, they enacted, that, where Judgment is for Money, he shall not be compelled to take any other Specie, but, for Want of it, the Officer shall imprison the Debtor, unless the Creditor is content to receive his Satisfaction in such other Estate as may be tendered or found; but don’t add, “or unless the Officer can raise the Money by Sale of the Estate,” or Words to that Effect — as they doubtless would have done, had they supposed he was obliged to do it, if the Creditor chose he should, rather than receive the Estate, or have the Body imprisoned. It is plain also, that the Makers of this Act thought, that the inserting those Words, “to the Acceptance of the Creditor,” in the Execution, would give the Creditor, for Want of the Money being paid by the Debtor, his Election to receive his Satisfaction in other Estate, or to have the Debtor imprisoned until he paid the Money; and they intended it should have that Effect, and, therefore, the present Writ ought to be so understood and construed. Especially, as this is the Sense put upon it by an explanatory
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explanatory Act. Carth. 396. 4 Bac. Abr. 650. 10 Co. 101. 11 Co. 73.

In England, the Creditor has this Election, and makes it by suing out the Elegit or Capias ad Substituendum, and here, the same Election is given him, though both these Writs are included in one. As, on the Elegit, the Sheriff could not extend the Lands, if there were Goods or Chattels enough to answer the Debt, &c., so the Act of 8 W. 3. c. 3, subjects the Land to be taken in Execution, unless the Debtor or his Attorney tenders the Officer personal Estate sufficient to pay the Debt, &c.; But this don't take from the Creditor his Election of receiving his Satisfaction in the Estate tendered or found, or having the Body imprisoned; nor doth it empower the Officer to sell the Estate tendered, unless the tendering it to him be considered as an Evidence of the Debtor's Consent that he should sell it, which ought not to be. For the Debtor may well be presumed to choose to pay his Creditor in Personal Estate, at the appraised Value, rather than his Real — especially, as then (a) he could not redeem either — and to choose to take the Chance of his being taken and imprisoned, until he raised the Money, by pawning, mortgaging or selling his Estate to the best Advantage; rather than to put it in the Power of an Officer, to sell it for the most it would fetch — perhaps, for half its Value.

Again, if the Legislature had designed, the Sheriff should

(a) The Act for redeeming real Estate taken in Execution was not made, till the 13th of Ann.
should sell a living Debtor's Estate, and thereby raise Money to pay the Debt, &c., they would not have made the Precept in the Form they did; but would either have expressly required him to sell it, or to have done that which could not be done without selling the Estate; as is done in the Levari Facias or the Fieri Facias; or would by some express Law have empowered the Sheriff to sell the Debtor's Estate, as they by the 2 An. c. 5. empowered him to sell a deceased Debtor's Estate, where the Creditor had Judgment and Execution for Money, and was not content to receive Satisfaction in the Goods or Estate of the Deceased, at an appraised Value. Here, the Creditor has his Election to take his Satisfaction in the Estate, or the Proceeds of the Sale of it. But, in the former Case, to have the Debtor's Estate, or his Body imprisoned, which would oblige him to raise the Money and to pay the Debt: And because the Body of the Executor or Administrator could not be imprisoned for the Deceased's Debt, and thereby be compelled to pay the Money, the Legislature, agreeable to the Spirit of the explanatory Act aforesaid, in Order to prevent the Creditor's being obliged to take his Satisfaction in the Deceased's Estate, at an appraised Value, enabled the Sheriff to sell it, and thereby to raise the Money and pay the Debt. There is a good Reason for the Sheriff's being empowered to sell a deceased Debtor's Estate, which doth not hold good in the other Case. — What Reason can be assigned for the Sheriff's being so expressly empowered by this Act to sell in this Case, if he was before, by the Writ of Execution or any prior Law empowered to do it? Surely, no good Reason can
can be assigned for it. The Words of the Execution, so far as respects the Estate, are the same in both Cases.

The Legislature hath, in many Cases, empowered Officers, as well as others, to sell Estates; but, then, it hath always been done by express Words, plainly and clearly giving them Power to do so. From thence may be deduced an additional Argument to prove that they did not intend, by our Writ of Execution, to impair the Sheriff to sell any Debtor’s Estate.

By our Writ of Attachment, or Capias, the Sheriff, his Undersheriff or Deputy are commanded to attach the Goods or Estate of a supposed Wrong-doer, to a certain Value, &c., and for Want thereof, to take his Body, so that they have him at Court, to answer the Plaintiff, and to make Return of their Doings. And by 13 W. 3, c. 15, the Estate so attached is not to be discharged, until thirty Days after Judgment for the Plaintiff; to the Intent, he may take the same by Execution, for satisfying the Judgment, so far as the Value thereof can extend, if he think fit, unless the Judgment be sooner, or otherwise satisfied. And the same Act provides, that, if the Body be taken and imprisoned on that Writ, it shall be held the same Time after Judgment for the Plaintiff, that it may be taken in Execution; if the Plaintiff don’t order the Sheriff to discharge him before. The Difference in the Mode of Expression in the same Act is observable; the Body is to be held, that it may be taken in Execution — the Estate is to be held, that the Plaintiff may take
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take the same in Execution to satisfy the Judgment, so far as the Value thereof can extend, if he think fit: that is, if he choos’es to receive the same at the apprized Value. This Act strongly implies that the Judgment may be satisfied within the 30 days, otherwise than by the Estate attached, or the Body’s being taken in Execution; and the 6 Geo. ch. 2, expressly impowers the Creditor to cause the Judgment to be otherwise satisfied; for it is thereby enacted, that, when any Person recovers Judgment for Money, or any other Specie, and the Debtor is either unwilling or unable to satisfy the Judgment by Money or other Specie, and the Creditor, finding no other personal Estate to his Acceptance, doth therefore think fit to levy upon the Real Estate of the Debtor, rather than on the Person of the Debtor, the Officer shall cause it to be apprized and set out by three Persons sworn and appointed as the Act directs, and deliver the Creditor Possession thereof, and make return thereof accordingly. And, if the Real Estate cannot be divided and set out by Meets and Bounds, then he shall extend the Rents, &c.

This Act extends to all Cases where the Debtor is unwilling or unable to pay the Money or other particular Specie the Judgment is for; and his not paying it, especially if demanded, will be an Evidence of his being either unwilling or unable to do it; — and, therefore, it must extend to the Cases, where the Body or Estate is taken upon the Capias, or Attachment, and the 30 days not expired: Because the Debtor’s being in Prison don’t show him to be able or willing to pay the Money; — nor doth
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do the Officer's attaching Estate, though by Direction of the Plaintiff, shew, that, when the Plaintiff has recovered Judgment, he is content to receive his Satisfaction in the Estate so attached, rather than in other Estate of the Debtor, or rather than the Debtor's Body should be imprisoned until he pays the Money, which this Act intends, by levying on the Person of the Debtor. And this Act alters the Condition upon which Real Estate might be taken in Execution by the 8 W. 3, from a Tender, to an Acceptance; and giving the Creditor his Election to take his Satisfaction in any Part of the Debtor's Estate, Real, or Personal, or to have his Body imprisoned until he pays the Money.

As the Creditor has this Right of Election, so the Debtor, in Consequence thereof, has a Right to his Liberty, if Goods, Chattels or Lands are shewn or found, to the Acceptance of the Creditor, to satisfy the Judgment, &c. And it is at the Peril of the Officer, that he infringes the Right of the one or the other. As the Officer's Duty, as well as the Debtor's Right, depends upon the Creditor's Election, the Officer cannot possibly know what he ought to do, and therefore, neither in Reason or Law is obliged to act, until that Election is expressly made, or, by some Act of the Creditor, is reasonably supposed to be made. If the Creditor, instead of Money, is willing to accept the Debtor's Goods, Chattels or Lands, in Satisfaction of his Debt, it is the Officer's Duty to cause him therewith to be satisfied; but, if he is not willing, it is the Officer's Duty, for Want of Money, to take the Debtor, and imprison him. As soon as the Officer has the Writ of Execution,
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he ought to know what he is to do by Force of it; or at least the first Step he is to take; and, if that depends upon the Will of the Creditor, he only can, and therefore ought to make it known to the Officer, as soon as he delivers to him the Writ.

The Debtor is allowed 24 hours, after Judgment, to pay the Money, and thereby prevent the Execution's issuing against him; and, if he does not pay it in that time, it is supposed he cannot or will not do it; — and thereupon the Execution issues in the Form prescribed; and wherein no Mention is made of the Money's being paid, or to be paid by the Debtor, or of its being demanded of him, and, therefore, the Officer is not obliged to demand the Money of the Debtor, or even let him know he has an Execution against him, before he arrests him or takes his Estate. The first Step, therefore, the Officer is to take, is to find and take the Debtor's Body or Estate. If the Officer, by Force of the Writ, has a Right to take the Debtor's Goods and Chattels, and doth take of them to the Value of the Debt, &c., the Debtor may be thereby discharged of the Debt, and the Creditor obliged to look to the Officer. For if (2 Bac. 355)* the Officer is not obliged to seek for any Estate, which, when found, it is not lawful for him to take, and he has no Right to take the Estate, unless the Creditor is content to receive it instead of the Money, and is a Trespasser if he doth it.

* Ld. Raymond, 1075. If the Sheriff seizes Goods, on a Fi. Fac., and they are rescued out of his Hands, he is answerable for them, and for the same Reason must be so, if he takes them from the Debtor, on the E legit.
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it against the Will of the Debtor, it cannot be thought reasonable that the Officer should be obliged to find and take the Debtor's Goods and Chattels from him, and carry them to the Creditor, or keep them until he will come to see if he is content to receive them at the Value they may be apprized at, instead of the Money; and, if he will not, that the Officer should be obliged to return them back to the Debtor, or to his House, and then look out for the Debtor, and imprison him. The Creditor may as well say, that he will not make his Election, until the Estate, Real and Personal, be apprized; whereas, by 6 Geo., it is plain the Election must be before the Apprization; because it is on the Creditor's thinking fit to levy on the Real Estate, that the Officer is to cause it to be apprized, set out, and delivered to the Creditor. Indeed, if he thinks an unreasonable Value is set upon the Estate, he may apply to the Court whence the Execution issued, to prevent the Officer's Return being filed and recorded; and, upon just Cause shewn, they will not allow it to be done; and then the Creditor may have an Alias-Execution. But, if the Officer returns, that he has caused the Estate to be apprized, &c., and has delivered possession thereof to the Creditor, and the Return be filed and recorded, the Creditor is bound thereby, but may have an Action of Ejectment, to recover the Land, if Possession thereof was not actually given him; and that Return will enable him to do it, if the Land was the Debtor's in Fee, when extended. Ld. Raymond, 346. Cro. Jam. 246. Holt, 348. L. R. 77.

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Upon the Whole, ye Creditor ought to make his Election as soon as ye Officer has ye Writ of Execution; and, if he delivers, or sends ye Execution to him without declaring his being content to receive his Satisfaction in ye Debtor's Estate, or giving the Officer any Direction concerning it, it is to be presumed he is not content to receive his Satisfaction in any other Estate of the Debtor's, than Money; for, his Willingness not appearing, when it ought to appear, if he is willing—he, in Judgment of Law, is not willing, according to the Rule, that, that which doth not appear, is not; especially, as ye Officer must, for Want of the Money, take the Debtor and imprison him, if to be found, which is esteemed, in Reason and in Law, the highest and best Execution, and most forceable. Hob. 61.

And, that, if Goods, Chattels or Lands were taken, ye Creditor must appoint one of the three Apprizers. The Officer, upon an Execution here, cannot determine the Value of Goods, Chattels or Lands, any more than the Sheriff, in England, can, ye Price and Extent on the Elegit; and therefore, he must find the Value by ye Verdict of a Jury, that being the Rule at Common Law; unless that Rule be altered by some Statute or Law of the Province. Now, although there is no Act of Parliament, or of this Province, touching this Matter, that expressly mentions Goods or Chattels, yet, as the 6 Geo. directs, that ye Value of Real Estate taken in Execution shall be determined by three Freeholders, under Oath, one of whom to be appointed by ye Creditor, it may be reasonably sup-
posed, that ye Makers of that Act intended the Officer should observe the same Rule in Regard to Goods and Chattels; and, therefore, that Act is, by an equitable Construction, extended to Goods and Chattels. So that, if the Creditor is content to receive his Satisfaction in Goods, Chattels or Lands, he must appoint one of the Persons who are to apprize the same. And he must also, by himself or by somebody else, receive the Goods and Chattels after they are apprized; for the Officer is not obliged to carry them to the Creditor, whatever they are, or wherever he be. And, therefore, if the Creditor points out no particular Estate, nor nominates or appoints any Person to apprize the Estate that may be found, or receive it for him, or give any particular Directions concerning it, it is reasonable to suppose he has no Thought of taking Anything but the Money or Body, although Goods, Chattels or Lands were attached, even by the Plaintiff's Orders, on the original Writ; for, after Judgment, he is not obliged to take them, as appears above. And a Creditor may, and often doth think himself in Danger of losing the Debt, and therefore directs the Officer to attach Estate that he would be very unwilling to take, at the apprized Value, instead of the Money, if he had any Prospect of getting the Money any other Way:—And, sometimes, directs Estate to be attached, which he only suspects to be the Debtor's, and that, before Judgment, he finds the Debtor has no Right in. And, therefore, as ye Creditor is not obliged to take the Estate in Execution that was attached by his Order, on ye original Writ; so neither is any Attachment of Estate
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Estate of 3\textsuperscript{d} Debtor, any Evidence of the Creditor being after Judgment content to receive it, in Satisfaction of his Debt, as will justify 3\textsuperscript{d} Officer's taking it by 3\textsuperscript{d} Execution — much less oblige him to do it.

It has been said, the Sheriff, his Under sheriff and Deputies are but one, and all Acts done by the Under sheriff and Deputies, are, in Law, considered as done by the Sheriff himself. If this be Law, in this Province, it affords a very strong Argument, that the Plaintiff's directing an Officer to attach Estate on the original Writ, is not, without further Directions, such Evidence as will make it the Officer's Duty to take it by the Execution; because the Rules must be the same, whether the Execution be delivered to Person who made Attachment, or to another. Suppose, then, the Sheriff of Middlesex attaches Estate by Force of a Writ returnable to Worcester Inferior Court, and returns it, and Judgment is obtained, and Execution issues thereon, and is sent to a Deputy Sheriff, at Malborough, within 30 days, without any special Direction, or Notice given that any Estate was taken, and 3\textsuperscript{d} Deputy knows not that any was attached, and doth not take it, but looks out for the Debtor — is he guilty of any Fault; or subject to an Action, when he is guilty of none; (2) or is 3\textsuperscript{d} Sheriff in Fault for not taking the Estate, by the Execution, when he had it not; or subject to an Action for not doing that,

(2) See 12 Met. 337, where it is intimated that want of knowledge of an attachment returned in another county will excuse the officer.
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that, which, without any Fault of his, he never had it in his Power to do; — or for the Default of his Deputy, who had not been guilty of any? — Surely Natural Justice forbids it; and therefore, he, who affirms, must shew some clear, express, positive Law, subjecting the Sheriff to an Action in such Case as this, before he can be believed. And it may, and frequently doth happen, that Attachments are made by one Person, and the Execution delivered to another: But, then, if the Creditor would have the Estate, that was attached taken in Execution, he tells the Officer to whom he gives your Execution, of it, and directs him to take it in Execution. And surely, it is much more reasonable that a Creditor should let your Officer know, when he gives him the Execution, that he is content to take his Satisfaction in your Debtor’s Estate, than that the Sheriff should be obliged to give Notice to his Undersheriff and Deputies of what he doth on every Writ of Attachment, and that they should do the like to him, and to each other; which must be done to save the Sheriff from being subject to an Action, in such a Case as is before mentioned, if the Law be as is suggested. In England, where your Writ is directed to the Sheriff, and returned by him only, it may reasonably be supposed he knows what is done by himself, or his Undersheriff, or Deputies, who make Return of their Doings to him, for him to make his Return by; but here, where your Writs are directed and delivered to your Deputies, as well as your Principal, and executed and

* See Dalton Sher. 96, 181 — to whom original Writs are to be directed and by whom to be returned.
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and returned by them to ye Court, according to ye Command therein, it cannot reasonably be supposed he should know what they have done; or they, what he and each other have done; and, therefore, the Creditor must make his Election after Judgment, although Estate be attached by his Order, on the original Writ. (3)

But the four other Judges were of a different Opinion. They did not give their Opinions at large, as Judge Trowbridge had done, but seemed to ground themselves upon the contemporaneous Exposition of our Laws (which they conceived to have been against Judge Trowbridge's Opinion) and the uninterrupted Practice of the Sheriffs in this Province. (4)

Judgment was thereupon rendered for the Appellees, for the Sum of —— and Costs. From which

(3) This opinion of Judge Trowbridge is also published in the supplement to 14 Mas. 473, from a copy taken by Hon. Increase Sumner, formerly Justice of the Supreme Judicial Court. We have not, however, on that account, thought best to omit Quincy's report from the term where it properly belongs.

(4) This "practice of the sheriffs" appears to have been that of selling personal property on execution; for, a few years later, an act was passed, reciting that doubts had arisen as to their right to do so, and formally establishing the same. Anc. Chart. 675.

At the present day, although the creditor may make his election, and if he would levy on real estate or the body, must do so; yet in the absence of any instructions it would seem that the officer's neglect to take and sell personal property, known to be attached, would be against the creditor's "manifest interest," and "would not bind him to lose a security which he had previously and lawfully obtained." See 11 Mas. 321. Also 12 Met. 532, by Shaw, C. J., in describing the duties of an attaching officer. — "If, within thirty days after judgment, the execution is delivered to him for service, he must take the property on the execution."
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which Judgment, the Appellant claimed his Appeal to y* King in Council.

Qu. whether there is any Reliance to be made on a contemporaneous Exposition of Laws, unless such Exposition has been made, seriatim, by the King’s Judges. — Now such Exposition was never pretended: — And if the Laws will not warrant certain Proceedings, can any Practice whatever establish them against Law?

——— "Marcellus

Ingreditur — Viros supereminet omnes."

Apthorp verf. Shepard.

Special Verdict.

INDEBITATUS ASSUMPSIT for Merchandise. The Case was: Goods were delivered in A. D. 17—. Afterwards an Abatement was made, the Account adjusted, and a Note given for the Balance; but this Action was brought upon the open Account. (1)

(1) This action was brought by Apthorp, as surviving partner of the firm of Apthorp & Wheelwright, against the defendant and one Miller (not served). The special verifi found that Shepard & Miller had paid part of the account, “besides a deduction allowed for damaged goods and overcharge,” “that the parties settled and adjusted their accounts as above, and the appellee Shepard gave his promissory note negotiable and endorsed, and which is in the case for said balance, payable on demand,” and that Apthorp & Wheelwright gave credit to Shepard & Miller therefor.
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It was urged for the Defendant that, where there had been an Adjustment, no Action would lie upon the open Account; but Infamul Computassent was the only Action. To support which, 2 Mod. 43, 44, Miltwood & Ingraham, was cited by Mr. Auchmuty.

But it was answered, that ye same Case is in 1st Mod. 205, 206 — where there is but one Debt, an Adjustment will not destroy ye original Contract, and the same Remedy remains as before such Adjustment. And, in 12 Mod. 537, 538, May v. King, the Case of Miltwood & Ingraham is denied by Holt to be Law. Also Fitzgib. 44; 1 Salk. 124; Cases in Law & Eq. (or 8 Mod.) 290; Str. 426; 1 Burrow, 9, Rboards vs. Barnes; Ibid. 375; & Hob. 68 were cited.

The Court took Time to advise. Afterwards the Chief Justice delivered the Opinion of the Court (which he said was unanimous,) that this Action after Adjustment would not lie. He also informed the Bar that the Court, in forming their Opinion, had Regard to the following Cases offered by Judge Trowbridge, which were not produced by the Council on Argument: Far. (2) 139; 1 Show. 155, 156; Mod. Cases, 36; 2 Salk. 442; 12 Mod. 86; Ld. Raym'd. 680 — and also 1 Mod. 261 — stated Accounts may be pleaded in Bar of an Action of Covenant, &c. (3)

Memorandum.

(1) 7 Mod.
(2) The objection taken by Mr. Auchmuty was, that the action should have been infamul computassent on the adjusted account. But from the authorities cited by Judge Trowbridge, it would seem that he at least
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Memorandum.

Jonathan Sewall, Esq'r., being now fixed Attorney General, we hear Nothing more at Present, of a Special Attorney General, or of the novel Office of Solicitor General. (1) Vide ante, p. 241.

least inclined to place the decision on the broader ground that the note given by Shepard was a payment, and extinguished the original claim against the firm. This would be in accordance with law as now established, and in opposition to the case of Patishall v. Apthorp, ante 179, decided before Judge Trowbridge took his place on the bench.

(1) The next incumbent of this newly created office was Samuel Quincy, elder brother of the reporter. See post, April Term, Middlesex, 1772.
Chief Justice's Charge to the Grand Jury.

Gentlemen of the Grand Jury: I have frequently in this Place freely given my Sentiments upon such Subjects as I thought of the highest Importance to Society. The Nature of Government in general, and the particular Form of it, in this Province, I have pointed out to Grand Juries, in the Course of my Charges to them, at the Opening of the Courts. This, I am sensible, has been done in an imperfect Manner: — but it was in the best Manner I was capable of.

I observe, Gentlemen, many among you, who are well acquainted with the Nature of your Duty, and what belongs to ye Business of a Grand Jury: — I shall therefore content myself with one or two Observations on the Constitution of this Court.

The
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The Constitution of this Court is set forth in your Charter; (1) and by this Charter we are distinguished from most of the Provinces on the Continent. And, beyond Dispute, we are favoured more, in this Respect, than any People on the Continent.

The King is, in our Laws, called the Fountain of all Justice:—and, at Home, the Judges are appointed directly by the King, and hold their Commissions during their good Behaviour. The Commissions of the Judges of this Court are, it is true, during Pleasure (2);—but when we consider by whom our Judicatories are appointed, we shall find that we approach very near the Privilege enjoyed by our Brethren, in England: At least, we are in a Middle between them, and some of our Brethren in America, whose Judicatories are erected at Home, their Judges appointed from the Senate, and are removeable at Pleasure.

Our Judicatories are erected by the General Court;—thus the Crown and Province are, finally, the Fountain of Justice. The House of Representatives,

(1) Anc. Chart. 35, 2.
(2) In 1772 salaries were granted by the Crown to the Judges of the Superior Court, and they were forbidden to receive their usual compensation from the Legislature of the Province. This excited the greatest alarm and indignation among the people, as an act which completed the dependence of the Judiciary on the Crown. Brigadier-General Brattle, senior member of the Council, in behalf of the government party, published an article in the "Massachusetts Gazette," Jan. 4, 1773, in which he attempted to prove that the Judges' commissions were not, (as Hutchinson here acknowledges,) during pleasure, but for life. He was most conclusively answered by John Adams. 2 John Adams's Works, 316. 3 Id. 511.
sentatives, in the Erection of a Court, are under no
Controul; and we must presume they will ever
constitute such a Court as is agreeable to the old
Form of Government and the Tempers of the Peo-
ple. — This is certainly no small Priviledge. The
Judges of this Court derive all their Power from
the Government; they are appointed by the King’s
Governumr, with the Advice and Consent of y®
Council, and are only removeable by the Governour
and Council at Pleasure. — This, I think, amounts,
to near the Priviledge of y® People in England: —
There, the Judges hold quamdiu, &c. ; and here, they
are displaced by the Governour, with the Consent of
Council. ? Now, unless you can suppose a House of
Representatives who would join in erecting Judica-
tories unknown to the Constitution, and infefting
them with Powers inconsistent with the Priviledges
of the People — the Governour and Council ap-
pointing Judges unworthy their Station, and remov-
ing them for their Integrity, — this People are as
secure, and as firmly establi{hed in their Liberties, as
they are in Great Britain. I know of no Difference.
Certainly, if they are not up to Great Britain, they
are the neareft that can be; — nearer than any other
Government on the Continent. Sensible of this,
in a Conversation, some Time ago, with one of the
Judges from New York, he expressed his Surprize
at our happy Circumstances, relative to the Consti-
tution of our Courts and the Appointment and
Removal of our Judges. There, they are appointed
from Home, and removed by the Governour at
Pleasure, and no one to call to Account. Certainly,
Gentlemen, we cannot too highly value these Privi-
ledges. It has, therefore, much excited my Won-
der
Liter and Aftonishment, when I have heard Men talk slightfly of our Charter, as if it was not worth Anything at all. Such Persons must surely be very ignorant or very bad Men. Our Ancestors thought it, in their Day, a great Blessing; and what is there to alter its Nature since their Time? What I have only now mentioned is enough to make it an Object of our highest Regard.

This leads me to mention a Report which has lately prevailed, very much to my Surprize and Concern:—it has been given out, with a great Deal of Confidence, and believed, as I learn, by many People, that I have received from Great Britain a Commission to be Chief Justice of this Court. The first Time I ever saw or heard of any such Thing, was seeing it suggested in our publick Prints.—For a Judge of this Court to endeavour to obtain a Commission of this Sort, so directly against our Charter, would be unpardonable: He would, in my Opinion, be guilty, not only of Infidelity to your People, but of a plain Violation of his Oaths, by attempting an Innovation unknown to the Laws of the Land, and in Breach of your Charter of Government. I have been employed now, I think it is upwards of thirty Years, in publick Affairs, and I can say, with your utmost Sincerity, that I never attempted or countenanced, directly or indirectly, any Invasion of any one Privilege the People are intituled to by the Royal Charter.

For the Reason I mentioned in the Opening of this Charge, I shall not, Gentlemen, be particular upon the Crown Matters.

You
August Term 8 Geo. 3.

You will, Gentlemen, diligently inquire of all Riots, unlawful Assemblies, flagrant Breaches of the Peace, Theft, Robberies, Burglaries, Murders, Treasons and Felonies of every Kind,—all inflammatory, seditious Libels upon Government or the Rulers in Government, which tend to destroy all civil Peace, and strike at the Root of all Order and Government; In short, Gentlemen, every Crime and Offence of every Denomination comes with Propriety before you. If, when you come together, you find no Offences presented, and none come within your own Observation and Knowledge,—in such Case, you will find no Bills.—But if, when you come together, you have Offences brought before you, or others which most certainly fall within your own Knowledge and Observation,—in such Cases, you must find Bills: But, Gentlemen, if you neglect your Duty, from any Cause or Motive whatever, you are not only criminal in the Sight of God, by a direct Violation of your Oaths, but, instead of being the Aiders and Supporters of Peace, Order and good Government, and rendering that Service to the Country which is your indispensible Duty, you do it the greatest Diservice in your Power, by introducing the worst of civil Evils.

My Absence from the Court, and other Engagements, during this Term, prevented my taking any Minutes of Arguments at the Bar.
March Term

IX Geo. 3.

N. B. This was the first Court held in the New Court House in the County of Suffolk.

Charge of the Chief Justice.

GENTLEMEN of the Grand Jury: We are met here together in Order to maintain the just Rights of the People of the County. The bare Mention of the Word Rights always strikes an Englishman in a peculiar Manner. — But, in Order to support and defend the Rights, of which we are so fond, we ought to have a just Apprehension of what they are, and whereon they stand. I do not intend to go very largely into the Matter, but only touch upon a few Fundamental Principles on which those Rights all stand.

As Men, in our natural Capacity, we have a Right
March Term 9 Geo. 3.

Right to do as we please, without any Controul whatever; but, as Members of Society, we are abridged of this our natural Liberty, and are obliged to submit to the Laws of the State. Now, as the End of Society is to preserve to us that Security in our Persons and Property which we could not have in a State of Nature, we are under a Necessity of giving up some of our original Rights, in Order to a full Enjoyment of the Remainder. And the best Constitution of Government must certainly be that, in which we part with the fewest of our natural Rights;—that is, where we part with no more than is absolutely necessary to attain the very Ends of Society and Government. —All this is obvious on the first Mention. The Constitution of Government, under which we have the Happiness to live, is, therefore, the most happy, because we have never yielded up more of the private Rights of Individuals than was needful to invest the Government with Power sufficient to protect us as Citizens. —It is, therefore, the Duty of every good Citizen, who is bound to preserve the Laws of the State under which he lives, to apply to the Legislative Body for a Redress of all Grievances which arise from the Laws. To aim at a Redress in any other Way is to bring Everything into Confusion.

We, Gentlemen, who are to execute the Law, are not to enquire into the Reason and Policy of it, or whether it is constitutional or not;—whether one Part of the Community are oppressed, and whether another Part oppress: We, and you, Gentlemen, as the Executive Body, are to enquire what is Law, and see that the Laws are inforced.
March Term 9 Geo. 3.

If we step over this Line, and judge of the Propriety or Impropriety, the Justice or Injustice of the Laws, we introduce the worst Sort of Tyranny:—
the most absolute Despotism being formed by a
Union of the Legislative and Executive Power. I mention this, Gentlemen, because, from my own Observation, both in this and some other Counties, I have found Juries taking upon them to judge of the Wholesomeness of the Laws, and thereby subverting the very End of their Institution.

Gentlemen of the Grand Jury: You are to enquire into all Things given you in Charge. Every Crime is cognizable in this Court; but it has generally been our Rule to leave the lesser Offences against ye Laws, to inferior Jurisdictions. And although, Gentlemen, few of you can be supposed to be Lawyers, yet you are all Men of Reason, and will be able to distinguish between those groser Offences and high Immoralities which deserve the most immediate and full Exertion of the Laws in this Court, and those lesser Matters which will receive an adequate Punishment in the lower Courts.

I need not inform you, Gentlemen, that High Treason is the highest Offence our Law knows of; as unhinging all Society, and demands the most entire Suppression.

(Murder — Arson — Burglary — Forgery — Thefts — the common Learning on these Topicks here laid down to the Grand Jury, by the Chief Justice.)
March Term 9 Geo. 3:

Not only these Crimes, Gentlemen, require your Attention, but all high Slanders and gross Defamations, which, though they do not amount to an actual Breach of the Peace, yet tend directly to Assaults and Batteries, and are deemed a very dangerous Offence, in our Laws, as promoting ill Blood, and stirring up the most alarming Confusion in the State: — These, Gentlemen, and some other Matters will be laid before you by the Order of this Court.

I do not mention the Matter of Libels to you, Gentlemen — I am discouraged! — My repeated Charges to Grand Juries, on this Head, both in this and other Counties, being so entirely neglected. How those Juries have got over their Oath, I tremble to think, — but I have discharged my own Conscience. In short, I have no Hope of the ceasing of this atrocious Crime, but from finding that they multiply so fast, are become so common, so scandalous, so entirely false and incredible, that no Body will mind them; and that all Ranks among us will treat them with Neglect.

Perjury, Gentlemen, is another horrid Offence. It strikes at the very Root of all Security in Society. One would think it impossible for any one deliberately to be guilty of this Crime: For my own Part, I have no Conception how any Person can call upon the Great God of Truth, to witness to what he knows is a Lie. I tremble when I think of the Reason we have to fear this Crime is so often committed among us. — People, sometimes, dispute
dispute the Constitutional Authority of the Court which requires their Oath, and hence think themselves excusable in a Departure from Truth. But there can be no Doubt, that every Court which our Law acknowledges may administer an Oath; and whatever would amount to Perjury in one Court, will in another. I have no Doubt, but all Oaths administered by lawfull Authority,—before Referees out of Court, or before any other like Authority, are, in the most extensive Sense, obligatory;—and, certainly, Perjury may as well be committed in a Court of Admiralty, as in this Court; for the Admiralty Courts have been acknowledged, Time out of Mind, by our Laws which constantly take Notice of them:—nay, they are recognized by our Charter and interwoven into our very Constitution;—there can be no Room to Doubt of this.

If any Thing of this Sort should come before you, you will take due Heed to your Duty. In a christian Country, one would think little need to be said on this dreadful Crime. An Oath administered, when, where, how and by whom it will, can make no Alteration in the Eye of the Deity;—he, who calls upon the Name of God, when he is swearing falsely, can never be the less culpable because the Laws of his Country do not deem it, in that particular Instance, a Crime. In my Mind, temporary Punishments would be as a Feather, compared with the Divine Vengeance.

False Swearing, in the View of God, must be as heinous
March Term 9 Geo. 3.

heinous as Perjury, though the Law does not subject that Offence to the Penalties of Perjury. But, Gentlemen, though, in the Divine Mind, it diminishes Nothing from the Guilt of the Criminal, that he escapes Punishment from the Civil Magistrate; yet the Wisdom of our Laws has been carefull to guard against this heinous Offence in the Sight of God. It is undoubted Law, that whoever takes upon himself to administer an Oath, without proper Authority, is punishable by Fine and Imprisonment; — nay, Gentlemen, a Magistrate who has a Power given him by the Laws to administer an Oath when Matters come judicially before him; yet, if he, in Order to support any one particular Party or depress another, will venture, under Colour of his Office, to administer an Oath to any one, he is guilty of a very high Offence against the Laws and deserves a very severe Punishment. Nay, Gentlemen, it aggravates and blackens an Offence very much, when it is committed under the pretended Cloak of the Law. This deserves your serious Attention and strict Enquiry. — For your own Sakes — for God's sake, Gentlemen, exert yourselves, on this Occasion,* and in all other Affairs which shall be laid before you.

* It may not be improper here, to remark the Offence above alluded to. So long ago as the Year 1763, Richard Dana, of Boston, Esqr., one of the oldest Barristers at Law, and the most accomplished and experienced Justice in the Province, did, on a Messege from the Sons of Liberty, administer the Oath of Refignation of the Stamp-Matter-ship, to Andrew Oliver, Esqr., Secretary of the Province, and Brother in Law of the present Chief Justice.

We may also further note, here, that the said Richard, and Jonathan Sewall, Esqr., the present acting Attorney General, (and late appointed
March Term 9 Geo. 5.

1760.

Charge to the Grand Jury.

A few Words, Gentlemen, on the Nature of your Office. Grand Juries, Gentlemen, are of very high Antiquity; the Institution is beyond the Knowledge of all History. Four hundred Years ago, they are spoken of as having been, Time out of Mind. The best Institutions are liable to Abuse. Sheriffs were found to return their Friends, or Friends to particular Parties; and Persons who would charge with Offences, or omit Charges, as he should name. A Statute was then made, to punish this Crime, and to inflict Penalties on such as should even mention to a Sheriff, who he should return as Jurors or who he should not. This seems to have answered the End pretty well, till, some Time in the Reign of Henry the Eighth, Sheriffs were again found abusing their Trusts; and were again subjected to additional Penalties, for Mal-Conduct. And many and repeated have been the watchfull Cautions of our Mother Country, to suppress this gross Iniquity, and to have a fair and impartial Return of unbiased Jurors.

We, in this Country, have been still more jealous of appointed Judge of the Admiralty for Halifax, with a Salary of £600 Sterling per Annum,) had, at the last Sessions of the Peace, for the County of Suffolk, exceeding high Words, on the said Attorney General's entering, without lisping the Matter to the Court of Sessions, a Nol. pros. to an Indictment against a Soldier for imprisoning Mr. Lewis Gray, a Merchant in Bolton, for not answering to the hailing of the said Soldier, who stood as Centry at the Main-Guard, in King Street.

It may be a Matter of Curiosity, some Years hence, to enquire the Reason, why the Sons of Liberty, in 1765, pitched upon Mr. Dana to administer the Oath to the Stamp-Master. — The Sons, at that Time, imagined Mr. Dana to be in a very different political Box, from that in which he afterwards appeared.
March Term, 9 Geo. 3.

of Jurors. We, by our Provincial Constitution, have not left the Return of Jurors to the Sheriff of the County, as in England; but we send out *Vexines* to the several Towns in the County, and they are returned by the respective Towns, to serve the Courts. In general, I believe, our Returns of Juries are made with more Impartiality than in England; but it would be a great Abuse of Privilege, if Towns should send Persons as Jurors who they know to be prone to prosecute with Vigour particular Offences and Misdemeanours; or such as they knew would connive at and pass over in Silence and entirely smother other Crimes of alarming Nature. I don't know this to be the Case, and therefore would not affirm it to be so; but I cannot say, but I have *some Reason* to fear.*

The Court have many Times observed, both upon the Grand and Petit Jury, Persons sent who have had Suits depending at those very Courts. This has been more frequently observed in the Country-Towns than in trading ones. The Reason of this happening so often in the Country has been, out of a false Compassion to those Persons who had Suits at Court; — that their Expenses of Attendance might be less burdensome to them; but it is a very dangerous Offence, and ought to be discountenanced by every good Citizen. I mention not this as an Offence happening in this Town, (for I do not remember ever to have had any Reason to think

* Qy. if this Insinuation has even the least Shadow of Truth for its Foundation.
March Term 9 Geo. 3.

Before I close, I would observe to you, Gentlemen, one other Branch of your Duty:—namely, Secrecy. People out of Doors will influence your Conduct if they know the Business you are engaged in. Offenders will escape and the End of Justice be, in a very great Measure, frustrated. Recollect that Secrecy you have been sworn to observe, and comply with the true Spirit of the Oath of God you have now taken.—I ask no more.

Should any one, while you are on Business, come and call you out, and endeavour to influence your Conduct, it is a very heinous Offence, and you are bound to give immediate Information to the Court, or to his Majesty's Attorney General, that such wicked Offenders may meet their Deserts.—I am told this happened, within this County, a few Months past;—if any endeavour so to work on you, you would be highly culpable if you omitted an immediate Presentment of such daring Offenders.

Thus, Gentlemen, I have run through such Parts of your Duty as I thought pertinent to the present Occasion. Many Things I have said I have mentioned with Reluctance;—a Sense of Duty has constrained me to say thus much.—It is not to be expected,
expected, in this World, that we should all be of the same Sentiments. But whatever are our Sentiments of Duty, a good Conscience will dictate to us, to act accordingly. — May the Great God bless and direct you.
August Term, 1769.

1769.

Memoranda.

There not being a Quorum of the Court, without the Chief Justice, he, though now the Commander in Chief of this Province, sat and acted, at the Opening of this Court, which very speedily adjourned to November.

Some have started a Question, whether the Commission of Chief Justice was not *ipsó facto* vacated by his Honour’s taking the Chair; — and, if so, have inquired how far the future Proceedings of this Term were irregular and erroneous: — and, therefore, reversible on a Writ of Error.

*Inter cuncta, Leges et percontabere Doctos.*

At the Adjournment, the Chief Justice did not appear; and the Charge to the Grand Jury was given by Justice Lynde.
August Term 9 Geo. 3.

At the last Sitting of the Superior Court in Charlestown, I argued (for the first Time in this Court) to the Jury, though not admitted to the Gown: — The Legality and Propriety of which some have pretended to doubt; but as no Scruples of that Kind disturbed me, I proceeded (maugre any) at this Court to manage all my own Business (for the first Time in this County,) though unsanctified and uninspired by the Pomp and Magic of — the Long Robe. (1)

(1) "The political course of Mr. Quincy having rendered him obnoxious to the Supreme Court of the Province, he was omitted in the distribution of the honours of the gown, which was due to his rank and standing at the bar." Quincy's Life of Quincy, 27.
October Term

XII Geo. 3, 1771.

Middlesex fs. (1)

SYMES  

v.

HILL

Rec. 1771.  
Fol. 130.

Symes & Wife, original Plaintiffs,  

verf.  

Hill, original Defendant.

EJECTMENT of two Pieces of Land in Cambridge. The Case was, that Hill, the Defendant, mortgaged the Premises to N. Wheelwright, Esq. Some Time after, Wheelwright failed and flut up; and, on the 10th of January A. D. 1765, conveyed all his Estate to Chas. W. Apthorp; (his wearing Apparel not excepted) and Apthorp, in the same Instrument, agrees to discharge certain Demands whereon Wheelwright might be arrested; or — should chuse to dis-charge.

(1) The following Middlesex cases, extending over two consecutive terms in that county, appear to have been reported by another hand. See preface.
charge. On the 18th of the same January the
Premises were attached as Wheelwright’s Estate
at a Suit of the Plaintiffs; and, on the 8th of March
following, the Assignment of the Mortgage to Ap-
thorp was recorded. Judgment on the Plaintiffs’
Action against Wheelwright entered up the 15th
of May following; and, on the 6th of June, the
Execution was levied on the Premises; and Seizin
thereof delivered to Wm. Vassal, Esq., Attorney to
the Plaintiffs, agreeable to the Law of the Province,
and the Officer made a regular Return, (as to one
Piece — as to the other, he did not certify the Liv-
ery of Seizin,) and the Execution duly recorded, as
directed by the Province Law. Hill, immediately
after the said Seizin, entered again on the Premi-
ses; and the Plaintiffs bring this Action.

Mr. Adams opened the Case and introduced Evi-
dence of the Facts as stated. As to the Defect in
the Sheriff’s Return, (which was discovered by Mr.
Justice Trowbridge) Mr. Adams moved to prove
Seizin by Parol Evidence; which was done, no
great Opposition being made by the Defendant.

Mr. Fitch for Defendant. 1. A direct Assignment
of a Mortgage may not be good to every Purpofe
till it be recorded. But, in our Cafe, the Bond was
assigned to Aplhorp before the Attachment; and
the Assignment of a Bond need not be recorded.
The Mortgage is only Security for the Money due
on the Bond — a mere Accident attending it. 2d.
Abr. Cases in Equity, 617, 618. — Vacating the
Bond vacates the Mortgage; and the Assignment
of
of the Bond carries the Land with it to every Purpose. 2d Burr. 978, 979. For Apthorp had a Right to the Bond by the Assignment, 1 Inst. 232; and may recover the Money, 1 Bacon, 157; 2d Vern. 239, 240; T. Jones, 222; 2 L. Ray. 1242; and, if recoverable in Chancery, it equally affects this Cause, for hereafter we may be in the Power of Chancery, (or, should the Bond be put in Suit by Apthorp, we cannot plead Symes's Recovery in Bar.)

But the Assignment conveys the Debt in Law; 1 Lil. Abr. 124; and also the Mortgage. See Burr. before cited. Therefore, the Mortgage bearing such Relation to the Bond, and consequentially in Apthorp with the Bond at the Time of the Attachment, the Plaintiffs cannot affect it by the Attachment.

2nd. Considers the Marks of Fraud in the Assignment.

Mr. Adams, contra. 1. If this Assignment be bona fide, still we have a Right to recover, but

2. The Assignment is fraudulent.

By the Attachment the Plaintiffs had an inchoate Title which was kept alive by the Judgment and Execution and completed by the Seizin thereon, the Return and Recording thereof; which Title, when thus regularly completed, takes Effect to all Intents and Purposes, from the Time of the Attachment,
October Term 12 Geo. 3.

tachment, which, in this Case, was before the pretended Assignment; and by the Pro. Stat. 9 W. 3, c. 7, no Conveyance of Houses or Lands is good, untill recorded, but against the Grantor and his Heirs; and the Plaintiffs are not Heirs.

Brother Fitch's Doctrine of Assignment is extravagant and incredible. A Chose in Action cannot be assigned. 'Tis a Rudiment in Law; and necessary to abridge the powerful and aid the weak.

Curia. Mr. Adams, we think you need not labour this Point. You may anwer Mr. Fitch's Authorities briefly, if you please.

Mr. Adams. — I say a Chose in Action cannot be assigned; 1 Bac. don't serve their Cause. See the Margin; the Prosecutions are by Power, and in the Name of the original Obligee. The Power is in its Nature revocable; and, when revoked, the Assignee can do no more in a Court of Law.

No Assignment can give him Power to prosecute in his own Name. Vern. and Cases in Equity Abr. are Principles of Equity; and as such are true; but, as we are before a Jury, are of no Consequence. In Chancery Anything will serve for Right and Title that gives it in Conscience. If the Debt is discharged, the Mortgage is discharged, i. e. Chancery will compel it. In Law, the Fee is in the Mortgagee untill regularly transferred by direct Assignment or otherwise, conformable to y' Pro. Stat. 2 Jones, is on Motion; subject to great Uncertainty;
October Term 12 Geo. 3.

1771. Sykes v. Hill.

Uncertainty; in a Court that proceeds on equitable Principles; nor does it appear what the Debt was. B. R. would not contradict the Customs of London,—which seems to be the Distinction. L. Raymond is not in Point. The Case in Burrow depends on the Testator's Intention, whose Sentiments on the Operations of Law we must suppose his Lordship is pursuing; and the common People take Chancery for Law. But his Lordship, in that very Case, expressly declares that the Estate has become absolute in Law. Lill. Abr. proves no more than that the Court would not insist on a Power. It don't prove but that a Discharge by the Executor would have been good.

2nd. He compared the Evidence with the common Marks of Fraud.

Court's Direction to the Jury.

Trowbridge. 1st Question in Law is, whether the Lands demanded were Wheelwright's Estate at the Time of the Attachment, so as to be bound by it. 2nd. Whether they were thereupon regularly taken in Execution, so as to satisfy the Debt.

As to the first Point, it may be inquired,—1st. Whether the Lands ever were Wheelwright's, so as to be held; and, if they were,—2nd. Whether he had not conveyed them before the Attachment. The Lands were a Mortgage to satisfy £900 Hill was obligated to pay Wheelwright, and due before the Attachment.
In Mortgages, the Fee passes from Mortgagor to Mortgagee at the compleating the Deed; and, on Failure in the Condition, becomes absolute in him (save the Equity of Redemption given by the Province Law). Then the Province Law charges all Lands with the Payment of Debts; and, when attached, are holden to satisfy the Judgment. And, on compleating the Process, the Creditor compleats his Title to the same Estate which the Debtor was possessed of; and the Debt is discharged. So that there can be no Doubt but that the Lands were once Wheelwright's, so as to be held by the Attachment. But, 2nd, had he not conveyed them before the Attachment? A Conveyance is produced. 1st, then it may be further inquired, whether it be made bona Fide; for the Contrary is strongly contended; and, if it be, 2d, whether, in the State it was at the Time of the Attachment, it was sufficient to defeat it.

The general Marks of Fraud you have had from the Council. As to that, therefore, I shall only add, that, if a Deed has Marks of Fraud, they are not conclusive Evidence. But, in this Case, there is Something peculiar. The Nature of the Case made it necessary for Apthorp to be secret in securing himself; and the Legislature seems to favour Creditors in this Thing; for, when a Creditor has so done, he is subject to foreign Attachment for the Overplus; and the Law prefers this to Bankruptcy. Two must concur in a Fraudulent Conveyance;—for, if the Grantor do it with a fraudulent Intention, yet, if the Grantee receive it bona Fide to satisfy his Debt, it is not a fraudulent Conveyance. —

Apthorp,
October Term 12 Geo. 3.

Apthorp, at the making the Covenant, might not know how much his Debt was, and secure more than was due; but he cannot hold more — and, you see, had covenanted to refund. No Time is set for Reconveyance, but the Law settles that. The most suspicious Clause is that which respects Apthorp's paying certain Sums for which afterwards he might become bound; but, if that was done only to satisfy true Debts for which he should become bound bona fide, it will not avoid the Conveyance; but, if to reserve Anything to Wheelwright, it vitiates the Whole.

2. As to the State they were in at the Time of the Attachment. The Assignment of the Mortgage was not then recorded. "But," saith the Defendant, "the Bond was then assigned, and that carries the Land with it to every Purpose." However, the Assignment of the Bond does not carry the Land with it. The Fee of the Land was in Wheelwright; and the Province Law requires all Conveyances of Houses and Lands to be recorded before they are good against any Person except the Grantor and his Heirs; and the recording after the Attachment shall never have such a Retrospect, as to enure from the Delivery of the Assignment, and so defeat the Attachment.

2nd. As to the 2d Point, there is no Doubt but the Lands were regularly taken in Execution, so as to satisfy the Debt, save the Slip in the Officer in not returning Livery of Seizin in the 15 Acres. I doubt if it will do without.

Oliver.
Oliver. There is a Receipt of the Seizin under Mr. Vassall's hand, as Attorney to Symes. I have little else to add to my Brother Trowbridge.

Cushing. If the Officer's Return is helped by the Testimony of the Witnesses, there is an End of the Case. I don't know that you will depart from the Intention of the Law, if you suppose it. The Generality of the Conveyance is a strong Mark of Fraud. I don't think such general Conveyances will do. Another Thing in the Conclusion of the Covenant is too loose,—that Apthorp shall pay who he pleases, and when he pleases.—'Tis such a Trust as Lord Coke says is a Mark of Fraud. Twine's Case is good Law.

Lynde, C. J. There is no Doubt as to the 8 Acres, the only Question is as to the 15,—'twas such an Estate as has been determined on Special Verdict to be in Wheelwright. (2)

Judgment for Plaintiffs.

(2) See post, Hooper v. Croft, where the question of the liability of the estate of the mortgagee to attachment and execution is considered at length by Judge Trowbridge.
October Term 12 Geo. 3.

The King verf. John Johnson Grant.

GRANT was a Prisoner in Concord Goal and, on Motion of the Attorney General, was removed to Cambridge Goal by parol Order, which I have taken Notice is the constant Practice of the Court.

And note that a Habeas Corpus ad Troijamam was awarded for Abram Littlehead at the Motion of the Attorney General.

Parker verf. Willard.

CASE. The Plaintiff declares that one Sam'l Reed, Jr., on, &c. — made his promissory Note to Plaintiff, and therein for Value received promised the Plaintiff, &c. — and afterwards on, &c. — at, &c. — the said Samuel Reed, Jun., engaged the Defendant to pay the Contents of said Note to Plaintiff for him and bring him said Note; and the Defendant paid said Contents, and thereupon the Plaintiff delivered him said Note to deliver to said Reed; which the Defendant did not do, but maliciously, &c. — on, &c. — at, &c. — in the Name of one P. Pike, and without his Knowledge, did procure a certain Writ of Attachment against the said Plaintiff, upon said Note, to be issued by J. Prescott, one of his Majesty's Justices, &c. — to attach, &c. — (as in the Form of the Writ) — to answer
said Pike in a Plea, &c.—in which Writ and Declaration it was falsely allledged that the Plaintiff had, on, &c.—endorsed the said Note to said Pike, which said Writ was afterwards, on, &c.—duly served, and the Defendant afterwards, on, &c.—did enter said Action commenced as aforesaid without the said Pike’s Knowledge, and thereupon the Plaintiff was put to great Expence, &c.

Sewall & Rogers, pro Prer.

 Exceptions in Abatement. J. Quincey, pro Defendant. 1st. The Plaintiff hath not set forth what Judgment was rendered by the said Justice on the said pretended Action of the said Pike against the Plaintiff.

2d. By the Plaintiff's own shewing, he could have suffered no Damage, but what would be considered in a regular Course of Law, by the said Justice.

3rd. By the Plaintiff's own shewing it doth not appear that the Plaintiff had suffered any Damage by the Defendant's supposed Conduct. (1)

Judgment that the Writ, &c. abate. (2)

(1) This plea was overruled in the Inferior Court, and the case brought up on sham demurrer. The copy of the pleadings on file is as follows:

“And the said Willard by Josiah Quincy, Jun., his Attorney, comes & defends

(2) Incorrect. The exception being to the declaration, and not to the writ, the judgment entered was that of nil capiat per breve. See Steph. Pl. (ed. of 1824) 128.
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1771.

Parker vs. Willard.

"& defends &c., and prays Judgment of the Plaintiff's said Writ & Declaration aforesaid. 1st. Because he saith that the said Parker hath not set forth what Judgment was rendered by the said Prescott, a Justice as aforesaid in the said pretended Action of Perley Pike against the said Samuel Parker. Andly. Because by the Plt's own shewing in his said Declaration he could have sustained no Damage but what must have been duly considered in the regular Course of Law by the said Justice in the Action aforesaid of the said Pike & Parker. 3rdly & lastly, because by the Plt's own shewing, it doth not appear that he hath suffered any Damage by Reason of the Def's supposed Conduct, all which the said Willard is ready to verify, wherefore he prays Judgment of the Plt's said Writ & Declaration, and that the same may be quashed, and for his Costs.

"J. Quincy, Jun."

"The foregoing Pleas in Abatement being argued by the Council for the Parties were overruled by the Court.

"Thad. Majen, Cler."

"Saving which, if overruled & referring Liberty of giving any new Plea on the Appeal, the said Aaron saith that he is an honest Man and thereof puts, &c.

"J. Quincy, Jun."

"And the said Parker, consented as above, says the Plea aforesaid is insufficient, & prays Judgment for his Damage & Costs.

"Jno. Sewall."

"And the said Willard says his said Plea is sufficient, & prays Judgment thereof & for his Costs.

"J. Quincy, Jun."
TRESPASS. Richardson had recovered Judgment against Hall, in a former Action, whereupon Execution issued, which Execution afterwards was directed to a Constable without the Knowledge of the Clerk or Request of Richardson. Richardson went with the Constable to take Hall, and, happening to meet him some Distance from the Constable, seized him. Hall then paid the Money and brought this Action.

_Trowbridge, 7._ I have altered judicial Writs out of Court, but 'tis wrong. Constables have nothing to do with Executions, except on Judgments rendered by Justices of the Peace. (1) However,

(1) The authority of constables in the service of civil process has been created and enlarged by successive statutes; their powers and duties by the common law being those of peace officers only. By the Colony Law of 1658, they were authorized "to serve all attachments directed to them in any civil cause." Anc. Chart. §3. By the Prov. St. of 9 W. 3, justices of the peace are "empowered to decide differences not exceeding forty shillings," and may direct their "execution, or warrant of distress" to a constable. Anc. Chart. 300. The Act of 11 W. 3, establishing the "inferior Courts of Common Pleas," provides that "all processes and writs for the bringing any cause or suit to trial, where the sum sued for is under ten pounds, may be also directed to the constables of the town." Anc. Chart. 329. St. 1795, c. 41, §3, empowers constables to serve "any writ, summons, or execution" in personal actions to the amount of $70. This is in substance re-enacted in the Rev. Sts. c. 15, §71. The amount has since been raised to $100, and their power extended to process in replevin for property not exceeding that value; and to process in forcible entry and detainer. Gen. Sts. c. 18, §61.
October Term 12 Geo. 3.

1771. However, the Writ is so executed that Richardson cannot now recover the Money again on a Seire Facias.

The other Justices agreeing in the Law.

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Memorandum.

N. B. At the Close of the Year 1771, Lynde, Chief Justice, and Cushing, Justice, resigned, and the Honourable Peter Oliver, Esq., was made Chief Justice, and the Honourable Nath'l. Ropes and William Cushing, Esquire, were made Justices, and all took their Seats accordingly in Suffolk, February Term, 1772.
April Term

Middlesex fs.

XII Geo. 3, 1772.

Honourable Peter Oliver, Esquire, Chief Justice.
Honourable Edmund Trowbridge, Esqrs.,
Foster Hutchinson, Justices.
Nathaniel Ropes,
William Cushing,

Jonathan Sewall, Esq., Attorney General.
Samuel Quincy, Esq., Solicitor General. (1)

Reed's Case.

A Venire facias issued to Littleton for a Jury-
man, and Mr. Reed was returned, who was a
Standing Grand Juror of the County for the Year,
which

(1) This office is said to have been created especially for the purpose
of winning over Sewall to the government party. See 10 John Adams's
Works, 1791. Anit, 241. After Sewall was raised to the office of
Attorney General, that of Solicitor General remained vacant until
March,
which was known, but, being in Doubt if that
exempted him, he was returned.

The Court, on hearing the Facts, told him he was
not obliged to serve, and, if he declined, they would
order a new Venire to issue.

Flagg verb. Hobart.

ACTION for Words, and Special Damages
alleged. Defendant justified speaking the
first Words, and plead not guilty to the Rest.

Dana, for the Plaintiff, going on to open the
Cause —

Quincy, for the Defendant, moved that he (Quincy)
might open it.

Sewall, also for the Plaintiff, said, if the Defendant
insists

March, 1771, when the place was given to Samuel Quincy; he also
having embraced the cause of the government.

It is intimated by John Adams that Samuel Quincy’s adherence to
this party was caused by jealousy of the greater professional success and
reputation of his younger brother, who had openly and with great fervor
espoused the patriotic cause. To John Adams’s Works, 195. It may
well be that the government leaders were induced to attempt his conver-
sion on the supposition that he might be so influenced; but that their
success was in fact attributable to this unworthy motive, we do not be-
lieve. The correspondence between the brothers, especially on the side
of the elder, evinces the tenderest fraternal affection, even at a time
when party animosity was at its height. See Quincy’s Life of Quincy,
insists on trying the Issues separately, they have a Right to open; but, if they will try them together, we must open; for Part of our Declaration is denied; we ought, therefore, to proceed and prove what we have first alleged. (1)

_Trowbridge, Justice,_ asked, if the Action had been Trespass, Assault and Battery, and Plea, as to the Force and Arms, not guilty; and Justification as to the Residue, who shall open there? — the Law is, if the Justification be found, Nothing more is to be done, as to the Force and Arms.

_Sewall_ answered, he could not think that a parallel Cause — he thought _Claujum fregit_, and Justification as to Part, and, as to the Residue, not guilty, rather in Point; there, he said, the Plaintiff might open.

But the Court directed the Issues to be tried separately. (2)

It became a Question, at the Trial, on the first Issue, whether Damages should be assessed separately on that Issue, or whether they should be passed over till the other Issue was also tried, and then assessed _in toto_: And _per Curiam_ — The Damages must be assessed.

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(1) _Acc. Davis v. Mason_, 4 Pick. 156; _Ayer v. Aydin_, 6 Pick. 225. But by the present rules of practice in this State, the plaintiff has the right to open and close in all cases, even when the only issue is on the defendant's declaration in set-off. _5 Cush. 603, note._ 2 Gray, 260.

(2) _S. P. Morse v. Jewett_, Mass. S. J. C., June Term, 1781, where, in assault and battery, "the defendants justified moderate correction," "there were several issues joined," and "as to the moderate correction, the defendant opened and closed." _5 Dane Ab. 564._
assessed on each Issue; for, perhaps, the other Issue will be found against the Plaintiff; then Damages will be passed over; or, perhaps, if Damages are assessed jointly, there may be a Motion in Arrest of Judgment, that the Words in the last Issue are not actionable, and then it may be said that Judgment must be stayed for the Whole; and other Reasons may be given also. (3)

Whitney verf. Haven.

TRESPASS. To the Force and Arms, not guilty. Justification for the Residue under a Warrant from Justice Jones, directed to an Officer, who took the Defendant for Aid, and, as such, arrested the Plaintiff. And, to support his Justification,

(3) This action was for words spoken against the plaintiff in his trade and business of a millwright, — accusing him of ruining defendant's mills, and assering that "it would have been better to have given any "Wages to a Workman than to have had my Mills so spoiled by such a "Blunderbus." These words and others were justified, as spoken "with Design only to prevent the said Eleazer from hurting others by his bad Work." The plea of not guilty as to the residue, applied to the charge of calling the plaintiff "a Logerhead," "a Deceiver," and a "fraudious Fellow," and of assering that "there was so much Liquor "stirring that Flagg hardly knew what he was about." The plaintiff joined issue on the second plea, and replied, de injurid, &c., to the first; on which replication, issue was also joined. In the Inferior Court, the jury found generally for the plaintiff, and assessed damages at £30. On the appeal, the verdict conformed to the issues, viz.: "the Jury find "upon the first Issue that the Appellant spoke the Words in his Plea of "Justification mentioned, of his own Wrong, without such Cause as he "has pleaded, and assess Damages for the Appellee Thirty Pounds; and "upon the second Issue they find the Appellant guilty, and assess Dam- "ages for the Appellee upon that Issue, Five Pounds."
tion, Defendant produced an attested Copy from the said Justice’s Records. Plaintiff objected to its being received, for he had Evidence to shew that the Warrant on which he was arrested had no Seal — whereas this Copy came with a Loco Sigilli.*

Trowbridge, Justice. If there be Anything in the Objection, it is to invalidate the Copies. But the Court accepted them, contrary to the Opinion of Cushing, Justice.

Afterwards, the Plaintiff was admitted to give Evidence that the pretended Warrant whereby he was arrested was different from that set forth in the Defendant’s Justification. The Proof was not sufficient.

Judgment for Defendant.

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LAINTIFF declared on a promissory Note made by the Defendant to one Winship, and by him indorsed to the Plaintiff. There was a Payment to Winship before Assignment. When this

* The Plaintiff also objected, that the Justice had not averred himself a Justice in his Warrant, but the Objection had no great Weight with the Court. The Warrant in the Justification was introduced thus, viz: “the Tenor of which said Warrant is as follows,” — the Warrant set out verbatim.

N. B. The Foreman on the other Jury, withdrawn to agree on ye Verdict, was sent for to testify in this Cause.
April Term 12 Geo. 3.

1772.

Tuttle
v.
Willington.

this appeared, the Court told the Plaintiff that this Point was settled against him on a Special Verdict, found at Cambridge, August Term, 1763, in the Cause of Russell & Oaks (1); and so solemnly determined on full Argument in the Court-House in Boston.

Judgment for Defendant.

Fowle
v.
Wyman.

TRESPASS. Lands were attached by Fowle. The Defendant then conveys to Wyman. (1) Execution levied in due Time and regular Return, &c., except the Officer did not certify, the Appraisers were "indifferent and discreet Men." Plaintiff offered this Evidence of his Possession; to which the Defendant objected, but admitted. (2)

Then

(1) ante, p. 48.

(2) The date of the attachment appears by the return to have been November 1, 1770. The conveyance to Wyman was merely a leafe "for and during the Term of Sowing and Ingathering one Crop of Winter Rye." The date of this leafe is prior to that of the attachment; but there is on file the deposition of Elizabeth Richardson, to the effect that the delivery of the premises to the leefee did not take place until some time near the middle of November; when the deponent, "being called as an Evidence, saw the said David cut out of the said "Land, Turff and Twigg, and deliver the Same unto the said Benja. "Richardson and Joshua Wyman respectively, and therewith the Pos. "session of the same Lands."

(3) A regular and complete levy under an execution has been held sufficient proof of possession to sustain this action. 3 Mife. 315, 523. But the omission to certify that the appraisers were indifferent and discreet men has been held a fatal defect. Williams v. Amory, 14 Mife. 26. Bradley v. Baffett, 3 Cush. 417.
April Term 12 Geo. 3.

Then 'twas said by Defendant that the Plaintiff had produced no Evidence of Trespass on the Lands set forth in the Declaration, which he there bounds, 'Westerly on a Way;,' the Land whereon the supposed Trespass was done, was bounded, Westerly on a Way and Lands of J. S.—therefore the Declaration is not supported; and so ruled unanimously by the Court. (3)

Note. The Defendant cited an Authority out of Salkeld, and one out of Hobart, of which inquire. (4) Sewall for the Plaintiff, insisted that where there was only an Omission of some of the Abutments, it was not fatal, for then what Abutments were set out were only Surplusage, that where there were false and contradictory Abutments set out, they were bad. (5)

(3) Although the first impression of the Court may have been in favor of the defendant, yet that the point must have been referred for advice and the objection finally overruled appears probable from the fact that the case resulted in a verdict, judgment, and execution for the plaintiff.

(4) 2 Salk. 453. Hob. 16. 176.

(5) Although before the St. of 1839, c. 151, § 3, in this commonwealth, and the Reg. Gen. Hil. T. 4 W. IV., in England, it was not necessary to name or describe the plaintiff's close in the declaration, yet if this were done by abuttals, they must be proved as laid. 2 Rol. Ab. 678. Bul. N. P. 89. 3 Stark. Evid. (ed. of 1832) 1435. But a general accuracy of description has been held sufficient. See Webber v. Richards, 1 Q. B. 443, where the rule is stated to be "that the party is not to be turned round on account of some minute variance in one out of several particulars, but that there must be a general accurate correspondence faithfully describing the close in substance, and conveying full information to the defendant of the place in which he is alleged to have committed the trespass. Also Wheeler v. Rowell, 6 N. H. 215,—a case in point, in which it was held that a description of a close as "abutting southerly on W.'s land" "did not imply that it was abutting all the way southerly on W.'s land," and that the omission of a rod or two of abutment was immaterial. 43
April Term 12 Geo. 5.

Thwing verf. Dennie.

Dennie was opening his Papers and Evidence; Thwing in a most savage Manner attempted to snatch some of them out of Dennie's Hand; and thereby tore some Papers very essential in the Cause.

The Court, seeing Thwing's Behaviour, ordered the Sheriff to take him immediately into Custody, which he did, and committed him to Prison.

Little verf. Holdin.

Little had Judgment on a Verdict below, and Holdin appeals, and entered his Appeal, and the Cause was continued one Term, &c.

Now, the Action called, Holdin failed to appear and prosecute. And thereupon Little files his Complaint, agreeable to the Prov. Stat. 13 W. 3, c. 5, and had Judgment as the said Statute directs.

Note. The Prov. Stat. 11 W. 3, c. 3, (1) gives this Court Cognizance of all Actions brought by Appeal, &c., which gives some Colour to suppose

pose that the Appeal being entered, the Appellee (having the Copies) might on Motion prove his Demand and have Judgment for his Damage and Cost, or as the Case may require, he still continuing Plaintiff, *quoad* the Trial; but the Law seems to consider the Appellant as Plaintiff or *Alit*, *quoad* the Support of the Suit; then he, being called, does not appear,—the Suit which he supported falls of Course, and is discontinued, or the Appellant is become nonsuit; and though perhaps the Appellee might thereupon have his Costs at that Court, yet Judgment for his Damages could not be supported; wherefore came *y* 13 W. 3, c. 5, (2) which seems the only Way for the Appellee to proceed in such Cases against the Appellant.

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**Dewing verf. Train.**

A *SSUMPSIT* for Money had and received to the Plaintiff's Use. The Case was, that one Ball, a Deputy Sheriff, had an Execution against the Plaintiff issuing on a former Suit brought by J. S., and Train passed his Word for Dewing's Appearance at a Day then to come; and Dewing gave Train a promissory Note for the Contents of the Execution; notwithstanding which, Train sued Dewing on the Note, on which Suit Dewing

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(2) Anc. Chart. 356.
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1772. Dewing v. Train.

never appeared, and Train had Judgment against him,—and, in the Course of the Affair, Dewing was committed by Ball on the Execution in Favour of J. S., and cleared it, and also cleared Train's Judgment on the Note; and then brings this Action to recover back the Money which Train had taken by his Suit on the Note.

Sewall, for the Plaintiff, in opening, discovered the Opinion of the Court, that the Action was not maintainable on these Facts, (1) advised his Client, (who before had refused,) to refer the Cause, which was accordingly done.

NOTE.

This action was continued under reference from term to term until October, 1774. At this date, there appears on the docket the usual heading for the term, with the exception of a blank in the place of the names of the justices by whom it should have been held; and after the list of continued actions appears the following entry:

"N. B. The Superior Court did not sit in the County of Middlesex "in October, 1774, by reason of the difficulty of the times, & there was "no term of the said Court in that County until October, 1776. And "the continued actions are carried forward by a special order of the gen- "eral Court."

The circumstances which prevented this session of the Court were as follows: Articles of impeachment had been drawn up by the House of Representatives against the Chief Justice, and, although the Council would take no action in the matter, yet, the articles being published, the effect

(1) On the general principle that money paid under legal process cannot be recovered back. The plaintiff's remedy should have been fought by review. 16 Mas. 308. 17 Mas. 394. 1 Pick. 440. 4 Gray, 148. 13 Gray, 70.
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1772.

effect, as described by John Adams, was that "when the Superior Court " came to sit in Boston, the grand jurors and petit jurors, as their names " were called over, refused to take the oaths," on the ground that "the " Chief Justice of that Court fled impeached of high crimes and mis-" demeanours before his Majesty's Council, and they would not sit as " jurors while that accusation was depending. At the Charlestown " Court the jurors unanimously refused in the same manner." 3 John Adams's Works, 332. On the 19th of July, 1775, the General Court holden at Watertown, while the American army was at Cambridge, and the British in Boston, passed the act removing all officers appointed by the Governor, whether civil or military, from their respective offices, from and after the 19th of September then next. On the 11th of the following October, a majority of the Council reorganized the Superior Court by appointing John Adams Chief Justice, and William Cushing, William Read, Robert Treat Paine, and Nathaniel Peaflee Sargent, Esqrs., Associate Justices thereof. Adams accepted the appointment, but resigned in 1777, never having taken his seat on the bench. 3 Ib. 23, 24. Read, Paine, and Sargent at first declined the office, and their places were filled by James Sullivan, Jedediah Foster, and James Warren. The latter also declined the appointment, but the two former accepted it, and were commissioned March 20, 1776. Foster had occupied a seat in the Council, which he at once resigned, as incompatible with the office of judge. In his letter of resignation he says: "It has for sundry Years past been a prevailing Opinion that a " Seat at the Hon'ble Council, and on the Superior Court Bench ought " not to be held by the same Person at one and the same Time: an " Opinion I think founded in the highest Reason, and should be supported " in a free Constitution." 195 Mass. Archives, 14. See ante, p. 242.

In May, 1776, was passed the act changing the style of commissions, writs, process, and proceedings in law, from the name and style of the King of Great Britain, France, and Ireland, Defender of the Faith, &c., to the name and style of the Government and People of the Massachusetts Bay in New England. Anc. Chart. 798. The first Court held under the new organization appears to have been in Ipswich, for the County of Essex, on the 3rd Tuesday in June, 1776. The records of this term are entitled "Colony of Massachusetts Bay," and the Court was held by "Wm. Cushing, Jedediah Foster, and James Sullivan, Esqrs., Justices," "They having first produced Commissions under the Government Seal, severally appointing them Justices of the said Court." Rec. 1776, Fol. 2.

In February, 1776, was passed an act altering the place of holding Courts in Suffolk, from Boston to Dedham and Braintree, the former being made the thire town of Suffolk,—the preamble reciting that "Boston, the Place appointed by Law for holding the Superior Court," &c., "is now made a Garrison by the Ministerial Army, and become a "common
April Term 12 Geo. 3.

1772. "common Receptacle (1) for the Enemies of America." In accordance with this act, the first term of Court for Suffolk was held at Braintree, in September, 1776. Rec. 1776, Fol. 29. In the following November, the act was repealed, and the first term held in Boston appears to have been in February, 1777. Rec. 1777, Fol. 67.

The first term for Middlesex was, as before stated, in October, 1776, when the Court met and adjourned to the following February. The adjourned session was held by Cushing, Foster, Sullivan and Sargent, the latter having been reappointed on the 19th of the preceding September, and this time accepting the office. At this term there appear the first instances of appeals claimed to the "General Congress of the United States of America." Rec. 1776, Fol. 51. "Middlesex Minute Book, October, 1776." The case of Dewing v. Train was continued to the following April Term, which was the first held at Concord under the act passed in February, 1776, changing the places of holding Court in Middlesex, "as Charlestown is destroyed by the Enemy." At this term the referees made their report in favor of the plaintiff for £18, 8, 6, for which sum judgment was entered, and execution issued November 3, 1777.

(1) "Old receptacles, common sewers" ———

April Term

XII Geo. 3.

Worcester sb.

Hooton vs. Grout. (1)

QUESTION: Whether Lands and Tenements mortgaged may be taken in Execution for satisfying the Mortgagee's just Debts.

Answer: The Province Law, 8 W. 3, c. 3, provides that all Lands and Tenements belonging to any

(1) The following opinion is by Judge Trowbridge. See note at the end of the case. The questions of law were raised as usual by a special verdict, as follows:

--- "That David Page, who was vouched in and admitted to defend this Action on the 30th day of June, A. D. 1761, was seized of the demanded premises in fee & on the same day gave his bond conditioned for the payment of One Thousand Pounds Lawful Money to Nathaniel Wheelwright, since dece'd, in one year, which is in the Case; and also at the same time gave his deed of Mortgage to the said Wheelwright of the said premises and other Lands as a Collateral Security for the payment of the money due on said Bond, which deed is also in the Case, that the said Nath'l, on the 10th day of January, A. D. "1765,
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any Person in his own proper Right in Fee shall stand charged with the Payment of his just Debts, as well as his Personal Estate, and be liable to be taken in Execution for satisfying the same. (2)

The Act of 6 Geo. 1, c. 2, subjects the Debtor's Real Estate to be taken in Execution to satisfy any Judgment recovered against him, if he doth not satisfy it by Money or other Specie; and directs how the Value shall be ascertained. (3)

The Act of 8 and 9 G. 2, c. 5, subjects the Right of Mortgagor hath in Equity to redeem the Land, &c., to be attached and taken in Execution for satisfying his Debts: (4) so that the Whole of the Debtor's Real Estate, and the Right he has to redeem any Real Estate mortgaged, is, by the Laws of

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"1765, (the money due on said Bond being then unpaid,) by his Deed of "Assignment duly Executed which is in the Case Conveyed and As-
signed the said Bond and the money due thereon & the said Mortgaged "premises to Charles Ward Apthorp Esq., that the said Deed of "Assignment was, on the 16th day of said January Rec'd at Boston by "Timothy Paine Esq. as Register of Deeds for the County of Worces-
ter, in which said premises lay, for Record. That on the twenty-first "day of said Month the said John, by Virtue of a Writ duly purchased "by him against the said Nathaniel, Caused the said Demanded premises "to be attach'd as the Estate of the said Nathaniel for a Debt due from "him, and afterwards on the same day the said Deed of Assignment was "filed in the Office for the Registry of Deeds for said County of Worce-
ter to be recorded, & was accordingly afterwards on the same day there "Recorded at length." The verdict further set forth that judgment was recovered and execution regularly levied by the plaintiff on the de-
manded premises then in the possession of the mortgagor, who after-
wards paid the bond to Apthorp, and also conveyed to him the premises which were held by Grout as his tenant. On this verdict, judgment was entered for the tenant. See note at the end of the case.

April Term 12 Geo. 3.

of this Province, made liable to be taken in Execution for satisfying his Debt.

A Mortgage is where one borrows Money of another and pledges his Land or Tenements, &c., to the Lender, to secure to him ye Repayment, at a future Day, of the Money lent. 1 Inft. 205 a. Treat. in Eq. 86, 7, 91. Abr. Cas. Eq. 311, 327. 3 Bac. Abr. 632, 641. 2 Black. Com. 157, 8.

This is done by the Borrower's conveying his Land, &c., to ye Lender to hold to him, for a certain Number of Years or in Fee, upon Condition that if the Money, &c. be repaid by the Day, that then the Mortgagor may re-enter, &c. 3 Bac. Abr. 632. 2 Black. Com. 157, 8.

The former is called a Term, and is a Chattel Real, which doth not descend to the Heir, unless it be attendant on the Inheritance, but goes to ye Executor, is Legal Assets after his Entry or Recovery, and may be sold by him, without the Aid of the Court of Chancery, in England. 3 Bac. Abr. 632. 1 P. Will. 730, 1. Or the Superior Court here.

A Term, not attendant on the Inheritance, may, in England, on a Fi. Fa., be taken and sold by a Sheriff; and, on an Elegit, he may deliver it to the Creditors at the appraised Value as Personal Estate, or extend it as Real. Comyn vs. Brandlyn, Moor, 873. 2 Inft. 395 b. 4 Rep. 74. 8 Rep. 96, 171. It may be sold as well as other Goods without Appraisement. Wood's Inft. 632.

When
April Term 12 Geo. 3.

When Lands or Tenements are mortgaged in Fee, the Land, &c., and the Mortgagor's whole Estate therein passes presently to the Mortgagee; so that such a Mortgagor, in England, has by Law Nothing left but the bare Condition. 1 Inst. 205 a. 210. Str. 689. Ca. Temp. Talb. 66, 68. 2 Cha. Ca. 97. 2 P. Will. 416.

The Mortgagor has a Right in Equity to redeem the Land, &c., at any Time within 20 Years after Forfeiture for Condition broken, if the Right be not foreclosed or released before; but it is only a naked Right and not liable to be taken in Execution, in England. 2 Atk. 292. Nor is it Legal Assets there. 2 Vern. 62. Though here, by Force of the Province Law, 8 & 9 G. 2, c. 5, it may be attached and taken by Execution for satisfying the Mortgagor's Debt.

Though the Estate of a Mortgagee in Fee is only a Fee Simple conditional at first, and while it is uncertain whether ye Condition will be performed or not,—yet the Mortgagee has as ample and great an Estate in the Land as if it was an absolute Fee Simple, though it may not be so durable. 1 Inst. 18 a.

If the Condition be not performed, the Mortgagee's Estate in ye Land, be it an Estate for Years or of Inheritance, becomes absolute; and, at Law, in England, is the same as though it had not been Conditional; and the Mortgagor could have no Relief in the Common Law Courts, until the Stat. of 7 G. 2, c. 20, was made, which provided that
that on Ejeàment brought by the Mortgagee, &c., if the Mortgagor, &c., pay the Principal, Interest, &c., the Mortgagee shall reconvey the Estate to the Mortgagor, &c.; which shews plainly the Sense of the Parliament, that the Legal Estate is in the Mortgagee; or they would not have obliged him to reconvey it to a Mortgagor in Actual Possession of the Land; as he must be supposed to be, when Ejeàment is brought against him. 2 Black. Com. 158, 9, & Stat. 7 G. 2, c. 20.

Though the Court of Chancery, upon Consideration that the Land was at first intended by the Parties only as a Pledge and Security for the Repayment of the Money lent, &c., allow the Mortgagor, his Heirs, Executors, Administrators or Assigns, upon Payment of the Money lent, &c., to redeem the Land, though forfeited, and in the Possession of the Mortgagee, his Heirs or Assigns; yet that Court also considers the Legal Estate in the Land mortgaged to be in the Mortgagee; and, if it be a Mortgage in Fee, that the Mortgagor has no Estate at all left in the Land. 1 Vern. 412. 2 Cha. Ca. 97, 187. 2 Vent. 337.

This last Point came directly in Question before Sir Joseph Jekyll, Master of the Rolls, in the Case of Hafkett vs. Strong; 12 G., which was thus:—Mr. How mortgages certain Lands to Neal for 500 Years; and afterward mortgages them to Hafkett in Fee. Neal assigns his Term to Strong, who advanced more Money to How, and took of him a Deed of y* Inheritance. Hafkett contended that the Term was merged in the Inheritance; but his
his Honour decreed that it was not; because How, after he had mortgaged to Hasket in Fee, had no Estate in him to grant, and then the Term could not be merged in a void Grant of the Inheritance. Stra. 689. Lord Chancellor Talbot in 1734 made a like Decree in the Case of Collet vs. De Gols & Ward, — that Ward, the Mortgagee, had the legal Estate in the Land, and that Tyffan, the Mortgagor, had no Estate in it to convey. Ca. Temp. Talb. 66, 68.

Upon this same Principle it is, that a third Mortgagee, without Notice, by buying in the first Mortgage, secures himself against the second Mortgagee; for, being equally intitled in Equity to a Repayment of the Money lent on the third Mortgage, as the second Mortgagee is on his, and having by the Purchase of the first Mortgage obtained the legal Estate in the Land, a Court of Equity will not take that from him, in Favour of one who has no more Equity on his Side than the third Mortgagee hath. 2 Vent. 338. 1 Vern. 187. 2 Vern. 29, 157, 159. Abr. Ca. Eq. 322. 1 Cha. Ca. 162, 201. Hard. 173, 318. Fra. Max. 64.

It also is upon this same Principle, that the Mortgagee, after having received the Money due to him, is, by the Court of Equity, considered as a Trustee to the Mortgagor, and holding the Estate in Trust for him, until he reconveys it to him. 3 P. Will. 252, Note. That the Heir of the Mortgagee has the Use and Benefit of the Land, until it is redeemed. It descends to him, and he holds it as a Trustee
Trustee for ye Executor. Abr. Ca. Eq. 327. — That, upon the Mortgagee's dying intestate, the Land mortgaged in Fee descends to his Heirs, he holds it in Trust for the Administrator until the Money is paid. Pre. Chan. 265. Abr. Ca. Eq. 327. 3 Bac. Abr. 641. Treat. Eq. 86, 88. — That the Mortgagee may devise the Land as Part of his Real Estate, and it shall pass accordingly. 2 Vern. 583. Ca. Eq. 3. 3 Bac. Abr. 642. 2 Burr. 978. — That, although a second Mortgage in Fee is considered as such, between the Parties, yet Nothing passes by it but the Mortgagor's Right of Redemption; and, on a third Mortgage, only the Right of redeeming the first and second Mortgages. Abr. Ca. Eq. 312.

Objection 1st. But it is objected, that Ld. Ch. Just. Mansfield, in the Case of Martyn & Mawlin, B. R. 1760, said that "a Mortgage is a Charge upon "the Land, and whatever would give the Money "will carry the Estate in the Land along with it to "every Purpose." "The Estate in the Land is the "same Thing as the Money due upon it. It will "be liable to Debts; it will go to Executors; it "will pass by a Will not executed with the Solemniti-" ties required by the Statute of Frauds. The Af-" signment of the Debt, or forgiving it, will draw "the Land after it, as a Consequence. Nay, it "would do it, though the Debt were forgiven by "Parol; for the Right to the Land will follow, "withstanding the Statute of Frauds." — And that Lord Hardwick says, "the principal Right of "the Mortgagee is to the Money, and the Land is "but an Accident."
In the Case of *Martyn & Mawlin*, there were but two Points considered or determined by the Court, viz. First. If the Father did, by his Will, give his Son and Daughter an Estate Tail in a certain Clofe, mortgaged to the Father in Fee, and into which he had entered for the Condition broken, and the Mortgage had run 8 or 9 Years. Secondly. If the Son and Daughter took such an Estate in the Clofe, whether it was well barred by the Surrender. And the Court determined, that the Testator did not give his Son and Daughter an Estate Tail in the Land, and that, if he had, the Estate would have been well barred by the Surrender; — but it was not because the Court thought the Testator could not give his Son and Daughter the Clofe to hold as an Estate Tail, but because it appeared to the Court, upon Consideration of the whole Will, that the Testator did not intend to give them the Land, but only the Money due upon it. For Lord Mansfield, in the Case, expressly says, if the Reporter is not mistaken, that — “if it appeared that "the Testator really meant and intended to devise "the Clofe, as Land, it would be a Devise of the "Land, the Mortgage being forfeited by Law, and "the Estate in the Land become absolute.” And Lord Keeper Cowper says,— “If a Man, seised of "Lands in Fee which were only mortgaged to "him, devises them to his Son and his Heirs, and "says, they shall go as an Inheritance, surely the "Heir, if the Mortgage be paid off, shall receive "the Money, and not the Executor; for the Fa- "ther, who had the governing Power over the "Estate, may dispose of it as an Inheritance so long "as it continues so, and y* Money, when paid off, "shall
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"shall go as he intended the Land should." Gilb.
Ca. Eq. 3. That is, to ye Heir, and not to ye Executor.

So, a Devises to the Heir, of the Land mortgaged, will intitle the Heir to the Money, if the Land be redeemed. And, on the other Hand, if the Mortgagee give the Money due on the Land to his Daughter, and the Mortgagor pays it to her, the Court of Chancery will oblige the Heir, to whom the Land descended, to reconvey it to the Mortgagor; but, if he refuses to pay the Money and redeem the Land, the Court will order the Land to be sold to raise the Money for the Daughter, or conveyed to her by the Heir, unless he will foreclose the Mortgage, pay the Money and keep the Land, as he may. 2 Vern. 67.

In this Sense, and in this Manner, a Gift of the Money may eventually carry the Estate in the Land, and indeed, the Land itself along with it. But, if Lord Mansfield said, "that ye Estate in the Land is the same Thing as the Money due upon the Land," it is not very easy to understand what he meant or intended thereby; for, if that be literally true, it necessarily follows, that the Money due upon the Land is the Estate in it; which is not only absurd, but at once destroys the Distinction between a Mortgage of Land for a Term only, and a Mortgage in Fee,—if it be for the same Sum,—as the Mortgagee's Estate, in that Case, must be the same in both; which his Lordship could not possibly mean. If his Lordship meant that the Mortgagee's Estate in the Land was worth no more than the Money
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Money due upon the Land, that may be true. But, that the Mortgagee's Estate in the Land will be liable to Debts, go to Executors, and pass by a Will not executed by the Solemnities required by the Statute of Frauds is not true with Regard to Mortgages in Fee or for a Term attendant on the Inheritance. Sir Joseph Jekyll, Master of the Rolls, decreed, that a Term attendant on the Inheritance would not pass by such a Will; and, upon an Appeal, his Decree was affirmed by the Lords Gilbert and Raymond, as Commissioners of the Great Seal, in the 8 G. 1 Gilb. Ca. Eq. 168. And, surely, if a Term attendant on the Inheritance will not pass by such a Will, the Inheritance itself will not. Nor do Lands mortgaged in Fee go to Executors, but descend to the Heir; and the Executor cannot obtain the same without the Aid of the Court of Chancery. And then they are not Legal Assets in the Hands of the Executor, but Equitable Assets only. These Propositions, therefore, could not be intended by his Lordship as extending to all Mortgages, though they may be true as to Mortgages for Terms not attendant on the Inheritance.

— "That the Assignment of the Debt, or the Forgiving of it, upon Parole, will draw the Land after it as a Consequence," without the Aid of the Court of Chancery, is not true, unless Lord Hardwick was greatly mistaken, when he said, in the Case of Harrison v. Owen, 1 Atk. 520, "That, if a Mortgagee "cancells a Mortgage, and it is found in his Possession, it is as much a Release (of the Debt, he must "mean) as cancelling a Bond; but it doth not con-

"vey or revest the Estate in y' Mortgagor; for that "must be done by some Deed." If assigning the Debt
Debt or forgiving it, would revest the Estate in the Mortgagor, surely his paying the Money would do it; and yet the Mortgagee, after he has received the Money, is a Trustee to the Mortgagor, until he hath reconveyed the Estate. 3 P. Will. 252, Note.

To what End are all the Applications to Chancery to compel the Mortgagee, his Heirs or Assigns to reconvey the Estate, if paying the Money or tendering it would revest the Estate in the Mortgagor? As none of these Points came directly in Question in the Case of Martyn & Mawlin, and it doth not appear that either of the other Judges concurred with Lord Mansfield in those Propositions (if they ever fell from him), they cannot stand in Competition with contrary Decrees and Determinations, regularly made upon the Points when directly in Question before the Court. But we have no Assurance these dark Sayings were ever uttered by Lord Mansfield. For the Reporter, Burrow, in his Preface, p. 8, says, "I do not take my Notes in Short Hand,—I watch the Sense, rather than the Words, and, therefore, very often use some of my own. I do not always take down the Restrictions with which the Speaker may qualify a Proposition, to guard against its being understood universally or in too large a Sense. And, therefore, I caution the Reader always to imply the Exceptions which ought to be made, when I report such Propositions as falling from the Judges." So that it is not certain that any of the Propositions are laid down in Lord Mansfield’s own Words, nor that they were laid down without Restrictions and Limitations;
Limitations; and, as they are inconsistent,—one plainly distinguishing between the Estate in the Land, and the Money due upon it, and the next ascertaining that they are the same Thing—and almost all of them being inconsistent with the Decrees and Determinations of some of the great Men in the Nation and the constant Course of the Court of Chancery, they can be of no Authority, ought not to be palmed upon Lord Mansfield, but attributed to the inaccuracy of *y* Reporter. Lord Mansfield certainly knew the Difference between Money and an Estate in Land,—between a Term and an Estate of Inheritance,—and between Legal and Equitable Assets;—which the Propositions, as they stand, absolutely confound, and, therefore, are not to be regarded.

*Objection 2nd.* But Lord Chancellor Hardwick says,—"The principal Right of the Mortgagee is to the Money, and the Land is but an Accident." This is, doubtless, true; and no Ways inconsistent with what his Lordship and others have said respecting Mortgages. Lord Hardwick also says, "That a Mortgage is a Debt by Specialty, and the Land is regarded, in this Court, (Chancery) only as a Pledge and Security for the Payment of the Money." 2 Atk. 435, 445. In Fra. Treat. Eq. 91, it is said, "the Principal Right of the Mortgagee is to the Mortgage-Money, and his Right to y* Land is only as a collateral Security for the Payment of it,"—and, in England, it always is so, because the Court of Chancery look upon a Mortgage as a general Debt, and the Land only as a Security. 2 Atk. 437. That Court considers the borrowing the Money
Money as creating a Debt, which, in good Con-
science, is due and ought to be paid: And, there-
fore, that Court will, sometimes at least, enforce the
Payment of so much as the Proceeds of the Land,
when fold, fall short of answering the Debt, though
there was neither Bond nor Covenant in the Deed
to oblige the Mortgagor to repay the Money.
Salk. 449. 3 P. Will. 360, 1. So that the Debt
is considered, in Chancery, as subsisting independent
of the Land. And the Mortgage as not essential
to the Debt, but only additional and collateral Se-
curity for the Payment of it. Fra. Treat. Eq. 91.

An Accident is a Non-essential; and therefore
Lord Hardwick with strict Propriety said, "The
Land is but an Accident," it being not essential to
the Debt. But, if the Mortgagor has no Estate in
the Land, how can it be any Security to him for
the Repayment of the Money lent, or how can
it be said to be pledged for the Security of
the Repayment of the Money, if the Mortgagor
has not the Land nor any Estate in it, according
to the legal Sense of the Word? Surely it cannot.
Where then is the Estate? It is not in the Mort-
gagor; he, though in actual Possession of the Land,
is but Tenant at Will to the Mortgagor. Newport's Café, Skin. 424. Fra. Treat. Eq. 91. Carth.

A Mortgagor in Fee, in England, has no Estate
left in the Land that can be taken from him by
Execution, though all Personal Estate and a Moiety
of the Real may be so taken. 2 Atk. 292.

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Though a second or third Mortgage in Fee be considered as a Conveyance of the Land between the respective Parties, because the Deed estops the Mortgagor and his Heirs from saying he had not the Land, or such an Estate in the Land as he hath taken upon him to grant, yet, in Fact, Nothing passes by the second Deed, but your Right of redeeming the Mortgage, or by the third than the Right of redeeming both the former. Fra. Treat. Eq. 90.

This Right of Redemption is not Legal Assets, in England. 2 Vern. 61. Nor are Mortgages in Fee Legal Assets in the Hands of the Executor or Administrator, unless the Money be paid them: Nor has the Ordinary Anything to do with them, unless the Money be paid. If it is not paid, the Heir may foreclose the Mortgagor; and then the Court of Chancery will not oblige the Heir to reconvey the Land to your Executor, if he will pay him the Money due upon it. 2 Vern. 61, 67. Fra. Treat. Eq. 91, 92.

Objection 3rd. Mortgages are looked upon as Parts of the Personal Estate; the Money lent coming out of the Personal Estate, it ought to return there.

It is so considered in the Court of Chancery, unless the Mortgagee in his Lifetime or by his last Will, doth otherwise declare, or dispose of the Mortgage. Fra. Treat. Eq. 91, 2. But where the Mortgagee enters for a Forfeiture, and absolutely sells the Land to J. S. and his Heirs, it shall not be looked
looked upon in his Hands as a Mortgage so as to make it Personal Estate. 1 Vern. 271, Cotton v. Iles, 1684. So, if Mortgagee in Fee, after Forfeiture and Entry, deviſes the Land to his two Daughters and their Heirs, and his other Mortgages to them and their Executors, the Daughters take the Land mortgaged in Fee as Real Estate, descindible to their Heirs untill it is redeemed. 2 Vern. 582. If Land mortgaged in Fee be deviſed as Real Estate, and afterwards redeemed, the Money shall go to him to whom the Land would have gone, and not to the Executors, as Part of the Personal Estate. 1 Vern. 4. 3 Bac. Abr. 642. Gilb. Ca. Eq. 3.

Charles Cox, posſessed of a Term, mortgaged it, and died posſessed of the Equity of Redemption of the Mortgage: — and, upon the Queſtion, if this mere Equity of Redemption was Legal, or Equitable Assets only, Sir Joseph Jekyll, Master of the Rolls, after taking Time to consider it, delivered his Opinion, with Solemnity, that this Equity of Redemption was Equitable Assets only; the Mortgage being forfeit at Law, and the whole Estate thereby vested in the Mortgagee. 3 P. Will. 342.

Assets are of two Sorts, — one, by Deſcent—the other, in Hand. By Deſcent is where the Testator binds himself and his Heirs and dies seised of Lands in Fee Simple which descend to his Heirs; such Lands are Assets by Deſcent. But where one is indebted and makes an Executor and dies, leaving sufficient Estate that by the Course of the Law comes into the Hands of the Executor, or Profits come
come into the Hands of the Executor in Right of his Testator, this is called Assets in Hand. Terms of Law. 2 Burn, Eccl. Law, 668.

Assets are also divided into Legal and Equitable. Legal Assets are such as are liable to Debts and Legacies by the Course of the Law; Equitable Assets are such as are only liable by the Help of a Court of Equity. Ib. 669.

It has before been observed that the Mortgage of Land for a Term of Years is but a Chattel Real; and, unless attendant on the Inheritance, goes to the Executors without the Aid of a Court of Equity, and, consequently, is Legal Assets as soon as the Executor enters or recovers it; as it may be sold by him, without the Aid of any other. 1 P. Will. 730, 1. 3 Bac. Abr. 632. But Mortgages in Fee are not Chattels, but Estates of Inheritance that may, by the Mortgagor, be granted or devised as Real Estate; and, if they are not, will descend to his Heir; and the Executor cannot avail himself thereof, without the Aid of the Court of Chancery, if the Mortgagor is not willing to redeem and there is neither Bond nor Covenant to oblige him to do it. And, therefore, a Mortgage in Fee, as such, in England, is not liable to Debts in general or Legacies, by the Course of the Law, as Goods and Chattels are, though such Mortgages may be Assets by Decent, and make the Heir answerable for the Value of it, if it is not redeemed. The mortgaged Premises are considered, in Chancery, after Forfeiture, as being the Estate of the Mortgagor, vested in him, and become absolute by the
the Forfeiture; That he, who comes into Chancery to redeem the Estate, shall pay the Costs in Chancery, which are very great. 3 P. Will. 342.

The Mortgagee of a Term, though he, after Forfeiture, has the absolute Estate for the Term, yet cannot make it Real Estate by devising it as such; and, therefore, though it be devised in Tail, the Executor shall have it. 1 Roll. Abr. 915. 2 Burn's Eccl. L. 646. And yet, a Mortgagee in Fee may consider y* Estate as Real or Personal, and dispose of it accordingly; because, the Land being Real Estate, the Mortgagee in Fee, having the Land and the whole Estate in the Land vested in him, may grant or devise it as Real Estate; and it shall pass accordingly; and being also intituled to y* Money lent and due on the Land, either by Bond, or Covenant in the Deed (as is most commonly the Case,) and also in good Conscience, the Mortgagee may give y* Money; and, if it be paid the Legatee, he shall have it; or, if it can be recovered by the Bond or Covenant, he may get it in the Course of Law; or he may obtain it by the Aid of the Court of Chancery, in ordering y* Land to be sold to raise the Money, or conveyed by the Heir to the Legatee, &c.; and, in that Sense, the Gift of y* Money may be said to draw y* Land after it.

This evidently shows that the Legal Estate in the Land is in the Mortgagee, as well as a Right to y* Money which the Land is pledged as a collateral Security for the Payment of; or else it could not pass by his Gift or Devise of it, as an Inheritance. Not only the Act of Parliament, but also the Prov. Law,
Law, 10 W. 3, c. 14, (5) shews that the Makers of those Acts supposed that a Mortgagee in Fee had an Estate of Inheritance which he might alienate; and, if he did not do it, that it did descend to his Heirs. The Prov. Law provides that the Mortgagee, his Heirs, or the Tenant in Possession, being the Purchaser, and holding in his own Right, upon the Mortgagor, or Vendor, or his Heirs, tendering Payment of the original Debt, &c., shall accept the same and restore Possession of the Land to the Mortgagor, &c., and release their Right there-in. There is no Mention made of the Money being paid to y' Executor or Administrator of y' Mortgagee, or their releasing their Right to y' mortgaged Premises. The Legislature well knew, that, after Forfeiture and Entry for the Condition broken, the Estate was absolutely in the Mortgagee, his Heirs or Assigns, and would remain so forever here, unless they provided for the Relief of y' Mortgagor, &c.; which they did by that Act. It is the only Relief he has here, and it is a Relief given by Law. So that it is not in the Discretion of y' Justices of the Inferiour or Superiour Courts, whether the Mortgagor, &c., shall, by paying the Mortgage Money, &c., redeem the Land within the Term appointed by the Act, nor whether he shall do it after the Expiration of y' Term, as it is in the Court of Chancery. Therefore, after the Time allowed by Law for Redemption is past, the Estate is irredeemable, and the Mortgagee has the same Right, Estate and Interest in and to the Land as if it had been granted to him at first absolutely and without any Condition at all. And he then may,  

may, in every sense, be as properly said to be seised in his demesne, as of fee, of the land, if it was mortgaged in fee, as any tenant in fee simple can be; and the land may be by him sold and devised as an estate in fee simple, and, if it is not, it will descend to his heirs in fee, subject only to his widow's dower, and to be settled by the court of probate on one or more of the children, as it will accommodate best; and the widow has not the least colour nor pretence for taking a third of it as personal estate, because it was a mortgage, and holding that third as an estate of inheritance, in fee. Because it is a real estate, and, if she don't hold it so, it cannot descend to her heirs, nor can she convey the inheritance.

In England, the common law courts hold, that the estate passes presently upon executing the deed and livery of seisin. The court of chancery holds, that the mortgagee's estate in the land becomes absolute upon the condition not being performed. Our law provides, that, upon the executing the deed, acknowledging and registering it, the land shall pass, without any other act or ceremony whatever; so that the land passes, here, as much as if there was livery of seisin given, and the mortgagor's estate in the land mortgaged passes with it, here, as much as in England. Can there, then, a question arise in a common law court here, whether any estate in the land mortgaged passes to the mortgagee presently upon the registry of the deed, when the court of chancery allows, that, by the forfeiture, the whole estate is in the mortgagor; and that it is absolute; and that the mortgagor
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gagor has no Estate left in him. Shall the Common Law Courts here say, the Mortgagee has no Estate in the Land? No, surely, unless they take it upon them to be wiser than the Law.

A Tenant in Fee Simple of Land has the largest Estate in it that a Subject can have. He can convey it absolutely or conditionally, for a limited Time or forever. If he mortgages the Land for a Time only, the Fee remains in him, and the Mortgagee has the Land during the Time, if it is not redeemed, and no longer; but, if it is mortgaged in Fee, the Land and all the Mortgagor's Estate there-in paffes prefently to the Mortgagee. A Mortgagor in England has Nothing by Law left but the bare Condition, though here he has not only the Condition, but also a legal Right, by 10 W. 3, c. 14, to redeem the Land after Forfeiture, at any Time within three Years after Entry for the Condition broken.

The Mortgagor, continuing in Possession, doth not hold the Land in his own proper Right here, any more than he doth in England, but is Tenant at Will of the Mortgagee here, as much as there; the Land therefore cannot be attached and taken in Execution as Land belonging to the Mortgagor in his own proper Right in Fee, by Force of 6 G. 1, c. 2, because the Land is not his, nor has he any Estate in it. The Right the 10 W. 3, c. 14 gives him to redeem the Land doth not give him any Estate in it before it is redeemed and reconveyed, any more than the Right in Equity to redeem doth, in England; that is but a naked Right, and cannot
cannot be taken by Execution there; Here, indeed, the legal Right the Mortgagor hath to redeem may be taken in Execution for satisfying his Debts: But the Creditor cannot avail himself of any more than what the Land is worth, above what it is mortgaged for: If the Mortgagor's Creditor by Execution does not pay the Money due on the Land to the Mortgagee, he cannot have the Land; nor has he any Estate in or Right to it, but upon Condition of paying the Mortgage Money, &c., to the Mortgagee.

Where the Land is mortgaged for the full Value of it or more, the Right of Redemption is not only a naked Right, but it is of no Value to the Mortgagor, cannot be attached or taken in Execution by his Creditors with any Advantage to themselves, and, therefore, will not. In such Cases, then, if the Land cannot be taken in Execution as the Mortgagee's Estate, it will not be taken at all, but must be exempt so long as it is redeemable; which may be an hundred Years after the Forfeiture for the Condition broken. That, surely, will be of no Advantage to Trade or the Community.

But why may not the Land be taken as the Mortgagee's Estate for satisfying his Debts, as well as the Mortgagor's Right of Redemption may, for satisfying his? If it belongs to the Mortgagee in his own proper Right in Fee, it doubtless may, by Force of ye Province Law, 8 W. 3, c. 3. Where doth or can the Estate in Fee in the Land vest, if it doth not in the Mortgagee in Fee? It must be in him or the Mortgagor or in Abeyance.
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It is plain it cannot be in the Mortgagor, nor can a Feoffment or Grant of Land in Fee annihilate the Estate in the Land, any more than it doth the Land itself. It serves only to pass *y* Land and the Mortgagor's Estate in it to the Mortgagee; therefore the Estate in Fee cannot be in Abeyance. Then it must be in the Mortgagee in Fee; and that as soon as the Grant is made. It is not granted *in Futuro*, but *in PRESENCE*. Upon the executing, acknowledging and recording the Deed, all the Mortgagor's Estate in the Land passes with it to the Mortgagee, and all the Estate then vest in him, that can vest. There is no future Act to be done by the Mortgagor or Mortgagee to make *y* Estate vested in the Mortgagee, or to devest the Mortgagor of it. By the Mortgagor's performing the Condition upon which the Estate in the Land is granted, and the Mortgagee's acknowledging it in the Margin of the Record, the Land and the Mortgagor's former Estate in it, upon his Entry, will return to him, and he will be in as of his former Estate. That is, *y* Estate in Fee will be vested in *y* Mortgagor so as to avoid all these Incumbrances. But, if the Condition be not performed, nor the Land redeemed within the Time limited by Law, the first Grant remains in Force, and the Estate at first granted to *y* Mortgagee remains and continues in him without any Increase of Estate at all. Though the Land be irredeemable, the Mortgagee's Estate in the Land is not enlarged, though it may be more certain and durable, as Lord Coke says. 1 Inst. 18. And it is evident that *y* Makers of *y* Stat. 4 and 5 W. 3, c. 16, so understood it, when they provided that a second Mortgagee, without Notice of
the first, shou'd hold the Land for such Estate and Term therein, as was granted to him against the Mortgagor, &c., freed from y* Equity of Redemption as fully as if y* Land had been purchased absolutely and without Liberty of Redemption. See y* Stat. or 3 Bac. Abr. 648.

No possible Inconvenience can attend the attaching and taking in Execution the Lands mortgaged for satisfying y* Mortgagee’s Debts, as to y* Mortgagee, beyond what would attend y* taking his other Real Estate in Execution. Nor will any other Inconvenience attend the Mortgagor than doth every Purchaser of Real Estate: He may redeem it as well after it is taken in Execution as before. If the Whole is taken in Execution and the Year is elapsed, the Land is become irredeemable by y* Mortgagee; and then, if y* Mortgagor pays y* Money to y* Creditor by Execution, who, in Fact, holds the same as a Purchaser, his Reconveyance of y* Estate to y* Mortgagor is sufficient. If but Part of y* Land is taken, and the Mortgagor would redeem, the Mortgagee and his Creditor may together, on Payment of y* Money, reconvey y* Estate. If they will not do it, y* Mortgagor may file his Bill against them, and upon lodging y* Money in Court, they must reconvey y* Land to y* Mortgagor, or he will have Judgment and Execution for Possession of it.

It is true, the Mortgagor may pay y* Money to y* Mortgagee, after his Creditor has attached the Land for his Debt, without y* Mortgagor’s knowing it is attached, and thereby lose his Money: And
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so a Purchaser may purchase Land after it is attached, and thereby lose his Money; but that has never been thought sufficient to prevent a Debtor's Land being attached and taken in Execution for satisfying his Debts.

It might be of Advantage to make such Attachments more public, by certifying them to the County-Register, or otherwise. If Lands mortgaged could not be taken for y° Mortgagee's Debts, not only the Land will be exempt, but y° Money also. For, as our Mortgages in general are without any Bond, or Covenant in the Deed, the Money cannot, upon the Mortgagee's absconding, be attached in Hands of the Mortgagor; for here such a Mortgage is only a Conditional Sale, and none of the Executive Courts can compel the Mortgagor to repay the Money. 3 Bac. Abr. 638, 9. Cro. Jac. 281. Yelv. 206. 2 D'Anv. Abr. 53.

Though it may be a Debt in Conscience, neither the Justices of the Inferiour Court or Superior Court have, by Force of the Prov. Law 10 W. 3, c. 14, the Power of the Court of Chancery in such Cases. Their Power is limited. All the Power they have for determining Cases in Equity is given them by that Act, and the obliging a Mortgagor to redeem the Land comes neither within the Words nor Meaning of the Act. So that, if the Land cannot be taken as Mortgagee's Estate to satisfy his Debts, he may have Ten or a Hundred Thousand Pounds secured to him by the Mortgage, which his Creditors, by no Possibility, can come at; he may shut himself up and bid Defiance to them all. Surely
Surely this is not to be endured, if it can possibly be avoided: Much less should first Principles of Common Law, Judgments and Determinations of the Common Law Courts and Courts of Chancery also, be set at Nought and disregarded in Order to subject Creditors to so great an Evil.

It has been objected, that, if the whole Estate in the Land is in the Mortgagee in Fee, all after Deeds of Conveyance of the Land, made by the Mortgagor, must be void and ineffectual to pass the Land to the Purchaser or give him any Estate in it, and all such Purchasers must lose the Land they have paid their Money for, and supposed they held in Fee Simple.

This was said without due Consideration, — for, although Nothing doth, in Fact, pass by such after Deed, but ye Mortgagor’s Right of Redemption, yet, as between the Grantor and Grantee, it is a good Grant of the Inheritance. It enables the Purchaser to redeem the Land, obtain Possession thereof and a Release of the Mortgagee’s Right and Interest in and unto the same. By the Mortgagor’s releasing to the Purchaser in actual Possession of the Land, the Estate which the Mortgagee had in the Land passes to the Purchaser, and he thereby becomes seised in Fee of the Land.

If the second Deed be made before the Time appointed in the Mortgage Deed for the Payment of the Money, and the Money is paid at the Day, and the Mortgagee acknowledges the Payment thereof on ye Record, that, by the Prov. Law 9 W. 3.
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3, c. 8, discharges the Mortgage and bars all Action thereon, (6) so that neither the Mortgagee, his Heirs or Assigns can demand or recover the Land; and the Estate in Fee which he had in the Land passes to the Purchaser with the Land, or reverts in the Mortgagor: If it passes to the Purchaser, he has it directly: — If it reverts in the Mortgagor, his second Deed estops him and his Heirs from demanding the same; for, as between the Parties to that Deed, it is a Conveyance of the Inheritance, and the Grantor and his Heirs, at least, are estopped to say the Contrary; and the Purchaser being in Possession of the Land, and the second Deed being acknowledged and registered, the original Mortgagor cannot grant or convey the Land to another; and so the Purchaser will thereby be quieted in the Possession of the Land, and it will descend from him to his Heirs, as an Inheritance.

Such Purchasers, therefore, are in no Danger of losing their Estates by the Court's determining, that a Mortgagee in Fee has an Estate in Fee in the Land mortgaged, as not only the Common Law Courts, but also the Courts of Equity have before done.

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**Note.**

The foregoing opinion is by Judge Trowbridge, the original MS. in his handwriting, though without title, having been found among his law papers, to which the editor was allowed access by the kind-ness of E. T. Dana, Esq. The same point was decided in *Symes v. Hill, ante*, 318, and, among John Adams's papers, we find minutes of this

(6) Anc. Chart. 304.
this opinion, and of the arguments of counsel, under the joint title
"Symes vs. Hill & Hooton vs. Grout,"—suggesting the probability that
both cases were argued together, so far as they were supposed to depend
on this question of the liability of mortgaged estates to attachment.
But it would seem that the latter case must have been in fact decided on
the first point raised by the special verdict, — viz., the effect of the leaving
the assignment for record, — as the only other ground for judgment
for the defendant would have been that the estate of a mortgagee was
not attachable. Such we might have thought the decision in the case,
overruling Symes vs. Hill, and that this opinion of Trowbridge was a dif-
senting one, but for the facts above mentioned tending to show that the
cases were argued together and that this opinion was the result, although
the point was necessarily decided in the case of Symes vs. Hill alone.

The law in this commonwealth has long been settled in opposition to
the doctrine here laid down. 13 Mass. 207. 16 Mass. 345. 3 Pick.
484. Another opinion upon the same point by Judge Trowbridge, of
which the original also remains among his papers, is published in the
supplement to 8 Mass. 551.
A SEIZED in Fee of Land in Cambridge, by his Deed, in Consideration of £50, bargains and sells it to B, who enters and improves the Land as his own for several Years; and, while he is so possessed thereof, A, for £50 more, paid by C, by another Deed, bargains and sells y\textdegree{} Land to him, acknowledges the Deed, and it is recorded before the first; after which the first Deed is recorded, — wherein these Questions arise:

1. If, by y\textdegree{} 2d Deed, y\textdegree{} Land, or any Estate in it passed to C.

2. If the Land, at y\textdegree{} Time of y\textdegree{} making y\textdegree{} 2d Deed, might have been lawfully taken in Execution by a Creditor of A. for Satisfaction of his Debt.

(1) The following opinion is without title, and occurs in the MS. between the memoranda at August Term 1769, ante, p. 316, and some unfinished notes of a case in Middlesex at October Term, 1771. In the case of Foxley v. Richardson, October Term 1770, in which the reporter was counsel for the defendant, this point was raised and decided as above. See Judge Trowbridge's reading on the provincial registry act, in the supplement to 3 Mass. 579. We should have supposed it probable that the opinion here copied into Quincy's book was that of Judge Trowbridge in the case referred to, but that the facts do not correspond: the land in Foxley v. Richardson being situated in Woburn, and the consideration in the deeds being also different. Whether these discrepancies can be accounted for on the supposition that the opinion was written out some time after the argument, and without the papers or record for reference, we leave the reader to judge.
In Order to determine these Questions aright, it will be necessary to consider not only y* Prov. Law 9 W. 3, 8, but how y* Law stood when that Act was made.

The Statute of 27 H. 8, 10, commonly called y* Statute of Uses, after reciting in y* Preamble, that "by y* common Laws of y* Realm, Lands, "Tenements and Hereditaments, be not devisable "by Testament, nor ought to be transferred from "one to another, but by solemn Livery of Seisin, "Matter of Record, Writing sufficient made bona "Fide without Covin or Fraud," enacts "that when "any Person shall be seised of Land," &c. "to the "Use, Confidence or Trust of any other Person or "Body Politic, the Person, or Corporations intitled "to the Use in Fee Simple, Fee Tail, for Life or "Years, or otherwise, shall from thenceforth stand "and be seised or possessed of y* Land, &c. of and "in y* like Estates as they have in the Use, Trust, "or Confidence; and that the Estate of y* Person "so seised to Uses shall be deemed to be in him or "them that have y* Use, in such Quality, Manner, "Form and Condition, as they had before in y* "Use."

At common Law, a Bargain and Sale was a real Contract, whereby y* Bargainer, for a pecuniary Consideration, bargained and sold, or rather contracted to bargain the Land to y* Bargaineer, and became, by such Bargain, a Trustee for, or seised to the Use of y* Bargaineer, and the above Statute of Uses compleated y* Purchase; thus, as y* Bargain vested y* Use, y* Statute vested y* Possession in him y*
1770. ANONYMOUS.

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had use, so soon as it arose, and thereby use became compleat Owner of use Land, in Law as in Equity. 2 Bla. 338.

But, to prevent clandestine Conveyances of Freeholds, use Statute of 27 H. 8, 16, commonly called use Statute of Inrollment, was made, whereby it is enacted, that no Land, &c. shall pass from one to another, whereby any Estate of Inheritance or Freehold shall be made or take Effect, or any use thereof be made, by Reason only of any Bargain and Sale, except it be made by Writing indented, sealed, and inrolled in one of use Courts of Westminster or in use County or Counties where use Land lies, before the Custos Rotulorum, &c., within six Months after the Date of use Indenture.

All Conveyances made by a Bankrupt of his Land, &c. are, by the Statute of Eliz. & James, made void, and use Commissioners are expressly empowered to sell and convey use same by Deed indented and inrolled in one of use Courts of Record, although they may have been conveyed by use Bankrupt to another; and such Conveyances by use Commissioners are made good and effectual in Law. But no Time is limited for the inrolling use Deed.

In 1641, the Massachusets Colony made an Act, that no Mortgage, Bargain, Sale or Grant made of any Houses or Lands, Rents or other Hereditaments, where use Grantor remained in Possession of use Lands, should be of any Force against any other Person, except use Grantor or his Heirs, unless use same be acknowledged before some Magistrate and
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and recorded by y* Clerk of y* County Court where y* Land lies. Old Colony Law Book, 33. (2) And in 1652 they made another Law, that no Sale or Alienation of Houses and Land should be held good, except it was done by Deed, and Possession delivered upon Part in y* Name of y* Whole, unless y* Deed be acknowledged and recorded according to Law. Idem, 32. (3) No Time is limited by either of y* Acts, for recording the Deed.

By y* Province Law 9 W. 3, 8, (4) it is enacted, that all Deeds or Conveyances of any Houses or Lands, signed and sealed by y* Party granting y* same having good and lawful Right and Authority thereto, and acknowledged by y* Grantor, before a Justice of y* Peace, and recorded at Length in y* County where y* Lands lie, shall be valid to pass y* same, without any other Act or Ceremony in the Law whatsoever. And, that, after three Months, no Bargain, Sale, Mortgage or other Conveyance of Houses or Lands, made and executed in the Province, shall be good and effectual in Law to hold such Houses or Lands against any other Person but y* Grantor and his Heirs only, unless y* Deed thereof be so acknowledged and recorded; and y* Act requires y* Register to note y* Time when y* Deed is received by him into y* Office, and y* y* Record shall bear y* Date; but no Time is limited for recording y* Deed. This Act and the Old Colony Law also empowers y* Grantee to compel y* Grantor to acknowledge y* Deed; and this Act provides that y* Vendee, by filing a Copy of y* Deed proved in

in ye Register's Office, shall thereby secure his Title in ye mean Time, and that it shall be accounted sufficient Caution against purchasing ye Estate in ye Deed granted, and there is a Clause in ye Old Colony Law of the like Import.

Upon ye Whole, it is observble, that there is a material Difference between ye Statute of Inrollment and ye Statute of Bankrupts, as to Time of inrolling ye Deed; ye latter limiting no Time, but ye former making it absolutely necessary to be done within six Months from ye Date of ye Deed; else no Estate passes or Use arises by ye Deed. If ye Indenture of Bargain and Sale be such as would have raised a Use at common Law, and is inrolled within ye six Months, ye Inrollment has such a Relation to ye Deed, as that ye Land passes from ye Execution of ye Deed, not by Force of ye Statute of Inrollment, but by Force of ye Deed, that raises ye Use to ye Bargainee, so soon as it is made, and the Statute of Uses, that vests ye Possession so soon as ye Use arises. Hob. 136. Cro. Ja. 408, Dimmock's Case. 2 Jones, 196, Perry v. Bowers.

Upon a Question, whether ye Vendee of ye Commissioners on ye Statutes of Bankrupts, of Lands, by Deed indented, could maintain, by his Leesee, an Ejectment before Inrollment of ye Deed, though it was inrolled after Action brought, it was held by ye King's Bench, that he could not, because ye Conveyance must be by Deed indented and inrolled, and that it would be very inconvenient and dangerous to admit of Relation, no Time being prefixed for

* 2 Inst. 673.
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for ye Inrollment, which might be 7 or 20 Years or more after ye Execution of ye Deed. 2 Jones, 196, and 1 Vent. 360, Perry v. Bowers.

Whether ye Makers of ye Old Colony Law or ye Province Law knew of these Determinations is not certain, but it is highly probable some of them did, and, to avoid ye Inconveniences that might attend a Relation, they thought it best to prefix no Time for recording ye Deed, and, for that Reason, among others, did not do it: But, instead of it, the Province Law requires the Register to note ye Time when ye Deed is received by him into ye Office, and that ye Record shall have that Date; which, to be sure, is altogether vain, if the Recording is to have ye like Relation to ye Execution of ye Deed, as ye Inrollment within six Months has; but is necessary, where ye Estate is not to pass, to every Purpose, untill ye Deed was recorded: and, was it not for ye Exception in ye restrictive Clause of ye Province Law, as well as ye Old Colony Law, of "ye Grantor and his Heirs," there would be ye same Reason for ye Estate's not being adjudged to pass here in any Case or to any Purpose, untill ye Deed is recorded, as there is for its not doing so on Sales made by ye Commissioners of ye Bankrupt Estates.

But, although ye Estate doth not pass, here, so as to avoid all mesne Conveyances, untill ye Deed is recorded, it doth not thence follow, that it doth not pass before to some particular Purposes, and yet not to others,—as, in all fraudulent Conveyances, ye Estate

* Qy. If ye Estate is not in them; and also, if ye Matter of ye Exception would not have been implied. See 3 Co. 8a b.
Estate passes from ye Grantor to ye Grantee, although ye Deed be void as to Creditors: So, here, if ye Deed be such as would have raised a Use at Common Law, it vests ye Use in ye Vendee upon ye Execution of ye Deed, and ye Statute of Use vests ye Possession in him that has ye Use, so soon as it ariseth, whereby ye Purchase is compleat as between ye Parties, though not with Regard to others. This is what is meant and intended by ye Deed's not being good and effectual to hold ye Estate against any other Person, except ye Grantor and his Heirs, unless it be recorded.

The Vendee cannot, with any Propriety, be said to hold ye Estate, until he has it; the Estate don't remain in ye Vendor untill ye Deed is recorded: The Grantor, between the Execution and recording ye Deed, has no Right of Entry into ye Land, nor can he recover it by Action, nor will it descend to his Heirs, ye Deed being effectual in Law, without recording, to hold ye Land against ye Grantor or his Heirs. But, on the other Hand, if, upon ye Delivery of ye Deed, ye Grantee enters into ye Land, as he has a Right to do, he may convey it, and, if he doth not, but dies seised of ye Land, it will descend to his Heirs, although ye Deed be not recorded; which would not be the Case if ye Estate never vested in him; for he could not convey that which he had not; and very great Part of ye People of ye Province hold their Estates by such Titles.

If, upon ye Delivery of ye Deed, ye Grantee enters, holds and improves ye Land as his own, while he is so possessed thereof ye Grantor cannot, by a second
second Deed, convey * Land to another; for, although * second Deed should be recorded before * first, yet neither * Land nor any Estate in it will pass to * second Bargaine, because no Use would at Common Law have arisen by such Deed. Lord Coke, in his 2 Inst. 673, says, * Statute of Inrollment is to be intended of lawfull and effectual Bargains and Sales, such as would have raised an Use at Common Law; and doth restrain * Execution of them only that would be of Effect, if inrolled in six Months.

That Rule holds good here. The second Bargain and Sale cannot be better than it would have been, had there not been a first. And "that no Man can, by Deed, convey Land to another, which a third Person is in Possession of, claiming it as his own"* is a Maxim of * Common Law which is by no Means altered by * Province Law. That rather confirms and establisheth * Rule: For it enables no other Persons to convey Land by Deed acknowledged and recorded, but such as "have good and lawfull Right and Authority to do." And, though this Clause, when taken together with * restrictive Clauses in * Act, must be construed to extend to such Persons as have an apparent Right and Authority to convey, yet that don't destroy, but establisheth * Rule of * Common Law; since no Man has even an apparent Right to convey Land to another, that a third Person is in Possession of, claiming it as his own.

Blackstone

* 9 Inst. 266.
Blackstone says, a Lease for Years gives ye Leesee a Right to enter, and when he enters, he is then, and not before, compleat Tenant for Years. — That such Entry serves ye Purpose of Notoriety, as well as Livery of Seisin from ye Grantor would have done. 2 Bla. 314. If so, surely ye Entry of ye Bargaineer, having a Deed which not only gives him a Right of Entry into ye Land, but vests ye Fee in him, to certain Purposes at least, must alike serve ye Purpose of Notoriety. The Lease is not inrolled, any more than ye Deed is recorded, the former may be as secret as ye latter; and ye Entry and Occupancy, which is alike in both, equally serve ye Purpose of Notoriety. The Occupant, in both Cases, is prima Facie supposed to be the Owner of ye Land, and, upon Inquiry, will be found so. No fair Purchaser, in such Cases, is in Danger of being defrauded, if he uses ye Caution he ought to do. The Design of ye Province Law, as well as ye Statute of Inrollment, is to prevent fair Purchasers being defrauded and injured.

The restrictive Clause in ye Old Colony Law is expressly confined to Deeds made by a Grantor remaining in Possession after ye Grant, and ye Deed not recorded. A second Conveyance, in such Case, ought to take Place, because ye Grantor then was ye apparent Owner of ye Land, and an honest, fair Purchaser ought reasonably suppose him to be so.

The first Deed may be deemed fraudulent upon ye same Principles ye a Bill of Sale of Goods is, where they remain in Possession of ye Vendor; but when ye Deed is recorded or ye Grantee enters into Possession
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Possession of your Land, and improves it as his own, every one, thereby, is sufficiently cautions against purchasing your Land of your former Possessor, and is in no Danger of being injured or defrauded, unless it be by an Attempt to defraud a fair bona Fide Purchaser.

The restrictive Clause in your Province, though not in your very Words of your Colony Law, is of your like Import, and establishes your same Rule; it is designed to prevent clandestine Conveyances, operating to your Prejudice of bona Fide Purchasers; and it will have your desired Effect, if it be so construed, as that a Deed of Conveyance, not accompanied with Possession, nor recorded, may not prevent House and Lands or any Estate therein passing by such an after Conveyance as would have been effectual for that Purpose, had your first Deed never been made. The Words of your Act will well bear such Construction, your Act, so expounded, will stand with your Reason of your Common Law, and, therefore, ought to be so expounded: — If it is, it is plain, that Land will not pass by a second Bargain and Sale thereof, made while your first Bargainer is in Possession of your Land, claiming it as his own; and, consequently, that the second Bargainer cannot recover or hold your Land.

Nor can your Land, in such Case, be taken in Execution by a Creditor of your Bargainer for Satisfaction of his Debts; because it is not, in Fact, his Land, nor is it apparently so. He has no Estate, Right or Interest, in or to your Land, nor Possession of it, by himself or his Tenant. The Bargainer is not a Tenant at Will to your Bargainer, nor doth he hold your
y* Land in Right of y* Bargainor, but in his own
Right; nor is he a Disfeisor; the Deed gives him a
Right to enter into y* Land, and hold it against y* 
Bargainor, and, consequently, he is not a Tenant at
Will or a Disfeisor. He is a Tenant in Fee Sim-
ple; he may convey y* Land to another in Fee, or
devise it; if he does neither, but dies so seised there-
of, it will descend to his Heirs, and neither y* Land
nor any Right or Estate in it will descend to y*
Heirs of y* Bargainor.

Nor is y* Conveyance fraudulent in Fact, but is
a bona Fide Purchase, and y* Land is liable to be
taken in Execution for satisfying y* Bargainee's
Debts.—Surely, it is not y* Estate of both, and
liable to be taken in Execution for y* Debts of
both, at the same Time.

If it be objected, “that y* Conveyance will be
effectual against other Persons besides y* Grantor
and his Heirs, if y* Land may not be attached by
his Creditors, against y* Intent as well as express
Words of y* Act,” — in Answer thereto, it may be
said: — 1st, That y* Objection is of equal Force,
upon the Supposition that y* Land may be attached
as the Bargainee's Estate, by his Creditors; for y*
Deed, though not recorded, secures y* Land against
y* Bargainor and his Heirs, so that y* Bargainee
cannot be removed by them; and, if his not re-
cording y* Deed will also secure it against y* Bar-
gainee's Creditors, then y* Conveyance will not only
be effectual against other Persons besides the Grant-
or and his Heirs, but be a strong Inducement to
many Purchasers not to record their Deeds, left
their
their Land should be taken from them by their Creditors.

2. It is not by Force of y\textsuperscript{e} Deed of Conveyance only, that y\textsuperscript{e} first Grantee is enabled to hold y\textsuperscript{e} Land against y\textsuperscript{e} Creditors and Vendee of y\textsuperscript{e} Bargainor; but by that accompanied with an Entry and continued Possession, which Blackstone says is of equal Notoriety with Livery of Seisin; and that was y\textsuperscript{e} common Evidence of y\textsuperscript{e} Alteration of Property at Common Law. (5)

(5) Under the early registration acts, it was constantly held that open and notorious possession constituted such implied notice of a conveyance as to preclude a subsequent vendee or creditor of the grantor from taking advantage of a neglect to record the same. 2 Mas. 306. 4 Mas. 637. 6 Mas. 487. 10 Mas. 60. 1 Pick. 164. 3 Pick. 149. But since the Rev. Sts. c. 59, § 28, actual notice only will have this effect, which possession alone, however notorious, will not prove. Pomeroy v. Stevens, 11 Met. 244. As to what degree of knowledge will amount to actual notice of a prior deed, see Currit v. Mundy, 3 Met. 405.
May 20th, A.D. 1771.

Court of General Sessions of the Peace.

The Petition of the Jurors in the Trials of Captain Preston and the British Soldiers. (1)

At last August Term the Honourable Justices of the Superior Court passed the following Order:

"Ordered, that it be recommended to the Court of General Sessions of the Peace to make the Jurors that were impannelled and sworn for the Trial of Thomas Preston, Esq., and the Soldiers, as also the Officers who kept them, a reasonable Allowance for said Services: said Preston's Trial holding"

(1) The following report of this decision, and the remarks thereon, were published by Quincy in the "Boston Gazette," May 20, 1771, as appears by the memorandum endorsed upon the MS. In the celebrated trials of Capt. Preston and the soldiers indicted for the murder of Crispus Attucks and others in the "Boston Massacre," Adams and Quincy were counsel for the prisoners. A report of Preston's trial was taken in short hand, and sent to England, but has never been published. a John Adams's Works, 236. 10 lb. 201. A report of the trial of the soldiers was taken by the same hand, three editions of which have been published in Boston; the first in 1770, the second in 1807, and the last in 1834.
May, 11 Geo. 3.

"ing six Days, and said Soldiers' nine Days; said 1771.
"Jurys being kept together every Night by two or
"more Officers." (2)

(2) These trials would seem to have been the first in the province which lasted more than a day. Among Judge Trowbridge's papers is a list of "Trypts by Jury cont'd for several Days," which may have been drawn up for this case, and which comprises the trials of John Lilburne, 2 Hargr. St. Tr. 19, & 7 Ib. 354; Peter Cook, 4 Ib. 738; Capt. Kidd, 5 Ib. 287, and quotes from the trial of Elizabeth Canning, as follows:

"Emlyn in his Opinion says ye Law will not allow a Jury to go at
"Large in a Criminal Case while ye Tryal is depending but ye they
"may take Refresh'mts & retire to rest in a place provided for them if
"Guarded by a sworn Officer," &c., and that "Perhaps ye suffering ye
"Jury to go at Large in ye midst of ye Tryal may be Cause for arresting
"Judgm't. 10 Vol. State Tryal, 407."

In the margin of the record of Preston's case appears the following memorandum:

"N. B. The Court being unable to go through this Trial in one Day,
"the King's Attorney and the Prisoner confess that the Court shall
"adjourn over Night during the Trial; the Jury being kept together by
"two Keepers, one chosen by the King's Attorney, the other by the
"Prisoner or his Council; besides the Officer appointed by the Court."
Rec. 1770, fol. 52.

A like memorandum appears on the record of the trial of the soldiers, except that, in this case, the prisoners did not enjoy the privilege of appointing a keeper, "the Jury being kept together by proper Officers appointed & sworn by the Court." Rec. 1770, fol. 52.

In 23 Mass. Archives, 414, appears the following letter, written by Oliver to Hutchinson during the trial of Preston; Hutchinson having ceased to act as Chief Justice, shortly after assuming the administration in consequence of the departure of Governor Bernard. See ante, p. 316.

"Dear Brother,
"Saturday Night.
"After having had the Pleasure of seeing you to Day, I now give
"myself the Pleasure of writing to you. I know you think you would
"have finished the Cause in half the Time, & I know it would not have
"taken half a Day at the Old Bailey; but we must conform to the
"Times. We have not finished yet. Mr. Paine has now to close for
"the
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In Consequence of this Order, the Jurors above named petitioned the Court of Sessions for the above Allowance, and the Court, having a Doubt of their Power touching the Grant of the Prayer thereof, ordered the Petition to stand over for Argument at the Sessions in April; and, on last Wednesday, the power of the court to grant the Prayer of the Petitioners was argued by four Gentlemen of the Bar (pro & con) by Desire of the Honourable Justices of the Sessions.

It seemed agreed by Bench and Bar that the only Power of the Sessions to grant Monies must be derived from provincial Law; that such a Power could be derived from no where else. — And the Question was, whether the Act of 4 of W. & M. c. 12,

"the Crown, & he was so unfit, that to avoid as much as possible all popular Censure we indulged him till Monday morn; for Mr. Auch-
muty did not finish till ½ past 4 o’clock. We shall finish I believe by one or two o’clock on Monday. Hard upon the Jury, you say, it is "so, but we have allowed them the Liberty of the Court House to-mor-
row with their Keepers. It is best on the whole.

"I have a Quarto Volume of Evidence which I have pretty minutely "taken. I have reviewed it, & it turns out to the Dishonour of the In-
habitants, & appears quite plain to me that he must be acquitted; that the Person who gave Orders to fire was not the Capt., & indeed if it had been he, it at present appears justifiable. What the Verdict will "be, Monday I suppose will declare.

"I shall be glad to be released from this Prison, but it will be only an "Exchange to others.

"Farewell, Dear Brother.

"Yours affectionately,

"To

"His Honour

"Mr. Hutchinson,

"Milton."

"PETER OLIVER."
May, 11 Geo. 3.

c. 12, (3) gave the Court a Power to grant Monies for the Allowance before mentioned.

The Act is intituled "An Act for the Settlement of the Bounds and defraying the publick and necessary charges arising within each respective County in this Province." "And for the due and equal raising of Monies for defraying of the Charges arising within each respective County, for the necessary Repairs and Amendments of Bridges, Prisons, the Maintenance of poor Prisoners, and all other proper county charges, It is enacted, that, when and so often as there shall be need of raising money for the ends aforesaid in any County, the Justices in Quarter Sessions for such County receiving Information thereof from the County Treasurer, shall agree and determine the whole Sum to be raised, &c., and issue their Order," &c., "to assess the same upon the Inhabitants," &c.

The Debates at the Bar took up the Day. And the Justices after this solemn Hearing (only Mr. Justice Dunbar doubting) were unanimously of Opinion that the Prayer of the Petition of the Jurors should not be granted; and the Petition was accordingly dismissed.

It gives a most sensible Pleasure in these Times to find a Court of Justice deciding a Point of Law against an Extension of their Power: especially as that

(3) Anc. Chart. 345.
that Power would affect the Purse of the Subject. — This Decision is of no small Moment; its Importance will appear more conspicuous upon a close Examen and Reflection. However, it is yet a Matter of deep Concern with some that the Superior Court seem to entertain a different Opinion on the Point in Question. They ordered a Recommendation of the Allowance to be made. They are presumed to know the Law, and we are willing to suppose they would not influence, and much less recommend to a subordinate Court the Exertion of an illegal Power; a Power derogatory to the natural and primary Right of the Subject over his Property; and of the highest Consequence to the Community, considered in a separate or collective View.

The Existence and Exertion of such a Power in the Sessions are of very extensive Concernment; we therefore imagine all due Consideration was had at passing the above Order of Recommendation: and, if so, does not a becoming Deference to the Supreme Court lead us to conjecture that they were of Opinion that the Court of Sessions was by Law vested with Power to take Money out of the Pockets of the People to make that Allowance which it was thought expedient thus formally to recommend?

{ Printed in Boston Gazette (Edes & Gill) }
{ Monday, May 20, 1771. }

Motto:
Intelligentibus.
December, A.D. 1763.

Curia Admiral.

Coram Honor.
Chambers Ruffell, Armiger.

Bishop vs. Brig Freemason.* (1)

Mr. Auchmuty. I shall consider first the Act of 15 Car. 2. (2) The Words are confined to Importation. Importation is to be a Forfeit; this


(1) This was a libel by Captain Bishop as a Custom House Officer, against the Freemason, as forfeited for importing European goods not shipped in Great Britain, in violation of the Act of 15 Car. 2, ch. 7, § 6. See note at the end of the case. Auchmuty was Advocate General — Gridley & Thacher for the claimants. No copies of the proceedings can be found, for most of the Admiralty records and files of Court prior to 1765 were destroyed in the stamp act riot of the 16th of August, in that year, (3 Minot's Hist. Mass. 215. Ante, 169,) and what remained are supposed to have been carried away, either to Halifax or England. 10 John Adams's Works, 205, 354.

(2) The act of 15 Car. 2, c. 7, § 6, provides that "no Commodity of the Growth, Production or Manufacture of Europe shall be imported into any Land, Island, Plantation, Colony, Territory, or Place to His Majesty belonging" "in Asia, Africa, or America, (Tangier only excepted)
December, 4 Geo. 3.

this four Times mentioned in the same Act; from this I reason that 'tis not a Landing that is required, but that a bare Importation will be a Forfeit. 15 Car. 2, ch. 7, § 6, p. 16. Acts of Parliament are to be construed as we find them; Courts have no Power to controul them. Foster's Crown Law, 20, 21, Alexander Kinlock & Chas. Kinlock, two Persons indicted for Treason; special Plea, that, by Custom, they were to be tried in Scotland: — This, only to shew how Acts are to be construed. — The Offence is allowed to be within the Letter, but not within the usual Construction. That the Vessel has imported these Goods is very certain. She was some Time below, was above the Castle (3) some Time. (He then observes upon the Evidence to shew there was a Design of fraudulent Importation.)

2. Whether she is within the Meaning of this Act, which is for the Encouragement of Trade: What the Trade is that is to be encouraged, Sec. 5 shews: It is to render Great Britain the Staple. The only sensible Meaning of Importation is Bringing in, exclusive of Landing. 13 & 14 Car. 2, ch. 13, shews this ought to be the Construction. In the same Sense 'tis taken in 13 & 14 Car. 2, ch. 19, and in 13 & 14 Car. 2, ch. 11, §§ 22, 23, and in 22 & 23 Car. 2, ch. 26. From these Acts, I think it was evident that Bringing in is all they meant by Importation,

"cepted) but what all be bona fide and without Fraud laden and "shipped in England, Wales or the Town of Berwick upon Tweed, and "in English built Shipping."

(3) Castle Island, on which Fort Independence now stands, is within the mouth of the harbor, and about two and a half miles from the city.
tion, as all these Acts use the Words. The Statute 6 Geo. 2, ch. 13, §§ 2 & 3, makes a Distinction between Landing and Importing: They designed to make a Distinction between Goods that are cussoomable, and not forfeited till Landing, and those which, being prohibited, are forfeited by bare Importation. If these Laws should be otherwise construed, they would be completely evaded. — For, if they have not a fair Opportunity of Running, they will Report. The Consequences of this Act to any particular Plantation cannot now be considered. There is a great Difference between Goods that may be imported and pay a Duty, and those which are absolutely prohibited.

Mr. Thacker. I ask no Favour against Law. There is a Preliminary to be settled before the Merits. I question the Power the present Libellant had to seize — and, if so, the Seizure is absolutely void. (Upon this, Capt. Bishop's Commission was read, which was from three of five Commissioners of the Customs — and a Power to seize such and such contraband Goods wherever he should find them.) By the 13 & 14 of Car. 2, ch. 11, § 15, none but an Officer can seize. 2 Strange, 952, Horne v. Boasey. If seized and condemned, the Owner shall afterwards recover in Trover, if the Person who seized was not a proper Officer. Now, every Officer is to be over some Port, Harbour, Town, &c.; Captain Bishop's Commission is general. No Plantations are mentioned, but it extends through the Globe. Have the Commissioners alone a Power to grant such Commissions? I can't find their Appointment, therefore suppose that it is by the King's Prerogative,
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Prerogative, and that he might farm the Customs or appoint Commissioners. This, with Regard to the Realm, not the Plantations, as their Planting is within Memory. There were no Officers for a long Time known as Officers of the Customs, but they were ordered to the Governour, or Officers by him appointed. And 'tis by express Acts of Parliament that their Appointment here is. 25 Car. 2, ch. 7, § 4. I find by the Records in the Council-Chamber, that the Commissioners ground themselves upon this Act, which respects only Collection of Customs. 'Tis 7 & 8 W. 3, ch. 22, § 11, this Warrant is grounded, if upon any. By this Act, Power is given to the Lord Treasurer or Commissioners of the Treasury (these are synonymous) and the Commissioners of the Customs, jointly. This Warrant is only from the Commissioners of the Customs, whereas no exclusive Power is given to either. Further, Officers who shall be thus appointed shall be particularly limited, they are still to appoint in some particular Place, and over some particular Department. By the 13 & 14 Car. 2, ch. 11, § 14, it seems that the Officers, even in England, are limited; and it seems to be divided into Districts Officers are obliged to reside in; so that, had there been no Claim, the Party might have brought his Action. This late Act gives no new Power, but only to appoint Ships. There is an Act in 10 of Wm. 3, which impowers Ships to seize, which is only on the Coasts, and this is only to extend that coasting Power to the Plantations.

Let us consider whether it comes within the Letter of this Act. If any Vessel approaches or comes into
into a Port, without any Intent to unload, shall her Cargo be said to be imported? Can a Thing be said to be imported, because the Vessel that holds it comes into Port? What Mischief do they mean to suppress? 'Tis lawfull for us to be Carriers from one French Port to another. Shall then an English Vessel, Carrier for other Nations, leaking and wanting Provisions, with Liberty from the Owner to touch at an English Port for a few Days to procure Stores, not be permitted to touch at such English Port? I challenge an Instance of a Seizure on this Act, till Landing or Bulk broken. Can it be said that this Stopping is the Mischief? 'Tis supplying the Colonies that is intended to be prevented. This will be still plainer from several Acts the Advocate has cited. 13 & 14 Car. 2, ch. 13, § 2. What they mean by Importation is bringing in as Merchandize, ch. 19, § 2. The Meaning must still be the same.

Mr. Gridley. The Expression in this Libel, that they are imported into the Port, is different from the Language of the Act, which generally runs, “imported into any Lands, Territories,” &c. The importing into a Port, is quite a different Thing from importing into a Land or Territory. In the 15 Car. 2, upon which this is grounded, it is, ‘imported into any Island,’ &c. and to lay any Thing is imported into any Land without Landing, seems to be downright Solecism. The Wisdom of the Nation has seen fit to gain a Profit from Merchandize, but still that the greatest may still remain with the Merchant. Shall such a Catch as this be the Design of the Wisdom of the Nation?
December, 4 Geo. 3.

tion? 28 Edw. 3, ch. 13. 20th R. 3, ch. 4. These were before the feudal Tenures were taken away, and, upon their ceasing, Customs were introduced. Carkeffe, Book of Rates, 767, 772. In the Act of Tonnage and Poundage, instead of importing, it is said, brought into England, 12 Car. 2, ch. 4. 15 Car. 2, ch. 7, § 8, shews there is importing by Land, so that the Word can't have a neccessary Regard to Port. 7 & 8 of Wm. 3, ch. 22, §§ 6, 14, it is, to put on Shore. 9 & 10th of Wm. 3, ch. 43, § 1, is an Importation into a Port. 10 & 11 W. 3, ch. 10, § 19, Export is by Land,—so is 11 & 12 W. 3, ch. 10, § 3. Never was an Instance of importing into a Port being an Importation. (4)  

(4) The report of this case in the MS. here breaks off. A full statement of the facts, the questions raised, and the decree of the Court, appears in the following letter from Governor Bernard to the Earl of Halifax, for a copy of which the editor is indebted to the kindness of Hon. Jared Sparks.

"My Lord, Boston, Decr. 2dth, 1763.

"Pursuant to the order received from Lord Egremont to fend to his office exact accounts of what shall happen in the execution of the Laws of trade, I proceed to give an account of the prosecution of the Brigantine & cargo, of the seizure of which I gave a short information in my letter dated Oetr. 25.

"The Brigantine Free Mason laden with french goods, chiefly wines, at Bourdeaux took her departure for Boston at which place she arrived (having first touched at Liverpool in Nova Scotia,) on fryday the 21st of Oetr. & came to anchor within the harbour about 6 miles distance from the Town. There she lay at anchor all the rest of that & the next day untill the Evening when it was dark, when she went up to town. Being hailed in passing the Castle, they answered, from Newcastle & being boarded by the Man of War's barge Theyanswered from Newcastle laden with Coals. But it appearing that the had a Cargo of Wine, Capt. Bishop commander of the sloop of War Fortune, who had qualified himself in this Province as a Custom house Officer, seised her. Soon after she was seized they owned that the Brigantine
December, 4 Geo. 3.

"antime was loaded with French Wines &c. & came from Bourdeaux being
"bound to St. Eustatia. And on the Monday following, being the first
"time the Custom House was open after the seizure, the Master made a
"report of his Cargo, (which in the course of the trial was falsified) &
his destination & prayed that he might be permitted to proceed to St.
"Eustatia. But the Captain, as a Custom House officer, by the advice of
"the Advocate General, libelled the Vessel & Cargo in the Court of
"Vice Admiralty as forfeited for importing European goods not shipt
"in Great Britain, contrary to the Act of the 15th of Cha. 2. Upon
"which the Vessel was claimed by owners living in this Province, & as
"for the Cargo, a claim was entered on the behalf of Mr.
"a French Merchant at Bourdeaux & Mr.
"a Dutch Merchant at St. Eustatia; and it was alleged that these goods were
"freighted by one to the other, and that leave was given for this Vessel
to take Boston in her way to St. Eustatia; and that they had a Right
to come into this Port so long as they reported & did not break bulk.
"This produced a Question very interesting to the Crown, that is,
"whether a Vessel laden with prohibited goods & pretended to be bound
"from a foreign European port to a foreign American port, might come,
"ever so much out of their way, into a British American port & there
"lie at anchor upon the credit of reporting her Cargo & pretended def-
tination. The affirmative of this Question had been pronounced to be
"law in some popular declamations in the causes which were carried on
"here against the Custom House officers about 3 years ago; but there
"never was a cause, that I know, in which this point was adjudged. I
"therefore determined, whenever a Case should happen in which this
"Doctrine should come into Question to oppose it with all my power;
"since it is obvious, that if this was determined to be law, it would be
"necessary to apply to Parliament for an amendment of the 15th of
"Cha. 2, since it would be impossible to prevent foreign European goods
"coming into America, if Vessels laden with such goods had a right to
"come to British American ports only by reporting the Cargo & a pre-
tended destination to a foreign Port.

"Upon this account I took upon me the overlooking the conduct of
"this prosecution in a manner more earnest & public than I have used in
"other causes of this kind. The Advocate General conducted it with a
"spirit & Judgment not to be enough commended. The most mate-
"rial Question was whether there could be an importation (fo as to for-
"feit) without landing. The judge having heard Council for two whole
days, gave his opinion that landing was not necessary to make an im-
portation contrary to that Act, & having shown how effectually the
"Act would be defeated if a liberty for Vessels laden with prohibited
"goods, to come into British Ports at their own discretion was allowed,
"& having marked out several particular Circumstances which showed a
"fraudulent intention in the present Case, decreed the Vessel & Cargo to
"be forfeited.

From
December, 4 Geo. 3.

"From this Decree the Claimants have appealed to the High Court of Admiralty. Upon this occasion I must, in parenthesis of the orders if better received in import to your Lordship, such misgiving may occur as may prevent any for the better execution of the laws of trade, earnestly recommend to your Lordship, that the defence of this Decree against the appeal may be supported at the expense of his Majesty. As one third part of this forfeiture is decreed to his Majesty, his interest in it requires the support of his Officers pro teste. But that is not all; if their extraordinary Custom house officers, whose service, as it's new, is the more inviolable, do not appear to have the public support of the Crown in what they do according to the best advice they can procure, I am convinced that a Combination will soon be made to distress & embarrass them by appeals & actions at common law for doing their duty in the most plain & positive cases. This I have been experienced in the Confederacy which was formed against the ordinary custom house officers of this port about 3 years ago, which was effectually discouraged by one instance only of a defence being carried on at the expense of the Crown.

Copies of the proceedings are making out, which, together with an abstracted state of the case & of the arguments used for the forfeiture, will be sent by the first opportunity. Capt'n Bishop has also joined a ship for loading with Rice without giving bond. I advised & assisted him in this profession, & the ship was condemned together with the Rice without any defence.

I am with great regard

My Lord your Lordships most, &c. &c. &c.

Fra: Bernard.

"The Rt. Hon'ble
"The Earl of Halifax."
APPENDIX I.

A. What are Writs of Assumpsition?

THIS term has been applied in the books of the law to many different processes, which may conveniently be classed under three heads.

1. Writs of assistance, more usually called "writs of aid," issuing from the Court of Exchequer, addressed to the sheriff, and commanding him to be in aid — "quod fit in auxilium" — of the King's tenants by knight service, or the King's collectors, debtors, or accountants, to enforce payment of their own dues, in order to enable them to pay their dues to the King. These writs are very ancient. (1) A like

(1) 1 Madox Hist. Exch. (3d ed.) 675, 677, 678, & notes. 2 lb. 192. Reg. Brev. 87 a. 1 Rapin Hist. Eng. (3d ed.) 404, which was cited by Otiis, ante, 55. 2 Bell Com. (4th ed.) 53. Manning's Exch. Prac't. in Revenue, (2d ed.) 74, 75, 323, 328, 333, where the forms of one of these writs and of the affidavit and fiat therefor are given.

One of the writs of aid in the Register (from what court issued is not stated) might almost be used for a precept to a marshal of the United States to assist the master of a fugitive from service under the Act of Congress of 1850, viz:

"REX vicecomiti saltem. Præcepimus tibi quod sì in auxilium A. de B. ubi ipse non susscit ad disponendum villanos suos de N. ad faciendum ei confuetudines & servitia debita & confecta. T. &c."

"De auxilio habendo ad disponendum villanos."

Reg. Brev. 87 b.

It is a curious coincidence that the word confuetudines, used therein, is

Different kinds of Writs of Assumpsition.

1. Writs of Aid in the Exchequer.
Appendix I.

like writ, issued in 20 James I., to levy debts due to the Prince of Wales, is entitled on the record "brevi de affis-
tendo." (2)

Under this head may conveniently be mentioned the
writs issued by King Edward I. to the Barons of the Ex-
chequer, commanding them to aid a particular creditor to
obtain a preference over other creditors of the same debtor,
out of a surplus of his goods remaining in the Exchequer,
after paying a debt due to the King, or to some other cred-
itor who had sued there. (3)

2. Writs to the sheriff, to affit a receiver, sequestrator,
or other party to a suit in chancery, to get possession, under
a decree of the Court, of lands withheld from him by another
party to the suit. These writs, which issue from the equity
side of the Court of Exchequer, or from any other Court of
Chancery, are at least as old as the reign of James I., and
are still in common use in England, Ireland, and some of the
United States. (4) But, whether from the odium attached
to the name here, or from the practice in this Common-
wealth to conform processes in equity to those at law, no
instance is known of such a writ having been issued in Mas-
sachusetts.

is the same word used in the old law books to denote customs on imports.
Magna Carta of H. 3, c. 30. 2 Infl. 58, 59. Lord Hale concerning the
Customs, Hargrave’s Law Tracts, 131 & seq.

(2) Manning’s Exch. Praet. in Revenue, 388, note.
(3) Memoranda in Scaccaria, 6, 13, 14. Manning’s Exch. Praet. in
Revenue, 75. 2 Madox Hist. Exch. 85, 86, & notes.
(4) Lord Hardwicke in Penn v. Lord Baltimore, 1 Ves. Sen. 454. 1
Sanders, Orders in Ch. 110, 237, 746, 879. "Brevi de Affi tens," in Reg.
Brev. app. 46, 47 — mentioned by Thacher, arguendo, 2 John Adams’s
Works, 523; post, D. 2 Fowler’s Exch. Praet. in Eq. 186. 1 lb. 161,
where a form is given. Greenblade v. Baker, 2 lb. 182, & Bunn. 168.
Cooper, 2 Hare, 412. White v. Philbin, Saufie & Scully, 88, & note.
1 Smith's Ch. Praet. 447-449. 1 Grant's Ch. Praet. (5th ed.) 132;
606, (the form). 2 Dan. Ch. Praet. (Amer. ed.) 1267, & notes, &
Praet. 97.
Writs of Affittance.

3. Writs of affittance to seize uncustomed goods were introduced by a statute of Charles II., (5) and were perhaps copied

(5) By St. 12 Car. 2, c. 19, (confirmed by Sts. 13 Car. 2, St. 1, c. 71; Anne, St. 1, c. 13, § 21; 9 Anne, c. 6, § 21; and 3 G. 1, c. 7, § 21,) if uncustomed goods are "landed or conveyed away without due entry thereof first made, and the customor or collector, or his deputy, agreed with, then and in such case, upon oath thereof made before the Lord Treasurer, or any of the Barons of the Exchequer, or chief magistrate of the port or place where the offence shall be committed, or the place next adjoining thereunto, it shall be lawful to and for" either of those officers "to issue out a warrant to any person or persons, thereby enabling him or them, with the affittance of a sheriff, justice of peace, or constable, to enter into any house in the day time, where such goods are suspected to be concealed, and in case of resistance to break open such houses, and to seize and secure the same goods so concealed, and all officers and ministers of justice are hereby required to be aiding and assisting thereunto." § 1.

"Provided always, That no house shall be entered by virtue of this act, unless it be within the space of one month after the offence supposed to be committed." § 2.

"Provided also, That if the information whereupon any house shall come to be searched shall prove to be false, then and in such case the party injured shall recover his full damages and costs against the informer, by action of trespass to be therefore brought against such informer." § 4.

By St. 13 & 14 Car. 2, c. 11, § 5, "it shall be lawful to or for any person or persons, authorized by writ of affittance under the seal of his Majesty's Court of Exchequer, to take a constable, headborough, or other public officer, inhabiting near unto the place, and in the day time to enter and go into any house, shop, cellar, warehouse, or room, or other place, and in case of resistance to break open doors, chests, trunks, and other packages, there to seize, and from thence to bring, any kind of goods or merchandise whatsoever, prohibited and uncustomed, and to put and secure the same in his Majesty's forehouse, in the port next to the place where such seizure shall be made."

Both these acts were repealed by St. 6 G. 4, c. 105, §§ 17, 19. But the substance of the provision of St. 13 & 14 Car. 2 as to writs of affittance has been repeatedly reenacted. Sts. 6 G. 4, c. 108, § 40; 16 & 17 Vict. c. 107, § 211. Hamel's Laws of the Customs, 215, & app. cx.

Writs of affittance continue in force until the demise of the Crown, and for six months afterwards. Sts. 1 Anne, St. 1, c. 8, § 21; 6 G. 4, c. 108, § 41; 16 & 17 Vict. c. 107, § 211. And they are not affected by the death, resignation, or removal of any of the commissioners named therein. St. 54 G. 3, c. 46.
copied from the sheriff's patent of assistance. (6) The book of precedents, (7) quoted at the first argument here in 1761, (8) is so rare, and the form therein given is so curious a justification of Otis's suggestion that it was framed "by some ignorant clerk of the Exchequer," (9) that it is exactly reprinted in the margin. (10) The same form, with very little

(6) By Sir Thomas Plumer, arguendo, and Lord Mansfield, C. J., in Cooper v. Boot, 4 Doug. 347. In Dalton's Sheriff is the following form:


(7) "Compendium of the Several Branches of Praetice in the Court of Exchequer at Westminster," by W. Brown. London, 1688. The copy once owned by Judge Lynde is in the library of the American Antiquarian Society at Worcester. The remnant of the first edition was published in 1699 as a second edition, and entitled "The Praetice of his Majesties Court of Exchequer at Westminster."

(8) 2 John Adams's Works, 523. 901. D. (9) lb.

(10) "EX, &c. Omnibus & singulis Officier' & Minist' qui 
nunc habent aut impostrum fumhabitur' aliquo Officier' 
"um potestatem vel auortitatem ab vel super Jurisdiction' Dom Magni 
"Admiralli feu Admiralista' regni nstoi Anglie Omnibus & singulis 
"Vice-admirallis Jufficiar' nstoi ad pacem Major' Vic' Confabular' 
"Ballivies Headboroughs ac omnibus alia Officier' Ministria & Subdit' 
"nostri de & infra quemlibet Civitatem Burgum Villam & locum hujus 
"regni Anglie dominii Wallie & vill' Berwici super Twed' & veltrum 
"cuilbet fultem Cum nos per literas nostras Paten' sub magnio figillo 
"nostro Anglie geren' dat' tertio die Decembris anno regni nostri 
"vicefimo septimo Assignaverimus dilectos nobis T. V. & R. B. Ar' 
"Collector' Custum nari infra Port' Dover & in omnibus locis & 
"crecis eadem Portui &c. (tab: the granting here in the Patent') 
"prout per easdem literas Paten' inter alia plenius liquet & apparet 
"Vobia
Writs of Assistance.

little change, is still followed in England, as appears by comparing the old writ with one issued in the first year of the present reign, for a copy of which the writer is indebted to Henry T. Parker, Esq., of London. (11)

"Vobis igitur & cuiilibet veitrum præcipimus & firmiter iungendo "mandamus quod omni excusatione cessante permittatis & quilibet veit-"trum permittat præfæt' T. V. & R. B. & eorum alterum deputat'" & servien' eorum & eorum quælibet de tempore in tempus ad eou"rum & cujuslibet eorù volunt' & placitum tam noél quam quæ intrare" & ire Anglice te geat an bæd' aliquam navem cimbam vel aliu "vas fluxuan' Anglice fæting jacen' vel exiiten' infra vel venien' ad "Portum præd' aut in aliquas Portus loca seu crecas eidem Portui adja"cen' talem navem cimbam vel vas tunc & ibidem invent' videre scrut"are & supervidere ac person' in eisdem friæte examinare tangen' vel "concernen' Cufuum & Subsid' nobis debit' Ac etiam in tempore di"utrum unacum Confabular' Prepositor Anglice Bradborough aut alio "publico officiariso prope inhabitant' intrare & ire in aliquas Cellas Ang"lice Vaults Cellar' Repositori' Anglice Warehouses Shopas vel alia "loca scrutare & videre utrum aliqua bon' res vel merchandizas in "eisdem navibus cimbas vel vañis cellis cellur' repositor' thopis vel alii" locis sint vel eirint ibi abcondit' vel concelet' exiiten' fat' vel induet' "vel ekippat' vel onerat' ad transportand' ab vel extra Port' D. pd aut "aliquos Portus vel crecas eidem Portui adjacen' Ac aperire aliquos "rificos Anglice Grunts cisfas pixid' fardell' Packs falt' vel de le Bulke "quecunque in quibus aliqua bona res vel merchandiz' erint supe' fore "paccat' vel concelet' Ac ulterioris ad faciend' et exeqvend' omnia ea "que de jure & fecundum legem & statut' hujus regni Anglie in hac "parte fuerit faciend' Ac vobis & cuiilibet veitrum præcipimus & firm"miter iungend' mandamus quod eisdem T. V. & R. B. deputat' & "servien' eorum & eorum cuiilibet in executione praæfìorum de tempore "in tempus auxiliantes asfìsten' & adjuvan' fist' & quilibet veitrum auxili"ians asfìsten' & advjans sit proust decret' Et hoc nullatus non omittatis "& quilibet veitrum omittit periculo incumbente Tefte, &c."

(11) "VICTORIA," &c. "To all and every the Officers and Ministers who now have or hereafter shall have any office power or authority derived from or under the Commissioners of our Admiralty or our High Admiral of our United Kingdom for the time being and to all and every our Vice Admirals Justices of the Peace Mayors Sheriffs Constables Bailiffs Headboroughs and all other our Officers Ministers and Subjects within every City Borough Town and County of England the Dominion of Wales and Town of Berwick upon Tweed and to every of you Greeting Know ye that Whereas We by our Commission or Letters Patent under the Great Seal

Writ of Assistance to Commissioners of the Customs in England in the reign of Victoria.
Appendix I.

"Seal of our United Kingdom of Great Britain and Ireland bearing date
"at Westminster the Twenty-fourth day of November in the first year
"of our reign have constituted appointed and assigned our trusty and well
"beloved Richard Bettenson Dean" and others "to be our Commissi-
"ners for and during our pleasure for the collection and for the manage-
"ment of our Customs in and throughout the whole of our said United
"Kingdom of Great Britain and Ireland" &c., &c. "as by our said
"Commissiion or Letters Patent enrolled amongst the Remembrances of
"our Court of Exchequer at Westminster (amongst other things) is
"more fully contained. We therefore command you and every one of you
"that all excuses apart you and every one of you permit and suffer the
"said Richard Bettenson Dean" and others "and the Deputies Minis-
ters Servants and other Officers of them the said Commissiioners and
"each of them from time to time as they shall think proper as well by
"night as by day to enter and go on board any Ship, Boat or other
"Vessel riding lying or being within and coming into any Port Creek
"or Haven of England Dominion of Wales and Town of Berwick
"upon Tweed and such Ship Boat or Vessel then and there found to
"search and survey and the persons therein being strictly to examine
"touching and concerning the premises aforesaid according to the form
"effect and true intent of our said Commissiion or Letters Patent and
"the Laws and Statutes of England or the United Kingdom of Great
"Britain and Ireland in that behalf made and provided. And in the
"day time to enter and go into the Houses Shops Cellars Warehouses
"Rooms and other places where any Goods Wares or Merchandizes ly
"concealed or are suspeeted to be concealed which are prohibited or
"for which the Duties of Customs and other the rates and sums of
"Money aforesaid are not or shall not be duly paid and truly satisfied
"answered and paid unto our Collectors or Deputy Collectors Minis-
ters Servants and other Officers respectively or otherwise agreed for
"according to the true intent of the Laws in force or hereafter to be made
"and such Houses Shops Cellars Warehouses Rooms and other pla-
ces to search and survey for the said Goods Wares and Merchandizes
"And further to do and execute all things which of right and according
"to the Laws and Statutes of England and of the United Kingdom of
"Great Britain and Ireland in this behalf shall be to be done according
"to the effect and true meaning of our said Commissiion or Letters
"Patent and the Laws and Statutes of England and of the United
"Kingdom. And we further strictly enjoin and command you and every
"one of you that to the said Richard Bettenson Dean" and others "our
"said Commissiioners and to their Deputies Ministers Servants and
"other Officers and each of them you and every one of you from time to
"time be aiding assisting and helping in the execution of the premises as
"is meet and this you or any of you are in no wise to omit at your perils
"In Witeness whereof we have caused these our Letters to be made pa-
tent. Witness James Lord Abinger" &c.
B. Writs of Assistance granted in Massachusetts Bay in the Reign of George II.

Hutchinson says, that under the administration of Governor Shirley, (which ended in 1756,) "he, as the civil magistrate, gave out his warrants to the officers of the customs to enter;" (1) and "these warrants were in use some years," until a dispute of their legality caused the Governor "to direct the officers to apply for warrants from the Superior Court; and, from that time, writs issued, not exactly in

(1) In 65 Mass. Archives, 77, is the following draft of a warrant, in Secretary Willard's handwriting, indorsed, "Warr. to Coll. Greenleaf Febry. 28, 1755," and also (in Governor Shirley's hand) "Let it wrote fair and brought to-night to me to sign" — which affords a curious example of confusing judicial and ministerial duties.

"William Shirley Esq. To John Greenleaf Esq. Greeting:

"Whereas I have receiv'd Information that one Follingworth who fails from Newbury has made a Voyage already from thence to Cape Breton, or other Settlem't near thereto, with a Load of Beef for their Supp'ly, & is now fitting out with Provisions for the same Purpose in "Contempt of the Authority of this Govern't and to the great Preju-
"dice of his Majestys Interests;

"These are therefore to desire & direct you forthwith to make strict "Inquiry into this Affair & take Evidence upon Oath thereon; & "with the Advice of other Justices of the Peace to use all the Methods "you can by Law effectually to prevent this pernicious Trade in your "Place, & for the Prosecution of such Persons as have violated or shall "violate the Laws & Orders of this Govern't for flouting all Vessels "from going to Sea at this time without my special Leave, as also for not "carrying Provisions & Ammunition off without Giving Bond at the "Improv. Offices; especially that the said Follingworth be stopp'd from "Proceeding on his Voyage: And all his Majestys Officers and other "his Majestys Subjects are hereby required to assist you herein.

"Given under my hand & seal."
Appendix I.

1755.

in the form, but of the nature of writs of assistance issued from the Court of Exchequer in England." (2) The accuracy of this latter statement is fully corroborated by the contemporaneous records. The foremost to apply to the Court was Charles Paxton. (3)

1. Paxton's Petition in 1755.

"Province of the Massachusetts Bay"

"To the Honourable his Majesty's Justices of his Superior Court for said Province "

"to be held at York in and for "

"the County of York on the "

"third Tuesday of June 1755.

"Humby shews Charles Paxton Esq; That he is lawfully authorized to execute the Office of Surveyor of all "

"Rates Duties and Impositions arising and growing due to "

"his Majesty at Boston in this Province & cannot fully "

"Exercice said Office in such Manner as his Majesty's Service and the Laws in such Cases Require Unless Your "

"Honours who are vested with the Power of a Court of "

"Exchequer for this Province will please to Grant him a "

"Writ of Assistants, he therefore prays he & his Deputies "

"may be Aided in the Execution of said office within his "

"District by a Writ of Assistants under the Seal of this "

"Superiour Court in Legal form & according to Usage in "

"his Majesty's Court of Exchequer & in Great Britain, & "

"your Petitioner &c; "

"Chas Paxton" (4)

This

(2) 3 Hutchinson's Hist. Mass. 92, 93.
(3) Boston Gazette of November 23, 1761. If, as there stated, the application was first made in 1754, the reason for its postponement may perhaps be found in this entry on the docket of August term 1754:

"The Court appoint Jam' Otis junr. Gent' to act as Attorney for the "

"King at this Term in the absence of the Attorney General."

(4) The original petition, in the handwriting of Samuel Winthrop (then one of the clerks of the Superior Court) and signed by Paxton, is in
Writs of Affiance.

This case first appears on the records of the Court at the ensuing August term in Suffolk, (which the docket shows to have been held by Sewall, C. J., Lynde, Cushing & Ruffell, JJ., and which was finally adjourned on the 30th of August,) in this form:

"Upon reading the petition of Charles Paxton Esquire wherein he shewed that he is lawfully authorized to execute the office of Surveyor of all Rates Duties and Impositions arising & growing due to his Majesty at Boston in this Province, and could not fully exercise said office in such manner as his Majesty's Service and the Laws in such cases require, unless said Court who are vested with the power of a Court of Exchequer for this province would grant him a writ of Affiants, he therefore prayed that he and his Deputies might be aided in the Execution of said office with his District by a writ of Affiants under the Seal of said Court in Legal form and according to Ufage in his Majesty's Court of Exchequer & in Great Britain. Allowed, and this Ordered by said Court that a writ be issued as prayed for." (5)

The


The form of petition, preferred by John Adams at the end of his notes of the argument in February, 1761, and mentioned in a John Adams's Works. 513, note, is precisely similar, from the words "that he is lawfully authorized" to the words "in Great Britain," having only these words prefixed: "Petition. To the honbl &c humbly shews"; and at the end "C. P.—-.

(5) The York docket for 1755 has not been found. The only Suffolk docket on which the case appears is that of August term 1755, upon which it is entered, without any number, as follows:

"The petition of Charles Paxton Esq'r surveyor of the Rates Duties & Impositions arising & growing due to his Majr in this Province, that the Court wou'd grant him a Writ of Affiants; allow'd & order'd that a Writ be issued as pray'd for."
Appendix I.

The writ was afterwards issued (6) in the following form: (7)

"Province of the Massachusetts Bay."

G E O R G E the Second by the Grace of God of Great Britain, France and Ireland King, Defender of the Faith &c —

"To all and singular Justices of the Peace, Sheriffs and Constables, and to all other our officers and Subjects within said Prov. & to each of you Greeting —

"WHEREAS the Commissioners of our Customs have by their Deputation dated the 8th day of Jany 1752, assigned Charles Paxton Esqr Surveyor of all Rates, Duties, and Impositions arising and growing due within the Port of Boston in said Province as by said Deputation at large appears, WE THEREFORE command you and each of you that you permit ye said C. P. and his Deputies and Servants from Time to time at his or their Will as well in the day as in the Night to enter and go on board any Ship, Boat or other Vessel riding lying or being within or coming to the said Port or any Places or Creeks appertaining to said Port, such Ship, Boat or Vessel then & there found to View & Search & strictly to examine in the same, touching the Customs and Subsidies to us due, And also in the day Time together with a Constable or other public officer inhabiting near unto the Place to enter and go into any Vaults, Cellars, Warehouse, Shops or other Places to search and see whether any Goods, Wares or Merchandises, in ye same Ships, Boats or Vessels, Vaults, Cellars, Warehouse,
Writs of Assistance.

"Warehouses, Shops or other Places are or shall be there hid or concealed, having been imported, ship't or laden in order to be exported from or out of the said Port or any Creeks or Places appertain'g to the same Port; and to open any Trunks, Chests, Boxes, fardells or Packs made up or in Bulk, whatever in w'h any Goods, Wares, or Merchandises are suspected to be packed or concealed and further to do all Things which of Rt and according to Law and the Statutes in such Cases provided, is in this Part to be done: And We strictly command you and every of you that you, from Time to Time be aiding and affil-
ing to the said C. P. his Deputies and Servants and every of them in the Execution of the Premises in all Things as becometh: Fail not at your Peril: WITNESS Stephen Sewall Esq' &c—"

Upon the record of January term 1758, in Middlesex, held by the same Justices, is the following entry:

"The Petition of Richard Lechmere, Esq' Collector of the port of Salem &C; for a Writ of Assistants as on the file: ORDERED that a writ be issued as pray'd for."

In Suffolk, February term 1758. Present: The same Justices and Oliver, J.

"The Petition of Francis Waldo Esq' Collector and Surveyor of the Port of Falmouth, (8) for a Writ of Assistants, GRANTED."

In Middlesex, January term 1759. Present: All the Judges but Oliver, J.

"The

(8) In Casco Bay, Maine—now Portland. St. 1786, c. 14.
Appendix I.

1759.


In Suffolk, February term 1759, these two cases:

"The Petition of Thomas Lechmere Esq; Surveyor General of his Majesty's Customs, for a Writ of Assistants; Granted." (9)

"The Petition of William Sheaf Esq; Collector of the Port of Boston, for a Writ of Assistants, as on file, Allowed." (9)

1760.


And in Suffolk, February term 1760, two cases, viz:

"The Petition of George Cradock Esq; Collector of the Port of Boston, for a Writ of Assistance, as on file Allowed."

"The Petition of William Walter Esq; Collector of the Ports of Salem and Marblehead, for a Writ of Assistance, as on file, Allowed; W't iss'd 1st Mar. 1760."

At each of these last two terms, as appears by the records, the whole court was present, viz: Sewall, C. J., Lynde, Cushing, Ruffell & Oliver, JJ. (10)

(9) Upon the margin of the docket opposite this case is this entry: "Hatch, Dr. W't iss'd 8th March 1759. Did Petition!" And there is a similar entry in the margin of the docket opposite Richard Lechmere's case, supra, 405. It may be conjectured that the words "Hatch, Dr." were intended as a charge of the clerk's fees to Nathaniel Hatch, Comptroller of the Port of Boston, who had perhaps presented these petitions. Vid. post, 422.

(10) These are all the applications for Writs of Assistance, which have been found in the time of Chief Justice Sewall, who is said to have had doubts of the legality of such writs. 3 Hutchinson's Hist. Mass. 89. 10 John Adams's Works, 183, 347. Each of the petitions in 1758 and
and 1759 is entered on the docket of the term at which the order was passed, and numbered with the civil actions. The Suffolk Docket for 1760 and the court files of all these terms are wanting.

Much light is thrown upon the subject of the Writs of Affiance by the very valuable collection of Governor Bernard’s letter-books and manuscripts in the possession of Mr. Jared Sparks, who has kindly and liberally given the writer every facility for examining and making copies of them.

The King’s instructions of March 18, 1760, to Sir Francis Bernard, at the time of his appointment to the Government of Massachusetts Bay, contained an order, in the most general terms, to “be aiding and affording to the collectors and other officers of our admiralty and customs, in putting in execution” the Acts of Trade. 13 Bernard Papers, 149, 196.

On the 18th of August 1760, Governor Bernard, in announcing to the Lords of Trade his arrival in Boston, wrote: “There are no disputable points of government remaining unsettled; and this people are better disposed to obey their compact with the Crown, than any other on the continent, that I know. I may add that I enter on the government without any party being formed against me.” 2 lb. 37.

Some weeks before this letter reached England, Pitt, as Secretary of State, sent the following instructions to the Governors of the American Colonies:

“Whitehall, 23d August 1760.”

“Sir,

“‘The Commanders of His Majesty’s Forces, & Fleets, in North America, & the West Indies, having transmitted repeated & certain Intelligence of an illegal & most pernicious trade, carried on by The King’s Subjects in North America, and the West Indies, as well as the French Islands, as to the French Settlements on the Continent of America, and particularly to the Rivers Mobile, & Mississippi, by which the Enemy is, to the greatest Reproach & Detriment of Government, supplied with Provisions, and other Nececcaries, whereby They are principally, if not alone, enabled to sustain, & protract this long & expensive War; And it further appearing, that large Sums in Bul-lion are also sent, by The King’s Subjects, to the above Places, in Return whereof, Commodities are taken, which interfere with the Produce of the British Colonies Themselves, in open Contempt of the Authority of the Mother Country, as well as to the most manifest Pre-judice of the Manufactures, & Trade of Great Britain; In order therefore to put the most speedy and effectual Stop to such flagitious Praxies, so utterly subversive of all Law, and so highly repugnant to the Honour and Wellbeing of this Kingdom, It is his Majesty’s express Will & Pleasure that you do forthwith make the strictest, & most diligent Enquiry into the State of this dangerous & ignominious Trade, and
Appendix I.

"and that you do use every Means in your Power, to detect and discover

"Persons concerned, either as Principals, or Accessories, therein, &

"that you do take every Step, authorized by Law, to bring all such

"heinous Offenders to the most exemplary, and condign Punishment;

"And you will, as soon as may be, & from Time to Time, transmit to

"me, for the King's Information, full & particular Accounts of the

"Progres you shall have made in the Execution of these His Majesty's

"Commands, to which The King expects that you do pay the most

"exact Obedience: And you are farther to use your utmost Endeavours,

"to trace out and investigate the various Artifices and Evasions, by

"which the Dealers in this iniquitous Intercourse find Means to cover

"their criminal Proceedings, & to elude the Law, in order that, from

"such Lights, due & timely Consideration may be had, what farther

"Provisions shall be necessary to restrain an Evil of such extensive &

"pernicious Consequences.

"I am, Sir,

"your most obedient humble Servant,

"W. Pitt."

These instructions are preserved in 22 Mass. Archives, 163-165; and there is a duplicate original in 9 Bernard Papers, 121-123. There is no evidence in this or any other public act of Pitt of an intention to put new restrictions on the trade of the Colonies, beyond cutting off supplies to the enemy in time of war. See 4 Bancroft's Hist. U. S. 375-377.

Governor Bernard answered, that on his arrival in August, 1760, he satisfied himself that no such trade was carried on here; and inclosed the report of a committee, approved by the Council, to the same effect; and added: "If I apprehended that there was the least danger that this trade would be carried on from this Province, I would immediately communicate your orders by circular letters to the several officers of the ports within my government. But I apprehend that, as things are, such public notifications would answer no other purpose than to imply a charge against the Province of what I believe it is quite free from." Bernard to Pitt, November 8, 1760, 1 Bernard Papers, 184. Council Rec. 1760, fol. 180, 185.

In a letter to Secretary Pownall, of June 15, 1761, the Governor particularly mentions these instructions and his answer. 1 Bernard Papers, 317. But no more specific order in 1760 for the execution of the Acts of Trade has been found in the Bernard Papers or in the Massachusetts Archives or Council Records.

It would seem therefore, that the above instructions must be those which John Adams mentions in his autobiography as "sent to the customs house officers, to carry the Acts of Trade and Navigation into strict execution," and which in his correspondence he left accurately describes as specific orders to the officers of the customs to apply for Writs of Assistance.
Writs of Assistance.

ance. 2 John Adams's Works, 124, note. 3 lb. 492. 7 lb. 267. 10 lb. 246, 274. It should be remembered that even the autobiography was not written until twenty-five years afterwards. 2 lb. Pref. vii.

The records quoted in the text show that the officers of Boston and most of the other principal ports of the Province had been previously supplied with Writs of Assistance, which would continue in force until the death of the King and for six months afterwards. Ante, 397, note 5, ad fin. Chief Justice Sewall died on the 10th of September, 1760. Mayhew's Sermon on his Death. Boston Gazette of September 15, 1760. And no application for a Writ of Assistance appears upon the record or docket of the autumn term in 1760 of the Superior Court in Essex, which began and ended in October. Rec. 1760, fol. 154–160. There could hardly be more conclusive proof of the inaccuracy of the statement in Adam's autobiography (repeated in his correspondence) that the first application for a Writ of Assistance was made by Cockle, Collector of Salem, to the Superior Court "at their session in November, 1760, for the County of Essex," and that "Mr. Stephen Sewall was then Chief Justice." 2 John Adams's Works, 134, note. 10 lb. 183, 246, 247, 374. By a similar error of date, in his preface of 1819 to Novanglus, Adams puts Chief Justice Sewall's death "in December, 1760, or January, 1761." 4 lb. 7. As a Writ had been issued to Paxton in Boston some years before, (ante, 403,) and the Collectors of Boston had obtained them there in this and the previous year, (ante, 406,) the application can hardly have been made in Salem because "Mr. Paxton thought it not prudent to commence his operations in Boston," as suggested by Adams. 10 lb. 246. Indeed there is no sufficient evidence that any application was made in Salem. The statement in Adam's later correspondence that Otis was retained by the merchants of Salem as well as of Boston to oppose the issuing of the Writs (1b. 247, 275,) receives no confirmation from the names subscribed to the petition of the merchants; and is inconsistent with the counter memorial of the Surveyor General, and with Otis's own statement in opening his argument. Post, 412, 413, 414. 2 John Adams's Works, 523. 2 Minor's Hist. Mass. 91. Post, D, note. Adams seems to have made a mistake of a year, at least, and may have been misled by some recollection of Paxton's application having been made in York, (ante, 401,) or of the subsequent doings of Cockle, whose unpopularity was second to Paxton's only. Vid. post, 422, 423, & notes. The reasons, derived from the court records, for believing that no application was made in writing at this time, are stated post, 418, note 3. And both Bernard and Hutchinson imply that the application which was opposed was made after the appointment of the latter to be Chief Justice. See 3 Hutchinson's Hist. Mass. 955; Hutchinson to Conway, and Bernard to Lords of Trade, and to Franklin, post, 415, 416, note. But it is possible that Cockle, who had been very recently appointed, (post, 423,) and to whom no Writ of Assistance had been issued, did orally apply for one before the end of the year.

Upon
Upon the death of Chief Justice Sewall, Hutchinson's friends at once began to move for his appointment to fill the vacancy. 3 Hutchinson's Hist. Mass. 86. Andrew Oliver to Israel Williams, September 30, 1760, 2 Williams Papers, 103, in Mass. Hist. Soc. Lib. John Adams's Diary of November 5, 1760, 2 John Adams's Works, 99, 100. James Otis in Boston Gazette of April 4, 1763. Gordon (who did not arrive in Massachusetts until ten years later — see his preface) states that "Mr. Hutchinson hurried to Mr. Bernard, procured a promise, which being once given the Governor would not retract, and got himself appointed Chief Justice." 1 Gordon's Hist. U. S. 141. See also Adams to Niles, February 13, 1815, 10 John Adams's Works, 285. But Hutchinson's own statement in his history that the appointment was unforth by him is well attested by the letter, above referred to, in which Oliver, his brother-in-law, wrote to Israel Williams, his intimate friend: "If his Excellency & the Lieutenant Governor were to confer together on the Subject the matter might be accommodated. The Lieutenant Governor is so diffident of his own fitness, that if he could be brought to accept of the place, yet I am persuaded he would never move in it." See also Williams to Hutchinson, December 3, 1760, 2 Williams Papers, 118. Even Otis in the Gazette (ib. sup.) does not show that Hutchinson did more than accept the office of Chief Justice, after promising to use his influence to have Otis's father appointed the youngest judge, according to a promise which Governor Shirley had made some years before. 3 Hutchinson's Hist. Mass. 86. 4 Bancroft's Hist. U. S. 379. And it is due to Hutchinson to add his explanation that "the Governor declared that, if the Lieutenant Governor should finally refuse the place, the other person would not be nominated." 3 Hutchinson's Hist. Mass. 87.

On the 17th of November, 1760, Bernard wrote to Lord Halifax: "No public business of consequence has been moved of late, except I may reckon the filling up the place of Chief Justice. This office became vacant on the 10th of September, and last Thursday I appointed the Lieutenant Governor to it. I propose to explain my motives to your Lordship for this proceeding; but I must wait for another opportunity, as this must go to the Post Office." 1 Bernard Papers, 283. The Governor apparently never found time to explain his motives, and they are therefore merely matters of conjecture. But it would appear from the statements of Bernard and Hutchinson that the first controversy with the officers of the customes was the claim in behalf of the Province for monies illegally received, which arose after this appointment. Bernard to Secretary Pownall, January 19, 1761, & February 13, 1765, 1 Bernard Papers, 236; 2 lb. 30. Hutchinson to Williams, January 21, 1761, 2 Williams Papers, 155. 3 Hutchinson's Hist. Mass. 89, 92. Poft, Appendix II. & notes. And, considering how many of the officers already held Writs of Assistance, there seems to be no good reason for adopting the suspicion expressed by John Adams in 1780, which thirty-five
Writs of Affiance.

five years later grew into an assertion, that Hutchinson was appointed for the special purpose of securing a decision in favor of these writs. 7
John Adams’s Works, 267. 10 lb. 183, 247, 280.

All the accounts show that Governor Bernard considered it necessary that candidates for judicial office should make personal applications to him. And the truth seems to be that Otis and Hutchinson each had strong partisans; that the Governor was determined to appoint a Chief Justice who would sustain the Crown and its officers in any controversy which might arise, while the Otises were indignant that he should disregard the promise of his predecessor; and that each party put the worst interpretation possible upon the action of the other. But the charge commonly made by the supporters of prerogative against James Otis, that his subsequent public course was dictated solely by revenge for his father’s disappointment, (3 Hutchinson’s Hist. Maf. 88 1 Judge Oliver, quoted in John Adams’s Diary of June 5, 1761, 2 John Adams’s Works, 135 1 Bernard to Shelburne, December 22, 1766, 4 Bernard Papers, 275,) may be classed with D’Israeli’s insinuation that John Hampden’s refusal to pay Ship Money was occasioned by an ancient grudge against the sheriff who levied it. See 2 Nugent’s Life of Hampden, 224.

George 2 died on the 25th of October, 1760. News of his death reached Boston on the 27th of December; and George 3 was proclaimed on the 30th, without waiting for any official notice of his accession. Hutchinson, who had been appointed on the 13th of November, was commissioned as Chief Justice on the 30th of December, and first took his seat upon the Bench on the 27th of January, 1761, in Middlesex.

But (probably from some doubt of the regularity of his appointment) he was included in the renewal of the commissions of the Judges after the demise of the Crown, on the 15th of April, 1761. Bernard to Secretary Pownall, January 11, 1761, 1 Bernard Papers, 285. 3 Hutchinson’s Hist. Maf. 88, 95, 96. Rec. 1761, fol. 161, 188. Council Rec. 1760, fol. 288, 298; 1761, fol. 382; Book of Commissions 1756–1767, fol. 191, 199, 201.
Appendix I.

C. Wrts of Affiitance in Massachusets Bay in the Reign of George III.

Among the few files of the Superior Court of Judicature in Suffolck of so early a date, now remaining in the custody of the clerk of the Supreme Judicial Court of Massachusets, one bundle, labelled in the handwriting of John Tucker, who was clerk of this Court from 1784 to 1825, "Bolton Mixed Papers down to A. D. 1762," fortunately includes the papers relating to the Wrts of Affiitance granted by Hutchinson, as well as the case of the Province of Massachusets Bay v. Paxton. (1) The papers on file in the matter of the Wrts of Affiitance are as follows:

The Petition of the Merchants. (Indorsed "Greene & al petition abt Writ of Affiitance").

"To the Honble the Justices of the Superior Court of Judicature, Court of Affidavit & General Goal, Delivery to be held at Boston within & for the County of Suffolk on the third Tuesday of February ADom. 1761.

"The Petitioners Inhabitants of the Province of the Massachusets's Bay Humbly Pray That they may be heard by themselves and Council upon the subject of Writs of Affiitance & your Petitioners shall (as in Duty bound) ever pray.

"Samuel Austin Sam' Grant Thos: Greene
"Edwd Davis Nat Wheelwright Joshua Winflow
"Jon'a Mason Tho'a Tyler Jos. Green
"Sam Ph Savage Nath'd Holmes John Spooner

(1) Pafi, Appendix, II.
Writs of Assistance.

John Scollay John Gooch Jn Barret
James Perkins W Molineux John Tudor
Tim Newell Ezek Goldthwait John Avery
John Waldo Samuel Welles Jun John Dennie
W Greenleaf Benj Austin John Rowe
Joseph Scott Arnold Welles Sam Wentworth
Thomas Gray Sam. Dexter J Erving jun
Jont Amory Jon Williams Ja Boutinou
Chris Clarke Sol. Davis Fitch Pool
Jonathan Sayward Henderon Inches John Lowell
Jam Warden John Boylton Melatiah Bourn
Peter Boyer James Pitts John Winnett
Geo Erving
John Baker
Thom Greene Jr

The Memorial of Thomas Lechmere, the Surveyor General. (Indorsed "Lechmere's petia")

Province of the Massachusettts Bay Suffolk fs.

TO the Honourable His Majesty's Justices of the Superior Court of Judicature Court of Assize and General Goal Delivery held at Boston within & for said County on the third Tuesday of February, 1761.

The Memorial of Thomas Lechmere Surveyor General of His Majesty's Customs for the Northern District of America.

Whereas a petition is enter'd in this Honble Court
Appendix I.

In the previous reign Lechmere as Surveyor General, Paxton as Surveyor of the Port of Boston, and the Collectors of the Ports of Boston, Salem and Marblehead, Newburyport, and Falmouth, had been supplied with Writs of Assistance. *ante*, 404-406. But those writs were about to expire. *ante*, 397, note 5, *ad fin.*

The question whether new ones should be issued was argued at this term, beginning on the 24th of February, 1761, by Otis and Thatcher against the writ, and by Gridley alone in its favor. This is the argument reported by John Adams. *vid. post*, D. Judgment was suspended; and at the next term, on the 18th of November, 1761, the question was argued again by Otis and Thatcher against the writ, and by Gridley and Auchmuty in its favor. This is the argument reported by Quincy, *ante*, 51 & seq., and mentioned in the Boston Gazette of November 23, 1761, *posta*, F.

At the conclusion of this argument, "judgment was immediately given in favor of the petition." Boston Gazette of November 23, 1761. So Quincy says: "The Justices were unanimously of opinion that this writ might be granted, and sometime after, out of term, it was granted." *ante*, 57. The court adjourned on the 19th of November, (*ante*, 51, note) and on the 4th of December, the writ was granted to Paxton, according to an elaborate form, prepared by Hutchinson, and reciting all the statutes relied upon. *infra*, 418.

Hutchinson, in his history, after saying that the writs were objected to because they did not specify the place to be searched, and were not supported by information upon oath, says: "The Court was convinced that a writ, or warrant, to be issued only in cases where special information was given upon oath, would rarely, if ever, be applied for, as no informer would expose himself to the rage of the people. The statute of the 14th of Charles II. authorized issuing writs of assistance from the Court of Exchequer in England. The statutes of the 7th and 8th of William III. required all that aid to be given to the officers of the customs in the Plantations, which was required by law to be given in England. Some of the judges, notwithstanding, from a doubt whether such writs were still in use in England, seemed to favor the exception, and, if
Writs of Assailance.

The other papers and memoranda concerning Writs of Assailance to various officers of the customs may be conveniently arranged under distinct numbers.

First.

judgment had been then given, it is uncertain on which side it would have been. The chief justice was therefore desired, by the first opportunity in his power, to obtain information of the practice in England, and judgment was suspended. At the next town [term], it appeared that such writs issued from the Exchequer, of course, when applied for; and this was judged sufficient to warrant the like practice in the Province. A form was settled, as agreeable to the form in England, as the circumstances of the Colony would admit, and the writs were ordered to be issued to custom-house officers, by whom application should be made to the Chief Justice by the Surveyor General of the customs. 3 Hutchinson's Hist. Mafs. 94.

In applying to the English government, in 1765, for compensation for his losses by the Stamp Act riot, (ante, 168.) Hutchinson enlarges upon his own services in overruling the scruples of the other judges, and upon the unworthy motives of those who opposed the writ. In a letter of September 12, 1765, he says: "Three or four years ago, after a long argument in the Superior Court, which has by its constitution the power of the Court of Exchequer, as well as that of the Common Pleas and King's Bench, it was determined to grant writs of assailance to the custom house officers, no other provision being made by law for entering suspected houses or warehouses. This was a great mortification to the illicit traders, who found no great difficulty in running goods and houling them; the great difficulty is after they are landed." 36 Mafs. Archives, 153. "In the year 1761 application was made by the officers of the customs to the Superior Court, of which I was then Chief Justice, for writs of assailance. Great opposition was made by some who professed themselves friends to liberty, and by others who favoured illicit trade, and the court seemed inclined to refuse to grant them; but I prevailed with my brethren to continue the cause until the next term, and in the mean time wrote to England, and procured a copy of the writ, and sufficient evidence of the practice of the Exchequer there, and the like writs have ever since been granted here." Hutchinson to Secretary Conway, October 1, 1765, 26 Mafs. Archives, 155. "About three years ago, upon application made to the Superior Court, of which I am Chief Justice, writs of assailance were granted in aid of the officers of the customs, which were complained of as grievous by the illicit traders, and by them a notion was put into the heads of the common people in general that these writs were contrary to their liberties as Englishmen." Hutchinson to Earl of Kinnoull, October 17, 1765, Iib. 164. "With respect to the writs
Appendix I.

First, The earliest in date of the remaining papers is the following certificate:

"Boston 2d decem', 1761.

"Sir
"Do me the favour to issue a Writ of assistance to
"Charles Paxton Esq. Surveyor & Searcher of his
"Majesty's Customs in the Port of Boston,
"Sir, Your most Obedient
"and most humble Serv'
"JOHN TEMPLE.".

"To the Honble Thomas
"Hutchinson Esq. Chief
"Justice of the Superior Court
"of this Province."

This

writs of assistance, I was well satisfied after great deliberation that in
issuing them I did what the law required me to do, and if I was mis-
taken, which I am not yet convinced of, it was an error in judgment
only." Hutchinson to Lords of Trade, November 3, 1765, lb. 160.

Governor Bernard, in a letter to the Lords of Trade, of November 30,
1765, describing the Stamp Act Riot, says: "Last of all the (Lieutenant
Governor) Chief Justice's house destroyed with a favagene known in a
civilized country. I mention him as Chief Justice, as it was in that
Character he suffered; for this connecting him with the Admiralty &
Customs house was occasioned by his granting writs of assistance to
the Customs house officers, upon the Accession of his present Majesty; which
was so strongly opposed by the Merchants that the Arguments in Court
from the Bar and upon the Bench lasted three days. The Chief Jus-
tice took the lead in the Judgement for granting Writs, and now he has
paid for it." 4 Bernard Papers, 176, 177. And on the 24th of March,
1768, (after the passage of the St. of G. 3, c. 46, infra,) he wrote to
Lieutenant Governor Franklin of New Jersey: "Writs of Assistance
were first granted by Chief Justice Sewall many years ago. Upon Chief
Justice Hutchinson coming to the Bench, there was a formal Opposition
to the renewing them after the Demise of the late King, which was
prosecuted with such earnestness, that the hearing lasted three days suc-
cessively. The Court was unanimous for granting them as the Laws
then stood." 5 lb. 261.

John Adams, in two letters to William Tudor, half a century after-
wards, says that the Chief Justice, some days after the argument in
February,
Writs of Affistanee.

This paper, which forms the wrapper of all the others filed

February, 1761, on ordering the case to be continued to the next term, said that the court "could not at present see any foundation for the Writ of Affistanee;" and adds, that no judgment was ever given in public, nor anything more said in court about the Writs of Affistanee. 10 John Adams's Works, 233, 248. If this last statement were not conclusively disproved by the contemporaneous evidence, any truth in its accuracy would be much shaken by the contradictions in those letters, on the question whether the writs were ever actually executed. On the 28th of December, 1766, he writes, "After six or nine months we heard enough of custom-house officers breaking houses," &c., "by virtue of writs of as- fistanee;" and, on the 29th of March, 1817, "It was generally reported and underfoold that the Court clandestinely granted them, and the custom-house officers had them in their pockets, though I never knew that they dared to produce them or execute them in any one instance." It is an unpleasant duty to point out inaccuracies in so spirited an account of this memorable cause. But similar doubts have been expressed by more competent and experienced judges. 10 John Adams's Works, 364, note. 4 Bancroft's Hist. U. S. 417, note. And in the examination of this matter the writer has from the beginning (ante, 419) but briefly followed Adams's own directions in a letter to Benjamin Water- boufe a year later: "You need not take my word. Look into Judge Minot's History of Massachusetts Bay, anno 1761; search the records of the Superior Court of Judicature, Court of Affize and General Gaol Delivery, at Salem term, 1760, and Boston term, 1761; look up the newspapers of 1761; ascertain the time when Chief Justice Stephen Sewall died; call for Dr. Mayhew's printed sermon on his death; search the date of Chief Justice Thomas Hutchinson's commisison as Chief Justice." 10 John Adams's Works, 280.

Tudor's son disposes of the contradiction in Adams's letters to his father by suppressing the first letter, and asserting that the statement in the other "is unquestionably correct." Tudor's Life of Otis, 87, note. This conclusion is reached by assuming that though "Minot's history says, 'the writ of affistanee was granted,' and refers to the court records for authority, yet this was probably a mere form to save the pride of the administration," and that "nothing was afterwards heard of this odious instrument." Indeed, Tudor's whole account of the Writs of Affistanee is a mere digest of Adams's letters, without attempting to verify their statements by the records or files of the Court, (of which his father was then a clerk,) or even examining the newspapers of the time. Upon him falls, with special weight, Lord Coke's reproof: "It appeareth that the reporter never saw the said record, only took it by the care of that which was spoken in court, (a dangerous kind of reporting, and subject
Appendix I.

1761.

filed in the case, bears these indorsemets, in the handwriting of Hatch, one of the clerks of the court: (3)

"Certificate of the Survey of General for a Writ of Affidavit for Mr. Paxton.

"1761. 2 Decr. writ issued.

"With Thomas Green & all petition & T. Lechmere's memorial." To which is subsequently added in Winthrop's hand: "and others papers are filed herein." (4)

There is also a much worn form of a Writ of Affidavit, of which the following is an exact copy, the words in brackets being interlined, and those in italics erased — the whole in the handwriting of Hutchinson, except the words "Annoque Dom 1761" at the end, which are apparently in the handwriting of Hatch, and "Cler." in the handwriting of Winthrop:

"Prov. of G.

"Mass Bay"

G. E. GEORGE the third by the grace of God of Great Britain France & Ireland King Defender of the faith &c.

"To

subject to many mistakes, for seldom or never the right case is put, as in this case it fell out." 4 Inf 17.

(3) Samuel Winthrop and Nathaniel Hatch had been re-appointed clerks in August, 1761. Rec. 1761, fol. 220.

(4) Under these, in the handwriting of William C. Aylwin, clerk of the Supreme Judicial Court from 1825 to 1837, are references to Nevin's case, (ante, 406,) and to the record book of 1761. Tudor's mistakes had been published in 1823. Supra, 437, note.

In the index to the volume of the records of the Superior Court 1760-1762 are the following references: "Greene & al Petition 225," "Lechmere, Surveyor General his petition 226." On referring to the places indicated, which are in August term 1761, the latter part of fol. 225 is found to be blank, with this entry on the margin: "Green & others Petition. No papers are on file." And the first page of fol. 226 is entirely blank. A temporary absence of these papers from the files may have been the cause of their escape from the fate which has befallen most of the court papers of that time. The dockets of 1761 and 1762 in Suffolk are missing, and the subsequent dockets and records contain no entries of applications for Writs of Affidavit. But the entry of the case on the record under no other names than those of the colonists and the Surveyor General shows that no written application for the writ had been previously filed in the case.

Writs of Assistance.

"To all & singular our Justices of the peace, Sheriffs Constables and to all other our Officers and Subjects within our said Province and to each of you Greeting.

"Know ye that whereas in and by an Act of Parliament made in the third year of the reign of the late King Charles the second it is declared to be [the Officers of our Customs & their Deputies are authorized and impow- ered to go & enter aboard any Ship or Vessel outward or inward bound for the purposes in the said Act mentioned & it is also in & by the said Act further enacted & declared that it shall be] lawful [to or] for any person or persons authorized by Writ of assistants under the seal of our Court of Exchequer to take a Constable Headborough or other publick Officer inhabiting near unto the place and in the day time to enter & go into any House Shop Cellar Warehouse or Room or other place and in case of resistance to break open doors chests trunks & other pack- age there to seize and from thence to bring any kind of goods or merchandize whatsoever prohibited & uncuf- fomed and to put and secure the same in his Majesty's [our] Storehouse in the port next to the place where such seizure shall be made.

"And whereas in & by an Act of Parliament made in the seventh & eighth year of the reign of the late King William the third there is granted to the Officers for collecting and managing our revenue and inspecting the plantation trade in any of our plantations [the same powers & authority for visiting & searching of Ships & also] to enter houses or warehouses to search for and seize any prohibited or uncuftomed goods as are provided for the Officers of our Customs in England by the said last mentioned Act made in the fourteenth year of the reign of King Charles the Second, and the like assistance is required to be given to the said Officers in the execution of their office as by the said last mentioned Act is pro- vided for the Officers in England.

"And

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"And whereas in and by an Act of our said Province of Massachusetts bay made in the eleventh year of [the reign of] the late King William the third it is enacted & declared that our Superior Court of Judicature Court of Affize and General Goal delivery for our said Province shall have cognizance of all matters and things within our said Province as fully & amply to all intents & purposes as our Courts of King's Bench Common Pleas & Exchequer within our Kingdom of England have or ought to have.

"And whereas our Commissioners for managing and causing to be levied & collected our customs subsidies and other duties have [by Commission or Deputation under their hands & seal dated at London the 22d day of May in the first year of our Reign] deputed and empowered Charles Paxton Esq to be Surveyor & Searcher of all the rates and duties arising and growing due to us at Boston in our Province aforesaid and [in & by said Commission or Deputation] have given him power to enter into [any Ship Bottom Boat or other Vessel & also into] any Shop House Warehouse Hoftery or other place whatsoever to make diligent search into any trunk chest pack case trufs or any other parcel or package whatsoever for any goods wares or merchandize prohibited to be imported or exported or whereof the Customs or other Duties have not been duly paid and the same to seize to our use In all things proceeding as the Law directs.

"Therefore we strictly Injoin & Command you & every one of you that, all excuses apart, you & every one of you permit the said Charles Paxton according to the true intent & form of the said commission or deputation and the laws & statutes in that behalf made & provided, [as well by night as by day from time to time to enter & go on board any Ship Boat or other Vessel riding lying or being within or coming to the said port of Boston or any Places or Creeks thereunto appertaining such Ship Boat or Vessel then & there found to search & oversee and the persons therein being strictly to examine touching the premises.
Writs of Assistance.

"Ifes aforesaid & also according to the form effect and true intent of the 9th commission or deputation] in the day time to enter & go into the vaults cellars warehouses shops & other places where any prohibited goods wares or merchandizes or any goods wares or merchandizes for which the customs or other duties shall not have been duly & truly satisfied and paid lye concealed or are suspected to be concealed, according to the true intent of the law to inspect & oversee & search for the said goods wares & merchandize. And further to do and execute all things which of right and according to the laws & statutes in this behalf shall be to be done. And we further strictly INJOIN & COMMAND you and every one of you that to the said Charles Paxton Esqr you & every one of you from time to time be aiding assisting & helping in the execution of the premises as is meet. And this you or any of [you] in no wise omit at your perils. WITNESS Thomas Hutchinson Esq at Boston the day of December in the Second year of our Reign Annoque Dom 1761.

"By order of Court
"N. H. Cler." (5)

Second.


Charles Paxton.

He was appointed on the 8th of January, 1752, by the Commissioners of the Customs in England, Surveyor and Searcher of the Port of Boston, and as such obtained the first Writ of Assistance ever issued in the Province. Book of Commissions &c. 1628-1763, in the office of the Secretary of the Commonwealth, fol. 79. Anie, 402-404. His renewed commission after the demise of the Crown, recited in the new writ now issued to him, (supra, 430,) is not recorded in either of the books there preserved; but doubtless corresponded with his first commission in 1752, which, like all the other commissions from that time to 1765, referred to below, was precisely similar to that issued in 1764 to Hallowell, infra, 432, note.

Paxton was also Marshal of the Courts of Vice Admiralty of Massachusetts, New Hampshire, and Rhode Island, at least as early as 1756. Post,
Appendix I.

1761.


Second. A certificate of the Surveyor General, dated December 4, 1761, and otherwise precisely similar to that for Paxton, (supra, 416,) for a Writ of Assistance to "James Cockle Esq: Collector of his Majesty's Customs at the Port of Salem."

This certificate is indorsed, apparently by Hatch, "Writ iff'd 8th Dec" [erased, and these words added by Winthrop:]
"W! issued 5th Feb. 1762: dld Cockle." (6)

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The mob that destroyed the house of William Story, the Registrar of the Admiralty, Comptroller Hallowell, and Chief Justice Hutchinson, on the night of August 26, 1765, went first to the house occupied by Paxton, which was seized by a prefent of a barrel of punch from the owner of the house. Bernard to Halifax, August 31, 1765, 4 Bernard Papers, 150. 1 Gordon's Hist. U. S. 176. In the library of the American Antiquarian Society is an old portrait of Paxton, with a patch in the canvas, said to have been put in to repair a breach made by a brickbat thrown by the mob.

In October 1766, Paxton went to England, for the purpose of assisting in remodelling the American revenue system; and, upon the establishment of the new Board of Customs in Boston, procured his own appointment as one of the Commissioners. 6 Bancroft's Hist. U. S. 32, 41, 50, 102. As such, on the 20th of June 1768, he wrote one of the letters to England, asking for a military force, which were afterwards denounced by the House of Representatives. Representations in Letters of Hutchinson, Oliver, &c. (Boston, 1773) 37, 67. See also 2 John Adams's Works, 220, 318; 10 lb. 298; Sabine's American Loyalists, 510.

(6) In the Boston Gazette of May 10, 1763, under the custom house advertisements, is a notice, of which the first paragraph is a sufficient specimen, viz:

"Port of C—k—le Borough.

"Now riding at Anchor and ready for Sailing, the Idiot of full Freight, with Ignorance, no Commission, few Guns; any necfesfitous Perfon that wants daily Sufpence may meet with fuitable Encour-
amental by applying to J—r C—k—le the Commander, at the King's "Arms in S———."

Cockle's predecessors, Richard Lechmere, and William Walter (who is mentioned as Cockle's deputy in the notice just cited), had been fur-
Writs of Assistance.

On a separate slip of paper is this memorandum, by which probably to draft the writ to Cockle:

"By Commission or deputation dated at London the sixth day of May 1760—appointed James Cockle Esq Collector of all Rates &c at the port of Salem Marblehead, &c." (7)

Third.

nished with Writs of Assistance in the previous reign. Ante, 405, 406. Newlin, who had also obtained a Writ of Assistance then as Collector of "Newbury &c." publishes notices in the Boston Gazette in January 1764 as "Collector of the port of Piscataqua."

(7) His commission of this date from the Commissioners of Customs in England is recorded in the Book of Commissions &c. 1628-1763, fol. 171. A renewal of it, dated London, July 24, 1762, is recorded in a book of Records of the Salem Custom House, May 1761—April 1775, in the possession of the Essex Institute, which is particularly described by David Roberts, Esq., in the second volume of their Historical Collections, 169 & seq. But to guard against misapprehension of that description, it should be added that that record contains no evidence of Cockle's application for a Writ of Assistance in 1760 or 1761 (ante, 405) nor of any restoration of Cockle after his removal by the Surveyor General in 1764.

In February 1764 the Commissioners of Customs in London published in the Boston Gazette offers of reward for the discovery to Temple, the Surveyor General, or any other principal officer of the customs in North America, of any person guilty of entering into or conniving at any composition for duties. On the 28th of September, 1764, Temple visited Salem; and removed Cockle from office, for compounding for duties, and concealing from him information received from Anguilla, "and above all for the Infract offered me by you in the Tender of a Brieve to pass over such your proceedings without punishment," and appointed William Brown in his stead. Salem Custom House Record, 43, 44. Compare 3 Hutchinson's Hist. Mass. 161. Governor Bernard, who was accustomed to consult with Cockle, was indignant at this, and pretended that the Surveyor General was possessed with "a most extreme and haughty jealousy" of the Governor and his office, and that the real cause of Cockle's removal was his having advised him on one occasion; and earnestly defended Cockle—Paxton also "testifying his good opinion of his integrity in his office." Bernard to Jackson, October 5, and to Jackson and other persons in England, November 30, 1764, 3 Bernard Papers, 256, 265-270. But the Governor was obliged to admit that "in truth, if conniving at foreign sugar & molasses, & Portugal wines & Fruit, is to be reckoned Corruption, there was never, I believe,
Appendix I.

Third. A similar certificate of the Surveyor General, dated December 17, 1761, for a Writ of Assistance to "Francis Waldo Esquire Coll' & Surveyor of his Majestys Cuftoms at Falmouth."

Indorsed in Hatch's handwriting: "Mr Waldoe's Commiss dated 18 March 1761." (8)

Fourth. A certificate of the Surveyor General, dated January 4, 1762, of his having "this day appointed William Sheafe

I believe, an uncorrupt Custom house Officer in America, till within twelve months; and therefore Incorruption in the best of them must be considered, not as a positive, but comparative term; and to doubt whether his own certificate of Cockle's good conduct "is not too free to be laid before a public Board, altho' it might safely and properly be communicated to every member of it." Ib. 367.

The Surveyor General charged the Governor with sharing Cockle's illegal gains; and an affidavit of Sampson Tovey, Cockle's clerk, made the day before his removal, supports this charge. Bernard to Temple, September 29, 1764, Ib. 45. Bollon Gazettes of June 12 & October 9, 1769, & Bancroft's Hist. U. S. 158, note. Hutchinson in May 1765 wrote, with his usual caution: "Mr. Temple it is evident has a very great personal prejudice against the Governor, which it is said arose from an apprehension that he had not all that respect shown him which he supposed to be due." Whether he [the Governor] ever took any improper steps will be determined in England. I do not know that he has done more than all his predecessors used to do." 26 Mass. Archives, 328. And a writer in the Boston Gazette of November 3, 1766, speaks of the Governor of New York as "A G. that has not turned custom-house officer, and cocked the simple merchant out of his interest to the prejudice of the King's revenue, at the same time representing to the ministry his desire to crush a trade upon which he placed his great dependence to enrich himself." Notwithstanding Governor Bernard's efforts in his behalf, Cockle was never restored. 3 Hutchinson's Hist. Mass. 163. The Surveyor General afterwards appointed Tovey a waiter and preventive officer at Cape Ann. Salem Custom House Record, 53.

(8) His commission of this date from the Commissioners of Customs in England is recorded in Book of Commissions &c. 1628-1765, fol. 216. A Writ of Assistance was issued to him. See account, infra, of a riot in Falmouth upon an attempt to seize goods under it in August 1766. He had received a similar commission, dated October 25, 1757, and a Writ of Assistance, in the preceding reign. Ib. 163. Same, 405.
Writs of Assistance.

Sheafe Esq; Collector of his Majestys Customs at the port of Boston," and requiring a Writ of Assistance for him. (9) *Fifth.*

(9) Sheafe's appointment of this date is announced in the Boston Gazette of the same day, and recorded in Book of Commissions &c. 1628–1763, fol. 219. He was subsequently made deputy of Roger Hale and Joseph Harrison, his own successors in the office of Collector. Book of Commissions 1764–1774, fol. 43, 68, 69. *Infra,* 428. It does not appear whether a Writ of Assistance was issued to him in this reign; but in 1766 he assailed Hallowell, the Comptroller, who had such a writ, in attempting to search a cellar. *Infra,* note 22.

In the preceding reign Sheafe had been repeatedly appointed by Henry Frankland, then Collector, his deputy in his absence. Book of Commissions &c. 1628–1763, fol. 110, 163. At last Frankland was suspended by the Surveyor General "for being absent from his duty," and Sheafe appointed in his stead on the 10th of March, 1759, and as such supplied with a Writ of Assistance. Book of Commissions 1756–1767, fol. 80. *Ante,* 406.

He was succeeded by Benjamin Barons, who was appointed by the Commissioners of Customs in England on the 11th of May, 1759, and who took the oath of office on the 25th of September, 1759. Book of Commissions &c. 1628–1763, fol. 170, 171. Barons was suspended by Lechmere, the Surveyor General, who appointed George Cradock temporary Collector in December 1759, and finally, upon charges filed by Paxton, removed Barons and appointed Cradock on the 14th of June, 1761. Governor Pownall's certificate of December 20, 1759, on file in *Erting v. Cradock,* *pofi,* Appendix II. Boston News Letter, December 20, 1759. Bernard's Letters of February 21 & June 28, 1761, 1 Bernard Papers, 297, 310. Book of Commissions 1756–1767, fol. 203. Barons immediately commenced actions against Lechmere for suspending him, against Cradock as an abetter of his suspension, and against Paxton for having made to the Surveyor General the complaint upon which he was removed; but brought none of these actions to trial. Bernard to Lord Barrington, February 20, 1763, 2 Bernard Papers, 27. Bernard to Lords of Trade, August 6, 1763, Ib. 45.

Paxton's articles of complaint against Barons alleged inter alia that "he procured a Meeting of Merchants, in which he was considered as principal, to act against the Court of Admiralty," who accordingly "presented a petition to the Assembly," (pofi, Appendix II.) and that "he hath declared that the Superior Court's granting Writs of Assistance is against Law, and he hath encouraged a Representation from the [same] Meeting of Merchants to the Superior Court against granting such Writs." *James Otis,* under the name of *Hampden,* in Boston Gazette of September 18, 1769.

Governor Bernard charged Barons and Otis with being the chief instigators.
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Fifth. A precisely similar certificate of the same date, for a Writ of Assistance to "Nathaniel Hatch, Esq' Comptroller of his Majestys Customs at the Port of Boston." (10)

And gators of the controversy of the merchants with the custom house officers, and especially of the actions of the Province v. Paxton, and Erving v. Cradock, post, Appendix 11. On the 19th of January, 1761, he wrote to Secretary Pownall: "Mr Barrons has paid the Devil in this Town. He has put himself at the head of a combination of Merchants all raised by him with the Assistance of two or three others to demolish the Court of Admiralty & the other Custom House officers, especially one who has been active in making seizes." 1 Bernard Papers, 296. And on the 6th of July, 1761, he wrote: "The Assembly keeps in very good temper; all necessary business is properly done, notwithstanding an opposition is kept up (fistom raising the minority to one third) by Mr. Otis Junr. who has been Mr Barrons faithful Counsellour from the first beginning of these Comotions to the hour of this present writing." lb. 233. To the like effect are his letters of July 12 & August 28, 1761, & January 12, 1762; lb. 7, 9, 25; December 22, 1766, & January 14, 1767, 4 lb. 275, 299.

Cradock Collector.

Cradock was furnished with a Writ of Assistance in the preceding reign, (ante, 406,) but was succeeded by Sheafe on the 4th of January, 1762, as above stated, before any new writs were issued, except to Paxton & Cockle. Before and after this time he was Deputy Judge in Admiralty here. Decrees on file in Gray, treasurer, v. Paxton, post, Appendix, 11. Walburn's Jud. Hist. Mafs. 184.

(10) This appointment is announced in the Boston Gazette of the same day, and recorded in Book of Commisions &c. 1658-1763, fol. 230. Hatch acted as Comptroller for a year at least. Boston Gazettes of January, 1764. He was also clerk of the Superior Court, and on the 10th of January, 1771, while continuing to hold that office, was made a Justice of the Inferior Court of Common Pleas. supra, 418, note 3. Book of Commisions 1767-1775, fol. 181. Mein & Fleeming's Register for 1772-75. 2 John Adams's Works, 194, 196, 251. Sabine's Amer. Loyalists, 351.

Plurality of offices —

The custom of combining incongruous offices in the same person was a prevailing abuse in the Province, and therefore very carefully guarded against in the State Constitution adopted in 1780. Declaration of Rights, art. 30. Constitution of Massachusetts, c. 6, § 2.

Hutchinson. Hutchinson was Chief Justice, Lieutenant Governor, a Councillor, and Judge of Probate for the County of Suffolk. 2 Minot's Hist. Mafs. 79 note. 2 John Adams's Works, 134 note, 155. "Instances may be found, where a man of abilities shall monopolize a power proportionate to all those of lord chief baron of the exchequer, lord chief justice of both branches, lord high treasurer, and lord high chancellor of Great
Writs of Assistance.

And a Writ of Assistance, in Winthrop's hand, and under the seal of the court, to Nathaniel Hatch, (11) in the corrected form above printed (supra, 418,) except in reciting the appointment of Hatch on the 4th of January 1762 by "John Temple, Esq", Surveyor General of our Customs for the Northern District of America, to be Comptroller of all the rates and duties arising and growing due to us at Boston in our province aforesaid," and with this tittle:

"WITNESS Thomas Hutchinson Esq: at Boston the " third day of June, in the second year of our Reign, An-" noq Domini 1762. (12)

"By order of Court.

"Saml. Winthrop Cler." (13)

Great Britain, united in one single person." James Otis, in Boston Gazette of January 11, 1763.

Chambers Ruffell, (also "one of the original conspirators against the public liberty" — 2 John Adams's Works, 333,) while Judge both of the Court of Admiralty and of the Superior Court of Judicature, was first a Councillor, and then a member of the House of Representatives. Bernard to Lord Barrington, October 15, 1766, 5 Bernard Papers, 164.

The Judges were often members of either house. 3 Hutchinson's Hist.

It was very common for the same person to hold offices in the customs and in the courts of justice. Paxton was Surveyor of the Port of Boston, Crier of the Superior Court of Judicature, and Marshal of the Court of Admiralty. Supra, 431, note 5. George Cradock was Collector of the Customs, and Deputy Judge in Admiralty. Supra, 426, note 9, ad fin. Edward Winfrow was Collector of the Customs and Clerk of the Courts in Plymouth. Infra, note 25.

(11) The reason why this Writ of Assistance was never issued may have been either that Hatch neglected to pay the clerk's fee, or that he was superseded before he had occasion to use the writ. Vid. ante, 406, note 91 infra, 432. However that may have been, we are indebted to his neglect for the preservation of the only original Writ of Assistance, issued in the Province, that has come down to us.

(12) The years of each king's reign were computed from the day of his accession. 2 Fois's Judges of England, 1. Ante, 411, 420, 421.

(13) The General Court, on the 6th of March, 1761, passed a bill authorizing any Judge or Justice of the Peace, upon information on oath by any officer of the customs, to issue a special writ or warrant of assistance; and prohibiting all others. But the Governor, after advising with the Judges of the Superior Court, refused to sign it. Vid. post, G.

The
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1762.
1763.

8. Writ issued to Surveyor General.

Sixth. A request of the Surveyor General, dated July 25, 1762, for a Writ of Assistance to "Roger Hale, Esq. Collector of his Majestys Customs for the Port of Boston. (14)

Seventh. A similar request, dated December 10, 1762, for a Writ of Assistance to "Joseph Dowse, Esq. Surveyor and Searcher of his Majestys Customs at Salem and Marblehead." (15)

Eighth. The form of writ printed above (supra, 418,) bears these indorsements in the handwriting of Hatch:

"Writ iff'd to the Surveyor General 27th May, 1763" (16)
"2d Dec. 1760." (17)

Ninth.

The General Court, at the same session, "not only reduced the allowance to this Court in general, but refused to make any allowance at all to me as chief justice." Hutchinson to Bollan, March 6, 1762, 26 Mafs. Archives, 8. Vide infra, 435, per Marjball, C. J.

(14) Hale's commission from the Commissioners of Customs in England bears date of February 8, 1763. Book of Commissions &c. 1628-1763, fol. 227. For the form of his instructions, vide infra, 433, note.

(15) Dowse was commissioned by the Surveyor General on the 31st of March, 1760, and by the Commissioners of Customs in England on the 5th of June, 1760, and again on the 21st of May, 1761. Book of Commissions &c. 1628-1763, fol. 172, 174, 217. But it would seem that he never obtained a Writ of Assistance; for the Commissioners of Customs appointed in 1767, in a letter dated "Castle William, Boston Harbor, 17th Oct 1768," directing him to search certain stores at Squam River, say: "If Mr Dowse is not furnished with a Writ of Assistants it will be necessary that the Comptroller shd attend him in this Service." Salem Custom House Record, 253. Mafscnewe was then Comptroller at Salem, and had a Writ of Assistance. Vide infra, note 24.

(16) No certificate or application in writing seems to have been made. Probably none was required of the Surveyor General.

(17) Probably the date of John Temple's appointment by the Commissioners of Customs in England in place of Thomas Lecbmer. He was certainly appointed before February 13, 1761. Instructions of that date from Commissioners of Customs to Governor of Connecticut, but not received by Governor Fitch (as appears by his indorsement) until November 13, 1761. 2 Trumbull Papers, 6, in Mafs. Hist. Soc. Lib. It would seem that Temple, who was born in Boston, (R. C. Winthrop's Address, 113,) brought these credentials with him on his return. In June.
Writs of Assistance.

Ninth. A certificate from the Surveyor General, dated November 5, 1763, of "the Commissioners of the Customs having appointed Thomas Bishop Esq' to be an officer of his Majestys Customs for seizing prohibited & uncustomed goods," and requesting a Writ of Assistance for him.

On which the Chief Justice issued the following order:

"Boston 4 Nov. 1763."

"Gents,"

"Thomas Bishop Esqr, Comander of His Majesty's Ship Fortune having applied to me for a writ of assistance as an Officer of His Majesty's customs you are to cause such writ to be issued a certificate being first produced from the Surveyor general & lodged in the office signifying that the said Thomas Bishop Esqr is such an Officer"

"T Hutchinson"

"To Samuel Winthrop Esq"

"or Nathanael Hanch Esq"

"Clerks of the superior court."

At the foot of this are added these minutes in Winthrop's handwriting:

"twenty third day of June 1763." (18)

"Wt issued Nov. 1763, was dld Cap. Bishop."

Tenth.

June Lechmere was still acting as Surveyor General, and recognized by the Governor as entitled to do so "till Mr. Temple arrives to take upon him the office." Supra, 425, note. Bernard to Lechmere, June 2, 1761, 2 Bernard Papers, 113. The first notice of this arrival of Temple in the Province is the following in the Boston Gazette of November 23, 1761.

"Last Night came to Town, from New York, the Hon. John Temple, Esq; Lieut. Governor of the Province of New-Hampshire, and Surveyor General of his Majesty's Customs for the Northern District of America."

In the same paper is the report of the decision in favor of the Writs of Assistance, the enforcement of which was among Temple's earliest official acts. Vid. supra, 416, 422; infra, 437; post, G.

(18) The date of the appointment by the Commissioners of the Customs Bishop's appointment.
Appendix I.

1765.

Tenth. A certificate of the Surveyor General, dated February 25, 1765, stating the appointment of "Mr Timothy Folger to be a searcher and preventive officer in the Customs in England of Captain Bishop to be an officer of the customs. Book of Commissions &c. 1628-1763, fol. 347.

In this year the commanders of all ships stationed on the American coast were authorized and directed to act as officers of the customs. St. 6 G. 3, c. 22. Order in Council of July 8, 1763, Book of Commissions &c. 1628-1763, fol. 355. Lord Egremont's Instructions to Governor Bernard, July 9, 1763, to Bernard Papers, 120. Governor's Proclamation of November 16, 1763, in Boston Gazette. Surveyor General's Instructions to Custom House Officers, December 26, 1763, Salem Custom House Record, 6. 5 Bancroft's Hist. U. S. 92, 161.

This measure was a surprise to the Province. On the 17th of September, 1763, Hutchinson wrote to Richard Jackson, Grenville's Secretary: "The first intelligence was from the Act itself and the proclamation and instructions consequent, which came to my hands two days since in the Governor's absence from Lord Egremont. I fancy many of the West India traders will be surprised. Such indulgence has been shown of late to that branch of illicit trade that nobody has considered it as such; vessels arriving and making their entries for some small acknowledgments as openly as from our own Islands without paying the duties." "The real cause of the illicit trade in this province has been the indulgence of the officers of the customs, and we are told that the cause of their indulgence has been that they are quartered upon for more than their legal fees, and that without bribery and corruption they must starve. If the penalty of the present age will not admit of reform in this respect, perhaps the provision now made may be the next best expedient." 36 Mass. Archives, 69.

On the 35th of October the Governor wrote to Lord Egremont in answer to the instructions, saying: "Ever since I have been in this Government, I have exerted the best of my powers to maintain a due obedience to the aforesaid Laws; and I can with pleasure add, that I believe they are nowhere better supported than they are in this Province. When first I came to this Government, about three years ago, some of the Merchants of this Town, provoked with liberties allowed at Ports almost under their eye, & really injured by them, did endeavour to enforce the allowance of the same liberties within this Port, by divers means. But my Resolution & the steadiness of the Judges of the Superior Court defeated this Scheme; & they became content to wait till measures should be taken for putting all the Ports in America upon the same footing. Before this Commotion & since, the Merchants here in general have acted in such a manner as to intitle themselves to all proper favour.
Writs of Assistance.

toms to reside at Nantucket," and requesting a Writ of Assistance for him.

1765.

Folger's

Wines in the Province.

favour. I do not pretend that this Province is entirely free from the breach of these Laws, but only that such breach, if discovered, is fully punished. There has been an Indulgence time out of mind allowed in a trifling but necessary article, I mean the permitting Lisbon Lemons & wine in small quantities to pass as Ships Stores. I have always understood that this was well known in England, and allowed, as being no object of trade, or, if it was, no way injurious to that of Great Britain.

He then goes on to speak of Lemons as "in this Climate not only necessary to the comfort of Life, but to health also." He says: "The wine generally used in this Country heretofore has been Madeira, but of late that has grown so extravagantly dear, that few People can afford it. The Wines of the Western Isles are now in the general use of this Country. But some Gentlemen prefer Portugal Wines. French Wines can never be an article of Trade here, as what comes to America is in general bad and very perishable; & when it is good, it comes as dear as Madeira, & is not near so much esteemed." He closes by "bespeaking your Lordship's favor that this intimation may not be understood to contain an admission that I myself have been knowingly concerned in or consenting to the aforesaid indulgence." 3 Bernard Papers, 99; Bernard's Select Letters, 1. The Governor's innocent ignorance of an indulgence which he "always understood was well known in England, and allowed," was not universally believed. See 5 Bancroft's Hist. U. S. 158, & note; 4 Franklin's Works, 469; supra, 424, note 7.

On the 26th of November, 1763, the Governor wrote to Jackson as follows, erasing the words in italics: "The Merchants here are greatly alarmed at the present proceedings to guard this coast & especially the appointing the Captains of the Men of War to be Customhouse Officers. They are strange People; they are either for taking the Government by storm & enforcing such a remission of the laws of trade as they think fit, or else in a fit of Despondency they give up themselves & their trade to ruin. They never think of a middle way; to remonstrate, with decency, upon the real hardships they lay under, & to crave redress, which I cannot think would be hard to obtain." 3 Bernard Papers, 106.

Compare Burke's account of the abuses and evils of this system of employing officers of the navy as custom house officers. 8 Annual Register, 18-21. "If these gentlemen did not understand all those cases in which ships were liable to penalty, they as little understood those in which ships were exempt even from detention; and, of course, hurt the interests of trade in the same proportion that they disappointed the expectations
Appendix I.

1765. 
Order for Writ to Folger.


Folger's certificate is indorsed by the Chief Justice "The writ is allow'd to issue." (19)

Eleventh. The following request of the Surveyor General:

"Boston, 14 March 1765.

"Sir,

"I believe it is necessary for the Service of the Revenue that Mr Hallowell the Comptroller of the Customs for the Port of Boston should have a Writ of Assistance. If you think proper to grant him one you will much oblige me. I am with great respect,

"Sir, Your most obedient

"and most humble Servant

"J. Temple.

"To the Hon' Mr Hutchinson."

On

peculations of the treasury; so that, through the natural violence of their disposition, and their unacquaintance with the revenue business, the trade still carried on between British subjects was very much injured." ib. 18.

When Captain Bishop was about to return to England, Governor Bernard, in a letter of July 5, 1766, to the Secretary of the Admiralty, commended him for his vigilance and assistance, and wrote that "upon his first arrival here he engaged in the particular business for which he was sent here, with great diligence and alacrity," and by two seizures "so discouraged the practice of illicit trade, that I believe we are indebted to him for having less of it in this port than in other places." 4 Bernard Papers, 243. See The Brig Freemason, ante, 381; Bernard to Halifax, December 24, 1763, printed from 3 Bernard Papers, 111, ante, 393-394. On the arrival of the stamps Captain Bishop had charge of their removal to the Castle; and he took them back to England when he returned. Bernard to Bishop, and to Halifax, August 23, 1765, 4 ib. 61, 145. Bernard to Bishop, July 17, 1766, 5 ib. 186. Bernard to Grey Cooper, July 18, 1766, ib. 138.

(19) It was issued on the 3d of February 1765, more than three weeks before the date of the certificate. Infra, 434. Folger was appointed by Temple on the 17th of August, 1764. Book of Commission 1764-1774, fol. 39. Among John Adams's MS. notes of his cases in court are memoranda of "Folger vs. Hallowell" and "Butler vs. Brig Union," by which it appears that the question of the right of a preventive
Writs of Assistance.

On which this order is indorsed by the Chief Justice:

"Agreeable to the within Request you are to cause a Writ of Assistance to issue. (20)

"T. Hutchinson.

"Mr. Winthrop or
"Mr. Hatch."

On

A writ was accordingly issued on the 23d of March 1765. In the Library of the American Antiquarian Society is the original commission from the Commissioners of the Customs in England to "M: Benjamin Hallowell the younger to be Comptroller of all the Rates Duties and Imposts arising and growing due to His Majesty at Boston in New England in America by Vertue of the act of 25 Car. 2, c. 7, "Whereby he hath power to enter into any Ship, Bottom, Boat, or other Vessel; As also into any Shop, House, Warehouse, Hoftery or other place whatsoever to make Diligent Search into any Trunk, Chest, Pack, Case, Truf or any other Parcel or Package whatsoever for any Goods Wares or Merchandize prohibited to be Imported or Exported, or whereof the Customs or other Duties have not been duly paid; And the same to Seize to His Majesties Use; And also to put in Execution all other the lawful powers and Authorities for the better managing or Collecting the said Duties. In all things proceeding as the Law Directs, Hereby praying and requiring all and every His Majesties Officers & Ministers, and all others whom it may Concern, to be Aiding and Assisting to Him in all things as becometh." This commission, printed on parchment from an engraved plate, is dated March 9, 1764; bears a certificate of Governor Bernard, dated July 18, 1764, that Hallowell had taken the oaths of office; and is recorded in Book of Commissions 1764-1774, fol. 35. Hallowell's appointment was rumored two months earlier. Boston Gazette of May 7, 1764.

In the same library are the original printed instructions from the English Commissioners of Customs to Hallowell as Comptroller, dated July 13th 1764, containing almost wholly of a copy of the printed instructions of the same date, to Roger Hale, Collector of Customs at Boston, (in a form which must have been then recently established, inasmuch as it mentions the St. of 4 G. 3, c. 15,) which contains no mention of Writs of Assistance, otherwise than by directing the Collector to execute the
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On the back of the precedent above printed, (supra, 418,) under the memoranda of the issuings of a writ to the Surveyor General, (supra, 428,) are the following, in Winthrop's handwriting:

10. Folger. "to Tim Folger" Feb 2nd 1765 (21)
11. Hallowell. "to B. Hallowell Esq" 22 Mar, 1765 (22)
12. Fisher. "to Jno Fisher" 1 April 1768 (23)
13. Macarene. "to Jno Macarene" 1 April 1768 (24)
14. Winflow. "to Edw Winflow" 8 Feb 1769 (25)
15. Capt Reid. "to Capt W Reid of y Sloop Liberty 10th Febry 1769." (26)

powers and authorities given him by the aet of 7 & 8 W. 3, c. 22, § 6, and other Acts of Parliament "for entering any Houses or Warehouse to search for and seize any such Goods, under the Regulations prescribed by Law;" and informing him that "the like Assistance is to be given to you, and the other Officers in the Execution of your and their Duties as by the 14th of Cha. II. is provided for Officers in Great Britain."

In a collection of folio pamphlets in the Boston Athenæum, labelled "Tracts, A. 23," are copies of such instructions; and also of similar instructions issued from the London Custom House to Collectors in America in 1707, which do not substantially vary in this respect, except in omitting the words "under the Regulations prescribed by law."

Hallowell was one of the most active and unpopular of the officers of the customs. His house was sacked on the 26th of August 1765, with those of Chief Justice Hutchinson, and William Story, the registrar of the Vice Admiralty Court. Ante, 168. In 1766 he and Sheafe, the deputy collector, were successfully opposed by Malcolm in the execution of a Writ of Assistance. Infra, 446. In June 1768 he was forward and violent in seizing John Hancock's Sloop Liberty, and was sent to England to misrepresent the behavior of the people upon that occasion. Franklin's True State of the Proceedings in Massachusetts, A Franklin's Works, 481. 6 Bancroft's Hist. U. S. 156, 161, 164. He was afterwards "appointed one of the Commissioners of the Board of Customs in America, in the Room of the Hon. John Temple, Esq." Boston Evening Post, December 31, 1770.

(21) Vid. certificate and order, supra, 430-432, & note 19.
(22) Vid. supra, 433, 433, & note 20. Writs of Assistance had now been issued to officers of all the principal and some of the smaller ports of the Province, and there seems to have been no difficulty in executing them until after the passage of the Stamp Act.

Chief Justice Marshall, speaking of the condition of the American Colonies...
Colonies in 1763, says: "At no period of time was the attachment of the colonists to the mother country more strong, or more general, than at present." To which he adds this note: "After the expulsion of the French from Canada, a considerable degree of ill humour was manifested in Massachusetts with respect to the manner in which the laws of trade were executed. A question was agitated in the court in which the Colony took a very deep interest. A custom-house officer applied for what was termed 'a writ of assistance,' which was an authority to search any house whatever for dutiable articles suspected to be concealed in it. The right to grant special warrants was never contented, but this grant of a general warrant was deemed contrary to the principles of liberty, and was thought an engine of oppression equally useless and vexatious, which would enable every petty officer of the customs to gratify his resentments by harassing the most respectable men in the province. The ill temper excited on this occasion was shewn by a reduction of the salaries of the judges, but no diminution of attachment to the mother country appears to have been produced by it." Marshall's American Colonies, 377. Such is the summary of the greatest authority on American constitutional law, in a work of which a most competent critic has said: "Every part of it is marked with the scrupulous veracity of a judicial exposition." Binney's Eulogy on Marshall, 59. And see Otis's Rights of the British Colonies, 48, 60; 3 Hutchinson's Hist. Mass. 102, 103.

Hutchinson, at this time, took the part of the Colony. "The Molasses Act as it now stands was undoubtedly intended to have the force of a prohibition. To reduce the duty to a penny per gallon I find would be generally agreeable to the people here, & the merchants would readily pay it; but do they see the consequence? Will not they be introductory to taxes, duties & excises upon other articles, & would this consent with the so much esteemed privilege of English subjects — the being taxed by their own representatives?" Hutchinson to Jackson, Augst 3, 1763, 26 Mass. Archives, 65, 66. So in July, 1764 (erasing the words in Italics, and inserting those in brackets): "The colonists like all the rest of his Majesty's subjects [the human race] are of different spirits and dispositions, some more calm & moderate, others more violent & extravagant; and if now & then some rude & indecent things are thrown out in print, in one place & another, I hope such things will not be considered as coming from the Colonists in general, but from particular persons warmed by the [intemperate] zeal, shall I say of Englishmen, in support of what upon a sudden appear to them to be their rights." ib. 90. And on the 9th of November, 1764, he wrote to Mr. Bellan: "If the Parliament begin with internal taxes, I know not where any line can be drawn. If it be said there is none but their discretion, we are in danger of unequal distressing burdens, which finally must affect the nation as much as the colonies themselves." ib. 117.

Governor Bernard wrote to John Pomflett, May 6, 1765: "I am sorry that this Province suffers in the opinion of their Superiors for the middeas
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misdeeds of a few particulars. I can assure you that the people in general is extremely well disposed to Government; & it is owing only to the Wickedness & folly of a few politicians, chiefly of this Town, that it does not always appear so.” 3 Bernard Papers, 289. Compare Franklin’s Examination before the House of Commons, 4 Franklin’s Works, 169.

Still the Acts of Trade were occasionally violated, and on grounds of right. The independent spirit of Rhode Island was a principal source of uneasiness to the Crown officers.

In the Old French War the Governor of Rhode Island granted licenses to trade with the enemy, which were decided by the High Court of Admiralty in 1762 to be invalid. The Chelsea, MS. Index to Admiralty Cases 1758–1766, purchased in London at the sale of the Library of Doctors’ Commons in 1860, and in the possession of the writer, pl. 145. See also Lieutenant Governor Delancy to Lords of Trade, June 3, 1757, 7 N. Y. Col. Doc. 325, Governor Hopkins’s reply to Pitt’s circular of August 23, 1760, and General Amherst’s letter of May 7, 1763, to the Governor of Rhode Island, 6 Rhode Island Col. Rec. 263, 317. But that practice was not confined to Rhode Island; indeed it was said that “Governor Bernard in particular has also done business in the same way.” Lieutenant Governor Sharpe of Maryland, quoted in 4 Bancroft’s Hist. U. S. 377.

However that may have been, Governor Bernard wasconfident in his complaints ofsmuggling in that Colony. On the 9th of May 1761 in a letter to John Pennwall, describing a seizure of a vessel for being concerned in the Mississippi Trade, he wrote: “These practices will never be put an end to till Rhode Island is reduced to the subjection of the British Empire; of which at present it is no more a part, than the Bahama Islands were, when they were inhabited by the Buccaneers.” 2 Bernard Papers, 312. On the 5th of October, 1761, he wrote a detailed account of “the notorious manner” of carrying on contraband trade in Rhode Island, in a letter addressed to Pitt, but which was never sent. 2 Bernard Papers, 14. 9 Ib. 229. And in another letter to John Pennwall, on the 10th of February, 1764, after stating that the support which he had given Captain Bishop as a zealous officer had occasioned a confederacy among the unfair traders to get him displaced from his government, he added: “They are not so temperate in Rhode Island: they cannot submit to the Laws of Great Britain as yet. When an Act of Parliament is quoted, they say they can’t find it in their law book. The Surveyor general lately appointed a Comptroller of the port of Newport, an officer before known in that port. The Governor promised to swear him into his office; but before he could do it, the Assembly made an order that the Governor should not admit him into Office; & the Governor obeyed. Upon which the Surveyor went thither himself & swore him in. Soon after, A Vessel coming up to Providence palled by the Custom House without reporting & immediately proceeded to land her Cargo. Soon after she was seized by the officer stationed
Writs of Assilance.

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Refuse of Sloop Folly.

Proceedings in Council.

Surveyor General.

From the image, it appears that the text is discussing legal documents related to the collection of taxes and the actions of public officials. The text mentions the refusal of a writ of assistance, a legal document that allowed customs officers to search private homes without a warrant. The passage reflects the debates and events surrounding the British policy of taxation and the reactions of the American colonies, particularly Rhode Island. The text references the Governor of Rhode Island, the Surveyor General, and includes judicial opinions and correspondence from the time period.

The text is a part of a larger document that likely discusses the legal and political implications of the refusal of the writ and the broader issues of colonial governance and taxation.
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Charges against the Justices of Bristol.

There cited. The Governor professed a desire to have these charges investigated, and relied mainly on the testimony of the inferior custom house officers (his alleged accomplices) to clear himself. Bernard to R. Jackson and to J. Pownall, May — August, 1765, 4 Bernard Papers, 1-10. He also recriminated by charging the Surveyor General with remissness in executing the Acts of Trade; and vehemently complained that none of the officers of the Navy except Captain Bishop would consult with him about seizures. Bernard to Halifax, July 1, 1765, Ib. 130.

On the 9th of May Collector Robinson and Captain Anrodes laid an information before the Governor, that after their seizure of said vessel and her cargo, and while Nicholas Lechmere, searcher and landwaiter of the customs in Rhode Island, and his servant, in whose custody the vessel had been left, "were refreshing themselves on shore within one hundred yards of the vessel," the cargo was carried away, and the vessel unrigged and scuttled, by persons unknown. 44 Mfs. Archives, 554. On the 11th of May, Robinson, by the Governor's request, at a special meeting of the Council summoned for the purpose, filed a complaint against divers Justices of the County of Bristol, for not yielding him proper assistance in the recovery of the goods. Ib. 556. Council Rec. 1765, fol. 373. Bernard to Robinson, May 8 & 9, 1765, 4 Bernard Papers, 44, 45. Bernard to Halifax, May 11, 1765, 3 Ib. 241. The Justices were summoned to appear, and made answers, to which Robinson replied, and depositions were taken. Proceedings in Council, June 5 & 13, 1765, Copy in Secretary's Office of Council Rec. 1765-1774, fol. 3, 9. 44 Mfs. Archives, 559. 56 Ib. 450. 66 Ib. 316, 317, 320-318. One of the Justices was Samuel White, of Taunton, who was Speaker of the House of Representatives this year, and who, as tradition reports, was "famed for his accuracy in making writs." Holmes's Address to the Bristol Bar, 8. The others were Timothy Fales, James Williams, Ezra Richmond, and Jerathmeeel Bowers.

The Justices answered that Robinson, when he applied to them, would not submit his commission to their inspection, but "Immediately demanded a Warrant to search the Stores of Job Smith and all other Suspected places, without preferring any Written Complaint or offering to make Oath to his Suspicion of the facts. Whereupon we severally told him it was a new matter, & that we doubted of our Power to Grant such a Warrant as he demanded and chose to Consider of the Matter, and under these Circumstances we Suspended the Matter for Consultation. May it please your Excellency we beg leave to observe that Mr. Robinson doth not pretend that he had any Writ of Affirmance or if he had that he shewed it to any of us; whereupon we Considered whether as Justices of the Peace we were obliged to Grant a General Warrant to break up all Suspected Houses or Even any particular House to Search for goods taken away as these were. Especially to a person who Shewed us no Power he had to demand one and who presented us no Regular Com-
plaint Tho' Requested We thought it not Incumbent on us by the Common Law if not Repugnant to it. And if there is any Act of Parliament Injoying it upon us it had not come to our knowledge, we thought it our Duty to attend to the observance of all Laws and not to take such Steps in the Execution of any Supposed one as to Infringe on others that were known." And they add that Robinson by their afliance obtained entrance without a warrant into every house which he defied to search. The original answers, drawn by Samuel White, are in 44 Mass. Archives, 560–564.

On the 24th of July 1765, the Chief Justice and the Attorney General were appointed by the Governor and Council a Committee "to consider whether Justices of the Peace in America are obliged or impowered by Law to grant Warrants to break open Stores or other Houses to search for Cuffomable Goods;" and on the 31st of July, at a Council at which the same Persons, except Hubbard, were present as on the 15th of April, (supra, 437.) and also James Otis (of Barnstable) & Royall Tyler, made this report, the original of which, with the order thereon, both in Hutchinson's handwriting, are preferred in 66 Mass. Archives, 319–321, and copied in Council Rec. 1765–1774, fol. 24 & seq.:

"To His Excellency Francis Bernard Esq' Governor in chief &c.

"In obedience to the Order of Your Excellency in Council we have considered the Points referred to us, and find That by the Act of Parliament of the 14th of Charles the Second intitled An Act for preventing frauds & regulating abuses in His Majesty's customs it is among other things enacted 'that it shall be lawful to or for any person or persons authorized by writ of assize under the seal of His Majesty's court of exchequer to take a confable, headborough or other publick officer inhabiting near unto the place & in the day time to enter & go into any house shop cellar warehouse or room or other place and in case of resistance to break open doors chests trunks and other packages, there to seize & from thence to bring any kind of goods or merchandise whatsoever prohibited and unconfisned." And that by a subsequent clause in the same Act it is further enacted 'that all Officers belonging to the Admiralty Captains & Commanders of Ships Forts Castles & Blockhouses, as also all Justices of the Peace Mayors Sheriffs Bailiffs & Headboroughs and all the King's Majesty's Officers Minissters & Subjects whatsoever whom it may concern shall be aiding and afflicting to all and every person or persons which are or shall be appointed by His Majesty to manage his customs and their respective deputies in the due execution of all and every act and thing in and by this present Act required and enjoined.' And that by the Act of the seventh & eighth of William the third intitled 'An Act for preventing frauds & regulating abuses in the Plantation trade' the same Powers and authorities are given to the Officers of the
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"the custums in the Plantations for visiting & seizing ships & taking their entries & for seizing securings & bringing on shore any prohibited or uncustomed goods as are provided for the Officers of the customs in England by the Act of the 14th of Charles the second and that by the same Act of William the Third it is further provided 'that the like assistance shall be given to the said Officers in the execution of their office as by the said last mentioned Act is provided for the Officers in England.' But we do not find that Justices of the Peace by any clause in the aforesaid Act of 14th of Charles the second or by any clause in any other Act of Parliament which extends to the Plantations or by the common law or by any law of this Province are obliged or empowered to grant Warrants to break open stores or other house to search for customable goods, and we apprehend the only provision for that purpose is by a writ of assistance from the Superior Court of judicature &c. to which Court the Act of this Province constituting the same gives the like Powers with those of the court of exchequer in England. All which is humbly submitted to your Excellency's judgment.

"Boston, July 31, 1765. "

T Hutchinson
EDM: TROWBRIDGE"

"The foregoing Report was accepted, and the Opinion therein given was unanimously declared to be the Opinion of the Board;" and it was Resolved, that "Mr. Robinson not having then procured a Writ of Assistance (as he hath since done)" the Justices were justified in doing as they did, and the complaint was dismissed.

The fact that James Bowdoin and Otis's father concurred with the rest of the Council in this Opinion goes far to show that the legality of Writs of Assistance was then considered to be established beyond controversy. But such acquiescence did not last much longer.

The development of public sentiment in this year is well shown in the familiar letters of Hutchinson to Jackson, agent of the Province in England. On the 5th of May, 1765, he said: "I do not believe that the officers of the customs are better supported in the execution of their trust in any government upon the continent than they are in this. The charge against the governor seems to be that he is too active. The council are always ready to do what is proper on their part. Every officer for whom it has been desired has been furnished with a writ of assistants, which have been refused in most of the other governments."

26 Mass. Archives, 138. In a letter of June 4, 1765, but marked in his letter-book "not sent," he wrote: "I think the Acts of Trade are better observed than in any time past. All the officers of the customs in this Province have been furnished with writs of assistance. I have also infused them to the officers in Rhode Island for that part of their district which lies in this Province." Ib. 139. In a similar letter of the next day: "The stamp act is received with us as decently as could be expected.
Writs of Affiance.

expected. The act will execute itself, & there is no room for evasion; and if there was, I am sure the executive court would show no countenance to it." Ib. 140. On the 6th of August: "I hope we shall be able to keep peace in the execution of the stamp act, notwithstanding all the newspaper threats; but pray do not be in great haste with more of the same sort. I do not mean to insinuate that they would not be submitted to, but they will cause an alienation of affection which must have an ill effect." Ib. 145. Ten days later, after the distributor of stamps had been burned in effigy, and ten days before the destruction of the Chief Justice's own house by the mob, he wrote: "I made a poor judgment when I wrote you before, & find I promised myself what I wished rather than what I had reason to expect. I am now convinced that the people thro' the continent are impressed with an opinion that they are no longer considered by the people of England as their fellow subjects & entitled to English liberties; & they expect some tragical events in some or other of the colonies; for we are not only in a deplorable situation at present, but have a dismal prospect before us as the commencement of the act approaches. If there be no execution of it all business must cease; and yet the general voice is, it cannot be carried into execution." Ib. 145, supplemental leaf. In a letter to the same of September 13, 1765, he wrote: "The late acts of Parliament for raising a revenue from Molasses & a duty on Stamps have caused great part of the people in the Colonies to run disaffected. The posts I sustaine have made me their object in this Province." [Then follows the statement of the case of the Writs of Affiance, already quoted, supra, 415, note.] "The Stamp duty, although I always feared the consequence of it would be bad, both to the nation & colonies, and privately & publickly declared my thoughts upon it, yet after the passing the act I could not avoid considering it as legally right, the Parliament being beyond dispute the supreme legislature of the British dominions; but our friends to liberty take advantage of a maxim they find in Lord Coke that an act of Parliament against Magna Charta or the peculiar rights of Englishmen is ipso facto void. This, taken in the latitude the people are often enough disposed to take it, must be fatal to all Government & it seems to have determined great part of the colonies to oppose the execution of the act with force & to show their resentment against all in authority who will not join with them." He then gives an account of the destruction of his house & papers; and adds: "I am still of the mind I always have been that those acts of Parliament have been unreasonably pushed." Ib. 153, 154.

"The change of the currency, writs of affiance, & letters in favour of the stamp act are said to be the reasons of my being particularly obnoxious; but the disposition to tumult in general is undoubtedly occasioned by an apprehension prevailing among the People that they are deprived of the liberties of Englishmen; & every attempt to maintain in them a due sense of their connexion with Great Britain is misconstrued into an attempt

Hutchinson to Conway, October, 1765.
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Bernard & Hutchinson on Otis.

attempt to inflame them, & the officers of the crown for doing what at any other time would be thought their duty are now charged with supporting the measures of the ministry & sacrificing the rights of the People." Hutchinson to Seymour Conway, October 1, 1765, lb. 155. See other quotations from Hutchinson's letters, infra, 415, note.

Bernard and Hutchinson were very bitter against Otis. "Some of them talk as if this Town was to remain forever independent of the King's Government: One says, Let us see now, who will seize Merchants Goods, what Judge will condemn them, what Court will dare grant writs of assistance now; Other talk as familiarly of turning out the Governor, (for adhering to the King & Parliament) as they could do at Rhode Island or Connecticut." [The Governors of those Colonies were elected, instead of being appointed by the King, as in Massachusetts."

"Mean while, Otis (who perhaps is as wicked a man as lives) publishes every week inflammatory invectives against the Governor & Government." Bernard to John Pownall, November 26, 1765, 5 Bernard Papers, 46. "I will hold out as long as possible. To die by inches will please my great adversary the present champion for liberties. What will posterity say of him when they reflect upon or feel the ruin he has brought upon his country," Hutchinson's letter of December 24, 1765, "not sent," 26 Mafs. Archives, 185. & vid. lb. 187. In a subsequent letter to Governor Pownall, (quoted at some length infra, 444, 445,) Hutchinson spoke of Otis as "a meteor which has appeared since you left the Province in the Massachusetts." lb. 215.

"The man is mad." Two years later Hutchinson wrote: "We have now and then flashes from our firebrand. I wish I could think them prelages of his extinction." Letter of February 17, 1768, lb. 289. In January 1768 he reported that during the election of Councillors "Otis like an enraged Daemon ran about the house." 25 lb. 265. And the Governor said that Otis at the same session "behaved in the house like a madman." Letters of Bernard, Gage & Hood, (Boston, 1769) 9. It is not quite clear whether the writers perceived (what was probably the fact) that the mind of Otis was already affected. See 2 John Adams's Works, 163, 214, 218, 220; Tudor's Life of Otis, 174, 336, 340; 1 Gordon's Hist. U. S. 204; 6 Bancroft's Hist. U. S. 120, 310; Mafs. Hist. Soc. Proceedings 1858, p. 53; Oliver to Bernard, December 3, 1769, infra, 465. Perhaps the more natural inference is that they only reëchoed the voice of the House of Lords in February 1766—"the man is mad." Holliday's Life of Mansfield, 248. 16 Parl. Hist. 172.

At the end of 1765 John Adams wrote in his diary: "The Stamp Act has raised and spread through the whole continent a spirit that will be recorded to our honor with all future generations. In every colony, from Georgia to New Hampshire inclusively, the stamp distributors and inspectors have been compelled by the unconquerable rage of the people to renounce their offices." "The people, even to the lowest ranks, have become more attentive to their liberties, more inquisitive about
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about them, and more determined to defend them, than they were ever before known or had occasion to be.” 2 John Adams’s Works, 154. & *vid.* ib. 169, 173; Trowbridge to Hutchinson, December 2, 1765, 25 Mass. Archives, 59; Otis’s Argument on the 19th of December, 1765, for the Opening of the Courts, *ante*, 202; Franklin’s Examination before the House of Commons in February, 1766, 4 Franklin’s Works, 167, 169, 176, 178, 196, 198, & 16 Parl. Hist. 140, 141, 145, 147, 159, 160; 5 Bancroft’s Hist. U. S. cc. 19, 20.

At the same time Hutchinson’s tone changed—stretching the authority of Acts of Parliament beyond what had ever been asserted in England, (*Vid.* post, H) and more than infusing the necessity of forcible measures, and habitual interference with the internal affairs of the Colony. “I thought we had settled a tolerable system of colony law in this province—that where the local laws did not provide, the law of England, not merely as it flowed when we came over here, but as it has been from time to time amended by subsequent statutes, except such statutes as apparently were confined to the realm, was the only certain rule of law in judicial proceedings, and that upon other plans the law would be vague and uncertain, & I was in hopes to have lived to see no body doubt of the reasonableness of it. But all of a sudden from this fatal act we have it advanced that acts of parliament of England or Great Britain have no more relation to us than acts of parliament of Scotland had before the Union. The King of Great Britain indeed is our Sovereign, but we have no representation in parliament, & strictly speaking, not merely those acts which lay taxes upon us, but no other acts any further than we adopt them, are binding upon us. In conversation with Hopkins, the late Governor of Rhode Island, a few weeks ago, who professed to be of this principle, I asked him what construction he gave to the restraint in their charter from making laws repugnant to the laws of England. ‘Oh! the common law as it flowed when their charter was granted.’ ‘If laws immediately respecting us are not obligatory, surely those of a more general nature are not so, & I know not by what law I am to judge or be governed.’ ‘In order to our future peace & happiness, it seems absolutely necessary that the relation between Great Britain and her colonies should be made certain, & then that the authority in each colony should be strengthened so as to maintain and preserve this relation. But this requires superior wisdom. All the service I ever hoped to be capable of is to represent the true state of our case.’ Letter of February 26, 1766, 26 Mass. Archives, 177, 178. “As Chief justice I am sworn to judge according to law. I look upon acts of parliament, not restrained to the realm, as binding the colonists where the local laws are silent, and controlling those laws themselves where they are made to respect them. The chief justice of Rhode Island supposes no act of parliament can controul a law of that colony. Should there be allowed such difference in a point of this importance? I wish to see known established principles,
principles, one general rule of subjection, which once acknowledged, any attempts in opposition to them will be more easily refuted and crushed. When this is done, will it not be convenient to familiarize to acts of parliament made immediately to respect us? Should a session pass without one or more acts of this sort; sometimes general, sometimes they may respect a particular colony. Proper subjects will always occur." Letter of April 21, 1766, Ib. 228.

But Hutchinson was never very scrupulous about restraining the liberties of the people. As early as July 1764 he not only agreed that "it is possible for Parliament to pass Acts which may abridge British Subjects of what are generally called natural rights," but was "willing to go farther, & suppose that in some cases it is reasonable & necessary, even though such rights should have been strengthened & confirmed by the most solemn sanctions & engagements. The rights of parts & individuals must be given up when the safety of the whole shall depend upon it." 26 Mafs. Archives, 90. Compare his Charge to the Grand Jury in 1767, ante, 334; his well known saying in January 1769—"There must be an abridgment of what are called English liberties"—Letters of Hutchinson, &c. (Boston, 1773) 16; and Edmund Quincy to John Hancock, March 25, 1776, Mafs. Hist. Soc. Proceedings 1858, p. 30.

On the 8th of March 1766, Hutchinson wrote a long letter to Governor Pownall, for the avowed purpose of acquainting him "with the rise and progress of this taint of principles and the degree to which it prevails," an outline of which is shown by the following extracts: "I have often had occasion to reflect upon your sentiments of the People of America, more justly formed, from the experience of a few years, than my own, from living among them all my days. A thought of independence I could not think it possible should enter into the heart of any man, in his fancies, for ages to come. You have more than once hinted to me that I was mistaken, and I am now convinced that I was so."

"It is not more than two years since it was the general principle of the colonists, that in all matters of privilege or rights the determination of the Parliament of Great Britain must be decisive." "Until the late act which lowered the duties upon molasses & sugar, with a professed design to raise a revenue from them, few people in the colonies had made it a question how far the Parliament, of right, might impose taxes upon them. When this first became a topic of conversation, few or none were willing to admit the right, but the power, and from thence the obligation to submit, none would deny. The Massachusettts assembly was the first representative body, which took this matter into consideration." He then describes the addresses from Massachusettts and New York to the House of Commons, (substantially as in the third volume of his History, 113-115.) and adds: "It had not however been suggested that the stamp act would not be executed." But soon after,
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"the resolves of the Virginia assembly were sent hither. A new spirit appeared at once. An act of Parliament against our natural rights was ipso facto void, and the people were bound to unite against the execution of it." "If the act should be repealed, we shall still be in a deplorable condition. In the capital towns of several of the colonies, & of this in particular, the authority is in the populace, no law can be carried into execution against their mind. I am not sure that the Acts of Trade will not be considered as grievous as the stamp act. I doubt whether at present, any custom house officer would venture to make a seizure."

In a postscript of a few days later to the same letter, Hutchinson mentions "a seizure of molasses & sugar at Newbury; half a dozen boats, well manned, went after the officer, took the goods from him and the boat he was in, and left him all night upon the beach. A proclamation with promise of reward upon discovery is nothing more than the shew of authority, no man will venture a discovery, and I imagine a few more such instances will make it settled law that no act but those of our own legislatures can bind us." 36 Mass. Archives, 214. The Governor's proclamation, which states that this refuge was on the 10th of March, is in the Boston Gazette of March 17, 1766. On the same day the Governor wrote to Secretary Conway and to the Lords of Trade: "Upon this occasion People do not wonder at the goods being refused, but at an Officer's being so hardy & foolish as to seize them & think he would be able to retain them. Under the present dominion of the People I have never expected that any goods, tho' ever so notoriously forfeited, would be seized, or secured or prosecuted; an attempt of that kind being judged impracticable in every step by some of the most diligent & discreet Custom house officers." 4 Bernard Papers, 218.

Hutchinson wrote again to Governor Pownall on the 11th of May, 1766, of the anticipated repeal of the Stamp Act: "Our advices are as late as the 8 of March, & though we do not know the act of repeal has passed through all branches, yet we are told it certainly would pass."

"We were in such a state that nothing short of an armed force in every colony could have carried the stamp act into execution, nor do I think the people ever will submit to internal taxes. It is well if no opposition is made to other duties. I hear the great haranguer told the inhabitants of Boston in town meeting last week the merchants were fools for submitting to duties and restraints upon trade. P—— had information of a vessel unloading dutch goods from Statia a few days ago, but he did not think it safe to go himself, nor could he find anybody else who would venture to seize her." 36 Mass. Archives, 231.

Governor Bernard, somewhat later, wrote: "Mr Otis at a meeting at the town hall (which I think was to fix a time for rejoicings for the repeal) in a short speech told the People that the distinction between inland taxes & port duties was without foundation; for whoever had a right

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Refuse of goods seized at Newbury.

Hutchinson on the Repeal of the Stamp Act.

Bernard's account of Otis's speech thereon.
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right to impose one had a right to impose the other: & therefore as the Parliament had given up the one, (for he said the Act securing the dependency had no relation to Taxes) they had given up the other: & the Merchants were great fools, if they submitted any longer to the Laws restraining their Trade, which ought to be free. This Speech made a great deal of Noise; & it was observed by serious Men, that Otis had thereby made himself answerable for all the disturbances which should thereafter happen in the execution of the Laws of Trade. But the natural Consequence, & what immediately followed, was, that a common talk prevailed among the People that there should be no more Seizures in this Town. There have been but two Seizures made in the Province since; & they have been both resolved with an high hand. In that at Boston, it is remarkable that the Man who opposed the Officers sent for Otis, & he went thither as his Councillor. This is the manner, in which this Man & his Faction, after they had heard of the Repeal of the Stamp Act, prepared to make a return for it, on the part of the Province." Bernard to Shelburne, December 22, 1766, 4 Bernard Papers, 382.

Both these seizures were made under Writs of Assistance. Neither of them seems to have been considered by Hutchinson important enough to be mentioned, either in his correspondence or his History.

The first was on the 7th of August, 1766, in the house of Enoch Ilfrey in Falmouth, now Portland, and was forcibly and publicly resisted by a large number of Persons. Copies of Council Rec. 1765-1774, fol. 145. Directions of August 18, 1766, to Collector and Comptroller of Falmouth, in 3 Bernard Papers, 195. Governor Bernard's Proclamation of the same date in Boston Gazette of August 25. In a letter of August 18 to the Lords of Trade upon this affair, Governor Bernard says: "As often as any Seizures are made in this Province, in its present state, so often shall I have a proclamation of this kind to issue, which is now become a mere farce of Government; since no one dares to discover or prosecute the Offenders, if they were so disposed; & indeed the Offenders are some times, as in this Case, the greatest part of the Town. Formerly a seizure was an accidental or occasional affair; now, it is the natural & certain Consequences of a seizure, & the Effect of a predetermined Resolution that the Laws of Trade shall not be executed." "These are the Consequences of the general Weakness of the Government, which is become a mere Shadow. I expect to have frequent occasion to repeat to your Lordships, that this Government is not like, by any internal powers of its own to recover itself from the great blow it has lately received. The popular Leaders have laboured so successfully, that the very Principles of the Common People are changed; & they now form to themselves pretensions & Expectations, which had never entered into their Heads a year or two ago." 4 Bernard Papers, 245. See also Bernard to Shelburne, February 28, 1767, 6 lb. 197.
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Contrast with these Adams’s Diary, November 11, 1766, 2 John Adams’s Works, 203; & Otis to Conway, June 9, 1766: “Should any persons attempt to persuade the administration, that the colonists are in the least disposed to forget their duty and loyalty to the best of Kings, they will soon find themselves confuted.” 2 Sparks’s Amer. Biog. ad series, 145, 146.

The other affair, called by the Governor in his letter of February 28, 1767, “the Riot at Boston,” and in that of the previous December (supra, 446,) a seizure “refused with an high hand,” was as follows:

On the 24th of September, 1766, Hallowell, the Comptroller of the Customs of the Port of Boston, and Skeate, the Deputy Collector, informed the Governor and Council that, upon going to the cellar of the house of Daniel Malcolm in the north part of Boston with a Writ of Assistance and a Deputy Sheriff to seize uncustomized goods, they had been denied admittance, and opposed by Malcolm with sword and pistols, and threats of death to any one who should attempt to open the door. The Council (Prefnt: the Governor, Danforth, Erving, Boardoin, Hubbard, Gray, Ruffell, Flucker, Tyler & Piitz) advised the Governor to inform the officers “that this Board are willing to do what in them lies for the assistance of the officers in the execution of his warrant, when their interposition shall appear to be necessary, but that it is their opinion that as the sheriff has it in his power to raise the Pffe Comitatus, any aid from his Excellency and the Board does not appear at present to be needful.” The Collector and Comptroller accordingly went with the Sheriff to the house, but, as the Governor the next day informed the Council, “found the house shut up close and surrounded with a great number of people, some of the most credible of which informed the officers that if they offered to force the house they would be in danger of their lives, and they were thereby prevented entering the house.” The officers and other witnesses were called in, and gave their affidavits before the Council. Copies of Council Rec. 1765-1774, fol. 157. 158. 88 Mass. Archives, 191-198. Bernard to Lords of Trade, October 20, 1766, 4 Bernard Papers, 252.

The testimony taken on this occasion shows how well instructed the people were in the principles of law applicable to the case, perhaps by Otis, who was counsel for Malcolm. Bernard to Shelburne, December 23, 1766, supra, 446. But compare Gage to Hillborough, October 31, 1768; “Copies of Letters from Governor Bernard, &c. to the Earl of Hillborough,” 251 Burke’s Speech in 1775 on Conciliation with America, 2 Burke’s Works, (Boston ed. 1839) 36, 77 1 Attorney General De Grey, January 26, 1769, 1 Cavendish Debates, 196.

Stephen Greenleaf, the Sheriff, testified, that he “left the Officers of y’ Customs & went singly up to a great Number of people who were collected
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collected at the head of ye Street leading to Malcolm's house & expostulated with them some time; that he was Civilly treated by them, but was assured that no admonition into Capt Malcolm's house would be suffer'd except the Custom house Officers would go before a Justice & make Oath who their Informer was; the declarant then inform'd them, as he had before desired Capt Nicholls to inform Mr Malcolm, that the Collector & Comptroller had both made Oath before Mr Justice Hutchinson that they had receiv'd such information as the Warrant yet forth, and that he did not apprehend that the Laws oblig'd them to tell who their Informer was; a reply was then made from ye Crowd but by whom the declarant does not know, that they knew better, and that ye Officers should Swear to their informer before they should go into the House; the declarant then inform'd them that if the Custom house Officers should think proper to force the house & should be oppos'd, they knew it was his Duty to command their Assistance, and he hop'd that no man there would refuse it; to which ye general voice was that they hop'd that no body would hurt him, they knew he was oblig'd to do what he did, but they believ'd that he would have no Assistance except the Informer was discover'd or delivered up; the declarant remembers to have heard one voice from behind him say 'Aye we'll assist you,' but by the manner of pronounciation & tone of voice he took it to be Ironical & either by way of Ridicule or threatening. The declarant says that it appearing to him that the people were determin'd, & that any further expostulations would be fruitless, return'd to ye Officers (who were standing at a little distance) and observ'd to them that it grew late & night would soon come on, that the streets were continually filling with people, that they must be sensible of the difficulty of the affair they were upon & that the warrant would not justify a forcible Entrance into any dwelling house after Sunseet;" and they then retired. See Mfas. Archives, 196, 197.

On the 13th of October the Inhabitants of Boston in town meeting unanimously appointed James Otis, Joseph Jackson, Samuel Sewall, John Hancock, William Phillips, Timothy Newell, John Rowe, Samuel Adams and Joshua Henley "a Committee to wait on his Excellency the Governor in Behalf of the Town, and to desire he would be pleased to give the Secretary Orders to furnish the Town-Clerk with Copies of all the Depositions relating to the Informations given the Custom-House Officers, and the Proceedings thereon, that fo the Town having Knowledge of their Accusers, and of the Nature and Design of the Testimonies taken, may have it in their Power to recite all Errors, and counterwork the Designs of any who would represent them in a disadvantageous Light to his Majesty's Ministers." Boston Gazette of October 13, 1766.

The Committee obtained the copies, and took other depositions, and reported a letter to Dennis De Berdt, the agent of the town in England, which
which was approved in town meeting on the 22d of October, and contained these passages: “Whatever representation may have been made to our prejudice, which we think we have some good reason to suppose, our most inveterate enemy dare not openly assert that the civil authority in this county & even thro' the province has not as good reason to be assured of the affiance of the people in the legal exercise of power as in any county in England.” “Mr Malcomb admitted them into every apartment saving one which being let he told them the key was not in his possession. They threatened to enter by force, which Mr Malcomb told them they must do at their peril. However not having sufficient authority as they apprehended, they then retired. Mr Malcomb supposing they would return determined to fasten his house that if they entred it should be forcible, being assured from the declarations of the person who hired the aforesaid cellar & his own knowledge of the other apartments, that no counterband goods were there. The officers returned in the afternoon & after some attempt tho' without violence to get an entry they again retired and came no more.” Boston Town Rec. 1766, fol. 721-726. See also Boston Gazette of October 27, 1766, which states “That there really were no goods in the House liable to a Seizure; and that as for the good People, who were curious spectators, they behaved as orderly, to use the words of some of the Deponents, as if they were at Church.” And the Gazette of November 24 declares that “the Metropolis has shared largely in these vile and false Representations, from the Days of that worthy and conscientious C—r Mr. B—ns, to the Affair of Capt. M—Ic—b’s, and they have, and are taking proper Measures to ward off the Evils they have been threatened with.” See also Gazette of March 20, 1769; & supra, 415, note.

In the following December, the Governor’s proceedings were denounced by Otis in the House of Representatives, “when,” if the Governor’s account is to be trusted, “a Member observed that ‘He knew the Time when the House would have readily assisted the Governor in executing the Laws of Trade, instead of being moved to oppose him in it.’ To this Otis replied that ‘the Times were altered; they now knew what their Rights were; then they did not.’” Bernard to Shelburne, December 24, 1766, 4 Bernard Papers, 289.

In 1767 Parliament paffed new statutes to promote the execution of the Acts of Trade. The St. of 7 G. 3, c. 41, authorized the appointment of Commissioners of the Customs to reside in America; and the St. of 7 G. 3, c. 46, § 10, declared the highest Court of Justice in each Province to be authorized to issue Writs of Assize. See Opinion of Attorney General De Grey, infra, 452.

The new Board of Commissioners consisted of Henry Hulton, John Temple, William Burch, Charles Paxton, and John Robinson. Hulton and Burch were newcomers. Hulton had previously been secretary of the Commissioners of the Customs in England; and his name is signed at
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at the foot of the commission of Harrison to be Collector of Customs at Boston, dated July 11, 1766, and recorded in Book of Commissions 1764-1774, fol. 68, and of similar earlier commissions. Temple had previously been Surveyor General of the Northern District of America; Paxton, Surveyor of the Port of Boston; and Robinson, Collector of Newport. *Vid. supra, 421, 428, 437.* Their commission is dated September 8, 1767, recorded in Book of Commissions 1764-1774, fol. 83-92, published entire in the Boston Evening Post of September 16, 1768, and quoted, in part, in the Report of the Committee of Boston in November 1772, infra, 466. Hulton, Burch, and Paxton arrived in Boston on the 5th of November 1767. *Temple* and Robinson were here before. Boston Evening Post, November 9, 1767, 3 Hutchinson's Hist. Mass. 183.

In a "general letter," dated "Custom House, Boston, 11 Janv 1768," and signed by all of them, they said to their subordinate officers: "You are to mention if you have received the Act of the 7th of his present Majesty ch. 46, the directions of which you are strictly to observe, and particularly, if you are not already furnished with Writs of Assistants, you are to apply by letter for such writs to the Justice or Justices of the Superior Court of your Province or Colony, who are empowered by said act to grant the same." Salem Custom House Record, 216.

Their printed instructions and commissions to their inferiors varied from the forms of 1764, *supra, 433, note,* in expressly mentioning Writs of Assistants. The instructions were altered by striking out the words "under the Regulations prescribed by Law," and inserting there: "Observing that you are not to enter any House, Shop, Cellar, or Warehouse, but in the Day time, and taking with you a Writ of Assistants, and a Constable, Headborough, or other Civil Officer next inhabiting." Printed instructions of February 28, 1769, to *John Macarone,* Comptroller of Salem, in Mfs. Hist. Soc. Lib. In the same library is an impression of the plate, engraved in London, for commissions to their subordinates, "By virtue whereof He hath power to enter into any Ship, Bottom, Boat or other Vessel, & also in the day time with a Writ of Assistants granted by his Majesty's Superior or Supreme Court of Justice," and taking with him a Constable, Headborough or other publick Officer next inhabiting, to enter into any House, Shop, Cellar, Warehouse, or other place whatsoever, not only within the said Port but within any other Port or place within our jurisdiction, there to make diligent Search, and in case of resistance, to break open any Door, Trunk, Chest, Case, Pack, Trufl, or any other parcel, or package whatsoever," &c. This is also printed (though misprints) in the Society's Proceedings of 1859, p. 314. See also Salem Custom House Record, quoted in a Essex Institute Hist. Coll. 173.

One of the first acts of the Commissioners was to remove Folger, Collector at Nantucket, *supra, 439,* for voting in the House of Representatives for the resolves in favor of American manufactures.
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(23) Fisher was Collector at Salem and Marblehead, having been appointed by the Commissioners of Customs in London on the 10th of January, 1765. Book of Commissions 1764-1774, fol. 45. Bernard to Fisher, April 30, 1765, in which the Governor cautions Fisher against "employing in your service one Toovey whom you find in the office; When you know his Story, as an honest Man, you will abhor him; as a prudent Man you will have no Communication with him." 4 Bernard Papers, 41. For the reason of the Governor's feeling, *vid. supra*, 424, note. Fisher had previously been a naval officer, as appears by an earlier letter to him, in which the Governor also says: "I am fully satisfied of the right of the Naval Officers to seize & prosecute for all breaches of the laws of trade equally with the Custom house Officers. I have therefore proposed to the chief Justice, this morning, to grant you a standing Writ of Affittance as he does to the Custom house Officers who apply for the same. As this writ has never been, as yet, granted to Naval officers, he has desired to consider of it & consult with his Brethren. They meet again in a fortnight's time & then I will move the Matter again; but will not take out the writ without you define." 1b. 38. Fisher was suspended by the Commissioners of Customs at Boston on the 30th of September 1768; but restored on the 4th of August 1769, by direction of the Commissioners of Customs in London. Salem Custom House Record, 247, 251, 301. Boston Gazette, November 7, 1768, & August 28, 1769.

(24) Mascarene had been appointed by the Commissioners of Customs in England Comptroller at Salem and Marblehead on the 13th of August 1764. Book of Commissions 1764-1774, fol. 40. For the form of his instructions *vid. supra*, 450.

The writs to Fisher and Masarene were probably in the same form as those previously issued; for on the 24th of March 1768 Governor Bernard, in addressing Lieutenant Governor Franklin of New Jersey forms of Writs of Affittance, which he hoped would "remove the Difficulties your chief Justice lies under," said: "It is not improbable but that, as there is now a Commision of Customs in America, the Form of the Writ may be altered so as to be made more conformable to that used in England. But no Steps have been taken towards this as yet." 5 Bernard Papers, 261.

Hutchinson, in a letter dated May 26, 1768, manifestly written with a view of setting the Commissioners in the most favorable light, at the expense of the Province, but marked in his letter-book "not sent," wrote: "The Commissioners of the Customs will represent the breaches of the Acts of Trade notorious enough, & yet they are not able to prevent or punish them. Writs of Affittance are issued whenever they have been applied for, but the Civil Officers are not regarded. The laws have lost their force, & upon the rising of a Mob I should have
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have no dependance upon any civil or military officer to suppress it; the only chance would be from private persons of spirit, who being alarmed with the fear of having their property destroyed might perhaps combine together & make resistance; but this is very uncertain at any time, and when a mob is raised meerly to rescue seized goods, such a combination is not to be expected.” 26 Mas. Archives, 306, 307.

In the Boston Gazette of September 5, 1768, under date of London, June 20, 1768, it is reported that “more than one very eminent Lawyer have publicly declared that a certain method of proceeding appears to them equally as unconstitutional as general warrants.” But on the 20th of August 1768 the Attorney General of England gave the following opinion, which is here reprinted from a copy remaining upon the files of March term 1769 of the Superior Court of Judicature of the Colony of Rhode Island.

"CASE.

"7th GEO. 3d,) "B Y this Act of Parliament, after reciting "Ch. 46. ++) That by an Act of Parliament made in "the 14th Chas. 2d, intitled an Act for preventing Frauds and regul-"rating Abuses in His Majesty's Customs, and several other Acts now "in Force, it is lawful for any Officer of His Majesty's Customs, au-"thorized by Writ of Assizes under the Seal of His Majesty's Court "of Exchequer, to take a Confess, Headborough, or any other pub-"lic Officer inhabiting near unto the Place, and in the Day Time, to "enter and go into any House, Shop, Cellar, Warehouse or Room, or "other Place, and in Case of Resistance to break open Doors, Cells, "Trunks and other Package, there to seise, and from thence to bring "any kind of Goods or Merchandize whatsoever, prohibited or uncul-"tomed; and to put and secure the same in His Majesty's Storehouse, "next to the Place where the Seizure shall be made. And further re-"citing, That by an Act made in the 7th and 8th of William the 3d, "intitled an Act for preventing Frauds and regulating Abuses in the "Plantation Trade, it was among other Things enacted, That the "Officers for collecting and managing His Majesty's Revenue, and in-"specting the Plantation Trade in America, should have the same Pow-"ers and Authorities to enter Houses or Warehouses, to search for and "seize Goods prohibited to be imported or exported into, or out of, any "of the said Plantations, or for which any Duties were payable, or "ought to have been paid, and that the like Assizes should be given "to the said Officers in the Execution of their Office, as by the said re-"cited Act of the 14th Chas. 2d, is provided for the Officers in England, "but no Authority being expressly given by the said Act of 7th and 8th "of William 3d, to any particular Court to grant such Writs of Assis-"ants for the Officers of the Customs in the said Plantations, it was "doubted
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"doubted whether such Officers could legally enter Houses and other "Places on Land to search for and seize Goods in the Manner directed "by the said Acts; to obviate which Doubts for the future, and in order "to carry the intention of the said Acts into effectual Execution.

"It is enacted, 'That after the 20th of November, 1767, such Writs "of Afflants to authorize and empower the Officers of His Majes- "ty's Customs to enter and go into any House, Warehouse, Shop, "Cellar or other Place, in the British Colonies or Plantations in "America, to search for and seize prohibited or uncustomed Goods in "the Manner directed by the said recited Acts, shall and may be "granted by the Superior or Supreme Court of Justice having Juris- "diction within such Colony or Plantation respectively.'

"IN PURSUANCE of this Act of Parliament, the Officers of the "Customs in America, have applied to the Judges of the Superior "Courts of Judicature in the respective Provinces, for Writs of Afflants, but most of them have refused to grant such Writs, seemingly "for this Reason, that no informations had been made to them of any "special Occasion for such Writ, and that it will be unconstitutional to "lodge such Writ in the Hands of the Officer, as it will give him a "discretionary Power to act under it in such Manner as he shall think "necessary.

"But it must be observed, that if such a General Writ of Afflants "is not granted to the Officer, the true Intent of the Act may in almost "every Case be evaded, for if he is obliged, every Time he knows, or "has received information of prohibited or uncustomed Goods being "concealed, to apply to the Supreme Court of Judicature for a Writ of "Afflants, such concealed Goods may be conveyed away before the "Writ can be obtained. Inquiry has been made into the Manner of "granting Writs of Afflants in England, and it appears that such "Writs are issued out of the Court of Exchequer whenever the Com- "missioners of the Customs apply for them. Every Officer of the Cus- "toms here, is armed with such a Writ, and whenever a new Officer is "appointed, the Commissioners direct their Solicitor to procure a Writ "of Afflants, which is issued as a matter of Course by the Clerks of "the Exchequer without any Application to the Court. This Writ is "directed to all Officers and Ministers who have any Office, Power or "Authority from or under the Jurisdiction of the Lord High Admiral "of England, to all and every Vice Admirals, Justices of the Peace, "Mayors, Sheriffs, Constables, Bailiffs, Headboroughs, and all other "the King's Officers, Ministers and Subjects, commanding them to be "aiding, assisting and helping the Commissioners of the Customs and "their Deputies, Ministers, Servants, and other Officers in the Execu- "tion of their Duty.

"Queft. Whether the Superior Courts of Justice in the British Col- "onies or Plantations in America, ought not upon Application, to issue "Writs of Afflants in the same Manner as is practised in the Court of "Exchequer
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"Exchequer in England, and what steps should be taken by Government in Order to Enforce the Issuing of these Writs for the Protection of the Officers of the Customs abroad?"

"There can be no doubt, but that the Superior Courts of Justice in America are bound by the 7th Geo. 3d. to issue such Writs of Assistance, as the Court of Exchequer in England issues in similar Cases, to the Officers of the Customs.

"As this Proceeded was probably new to many of the Judges there, and they seem to have had no Opportunity of informing themselves about it, it is perhaps in some measure excusable, that they wished to have time to consider of it, and to inquire into the Practice of the Court of Exchequer and of other Colonies; and I think it can only be because the Subject was entirely misunderstood, and the Practice in England unknown, that the Chief Justice of Pennsylvania, who is generally well spoken of, could imagine, that 'He was not Warranted by Law' to issue a Writ commanded by the Legislature; which Writ was founded upon the Common Law, enforced by Acts of Parliament and in daily use in England, and which from the general import of the 7th Will. 3d. ought to have been set on foot from that time in America, and which Statute the late Act only meant to Explain. And it appears accordingly that in Byelor where a very able Judge presides and some Experience had been had upon the Subject, no Difficulty was made in granting it.

"I think therefore it is advisable that the Form of the Writ issued by the Court of Exchequer in England, should be sent over to the several Colonies in America, together with the Manner of applying for it and of granting it, by which they will see, that the Power of the Custom House Officers is given by Act of Parliament and not by this Writ, which does nothing more than facilitate the Execution of his Power by making the Disobedience of the Writ a Contempt of the Court: The Writ only requiring all Subjects to permit the Execution of it and to Aid it. The Writ is a Notification of the Character of the Bearer to the Connable and others to whom he applies, and a Security to the Subject against others who might pretend to such Authority. No Body has it but a Custom House Officer armed with such a Writ. The Writ is not granted upon a previous Information, nor to any particular Person, nor on a special Occasion. The inconvenience of that was experienced upon the Act of 12th Char. 2d, C. 19. and the present Method of proceeding adopted in lieu of what that Statute had prescribed.

"20th August, 1768."

Wm. DeGrey.

On the evening of August 31, 1768, during a visit of John Robinson to Newport, notice having been publicly posted that he had 'boasted among his brother Commissioners that he could be well supported in the Execution
Writs of Affittance.

1768.

Parody of Writ of Affittance.

Change in form of Writ of Affittance.

Hutchinson’s comments thereon.

Winflow Collector at Plymouth.

Erection of his Office at Rhode-Island, and be fully protected from the least insult,” a great mob collected about the tavern. “But after a very diligent Search, (not by Virtue of any Writ of Affittance, but by Candle Light,) of the House, Out-Houses, Bales, Barrels, Meal Tubs, Trunks, Boxes, Packs and Packages, packed and unpacked, and in short of every Hole and Corner sufficient to conceal a Ram Cat, or a Commissioner, they could find neither.” Boston Gazette of September 5, 1768.

On the 20th of December 1768 the Commissioners of the Customs in Boston wrote to Chief Justice Hutchinson: “Having directed our Sollicitor to prepare a form of a Writ of Affissants, copies of which are intended to be sent to the different ports in America, to be applied for in the respective Courts by our Officers, as occasions may require, We herewith enclose the same, and a copy of the Opinion of the Attorney General in England for your Honor’s perusal, and should be glad to receive your opinion, whether the Form is such as you would choose to issue to our several Officers within the Province of Massachusetts Bay.” The letter is signed by Burch, Hulton, and Temple. 44 Mafs. Archives, 670.

That the changes proposed were merely formal is evident from the following reply of Hutchinson: “I have received from your Board the Copy of a Writ of Affissants framed by your Sollicitor upon which you desire my opinion. I have compared it with the Writ issued from His Majesty’s Court of Exchequer in England, and I do not find that the two Writs vary from each other any farther than the different circumstances of Place make necessary, only I observe in the direction you have omitted the word Mayors. We have no Mayors in this Province at present, no more have we Headboroughs. I think the Writ should either be refrained to such Officers only as are existing in the Colony where it issues, or else take in all that are named in the Writ which issues at home. If it should be the latter that part which expresses such Officers as have at that time no existence would be considered as surplusage. I am for keeping to the very words of the Exchequer Writ as far as different circumstances of place will admit. I should be willing immediately to issue Writs in the form proposed only I think it convenient my brethren should be first consulted. Our next Term will begin the 3d Tuesday in March. I imagine no inconvenience can arise by deferring the matter until that time, your Officers being already furnished with Writs as agreeable to the form proposed as the Circumstances of the Colonies before your Board was constituted would admit, but if you think otherwise I will consult my brethren as soon as may be.” 44 Mafs. Archives, 671.

(25) Edward Winflow was Deputy Collector at Plymouth, appointed by the Surveyor General on the 27th of March, 1765, and reappointed by the Commissioners of Customs in 1768; and was also clerk of the courts and register of probate in Plymouth County. Book of Commissions
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Sloop Liberty feizd at Boston —

millons 1764-1774, fol. 44. Boston Evening Post of June 6, 1768. Mein & Fleeming's Register for 1769, 58, 60.

(26) The Sloop Liberty, Barnard Master, originally belonged to John Hancock, and was set ad at Boston by the Commissioners of the Customs near quay on the 10th of June, 1768, for landing Madeira Wines without paying the duties; and, at Comptroller Hallowell's suggestion, was taken out from the wharf by armed boats from the Romney Man of War, and anchored under her guns; which occasioned a riot. For those proceedings, and the discussions about them, see Letters of Bernard, Gage & Hood, (Boston, 1769) 20-28, 85-108; "A third extraordinary Budget" of Letters, &c. between Governor Bernard and the Ministry, 2-8; 6 Bernard Papers, 311-326; Bernard to Hillborough, December 3, 1768, 7 Ib. 113; Letters of Hutchinson, &c. (Boston, 1773) 3-9; John Powell to Collector Harrison, and Harrison to Powell, June 13, 1768, 3 Chalmers EM. New England Papers, 3, in the possession of Mr. Jared Sparks; W. Molineux to Harrison, June 15, 1768, Ib. 13; Affidavit of Richard Silvester, Ib. 12, 13; Joshua Henshaw to William Henshaw, June 15, 1768, a copy of which is in Mass. Hist. Soc. Lib. Proceedings in Council, 50 Mass. Archives, 287-300; Copies of Council Rec. 1765-1774, fol. 333-342; & Bradford's State Papers, 156-158; Boston Gazette, June 20, August 8, & October 10, 1768; Indications of Town of Boston, 9-15; Franklin's True State of Proceedings in Massachusetts Bay, Almon's Prior Documents, 262, 263; Gordon's Hist. U. S. 230-237; 3 Hutchinson's Hist. Mass. 188-193, 488-491; 6 Bancroft's Hist. U. S. 155-162, 174; Richard Frothingham in 9 Atlantic Monthly, 708. The popular objection, that this seizure near quay was unprecedented and unlawful, was founded, Hutchin- son says, on a misapprehension that the direction in a Writ of Affirmance, to enter houes "in the day time only," applied to all seizures of vessels or goods. 3 Hutchinson's Hist. Mass. 190, note.

The Commissioners, in seizing the Liberty, acted upon the written opinion of their Solicitor, David Lifte. Collector Harrison to John Powell, June 13, 1768, 3 Chalmers New England Papers, 2. The sloop was libelled in the Court of Vice Admiralty, and "adjudged forfeit for breach of the Acts of Trade," and an order of sale passed on the 21st of August, and published on the 3th of September, under which she was sold by auction on the 6th of September, and was bought by the Collector of the Port of Boston, to be used as a cruiser for the protection of trade. Boston Evening Post of September 5 & 12, 1768. See also "Journal of the Times" of November 3, 1768, in Boston Evening Post of January 9, 1769. In the spring of 1769 she cruised as a "guarda-costa" on the shores of Connecticut and Rhode Island, and seized several vessels. Boston Gazette of January 9, May 1 & 15, and Evening Post of May 15, & June 19, 1769.

On the 19th of July 1769 a mob at Newport, provoked by her seizures of vessels on unfounded suspicions, and by the insolence of her crew,
crew, scuttled and burned her. Affidavit of Captain Reid, 2 Trumbull Papers, 219, in Mafs. Hist. Soc. Lib. Letters of Commissioners of Customs in Boston, and of Collector and Comptroller of New London, to Governor of Connecticut, 1b. 221, 223. Proclamations of Governor of Rhode Island and of Commissioners of Customs, and extracts from Rhode Island Newspapers, 6 Rhode Island Col. Rec. 593–596. Boston Gazette and Evening Post of July 24 & August 7, 1769. "Journal of the Times" in Boston Evening Post of December 11, 1769. Boston Gazette of December 18, 1769, and March 5, 1770. 1 Cavendish Debates, 495, 496. 2 Arnold's Hist. R. I. 297. The Rhode Island historians, in the books just cited, consider this the first overt act of resistance to the authority of Parliament. But in 1765 the execution of the Stamp Act had been rendered impossible by compelling the resignation of all the stamp distributors throughout the Continent. Supra, 443, 444. And if a single act of violence is to be deemed ofsuch importance, a vessel had been rescued from the custom house officers in Newport in 1764. Supra, 436.

The identity of John Hancock's Sloop Liberty with the revenue vessel destroyed at Newport seems to have escaped the notice of historians. But the evidence of her forfeiture, sale, subsequent use, and destruction, is perfectly conclusive, notwithstanding the vague statements of some writers that Hancock's sloop was restored after a long detention. See Almon's Prior Documents, 263, note 1; Gordon's Hist. U. S. 340. The mistake probably arose from confounding the proceeding against the vessel with the information against her owner. It would seem that no defence to the libel in rem was attempted; for John Adams's "Admiralty Book" contains no note of it, although it does contain a full report of the proceeding in persona, which is so like the account in the "Journal of the Times" in the Boston Evening Post of 1769 as to raise a suspicion that so much at least of that journal is by the same hand.

This case affords such curious examples of the Admiralty proceedings and of the constitutional arguments of that period, as to excite the insertion here of a full report. Adams's notes begin with the information and order for process, as follows:

"Jonathan Sewal vs. John Hancock.


"Be it remembered, that on the 29 day of October in the Ninth Year of the Reign of his Majesty George the Third, Jonath. than Sewall Esq. Advocate General for the said Lord the King, in his proper Person comes and as well on behalf of the said Lord the King, as of the Governor of this Province, gives the said Court to understand..."
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"and be informed, that on the ninth day of May last, a certain Sloop called the Liberty, arrived at the Port of Boston in said Province, from the Islands of Madeira, having on Board, one hundred and twenty seven Pipes of Wine of the Growth of the Madeira’s; of which said Sloop, one Nathaniel Barnard was then Master, and that in the Night Time of the same day the said Nathaniel Barnard with Intent to defraud the said Lord the King of his lawful Customs, did unlawfully and clandes-
tinely unship and land on Shore in Boston aforesaid one hundred of the aforesaid Pipes of Wine of the Value of Thirty Pounds Sterling Money of Great Britain, each Pipe, the Duties thereof not having been first paid, or secured to be paid, agreeable to Law. And that John Hancock of Boston aforesaid Esq was then and there willfully and unlawfully aiding and assisting in unshipping & landing the same one hundred Pipes of Wine, he the said John Hancock, at the same time well knowing, that the Duties thereon were not paid or secured and that the unshipping and landing the same, as aforesaid, was with Intent to defraud the said Lord the King as aforesaid, and contrary to Law; against the Peace of the said Lord the King and the Form of the Statute in such Case made and provided, whereby and by Force of the same Statute, the said John has forfeited Treble the Value of the said Goods, so unshipped and landed as aforesaid, amounting in the whole to the Sum of Nine Thousand Pounds Sterling Money of Great Britain, to be divided, paid and applied in manner following, that is to say, after deducting the Charges of Pro-\n\ncution, one Third Part thereof to be paid into the Hands of the Collector of his Majesty’s Customs for the said Port of Boston, for the Use of his Majesty, his Heirs and Successors, one Third Part to the Governor of said Province, and the other Third Part to him that in-\nforms for the same.

Whereupon as this is a matter properly within the Jurisdiction of this Honble Court, the said Advocate General prays the Advisement of the said Court in the Premises, and that the said John Hancock may be attached and held to answer to this Information, and may by a Decree of this honourable Court be adjudged to pay the aforesaid sum of Nine Thousand Pounds to be applied to the Uses aforesaid.

"Jon Sewall Adv. for the King."

Warrant issued.

"Oct 29, 1768. Filed and allowed and ordered that the Register of this Court or his Deputy issue out a Warrant for the Marshall of this Court or his Deputy to arrest the Body of the said John Hancock and him keep in safe Custody so that he have him at a Court of Vice Admiralty to be holden at Boston on the seventh day of November next at Nine of Clock before noon and that he take Bail for Three Thousand Pounds Sterling Money of Great Britain.

"Robert Auchmuty Judge &c."
Writs of Assistance.

Hancock was arrested on the night of November 2d, and gave the required bail. "Journal of the Times" of November 3, 1768, in Boston Evening Post of January 9, 1769. The Court adjourned from time to time until January 2d, when "a number of witnesses were examined by the court in a most extraordinary and curious manner; Mr. Hancock's nearest relations, and even his tradesmen, were summoned as evidence;" and the Court afterwards sat repeatedly and examined other witnesses. "Journal of the Times" of December 5 & 14, 1768, January 2, 5, 7, 23, 28, 30, February 11, 18, 21, 1769, in Boston Evening Post of January 30, February 6, 20, 27, March 15, 20, 27, April 10, 17, 1769. Observations published by the Merchants of Boston in 1769, 19, note. The grounds of defence, as stated in the notes of John Adams, were as follows:

1st. That even if Captain Marshall had landed the wines before the duties were paid, (of which there was evidence,) Mr. Hancock, if he "neither confented to this Frolick, nor knew of it," could not be held to be "afflicting or otherwise concerned in the unshipping or landing inwards," within St. 4 G. 3, c. 15, § 87, which Adams compared with St. 8 Anne, c. 7, § 17.

2d. That the St. of 4. G. 3 was to be construed with the utmost strictness; because it was "the most penal of almost any Law in the whole British Pandect," forfeiting the whole ship and cargo for withholding a small amount of duties.

"But among the Groupe of Hardships which attend this Statute, the first that ought always to be mentioned, and that ought never to be forgotten is

"That it was made without our Consent. My Clyent Mr. Hancock never confented to it. He never voted for it himself, and he never voted for any Man to make such a Law for him. In this Respect therefore the greatest Conflation of an Englishman, suffering under any Law, is torn from him, I mean the Reflection, that it is a Law of his own Making, a Law that he sees the Necessity of for the Public. Indeed the Consent of the subject to all Laws, is so clearly necessary that no Man has yet been found hardy enough to deny it. The Patrons of these Acts allow that Consent is necessary, they only contend for a Consent by Conformance, by Interpretation, a virtual Consent. But this is only deluding Men with Shadows instead of Substances. Conformity, has made Treson where the law has made none. Confrictions, in short and arbitrary Illusions, made in short only, for so many by Words, so many Cries to deceive a Mob have always been the Instruments of arbitrary Power, the means of lulling and enfraling Men into their own Servitude, for whenever we leave Principles and clear positive Laws, and wander after Confrictions, one Confrucion or Confluence is piled up upon another until we get at an immoveable distance from Fact and Truth and Nature, lost in the wild Regions of Imagination and Possibility, where arbitrary Power sitts upon her brazen

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Further proceedings.

Argument of John Adams.

1. Defendant did not affi.

2. St. 4 G. 3 to be construed strictly.

Because "made without our consent."
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General

c Hancock.

Because no trial by jury.

Throne and governs with an iron Scepter. It is an Hardship therefore, fearfully to be endured that such a penal Statute, should be made to govern a Man and his Property, without his actual Consent and only upon such a wild Chimera as a virtual and conclusive Consent.

"But there are greater Proofs of the Severity of this Statute, yet behind. The Legislative Authority by which it was made is not only grievous, but the Executive Courts by which it is to be carried into Effect, is another. In the 41st § of this Act 4 G. 3, c. 15, we find that all the forfeitures and Penalties inflicted by this or any other Act of Parliament, relating to the Trade and Revenues of the said British Colonies or Plantations in America, which shall be incurred there, shall and may be prosecuted, sued for, and recovered, in any Court of Record, or in any Court of Admiralty," &c. "Thus, these extraordinary Penalties and Forfeitures are to be heard and tried,—how? Not by a Jury, not by the Law of the Land, but by the civil Law and a Single Judge. Unlike the ancient Barons who unà Voe responderunt, No- lumus Leges Angliae mutari—The Barons of modern Times, have answered, that they are willing, that the Laws of England should be changed, at least with Regard to all America, in the most tender Point, the most fundamental Principle. And this Hardship is the more severe as we see in the same Page of the Statute and the very preceding Section, § 40, That all Penalties and Forfeitures, herein before mentioned, which shall be incurred in Great Britain, shall be prosecuted, sued for and recovered in any of his Majesty's Courts of Record in Westminster or in the Court of Exchequer in Scotland respectively. Here is the Contrast that stirs us in the Face! The Parliament in one Clause guarding the People of the Realm, and securing to them the benefit of a Tryal by the Law of the Land, and by the next Clause, depriving all Americans of that Privilege. What shall we say to this Distinction? Is there not in this Clause, a Brand of Infamy, of Degradation, and Disgrace, fixed upon every American? Is he not degraded below the Rank of an Englishman? Is it not directly, a Repeal of Magna Charta, as far as America is concerned. It is not at all surpris- ing that the Tryals of Forfeitures & Penalties are confined to the Courts of Record at Westminster, in England — The Wonder only is that they are not confined to Courts of common Law here." He then refers to the attachment of Englishmen to c. 29 of Magna Charta and to Lord Coke's commentary thereon in 2 Infl. 51, as "concluding with a Re- flecion, which if properly attended to might be sufficient even to make a Parliament tremble." This paragraph of the argument, somewhat expanded, was inserted by John Adams in the instructions of the town of Boston to their representatives in May 1769, 3 John Adams's Works, 508, 509 and abridged in the "Journal of the Times" in the Boston Evening Post of July 10, 1769. See also Letter of House of Representatives to Franklin, November 6, 1770, Massachusetts Papers published by the Seventy-Six Society, 174.

3d. Adams
Writs of Assifiance.

3d. Adams also said: "We are here to be tried by a Court of civil not of common Law, we are therefore to be tried by the Rules of Evidence that we find in the civil Law, not by those that we find in the common Law.—We are to be tried, both Fact and Law is to be tried by a single Judge, not by a Jury.—We therefore claim it as a Right that Witnesses not Premptions nor Circumstances are to be the Evidence." And he argued that by the rules of the civil law, in order to convict a person of any crime, there must be two witnesses, free from all exception; that "if there were two or ten such Witnesses as used, they would not amount to Proof sufficient for condemnation;" and that the respondents had "a right to examine the Witnesses whole past life, and his Character at large," and to prove by other witnesses that (as it is stated in the "Journal of the Times") "he was a fugitive from his native country to avoid the punishment due to a very heinous crime;" for which he cited the following authorities: "New Inl. Civil Law, 315, 316. Dig. Lib. 22, Tit. 5, §§ 3, 12. Codicis, Lib. 4, Tit. 19, § 25; Tit. 20, § 9, § 1, & note 32. Deut. 19, 15. Calv. Lex Testis. Fortecluc de Laudibus Legum, c. 31, p. 38. Wood Inl. 310. Domat, V. 1, p. 13, Preliminary Book, Tit. 1, § 2, IV. 15."

"On the contrary," Adams argued, "if we are to be governed by the Rules of the common Law we ought to adopt it as a whole and summon a Jury and be tried by Magna Charta—Every Examination of Witnesses ought to be in open Court, in Prefence of the Parties, Face to Face—and there ought to be regular Adjournments from one Time to another. What other Hypothesis shall we assume? Shall we say that we are to be governed by some Rules of the common Law and some Rules of the civil Law, that the Judge at his Discretion shall choose out of each System such Rules as please him, and discard the rest, if so, Mi versa ferendo est. Examinations of Witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen & common Lawyers have an abhorrence to them if not an abhorrence of them. Shall we suffer under the odious Rules of the civil Law, and receive no advantage from the beneficial Rules of it? This, instead of favouring the Accused, would be favouring the Accuser, which is against the Maxims of both Laws."

This point, which is also reported in the "Journal of the Times," was argued on the 24th of February, and decided on the 1st of March. Boston Evening Post of April 17 & 24, 1769. It is followed in Adams's MS. by this "Interlocutory Decree," entitled "Advocate General vs. John Hancock Esq."

"The Substance of the Point before the Court, is, whether a Witness shall be examined to charge another Witness in the Cause with a particular infamous Crime."

"It is urged by the Advocates offering the first mentioned Witness, "first, that this is a civil Law Court, and Secondly, by that Law such Evidence is admissible. To the last Point several authorities were cited, but the principal one from the Digest 22. 3. 3."

"To
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"To which it was answered by the Advocates on the other Side that "this is not a civil Law Court in such Cases as the present. And that "the Authorities produced were not to be understood in the Sense con- "tended for by the Respondent's Advocates. In Support of the last, "the Notes under the aforesaid 3 Law in the Digest were read and re- "futed on. It was also urged, that admitting the civil Law to be as "contended for, the Argument would prove too much, because it would "exclude relations in certain Degrees, intimate Friends, Persons under "the age of Fourteen &c. from testifying.

"I take the Sense of the Authority first mentioned, to be no more "than a general description of what are good objections against Persons "being admitted to their Oaths as Witnesses without describing the "mode whereby such disqualifications are to be ascertained. If said Au- "thority is not so construed, it certainly clashes with the Notes, which "clearly relate not to the Admission of Witnesses, but the Credit or Reput- "ation of their Evidence. The reason why proof by record ought to "be exhibited against a Witness, when charged with a Crime, appears "clear from the Question put in the Note, under D. 25, Tit. 3. *Quis "enim si sufficiat accusans, innocent fiet?* Such a reading reconciles the "Text and comment in the Digest to each other, and the former to "Reason. I am therefore of Opinion the motion is not well supported, "even by the Rules of the civil Law. In addition to which, when I "consider the process now in question, is founded on an Act of parlia- "ment, originally intended to be guided by the Rules of the common "Law, that the Practice of the Court has ever been to hear and deter- "mine similar cases, according to those rules, the manifest and great "inconveniences which must accrue, by the admission of such evidence, "I am clearly of Opinion, the Question put is improper, and therefore "Decree the fame to be withdrawn.

"Robt Auchmuthy Judge &c."

Upon this decree, Adams makes the following observations, with which his report ends:

"1. The Advocates for the Crown, did not argue that our Argument would exclude Relations, Friends, Persons under 14, &c—But the Advocates for the Respondent, insisted that all those Rules of the civil Law ought to be adopted, because they were beneficial to the Subject the Respondent.—We had no difficulty at all in admitting the Consequence as far as it is here mentioned. So far from it that we desired it, because Mr Hancock's Relations, Friends, and many Persons under Age have been examined in this Case.—It is true Mr Fitch did argue that our Principle would justify the Introduction of Torture, and this he thought was proving too much, and this was well observed by Mr Fitch and was the best argument I have heard in the Case.

"2. The Judge has totally misapplied the 'Sense' of the Authority, for instead of being a Description of Objections against Persons being admitted
admitted to their Oaths it is wholly confined to those who are already Sworn.—It is Tectum Fides examinanda est, not Personarum Fides, and as a Witness in English implies the Competency of the Person, so Tectis in Latin implies the Same and a Person cannot be Tectis, until he is admitted to tell what he knows, i.e. to give Evidence.”

This suit was dropped on the 26th of March. “Journal of the Times,” in Boston Evening Post of May 22, 1769. See also Observations published by the Merchants of Boston in 1769, 19, note; Almon’s Prior Documents, 263, note. The statement in Adams’s autobiography (in John Adams’s Works, 216) that “this odious cause was suspended at last only by the battle of Lexington” is manifestly an exaggeration. It is not the only instance of a mistake of date in his autobiography. *Vid. ante, 409.*

About the same time the grand jury found an indictment for perjury at the trial of this case against “one Joseph Muzzelle” or “Mouzel,” (evidently the same as Mezle, *supra*, 464,) which could not be immediately tried, “as this fellow, to whom a poft has been given by the recommendation of the committee, on board the Sloop Liberty, late Mr. Hancock’s, now a Guarda-Craft, is upon a cruise in said Sloop.” “Journal of the Times” of March 26 & 27, & April 22, in Boston Evening Post of May 22 & June 19, 1769. As this indictment does not appear on the records of the court, it was probably withdrawn by the Crown officers.

Governor Bernard’s subsequent representations and conduct afford a fair example of his policy. Much feeling having been excited by the manner of seizing the Liberty, (*supra*, 436,) the Governor had the next vessel seized left in a place convenient for the rescue of the cargo; and, when it was rescued according to his expectation, and restored the next day, pretended that the restoration was only made “upon pain of the displeasure of the town.” Letters of Bernard, Gage & Hood, 38-41. Vindication of Boston, 33. He wrote to Lord Hillsborough that “every seizure made or attempted to be made on Land in Boston, for three Years past, before these two Instances, has been violently refused or prevented;” and immediately afterwards, in his “Observations upon the Answer of the Council,” said, “That there has been no seizure lately is very True; & the reason is that there has been no Seizure!” and was obliged to fall back upon Malcolm’s case of two years before, *supra*, 447. Letters of Bernard, Gage & Hood, 39. 13 Bernard Papers, 193. Contrast with Governor Bernard’s statements the Resolves of the House of Representatives of June 29, 1769, Bradford’s State Papers, 179; 6 Bancroft’s Hist. U. S. 272; Richard Frothingham in 9 Atlantic Monthly, 708. The friends of America in the House of Commons saw and expressed the truth. Colonel Barre said: “May not a little mob have been called a tumult, and a little insurrection a rebellion? In being riotous, the Colonies have mimicked the mother country.” 1 Cavendish Debates, 44. And Governor Pownall said: “Rebellion
"Rebellion is not in their hearts; independence is not in their heads."

1769.

Rejoicings of crown officers over infancy of Otis and deaths of Malcolm and others.

It would be hard to find more bitterness of party spirit than is shown in a letter of December 3, 1769, from Andrew Oliver, the Secretary of the Province, to Governor Bernard in London, written three months after Commissioner Robinson's assault upon James Otis, and narrating as "curious anecdotes concerning M' Otis," the following: "Doc! Gardner has not scrupled declaring to one and another, that upon his applying to him to argue a cause, he told him he could not do it, for his Lungs were gone, nor could he sufficiently collect himself, for he had ruined his Country; but that he had acted with a good intention, & stretching forth his hand, curst the day on which he was born. To another person from whom I had it he said, He wondered what our par- fons meant by thanking God for their existence; for his part he never did nor never would, or never could. He is become the Sport of the young Gent of the Bar, and he was greatly mortified on looking over the Entries this present term of the Sup Court, to find he had but 4 when the youngf Quincy had 9 & John Adams had 60. It is remark- able that there have been three untimely deaths among those concerned in running the Sloop Liberties Cargo, viz. Capn Marjall the next day, Capn Bernard afterwards drowned at Sea, & Capn Malcolm since, who I hear said he catch'd his death at that time. Should this other Perfon's Fate prove as is expected, we might be justified in looking to the hand of Providence in the disposal of these Events." 12 Bernard Papers, 163, 164. In a letter of October 30, 1769, another of the same party (supposed by Schalmev to have been Aubmey) ex- pressed familiar sentiments: "Otis by a kind providence of heaven is generally supposed to be delirious. It is beyond doubt he has given signal proofs of it in his late conduct." 3 Chalmers New England Papers, 48.


"At the Superior Court held at Charlestown, application was made by the Custom-House Officers for a full supply of Writs of Alires whi..."
Writs of Assistance.

which were accordingly granted." "Journal of the Times," under date of April 28, 1769, in Boston Evening Post of June 26, 1769. April term 1769 of the Superior Court of Judicature in Middlesex lasted from the 11th to the 14th of April. Rec. 1769, fol. 41-56. It may be conjectured that these writs were in the amended form. Supra, 455. But Writs of Assistance had now become so much a matter of course, that no notice appears on the record, docket, or files of court, of this issue, except to Collector Winslow and Captain Reid, (supra, 434,) who may have been the only persons to whom they were now first granted. On the 20th of April 1769 the Commissioners of the Customs wrote from Boston to the Officers of the Customs of other ports in the Province, saying: "Gentlemen, Writs of Assitants having been issued by the Superior Court of this Province for the Officers of your Port, we direct you forthwith to apply for them to the Clerk of that Court, so that you may be furnished with the same, to be used as occasion may require." This letter was signed by the whole board. Salem Custom House Record, 279.

Hutchinson's opinion of the part to be taken by the sheriff in the execution of a Writ of Assistance, is shown in his answer, dated February 21, 1770, to an inquiry of William Tryon, Sheriff of Cumberland County, in which he says: "It always appeared to me to be the more immediate business of the Officers of the Customs to enter ships &c. and also to break open Cellars, Warehouses & other places, to search for contraband & uncustomed goods, but they are required in certain cases to have a Writ of Assistants, which is directed to all Officers and all His Majesty's subjects in general, who are requested to permit the Officers of the Customs to do their duty & to be aiding & assisting. I think every person may be justified who shall prevent the Officers of the Customs from being impeded in the discharge of their duty, & that it is the especial business of the Civil Officers to whom the writ is directed to see that the Officers of the Customs are protected & aided & assisted whenever they shall be obstructed in the discharge of their duty, but in the particular case that you refer to I do not see that you was obliged to furnish hands to unrig the Vessel, but it is to be supposed there are inferior Officers or Servants of the Customs to be employed in such Services. Had there been an attempt to rescue I think you would have done well in requiring aid to prevent &c. Notwithstanding the remarks you have seen in the newspapers, this Writ of Assistants, after a long argument, by the unanimous voice of the Judges of the Superior Court has been determined to be legal and constitutional, & by a late Act of Parliament the Court is required to issue it, & undoubtedly all who oppose the due execution of it must be considered as offenders." 26 Mass. Archives, 439. See also Comptroller Savage to Hutchinson, February 20, 1770, 25 lb. 355-360; 2 Willis'sHist. Portland, 132.

The Commissioners of the Customs, in a "general letter" of October 11, 1771, instructed their officers: "You are also to acquaint us whether
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whether you have been furnished with Writs of Affiants by the Superior Court of this Province, agreeably to the form transmitted by our Solicitor, and if you have not, you are to assign the reasons why you have not been able to obtain them." Salem Custom House Record, 342. This letter was signed by Halton, Burch, and Hallowell, who was the successor of John Temple.

Temple had never had any scruples about Writs of Affiance. Supra, 416 & seq., 429, note, 437, 450, 464. But he did not agree with the Commissioners in other measures, and did not share their unpopularity. Boston Gazette, February 6, 1769. Letters of Bernard, Gage & Hood, 107. Bernard to Barrington, February 20, 1769, 7 Bernard Papers, 260. Hutchinson in December, 1769, 26 Mass. Archives, 417. Proceedings of Town Meeting of October 4, 1769, 3 Chalmers's New England Papers, 37. 4 Gordon's Hist. U. S. 236. 5 Hutchinson's Hist. Mss. 193, 194. 6 Bancroft's Hist. U. S. 249. Adams and Hutchinson both testify to Temple's intimacy with Otis. 7 John Adams's Works, 457. 3 Hutchinson's Hist. Mss. 293. It is therefore not improbable that Governor Bernard's disfrut of him was not wholly unfounded. Fid. supra, 433, 438; Bernard to Hillborough, February 21, and to John Pownall, June 12, 1769, 7 Bernard Papers, 141, 297. He was appointed in 1771, Surveyor General of the Customs in England; was removed in 1774 for his attachment to the American cause; returned to America in 1781; and, after the Revolutionary War, was appointed Consul General of Great Britain in the United States. Supra, 434, note 20. R. C. Winthrop's Addresses, 112-115. John Adams to President of Congress, August 16, 1781, 7 John Adams's Works, 457. Adams to Jay, April 13, 1785, 8 Ib. 334.

At a meeting of the inhabitants of Boston in Faneuil Hall on the 2d of November 1772, a committee of twenty-one was appointed "to state the Rights of the Colonists, and of this Province in particular, as Men, as Christians, and as Subjects; to Communicate and Publish the same to the several Towns in this Province, and to the World, as the Senet of this Town, with the Infringements and Violations thereof that have been, or from Time to Time may be made." The three first named on this Committee were James Otis, Samuel Adams, and John Warren. John Adams was also a member. The report of this committee, which was accepted on the 20th of November, is said to have been written by Adams and Warren. Its formal presentation was the last public act of Otis. 6 Bancroft's Hist. U. S. 431. One article in its "Lift of Infringements and Violations of Rights" is so curiously like Otis's argument upon the Writs of Affiance in 1761, which had been the beginning of his public career, that with it this sketch of the history of those Writs in Massachusetts Bay, already too much extended, may fitly close.

"These Officers are by their Commissions invested with Powers altogether unconstitutional, and entirely destructive to that Security which we
Writs of Affiustance.

we have a right to enjoy; and to the last degree dangerous, not only to our property, but to our lives; For the Commissioners of his Majesty's Customs in America, or any three of them, are by their Commissions impowered, by writing under their hands and seals to constitute and appoint inferior Officers in all and singular the Port within the Limits of their Commissions. Each of these petty officers so made is intrusted with Power more absolute and arbitrary than ought to be lodged in the hands of any Man or Body of Men whatsoever; for in the Commission aforesaid, his Majesty gives and grants unto his said Commissioners, or any three of them, and to all and every the Collectors, Deputy Collectors, Ministers, Servants, and all other Officers serving & attending in all and every the Ports & other Places within the Limits of their Commission, full Power and Authority from time to time, at their or any of their Wills and Pleasures, as well by Night as by Day, to enter and go on board any Ship, Boat, or other Vessel, riding, lying, or being within, or coming into, any Port, Harbour, Creek or Haven, within the limits of their Commission; and also in the day-time to go into any House, Shop, Cellar, or any other Place, where any Goods, Wares or Merchandises lie concealed, or are suspected to lie concealed, whereof the customs and other duties, have not been, or shall not be, duly paid and truly satisfied, answered or paid unto the Collectors, Deputy-Collectors, Ministers, Servants, and other officers respectively, or otherwise agreed for; and the said House, Shop, Warehouse, Cellar, and other Place to search and survey, and all and every the Boxes, Trunks, Chests and Packs then and there found to break open.

"Thus our Houses, and even our Bed-Chambers, are exposed to be ranfacked, our Boxes, Trunks and Chests broke open, ravaged and plundered, by Wretches, whom no prudent Man would venture to employ even as Menial Servants; whenever they are pleased to say they suspect there are in the House, Wares, &c. for which the Duties have not been paid. Flagrant instances of the wanton exercise of this Power, have frequently happened in this and other seaport Towns. By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable. These Officers may under color of Law and the cloak of a general warrant, break through the sacred Rights of the Domicil, ranfack Mens Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders." Report of the Committee, as published by Order of the Town, 15-17. Compare Janius Americanus in Boston Gazette of December 24, 1770, & January 28, 1771.

Nothing later than this, tending to illustrate the matter of Writs of Affiustance, has come to the notice of the writer. The port of Boston was closed by the Boston Port Bill on the 1st of June, 1774. St. 13 G. 3, c. 45. 34 Mass. Hist. Coll. 1.

On the 28th of July 1775 the Council, elected according to the Province Charter, with the consent of the House of Representatives assumed the

1772.

1774.

Boston Port Bill.

1775.

Change of Government.
the government, upon the ground that the Governor and Lieutenant Governor "have abdented themselves, and have refused to govern the Province according to said Charter." Journal H. R. 1775, p. 21.

On the same day a committee was appointed, of which James Ois (of Barnstable) was chairman on the part of the Council, and Joseph Hawley on the part of the House, to consider what is necessary to be done relative to a Colony Seal; and on the 3d of August was directed "to fit forthwith," and reported that the Old Province Seal (which bore the Royal Arms) "be not taken up," but that "the established form of a Seal for this Colony, for the future," should be an Indian holding a Tomahawk and Cap of Liberty, with the motto Petit in Libertate quietem. The idea of the Indian was doubtless derived from the ruder figure on the first Seals of the Colony, brought over by Endicott in 1639 and Winthrop in 1630. 1 Mafs. Col. Rec. tit. & pp. 24, 25, 59, 73, 383, 396. The Council accepted the report of the committee, substituting however for the Indian "an English American, holding a sword in the Right Hand, and Magna Charta in the Left Hand, with the words 'Magna Charta' imprinted on it." The House of Representatives concurred, with this significant amendment, that "in the Device previous to the Word 'Petit,' be inserted the Word 'Ente,' and subsequent to it, the Word 'Placidam.'" 137 Mafs. Archives, 14, 86 lb. 340, 364. Journal H. R. 1775, pp. 20, 46, 47, 48. The same image and motto, and the words "Iced in Defence of American Liberty," were stamped on the bills of credit issued by the Colony until some time after the Declaration of Independence, when the letters "IND" took the place of "Magna Charta." Sts. of 1775, cc. 2, 9; 1776, cc. 11, 16, 26; Acts & Laws of the Colony of Massachusetts Bay 1775-1776, pp. 5, 71, 72, 75, 84, 99. Journal H. R. September 1775, p. 109.

Massachusetts, in 1780, after framing a Constitution of her own, (the Declaration of Rights prefixed to which repeated the chief articles of Magna Charta, and condemned general warrants,) replaced the image on the seal by her ancient emblem, in a more heraldic form, and established the following as the Seal and Arms of the Commonwealth: "Sapphire, an Indian drest in his Shirt, Moggofoas, belted, proper, in his right Hand a Bow Topaz, in his left an Arrow, its point towards the Bale; of the second, on the Dexter side of the Indian's head, a Star, Pearl, for one of the United States of America. Crest — On a Wreath a Dexter Arm cloathed & ruffled proper, grasping a Broad Sword, the Pummel & Hilt Topaz, with this Motto, Ense petit placidam in Libertate quietem." Council Rec. December 13, 1780, fol. 49. Thefe Arms, assumed in the midst of the Revolutionary War, year before the adoption of the Federal Constitution, are still unchanged. And the motto, established by the first legislature of the Revolution, recognizing that the quiet of liberty is to be fought, if need be, by the sword, remains the device, and governs the action, of Massachusetts to-day.
Writs of Assistance.

D. John Adams's Report of the First Argument in February 1761. (1)

GRIDLEY. — The Constables distraining for Rates, more inconsistent with Eng. Rts. & liberties than Writts of assistance. And Necessity, authorizes both.

Thacher. I have searched, in all the ancient Repertories, of Precedents, in Fitzherberts Natura Brevium, and in the Regifier (Q. w* y* Reg. is) and have found no such Writt of assistance as this Petition prays. — I have found two Writts of afs. in the Reg. but they are very diff, from y* Writt prayd for. — (2)

In

(1) This report, which has been once published in a John Adams's Works, 521-523, is by the courteous permission of Mr. Charles Francis Adams here reprinted as exactly as possible, with the original paragraphs, spellings, and punctuation, from the MS. notes of John Adams, who was present at the argument, though he was not admitted as a barrister until the 14th of November following. 2 John Adams's Works, 134 & note, 133. 10 lb. 245. Rec. 1761, fol. 339. The only other contemporaneous report is an enlargement of this. Vid. infra, 477, note 39.

The elaborate narrative given more than half a century afterwards by Adams to Tudor, who printed an abstrait of it as the argument of Otis in this case, is rather a recollection of the sentiments of the colonists between 1761 and 1766. 10 John Adams's Works, 332-362, & note. Tudor's Life of Otis, 68-86. 4 Bancroft's Hist. U. S. 417, note. Ante, 409, 417. It would seem to have been written by Adams without even referring to his own notes; for it substitutes Rallif's Entries for Registrium Brevium; and asserts that no precedent could be found of a writ of assistance to a custom house officer — in direct opposition to all the counsel in the case, as reported by himself in the text. 10 John Adams's Works, 332, 342. He seems also to attribute to Otis his own argument seven years later in the case of The Liberty, ante, 460, 461. 10 John Adams's Works, 348, 349.

(2) Reg. Brev. app. 46, 47 1 ante, 396 & note 4.
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In a Book, intituled the Modern Practice of the Court of Exchequer there is indeed one such Writ, and but one. (3)

By ye A& of Pal; any other private Person, may as well as a Custom House Officer, take an officer, a Sheriff, or Conftable, &c. and go into any Shop, Store &c. & seize: any Person authorized by such a Writ, under the Seal of the Court of Exchequer, may, not Custom House Officers only. — Strange. (4) — Only a temporary thing.

The moft material Question is, whether the Practice of the Exchequer, will warrant this Court in granting the same.

The A& impowers all the officers of ye Revenue to enter and seize in the Plantations, as well as in England. 7. & 8 W. 3, C. 22, § 6, gives the same as 13. & 14. of C. gives in England. (5) The Ground of Mr. Gridley's arg is this, that this Court has the Power of the Court of Exchequer. — But This Court has renounced the Chancery Jurisdiction, wb. the Exchequer has in Cafes where either Party, is ye Kings Debtor. (6) — Q. into ye Cafe. (7)

In

(1) Copied in full ante, 398, note 10, qu. vid.
(4) Probably Horne v. Bootey, 2 Stra. 932, in which, notwithstanding a condemnation of goods in the Exchequer, trover was maintained against "one not the proper officer" for seizing them, on the ground of his "being a tidesman, who could not enter a house without a writ of affiace and a peace officer, the words of his warrant being so restrained."
(5) Vid. Sts. 13 & 14 Car. 2, c. 11, § 5 1 7 & 8 W. 3, C. 22, § 6 1 quoted in full by Gridley argiendo, infra, 480, 481.
(6) 3 Bl. Com. 45. That jurisdiction was transferred to the High Court of Chancery by St. 5 Vict. c. 5.
(7) That case was again cited by Thacker at the argument in November 1761, as "the Cafe of McNeal of Ireland & McNeal of Boston," ante, 53. The only trace of it to be found in the clerk's office is the following entry on the records of February term, 1754, in Suffolk, which was held by Sewall, C. J., Saltonstall, Lynde, Cushing & Oliver, JJ.

"Ann McNeal Widow and Mary McNeal Spinftr both of the City of Dublin in the Kingdom of Ireland Debtors and Accountants to his Majesty Compl against Sarah Brideoak of Boston in the Court of Exchequer as party in this case."
Writs of Affihtance.

In Eng. all Informations of uncuffed (8) or prohibited Importations, are in y* Exchequer. — So y* Cufm Houfe officers are the officers of y* Court. — under the Eye, and Direction of the Barons.

The Writ of Affihtance is not returnable. — If such fae- sure were brot before your Honours, yould often find a wanton Exercife of their Power.

At home, y* officers, feife at their Peril, even with Probable Caufe. — (9)

Otis. This Writ is against the fundamental Principles of Law. — The Privileedge of Houfe. A Man, who is quiet, is as secure in his Houfe, as a Prince in his Castle — notwithstanding all his Debts, & civil processe of any Kind. — But

For flagrant Crimes, and in Cases of great public Neces- sity, the Privileedge may be incroohd (10) on. — For Felonies an officer may break, upon Procefs, and oath. — i. e. by a Special Warrant to search such an Houfe, sworn to be suspected, and good Grounds of suspicion appearing.

Make oath cor. Ld. Treas., or Excheque, in Eng. or a Magistrate

(" County of Suffolk in said Province Spinster commonly called Sarah McNeal of said Boston Widow Defendant on a Bill in Equity filed in Court Decem' the 20th 1752 (and on file). This Bill hath been continued from the Term of this Court for this County held at said Boston in November A D 1752 by Adjourn' from the third Tuesday of Auguft preceeding by Content of both Partys unto this Court & now both Partys appear'd & the said Bill is Dismift and the said Sarah Brideoak is allowed her Costs Taxed at £."

" The compl' moved that they might be allowed an appeal to y* King in Council; Allow'd."

(8) Uncustomed. Compare enlarged report, infra, 483.
(10) This looks in the MS. like an indilinct abridgment of "in- croached."

Rec. 1754. Fol. 130.
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As to Acts of Parliament. an Act against the Constitution is void; an Act against natural Equity is void; and if an Act of Parliament should be made, in the very Words of this Petition, (18) it would be void. The Executive Courts (19) must pass such Acts into difufe—8. Rep. 118. from Viner. (20) — Reason of ye Com Law to control an Act of Parliament.—Iron Manufacture. noble Lord's Proposal, ye we should send our Horfes to Eng. to be fhod.—(21)

If an officer will justify under a Writ he must return it. 12th Mod. 396.—perpetual Writ. (22)

Stat.

(18) It would seem from this expression, as well as from the enlarged report of Gridley's argument, infra, 478, that Adams suppos'd a written petition to have been filed in this case. But it is more probable that the counsel referred to the form of petition which had been previously used; for there does not appear to have been any application in writing for the writ at this time, except the memorial of the Surveyor General in behalf of himself and all his officers. Ante, 415, 418, & note.

(19) The term "executive courts" was commonly applied to Courts of Judicature, as distinguished from the Legislature or "General Court." Ante, 200, 245, 280, 307. Quincy's Life of Quincy, 68. 2 John Adams's Works, 135, 155, 194, 234, 235. 3 lb. 481. 1 Hutchinson's Hist. Mas. 305. 1 Doug. Hist. N. A. 517, 520.


(21) Perhaps in the debate in 1750 on St. 23 G. 3, c. 29, which prohibited the erection or maintenance in the Colonies of any rolling or slitting mill, plating forge, or furnace for making steel. See Minot's Hist. Mas. 170. John Adams, in a letter to Tudor of August 21, 1818, makes Otis, in 1761, quote, with this, the similar remark "that a hobbain should not be manufactured in America"—which was in fact a threat of Chatham's in 1766, in case the Americans should deny the power of Parliament over their trade. 10 John Adams's Works, 330. 4 Bancroft's Hist. U. S. 417, note. 3 lb. 387.

(22) "He, that has not shewed to the Court that he hath done his duty in what the process of the Court required him, shall not be justifi-
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Stat. C. 2. We have all as good Rt to inform as Custom House officers (23) & every Man may have a general, irrefutable Writ Commission to break Houses. —

By 12. of C. on oath before L. Treasurer, Barons of Exchequer, or Chief Magistrate to break with an officer. (24) — 14th C. to issue a Warrant requiring sheriffs &c to assist the officers to search for Goods not entd, or prohibited (25); 7 & 8th W. & M. gives Officers in Plantations same Powers with officers in England. — (26)

Continuance of Writs and Processses, (27) proves no more nor so much as I grant a special Writ of af. on special oath, for specul Purpose. —

Pew indorsd Warrant to Ware. — (28) Justice Waley

...ed by the procfs." Freeman v. Bluett, 12 Mod. 396. In that case, the precept directed the officer to return it. Otis argued that the Writ of Assistance, not being irrefutable, was perpetual. 2 Minot's Hist. Mafs. 95. 2 John Adams's Works, 524.

(23) Compare supra, 469, 472, & note 13.
(24) St. 12 Car. 2, c. 19.
(25) St. 13 & 14 Car. 2, c. 111, § 5.
(26) St. 7 & 8 W. & M. c. 32, § 6.
(27) By St. 1 Anne, St. 1, c. 8, § 5, relied on by Gridley, infra, 491.
(28) In the fuller report of Otis's speech this illustration is thus introduced: "This wanton exercise of this power is not a chimical fuggetion of a heated brain. I will mention some facts. Mr. Pew had one of these writs, and when Mr. Ware succeeded him, he endorsed the writ over to Mr. Ware: so that these Writs are negotiable from one officer to another; and so your Honours have no opportunity of judging the persons to whom this vaft power is delegated." 2 Minot's Hist. Mafs. 96, 97. 2 John Adams's Works, 524, 525.

In April 1860, the serjeants-at-arms of the United States Senate indorsed over to another person a precept, addressed to himself by name, to arrest a witness who had refused to appear before a committee of the Senate; and the witness was arrested by the deputy, but discharged by Chief Justice Shaw, with the concurrence of the other judges of the Supreme Judicial Court of Massachusetts, upon the ground that the deputation was invalid. Sanborn v. Carlton, 15 Gray. In June 1860, the Committee on the Judiciary of the Senate, through Mr. Bayard of Delaware, their Chairman, made a report on this subject, controverting this decision, and accompanied by a bill expressly conferring on the serjeants-at-arms of the Senate and House of Representatives
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ley seare'd Houfe. (29) Law Prov. (30) Bill in Chancery.—this Court confined their Chancery Power to Revenue &c. (31)

Gridley. By the 7. & 8 of Wm C. 22. § 6th.—This authority, of breaking and entering Ships, Warehouses Cellars &c given to the Custom House officers in England by the Statutes of the 12th and 14th of Charle. 2d, is extended to the Custom House officers in y' Plantations: (32) — and by the Statute of the 6th of Anne, (33) this Writs of Assistance are continued, in Company with all other legal Processes for 6 months after the Demise of the Crown. — Now what this Writ of assistance is, we can know only by Books of Precedents. — And we have produced, in a Book intituled the modern Practice of the Court of Exchequer, a form of such a Writ of assistance to the officers of the Customs. (34) The Book has the Imprimatur of Wright C. J.

atives the power to serve or execute by deputy the mandates, precepts, and warrants of their respective houses. But Congress did not pass the bill.

(29) "Another instance is this: Mr. Justice Walley had called this name Mr. Ware before him by a constable to answer for a breach of Sabbath-day acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied, Yes. Well then, said Mr. Ware, I will shew you a little of my power. I command you to permit me to search your house for uncustomed goods; and went on to search his house from the garret to the cellar; and then served the constable in the same manner." Otis's argument, as reported in 2 Minor's Hist. Maifs. 91, and 2 John Adams's Works, 525.

(30) Probably Prov. St. 11 W. 3, defining the jurisdiction of the Court, quoted by Gridley, infra, 479.

(31) Fid. supra, 470, & notes 6 & 7.

(32) For these statutes, vid. ante, 397, note 5; infra, 479, 480.

(33) St. 1 Anne, St. 1, c. 8, § 5, the context of which however is quite as consistent with the supposition that only the ordinary writs of assistance, issuing out of chancery, were intended — "That no commission of association, writ of admittance, or f& n non omnes, original writ, writ of nisi prius, writ of assistance, nor any commission, process, or proceedings whatsoever, in or issuing out of any Court of equity," &c. &c. should be determined by the demise of the King.

(34) Printed ante, 398, note 10.
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of the K.'s B. (35) wh is as great a san&ion as any Books of Precedents ever have. altho Books of Reports are usu&y approved by all the Judges (36) — and I take Brown the author of this Book to have been a very good Collector of Precedents. — I have two Volumes of Precedents of his Collection, (37) wth I look upon as good as any, except Coke & Raftal.

And the Power given in this Writ is no greater Infringe- ment of our Liberty than the Method of collecting Taxes in this Province. — (38)

Every Body knows that the Subject has the Privilege of House only against his fellow Subjects, not vs yr K. either in matters of Crime or fine. (39)

(35) The value of the Imprimatur of Wright, C. J. may be judged from these facts: "He was so poor a lawyer, that he could not give an opinion on a written case, but used to bring such cases, as came to him, to his friend Mr. North, and he wrote the opinion on a paper, and the lawyer copied it, and signed under the case as if it had been his own." 2 North's Lives, (ed. 1826) 94. At the influence of Chief Justice Jeffreys, he was appointed by James 2 a Baron of the Exchequer, notwithstanding the remonstrances of Lord Keeper Guilford that he was "the most unfit person in England to be made a judge," "a dunce, and no lawyer," and "of no truth nor honesty." Ib. 96, 97. By the same influence he was afterwards succe&orly advanced to be a Judge of the King's Bench, Chief Justice of the Common Pleas, and Chief Justice of England; and signalized the last appointment by ordering a capital execution to take place, according to the King's will, in a different county from the conviction, which Chief Justice Herbert, who was removed to make way for him, and another Judge who "had his quietus the night before," had just decided could not be done. 3 Mod. 71, 124, 125. For Lord Camden's opinion of him, see 19 Howell's State Trials, 989, 990, 991, 992.

(36) See Wallace's Reporters, (3d ed.) 34, & note.


(39) These notes, the handwriting of which exhibits the haste with which they were made, are followed by more distinctly written "ex- tracts from the Acts of Parl." and "Prov. Law, Page 114." — being the same provisions which are incorporated into the extended sketch of Gridley's
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Gridley's argument, infra, 479, 480; and by the forms of petition and writ printed ante, 403 & note, 404.

A more extended sketch of this argument is contained in a manuscript book entitled on the fly leaf "Israel Keith's Pleadings, Arguments, Extracts, &c.," in the possession of John G. Newell, Esq., of Pittsford in the State of Vermont, who has kindly furnished the writer with the following information: "From what I can learn, Israel Keith was born in Boston; educated at Cambridge, Mass.; was for a short time in the practice of the law in Boston; and in 1798 or near that time he moved to this place, where he lived and died. He was 67 years of age. He died 5th June 1819, as appears from the record upon his monument. Col. Keith was a gentleman of the old school; while living, sustained the reputation of strict integrity and correct morals. It was said of him, that because he could not be at the head of his profession, he gave up the practice of the law, and left for the wilderness of Vermont. At one time he was aid to General Washington during the American Revolution. I have understood that while he was studying his profession, he took the notes of Mr. Otis's speech. It is in Col. Keith's handwriting, and the manuscript has been in my possession since 1825, and before that time it was in possession of his widow, Mrs. Caroline Keith. She died 23d May 1834, and was buried in this town." It may be added that Israel Keith appears in the Harvard College Catalogue among the graduates of 1771, and was admitted to practice as an attorney of the Superior Court of Judicature at March term 1780 in Suffolk, (Rec. 1780, fol. 153,) and is mentioned as an attorney of the Supreme Judicial Court in the Boston Register from that time until 1791, but not afterwards.

The book itself contains sufficient evidence that Mr. Keith was a careful student of law, and had access to some of John Adams's materials. Besides other curious cases, opinions and extracts, it contains Governor Powall's message on Courts of Probate (infra, Appendix, 111.); the case of Glover v. Le T frost, decided in 1770, (printed ante, 325, note, from Adams's original notes); "Lord C. J. Hale's advice for the study of the Common Law" (being one long paragraph out of his preface to Rolle's Abridgment, reprinted in Colleét. Jurid. 276, 277); "Lord C. J. Reeve's Advice to his nephew on the study of the Law" (since published by Mr. Hargrave from a left perfect copy in Colleét. Jurid. 79); a letter from Dr. Dickinson, Regius Professor of Law at Cambridge, to Mr. Gridley on the books necessary to a knowledge of the Civil Law; and a letter from Mr. Gridley to Judge Lightfoot of the Admiralty Court in Rhode Island on the study of the Admiralty Law. The four last were recommended in 1758 by Gridley to Adams, when a student at law. 3 John Adams's Works, 46.

Mr. Keith's cannot be an original report of the argument upon the Writs of Assistance; for he was only nine years old at the time of that argument. And the mistakes of "3 W. 3" for "11 W. 3," and "Chance
Writs of Assistance.

"Chance of Jurisdiction" for "Chancery Jurisdiction" (infra, 480, 481) are not those of one who had heard the argument, though easily made in copying.

But there are many reasons for presuming that it is a copy of a sketch made by John Adams, from which the speech of Otis, printed in a Minot's Hist. Mafs. 91-99, and, with some variations, in 2 John Adams's Works, 523-525, formed a part. Otis's argument is given, almost word for word, as in Minot's History; and the arguments of Gridley and Thacher are evidently reported by the same hand, and correspond with the abstractions and quotations of parts of them by Minot, and in a remarkable degree with Adam's original notes. Adams, in his diary of the spring of 1761, quotes some one as praising the style of his "abstraction of the argument for and against the Writs of Assistance," and especially of Gridley's, in a way that could hardly have been applied to his first rough notes, printed in the text. 2 John Adams's Works, 124, 125. And Adams himself many years after said that the more extended notes printed by Minot were his own, except some passages which he pointed out. Ib. 525-527. A comparison of his report with those preferred by Minot and Keith tends to the conviction that in republishing those passages he was guided by his taste rather than his notes or his memory. The form of writ and petition preferred by Adams correspond with those quoted by Gridley, according to this report. Ante, 409, note 4; infra, 480.

The antiquity and accuracy of the report copied by Mr. Keith are curiously corroborated by the following order, entered at the end of the Docket of August term 1759 of the Superior Court of Judicature in Suffolk:

"N. B. The Court determin'd that for the future the special pleadings shall come on the second Tuesday in each term & continue from day to day till finish'd, & to allow the Bar the preceding Monday to prepare therefor."

In Mr. Keith's manuscript the introductory statements and the reports of the arguments of Gridley and Thacher (which have never been printed) are as follows:

"Boston Superior Court February 1761.

On the second Tuesday of the Court's sitting, appointed by the rule of the Court for argument of special matters, came on the dispute on the petition of M' Cockle & others on the one side, and the Inhabitants of Boston on the other, concerning Writs of Assistance. M' Gridley appeared for the former, M' Otis for the latter. M' Thacher was joined with him at the desire of the Court.

"M' Gridley. I appear on the behalf of M' Cockle & others, who pray that as they cannot fully exercise their Offices in such a manner as his Majesty's Service and their Laws in such cases require, unless your Honors are vested with the power of a Court of Exchequer for this
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this Province will please to grant them Writs of Assistance. They therefore pray that they & their Deputies may be aided in the Execution of their Offices by Writs of Assistance under the Seal of this Court and in legal form, & according to the Usage of his Majesty's Court of Exchequer in Great Britain.

"May it please your Honors, it is certain it has been the practice of the Court of Exchequer in England, and of this Court in this Province, to grant Writs of Assistance to Custom House Officers. Such Writs are mentioned in several Acts of Parliament, in several Books of Reports; & in a Book called the Modern Practice of the Court of Exchequer, We have a Precedent, a form of a Writ, called a Writ of Assistance for Custom house Officers, of which the following a few years past to Mr Paxton under the Seal of this Court, & tested by the late Chief Justice Sewall is a literal Translation." [Here follows the writ printed ante, 404.]

"The first Question therefore for your Honors to determine is, whether this practice of the Court of Exchequer in England (which it is certain, has taken place heretofore, how long or short a time forever it continued) is legal or illegal. And the second is, whether the practice of the Exchequer (admitting it to be legal) can warrant this Court in the same practice.

"In answer to the first, I cannot indeed find the Original of this Writ of Assistance. It may be of very antient, to which I am inclined, or it may be of modern date. This however is certain, that the Stat. of the 14th Char. 24th has established this Writ almost in the words of the Writ itself. And it shall be lawful to & for any person or persons authorized by Writ of Assistance under the seal of his Majesty's Court of Exchequer to take a Constable, Headborough, or other Public Officer, inhabiting near unto the place, & in the day time to enter & go into any house, Shop, Cellar, Warehouse, room, or any other place, and in case of Resistance, to break open doors, Chests, Trunks & other Package, & there to seize any kind of Goods or Merchandise whatever prohibited, and to put the same into his Majesty's Warehouse in the Port where Seizure is made."

"By this act & that of 12 Char. 24th all the powers in the Writ of Assistance mentioned are given, & it is expressly said, the persons shall be authorized by Writs of Assistance under the seal of the Exchequer. Now the Books in which we should expect to find these Writs, & all that relates to them are Books of Precedents, & Reports in the Exchequer, which are extremely scarce in this Country; we have one, & but one that treats of Exchequer matters, and that is called the 'Modern practice of the Court of Exchequer,' & in this Book we find one Writ of Assistance, translated above. Books of Reports have commonly the Sanction of all the Judges, but books of Precedents never have more than that of the Chief Justice. Now this Book has the Imprimatur of Wright, who was Chief Justice of the King's Bench and
and it was wrote by Brown, whom I esteem the best Collector of Precedents; I have Two Volumes of them by him, which I esteem the best except Raffall & Coke. But we have a further proof of the legality of these Writs, & of the settled practice at home of allowing them, because by the Stat. 6th Anne which continues all Process & Writs after the Demise of the Crown, *Writs of Assistance are continued among the Rest.*

"It being clear therefore that the Court of Exchequer at home has a power by Law of granting these Writs, I think there can be but little doubt, whether this Court as a Court of Exchequer for this Province has this power. By the Statute of the 7th & 8th W. 3d, it is enacted 'that all the Officers for collecting and managing his Majesty's Revenue, and inspecting the Plantation Trade in any of the said Plantations, shall have the same powers &c. as are provided for the Officers of the Revenue in England; also to enter Houses, or Warehouses, to search for and seize any such Goods, & that the like Assistance shall be given to the said Officers as is the Custom in England.'

"Now what is the Assistance which the Officers of the Revenue are to have here, which is like that they have in England? Writs of Assistance under the Seal of his Majesty's Court of Exchequer at home will not run here. They must therefore be under the Seal of this Court. For by the law of this Province 2 W. 3d Ch. 3 'there shall be a Superior Court &c. over the whole Province &c. who shall have cognizance of all pleas &c. & generally of all other matters, as fully & [amply] to all intents & purposes as the Courts of King's Bench, Common Pleas & Exchequer within his Majesty's Kingdom of England have or ought to have.'

"It is true the common privileges of Englishmen are taken away in this Cafe, but even their privileges are not so in cases of Crime and fine. 'Tis the necessity of the Cafe and the benefit of the Revenue that justifies this Writ. Is not the Revenue the sole support of Fleets & Armies abroad, & Ministers at home? without which the Nation could neither be preferred from the Invasions of her foes, nor the Turmoil of her own Subjects. Is not this I say infinitely more important, than the imprisonment of Thieves, or even Murderers? yet in these Cafes 'tis agreed Houses may be broke open.

"In fine the power now under consideration is the same with that given by the Law of this Province to Treasurers towards Collectors, & to them towards the subject. A Collector may when he pleases distrain my goods and Chattels, and in want of them arrest my person, and throw me instantly into Goal. What! shall my property be wrested from me! — shall my Liberty be destroyed by a Collector, for a debt, unadjudged, without the common Indulgence and Lenity of the Law? So it is established, and the necessity of having public taxes effectually and speedily collected is of infinitely greater moment to the whole, than the Liberty of any Individual."
Thacker. In obedience to the Order of this Court I have searched with a good deal of attention all the antient Reports of Precedents, Fitz. N. Brev. & the Register, but have not found any such Writ as this Petition prays. In the latter indeed I have found Two Writs which bear the Title of Brev. Allistence, but these are only to give poffefion of Houses &c. in caufes of Injuftice & Sequeftration in Chancery. By the Act of Parliament any private Perfon as well as Cuftom Houfe Officer may take a Sheriff or Confible & go into any Shop &c. & feize &c. (here M'r Thacker quoted an Authority from Strange which intended to fhew that Writs of Affifiance were only temporary things.)

"The moft material quefion is whether the praftice of the Exchequer is good ground for this Court. But this Court has upon a folemn Argument, which lafted a whole day, renounce'd the Chance of [Chancery] Jurifdiction which the Exchequer has in Cauces where either party is the King's Debtor.

"In England all Inforrnations of uccufom or prohibited Goods are in the Exchequer, fo that the Cuftom Houfe Officers are the Officers of that Court under the Eye & Direction of the Barons, & fo accountable for any wanton excercife of power.

"The Writ now prayed for is not returnable. If the Seiziures were fo, before your Honors, and this Court should enquire into them you'd often find a wanton excercife of power. At home they feize at their peril, even with probable Cause."

The extended fketch of Otis's argument express his legal poftions no better than Adams's original notes, reprinted in the text, and has been twice printed already, once in a Minot's Hiift. Mafs. 91-99, and again, with little alteration, in a John Adams's Works, 523-525. Vid. supra, 478, 479. It is therefore omitted here. The Keith MS. is evidently from a more perfect copy; but the variations are trifling. The most important one is in the punctuation of the following passage, which is thus in the Keith MS.: "I have taken more pains in this caufe than I ever will take again. Although my engaging in this & another popular Caufe has raised much Refentment, yet I think I can fincerely declare that I cheerfully submit myself to every odious name for Confiquence fake." In the works of Minot and Adams there is a comma after "again," and a period after "Refentment," followed by "But."

"Another popular caufe" was doubtles the controversy between the Province & Paxton, post, Appendix, II.

The report in the Keith MS. concludes thus: "The Court fuper- pended the absolute determination of the matter." This accords with Hutchinson's accounts. Ante, 415, note.
E. Otis's Quotations from Coke on Magna Carta, cap. xxix.

"**NULLUS** liber homo capiatur, vel imprisonetur, aut dissiifuetur de libero tenemento suo, vel libertatibus, vel liberis confuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruaturn, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae. Nulli vendemus, nulli negabimus, aut differemus justitiam, vel rectum."

2 Inst. 45.

"This is a beneficial Law, and is construed benignly," &c. p. 47.

"[Per judicium parium suorum.]" "And it extendeth to the King's suit in case of treason or felony, or of misprision of treason or felony, or being accessory to felony before, or after, and not to any other inferior offence. Alfo it extendeth to the trial itself, whereby he is to be convicted; but a Nobleman is to be indicted of treason or felony, or of misprision, or being accessory to in case of felony, by an inquest under the degree of nobility: the number of Noblemen that are to be triers are, 12 or more." p. 49.

"The ill success hereof," [The St. of 11 H. 7, c. 3, authorizing Justices, "(without any finding or presentment by the verdict of twelve men) by their discretions to hear and determine all offences and contempts,"] "and the fearful end of these two oppressors," [Empfon and Dudley] "should deter others from committing the like, and should admonish Parliaments, that instead of this ordinary and precious trial _per legem terrae_, they bring not in absolute and partial trials by discretion." p. 51.

"If Treason or Felony be done, and one hath just cause of suspicion, this is a good cause and warrant in Law for him to arrest any man, but he must shew in certainty the cause of his suspicion: and whether the suspicion be just or lawful, shall be determined by the Justices in an _Action of false imprisonement_ brought by the party grieved, or upon a _Habeas corpus_, &c." p. 52.

"If an affray be made to the breach of the King's peace, any man may by a Warrant in Law restrain any of the offenders, to the end the
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the King's peace may be kept, but after the affray ended, they cannot be arrested without an express Warrant." p. 52.

"The like Writ" [of habeas corpus] "is to be granted out of the Chancery, either in the time of the Term (as in the King's Bench) or in the Vacation; for the Court of Chancery is officina justitiae, and is ever open, and never adjourned, so as the Subject being wrongfully imprisoned, may have justice for the liberty of his person as well in the Vacation time, as in the Term." p. 53.

"Now it may be demanded, if a man be taken, or committed to prison contra legem terrae, against the Law of the land, what remedy hath the party grieved? To this it is answered, First, that every Act of Parliament made against any injury, milchief, or grievance doth either expressly, or impliedly give a remedy to the party wronged, or grieved: as in many of the Chapters of this great Charter appeareth; and therefore he may have an action grounded upon this great Charter." p. 55.

"[Nulli negabimus, aut differemus, &c.]" "These words have been excellently expounded by latter Acts of Parliament, that by no means common right, or Common Law should be disturbed or delayed, no, though it be commanded under the Great Seal, or Privy Seal, order, writ, letters, meffage, or commandment whatsoever, either from the King, or any other, and that the Justices shall proceed, as if no such writs, letters, order, meffage, or other commandment were come to them. Judicium redditum per desolatam affirmatur, non obstante breve Regis de prorogatione judicii."

"That the Common Laws of the Realm should by no means be delayed, for the Law is the surest sanctuary, that a man can take, and the strongest fortress to protect the weakest of all; lex est tuaestima caffis, and sub eypo legis nemo decipitur: but the King may lay his own suite, as a capit pro sine, for the King may retch his sine and the like.

"All Protections that are not legal, which appear not in the Register, nor warranted by our books, are expressly against this branch, nulli differemus: As a Protection under the Great Seal granted to any man, directed to the Sheriffs, &c. and commanding them, that they shall not arrest him, during a certain time at any other man's suit, which hath words in it, per prorogationem nostrum, quam nolumus esse arguendum; yet such Protections have been argued by the Judges, according to their oath and duty, and adjudged to be void." p. 56.

"Juictiam vel rectum."

"It is called Right, because it is the best birth-right the Subject hath, for thereby his goods, lands, wife, children, his body, life, honor, and estimation are protected from injury and wrong: major hereditatis venit unicuique nostrum a jure, & legibus, quam a parentibus." p. 56.

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**Note.** In the margin of James Otis's copy of Lord Coke's Second Institute, (6th ed. London 1681,) now owned by Mr. George Fribbie.
Hoar, of Worcester, the mark ⚘ is frequently written, especially in the margin of the twenty-ninth chapter of Magna Charta, and the commentary thereon, as shown above. Remembering also Otis's reference, as reported by Quincy, to "29 M." (ante, 56.) it can hardly be doubted that the passages thus indicated, or some of them, were cited in the argument upon the Writs of Assistance, though some of them were also referred to in the argument for opening the Courts in 1765. Ante, 205–207; a John Adams's Works, 158, 159, & notes.

The reference in the margin to "Trial per Pares" is apparently in Otis's hand; and the words "this ordinary and precious trial Per legem terræ," and "Aætion of false imprisonement," are underscored with ink. This paragraph about trial by jury was a favorite with the patriot lawyers of that time. Compare Adams, arguendo, in Advocate General v. Hancock, ante, 466.

There is also a mark in the margin of the passage referred to in Thacher's argument, (ante, 53, 54.) "The Exchequer is an ancient Court of Record for the King's affairs, touching his rights and revenues of his Crown," &c. a Infl. 551.
F. Contemporaneous Notices in the Boston Gazette.

"BOSTON, November 23. Wednesday last, a Hearing was had before the Hon. the Superior Court of Judicature then sitting in this County, upon a Petition of the Officers of the Customs for a Writ of Assistance — As this was a Matter in which the Liberty of the People was most nearly interested the whole Day and Evening was spent in the Argument. The Gentlemen in favour of the Petition alledged, that such Writs by Law issued from the Court of Exchequer at home; and that by an Act of this Province, the Superior Court is vested with the whole Power and Jurisdiction of the Exchequer; and from thence it was inferred, that the Superior Court might lawfully grant the Petition.

The Arguments on the other Side were enforced with such Strength of Reason, as did great Honour to the Gentlemen concerned; and nothing could have induced one to believe they were not conclusive, but the Judgment of the Court immediately given in Favour of the Petition. (1)

It is probable that very urgent Necessity for this Writ was set forth in the Petition, as some private Hints had been given that the King’s Officers were set at defiance — An Assertion which no unbiased man will believe to be true, who is either acquainted with the Character of the Body of Merchants in this Town, or knows the powerful influence under which the King’s Officers are protected.

It is worth observing, that the Power of the Exchequer had

(1) Quincy’s Report, ante, 57, acc.
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had never been exercised by the Superior Court, for near Sixty Years after the Act of this Province investing them with such Power had been in Force — The Writ, which was the first Instance of their exercising that Power now granted, was never asked for, or if asked, was constantly deny'd for this long Course of Years, until Charles Paxton, Esq; whose Regard for the Liberty and Property of the Subject, as well as the Revenue of the King, is well known, (2) apply'd for it in 1754 — It was granted by the Court in 1756, (3) sub silentio, and continued till the Death of the late King — Upon this new Application, it is now revived, and no doubt will be of eminent use to the present Generation at least; otherwise it is not to be presumed the Court would have allowed it — it will never be looked upon in an indifferent Light; and therefore if it lives to Posterity, it will afford to them one striking Characteristic, at least of the present Times, according as they shall find the Effects of it to be, when it may arrive to more perfect maturity, whether good or bad.

The above report is the only notice in the Boston Gazette during this year, of proceedings in court concerning the Writs of Assistance. The italics are in the original.

December 7.

In the Gazette of December 7th 1761 "A Fair Trader" says: "Writs of Assistance are now established and granted to the Officers of the Customs, who were tho't by many Persons, to have had full Power enough over us before." And on the 21st of December the leading article, which is not signed, says: "Let us then all lend a helping hand to this good work — not only custom house

(2) Vid. ante, 421, note; Province of Massachusetts Bay v. Paxton, post, Appendix II. Governor Bernard, on the 17th of May 1764, wrote: "When I first came to this Government, seizures were much more frequent than they have been for two or three years past. They were all made by one officer only — Mr. Paxton, the Surveyor of the Port." 3 Bernard Papers, 316.

(3) At August term 1755, ante, 407.
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house officers but others — let all apply for writs of assistance — for it shall be lawful for any person having a writ of assistance from the exchequer — these are the words of the act — and there is an exchequer in this province, to all intents and purposes — a court that can exercise as many of the powers of the exchequer as they please.

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January 4.

The first article in the Gazette of January 4th 1762 repeats with such clearness and power the very grounds taken by the counsel against the writ, as almost to compel the inference that it was from the pen of one of them; and at that time James Otis was a frequent contributor, both in his own name, and anonymously. No further reason is necessary for printing the whole article.

"To the Printers.

SINCE the advancement of so great a lawyer as the Hon. Mr. H—c—n to the first j—r—l seat, (4) it would be deemed the highest impertinence for any one to express the least surprize, that the Superior Court of this province, should after solemn hearing, adjudge themselves authorize'd to grant such a writ, as the WRIT OF ASSISTANCE; or even to doubt, whether by law, they have power so to do: I hope however, I may say without offence, especially as I am inform'd that this writ is not yet given out, (5) that I heartily wish it never may —

It seems necessary to preface all our objections against such a power being given to the custom-house officers, "with


(5) It had actually been issued to Paxton a month before, (ante 418,) but had perhaps not yet been used.
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"with a formal declaration against an illicit trade; for to
"bear any spirited testimony against their abuse of power,
"and especially to offer such abuse as the strongest reason
"why they ought not to be trusted with more, has been
"represented by these very persons and their patrons, as
"if we had combin'd to break thro' all the just restraints of
"the laws of trade, and to force a free port.—I do there-
"fore from principle declare against an illicit trade; I would
"have it totally suppress'd, with this proviso only, that it
"may have the same fate in the other governments; other-
"wise all the world will judge it inequitable: it is because
"we only are severely dealt with, that we complain of un-
"reasonable treatment; and the writ of assistance, being a
"further degree of severity will give us still further reason
"to complain—

"but it is not trade only that will be affected by this
"new severity: every housholder in this province, will
"necessarily become less secure than he was before this writ
"had any existence among us; for by it, a custom house
"officer or any other person has a power given him, with
"the assistance of a peace officer, to enter forcibly into a
"dwelling house, and rifle every part of it where he shall
"please to suppose uncustomed goods are lodged! — Will any
"man put so great a value on his freehold, after such a
"power commences as he did before? — every man in this
"province, will be liable to be insulted, by a petty officer,
"and threatened to have his house ransack'd, unless he will
"comply with his unreasonable and impudent demands: Will
"any one then under such circumstance, ever again boast
"of british honor or british privilege? — I expect that
"some little leering tool of power will tell us, that the pub-
"lick is now amus'd with mere chimeras of an overheated
"brain; (6) but I desire that men of understanding, and

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(6) The very expression used by Otis at the 1st argument—"“This
wanton exercise of this power is not a chimerical suggestion of a heated
brain,” ante, 475, note 28.

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"morals, would only recollect an instance of this sort; when a late comptroller of this port, by virtue of his writ of assize, forceably enter'd into and rummag'd the house of a magistrate of this town; and what render'd the insolence intolerable, was, that he did not pretend a suspicion of contraband goods as a reason for his conduct, but it was only because the honest magistrate had a day before taken the liberty to execute a good and wholesome law of this province against the comptroller. — (7)

"It is granted that upon some occasions, even a Britsh freeholder's house may be forceably opened; but as this violence is upon a presumption of his having forfeited his security, it ought never to be done, and it never is done, but in cases of the most urgent necessity and importance; (8) and this necessity and importance always is, and always ought to be determin'd by adequate and proper judges: Shall so tender a point as this be left to the discretion of any person, to whomsoever this writ may be given! shall the jealousies and mere imaginations of a custom-house officer, as imperious perhaps as injudicious, be accounted a sufficient reason for his breaking into a free-man's house! what if it shall appear, after he has put a family which has a right to the King's peace, to the utmost confusion and terror; what, if it should appear, that there was no just grounds of suspicion; what reparation will he make? is it enough to say, that damages may be recover'd against him in the law? I hope indeed this will always be the case; — but are we perpetually to be expos'd to outrages of this kind, & to be told for our only consolation, that we must be perpetually seeking to the courts of law for redress? Is not this vexation itself to a man of a well disposed mind? and besides, may we not be insolently treated by our petty tyrants in some ways, for which the law prescribes no redress? and if this should be the

(7) Cafe of Welley & Ware, Otis, arguendo, ante, 476, note 29. (8) S. P. Otis, arguendo, ante, 471.
"the case, what man will hereafter think his rights and
privileges worth contending for, or even worth enjoying.
"The people of this province formerly upon a particular
occasion allerted the rights of englifhmen; and they did it
with a fober, manly spirit: they were then in an infulting
manner asked 'whether englifh rights were to follow
them to the ends of the earth' (9) — we are now told,
that the rights we contend for 'do not belong to the
'Engliih' — thefe writs, it is faid, 'are frequently illufed
from the exchequer at home, and executed, and the
people do not complain of it — and why should we de-
fire more freedom than they have in the mother coun-
try' — fuch is the palliating language of the great patrons
of this writ — and who claims more liberty than belongs
to us as Britifh subjects? we defire no securities but
fuch as are deriv'd to us from the britifh constitution,
which is our glory — no laws but what are agreeable to
the true spirit of the britifh laws, to which we always
have, and I hope always shall yield a cheerful obe-
dience (10) — these rights and securities, we have with
other britifh subjects gloriously defended againft foreign
invasions, and I hope in God we shall always have spirit
enough to defend them againft all other invasions. — Is
there then any express act of parliament authorizing the
exchequer to iuffue fuch writs? for if there is not plain
law for fuch a power, the practice of one court againf
law, or which is the fame thing, without law, can never
be deem'd a good precedent for another, allowing there is
no reafon to doubt, the one is legally veited with all the
power and juriflication of the other: but if all this be
matter of uncertainty, ought it not then forever to be de-

(9) By the Judges prefiding at the trial of John Wise and other in-
habitanls of Ipswich, in 1687, for denying the validity of a tax affifted
by Anders and his Council without an assembly. Felt's Hist. Ipswich,

(10) Compare the accounts of Bernard, Hutchinson, and Chief Justice
Marshall, ante, 430, 434-437, notes.
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"termin'd in favor of common right and liberty? and would
"not every wise man so determine it? (11)

"But admitting there is such a practice at home, and
"that it is not disputed, even at this time, when there
"is so warm a sense of liberty there; it may nevertheless
"be an infringement upon the constitution: and let it be
"observ'd, there may be at some times a necessity of con-
"ceeding to measures there, which bear hard upon liberty;
"which measures ought not to be drawn into precedent
"here, because there is not, nor can be such necessity for
"them here; and to take such measures, without any neces-
"sity at all, would be as violent an infraction on our liber-
"ties, as if there was no pretence at all to law or precedent.

"It is idle then, to tell us we ought to be content under
"the same restrictions which they are under at home, even
"to the weakening of our best securities, when it is tolerated
"then only thro' necessity, and there is no necessity for it
"here. — In England something may be said for granting
"these writs, tho' I am far from saying that anything can
"justify it. In England the revenue and the support of
"government, in some measure, depend upon the customs;
"but is this the case here? are any remittances made from
"the officers here? has the king's revenue, or the revenue
"of the province ever received the addition of a farthing,
"from all the collections, and all the seizures that have
"been made and forfeited, excepting what has been remit-
ted by the late worthy collector Mr. B—r—ns? (12) — I
"assert nothing; but if no benefit accrues to the publick,
"either here or at home, from all the monies that are
"receiv'd for the use of the publick, Is not this Peculation?

(11) Compare Otis's arguments, in February — "Better to observe
the principles of law than any one precedent" (ante, 473) — and in
November — "It is worthy consideration whether this writ was consti-
tutional even in England, and I think it plainly appears it was not,"
ante, 55. See also Thacher's argument, ante, 52.

(12) Compare Bernard's and Paxton's accounts of Barons, ante,
425, 426, note.
Writs of Affrstance.

and what reason can there be, that a free people should be expof'd to all the insult and abuse, to the rique and even the fatal consequences, which may arise from the execution of a writ of affrstance, only to put fortunes into private pockets.

I desire it may be further consider'd, that the custom house officers at home, are under certain checks and restric- tions, which they cannot be under here; and therefore the writ of affrstance ought to be look'd upon as a different thing there, from what it is here. (13) In England the exchequer has the power of controuling them in every respect; and even of inflicting corporal punishment upon them for mal-conduct, of which there have been instances; they are the proper officers of that court, and are accountable to it as often as it shall call them to account, and they do in fact account to it for money receiv'd, and for their behavior, once every week — so that the people there have a short and easy method of redres, in case of injury receiv'd from them: but is it so here? Do the officers of the customs here account with the Superior Court, or lodge monies received into the hands of that court; or are they as officers under any sort of check from it? — Will they concede to such powers in the Superior Court? or does this court, notwithstanding these powers belonging to the exchequer — notwithstanding it is said to be vested with all the powers belonging to the exchequer — and, further, notwithstanding this very writ of affrstance is to be granted as a power belonging to the exchequer, will the Superior Court itself, assume the power of calling these officers to account, and punish them for misbehavior? It would be a small consolation, if we could have one instance: Have we not seen already, one of those officers, and he an inferior one too, refusing to account to any power in the province, for monies receiv'd by him by virtue of his office, belonging to the province, 

(13) Compare Thacker's argument, ante, 56.
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"province, and which we are assured by the joint decla-
ratin of the three branches of the legislature is unjustly
as well as illegally detain'd by him? (14) Does not every
one then see that a writ of affianse in the hands of a
custom house officer here, is in reality a greater power &
more to be dreaded, than it is in England? greater be-
cause uncontrol'd — and can a community be safe
with an uncontrol'd power lodg'd in the hands of such
officers, some of whom have given abundant proofs of the
danger there is in trusting them with any?" (15)

(14) Province v. Paxton, post, appendix II.
(15) There is also a communication upon the extent of the duty of
affixing custom house officers in executing Writs of Affianse, occu-
pying a column in the Gazette of February 22d, 1762. See also "Jour-
nal of the Times" in Boston Evening Post of June 26, 1769.
G. Subsequent Action of the General Court.

At the next session of the General Court, on the 22d of February 1762, the following bill was introduced and passed to be engrossed in the Council:

"An Act for the better enabling the Officers of his Majesty's Customs to carry the Acts of Trade into Execution.

"Whereas it is the Desire of this Court, that the Officers of his Majesty's Customs in this Province may be assissted in the due Execution of their Office, for the securing his Majesty's Dues, and for the preventing of Fraud:

"Be it enacted by the Governour, Council and House of Representatives, That upon Application of any of the Officers of his Majesty's Customs in this Province, impowred by Commission to seise upon Oath made to the Superior Court of Judicature, Court of Affize, and General Goal Delivery, or to the Court of General Sessions of the Peace, or to the Inferiour Court of Common Pleas,

"or to either of the Justices of said Courts, or to any one of his Majesty's Justices of the Peace of the County, that he has had Information of the Breach of any of the Acts of Trade; and that he verily believes or knows such Information to be true; it shall be lawful in every such Case, for such Court or Justice, to whom Application may be made as aforesaid, upon reducing such Oath to Writing, with the Name of the Perfon [Informing and the place] informed against, and not otherwise, to issue a Writ or Warrant of Assistance, which Writ or Warrant of Assistance shall be in the Form following and no other, "Viz."

"
Appendix I.

1762. "fs. To the Sheriff and Coroner of the County and to their respective deputies; and to the respective Constables of the Town of in said County — Greeting.

"Whereas A. B. of his Majesty's Customs, hath this Day made Complaint on Oath, That (setting forth the Complaint and Oath with the name of the Person complained of) You and every of You in his Majesty's Name, upon Sight thereof, are strictly Commanded to be aiding and afflicting to the said A. B. in the due Execution of his Office relating to the Information aforesaid. Hereof fail Not at your Peril, and make Return of this Warrant and of your Doings thereon unto myself in seven Days from the Date hereof. Dated at B. the Day of In the Year of his Majesty's Reign: Anno Domini

"And be it further enacted, That it shall be lawful for any Person or Persons authorized by Writ or Warrant of Assistance, in matter and Form as aforesaid, and not otherwise, in the Daytime to enter and go into any House, Shop, Cellar, Warehouse, or other Place; and in Case of Resistance, to break open Doors, Chests, Trunks and other Packages, them to seize and from thence to bring any Kind of Goods or Merchandize whatsoever prohibited and unaccustomed there found and them secure. And all his Majesty's good Subjects are required to be aiding and afflicting in the due Execution of said Writ or Warrant of Assistance, and all such shall hereby be defended and saved harmless.

The bill was also passed through all its stages by the House, with the amendment inclosed in brackets in the third paragraph, (supra, 495,) and was returned to the Council on the 6th of March, and there passed on the same day. (1) After the bill had been sent up from the House, the

Writs of Assistance.

the Governor sent a message to the House that he had signed certain bills, of which this was not one; and the House thereupon sent a message to the Council by James Otis to inquire if they had passed on this bill, and the Council returned a message to acquaint the House that the Council had passed it to be enacted.(2)

At a Council held on the 6th of March 1762, "His Excellency informed the Council that he had a Bill laid before him for his consent intituled an Act for the better enabling the Officers of his Majesty's Customs to carry the Acts of Trade into Execution which appeared to him to be repugnant and contrary to the Laws of the Realm and particularly to the Act of Parliament of the 7th and 8th of William the Third Chap: 22, in pursuance of which Act the Judges of the Superior Court heretofore granted Writs of Assistance to the Officers of the Custom House, Wherefore he thought proper in Council to take the opinion of the Judges upon this Question,

"Whether if this Bill should be enacted, The Superior Court as a Court of Exchequer could (consistently with such Act) grant a Writ of Assistance in pursuance of the Act of Parliament of the 7th and 8th of William the Third in the same manner as if such Bill was not enacted.

"The Judges having the Question in Writing given to them retired into the Lobby, and soon after returning, unanimously declared their opinion,

"That if this Bill should pass into a Law the Superiour Court would be restrained from granting a Writ of Assistance in the manner they have heretofore done and in the manner such Writs of Assistance are granted by the Court of Exchequer in England."(3)

On the 6th of March the Governor prorogued the General

Governor's disapproval.

(2) 24 General Court Rec. 316, 317.
(3) Council Rec. 1763, fol. 111.
Appendix I.

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General Court, after making a speech to the two Houses, in which he gave these reasons for refusing to sign this bill:

"I have had a Bill laid before me, which I have not "Power to pass to be enacted, I mean the Bill Intituled "An Act for the better enabling the Officers of his Maj- "esty's Customs, to carry the Acts of Trade into Execution;" "which is so plainly repugnant and contrary to the laws "of England, and particularly to the Act of Parliament of "the seventh and eighth of King William the Third, Chap- "ter twenty-second, that if I could overlook, it is impossi- "ble it should escape the Penetration of the Lords of Trade: "In such Cases, if I was to transmit this Bill as passed here, "it would have no other Effect than to give a Proof of my "Ignorance of my Business, and your Inattention to the "Conditions upon which we are intrusted with the Power "of Legislation." (4)

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(4) Journal H. R. 1761-2, p. 299. The Chief Justice wrote the same day to Mr. Ballin, the agent of the Province in England: "This Vessel tarrying longer than expected gives opportunity of acquainting you that troublesome session of the General Court is at an end. The Governor for the sake of peace complied, I think, farther than he would otherwise inclined to have done with the opposers of government & found by experience the truth of Sir R. Walpole's saying that one expedient makes necessary a great many more and to-day they presented him a bill restraining the Superior Court from issuing writs of assize except upon special information to a Custom house officer oath being first made, the informer mentioned & the person supposed to own the goods & the place where they were suspected to be concealed. You will not imagine it possible for him to have signed such a bill and after requiring such of the Justices of the Superior Court as were in town to give their opinion upon some points he refused it." - 26 Mass. Archives, 8.

On the 13th of April, the Governor wrote to the Lords of Trade as follows: "I shall in this acquaint your Lordships with my rejecting a Bill of a very popular construction & my reasons for & manner of doing it. The Bill, of which I here inclose a Copy, was the last Effort of the Confederacy against the Customhouse & Laws of Trade. The intention of it was to take away from the Officers the writ of Affidavit granted in pursuance of the Act of Will. 31 & substitute in the room of it another Writ which would have been wholly ineffectual. The was covered with all the Art which the thing was capable of: but I w.
too well acquainted with the Subject to be deceived in it. I had not the least doubt, upon the first reading of it, of rejecting the bill. Nevertheless as it was very popular, & I knew that the negativine of it would occasion a clamour, I gave it a more solemn condemnation than it deserved; the manner of which will appear from the enclosed Copy of the Act of Council. This anticipated all objections & reduced the popular cry to a murmur only, which soon ceased, & I believe there is now a total end to this troublesome Altercation about the Custom house Officers." a Bernard Papers, 58. See also Bernard to John Pownall, April 25, and to Lord Barrington, May 1, 1762, Ib. 186, 188.
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H. Writs of Assistance in other Colonies.

WRITS OF ASSISTANCE do not appear to have been granted in any of the Colonies except Massachusetts and New Hampshire, until after the passage of the St. of 7 G. 3, c. 46, and even then they were refused almost everywhere. (1)

1. New Hampshire.

At May term 1762 in Rockingham County of the Superior Court of Judicature of the Province of New Hampshire.

"Upon the motion of the Hon'ble John Temple, Esq., Surveyor General of his Majesty's Customs, &c. Desiring that Writs of Assistants might Issue from this Court (to the Collector of his Majesty's Customs) for that part of the port of Piscataqua that is within this Province—It is considered that such a Writ issue according to the said motion when applied for by the said Collector." (2)

2. Connecticut.

(1) Hutchinson to Jackson, May 1, 1763, 26 Mass. Archives, 138. Opinion of Attorney General De Grey, August 20, 1768, ante, 453. Chief Justice Trumbull to W. S. Johnson, June 14, 1769, infra, 503. John Adams to Calkoens, October 4, 1780, 7 John Adams's Works, 267. "We are well informed, that the officers of the customs applied the last year to the chief justice or bench of judges, in several of the colonies, for granting them writs of assistance, but that those justices from a tender regard to the constitution, and the rights of American freeholders, did actually refuse a compliance with those demands." "Journal of the Times," of April 29, 1769, in Boston Evening Post, of June 28, 1769.

(2) The writer is indebted to the kindness of the H.
Writs of Assistance.

2. Connecticut.

No application to the Superior Court of Connecticut for Writs of Assistance appears to have been made until after the passage of the St. of 7 G. 3, c. 46, when in March 1768.

"Upon the Petition of Duncan Stewart, Collector, and Thomas Moffat, Comptroller, of his Majesty's Customs for the Port of New London, Esquires, requesting this Court to grant them Writs of Assistance pursuant to the spirit and true meaning of the Act of Parliament therein referred to—And no information being made by said Petitioners, or otherwise, of any special occasion for said Writ—This Court is of Opinion that it is needful to consider on the purport of said Acts, and the manner and form of granting such Writs of Assistance, according to the usage of his Majesty's Court of Exchequer: Therefore this Court will further consider and advise thereon." (4)

"An

D. Bell, Chief Justice of New Hampshire, for a copy of this record, to which his attention was first directed by a notice dated "Province of New Hampshire, July 15, 1762," and published in the Boston Gazette of July 26, 1762.

(4) Stuart's Life of Trumbull, 79. This "court record," as Mr. Stuart calls it, "must have been a private memorandum, or loose file, which he found perhaps among Gov. Trumbull's MSS., for it does not appear on the records proper," as the writer has been informed by Mr. J. Hammond Trumbull, to whom he is indebted for the copy (infra, 504) of the subsequent motion, and other facts relating to Writs of Assistance in Connecticut.

On the 23rd of March 1768, Hutchinson wrote to Jackson: "The Commissioners shewed me a letter from some of their Officers in Connecticut, who by direction had applied to the Superior Court for Writs of Assistance agreeable to the late Act of Parliament. The Officers say they were refused & that the Chief Justice gave as a reason that the Court was of opinion such writs were unconstitutional. The Officers are ordered to make a more formal application & to obtain the Answer of the Court in writing." 26 Mass. Archives, 296. "It is said the grand Pensioner, always ready with his Council, has advised the C——m———rs to remonstrate Home against the Civil Authority of Connecticut, for declining to issue Writs of Assistance for a General Search of contraband Goods, in the base unconstitutional Manner
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A similar application was made at April term 1769 at Norwich, supported by the opinion of Attorney General De Grey.

Manner they have been granted in another Province. Perhaps the same Advice may be given relative to the Chief Justice of Philadelphia, who we hear has also acted in a like worthy Manner upon a singular Demand." Bolton Gazette of August 15, 1768.

Immediately after the application in the text, Governor Pitkin wrote to William Samuel Johnson, then an agent of the Colony in England, asking him to "Transmit an Account Relative to Writs of Assize's issued under the Seal of his Majesty's Court of Exchequer: in what Manner application is made in order to obtain them, and whether general Warrants are issued &c &c." Pitkin to Johnson, March 15, 1768, a Trumbull MSS. 169, in Mafs. Hlst. Soc. Lib. Johnson replied: "I have made all the enquiry I could, since I received your Letter, concerning Writs of Assize to Custom House Officers, but cannot yet perfectly satisfy myself with respect to them. It is surprising how little Attention Gentlemen here pay, & how slender Intelligence they can give out, relative to things not immediately within their own departments. It seems, to be clearly the Opinion of several Lawyers, that I spoke with upon the subject, that they were not Issued but in particular Cases, and upon Information on Oath, not in general Terms, nor to be made use of as general Warrants, at the Discretion of the Officer, which appeared to me to be the only legal and reasonable Method. But upon application to the Clerks of the Exchequer for Copies of the usual Writs Issued here in Cases of this Nature, they have furnished us with the enclosed, which you will see are very general, and not grounded upon any particular Fact, or Information, & they add, that all the additional Instruction, besides what the Writs express & direct, is, that the King's Officer, take unto him a Peace Officer, if he breaks open any House or place. I am not satisfied however that this ought to be the Procedure in Connecticut; nevertheless I think it expedient to forward the Copies to you, as soon as I could, but shall continue to make further enquiry into this matter, and if anything material Occurs, it shall be immediately communicated to you." Johnson to Pitkin, July 23, 1768, Johnson's letters in fame Collection, 97, 98.

Roger Sherman also wrote to Johnson, informing him of the refusal to grant the writs. 6 Bancroft's Hist. U. S. 279. And Johnson replied on the 28th of September: "I can add nothing material to what, you will see, I have said to his Hon'ble the Gov't upon the Subject of the Writ applied for by the Custom House Officers. It seems it is in practice here, tho' how it can have existed, so long as it has, I am at a

mine. It is certainly of a dangerous Nature. The
Writs of Assistance.

De Grey; (5) and renewed at May term at Hartford, in the following form:

“Colony

have all of them, I think, too much of the Arbitrary in them, & too strongly tend to Despotism. You justly Objet, that the officer might as well be Authorized by his Commission as by such a Writ, to which they Answer that he has such Authority, & that the use of the Writ, & the Attendance of the Civil Officer is only to preserve the Peace, which the Revenue Officer has not the Authority to Command, sh'd any disturbance happen. The Intention of this Provision is therefore, plainly to bring the Common Law in Aid of the Revenue Laws, & to give the latter, all that Countenance & Sanction, which may be derived from the former.” Letters & Papers 1761-1776, fol. 83, in Mafs. Hlst. Soc. Lib. See also Johnston to Trumbull, September 29, 1769, Stuart's Life of Trumbull, 80.

In May 1768, an attempt made in the legislature of Connecticut to remove Trumbull, who was also Lieutenant Governor, from the office of Chief Justice, on the ground of the importance of separating the judiciary from the other branches of government, was defeated, “upon mature deliberation of the whole matter; the affair of general warrants lying in the situation they are now in, and danger of difficulties from many quarters, jealousies and uneasiness of the people, and the like.” Connecticut Courant, December 1768.

(5) Amor, 453. The writer of the “Journal of the Times,” under date of April 29, 1769, says: “The C—I—r of the port of New-London in Connecticut, has lately applied a second time to the superiour court there for such writs; at the same time laying a letter before them, which he had received from one of the crown lawyers in England in answer to one wrote upon the subject, in which letter a great compliment was paid to the chief justice of the Massachusetts, for the proof he had given of a right understanding of the law, and of his zeal for his Majesty’s service, by so readily granting those writs, upon the application made by the custom-houfe officers; and his example was recommended as worthy of their imitation. The court did not however think proper to show a like complaisance, but chose to refer this request, to the consideration of their general assembly at the approaching session.” Boston Evening Post of June 26, 1769.

“At April 1769 term laid at Norwich, Mr. Stewart,” the Collector, as we learn from Chief Justice Trumbull, “made further application to the Superior Court for such Writs; and produced Forms of such from the Board of Commissioners as they judged proper for us to give, with the same per Mr. De Grey. To which the Court replied, that they would be further advised, and as the Sessions of the General Assembly was near, they should ask their advice and direction. Accordingly the matter
Appendix I.

"Colonies of Connecticut

"Hartford County vs. May 23d, A.D. 1769.

"To the Honourable Jonathan Trumbull Esq* Chief Justice: Robert Walker, Matthew Griswold, Eliphalet Dyer, and Roger Sherman, Esquires, Assistant Justices of his Majesty's Superior Court of Judicature within for said Colony:

"May it please your Honours,

"At the request of David Lisle Esq* Solicitor of his Majesty's American Customs, signified to me by letter of the 9th instant, I am now to desire and move your Honours that a final and judicial determination be had, concerning the issuing of Writs of Assistants to the Officers of his Majesty's Customs within the said Colony, in consequence of their motion heretofore made for that purpose.

"THOMAS SEYMOUR,
"Attorney for Our Lord the King,
"within and for the County of Hartford." (6)

3. Rhode

...ter was fully laid before them. They appointed a Committee to consider the letters &c. laid before the Assembly. Within their province fell this matter, and they advised that the Assembly take no notice of it; that it properly belonged to the Superior Court; that, *as individuals*, not as members of the Assembly, they advised the Court *not to grant* such Warrants, which seemed to be the universal opinion." Trumbull to Johnson, June 14, 1769, Stuart's Life of Trumbull, 80, 81.

(6) "Since this," Chief Justice Trumbull continues, "Mr. Seymour, as Attorney for the King, by direction of the Board of Commissioners, has made application to me for a Judicial Determination on the Matter. I have given him no answer, nor do I intend giving any till the Next Term, which now soon comes on.

"I have taken care to find what the Courts in the other Colonies have done, and find no such Writs have been given by any of the Courts except in Massachusetts and New Hampshire, where they were given as soon as asked for. I believe the Courts in all the other Colonies will be as well united, and as firm in this Matter, as in anything that has yet happened between us and Great Britain.

"I have never yet seen any Act of Parliament authorizing the...
Writs of Assilstance.

3. Rhode Island.

An examination of the records and dockets of the Supreme Court of Judicature of the Colony of Rhode Island of Exchequer in giving such Writs as they give, but conceive they have crept into use by the inattention of the people, and the bad practices of designing men. We are directed to give such writs as the Court of Exchequer are enabled by Act of Parliament to give, which are very different, as I conceive, from such Writs as they do give. Our Court will on all occasions of complaint grant such Warrants as may be necessary for promoting his Majesty’s service, and at the same time consistent with the liberty and privilege of the subject, and made returnable to the court; but farther than that we dare not go, and they must not expect we shall.” Trumbull to Johnson, June [July?] 14, 1769, ub. sup.

Johnson, in a letter dated “Westminster, Octo’ 16th, 1769,” acknowledging the receipt of a letter from Trumbull of July 14th, wrote: “The Intelligence, you have favour’d me with, of the Steps which have been taken relative to Writs of Assilstance, is very obliging, as well as useful to the purpose you mention. It gives me pleasure to find that it is so probable that the Courts of the other Colonies will be agreed with you in this important point. Union in this, as in everything else, is of the last Importance. If an United Stand is made upon this occasion, I think it extremely probable that this capital Point will be carried without much difficulty; & it will be a very great satisfaction, & not a little redound to their Honour, that the Sup’ Court of Connecticut have taken the lead in a matter of so much Consequence to the Liberty, the Property, and the Security, of the Subject. The Example of the Courts of the Massachusets Bay and N: Hampshire ought not to Influence the Courts in the other Colonies. It is easy to Account for their Conduét. But of them it is most Candid to say that they were surprised into this Injudicious Step, & to suppose that they wish it were now Res Integra & to do again, that they might Unite with their Brethren throughout the Continent in making a neccessary & noble Stand against so dangerous an Encroachment upon the Rights of a free People.” Johnson’s Letters, 217. 318.

Although we have no record of the subsequent action of the court, yet we can hardly fail to infer from the letters above quoted that the writs were ultimately refused; especially when we remember that the Chief Justice and two of his associates, Griswold and Dyer, were among the attornets who had left the Council Chamber in 1765 to avoid wit, nally the taking of the oath to execute the Stamp Act by Governor Pitch; Stuart’s Life of Trumbull, 91, 92; and that a third, Roger Sherman, told John Adams a few years later, that “he read Mr. Otis’s

Rights
Appendix I.

Iland 1761–1769, which seem to be quite complete, discloses no trace of Writs of Assistance; and the only papers upon the subject are among the files of March term 1769, and confirm the opinion of Attorney General De Grey (printed ante, 452–454) and of a letter from the Solicitor of the Board of Customs in Boston to the Attorney General of Rhode Island, desiring him to move the Superior Court for Writs of Assistance to the officers of the customs there. (7)


Rights &c. in 1764, and thought that he conceded away the rights of America," and "thought the reverse of the declaratory act was true, namely, that the Parliament of Great Britain had authority to make laws for America in no case whatever." 2 John Adams's Works, 343.

(7) This letter, which is in a different hand from the signature, and seems to have been a circular prepared by order of the Commissioners of Customs in Boston to be transmitted to all the Colonies, (ante, 455; infra, 510,) is as follows:

Sir

"I am directed by the Commissioners of His Majesty's Customs to transmit you the Form of a Writ of Assistants to the Officers of the Customs, as issued by the superior Court here; likewise blank Forms of the Writ, and a copy of the Opinion of the Attorney General in England in relation thereto; and I am to desire the Favour of you to move the superior Court of your Province that Writs of Assistants may be issued to the Officers undermentioned, and from time to time to such Officers as the Board may direct to apply for the same, by their Solicitor. I am, Sir,

"Your most humble servant

"D. Lisle, Solicitor to the American Customs

"Boston March 16th 1769

"Charles Dudley Esq. Collector

"John Nicholl Esq. Comptt.

"Nicholas Lechmere Esq. Searcher.

"Mr. Attorney General of Rhode Island."

The following letter from the Chief Justice of Rhode Island to Chief Justice Trumbull (2 Trumbull MSS. 222, in Mass. Hist. Soc. Lib.) shows that the Writs were not granted immediately; and, taken in connection with the state of feeling in Rhode Island (ante 436, 437) and the want of any evidence of any action of the Court upon the subject, makes it probable that none were ever issued.

"South Kingston Aug. 7th 1769

"Sir

"Judge Ruffell did me the Honor to transmit me your Letter to him of
Writs of Assistance.


"Thursday the Twenty eighth day of April, 1768.

"Present

"The Honorable Daniel Horsemend Esq' Chief Justice.

"The Honorable David Jones Esquire second Justice.

"The Honorable William Smith Esquire third Justice."

"On the application of Andrew Elliot Esquire Collector
and Lambert Moore Esquire Comptroller of his Majesty's
Customs of the Port of New York, for Writts of Assistance
to themselves and the other Officers of the said Customs,

"of the 14th June last respecting Writts of Assisting to the Customs
House Officers. As I was then but just nominated in the Court, had
not seen M' De Grey's State of the Case, nor had any opportunity of
convering with any One of my Brethren; I did not return your
Honor an Answer. And indeed Sir I remain just in the same Situation, without having had an Opportunity of Information in any One
Point; so that it is impossible for me to say what will likely be the
Determination of the Court, especially as there are several new Members with whom I never conversed on the Subject. The Case hereto-
fore in the year 1767 was moved in our Court, who then put of the
Determination, making the same Excuse as you did in Connecticut:
had it been then determined I am very sure it would have passed in
the Negative.

"Should it be found on Examination that the Writ ought to be
granted, I think there can't be much in the Objection that it may be
misused & the Offenders escape with Impunity; to suppose a Court
authorized to grant a Writ, and not have Power to punish the abuse
of it, to me appears a 'solecism.'

"M' Trumbull who did me the Favor of yours from M' Raffell told
me that Col' Dyer was bound on a Journey to the Westward, &
that he intended to take the Opinion of the Judges there; As I think
with you 'that Union of Sentiment & Practice of the Court of each
Colony is needful on this Occasion' I beg the Favor of you to let me
know the Opinion of the Judges in the western Colonies, as well as
those of your Court. Our next Term will be at Newport the first
Monday in September.

"I am with great Respect
"Sir your most obedient Servant

"J. A. HELME.

"The Hon'ble Jonathan Trumbull Esq'"
Appendix I.

1768.

"toms, agreeable to an Aët of Parliament made in the
"Seventh Year of his present Majesty’s Reign: It is
"ordered by the Court that Writs of Assitants illue to
"the Officers of his Majesty’s said Customs severally, ac-
"cording to the directions of the said Aët.” (8)

5. New Jersey.

Even the St. of 7 G. 3, c. 46, did not remove the
difficulties in the way of granting Writs of Assitance in
New Jersey; (9) and as the records of the court there,
which are in quite a perfect state, contain no evidence of
any writs having been illued (10), it seems likely that those
difficulties were not overcome. One of the earliest stat-
utes of the State of New Jersey, passed during the Revolu-
tionary War, shows that the subject must have attracted
some attention in that State. (11)


(8) Minute Book 1766–69, fol. 453, in the office of the County Clerk
in New York City. This is the only known evidence of the illuing of
Writs of Assitance in New York. It was after the passage of St. 7 G. 3,
and the particular form in which the writs were illued does not appear.

(9) Governor Bernard to Lieutenant Governor Franklin, March 24,
1768, quoted ante, 451.

(10) The writer is indebted for this information to the courtsey of
Chancellor Green of New Jersey, who has kindly examined the records.

(11) By St. of June 24, 1781, c. 317, entitled “an Aët for preventing
an illicit Trade and Intercourse between the Subjects of this State and
the Enemy,” § 18, it was enacted, “that it shall and may be lawful for
any judge of the Court of Common Pleas in any County of this State,
and he is hereby authorized and required, upon Application to him
made, and due and satisfactory Caufe of Suspicion shewn, on Oath or
Affirmation, which Oath or Affirmation shall be taken in Writing and
subscribed, as in case of stolen Goods, that Goods, Wares, or Merchand-
ize, liable to Seizure by Virtue of this Aët, are concealed or deposited
in any Dwelling-house or other Building whatsoever, within such County,
to grant a Warrant, directed to the Sheriff or any of the Coroners of
such County, who are hereby respectively required to pay Obedience to
such Warrant, and to make Search for, and to seize and secure such
Wares or Merchandize; and in case of Refusal to make such Search, or if Opposition be made thereto to break open Dr
Writs of Assistance.


It would seem that in Pennsylvania Writs of Assistance were refused, even after the passage of the St. of 7 G. 3, c. 46. Chief Justice Allen was at first opposed to issuing them. (12) And some examination of the files and records of the Court has not disclosed any signs of his having changed his opinion.

7. Maryland.

Nothing has been discovered upon the subjects of Writs of Assistance in this Province. But as early as 1698 an application was made to the Governor and Council by an officer of the customs for a "Warrant of Assistance." (13)

8. Virginia.

for the Purpoze aforesaid. PROVIDED ALWAYS, That no such Search shall be made before Sun-rising, nor after Sun-settig. AND PROVIDED ALSO, that no Person shall be hereby authorized to enter any House or other Building as aforesaid, other than the Sheriff or Coroner, and two respectable Freeholders not being the Informers, or interested in the Seizure, unless Opposition be made by an armed Force."


(13) The writer's first knowledge of this was acquired from an "Index to the Calendar of Maryland State Papers, compiled under direction of John Henry Alexander, Esq' L.L.D.," Baltimore, 1861, p. 5. The record referred to in that calendar is as follows:

"March 30, 1698. It being presented to his Excellency and this Board by David Kennedy Esquire his Majesty's Collector of the District of Pocomoke that his Majesty's Service is much prejudiced for want of a Warrant of Assistance to empower him to press Men and Horses for that whilst he is a Going to a Justice of the Peace perhaps Ten or Twelve Miles from the Place where he has Occasion for Assistance the Traders may take Liberty to run what Goods they please in the Interim," &c. This petition was "referred to his Majesty's Lawyers to consult and make report what sort of Warrant shall be granted." But no report appears. 10 Maryland Council Rec. fol. 17.

The writer is indebted to the politeness of Mr. Alexander for a copy of this record, as well as for the information that no trace of Writs of Assistance in later times has been found in Maryland.
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8. Virginia.

In Virginia, after the passage of St. 7, G. 3, c. 46, the Supreme Court of Justice refused to grant general Writs of Affiance, but granted special Writs. (14)

9. Other Colonies.

The only evidence, attainable at present, of proceedings in the other Colonies tends to show that Writs of Affiance were not granted in any that afterwards became part of the United States. (15)

(14) This appears by the following correspondence, preferred in the State Paper Office in London, for copies of which the writer is indebted to the kindness of Mr. Bancroft.

On the 15th of May 1769 John Randolph, Attorney General of Virginia, wrote to the Commissioners of the Customs at Boston: "Upon receipt of your favor of 11th March, inclosing the form of a Writ of Affiance, and the opinion of the Attorney General, shewing the legality of the same, I immediately laid them before our Supreme Court of Justice, which was then sitting; and moved that a similar Writ might be granted to those Officers of the Customs, whose Names you mentioned in your Letter. The Gentlemen of our Bar very strenuously opposed the Motion, and insisted that the Writ sent was by no means conformable to the Act of Parliament; that its direction was too general, and ought to be regulated by the 33d clause of the 14 Car. II.; that the Act gives no authority to enter houses etc. in the night time; and that the Writ ought not to be a standing one, but granted from time to time, as the information of the Officer to the Supreme Court, on oath, may render necessary. These observations at length prevailed, and the Court directed me to prepare a Writ agreeable to the words of the Act of Parliament, which was accordingly done and approved of, a copy of which I thought proper to transmit to you."

Lord Botetourt, in a letter to the Earl of Hillsborough, dated "Williamiburg, May 16, 1769," inclosed a copy of the above letter, and added: "I was upon the Bench when he made the motion, and concurred with my Brethren in directing him to draw a Writ exactly conformable to the Acts of Parliament which relate to that matter and are in force in this Colony; and it is with great pleasure I can assure your Lordship that the Bench of Counsellors are always of opinion to make the Law the rule of their conduct, however disagreeable the letter of it may be to them in their several capacities."

(15) "To the everlasting Honor of the great and worthy 'Squire Grafton,'
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Graspall, that Man of Truth and Justice, we are well informed that every Province in America, except Massachusetts-Bay and Halifax, have refused to grant General Warrants or Writs of Assistance to the Order of the Commissioners; even the little Colonies of Georgia and the Florida's have absolutely refused it." Boston Gazette of September 11, 1769. This squib is evidently aimed at Hutchinson, in allusion to his granting Writs of Assistance and his plurality of offices. Vide ante, 418, 426, note 10. If its statements could be relied on as strictly accurate, they would seem to indicate that in New Hampshire (supra, 502) the application had not been renewed since the passage of St. 7 G. 3, or, if renewed, that the writs had been granted in a modified form; and that in New York the Writs issued "according to the directions of the said A[?]," (supra, 508,) were special, as in Virginia, supra, 510, note.
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I. Were the Writs of Assistance legal?

A REPORT of the controversy upon the Writs of Assistance would be incomplete without an examination of the legal correctness of the decision of Hutchinson and his associates. Such an examination naturally resolves itself into four questions.

1st. Did Acts of the Parliament of Great Britain bind the Colonies?

2d. Were those Acts of Parliament, which provided for Writs of Assistance, void for unconstitutionality?

3d. Did those Acts, properly construed, authorize the issuing of general Writs of Assistance?

4th. Had the Superior Court of Judicature of the Province the powers of the English Court of Exchequer in this respect?

I. The inseparableness of taxation and representation, and the distinction between external and internal taxes, were familiar to the law of England before the discovery of America.

In the reign of Edward 3 Irish nobles were sometimes summoned to the English Parliament—"an excellent president to be followed," says Lord Coke, "whenever any Act of Parliament shall be made in England concerning the state of Ireland." (1) In 1441 Chief Justice Fortescue held, that an act of the Irish Parliament, forfeiting offices in Ireland held by absentees, vacated an office previously expressly granted by the King to one or his deputy; and said that an English statute granting a tax would not bind the Irish, unless approved by their Parliament. For this last position the counsel for the losing party suggested the reason

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reason, that they were not represented in Parliament. (2) In 1486 the same doctrine and the same reason were laid down

(2) Pilkington's case, 30 H. 6, 8. This was scire facias to repeal letters patent of the King, granting an office in Ireland to A., which he had previously granted to John Pilkington to occupy by himself or his deputy. A. pleaded "that the said land of Ireland is and always has been a land separated and severed from the Kingdom of England, and ruled and governed by the customs and laws of the same land; and that the Lords of that same land, who are the King's Council, have used from time to time in the absence of the King to elect a Justice, who, so elected, shall have power to pardon and punish all felonies, treasons &c. to assemble a Parliament &c. and by advice of their Lords and Commons, to make statutes; and further how a Parliament was summoned," at which it was ordained, that every one who held any office in Ireland should before a certain day occupy it by himself, or forfeit it; and that the plaintiff occupied the said office by a deputy until that day, so that the office became void, and was afterwards granted to the defendant by the said letters patent, which he prayed might be made effectual. This plea was demurred to, but adjudged good.

Sir John Fortescue, C. J. K. B., after showing that "this prescription was not in any of the persons of Ireland, but in the King himself," under whom the defendant as well as the plaintiff claimed, added, "the land of Ireland is severed from the Kingdom of England; for if a tenth or fiftieth be granted here, that shall not bind those of Ireland, even if the King shall send that statute into Ireland under his great seal, unless they will in their Parliament approve it; but if they will allow it, then it shall be held there that they shall be bound by it; and so this prescription is good; so that the letters patents should be adjudged effectual." Upon the delivery of this opinion, Serjeant Porington, for the plaintiff, said that it was very true that a tenth granted in the Parliament here shall not bind those of Ireland, because they have no commandment with us by Writ to come to Parliament; but this is no proof that the land is severed from England, for a tenth granted shall not bind those of Wales, or of the County Palatine of Chester, and yet they are not severed from this Kingdom.

The Chief Justice's brother, Sir Henry Fortescue, had previously been C. J. K. B. in Ireland; the plaintiff's counsel, Serjeants Tebroton and Porington, were both soon after raised to the bench; and Serjeant Markham, the defendant's counsel, succeeded Chief Justice Fortescue as C. J. K. B. in England. 4 Fos's Judges of England, 309, 310, 354, 379, 442, 462.

It will be observed that the Chief Justice's statement as to the power of the English Parliament was merely obiter dictum; for the case only concerned
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External and internal taxes. down by all the Judges of England, limited however to internal as opposed to external legislation. (3) Lord

concerned the power of the Irish Parliament to legislate where the English Parliament had not.

The only other judge who appears to have said anything was Ayscoghe (a Judge of the Common Bench — 1b. 281), who seems to have restated his opinion upon the rule of pleading, that the plaintiff, having by demurrer admitted a prescription, could not object to the validity of that prescription; "for when he has not denied the prescription, we must understand that such custom is in the land of Ireland, because we shall not be skilled to take cognizance here what is the law there, except only upon the allegation of the party." This treating the law of Ireland as a foreign law, to be pleaded and proved as a fact, indicates an opinion that the two Islands were governed by distinct laws. See Palfrey v. Portsmouth, Salt & Portland Railroad, 4 Allen, 56, 57.

(3) Cafe of the Merchants of Waterford, 2 Ric. 3, 11, 12. Certain Merchants of Waterford in Ireland, who had shipped merchandise there to be carried to Flanders, but whose ship had been driven by stress of weather into Calais (then an English port), and there informed against the Treasurer of Calais, and seised for a violation of St. 15 H. 6, c. 3, applied to the King in Council for restitution, and shewed a royal licence to carry merchandise from Ireland whithersoever they would.

"And upon that matter were two questions: 1st. If corporate towns in Ireland and others dwelling in Ireland were bound by a statute made in England; 2d. If the King could give a licence against the statute, and especially when it was now ordained by the statute that the informer should have one half and the King the other. And for the solution of these questions all the Justices were assembled in the Exchequer Chamber.

"And there as to the first question it was said, that in the land of Ireland they have a Parliament of their own, and every kind of Court as in England, and by the same Parliament they make laws and change laws, and they are not bound by a statute in England, because they have here no Knights in Parliament; but this is to be understood of affecting their lands and things on land only, for their persons are subjects of the King, and as subjects are bound as to doing anything outside their land contrary to statute, like the inhabitants in Calais, Gascoigne, Guienne, &c. while they were subjects."

"And as to the second question, the King can well enough give a licence with a clause of non-obstante," "so far as it touches the King, but not so far as it touches a party;" and that there was a
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Lord Coke declared in the House of Commons in 1627 that "the lord may tax his villein high or low, but it is against the franchises of the land, for freemen to be taxed, but by their consent in Parliament." (4) Lord Hale is said to have been of opinion that "no acts here can bind the Irish pardoning after an action brought or seizure made, in which the informer had an interest.

It is evident that no final decree was then entered for upon the death of Richard 3 and the accession of Henry 7 the petitioners renewed their bill; and after notice to the Treasurer of Calais, the case was reheard, and seems to have been disposed of upon the ground previously indicated, that the informer had acquired an interest which the King could not release. S. C. 1 H. 7, 1.

In the course of this second hearing "Huffey, C. J. said that the statutes made in England should bind those of Ireland. Which," the reporter adds, "was not much denied by the other Justices, although some of them were of a contrary opinion the last term in his absence. Then he said they must see how the statutes and their licence could be together," and proceeded to do so. 1 H. 7, 3, 3. Huffey's statement has sometimes been understood as an assertion that all English statutes bind Ireland, and so the reporter may have understood it; but "the statutes" would seem rather to apply to the particular statutes in question, which had been held at the previous hearing by a majority of the Judges, at least, to be binding on the Irish. That Lord Coke did not consider the first opinion as shaken by the last is shown by his repeatedly quoting it with approval. Calvin's case, 7 Rep. 22 b. Parliament in Ireland, 12 Rep. 111. And see Jenk. Cent. 164.

In explanation of the opinion "as to the second question," it should be remembered that the power of the King to dispense with penal statutes was recognized to some extent by law, until the passage of the Bill of Rights in 1688. See Case of Non-obstante, 12 Rep. 18; Co. Lit. 120 a, & Hargrave's notes; St. 1 W. & M. St. 2, c. 3, § 121 3 Hallam's Conft. Hist. Eng. (7th ed.) 60, 104; Amos's notes to Fortescue de Laudibus, c. 9.

(4) 2 Parl. Hist. 237. Lord Mansfield's statement in the House of Lords in 1766, that a doubt thrown out in the House of Commons in 1621, "whether Parliament had anything to do with America," "was immediately answered, I believe, by Coke," is shown, by referring to the Journals of the House, to have been unwarranted, in so far as he attempted to vouch in the authority of his greater predecessor. 16 Parl. Hist. 176. 1 Commons Journals, 591, 592.
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Irish in point of subsidies." (5) Even Sir William Blackstone, in the debate on the repeal of the Stamp Act, is reported to have "declared, Tory as he was, that Parliament had no right to impose internal taxes." (6) And Lord Camden, in his first speech in the House of Lords, said that the Act of 1766, declaring the right of the British Parliament to make laws to bind the American Colonies in all cases whatsoever was "illegal, absolutely illegal, contrary to the fundamental laws of nature, contrary to the fundamental laws of this Constitution;" (7) and, nine years later, speaking "not only as a statesman, politician and philosopher, but as a common lawyer," told the house, "You have no right to tax America." (8)

Yet Coke agreed with the uniform current of English authority, in holding that an Act of Parliament bound Ireland or the Colonies, if expressly named or necessarily included therein. (9) And Camden, in the winter of 1767-8, said


(6) 2 Walpole's Memoirs of George 3, 279.

(7) 16 Parl. Hist. 168, 169, 170, 177. 5 Bancroft's Hist. U. S. 403. This speech was reprinted from the Political Register of October 3, 1767, in the Boston Gazette of January 18, 1768, and was read a few days earlier in the Massachusetts House of Representatives by Otis, who "triumphed upon it most immoderately." Bernard to Jackson, January 16, 1768, 6 Bernard Papers, 67.

(8) Quincy's Life of Quincy, 329. It was on this occasion that Lord Camden "imagined, that a power resulting from a trust, arbitrarily exercised, may be lawfully resifted; whether the power is lodged in a collective body, or single person;" and cited with approval the saying of Selden, that to refist tyranny was the custom of England, and the custom of England was the law of the land. 1b. 330, 332. The notes then taken by Josiah Quincy, Jr. were in the opinion of Benjamin Franklin, who was also present, "by much the best account preferred of that day's debate." 1b. 492. Quincy's journal is also the earliest evidence we have of Camden's prophecy to Franklin in 1758 of American Independence, and was evidently copied by Gordon. 1b. 269, 370. 2 Gordon's Hist. U. S. 136.

(9) Orerick's cafe, 1 And. 263. Earl of Derby's ca
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said in the House of Lords that "though he had been clearly of opinion that Parliament had no such right, yet since it had been declared by Parliament, he did not think himself, or any man else, at liberty to call it in question." (10) The reason of this is to be found in that principle of the English law, which attributes to Parliament the supreme legislative authority and the ultimate power of deciding what accords with the Constitution. (11) In England, as has been truly said by Lord Brougham, though it sounds to American ears like a paradox, "things may be legal and yet unconstitutional." (12)

Under the Colony Charter, Massachusettts constantly asserted her right of exemption from Parliamentary taxation, upon the ground of not being represented in Parliament. (13)

And


(12) Wensleydale Penrige, 6 H. L. Cas. 979.

(13) In 1643 the Government of the Colony declined to solicit favors from Parliament, "for this consideration, that if we should put ourselves under the protection of the Parliament, we must then be subject to all such laws as they should make, or at least such as they might impose upon us; in which course, though they should intend our good, yet it might prove very prejudicial to us." 2 Winthrop's Hist. N. E. 25. And see ib. 42, 183, 183. Edward Winslow, the agent sent to England...
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And upon this theory several acts were passed by the General Court to carry into effect the Acts of Trade and Navigation. (14)

Under the Province Charter the subjection to the authority of Parliament seems to have been less disputed on grounds of legal right. The first statute of the Province was "an act setting forth general priviledges," one of which was that no tax should be imposed or levied on persons or estates, "on any colour or pretence whatsoever, but by the act and consent of the Governour, Council and

England in 1646 to plead for the judicial and legislative rights of the Colony, argued that "if the Parliaments of England should impose laws upon us, having no burgesses in their House of Commons, nor capable of a summons by reason of the vast distance of the ocean, being three thousand miles from London, then we should lose the libertie and freedome of English indeed." 3 Mafs. Col. Rec. 96, 97. Winslow's New England's Salamander Discovered, 23 Mafs. Hist. Coll. 137, 138. In 1661 the General Court declared, "Wee conceive any imposition prejudicial to the country contrary to any just lawe of ours, not repugnant to the lawes of England, to be an infringement of our right." 4 Mafs. Col. Rec. pt. ii. 25.

(14) Mafs. Col. St. May, 1663, 4 Mafs. Col. Rec. pt. ii. 86, 87. Letter of General Court to Royal Commissioners, May 11, 1665, Ib. 202. Col. St. October, 1677, 5 Ib. 155. In 1678 the General Court, in answer to the objections of the Lords of Trade and the Attorney and Solicitor General, wrote "That for the Acts passed in Parliament for encouraging trade and navigation, wee humbly conceive, according to the usall Fayings of the learned in the lawe, that the lawes of England are bounded within the lower seas, and doe not reach America; the subjects of his Majestie here not being represented in Parliament; so wee have not looked at ourselves to be impeded in our trade by them, nor yett wee abated in our relative allegiance to his majestie. However, so soon as wee understand his Majesties pleasure, that those Acts should be observed by his Majesties subjects of the Massachusetts, which could not be without invading the liberties and properties of the subject, until the General Court made provision therein by a law, which they did in October 1677," &c. Ib. 200. And they committed the enforcement of the Acts of Trade to the Governour and Council; and ordered him to take the required oath to execute them, and the Acts "to be published in the market place in Boston by beate of drum." Ib. 236, 263, 337.
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and Representatives of the People, assembled in General Court.” (15) But this act was disallowed by the King, under the power reserved to him in the new Charter. (16) Three years later Parliament expressly extended the Acts of Trade to the American Colonies, and declared all laws, by-laws, usages or customs, repugnant to those or any future acts which should relate to and mention the Colonies, to be illegal and void. (17) And the lawful authority of all Acts of Parliament, which concerned the Colonies and in terms applied to them, was acknowledged in the Provincial Courts of law, and expressly admitted in the addressees of the General Court of Massachusetts Bay to the Governor in 1757 and 1761; and in matters of external commerce, at least, was not seriously disputed until after the passage of the Stamp Act. (18)

The opposite position, if taken in the argument upon the Writs of Assistance, would have been too striking to have been omitted in the contemporary reports. Yet none of them contain anything which could bear that construction, except a single expression in Quincy's Report. (19)

(15) Prov. St. 4 W. & M. (1692); Prov. Laws, (ed. 1699), 11
Anc. Chart. 314.
(16) 1 Hutchinson's Hist. Mass. 64, 65.
(17) St. 7 & 8 W. 3, c. 22, § 6. This act was published here by the Governor. Copies of Council Rec. in Office of Secretary of Commonwealth, 1696, fol. 409.
(18) Ante, 200, 443-444. 3 Hutchinson's Hist. Mass. 65 & note, 92, 164, 463. 2 Marshall's Life of Washington, 74-79. Franklin's Examination before the House of Commons in 1766, 4 Franklin's Works, 169, 170, 196; 16 Parl. Hist. 170, 176. Hutchinson in the same year went so far as to pretend that all Acts of Parliament, “except such as apparently were confined to the Realm,” were law here. Ante, 443, 444. On the other hand, the magistrates of one county in Virginia held that the Stamp Act was not binding there. 5 Bancroft's Hist. U. S. 436, 437. And in South Carolina, with characteristic originality, a grand jury, by direction of one of the judges, is laid to have preferred parliamentary jurisdiction as a nuisance. Chalmers, Letter to Lord Mansfield in 1780, a copy of which is in the possession of Mr. Sparks.
(19) Ante, 50.
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And the elaborate argument printed in the Boston Gazette (20) immediately after the decision, as well as the later published writings of Otis and Thacher, (21) assert in the most explicit terms the rightful authority of Parliament to legislate for the Colonies. (22)

II. But Otis, while he recognized the jurisdiction of Parliament over the Colonies, denied that it was the final arbiter of the justice and constitutionality of its own acts; and relying upon words of the greatest English lawyers, and putting out of sight the circumstances under which they

(20) Ante, 488-494.

(22) It is not proposed to pursue the political history of the question. Yet it may be mentioned as a curiosity, that in Quincy's copy of the first volume of Blackstone's Commentaries (3d ed. Oxford 1768), in the possession of his son the Honorable Josiah Quincy, are marginal notes in his handwriting, in which "Qu." is written opposite every allusion of the power of Parliament to legislate for Ireland or the Colonies. 1 Bl. Com. 103-108. Against Blackstone's statement that "the Statute 6 Geo. 3, c. 13, expressly declares the power of Parliament to make statutes to bind the Colonies in all cases whatsoever" (1 Bl. Com. 109) Quincy writes, "The American Colonies expressly declared the contrary. (See the Journals of the several Assemblies on the Continent.) How is the controversy to be decided?"

In the House of Lords in 1766 Lord Mansfield had said of the same dispute, "It is only affirmation against affirmation." 5 Bancroft's Hist. U. S. 449. Quincy's question finds an answer in a note of Mr. Justice Coleridge to the same page of Blackstone. "It is hardly necessary to state that the American Colonies, who had united to the number of thirteen States, in their opposition to the mother country, succeeded in establishing their independence, and were recognized as a separate independent nation by a treaty of peace, executed on the 3d of September 1783." (15th ed.) 209.
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they were uttered, contended that the validity of statutes
must be judged by the Courts of Justice; and thus fore-
shadowed the principle of American Constitutional Law,
that it is the duty of the judiciary to declare unconstitutio-
tional statutes void.

His main reliance was the well known statement of Lord Coke.

*Coke in Dr. Bonham’s cafe—* “It appeareth in our books,
that in many cases the common law will control Acts of
Parliament and adjudge them to be utterly void; for where
an Act of Parliament is against common right and reason or
repugnant or impossible to be performed, the common law
will control it and adjudge it to be void.” (23) *Otis* feems
also

(23) 8 Rep. 118 a, quoted by *Otis, ante, 474.* *Dr. Bonham’s cafe,* Bonham’s
(fo far as is material to exhibit this point,) was an a*ction of false impris-
onment, brought against the president and censors of the College of
Physicians in London, for committing the plaintiff to jail for praefizing
medicine in London without their license. The defendants justified, on
the ground that it was granted in their charter, and since confirmed by
Act of Parliament, that no one should practice medicine in London
without license from them, under penalty of 1000. for each month,
one half to the King, and one half to the College: and it was more-
over granted that they should have the supervision of all physicians prac-
tising in London, and the punishment of them for malpractice, and the
scrutiny of all medicines: “so that the punishment of the same physi-
cians fo delinquent in the premises might be by fine and imprisonment,
and other suitable manner.” *Coke, C. J., Warburton & Daniel, J.J.,* gave
judgment for the plaintiff upon two points: 1st. That the defendants
had no power to commit the plaintiff for the cause alleged. 2d. That
if they had such power, they had not pursued it. 116 b, 117 a, 121 a.
The 2d point need not be further noticed here.

Of the first point “the cause and reason shortly was” that the clause
giving the power to fine and imprison did not apply to those practising
without license, but only to those who were guilty of malpractice.

“ And that was made manifest by five reasons, which were called *vividae
rationes,* because they had their vigor and life from the letters patent and
the act itself;” “by construction, and conferring all the parts of them
together.” 117 a. “And all these reasons were proved by two grounds
or maxims in law: 1. *Generalis clausula non porrigitur ad ea quae speciali-
tier sunt comprehensa.*” 118 b. “2. *Ferba posteriora propter certitudinem
addita ad priora qua certitudine indigent sunt referenda.*” 119 a.

The fourth of the reasons thus derived from the whole context, and

supported
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also to have had in mind the equally familiar dictum of Lord Hobart — "Even an Act of Parliament made against natural

supported by legal maxims for restraining the application of general words, was this: " The cenfors cannot be judges, ministers, and par-
ties; judges to give sentence or judgment; ministers to make sum-
mons; and parties to have the moiety of the forfeiture, quia aliquis non
debet esse iudex in propria causa, imo iniquum si aliquem sua rei
esse iudicem; and one cannot be judge and attorney for any of the par-
ties." "And it appears in our books, that in many cafes, the com-
mon law will control Acts of Parliament, and sometimes adjudge them
to be utterly void: for when an Act of Parliament is against common
right and reason, or repugnant, or impossible to be performed, the com-
mon law will control it, and adjudge such Act to be void." 118 a.
And see S. C. 2 Brownl. 245.

When this passage was made one of the points of attack against him,
Coke called the King’s attention to the fault (which had been omitted in
the questions drawn up by his enemies, Lord Chancellor Ellesmere
and Sir Francis Bacon) that the words of his report did “not import any
new opinion, but only a relation of such authorities of law, as had been
adjudged and resolved in ancient and former times, and were cited in the
argument of Bonham’s cafe;” “and therefore the beginning is, It ap-
peareth in our books, etc. And so it may be explained, as it was truly
intended.” 6 Bacon’s Works, (ed. 1824) 400, 405, 407. One of the
authorities thus referred to was the remark of Herle, C. J., in Tregor v.
Vaughan, & E. 3, 30, that “some statutes are made against law and
right, which they that made them, perceiving, would not put them in
execution.” The others are either cafes in which a limited construc-
tion had been given to general words in order to avoid an absurdity;
or infances of rejecting repugnant or unfavorable provisions, as in other
English and American cafes. Cafe of Alton Woods, 1 Rep. 47. Crom-
well’s cafe, 4 Rep. 13. Jenk. Cent. 196, pl. 4. Riddle v. White,
Gwillim’s Tithe Cafes, 1387. United States v. Cantril, 4 Cranch, 167.
Cheesam v. State, 2 Ind. 149.

In a later cafe Coke is reported to have said “that Fortescue and
Littleton and all others agreed, that the law consists of three parts:
First, Common Law: Secondly, Statute Law, which corrects, abridges,
and explains the common law: The third, Custom, which takes away
the common law: But the common law corrects, allows, and disallows,
both statute law and custom; for if there be repugnancy in statute, or
unreasonableness in custom, the common law disallows and rejects it,
as it appears by Dr. Bonham’s cafe,” &c. Rowe’s v. Mason, 2 Brownl.
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ural equity, as to make a man judge in his own case, is void in itself: for jura naturæ sunt immutabilia, and they are

197, 198. In his first Institute he repeats the same classification, adding, "The common law hath no controller in any part of it, but the High Court of Parliament." Co. Lit. 115 b. Again he says, in a passage which seems to have been cited by Otis, (ante, 56) "the surest construction of a statute is by the rule and reason of the common law." Co. Lit. 272 b. S. P. Herbert's Case, 3 Rep. 13 b. And in his second Institute, in commenting on the 17th chapter of Magna Charta, declaring that affizes should "not be taken except in their own counties," and on the apparently repugnant decision that "if a man be displeased of a commote or lordship marcher in Wales, holden of the King in capite," the affize should be taken in an adjoining county in England, he says, "the reason is notable, for the Lord Marcher, though he had jura regalia, yet could not doe justice in his owne case." "Hereby it appeareth (that I may observe it once for all) that the best expostors of this and all other statutes are our books and use or experience." 3 Inst. 25.

The same rules of construction have prevailed ever since. Acts of Parliament are always to be construed according to the common law and natural right, even if it should be necessary for this purpose to adopt what would otherwise be a forced construction. Fulmerston v. Steward, Plow. 109. Sheffield v. Ratcliffe, Hob. 348. Williams v. Pritchard, 4 T. R. 3. The King v. Inhabitants of Cumberland, 6 T. R. 194. Dwarris on Sts. (2d ed.) 484, 613. The rule has been thus expressed by one of the most exact of modern English judges: "The rule by which we are to be guided in construing Acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done." Parke, B., in Perry v. Skinner, 2 M. & W. 476.

For an example of American opinion upon this subject, it is sufficient to quote from Chief Justice Marshall the following "principles in the exposition of statutes": "An Act of Congress ought never to be construed to violate the Law of Nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the Law of Nations as understood in this country." "Every part of the statute is to be considered, and the intention of the legislature to be extracted from the whole;" and "where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain, in which case it must be obeyed."
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"Leges legum." (24) Lord Holt is reported to have said, "What my Lord Coke says in Dr. Bonham's case in his


The same doctrine has been applied to the construction of a written constitution. Chief Justice Parsons, and his associates (and afterwards in turn succeseors) Justices Sewall and Parker, in an opinion given to the Massachusetts House of Representatives in 1811, said: "The natural import of the words of any legislative act, according to the common use of them, when applied to the subject-matter of the act, is to be considered as expressing the intention of the legislature; unless the intention, so resulting from the ordinary import of the words, be repugnant to found, acknowledged principles of national policy. And if that intention be repugnant to such principles of national policy, then the import of the words ought to be enlarged or restrained, so that it may comport with those principles; unless the intention of the legislature be clearly and manifestly repugnant to them. For although it is not to be presumed that a legislature will violate principles of public policy, yet an intention of the legislature, repugnant to those principles, clearly, manifestly and constitutionally expressed, must have the force of law."

Opinion of Justices, 7 Mass. 524, 525.

Thus by weighing Coke's words, and comparing them with his own statements and later authorities, they are relieved from the misconstruction, which has occasioned modern commentators either, like Chancellor Kent, to praise a boldness which Coke never allowed, or, like Lord Campbell, to sneer at what they would not take the trouble to understand. 1 Kent Com. (6th ed.) 448. 1 Campbell's Lives of the Chancellors, 248, note. 1 Campbell's Lives of the Chief Justices, 290.

(24) Day v. Savadge, Hob. 87. The dispute there was upon the liability of a freeman of London to pay wharfage to the city, and the question was whether this should be tried by certificate of the mayor and aldermen according to the customs of London (which had been confirmed by Act of Parliament) or by a jury. The very paragraph which contains the dictum quoted in the text shows that there was another sufficient reason for ordering a trial by jury. That paragraph, which concludes the opinion, is thus: "By that that hath been said it appears, that though in pleading it were confessed that the custom of certificate of the customs of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customs intended, and because even an Act of Parliament, made against natural equity, as to make a man judge in his owne case, is void in it selfe, for jura natura sunt immutabilia, and they are leges legum." Bracton.
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8 Rep. is far from any extravagancy, for it is a very reasonable and true saying, That if an Act of Parliament should ordain that the same person should be party and judge, or what is the same thing, judge in his own cause, it would be a void Act of Parliament.” (25)

Bralton.

Bracton, with more accuracy, wrote, “Jura enim naturalia dicuntur immutabilia, quia non possunt ex tuto abrogari vel auferri, potestamen vis derogari vel detrabri in specie vel in parte.” Lib. 1, c. 5, § 8.


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The law was laid down in the same way, on the authority of the above cases, in Bacon's Abridgment, first published in 1735; in Viner's Abridgment, published 1741-51, from which Otis quoted it; and in Comyn's Digest, published 1762-7, but written more than twenty years before. And there are older authorities to the same effect. So that at the time of Otis's agreement his position appeared to be supported by some of the highest authorities in the English law. (26)

The

brought before him, his judgment therein will be void, although he is sole judge of the court. Mayor of Hereford's case, cited 7 Mod. 1; 2 Ld. Raym. 766; & 1 Salk. 201, 396. Richardson v. Welcome, 6 Cush. 332. Judge Rolle was of opinion that even consent of parties would not give jurisdiction to an interested judge, "because it is against natural reason." Smith v. Hancock, Style, 138. But it is now well settled that the objection of interest may be waived, unless it is made by constitution or statute an absolute disqualification. Regina v. Chelsea Commissioners, 1 Q. B. 475. Kent v. Charlestown, 2 Gray, 281. Tolland v. County Commissioners, 13 Gray, 13. Sigourney v. Sibley, 21 Pick. 106. Paddock v. Wells, 2 Barb. Ch. 335. Oakley v. Affinrow, 2 Comst. 547.


Even Sir William Blackstone in his Commentaries, first published in 1765, admitted "that the rule is generally laid down that acts of parliament contrary to reason are void;" adding, however, "but if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it." 1 Bl. Com. 91. And so the law was stated in the editions published during his life, the eighth and last of which was published in 1778. In the posthumous editions his statement is thus modified: "I know of no power in the ordinary forms of the Constitution, that is vested with authority to control it;" and the qualifying words appear in the corrections for the press made in his own handwriting in the margin of a copy of the eighth edition, now owned by Mr. Francis E. Parker of Boston. Perhaps the American Revolution forced itself more distinctly upon the notice of the learned commentator between 1778 and his death in 1780.

Opposite the statements of the power of the Parliament is
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The same doctrine was repeatedly asserted by Otis, (27) and was a favorite in the Colonies before the Revolution. (28) There are later dicta of many eminent judges to

97, 161, 189, Quincy in his copy wrote "Qu," and references to Vattel's Law of Nations, Bk. 1, c. 3, pp. 15-19, and Furneaux's Letter to Blackstone, 82, 83. And at Blackstone's statement, "It must be owned that Mr. Locke and other theoretical writers have held that 'there remains still inherent in the People a supreme power to remove or alter the legislature, when they find the legislative act contrary to the trust repose on them; for when such trust is abused, it is thereby forfeited, and devolves to those who gave it.' But however just this conclusion may be in theory, we cannot adopt it, nor argue from it, under any dispensation of government at present actually existing." — 1 Bl. Com. 161, 162 — the words here printed in italics are underlined by Quincy, who adds in the margin, "Tamen quare whether a conclusion can be just in theory, that will not bear adoption in practice." This very passage affords another instance of Blackstone's careful revision of his work. In the sixth and subsequent editions the word "practically" is inserted before the word "adopt"; and for the words "argue from it" are substituted "take any legal steps for carrying it into execution."


(28) In the controversy of Massachusetts with the other Confederated Colonies of New England in 1652 upon the right of the Confederation to make offensive war, all parties agreed that any acts or orders manifestly unjust or against the law of God were not binding. 10 Plym. Rec. 215-217; 3 Hazard Hist. Coll. 270-283. In 1688 "the men of Massachusetts did much quote Lord Coke." Lambert MS. quoted in Bancroft's Hist. U. S. 428. And in 1765, Hutchinson, speaking of the opposition to the Stamp Act, said, "The prevailing reason at this time is, that the Act of Parliament is against Magna Charta, and the natural Rights of Englishmen, and therefore, according to Lord Coke, null and void." "Summary of the Difforders in the Massachusetts Province proceeding from an Apprehension that the Act of Parliament called the Stamp Act deprives the People of their natural Rights," 36 Mass. Archives, 180, 183. And see Hutchinson to Jackson, September 12, 1765, quoted ante, 441; Arguments of Adams and Otis on the Memorial of Boston to the Governor and Council, ante, 200, 201, 205, 206; 2 John Adams's Works, 158, 159 note. Even the Judges appointed by the Royal Governor do not seem to have been prepared to deny this principle. John Cushing, one of the associate Justices, in a letter to Chief Justice Hutchinson, dated "In a hurry, Feb. 7, 1766," upon the question whether the Courts should be opened without lamps, wrote,
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to the effect that a statute may be void as exceeding the just limits of legislative power; (29) but it is believed there is

wrote, "Its true It is said an Act of Parliament against natural Equity is void. It will be disputed whether this is such an Act. It seems to me the main Question here is whether an Act which cannot be carried into execution should stop the Course of Justice, and that the Judges are more confined than with respect to an obsolete Act. If we admit evidence unlimed ex necessitate Q[iuis] it can be said we do wrong." 25 Mads. Archives, 55. And in 1776, after the Governor had left, and the Council and House of Representatives had assumed the government, John Adams, in answering a letter of congratulation upon his own appointment as Chief Justice of Massachussetts, from William Cushing, his senior associate, and who upon Adams's declination became Chief Justice in his stead, and afterwards a Justice of the Supreme Court of the United States, wrote, "You have my hearty concurrence in telling the jury the nullity of acts of parliament." 9 John Adams's Works, 390, 391, & note.

In a case before the General Court of Virginia in 1773, George Mason, as reported by Thomas Jefferson, argued that the provision of the statute of that Colony of 1682, that "all Indians which shall hereafter be fold by our neighboring Indians, or any other trafficking with us as for slaves, are hereby adjudged, deemed and taken to be slaves," was "originally void, because contrary to natural right and justice," citing Coke and Hobart, ubi sup. The only authority cited on the other side was 1 Bl. Com. 91. As the court held that the act of 1682 had been repealed by a subsequent statute, it became unnecessary to decide the question. 2 Hening's Sta. at Large, 491. Robin v. Hardway, Jefferson R. 114, 118, 123. And in the Debates on the adoption of the Constitution of the United States, Patrick Henry said that the Virginia Judges had opposed unconstitutional acts of the legislature. 4 Elliott's Deb. (3d ed.) 325. Et vid. sup. 519, note.

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is no instance, except one case in South Carolina (30), in which an act of the legislature has been set aside by the courts, except for conflict with some written constitutional provision. (31)

The reduction of the fundamental principles of government in the American States to the form of written constitutions, established by the people themselves, and beyond the control of their representatives, necessarily obliged the judicial department, in case of conflict between a constitutional provision and a legislative act, to obey the Constitution as the fundamental law and disregard the statute. This duty was recognized, and unconstitutional acts set aside, by courts of justice, even before the adoption of the Constitution of the United States. (32) Since the ratification of that

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(30) In 1792 the Superior Court of South Carolina held that an act passed by the legislature of the Colony in 1712, which took away the freedom of one man and vested it in another, was "against common right, as well as against Magna Charta," and therefore "facto void." Browman v. Middleton, 1 Bay, 233.


(32) The very few reports which have been preserved of the judicial decisions of that period afford two such examples. In 1786 the Judges of the Superior Court of the State of Rhode Island refused to act under a statute of the General Assembly, which provided for the trial of an offence upon information before the Judges without a jury, contrary to the Constitution of the State as embodied in the Royal Charter of Charles 2. Trevett v. Weedon, reported by James M. Varnum, 67 Providence.
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that Constitution the power of the courts to declare unconstitutional statutes void has become too well settled to require an accumulation of authorities. (33) But as the office of the judiciary is to decide particular cases, and not to issue general edicts, only so much of a statute is to be declared void as is repugnant to the Constitution and covers the case before the court, unless the constitutional and unconstitutional provisions are so interwoven as to convince the court that the legislature would not have passed the one without the other. (34)

III. The St. of 13 & 14 Car. 2, c. 11, § 5, declared that it should be lawful for any person "authorized by writ of assistance under the seal of his Majesty’s Court of Exchequer" to take an officer and go into any house or shop and seize and bring out accustomed goods. This statute, in which the name first appeared as applied to this process, (35) did not define what it was, but assumed it to be already

Providence, 1787; 2 Chandler’s Crim. Trials, 279 & seq. And in 1787 the Judges of the Superior Court of North Carolina set aside an act of that State, which deprived a citizen of his property without trial by jury, in violation of the State Constitution of 1776. Den v. Singleton, Martin N. C. 49.


(35) The discussions on either side of the ocean disclosed no earlier trace of it. And none was found when in 1785 Lord Mansfield postponed the argument of a case for the purpose of a search. Cooper v. Boot, 2 Doug. 347.

It would seem that the writ of assistance may have been framed in analogy to the warrants issued under the act of the same year, which provided that "for the better discovering of printing in corners without license, one or more messengers of his Majesty’s chamber."
already known. The only process, mentioned in any earlier statute or law book, to which the name could be referred, would seem to be the warrant mentioned in St. 12 Car. 2, c. 19, (confirmed by St. 13 Car. 2, St. 1, c. 7, and subsequent statutes,) which could only issue upon information on oath, and authorized the entry of a house for one month only after the offence, and by which, "if the information upon which any house is searched should prove to be false," the informer was made liable in full costs and damages to the party injured. (36)

As general warrants were not authorized by the common law, (37) Otis argued that the writ of assistance mentioned

under his Majesties sign manual, or under the hand of one or more of his Majesties principal Secretaries of State, or the Master and Wardens of the Company of Stationers, or any one of them, shall have power and authority with a constable to take unto them such assistance as they shall think needful, and at what time they shall think fit, to search all houses and shops where they shall know, or upon some probable cause suspect any books or papers to be printed," &c., and to seize any unlicensed books, "together with the several offenders," and bring them before Justices of the Peace. St. 13 & 14 Car. 2, c. 33, § 15. That statute expired in the same reign in which it was framed, and similar warrants for the seizure of papers were held illegal in 1765. Enick v. Carrington, 19 Howell's State Trials, 1039, 1070; 2 Wils. 292.

(36) These provisions of Sts. 12 Car. 2, c. 19, and 13 & 14 Car. 2, c. 11, § 5, are copied ante, 397, note.


Lord Coke even doubted whether any search warrants for stolen goods were legal; but his doubt was disregarded in practice, and overruled by later authorities. 4 Inbl. 176, 177. 2 Hale P. C. 113, 149. Enick v. Carrington, 19 Howell's State Trials, 1067; 2 Wils. 291.

The Act of 1 Jac. 1, c. 19, "for the well garbling of spices," provided that all spices and drugs in London or the liberties thereof should be "sufficiently cleaned, fevered, garbled and divided, and afterwards sealed up by the garbler thereunto appointed," or his deputy, before sale. The meaning of "garble" in this statute seems to have been
tioned in St. 13 & 14 Car. 2, must be special, according to St. 12 Car. 2. This seems to have been considered at the time of the argument and afterwards the most important point; (38) and upon the ordinary rules of interpreting statutes in pari materia together, and according to the rule and reason of the common law, the conclusion of Otis seems inevitable. If the writ of assistance contemplated by the Sts. of Charles 2 was general to search all houses and issuied without oath, it is a little remarkable that Lord Hale, neither in discussiug general warrants, nor in speaking of these very statutes, gives any hint of such a departure from the principles of the common law. (39)

It must be admitted that in practice general writs of assistance were commonly used in England. (40) But they do not seem to have been the subject of judicial remark there before the argument in Massachusetts, after which Lord Mansfield took every opportunity to assert that general writs directly oppose to that in which it is now commonly used; for Lord Coke says, "To garble, signifith in our legall understanding to sever and divide the good and sufficient from the bad and insufficient." 4 Inst. 264. The St. of 1 Jac. 1, c. 19, § 3, authorized the said garbler of spices and his "deputy or deputies, assignee or assignees," at all times "in the daytime to enter into any shops, warehouses or cellars within the said city or liberties thereof," and search for, seize and garble spices and drugs "there ungarbled, which have been accustomed to be garbled." And Coke says, "This had been implied if it had not been expressed" — which seems hardly consistent in principle with his opinion about search warrants for stolen goods.


(39) 3 Hale P. C. 116. Treatise concerning the Customs, in Har-grave's Law Tracts, 210, 223, 224, 225.

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writs of assistance were expressly authorized by statute, (41) which was certainly not the fact. And the practice was no more uniform nor better established than that which was allowed

(41) In delivering his opinion upon the invalidity of general warrants, he is reported by Burrow to have said, "There are many cases where particular Acts of Parliament have given authority to apprehend under general warrants, as in the case of writs of assistance," &c. Money v. Leach, 3 Burr. 1766; 19 Howell's State Trials, 1026, 1027. Sir William Blackstone's report of the same case speaks only of the form in use, omits all mention of the statute, and puts the sentence thus: "The words of the writs of assistance in the customs and excise are equally general; yet a probable suspicion will justify acting under them." 1 W. Bl. 561.

The last clause of this sentence must be misreported; for it was well settled law that a person searching under a writ of assistance and finding nothing was not justified. Legg.v. Champaine, 2 Stra. 819, evidently the authority intended by Otis, ante, 471. Shipley v. Redman, before Lord Camden, quoted by Plomer, arguendo, in Cooper v. Boot, 4 Doug. 347. Bruce v. Rawlins, 3 Wils. 63. By Lord C. J. De Grey, in Bofstock v. Saunders, 2 W. Bl. 914; 3 Wils. 434. By Lord Mansfield, in Cooper v. Boot, 4 Doug. 343; 3 Esp. R. 128. In the Common Bench in 1773, Lord C. J. De Grey, Gould, Blackstone, & Nares, JJ. held that the same rule applied to an excise officer acting under St. 10 G. 1, c. 10, § 13, which provided that if any officer should suspect goods to be concealed with intent to defraud, "upon oath made to the Commissioner of Excise, setting forth the grounds of his suspicion, it shall be lawful for them to authorize the officer to enter the house by day or night, and if by night with a peace officer, and seize and carry away such goods." Bofstock v. Saunders, 2 W. Bl. 912; 3 Wils. 434. An opposite decision was made in the King's Bench twelve years later by Lord Mansfield, Buller, Ashurst, & Willes, JJ. Cooper v. Boot, 4 Doug. 339; 3 Esp. R. 125.

Lord Mansfield, in delivering his opinion in the last case, said, "The case of the writ of assistance is not applicable. There is no warrant, and all is left to the discretion of the officer; besides, which is very material, there is a positive clause in the statute of Charles 2, which makes the whole depend on the actual finding of goods." "That however is a politic prevention to avoid abuse; but on this point we give no opinion." And he said that to hold the officer liable if no goods were found "would be adding to the statute a clause which the legislature, with the statute of Charles 2 before their eyes, have purposely avoided." 4 Doug. 348, 349; 3 Esp. R. 146. The opinion given by De Grey as Attorney
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allowed no force, either by Lord Camden, or by Lord Mansfield and his associates, in the matter of general warrants. (42) But Lord Camden, who led the way in that matter, had not yet been raised to the Bench.

It is hard to imagine that the same House of Commons which condemned general warrants in 1766 (43) intended to authorize general writs of assise in 1767. (44) Even after the passage of the St. of 7 G. 3, some of the American courts refused to issue anything but special writs of assise; (45) and attempts were made to limit them by

Attorney General in 1768 was to the same effect. Ante, 454. But the "positive clause," which Lord Mansfield thought so "very material," was not in St. 13 & 14 Car. 2, c. 111, but in St. 12 Car. 2, c. 19, § 4; and there seems to be no good reason for holding that section to apply to writs of assise under 13 & 14 Car. 2, which would not also make applicable the other provisions of St. 12 Car. 2. Both statutes were quoted as applicable to writs of assise by Gould, J. in Bruce v. Rawlins, 3 Wils. 63.

Mr. Justice Buller, according to the report in Douglast, said, "In the Exchequer, officers are never permitted to be asked what their information is"—or, as more fully reported by Eppinot, "It has been resolved by a majority of all the Judges, that the officer is not obliged to declare the grounds of his suspicion, lest accidents should happen to him." 4 Doug. 343; 3 Epp. R. 138. The use of the word "resolved," instead of "held" or "determined," the giving of the same reason as Hutchinson in his account of the matter (ante, 415 note), and the want of printed reports of any such adjudication, suggests the possibility that upon receiving Hutchinson's inquiries while the question was pending before him, an auricular opinion of the English Judges was obtained by the ministry.


(43) 16 Parl. Hist. 207, 209.

(44) St. 7 G. 5, c. 46, ante, 452.

(45) In Connecticut, ante, 501, 504, 505; notes: Rhode Island, ante.
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by statute. (46) But in England the practice of issuing general writs of assistance continued until 1817, when a limit was imposed upon their use by an order of the Board of Customs, providing that no writ of assistance shou'd in future be delivered to any officer of the customs, unless he should previously make oath before a magistrate of his belief and grounds of belief that smuggled goods were lodged in a certain house. (47) And thus the reasonableness of the position of the Colonies was finally vindicated in the mother country.

In Massachusetts, the General Court recognized and applied the principles of the common law on the subject of general warrants, even in time of war, not allowing general warrants to issue even for the arrest of deserters in the Old French War, (48) or to search for the arms of disaffected persons at the beginning of the War of the Revolution. (49) Those principles were confirmed in 1780 by the Declaration

506, note: Pennsylvania, ante, 454, 502, note: Virginia, ante, 510, note: Other Colonies, ante, 500, 511, notes.

John Dickinson, in the 9th of his Farmer’s Letters, commenting on the St. of 7 G. 3, wrote, “I am well aware that writs of this kind may be granted at home, under the seal of the Court of Exchequer. But I know also, that the greatest asserters of the rights of Englishmen have always strenuously contended that such a power was dangerous to freedom, and expressly contrary to the common law, which ever regarded a man’s house as his castle, or a place of perfect security. If such power was in the least degree dangerous there, it must be utterly destructive to liberty here. For the people there have two securities against the undue exercise of this power by the Crown, which are wanting with us, if the late act takes place,” to wit, independent judges to try an action against the offenders, and redress in Parliament. Farmer’s Letters, (Boston ed. 1768,) 50, 51. See also Boston Gazette of September 5, 1768, quoted ante, 452.

(46) In Massachusetts in 1762, ante, 495. In New Jersey in 1783, ante, 508, note.


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tion of Rights, prefixed to the Constitution of Massachusetts, as follows: "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers and all his possessions. All warrants therefore are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws." And the substance of this article was incorporated into one of the earliest amendments of the Constitution of the United States. (50)

IV. The only question remaining is, whether the Superior Court of Judicature of the Province had in this matter the powers of the Court of Exchequer in England.

Upon this point Gridley's argument seems hard to meet. The Act of Parliament of 13 & 14 Car. 2, c. 11, § 5, one of the Acts of Trade, empowered "any person authorized by writ of assize under the seal of his Majesty's Court of Exchequer," to enter with a peace officer houses, etc. The General Court of the Colony afterwards provided for the strict observation of those acts. (51) And the English St. of 7 & 8 W. 3, c. 22, § 6, provided "that the like assize shall be given" to officers of the customs in the American Colonies, "as by the said" Act of Car. 2 "is provided for the officers in England." By the Province Charter "the great and general court or assembly"


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bly” was vested with power “to erect and constitute judiciaries or courts of record, or other courts,” to try all crimes and civil actions; referring the probate jurisdiction to the Governor and Council, and the jurisdiction in admiralty to Judges to be commissioned by the King. And under the power thus conferred, the General Court of the Province, by the first Judiciary Act which obtained the King’s approval, established a Superior Court of Judicature, and bestowed upon it all the jurisdiction which “the Courts of King’s Bench, Common Bench and Exchequer within his Majesty’s Kingdom of England have or ought to have.” (52)

In support of the argument that the Superior Court had not the powers of the Court of Exchequer, much reliance was placed upon their refusal to entertain jurisdiction of a bill in equity. (53) But no Court of the Province could well have assumed, on any pretence, a general equity jurisdiction, in the face of the opinions repeatedly expressed by the English Government upon that subject. (54)

Whether

(52) Prov. St. 11 W. 3 (1699), Anc. Chart. 332.
(54) In England, before Lord Bacon’s impeachment and conviction for corruption, (which, Lord Hale says, “gave such a discredit and brand” to his decrees, “that they were easily set aside, and made way in the Parliament of 3 Car. for the like attempts against decrees made by other Chancellors,” and which was just before the granting of the Charter to the Massachusetts Company,) decrees in chancery were not revived by the House of Lords sitting judicially, but by legislative act of both Houses of Parliament. Hale’s Jurisdiction of the House of Lords, 193–195; Nottingham MSS. quoted in Hargrave’s Pref. ciii. note.

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Whether the authority of the Court of Exchequer in matters of revenue was a part of its jurisdiction in equity does

court, with power to compel a discovery. In some cases, the want of remedy at law is assigned as the ground of jurisdiction in equity. Ded- 


1671, 41b. pt. ii. 488; 1683, 51b. 375; 1685, 51b. 477; Anc. Chart. 

52, 93, 94, 148. And see Washburn’s Jud. Hist. Mass. 28, 34; Plym. Col. Laws of 1672 and 1685 (ed. 1836) 260, 256. After the 

repeal of the Massachusetts Colony Charter, the President, or Governor, 

and Council exercised similar jurisdiction. Hadley v. Hopkins Academy, 


Immediately after the Province Charter, the General Court at- 

tempted to establish a Court of Chancery; but the act was disallowed 


4 Dane Ab. 518. 61b. 405. Charles River Bridge v. Warren Bridge, 

7 Pick. 368. In 1704 Attorney General Northey gave an opinion to 

Queen Anne that the Province Charter conferred no authority on the 

General Court to establish such a court. 1 Chalmers’ Opinions, 182, 183.

But Ryder and Strange, as Attorney and Solicitor General, in 1738 

gave an opinion that the colonial assembly could establish a Court of Ex- 

chequer in South Carolina, 11b. 170. The condition of Chancery jurif- 

diction in the Province of Massachusetts Bay is thus expressed in “the 

opinion of a great lawyer in the Colonies,” quoted by Governor Pownall, 

whole term of office intervened between the decision of McNeal v. 

Brideoak, ubi supra, and the argument upon the Writs of Assistance.

“There is no Court of Chancery in the charter governments of New 

England, nor any court vested with power to determine causes in equity, 

save only that the justices of the inferior court and the justices of the 

superior court respectively have power to give relief on mortgages, 

bonds, and other penalties contained in deeds. In all other chancery 

and equitable matters, both the Crown and the subject are without 

redress. This introduced a practice of petitioning the legislative courts 

for relief, and prompted those courts to interpose their authority. These 

petitions becoming numerous, in order to give the greater depatch to 

such business, the legislative courts transferred such business by orders 

or resolves, without the solemnity of passing acts for such purposes; and 

have further extended this power by resolves and orders beyond what a 

Court of Chancery ever attempted to decree, even to the suspending of 

public laws; which orders or resolves are not sent home for the royal 

affirm.” Administration of the Colonies, (3d ed.) 81, 82. The jurif-

diction mentioned by Governor Pownall was conferred by Prov. Sts. 20
Writs of Assistance.

does not appear to have been determined when the case of the Writs of Assistance came up. But the opinion seems to have since prevailed in England, that the revenue jurisdiction of that Court was strictly a common law jurisdiction, although some of its incidental proceedings might take the form of process in equity. (55) And the writs of assistance to officers of the customs certainly seem to bear a closer analogy to the common law writs of aid, which always issued from the Exchequer, than to the writs of assistance out of Chancery to take possession of lands. (56)

Yet it is evident that the exercise of the jurisdiction of the Exchequer by the Superior Court was considered by both parties

W. 31 13 Anne; 5 G. 1 8 G. 2 1 Anc. Chart. 325, 326, 401, 402, 434, 501. And see 4 Dane Ab. 343; 6 lb. 398; 7 lb. 516, 518; 3 Amer. Juris. 361, 362; Washburn's Jud. Hist. Mss. 158, 167. Governor Bernard, in his answer on the 5th of September 1763, to the "Queries propofed by the Lords Commissioners of Trade and Plantations," for a copy of which, taken from the MSS. in the King's Library, the writer is indebted to Mr. George Bancroft, says: "It might have been made a question whether the Governor of this Province has not the power of Chancellor delivered to him with the Great Seal, as well as other Royal Governors; but it is impracticable to set up such a claim now, after a non-use of 70 years, and after several Governors have, in effect, disclaimed it, by confenting to bills for establishing a Court of Chancery, which have been disallowed at home. A Court of Chancery is very much wanted here, many causes of consequence frequently happening, in which no redress is to be had for want of a Court of Equity. I am inclined to think that if a complainant in a matter of equity arising within this Province should file his bill in the Court of Chancery in England, suggesting there was no Provincial Court in which he could be relieved, that the bill would be retained, in the same manner as I suppose a libel in the high Court of Admiralty would be admitted, if there was no inferior court of Admiralty in the Province, unless it was used only to enforce the necessity of establishing a Provincial Court of Equity."


(56) Ante, 395, 396.
Appendix I.

parties to be very doubtful. No instance was shown in which this Court had exercised any of the powers of the Exchequer, which might not have been exercised by the King's Bench or Common Bench; and it certainly did not possess all the powers of that Court even in matters of revenue. (57) And this objection seems to have been thought the only one worthy of notice in England. (58)

A careful examination of the subject compels the conclusion that the decision of Hutchinson and his associates has been too strongly condemned as illegal: and that there was at least reasonable ground for holding, as matter of mere law, that the British Parliament had power to bind the Colonies; that even a statute contrary to the Constitution could not be declared void by the judicial Courts; that by the English statutes, as practically construed by the Courts in England, Writs of Assistance might be general in form; that the Superior Court of Judicature of the Province had the power of the English Court of Exchequer; and that the Writs of Assistance prayed for, though contrary to the spirit of the English Constitution, could hardly be refused by a Provincial Court, before general warrants had been condemned in England, and before the Revolution had actually begun in America. The remedy adopted by the Colonies was to throw off the yoke of Parliament; to confer on the judiciary the power to declare unconstitutional statutes void; to declare general warrants unconstitutional in express terms; and thus to put an end here to general Writs of Assistance.

(57) Ante, 52, 471, 483, 486, 488, 493.
(58) Opinion of De Grey, A. G., in 1768, ante, 452, 453. And see Adams to Tudor, August 6, 1818, to John Adams's Works, 343. Governor Pownall was too well acquainted with the Government and laws of the Province, to have suggested in 1766, “the creating in America, by Act of Parliament, Courts of Exchequer for the express purposes of the Crown's revenue,” if it was clear that such a Court already existed here. Administration of the Colonies, (3d ed.) App. iii. 44.
APPENDIX II.

GRAY, Treasurer of the Province of Massachusetts Bay, vs. Paxton. (1)

ASSUMPSIT. "Harrison Gray, of Boston in the County of Suffolk, Treasurer and Receiver General of the Province of the Massachusetts Bay," sued "Charles Paxton.

(1) The case of the Writs of Assistance, though the most important, was not the only one which excited the feeling of the people against the officers of the customs. There were also several suits at common law, growing out of forfeitures in the Court of Admiralty, to the best known of which Paxton was a party. The statements of this dispute in some histories are confused and inaccurate by reason of omitting to notice the fact that two actions were brought against Paxton, the first in the name of the Treasurer, the second in the name of the Province.

The controversy arose thus: The Act of Parliament of 6 G. 2, c. 13, imposed a duty on all foreign rum, molasses, or sugar imported into the Colonies, to be recovered in any Court of Admiralty or Court of Record, "one third part thereof for the use of his Majesty, his heirs and successors, to be applied for the support of the Government of the Colony or Plantation where the same shall be recovered," one third to the Governor, and the other to the informer.

On the 17th of December 1760 a petition to secure the rights of the Province in this respect was presented to the General Court, signed by all the merchants who a few weeks later signed the remonstrance against the Writs of Assistance, (ante, 413,) except "Nat Wheelwright," "Joseph Scott," "Jone Warden," "James Pitts," "John Winniett," and "Saml Gridley." A comparison of the two petitions shows that "John Lowell" (ante, 413,) should have been printed "John Powell." The petition to the General Court also bears the names

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v.

PAXTON.

Rec. 1761, fol. 235.

A resolve of the General Court, authorizing "H. G., the Province Treasurer," to demand and sue for money due to the Province, does not authorize him to sue therefor in his own name.

Petition of Merchants to the General Court.
Appendix II.

Paxton of said Boston Esquire” “for that whereas the said Charles at said Boston on the first day of March Instant was Indebted

names of “John Amory” and “Benje Hallowell.” 44 Mafs. Archives, 446. In the Boston Gazette of September 4, 1769, James Otis published a deposition, given (as he said) by Paxton on the 28th of February 1761 before Judge Raffell, testifying “that Benjamin Bar- nes Esq: Collector of his Majesty’s Customs for the port of Boston, entered into a Confederacy with the following persons, viz. Benjamin Hallowell, senior, who for some years past hath publicly professed himself an enemy to the Court of Vice-Admiralty in this Province, and hath declared the fame to be a Nuisance, and ought to be laid aside, or words to that purpose; and that James Otis, junr Esq: who resigned his commission of Advocate General, and immediately thereafter appeared advocate for the meeting hereafter to be mentioned; and sundry other persons who are supposed to have been concerned in carrying on an illicit trade.”

The House of Representatives on the 19th of December 1760 ordered that the “Petitioners are allowed to be heard upon the Floor by their Council,” and “the Register of Vice Admiralty, and any other Person or Persons belonging to that Court, who may be affected by the consequence of this application, may attend (if they see cause) at that time.” A hearing was had accordingly, at which Otis appeared as counsel for the petitioners, and a committee appointed by the House “to take the petition and all the papers in the case under consideration, and report what they judge proper for this court to act thereon.” To this committee the Council, after a hearing on the 26th, joined others. Journal H. R. 1760, pp. 107, 123, 238. 3 Hutchinson’s Hist. Mass. 89.

The committee reported that in six cases of seizures of goods there had been paid “for procuring information, £282. 6. 8.;” “charged as paid to lawyers more than legal fees, £36. 12.;” for “condemnation dues at 5 per cent, £79. 8. 3. 1.;” “receiving and paying, at 3 per cent, £47. 11. 14.;” and “marshal’s custody of the goods at 34. per day besides forage, £18. 3.;” making the “amount of illegal charges £484. 1. 11.;” that all these expenses were charged upon the share of the Province, the effect of which was to leave it in one case “five shillings and eight pence farthing,” in another “thirty-eight shillings and eight pence,” and in the other four nothing whatever; and that the amount due to the Province as aforesaid (after deducting £8. 12. for lawful fees of the Judge of Admiralty) was £475. 9. 11. Journal H. R. 1761, pp. 180, 181, 239-241. Copy of Report on file in Court of Common Pleas.

The
July Term 1 Geo. 3.

Indebted to the said Province in the sum of Three hundred & fifty seven pounds one shilling and eight pence lawfull money

The papers on file in the Court of Common Pleas show that Paxton was acting as marshal in January 1756; and that the decrees in the five earliest cases were made in 1753, 1756, and 1759 by George Cradock as Deputy Judge, and in the sixth in 1760 by Chambers Russell as Judge of the Court of Vice Admiralty. *Vid. ante*, 233, 426 & 427 notes 1 Washburn’s Jud. Hist. Mafs. 184. It was customary for the Judges of that and other Courts of civil law in the Colonies to appoint Deputies. 1 Doug. Hist. N. A. 484. Governor Pownall’s Message, *post* Appendix III.

The House of Representatives, upon the recommendation of their committee, on the 15th of January, 1761, “Resolved that Harrison Gray, Esq. the Province Treasurer, be and hereby is impowered and directed to demand and receive the aforesaid sum of 473£ 9s. 11d of the respective persons from whom it shall appear to be due; and in case of their refusing or neglecting payment for the space of one month after demand, to bring an action or actions at common law for recovery of said sum, to the use of his Majesty, to be applied to the support of this Government as this Court shall hereafter direct.” Journal H. R. 1761, p. 181. Hutchinson says, “Opposition however was made in Council; and it was plainly shewn that no such action could lie. The Superior Court having all the powers within the Province of the Court of King’s Bench in England, might put a stop to the proceedings of the Court of Admiralty, whenever it took cognizance of a cause not within its jurisdiction, by a writ of prohibition; but in this case jurisdiction had been expressly given by an Act of Parliament to the Court of Admiralty. The Province might have appeared by an attorney, and have taken exceptions to the decree, and, if the exceptions had not prevailed, might have brought an appeal to the High Court of Admiralty in England; but the opportunity was wilfully slipped, and there was now no remedy. It was said, however, that the people were dissatisfied, and that it would not be believed that there was no remedy, unless there was a trial; and a majority of the Council concurred with the House.” 3 Hutchinson’s Hist. Mafs. 90. Upon the power of the Superior Court of Judicature to issue a writ of prohibition to the Court of Vice-Admiralty, see Dumser’s Defence of the New England Charters (Bolton ed. 1745) 26–29; *Scollay v. Dunn*, ante, 74.

The Governor, in a message to the House on the 16th of January, objected “that this money is part of His Majesty’s Revenue, granted to him by Act of Parliament,” and therefore must be sued for by his Attorney General, though, when recovered, to be received by the Treasurer; and that the proposed Resolve “would amount to altering an Act
money for so much lawfull money before that time had &
received by the said Charles to & for the use of the Prov-
ince aforesaid, and the said Charles being so Indebted then
and there promised the said Province to pay the same on
demand yet the said Charles tho' often requested has not
paid the same sum but neglects it. To the damage of the said
Harrison Gray in his said capacity the sum of Three hundred
and sixty Pounds.” Writ dated March 18th 1761, and
returnable at July term 1761 of the Inferior Court of Com-
mon Pleas. (2)

And the said Charles comes & defends &c. & prays Judg-
ment of the Writ aforesaid & that the same may be abated.
For 1st. The Plaintiff herein sues in an Indebitatus assump-
fit, And yet has not in his Declaration shewed that the
said Charles was ever indebted to the Plaintiff or ever
promised him to pay him anything or broke any Promise,
Contract or Agreement with or to the Plaintiff. 2ndly.
According to the Plaintiff’s own shewing the money alleged
to be received by the said Charles was to the Use of the
Province of the Massachufetts Bay, & the Debt & Promife
grounded thereon were to the said Province, And the right
of

A#t of Parliament,” and therefore refused his assent. The House on
the 27th replied, “We are far from apprehending that a resolve of this
Court can alter an A#t of Parliament. We are quite sensible that if
an A#t of this Court should obtain the royal Sanction, it cannot do it.
Every A#t made by the General Court or Assembly of this Province is
voidable; because the same may be disallowed by His Majesty: Every
A#t we make repugnant to an A#t of Parliament extending to the
Plantations is (ipso facto) null and void,” and that they held the King’s
Prerogative as sacred as the People’s liberties; but that this money
was the Province’s, not the King’s, and the form of the grant by Par-
liament was the same as that used in Provincial Revenue A#ts, which
had been always approved by the King. The Governor, after another
protest, on the 31st of January finally approved the resolve. Even
Hutchinson says, “this objection from the Governor was really of no
weight.” “But he hoped to prevent Mr. Otis from carrying on the
90, 91i. 2 Minot’s Hist. Mafs. 80-86.

(1) Writ on file in Court of Common Pleas.
August Term 1 Geo. 3.

of action accruing on the Breach of such Promise was to the said Province & not to the Plaintiff according to his own Shewing. 3rd. The Plaintiff has not in his Declaration shewed or alleged any Matter or Cause Sufficient to intitle him to bring forward as he doth this Action & maintain the same. All these things the Defendant is ready to verify, Wherefore he prays Judgment that this Writ be abated & for costs." (3)

This plea was overruled by the Superior Court. (4) The defendant then pleaded the general issue, which was joined by the plaintiff (5) and submitted to the jury, who returned a verdict for the plaintiff of £357. 1. 8. and costs, (6) upon which judgment was rendered. (7) The defendant appealed, and at August term 1761 of the Superior Court "the parties appeared and being fully heard upon the plea in abatement (8), it is considered by the Court that the writ

(3) Plea in abatement on back of writ. Rec. 1761, fol. 235.
(4) Rec. 1761, fol. 235.
(5) Pleadings indorsed on writ.
(6) Verdict on file.
(7) Rec. 1761, fol. 235. Governor Bernard in a letter to the Lords of Trade of August 6th 1761, speaks of this action as "being one of the first fruits of M' Barrons's confederacy, in which I had a principal share of trouble, it being particularly designed by some of M' Barrons's friends, to involve me in a dispute with the General Court, which however I prevented." "This cause is determined against M' Paxton in the Inferior Court, & he has appealed against that determination to the Superior Court. If judgement should be given against M' Paxton in this Court also, these two points will be settled: 1. That Money paid in pursuance of a decree of the Court of Admiralty having jurisdiction in the case, and unappealed from, may be recovered in a Court of Common Law by other persons for other uses, notwithstanding such decree. 2. That money given by Act of Parliament to His Majesty for the use of the Province can be recovered by the Provincial Treasurer ex officio, without the intervention of the King's Attorney or any person acting by authority under His Majesty." 2 Bernard Papers, 45. As to Barons, vid. ante, 435 note, 492, and his Petition to the General Court, January 16, 1762, in Boston Evening Post, June 11, 1770.
(8) In John Adams's Diary, immediately after his account of the

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Appendix II.

1761.
GRAY v. PAXTON.

In Superior Court writ abated and judgment for defendant.

Writs of Affidavit, are the following unfinished notes of the argument, which are not published in his Works, and are now printed by permission of Mr. Charles Francis Adams:

"Gray v. Paxton. Otis drew a writ vs. Paxton for Money had & reed to the use of the Province. Prat pleaded in abatement, "That, altho the suit was bro't in Grays name, altho Gray was Plaintiff, yet no promise was alleged to have been made to Gray. The Debt is alleged to be indebted to the Province, for money rede to the Provinces use, and to have promised to pay it to the Province, yet the Province is not Plaintiff. It is Gray v. Paxton, but it should have been the Province of the Massachusetts Bay v. Paxton. The Treasurer & Receiver General has not a Right ex Officio, to demand, sue for and recover all Monies that are due to the Province. No more than a Nobleman's stewart has to sue for and recover the demands of the Nobleman: No more than the Cashier of the Bank of England has to sue for and recover all Monies due to the Bank of England. A stewart may sue, but not in his own Name; he must sue in the Name of his Master. The Cashier may sue, but not in his own Name, he must sue in the Name of the Gov'r & Company of ye Bank of England. A corporate body is one Person in Law and may sue or be sued. And there is an Instance, before the Court this term, in your own Docket, of a suit bro't by a Town, the Town of Dorchester vs. A B & c. There is a special Law of this Province, which impowers."

The case here referred to is doubtles "the Proprietors of the common and undivided lands in Dorchester, now in Stoughton, who sue by James Foster, Richard Hall, and Joseph Hewin a Committee for that purpose," vs. Joseph Man. Man vs. Dorchester Proprietors, Rec. 1761, fol. 231. The files of the Superior Court in that case have not been found. Thole of the Inferior Court show that Treasurer was counsel for the defendant and Prat for the plaintiff. The provincial statute alluded to is probably the 2d of 11 W. 3 (1699), which authorizes every town treasurer "to demand and receive all debts, rents and dues belonging or owing to such town, or the poor thereof, and to sue for and recover the same by due process in the law." Anc. Chart. 341.

(9) The decision that the action should have been brought in the name of the Province, and not of Harrison Gray, its Treasurer, was doubtless correct. Bainbridge v. Downie, 6 Mals. 258. Irish v. Webster, 5 Greenl. 171. State v. Boies, 2 Fairf. 474. 365. Dugan v. United States, 3 Wheat. 42.
against the said Harrison Gray, Treasurer and receiver as aforesaid costs taxed at £4. 6. 9." (10)

(10) Rec. 1761, fol. 235. On the 27th of August 1761 Governor Bernard wrote to the Lords of Trade thus: "Gray vs Paxton. This cause was determined without a jury, by a plea of abatement to the writ, which the Court determined in favor of the defendant. The point upon which it turned was that the Treasurer could not sue for the money ex officio; and there was no order of the General Court to enable him. There has been an order made since the bringing this writ; and it is expected that a new writ will be brought in pursuance of that order; and then will arise another question, whether an order of the General Court can enable a person not authorized by his office to sue for money given to the King by Act of Parliament. My reasons for the negative your Lordships will see in the Votes of Jan’ 1761, pa. 246."

2 Bernard Papers, 51.

This statement is not quite accurate; for the resolve "made since the bringing this writ," to wit on the 15th of April 1761, was substantially in the same terms as the resolve of January 13th. Ante, 543 note. Pafl., 548 note.

On the 22d of July 1761, John Powmal wrote to Governor Bernard, "The fees and charges of proceedings in Admiralty courts are become so shamefully exorbitant, as to be matter of notice to Government, and have been in one or two cases pretty severely cenured by the Council."

9 Bernard Papers, 232.

On the 17th of May 1764, Governor Bernard wrote, it would seem to Lord Egremont, "When I first came to this government, seizures were much more frequent than they have been for two or three years past. They were all made by one officer only (Mr. Paxton the surveyor of the port) and wholly by means of private intelligencers, who were never discovered. To encourage thee, It has been usual to allow the prosecutor a sum of money, about ten or fifteen per cent. of the value of the seizure, to pay for private intelligence, upon no other voucher than his own oath that he had engaged to pay that sum to the intelligencer. This, with the content of all parties, was inferred in the prosecutor's bill of charges, and allowed by the Judge. There was no danger that this would be used to the King's detriment: for as the Governor paid as much as the King, it must be supposed that he would take care that the sums allowed should be neither exorbitant nor unnecessary." 3 Bernard Papers, 216. This last statement can hardly be called anything but a wilful falsehood; for it was the charging of all these expenses on the share which belonged to the King for the use of the Province, which occasioned the suit reported in the text. Ante, 543, note.
On the 21st of September, 1761, a new action was brought in the name of "the Province of the Massachusetts Bay in New England, which sues by Harrison Gray of Boston in the County of Suffolk Esq'r Treasurer and Receiver General of the same Province, who by an Order of the Great and General Court of said Province held at said Boston on the twenty-fifth day of March A.D. 1761, (1) is specially impowered to sue on the behalf of said Province," returnable at October term of the Inferior Court, in which the plaintiff declared in assumpsit "for that whereas the said Charles of said Boston on the first day of September last was Indebted to the said Province in the sum of Three hundred and fifty-seven pounds three shillings and eight pence lawful money for so much lawful money before that time had and received by the said Charles to and for the use of the Province aforesaid, and the said Charles being so Indebted then and there promised the said Province to pay the same on demand, yet the said Charles though often requested has not paid the same sum, but neglects it, to the damage of the said Province, as they say by the said Harrison Gray who sues as aforesaid the sum of Three hundred and sixty pounds." (2)

"And the said Charles by Benjamin Prat his Attorney comes and says that this Honourable Court ought not to take cognizance

(1) This resolve was in fact passed on the 15th of April, 1761, and was precisely like that of January 15th, 1761, (ante, 543, note,) except in extending the authority to any successor of the present Treasurer, and in not requiring any delay, after demand and refusal, before bringing suit.
(2) Rec. 1762, fol. 303. Copy of Writ on file.
January Term 2 Geo. 3.

1761.

PROVINCE
v.

PAXTON.

Plea to the Jurisdiction.

Plea to the plaintiff's right to sue.

General issue.

Trial, verdict, and judgment for the plaintiff in Inferior Court.

The Court overruled the pleas in abatement, and continued the case for trial to January term 1762, when "the case after a full hearing was committed to the Jury who were sworn according to Law to try the same, who Returned their Verdict thereon upon Oath, that is to say, they find for the Plaintiff the sum sued for." Judgment was rendered accordingly,

(3) "Jurymen and Judges, belonging to this Province, sit in the case of Gray and Paxton, though interested, for the necessity." John Adams, in Diary of November 5, 1763, 2 John Adams's Works, 138. Evid. ante, 531, note, for similar cases.

(4) Pleas, and Copy of Record of Inferior Court, on file.
Appendix II.

1762.
Province
v.
Paxton.

Paxton's petition for the appointment of a Special Justice.

Timothy Ruggles appointed a Special Justice.

Adams's account of Ruggles.

ingly, and the defendant appealed to the Superior Court, (5) and on the 27th of January entered into a recognizance in the sum of Ten Pounds with Samuel Quincy and Pelham Winslow as sureties to prosecute his appeal with effect. (6)

Paxton then presented a petition to the Governor and Council, representing "That your Petitioner was sued at the last October Court by said Province, for three hundred fifty seven pounds three shillings and eight pence, and Whereas said action is to be tried at the Superior Court now holden at Boston, and the pretended cause of Action arose on Matters Adjudged in the Court of Admiralty by His Honour Judge Ruffell; your Petitioner imagines that He cannot with propriety set by means whereof there will be only four Judges and so the Court may be equally divided which will be attended with very great inconvenience as there are several points of Laws of much Importance to be settled in said cause, and which cannot be conclusively done without a Majority of the Court. Wherefore your Petitioner prays Your Excellency and Honors would appoint a special Justice to sit in said cause, in the place of His Honor Judge Ruffell, so that there may be a full Court: and Whereas your Petitioner hath in said Action pleaded to the Jurisdiction of the Court, he prays he may not by this petition be understood to give up said plea, or any others; the right of which he expressly begs leave to reserve. And as in Duty bound &c." (7)

The Governor and Council accordingly issued a Commission to Timothy Ruggles, (8) reciting the first section of the Province

(5) Copy of Record of Inferior Court, Verdict and Bill of Costs, on file.
(6) Recognizance on file.
(7) 44 Mass. Archives, 454. It was usual to appoint special justices to sit in particular cases. Washburn's Judicial Hist. Mass. 155-158.
(8) John Adams relates that Ruggles, when Chief Justice of the Worcester Court of Common Pleas, in May, 1761, upon hearing of the election of James Otis into the House of Representatives, said: "Out of this election will arise a damned faction, which will shake this Province to its foundation." Adams to Tudor, Mass., Adams's Works, 248.
February Term 2 Geo. 3.

Province Act of 11 William 3, which established the Superior Court of Judicature, and proceeding thus:—

"We therefore replying eespecial Trust and Confidence in your Loyalty, Prudence and Ability have assigned constituated and appointed and do by these Presents assign constitute and appoint you, the said Timothy Ruggles to be a Justice of our Superior Court of Judicature &c. for the tryal of a Cause depending on an Appeal in the said Court now holden at Boston in and for the County of Suffolk between Charles Paxton Esq: Appellant and [the Province of the Massachufetts Bay in New England, which fues by (9)] Harrison Gray Esq'. Treasurer and Receiver General of the Province aforesaid Appellee, in the room of Chambers Russell Esq: one of the standing Justices of our said Court who declines to fit as Judge in the said Cause being interested in the Event thereof. And we do hereby Authorize and empower You to have, use, exercise and execute all and singular the Powers, Authorities, and Jurisdicctions to Justices of our said Court belonging or in any wise appertaining so far as it relates to the said Cause; and with other our Justices of the said Court (or any of them so as to make a Quorum of said Court) to hear and determine said Cause and Matter, and to give Judgment therein and award Execution thereupon, and to do that which to Justice therein appertains according to Law." (10)

At February term 1762 of the Superior Court, "both parties appeared, and the pleas in abatement (as on file) having been argued and overruled, The case after a full hearing was committed to a Jury sworn according to Law to try the same, who returned their verdict therein upon oath,

(9) The words in brackets are interlined both in the original commission and in the copy in the Book of Commissions, 1756–1767, fol. 262, in the office of the Secretary of the Commonwealth.

(10) The original commission, dated February 23, 1762, is on file with the papers in the case, and bears a certificate of Hutchinson as Lieutenant Governor that Ruggles qualified under it on the 25th of February.
oath, that is to say, they find for the appellant reversion of the former judgment and costs. It's therefore Considered by the Court that the former judgment be reversed, and that the said Charles Paxton recover against the Province of the Maffachusets Bay who sued by Harrifon Gray Esq. Treasuruer thereof, Costs taxed at £6. 1. 0."  (11)

(11) Rec. 1762, fol. 203. Verdict and bill of costs on file. On the 1st of March, 1762, Governor Bernard wrote: The cause of Mr. Gray agst Paxton has been heard in the Superior Court when pursuant to the direction of all the Judges the jury found a verdict for the defendant."

2 Bernard Papers, 81. S. P. February 27, 1762, 1b. 19.

Hutchinson's report is more particular: “When the cause came upon trial, it was very feebly supported, by shewing that the charges ought not to have been allowed by the Court of Admiralty; and by representing that Court as not congenial with the spirit of the English Constitution, for which reason no indulgent construction ought to be allowed to their proceedings. The Court summed up the cause to the jury, so as to shew that the action had not been supported; and cautioned them against departing from the rules of law, and consequently from their oaths, in compliance with popular prejudices; and, contrary to the prevailing expectation, they found costs for the defendant.” He then refers to the acknowledgment, by the two houses, of the authority of Acts of Parliament, (ante, 544, note,) and adds: “Juries were disposed to receive the law from the Court, and could not easily be induced to depart from their oaths.” 3 Hutchinson’s Hist. Mafs. 91, 92. As to the jurors’ oath, vid. post, note to Erving v. Cradock.

"Who is it that has always given his opinion in favor of prerogative and revenue, in every case in which they have been brought in question, without one exception? Who is it that has endeavored to bias simple juries, by an argument as warm and vehement as those of the bar, in a case where the Province was contending against a custom-house officer? And what were the other means employed in that cause against the resolutions of the General Assembly?" John Adams’s Diary, December 30, 1765, 2 John Adams’s Works, 170.

ERVING vs. CRA DOCK.

TRESPASS by John Erving against George Cradock, "for that the said George on the twenty-sixth day of April last, with force and arms at said Boston took the said John’s Brigantine called the Sarah, his Tackle, Apparrell, Gunns, Boat, and two barrels and an half of Gunpowder belonging to her, and his Cargo on board her, viz, forty reels of Cable Yarn, one bale of Canvas, eighty five bundles of Russia Duck, four hundred and fifty nine bars of Steel, two hampers of Stone ware, two cases of Geneva, one bundle of Brushes, one case of painted Canvas, one box of China ware, one case of striped Holland, all of the value of one thousand pounds Sterling, and carried them away, and detained them until the said John made a fine by five hundred and fifty five pounds, four shillings, and four pence Sterling, with the said George for having the delivery of the said Brigantine, Tackle, Apparrell, Gunns, Boat, and Cargo, contrary to the King’s peace, and to the Damage of the said John, as he faith the Sum of a thousand Pounds." Writ dated March 24th, 1761, and returnable at July term 1761 of the Court of Common Pleas.

The defendant pleaded the general issue, the plaintiff joined issue (1) and obtained a verdict, (2) upon which the court of common pleas rendered judgment, and the defendant appealed to the Superior Court, in which at August term

(1) Writ and plea on file in the Court of Common Pleas.
(2) "This is an action brought by the hon’ble John Erving, Esq one of the Council against Mr. Cradock, heretofore and now temporary Collector of this Port. This case is this: Mr. Cradock about 16 months ago, as Collector, feized a Vessel of Mr. Erving’s charged with contraband trade & libelled her in the Court of Admiralty. Mr. Erving

ERVING

v.

CRA DOCK.

Rec. 1761, fol. 230.

The owner of a ship and cargo, seised for breach of the revenue laws, and libelled in the Court of Vice-Admiralty, compounded with the Government officers, by leave of that Court, by paying half the value of the property; and then fined the collector in trespass for the seizure. The jury, against the express instructions of the Superior Court, returned a verdict for the plaintiff; and the Court gave judgment upon it.
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Erving v. Cradock.

1761. The parties Appeared, and the Case, after a full hearing was committed to a Jury Sworn according to Law to try the Same, who returned their Verdict therein upon Oath, that is to say they find for the Appellee Seven hundred and forty pounds lawful Money, damage and cost.

Erving appeared personally in Court & prayed leave to compound, which being agreed to by the Governor & Collector as well as the King's Advocate, was allowed by the Court at one half of the value, which upon appraisement was ascertained at above £500 sterling. This sum Mr Erving paid into Court; & it was equally divided between the King, the Governor & the Collector. Mr Cradock remitted the King's share to the Commissioners of the Customs; the Governor received his third, & Mr Cradock his own. And now Mr Erving has brought his action against Mr Cradock for damages accrued to him by means of this seizure; and in the Inferior Court has got a verdict.

Governor Bernard to Lords of Trade, August 6, 1761, in Bernard Papers, 46, 47.

This statement is fully supported by the papers on file in this case in the Court of Common Pleas, which consist of the writ, pleadings, and officer's return; the clearance of the vessel at Port Kirkwall in the Orkneys on the 31st of December, 1759; two invoices of the cargo; Governor Pownall's certificate, dated December 20, 1759, of Cradock's having taken the oaths of office as Collector on the 18th of December; the depositions of the master and one of the sailors to their voyage from Amsterdam to the Orkneys and thence to Boston, and the seizure of the vessel on the 16th of April, 1760, by William Sheaffe, and the unloading of the cargo by orders of Cradock; copies of the information filed by Pratt as Advocate General in the Court of Vice-Admiralty on the 3d of May, 1760, and of the order thereon; a subpoena to Sheaffe to appear as a witness in the Inferior Court on the 23d of July, 1761; and a copy of the decree of that Court approving the composition between the parties, by which Erving was to forfeit one half of the vessel and goods and to pay all the costs, and the value of the half forfeited was to be paid to the King, the Governor and the informer, in equal thirds.

The master gave this account of the conversation between the parties to this action after the arrival of the vessel: "My owner said she should not be unloaded, for that she had not broke bulk or committed any breach of trade, and that if he did unload her he must answer the consequence and stand to all damages. The Collector then answered that there was nothing of value hid clandestinely on board, and that he was very poor and expected to get Two Thousand pounds shipping for his share. My owner then told him that he would be..."
August Term 1 Geo. 3.

It is therefore considered by the Court that the said John Erving recover against the said George Cradock, the Sum of Seven hundred and forty pounds lawfull Money of the Province appointed, for that the whole Vessell and Cargo would not amount to half that Sum."

Governor Bernard, in his letter to the Lords of Trade of August 6, 1761, after stating the cases of Gray v. Paxton and Erving v. Cradock, (as quoted ante, 545, 553, 554, notes) and describing the three aotions brought by Barons in his own name to recover damages for his suspension, (ante, 435, note,) added: "I state to your Lordships only the aotions that are now brought. But it is generally understood that Mr. Ervings is only a leading aotion to a great many others; and that if he meets with success, every one that has had goods condemned, or been allowed to compound for them at their own request, will bring aotions against the officer who seized them. Your Lordships will perceive that these aotions have an immediate tendency to destroy the Court of Admiralty and with it the Custom house, which cannot subsist without that Court. Indeed the intention is made no secret of: In the two cases above mentioned that were tried in the Inferior Court, the chief subject of the harangues of the council for the plaintiff (and some of the Judges too) were on the expediency of discouraging a Court immediately subjéct to the King and independant of the Province and which determined property without a jury; and on a necessity of putting a stop to the practices of the Custom house officers, for that the people would no longer bear having their trade kept under restrictions, which their neighbours (meaning Rhode Island) were entirely free from. And one gentleman, who has had a considerable hand in promoting these disturbances, has been so candid as to own to me, that it was their intention to work them up to such a pitch as should make it necessary for the ministry to interfere and procure them justice (as they call it) in repealing or qualifying the Molasses A&., and in obliging the Neighbouring Provinces to observe the same restraints which this is to be kept under. In regard to both these points, if they were solicited in another manner, there would be much to be said in their behalf." 2 Bernard Papers, 48, 49.

"The pretence for this aotion is, that the seizure was illegal and a trespass, and that the payment of Mr. Erving was not voluntary, but extorted by violence and duress. Upon this shadow of reason, two of the Judges of the Inferior Court, Mr. Watts and Mr. Wells, directed the jury to find a verdict for the plaintiff, and give him for damages every farthing he was out of pocket; and said they must put a stop to these proceedings of the Custom house officers; if they did not there would be tumults and bloodshed; for the people would bear with them no
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1761.
Erving v. Cradock.

Province (3) damages and costs taxed at £

The defendant appealed to the King in Council; but on the 25th of March 1762, the plaintiff acknowledged on the record that he had received of the defendant "full satisfaction of this Judgment." (4)

no longer. The jury accordingly gave the plaintiff near £600 sterling damages." Bernard to Pownall, August 28, 1761, Ib. 9.

Samuel Watts and Samuel Welles, the Judges here mentioned, as well as John Erving, the plaintiff, were members of the committee of the General Court on the petition of the merchants against Paxton, and Judge Watts made the report. Ante, 542, note. Journal H. R. 1761, p. 238.


(4) Rec. 1761, fol. 230. The files of this case in the Superior Court have not been found. But the letters of Governor Bernard contain a full account of the proceedings subsequent to the appeal from the judgment of the Inferior Court.

"Erving v. Cradock. This action came before a jury in the Superior Court. Upon the summing up the evidence the judges were all of opinion that tho' Mr Cradock might by means of some irregularity in the seizing of the ship have been guilty of a trespass (which however was neither proved nor admitted) yet it was wholly purged by the composition confirmed by the Court of Admiralty, the decrees of which were of equal force with a judgment at common law. It was urged by the Chief Justice that the Court of Admiralty was part of the Constitution of the Province, it being expressly provided for by the Charter. The whole Bench directed the jury, as strongly as they could, to find for the defendant. Nevertheless they found for the plaintiff and gave upwards of £550 sterling in damages, being all he said he was out of pocket. This was no surprize to those that were acquainted with the violence with which these proceedings are carried on. It was remarkable that Mr. Erving, according to the Usage of these Courts, spoke a great deal for himself, when he had admitted everything necessary to prove that he had incurred a forfeiture and declared he only acquiesced only in expectation that a time should come when he should have his revenge; a word he used several times to express the purpose of his conduct. He declared after the verdict that he should be supported by the principal merchants of London against any representations the Governor could make.

"Mr. Cradock will take care to enter an appeal to the King in due time: as he will nevertheless be subject to execution, care will be taken to prevent his being sent to gaol before orders come from England. They now begin to talk of bringing more actions against Custom house officers who have made seizures and have had them condemned
August Term 1 Geo. 3.

1761.

ERVING v. CRADOCK.

Release of judgment.

Counsel in the case.

Hutchinson's report of a similar case.

demned or compounded in Court for them. A Custom house officer has no chance with a jury, let his cause be what it will. And it will depend upon the vigorous measures that shall be taken at home for the defence of the officers, whether there be any Custom house here at all." Bernard to Lords of Trade, Augst 2, 1761, 2 Bernard Papers, 51, 52. To the same effect is his letter of the next day to Governor Pembina, lb. 10.

On the 27th of February 1762 Governor Bernard wrote to Lord Barrington, that he apprehended this cause would "soon be ended by the plaintiff's discharging his judgment to prevent his answering in appeal. So that the King's authority is now triumphant in every instance." 2 Bernard Papers, 29. Attorney General Trowbridge and Mr. Auchmuty were retained by the Governor to prosecute the appeal, and were paid "out of the King's share" of seizes, upon an order of Governor Bernard and Surveyor General Lechmere of October 19, 1761. Boston Gazette, June 11, Augst 27, and September 3, 1761. And after Erving had acknowledged satisfaction of his judgment, Trowbridge, on the demand of Temple, Lechmere's successor, (ante, 428, note 17,) on the 4th of May 1762 refunded part of the fees.

The circumstances of a case reported by Hutchinson correspond so nearly with those of Erving v. Cradock, as to leave little doubt of its being the same. He says, "The Court imagined their opinion upon what was a mere matter of law, would have the same influence with the jury as formerly in a like case," evidently Province v. Paxton, ante, 552. "The Judges could have no doubt that the decree of the Court of Admiralty, where it had jurisdiction, could not be traversed and annulled in a court of common law; but the jury notwithstanding gave their verdict for the plaintiff. As it was a personal action, and the value more than 300l. sterling, an appeal clearly lies by charter to the King in Council. It was claimed, and granted." 3 Hutchinson's Hist. Mass. 161. The entry of 1766 in the margin of the page is of no weight to disprove the identity of the case; for on the same page Hutchinson states the decree of the Court of Admiralty in the case of the Freemasons, which was in 1763; and on the next page, as having occurred "just after thefe," the admission by Cockle at Salem of vessels from Anguilla, which was in 1764. Ante, 390, 423. The question whether Hutchinson, in this place, is speaking of 1761 or 1766 is rendered interesting by the fact that he speaks of these cases as having occurred "while the minds of the people of every rank and order, in all parts of the Province, were more or less disturbed with apprehensions of taxes by authority of Parliament." Compare John Adams's Preface of 1819 to Novanglus, 4 John Adams's Works, 61; 4 Bancroft's Hist. U. S. 370.

The fact that judgment was thus rendered on a verdict found against the express instructions of the judges, in a civil action of great moment to the Government, show how much deference was paid to the verdict of a jury in the Province of Massachusetts Bay. And this case is not a solitary instance.

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In 1763, in an action of trover brought against a military officer for recruiting a man who was claimed as a slave, the plaintiff recovered a verdict, upon which judgment was rendered, "although," Governor Bernard wrote, "upon the trial the Judges told the jury that there was no evidence against the defendant, not the least pretence to charge him in such an action." Goodspeed v. Gay, Rec. 1763, fol. 47. Governor Bernard to General Amherst, May 14, 1763, 2 Bernard Papers, 305. This explanation deprives that case of any authority upon the question of maintaining trover for a negro. Vid. ante, 98-102, note.

In 1770, in giving an account of the action of James Otis against John Robinson, one of the Commissioners of the Customs, for assault and battery (Tudor's Life of Otis, 362, 503; Rec. 1772, fol. 109.) Hutchinson, after mentioning the verdict of £1000 for the plaintiff in the Inferior Court, and the defendant's appeal to the Superior Court, wrote, "I hope that a better jury will not give exorbitant damages. If they should, there will be no remedy but by an Appeal to the King in Council." 25 Mass. Archives, 438. The Chief Justice evidently meant here no remedy of any value; for the statutes of the Province clearly allowed as of right a review in this as in other ordinary civil causes, although they would not allow it of judgments upon informations for the forfeiture of goods. Prov. Sts. 3 W. 3; 24 G. 31; 30 G. 21; Anc. Chart. 368, 574, 611. The review of an action at law was introduced here very early. In 1639 it is spoken of as already existing. 1 Mass. Col. Rec. 275. It was at first called a "bill of review," and doubtless derived its origin from the analogous remedy in chancery. St. 1642, 2 Ib. 11. Sewall, 7th. in Burrell v. Burrell, 10 Mass. 222. Bacon's Ordinances of 1619, 1 Sand. Ord. Ch. 109. Elliot v. Balcum, 11 Gray, 286, and authorities cited. 6 Dane Ab. c. 189. Rev. Sts. c. 99. Gen. Sts. c. 146, §§ 19-38. See also Plym. Col. Laws (ed. 1672) 12; (ed. 1836) 254; Nantucket St. of 1674, Hough's Nantucket Papers, 43; 2 Doug. Hist. N. A. 518. New trials did not come into use in England until after the settlement of the Massachusetts Colony. Slater's Case, Style, 158. Wood v. Gunston, Style, 466. Wheeler v. Honour, 1 Sid. 85. The Queen v. Helston, 10 Mod. 303. Wilham v. Lewis, 1 Wilc. 55. Bright v. Eynon, 1 Bur. 394, 395. And though recognized as possible, they seem to have been very rarely ordered by the Courts of the Province. Angier v. Jackson, ante, 83 & 85.


By art. 31 of the Body of Li
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Non-liquet;" and this power was sometimes exercised. Clues v. Jocelin (1641) 2 Winthrop's Hist. N. E. 357. Hall v. Louden (1649) and Boidon v. Pratt (1650) in Middlesex County Court Rec. But this term, derived from the Roman law, and unknown to the law of England, (Bacon's Reading on the Statute of Uses, 4 Bacon's Works, ed. 1824, p. 184,) occasioned so much doubt and confusion in practice, that the provision was repealed by the St. of 1657, sub. sup., in which the right and duty of the jury to decide the case when they could be very strongly affected.

In the early times of the Massachusetts Colony, if the Court and jury did not agree, the case was brought to the General Court. But this practice occasioned difficulties and disputes between the two houses; and they, according to the custom of the time, consulted the elders, whose advice was "that the magistrates may be, by express law, directed to accept the juries verdict and to grant judgment accordingly, unless they shall judge the juries verdict to be evidently contrary to law and evidence, in which case, that they may be impoverished by law to caufe the jurie to answer for their default in the same court, before a jurie of twenty-four persons chosen by the freemen, or otherwise to be liable to be served by the party aggrieved with a writ of attainder out of the same court, or otherwise as this honoured court may see more aptly and amply to provide. It being the great liberty of an English subject to be tried by his peers, before whom he hath free and full libertie to plead law for his indemnity and safety." Hutchinsofn's Coll. 436, 439. The General Court did not adopt this suggestion in criminal cases; but in May 1672 passed an act requiring all judges in civil cases, after having "used all reasonable endeavours for clearing the case to the jury by declaring the law, and comparing the matter of fact therewith," to accept and render judgment upon every verdict, "unless upon corruption or error in the jury giving in their verdict contrary to law and evidence the party castr shall be open court attain the jury," in which case a trial should be had by a jury of twenty-four, upon whose verdict judgment should be rendered. Mass. Col. St. 1672, Mass. Col. Laws (Suppl. to ed. 1673) 171, 172; 4 Mass. Col. Rec. pt. ii. 508, 509; Anc. Ch. 147. Under this statute, if the judges did not approve of the verdict of a petit jury, they sent them out again; but if the jury persisted, the judges were obliged to record the verdict. Greene v. Baker, Rec. 1680, fol. 114. Attaints were brought so often, that another statute was passed to check and regulate them, after which they became less frequent. Rec. 1672—85, passim. St. 1684, 5 Mass. Col. Rec. 449; Anc. Ch. 147.

The law of attaints in England in civil cases was very like that of Massachusetts. A verdict against the instructions of the Judges, if affirmed by the jury of attaint, was final. Lit. § 514. Co. Lit. 317 b, 294 b. Cberin &Paramour's case, Dyer, 201 a. 301, a, b. 1 Rol. Ab. 180. Vin. Ab. Attaint, A. Com. Dig. Attaint, B. And, although the petit jury

Attaints in England.
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jury could not be attainted for not considering evidence ruled out by the Court, the authorities are not agreed upon the question whether following the instructions of the Court would excuse them from an attain.


The prescribed forms of oath, in the Colony and Province of Massachutets, seem to have referred the jury to the established law, rather than to that laid down by the Court in the particular case. In the Massachutets Colony the ordinary oath of the petit jury required them to return a verdict "according to the evidence given you, and the laws of this jurisdiction." The grand jury's oath was similar. The "Oath of Life and Death" in Massachutets, and all the oaths of petit juries in the Plymouth Colony, were simply "according to your evidence." 3 Mafs. Col. Rec. 48. Mafs. Col. Laws (ed. 1660) 86; (ed. 1673) 107. Plymouth Col. Laws (ed. 1685) 73. By one of the earliest acts of the Province these forms were somewhat modified. The grand jurors' oath was put into substantially its present shape, (ante, 268, note) one form was prescribed for petit jurors in all criminal cases, being the same used in England (2 Hale P. C. 293) ending "according to your evidence," and the "Jury oath in civil causes," in this form: "You swear that in all causes betwixt party and party that shall be committed unto you, you will give a true verdict therein according to law, and the evidence given you." Prov. Sis. 4 W. & M., p. 60. In some objections forwarded to England against the acts of this session, (for a copy of which from the State Paper Office in London, the writer is indebted to Mr. Henry T. Parker,) it was suggested "whether the words "according to law" in the juryman's oath be not to spare, confounding the court and jury together." New England Board of Trade, 7 Original Papers, 15. Yet the act was confirmed by the King. Mass. Prov. Laws, (London ed. 1724) p. 28; (Boston ed. 1736,) p. 27.
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It would have been strange, indeed, if the doubt suggested had been allowed any force in England under a King who had appointed, as his highest Judges in law and equity, Holt and Somers, of whom the first in 1697 declared from the bench that "in all cases and in all actions the jury may give a general or special verdict, as well in causes criminal as civil, and the Court ought to receive it, if pertinent to the point in issue, for if the jury doubt they may refer themselves to the Court, but are not bound to do so," and in 1704 submitted the criminality of an alleged libel to the jury; and the other had previously written, "The office and power of these juries is judiciall; they only are the judges from whose sentence the indicted are to expect life or death; upon their integrity and understanding the lives of all that are brought into judgment do ultimately depend; from their verdict there lies no appeal; by finding guilty or not guilty, they do complicately resolve both law and fact. As it hath been the law, so hath always been the custom and practice of these juries, upon all general issues, pleaded in cases civil as well as criminal, to judge both of the law and the fact." 3 Salk. 373, pl. 6. Tutchin's case, 14 Howell's State Trials, 1128, 1129. Essay on Grand Juries, 9, 10.


Opinions of Holt and Somers.

Earlier English authorities.

No
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No other English authorities upon this question have been found in the reigns of King William III. and Queen Anne. But the opinions of later English judges have generally been adverse to the right of the jury. Sir John Pratt in Galard's case, cited in a Cavendish Debates, 362, 375. Lord Raymond, in Onexby's case, 17 Howell's State Trials, 49, 2 Ld Raym. 1493, 1494. 1 Barnard, 17, & 2 Stra. 773; in Clark's case, 17 Howell's State Trials, 667 note, 1 Barnard. 305, 4 Doug. 166, 167, & 21 Howell's State Trials, 1036; and in Franklin's case, 1b. 1037, 4 Doug. 167, and 17 Howell's State Trials, 672. Lord Hardwicke, as Attorney General, lb. 1669; in the House of Commons, 3 Parl. Hist. 1590; and as Chief Justice, the King v. Poole, Case temp. Hardw. 28. Chief Justice Lee, in Owen's case, 4 Doug. 168, 21 Howell's State Trials, 1038, & 18 lb. 1228. Chief Justice Ryder, as Attorney General, lb. 1222; and as Chief Justice, Rex v. Nutt, 4 Doug. 168, 21 Howell's State Trials, 1038, and 20 lb. 837 note. Sir Michael Foster, Foster's Crown Law, 235, 236. Mr. Justice Butler, at nisi prius, in the Dean of St. Asaph's case, 21 Howell's State Trials, 945-950. Sir William Blackstone, 3 Bl. Com. 378; 4 lb. 361. Serjeant Havokin, 2 Hawk. c. 22, §§ 21, 32. And, last and most important, Lord Mansfield, as Solicitor General, in Owen's case, 18 Howell's State Trials, 1333; and as Chief Justice, in Shebbeare's case, 4 Doug. 169, & 21 Howell's State Trials, 1038; in Miller's case, 20 lb. 893, 895; in Woodfall's case, lb. 90, 913, 918, 5 Bur. 1667, & Lofti, 778; and in the Dean of St. Asaph's case, best reported nom. the King v. Shipley, 4 Doug. 73, also in 21 Howell's State Trials, 936, and fully 3 T. R. 438 note. If Erskine's great argument for the defendant in that case could be thought to have been influenced by the interests of his client, such a view would add weight to Mr. Bærcroft's express admission, in his argument for the Crown, of the right of the jury to take upon themselves, if they pleased, the decision of every question of law involved in the general issue, and to his refusal to adopt the suggestion of Lord Mansfield to say "power" instead of "right." 4 Doug. 94 note. And Mr. Justice Wills, who diffented from Lord Mansfield on this point, said that Mr. Bærcroft expressed "the sentiments of the greater part of Westminster Hall." 4 Doug. 173, 175. It is worthy of remark that the earlier decisions of Lord Mansfield and his associates were made without argument of this question. By Lord Mansfield, C. J. & Wills, J., 4 Doug. 169, 174; 21 Howell's State Trials, 1038, 1039. And in Horne's Trial for a libel in saying that the Americans, "preferring death to slavery, were for that reason only inhumanly murdered by the King's troops at or near Lexington and Concord in the Province of Massachusettts on the 19th of April," 1775, Lord Mansfield himself submitted to the jury the criminality of the alleged libel. 20 Howell's State Trials, 653, 759. See also Almon's case, lb. 836, 838; Serjeant Glynn, Turlow, A. G., Wedderburn, S. G., Dunning & Burke, 2 Cavendish Debates, 99-104, 125, 126, 145, 359, 373, 374.
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It is not proposed to do more than refer to well known authorities upon this subject. But there is one, ("undoubtedly the first common lawyer in England," as Quincy justly called him — Quincy's Life of Quincy, 329,) who should not be omitted in an investigation of American constitutional law from an ante-Revolutionary point of view, and who, upon a question affecting the liberty of the subject, outweighs all those cited in the last paragraph. Lord Camden, whether as counsel for the defendant, as attorney general, or upon the bench, uniformly maintained the doctrine that the jury in criminal cases were judges of the law as well as the fact. Owen's case, 18 Howell's State Trials, 1227. Henley's case, 15 Ib. 1355, 1356. By Erskine, arguendo, 21 Ib. 928, 1014, & 4 Doug. 153. Pettingal on Juries, 122, cited 21 Howell's State Trials, 853. 2 Cavendish Debates, 135, 143. By Lord Camden, 29 Parl. Hist. 1408. In the House of Lords, in 1770, upon Lord Mansfield's leaving with the clerk the opinion in Woodfall's case, Lord Camden said that he considered it as a challenge directed personally to himself, which he accepted; and declared himself ready to maintain that Lord Mansfield's doctrine was not the law of England; and put to him questions in writing, framed with a view to ascertain how far the opinion denied the right of the jury to decide the law in cases of libel, which Lord Mansfield evaded answering. 16 Parl. Hist. 1330. 2 Cavendish Debates, 352, note. 4 Walpole's Memoirs of George III., 216, 320, 321. Lord Chatham, as usual, concurred with Lord Camden, and opposed Lord Mansfield. 16 Parl. Hist. 1305. Lord Camden retained the same opinion to the end of his life. In his last speech in the House of Lords, in the debates on Fox's Libel Bill in 1792, he declared that "the jury had an undoubted right to form their verdicts themselves according to their consciences, applying the law to the facts; if it were otherwise, the first principle of the law of England would be defeated and overthrown. If the twelve judges were to alter the contrary again and again, he would deny it utterly, because every Englishman was to be tried by his country; and who was his country but his twelve peers, sworn to condemn or acquit according to their consciences? If the opposite doctrine were to obtain, trial by jury would be a nominal trial, a mere form; for, in fact, the Judge, and not the jury, would try the man. He would contend for the truth of this argument to the latest hour of his life manibus pedestibus. With regard to the Judge stating to the jury what the law was upon each particular case, it was his undoubted duty to do; but having done so, the jury were to take both law and fact into their consideration, and to exercise their discretion and discharge their consciences." 29 Parl. Hist. 1356. See also, 1 Ib. 729, 1408; and 1 Lord Brougham's Statesmen of George III. 3d series (ed. 1853), 316, 317.

In the Province of Massachusetts, and for many years after the adoption of the State Constitution, trials by jury were held before the whole bench, and the Judges expressed their several opinions or doubts to the jury; and on a review in the same Court before a new jury, each dissenting
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Hutchinson nowhere appears to have asserted that the jury were bound to take the law from the Court. In the Province v. Paxton he says that the Court "cautioned the jury against departing from the rules of law, and consequently from their oaths." Ante, 553, note. Their oaths, it will be remembered, referred them to the law, not to the instructions of the Judges. Supra, 560. The most that is reported in other trials at which Hutchinson preceded is that the Judges "imagined," or "supposed it was proper," that the jury should be influenced by their opinion in matter of law. Supra, 577. Trial of Warren & others, ante, 249. In an action brought to recover land claimed under a will, and tried before the whole Court in 1767, an objection that the will gave the demandant no title, and therefore should not be admitted, was unanimously overruled, as "the first of the kind ever made" and "subversive of the hitherto uninterrupted course of practice"; and "the Court said, the will should go in as evidence to the jury, who, upon finding the special matter, would bring the point of law properly before the Court." Gibbs v. Gibbs, ante, 351, 352. But the Court do not appear to have said what could be done if the jury should insist on returning a general verdict for the tenant.

Soon after the appointment of Troubridge, a learned crown lawyer, who had been Attorney General of the Province, and was better acquainted than the other Judges with the recent English text books and decisions, the rulings of the Superior Court of Judicature tended to limit the right of the jury. In a civil action for libel in 1767, Lynde, Cushing, Oliver and Troubridge, JJ., refused to allow John Adams to argue to the jury whether the words were actionable or not. Cotton v. Nye, Rec. 1767, fol. x18; a John Adams's Works, 207. Among Judge Troubridge's MSS. is a memorandum, in his own handwriting, indorsed "Jurors to take the law from the Court," containing references to a Hawk. c. 22, §§ 21, 32, and Plow. 114, 131, 259, 496. And upon the trial of the British Soldiers in December, 1770, he instructed the jury accordingly, relying on Hawkins, Lord Raymond, and Foster. Trial of British Soldiers, (ed. 1770), 186; (ed. 1824), 137. Josiah Quincy, Jr., in opening the defence, had taken the same ground. Ib. (ed. 1770), 69, 136, 143, 144; (ed. 1824), 44, 45, 86, 92. But John Adams, associated with Quincy, less carried away by zeal for his client, argued the law at length to the jury, and appealed, for the rules of law which must govern the case, only to the authorities which he cited. Ib. (ed. 1770), 149, 155, 156, 160; (ed. 1824), 96, 104, 105, 110; 1 Gordon's Hist. U. S. 291, 296. The real danger there was that the jury would
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would not be restrained by any rules of law from convicting the prisoners; and the counsel for the Crown did not dispute the principles of law upon which the defendants relied. Paine's Argument on the Trial of the Soldiers, (ed. 1824), 118. 2 John Adams's Works, 236. And see ib. 317. It is also to be remarked that those soldiers who were convicted against the instructions of the Judges were branded in the hand by order of the Court. Rec. 1770, fol. 55. Boston Gazette of December 17, 1770. Among Judge Trowbridge's MSS., under the head of "New Tryals in Criminal Cases," is this collection of authorities: Rex v. Davis, 1 Show. 336. Regina v. Clarke, 1 Stra. 106. Rex v. Walhamsrow & Wilts, 1 Stra. 101. Dr. Salmon's case, 1 Stra. 104. Regina v. Berulley, 1 P. W. 213. Rex v. Marchant, 2 Keb. 403. Rex v. Hannis, 2 Keb. 765. Rex v. Bowden, 1 Keb. 134. Regina v. Banki, 6 Mod. 245. Anon. 3 Salk. 363. Rex v. Simmons, 2 Wils. 329. Rex v. Smith, 2 Show. 165, & T. Jon. 163. Rex v. Reed, 1 Lev. 9. Rex v. Jackson, 1 Lev. 134. To which Judge Trowbridge adds, "In the case of ye King agst Jackson it seems to be agreed by ye whole Crt that a new Tryal could not be had in a Capital Cae." And the statements of Hutchinson and Bernard, concerning the Trial of the Soldiers and the previous conviction of Richardson for murder in the same year, show that when a jury convicted against the instructions of the Court, the only remedy was supposed to be to respite the prisoner until a pardon could be obtained from the King. 3 Hutchinson's Hist. Mafs. 326, 327. Hutchinson to Gage, April 23, 1770, 25 Mafs. Archives, 327. Bernard to Hutchinson, July 15, 1770, 8 Bernard Papers, 109. Hutchinson's Letters, November 26, December 3, 5 & 6, 1770, 27 Mafs. Archives, 38, 63, 64, 65, 67. Richardson's case, Rec. 1772, fol. 13.

That John Adams did not consider the Case of the British Soldiers as conclusive against the right of the jury to decide the law in favor of any man notwithstanding the instructions of the Court, even in a civil action, is clearly shown in his own notes of an argument made by him immediately afterwards. In an action to recover a balance of account, tried in the Inferior Court, Adams says, "the jury found a verdict for the sum sued for. Kent moved it should be rejected. I denied the power of the Court to reject it, and said if he would move for a new tryal, that would not be without a precedent in the Superior Court, tho' it would be in an Inferior Court." MS. note by John Adams of Wright & Gill v. Mein, January term 1771, in the possession of Mr. Charles Francis Adams. Then follows this collection of authorities, apparently noted as they were found: St. Westm. 2, c. 30. Barrington on Sts. (2d ed.) 74, 103, [5th ed. 100, 136]. Lord Mansfield in Baldwin's case, Juneius to Ed. M. [Letter of November 14, 1770]. 3 Bl. Com. 378. 5 Bac. Ab. 285, 286, 292, "relating to general and special verdict," [Verdict, C. D.]. 1 Inst. 228 a. Lit. § 368. Rawlins' case, 4 Rep. 53 b. Oneby's case, 2 Ld Raym. 1490, 1494. Foster, 255. 1 Trials per Pais
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Pais, 383. Bright v. Eynon, 1 Bur. 393. Argent v. Darrell, Cas. temp. Holt, 701. Abb v. Abb, Ib. 701. Guy v. Cross, Ib. 703. Buill's case, Vaugh. 147. [Anon.] 1 Salk. 405. [S. C. Wright v. Crump.] Farr. [7 Mod.] 2. Firgaines v. Mays, 1 Sid. 133. Graves v. Short, Cro Eliz. 616. Cunningham Law Dict. Attaint, 3. Gilb. C. P. 128. 1 Bl. Com. 63. Lord Camden's Questions to Lord Mansfield in the House of Lords, [ante, 563]. 4 Bl. Com. 354, 451. Baker's case, 5 Rep. 104. At the end of all which Adams adds: "Mem. Everything that is said by the Court to the jury, is uniformly imputed in our books a direction. So the Court give a charge to the grant jury to present a particular offence, &c. But the question is whether the jury are bound, in point of conscience or of law, to observe that direction and find according to it? Are they subject to any penalty, or fine or imprisonment if they find contrary to that direction? No man will say that they are." In the Superior Court, on appeal, at February term 1771, the plaintiff filed a new declaration, and obtained an increased verdict, upon which judgment was rendered, although the defendant moved for a new trial. Mein v. Wright, Rec. 1771, fol. 210, and papers on file.

It is manifest from the coincidence in date that the discussion in John Adams's Diary, from which the following extract is taken, was part of his preparation for the argument of this case: "The oath of a juror, in England, is to determine causes 'according to your evidence.' In this Province, 'according to law and the evidence given you.' It will be readily agreed that the words of the oath, at home, imply all that is expressed by the words of the oath here; and whenever a general verdict is found, it assuredly determines both the fact and the law. It was never yet disputed or doubted that a general verdict, given under the direction of the Court in point of law, was a legal determination of the issue. Therefore the jury have a power of deciding an issue upon a general verdict. And if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the Court, against their own opinion, judgment and conscience? It has already been admitted to be most advisable for the jury to find a special verdict, where they are in doubt of the law. But this is not often the case; a thousand cases occur in which the jury would have no doubt of the law, to one in which they should be at a loss. The general rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known to ordinary jurors. The great principles of the Constitution are intimately known; they are sensibly felt by every Briton; it is scarcely extravagant to say they are drawn in and imbibed with the nurture of the Briton's milk and Briton air. Now, should the melancholy case arise that the Judges should give their opinion to the jury against one of these fundamental principles, is a juror obliged to give his verdict generally, according to this dictum, the fact specially, and submit the law to the Court?
feeling or conscience, will answer, no. It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the Court. A religious cafe might be put, of a direction against a divine law. The English law obliges no man to decide a cause upon oath against his own judgment, nor does it oblige any man to take any opinion upon trust, or to pin his faith on the sleeve of any mere man." 2 John Adams's Works, 254, 255.

This was when he was in the height of his practice at the bar, the first constitutional lawyer of the Province, and only four years before he was appointed by the Revolutionary Government, upon the removal of Trowbridge and his colleagues, Chief Justice of Massachusetts. 3 lb. 23, note. By resigning that office without ever having taken his seat, he laid aside the opportunity of carrying out himself on the bench the principles which he had uniformly maintained at the bar.

But these principles were supposed to be the law of Massachusetts long after the adoption of the State Constitution. Even in civil cases, the right of the jury to decide the law seems to have been recognized until since the beginning of the present century. Suckley v. Atwood, (1784) 6 Dane Ab. 351. Sullivan on Land Titles (1801), 343. Coffin v. Coffin, (1808) 4 Mass. 35. St. 1807, c. 140, § 15. But the power of the Court to grant new trials, which appears to have been in familiar use before the beginning of the regular series of reports, has prevented the rendering of judgments on verdicts against the directions of the Court in civil cases. Brown v. Swan, 1 Mass. 203. Cogswell v. Brown, 1 Mass. 237. St. 1804, c. 105, § 6. Bryant v. Commonwealth Ins. Co. 13 Pick. 550. Coffin v. Phoenix Ins. Co. 15 Pick. 395. Cunningham v. Magoun, 18 Pick. 15. Miller v. Baker, 20 Pick. 289. And it has recently been determined that if the evidence introduced by the plaintiff in a civil action "is such that the Court would set aside any number of verdicts rendered upon it, to sies quotes, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant." Denny v. Williams, 5 Allen, 5. And see Sienietz v. Currey, 1 Dall. 234.

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New York.

In the Province of New York, the right was repeatedly asserted by counsel in criminal cases, and not denied by the Court. Bayard's Trial, (1703) 14 Howell's State Trials, 501, 503, 505. Zenger's Trial, (1735) 17 Ib. 706, 722, 723. See also Remarks on Zenger's Trial by "two eminent lawyers in one of our Colonies in America." Ib. 726, 731. The Supreme Court of the State of New York in 1804 was equally divided upon the question, Kent & Thompson, J. J. affirming the right, and Lewin, C. J. & Livingston, J. denying it. People v. Croswell, 3 Johns. Cas. 337. The question does not appear to have been since argued before the same Court or the Court of Errors or the Court of Appeals in that State. But the right of the jury was repeatedly affirmed in 1835 by Walworth, J. (afterwards Chancellor). People v. Thayers, 1 Parker C. C. 598. People v. Video, Ib. 604. It has lately been denied by some Judges of the local Supreme Courts. People v. Pine, (1848) 2 Barb. 568. People v. Finneghan, (1848) 1 Parker C. C. 132, 153. Carpenter v. People, (1850) 8 Barb. 611. Safford v. People, (1854) 1 Parker C. C. 480. In New Jersey, the right was affirmed by early statutes. Welt New Jersey Laws of 1676, cc. 19, 22, 1681, cc. 6, 7, 10 (Learning & Spicer's ed.) pp. 396, 397, 398, 428, 429. See also Dickinson's Farmer's Letters, (Boston ed. 1768) 51.

Pennsylvania.

In Pennsylvania, before the Revolution, the right of the jury to decide the law for themselves appears, from the notes of Presidents Shippen and Reed (1 Dall. 30), to have been admitted, even in civil cases. Alderson's lessee v. Robertson, (1764) 1 Dall. 9. Bohm v. Angle, (1767) Ib. 16. Proprietary's lessee v. Ralston, (1773) Ib. 19. Anonymous (1773) Ib. 20. And in 1784 McKeen, C. J. began his charge in a civil case by telling the jury that as the counsel "have quoted many cases, but have not appealed to the Court for their opinion on the jury must take the whole together, and for."
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upon the subject." *Wilson v. Henry*, Ib. 71. This report had been revised by the Chief Justice. *Ib.* pref. iii. The only American Judge between the Revolution and the year 1800, who is known to have denied the right of the jury to decide the law in a criminal case, was a Judge of a Court of Common Pleas in Pennsylvania. *Addison's Charges to Grand Juries*, (1792) 52. *Pennsylvania v. Bell*, (1793) Addis R. 160, 161. *Pennsylvania v. M'Fall*, (1794) *Ib.* 257. He was afterwards impeached by the House of Representatives, and removed by the Senate, and disqualified to hold any judicial office in the State, for interfering with the rights of an associate in charging the grand and petit juries. *Addison's Trial*, Lancaster, 1803. And the right of the jury in criminal cases was then generally recognized in Pennsylvania, as is shown by the testimony of her most eminent lawyers upon the trial of Judge Chaile in 1804. *Testimony of William Lewis* and *Edward Tilghman*, 1 Chaile's Trial, (Smith & Lloyd's ed.) 131-135, 148; *Ib.* (Evans's ed.) 20, 21, 27. And it seems to be still in that State. *John Read*, *arguendo*, in *Harvey's Trial*, (1851). *Guffy v. Commonwealth*, (1853) 2 Grant, 68.


But it is believed to have been denied in every other Southern State in which the question has arisen, except where, as in Georgia and Arkansas, it had been established by express enactment. Constitution of Georgia of 1777, arts. 41-43, Watk. Dig. 14. *Georgia Penal Code* of 1833, div. 14, § 46, *Prince's Dig. 660. Holder v. State*, (1848) 5 Georgia, 444, 445. *Ricks v. State*, (1855) 16 *Georgia*, 603-605. *McPherson v. State*, (1857) 22 *Georgia*, 484, 485. Rev. Sts. of Arkansas, c. 25, § 25. *Patterson v. State*, (1846) 2 *English*, 60. *Sandford v. State*, (1850) 6 *English*, 331. It was early denied in Maryland. Judge Winchestre and Luther Martin, (1804) 1 Chailes's Trial, (Smith & Lloyd's ed.) 597; 1 *Ib.* 120, 121; *Ib.* (Evans's ed.) 180, 181, 183. And even after the Constitution of that State in 1831 had expressly declared that "in trial of all criminal cases the jury shall be judges of the law as well as the facts," the Court of Appeals decided that the jury had no right to judge of the constitutionality of a statute. *Franklin v. State*, (1838) 12 Maryland, 246, 249. The right of the jury to decide the law is denied
Appendix II.

North Carolina.  
Alabama.  
Mississippi.  
Kentucky.  
Missouri.  
Texas.  
Ohio.  
Indiana.  

Power of the Legislature.  

The authority of the Legislature to confer this right upon the jury (if they did not have it before) was recognized by the whole Supreme Court of New York in People v. Crawford, 3 Johns. Cas. 413; asserted by Jackson, Dewey and Thomas, JJ. of the Supreme Court of Massachusetts, and denied by Shaw, C. J., Metcalf, Bigelow and Merrick, JJ., of the same Court. Debates in Mass. Convention of 1830 (ed. 1843) 542. Commonwealth v. Anthes, 5 Gray, 323, 326, 320, 321, 303.

There can be no better evidence of the recognition in the last century of the right of the jury to decide the law, even in civil cases, than the unanimous decision of the Supreme Court of the United States, as declared by Chief Justice Jay in 1794 in a civil cause of great importance, to which a State was a party, and which was therefore tried at the bar of the Supreme Court. Georgia v. Brailsford, 3 Dall. 4. The authenticity of the report of that case is hardly open to question. It had probably been submitted to Chief Justice Jay himself; for there is no reason to doubt that Mr. Dallas kept up the practice, which he had established in his first volume, of submitting each case, before printing, to "the examination of the preceding judge of the Court in which it was determined." 1 Dall. pref. iii. And the report was quoted by Alexander Hamilton, within ten years after the decision, in a criminal trial of great importance and interest, and its accuracy not disputed. People v. Crawford, 3 Johns. Cas. 347, 358. "Speeches at full length" in that case, published in New York in 1804, pp. 11, 49, 77.

Another case, not usually referred to upon this subject, which came before the Supreme Court of the United States in 1795, presents so curious an analogy to the cases of the Province v. Paxton, ante, 548, and Erving v. Cradock, supra, 553, as to be worthy of being here stated. In an action for money had and received, the defendant contended that he received the money as agent of the United States at Martinique, for the sale, pursuant to a decree in admiralty there, of a neutral vessel captured and sent in to that island during the Revolutionary
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privateer owned by the plaintiffs. The jury, under the instructions of
the Circuit Court, returned a verdict for the plaintiffs, and the defendant
fused out a writ of error. Cabot v. Bingham, 7 Dane Ab. 655 & seq.;
3 Dall. 191. Printed Case of the Danish Brig the Hope. Mr. Dane
says that the common law courts in Massachusetts had previously been
in the practice of trying the question of prize or no prize, when it arose
incidentally; contrary to the practice in England and in other States.
7 Dane Ab. 645, 646, 650, 660. In the Supreme Court of the United
States, Iredell, J., in giving his opinion in favor of the jurisdiction of
the Court below, said: "It will not be sufficient to remark that the
Court might have the jury to find for the defendant; because, though
the jury will generally respect the sentiments of the Court on points of
law, they are not bound to deliver a verdict conformably to them." 3
Dall. 33. Neither of the Judges expressed any doubt of this, but the
Court was equally divided on the question of jurisdiction.

The extent of the rights and duties of juries in this respect has not
since come before the Supreme Court of the United States. But indi-
gu trial Judges of that Court, before and after the cases just cited, repeat-
edly affirmed the right of the jury to judge of the law in criminal cases.
Iredell & Wilson, J.J. in Henfield's Trial, (1793) Wharton's State
of Fries, 1961 of Callender, Wharton's State Trials, 634, 709, 710,
713 & seq.; and on his own trial, (1804) (Smith & Lloyd's ed.) 34,
35. (Evans's ed.) Appendix, 44, 45. Marshall, C. J. in Burr's
Trial, (1807) 470; 2 lb. 444, 445, 448. Duvall, J. in Trial
of Hodges, (1813). Baldwin, J. (1830) in United States v. Wil-
son & Porter, Bald. 99, 108. See also Talmadge, J. in Trial of
Smith & Ogden, (1806) 236, 237; Cases under the Embargo Laws,
3 Bradford's Hist. Msfs. 108, & Lyman's Trial, 41. And this right
does not seem to have been denied by any Judge of the Supreme Court
of the United States before 1835, except upon questions of the con-
stitutionality of statutes, of which an exception was made by Patterson,
J. in United States v. Lyon, (1798) Wharton's State Trials, 336, by
Chase, J. in Callender's Trial, ub. sup. and by Baldwin, J. in United
States v. Skirve, Bald. 512 — a distinction which can hardly be main-
tained. See Theophilus Parsons in Convention of 1788, ub. sup.;
Shaw, C. J. in Commonwealth v. Anthes, 5 Gray, 188-191; Curtis, J.
in United States v. Morris, 1 Curt. C. C. 59; ante, 529. But the
more recent opinions of some Judges of the Court deny the right of the
jury to decide the law adversely to the instructions of the Judge in any
case whatever. Story, J. in United States v. Battiste, (1835) 2 Sumner,
245; Curtis, J. in United States v. Morris, (1851) 1 Curt. C. C. 49-
631, and many unreported cases.

It is worthy of notice how the history of this question after the Eng-
lish Revolution of 1688 repeated itself in America nearly a century later.
The great constitutional lawyers and judges of either Revolutionary
period

Other opinions of U. S. Judges.
period—Somers and Holt; Adams, Jay, Wilson, Iredell, Chase, Marshall, Hamilton, Parsons and Kent— with one voice maintained the right of the jury upon the general issue to judge of the law as well as the facts. But they had hardly passed away, or fifty years elapsed since either Revolution, when the courts of the new government began to assert as much control over the consciences of the jury, as had been claimed by the most arbitrary Judges of the Monarch whom that Revolution had overthrown. The analogy recalls the motto from Grotius, placed by Mr. Dallas upon the title-page of his reports: *Atque eo magis necessaria est hac opera, quod et nostro saculo non desunt, et olim non defuerunt, qui hanc juris partem ina contemnereat, quasi nihil ejus prater ivane nomen existeret.*
APPENDIX III.

Governor Pownall's Message to the Council upon
the Jurisdiction of Judges of Probate.

Province of the Massachusetts Bay.

At a Court of Probate held by the Governor, with the
Council or Assistants at the Council Chamber in Boston on
the 9th day of February A.D. 1760.

His Excellency having been pleased to lay before the Court
 sundry matters to be by them considered, the same were
referred to a Committee and are as follows, viz.:

Gentlemen,—By the Royal Charter granted to His
Majesty's Province the Massachusetts Bay, it is Established and Ordained "That the Governor of said Province
or Territory for the Time being, with the Council or
Assistants, may Do, Execute or Perform all that is necessary
for the Probate of Wills and Granting of Administrations
for, touching or concerning any Interest or Estate which
any Person or Persons shall have within our said Province
or Territory" — with Liberty to the Subject of Appeal to
His Majesty.

The Governor with the Council or Assistants is thus
Constituted a Court of Justice of such Ample Jurisdiction
and important Powers as seem not to have been hitherto
sufficiently attended to; And to this Inattention it must be
Imputed that the Idea of the nature of the Court and the
Laws
Appendix III.

Laws of Practice which it ought to adopt should so long remain Vague and Indeterminate, And the Court itself still exist without a Seal, Records and Rules or even the Common Formalities of a Judicial Court.

In order to Establish these necessary Points and form some Regular Plan of Conduct it should be observed That this Court and this Only is immediately Constituted by Charter antecedent to all Provincial Law.

The matter subjected to its Judgment is all Estates and Interests in this Province so far as they are connected with the Probate of Wills or the Granting Administration.

The Jurisdiction Granted is the Execution of this Probate of Wills or Granting Administration with all that is necessary thereto.

These things under the old Charter were cognizable in the County Court; and in England, so far as concerned Personal Estate, in the Spiritual Court only.

As the business of this Court was never the Object of Common Law; And as its Proceedings for the most Part are in matters Executory and cannot admit of Tryals and Precedents according to the Methods of the Common Law, it cannot be a Common Law Court.

As it is a Judiciary of Laymen and cannot execute its Decrees by Excommunication and Ecclesiastical Censures it cannot be deemed a Spiritual or Ecclesiastical Court.

It therefore follows that it is a CIVIL LAW COURT. This Idea will not only point out to us what ought to be the Rules or Practice of this Court; but from this alone can its present method of administration be accounted for.

No Common Law Court has a power of Substitution; No Law of the Province establishes the Court of the County Judges of Probates, Though many Laws recognize them as Constituted. This power of Substitution or Delegation is Incidental to every Civil Law Judge, and this Incidental Right is specially mentioned in the Charter by the words all that is necessary thereto.

The Wisdom therefore of Idea, understanding the
said Grant of a Civil Law Jurisdiction, Delegated or Substituted Judges of Probates in the several Counties who are thereby by Inferior Civil Law Courts for Distinct Peculiars, and substitutes by a Delegation of Power to Judge in the first Instance from whom lies an appeal to the Governor with the Council or Assistants as the Superior Court of the Province for such matters.

All Civil Law Courts in England (whether they be called Spiritual or merely Civil) are controllable by the King's Bench; but the State and Relation of these Delegates of the Supreme Power in the Province exempt them from receiving Prohibitions and Mandamus from the Common Law Superior Court.

An appeal to his Majesty in Council does, in this Case as in all others specified by the Charter, lye from their Decrees, and there alone the Grievance can be redressed. But in the mean while in all such Cases wherein an Inhibition or Mandamus would issue in England there seems to be by the present indeterminate method of Practice of this Superior Civil Law Court, a defect of Justice. And yet the Proper and constitutional Remedy does by Charter lye within their Jurisdiction.

The Provision made by the Laws of this Province respecting Insolvent Estates and other matters which impower the Judge of Probate to Execute these matters—— These matters being the Subject matter of Chancery and Appeal lying to the Governor with the Council or Assistants—— The Governor with the Council or Assistants Acts in such Case as a Civil Law Court Remedial or a Court of Chancery.

This Court Therefore being a Civil Law Court having Jurisdiction in those matters wherein the Spiritual or Ecclesiastical Courts and the Court of Chancery in England exercise Jurisdiction, The Civil Law so far as it hath been adopted or recognized as authority in either the Ecclesiastical Courts or the Court of Chancery and so far as it hath been establisht by Law in England ought to be the Law and Rules of this Court, so far as the Circumstances and
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and Laws of this Province will admit of such Reception.

The Civil Law is the Basis of the Practice of the Ecclesiastical Courts in England, but they have admitted also of some of the Papal and other Decretals, the Canons, &c: and have also incorporated therewith Acts of Parliament and Resolutions of Common Law Courts by which they have been controuled. Their is the Rule of Practice in that Court in England. And therefore so far as this Superior Civil Law Court acts in matters wherein that Court exercises Jurisdiction it may receive said Rule as the rule of its Practice; Though the Civil Law alone should still be the Basis of its Practice so far as the Circumstances and Laws of the Province will admit.

In the same Manner where the Objects or Matters are matters cognizable by Chancery and come under the Jurisdiction of this Court; the Civil Law with such alterations and additions as has been made in that Case by the Common and Statute Law of England should, so far forth as said Law extends bither or is received as the Common Law of the Country, be the Basis of the Rules and Practice of the Civil Law Court; as Chancery is itself in great measure in its proceedings, Examination of Evidence, Hearings and Determinations, a Civil Law Court and regulated by the Forms and the Rules of such.

This Point being precisely Determined, the Rules and Laws of these Courts are Fixed and Known, Things taken up by the Wisdom of the Courts and Established by the Experience of Ages.

There is one matter further which deserves very serious Consideration as to this Court of Governor with the Council or Assistants, the considering of which in this Light will relieve it of very great difficulties and embarrassment — It is concerning a matter not subject to its Jurisdiction by Charter but subjected to it by a Law of this Province.

By an Act of this Province, Confirmed by their Majesty’s William and Mary Aug. 22, 1695, “all Controversies concerning Marriage and Divorce are to be heard and Determined
Judges of Probate.

termined in a Court of Civil Law, in which Courts Questions of Divorce are Determinable so far forth as Marriage by the Law of the Province is esteemed a Civil Contract, so far may it be Determined in said Court.

Divorce in the genuine and original Sense of that Word was Dissolution Vinculi Matrimonii. It supposed the Existence and real Validity of the Marriage, and from thence Determined the Contract and absolved the Parties from the Civil Covenant. In this Sense of the Word the Civil Law Courts used to Divorce, and rescind this Kind of Contract as they did others, either for Fraud and gross Circumvention in entering into the Contract or for Essential Contraventions Subsequent to it.

When the See of Rome took this Power out of the hands of these Lay Courts, It gave to the Spiritual Court Power only to Judge whether the Marriage was originally Valid according to Canon Law, and if not, to pass Sentence of Nullity, as void ab Initio: And also for certain Causes (when the Person were actually under the Tyes of Matrimony) to order the Parties to live Separate, till both parties should agree to come together again as before, and improperly called these, which were Controversies of Marriage, Sentences of Divorce, Whereas the real Power of Divorce a Vinculo the Pope reserved in his own hands.

And thus Matters continued to the Reformation, when Henry the 8th, Vindicating to himself the Legal Power of the Supremacy, The Power of the See of Rome being by act of Parliament abolished in England, Henry referred this Power to Parliament, and there alone it rests in England. If the Law of this Province Vefts this Power in the Governor and Council as a Civil Law Court in the Case of a Civil Contract, and this Law be confirmed, The Case of Divorces in this Province are freed of all Difficulty. If not, The Doubt then remains whether this Power lies with the Legislature of this Province or only with the Parliament of Great Brittain. I have said in the Case of a Civil Contract, because a Doubt may arise whether if the Parties be Married by a Minister ordained by a Bishop
Appendix III.

of the Church of England or Ireland, whether it be a Civil Contract or not.

The Committee having reported upon the matters aforesaid — The following Orders were made thereon viz.—

Whereas in and by the Royal Charter granted to this Province by King William and Queen Mary it is established and ordained that the Governor for the time being, with the Council or Assistants, may do, execute or perform all that is necessary for the Probate of Wills and granting of Administrations for, touching or concerning any Interest or Estate which any Person or Persons shall have within said Province; and whereas the Laws of this Province have made provision to Appeals from the Decrees and other Proceedings of the Judges of Probate, to the Governor and Council — To the end therefore that all proceedings had in consequence of any such appeals and other matters transacted by the Governor with the Council or Assistants as the Supreme Court of Probate, may be kept separate and apart from their Transactions relative to matters of any other Nature or kind.

Ordered, that there be a Register appointed for this Court, to enter all Determinations and Proceedings therein (whether upon Appeals or otherwise) relating to Probate of Wills, granting Administrations or Guardianships and Settlements of Estates, in a Book to be provided for that purpose only; who shall give out attested Copies of all such Determinations and Proceedings, as occasion may require, and shall be Sworn for the faithful Discharge of his Trust.

Ordered likewise, that there be a Seal provided and appropriated to the use of this Court. Also

Resolved, that the Supreme Court of Probate be statedly held twice in each year, for transacting the Affairs cognizable therein — Viz.: on the Second Wednesday in the May Session of the General Court, and on the Second Wednesday of the Session of the same Court, next following the first day of November annually.

Upon a Question being moved relating to Appeals from the Judges of Probate —

Resolved
Judges of Probate.

Resolved by this Court, that no Judges of Probate ought to admit of Appeals, unless the same be claimed, Bond given, and Reasons of Appeal filed, in Time and manner as the Law directs; and that upon the Appellants failing to comply with the Directions of the Law in any or either of those Particulars, such Judges ought to carry their respective Orders and Decrees (from which such Appeal was or shall be claimed) into execution.

His Excellency having observed that there still remained to be considered these two Points namely (1st.) What Rules or orders are to be observed by the Court in its Judicial Capacity, (2nd.) In what method the exercise of its Jurisdiction may be carried into Execution,—Said matters were referred to the Same Committee as before, to consider and report thereon.
APPENDIX IV.

Quincy on the Impeachment of Public Officers.*

Messieurs Edes & Gill,

Please to insert the following.

"If to differ ever hereafter with an upstart Minister, is to be construed as a Crimen laesae Majestatis; if the Giant Prerogative is to be let loose, and stalk about, to create unusual Terrors, and inflict unpractised Punishments; if the fiercest Thunderbolts of Jupiter are to be launched by a low Miscreant against the slightest Offence, and even against Innocence itself; if the favourite Motto of the North, the Nemo me impune lacesit, is to be adopted as the future rule of Government in our once happy Land, we may then boast as much as we please of our invaluable Liberties, purchased with the Blood of our heroic Ancestors; but let us watch our narrowly, lest, before we are aware, they should depend upon too slight a Thread."

READER! Make thine own Comment — Permit me also to make my own Application. If the preceding Quotation excite Sentiments in thy Mind, different from those Sentiments which affect my Breast, I will not pluck out thine Eyes, or tear out thy Heart. My Creed will not condemn thee, neither will thy Faith obtain my Salvation. Theoretic Opinions are of but little Consequence to Mankind: It is the practical Deportment which is of Importance to the Community. For let a Man’s Thoughts in Religion and Politicks, be what they may, they are of inconsiderable Moment to his Fellow-men: but when once the Principles of a Man prompt

Published in the Boston Gazette, Jan. 4, 1768.
prompt him to prostitute his Office, or neglect the sacred Duties of his Station, the State has an undoubted Right to demand the Infliction of due Punishment, and it is incumbent upon every Individual of Society to forward a rigorous Execution of Justice. And when it happens, that any one Man has obtained, by a general Amassment of Power, such an unlimited Sway, in the State, as to be able, with Impunity, to condemn the Innocent as a Judge, and destroy the Constitution as a Statesman, deplorable indeed is the Fate of that Nation. But there is Hope, that the Case is not desperate, unless this rapacious Grasper of Sovereignty, elated with a Plentitude of Power, has had the Effrontery to make an open Avowal of his Designs, and Hardines sufficient to proclaim his Resolution to fulfill their Accomplishment. When such is the Object, such the Determination, such the Boldness of only one single Tyrant, irremediable, indeed, in all human Probability, is the Malady of the Common-wealth. For when despotic Views of this complexion are form'd and executed, 'tis Demonstration, that the Minds of the People are sunk in Submission; and should some dauntless Champion of the Cause of Freedom, providentially arise for their Defence, they would fly, like a timid Herd, and leave the virtuous Hero to be sacrific'd as a Victim. Never indeed was there a Wolf of the State, who did not think the People were but Sheep;—Strange Infatuation of Mankind! They bow the Knee to the Image, they themselves have form'd, and tremble before the Bug-bear of their own Creation.—Strip yon gorgeous Monarch of his Regalia, take from that despotic Tyrant, the Powers with which a despised Rabble have invested him;—the one sinks, a weak, pusillanimous Mortal, the other hides, a wretched, contemptible and execrated Monster.

It is almost incredible, that one, who had enjoy'd the Felicity of living under a British Government, should be endued with so intractable a "Lust of Power" as to wish the Subversion of it's Constitution.—It is equally incredible, that any Man, who knew the characteristic Bravery of Free-men, should dare make the Attempt. — Quid non mortalia Pectora
Appendix IV.

Pectora cogis Imperii sacra Fames? An exorbitant Thirst of Dominion, united with a desparate Mind, will do Wonders. Restles Ambition will be unwearied in the Race for the Prize of Power; an intrepid Spirit will, at all Hazards, win the Palm. With a With to Command, and Ability to Execute, Conquest is inevitable. — The Thirst of Rule renders the Plan of Empire obvious to the Aspirer; a Determination to accomplish, facilitates the Progress of Attainment. — Happy for Americans, their wife and venerable Ancestors, conscious of the predominant Vices of Mankind, have been eminently careful in guarding every Avenue, where it was probable, the ambitious and intrepid Enemy would labour to enter, by Stratagem and Force, in order to destroy that noble Fabrick, the complicated Work of Heroes, Saints and Ages, the British Constitution.

A short Attention to the following Extracts will abundantly convince every intelligent Mind, that, while the first Principles of our Constitution, the Fundamentals of all our Liberties, are adher’d to, no Subject, however great and powerful, is beyond the Reach of a strict Examination into his Conduét, or out of Danger of a Scourge for his Crimes.

"A Peer of the Realm may be Impeached in Parliament by Articles exhibited at the Suit of the King, by the Attorney General, as against the Earl of Bristol. Rush. 249.

By Articles exhibited by another Peer. Rush. 254.

So the Commons may by Parol, charge a Peer before the King and Lords. Seld. Jud. Parl. 24. (3 Vol. 2. p. 1596. 1598, 9.)


So before the Lords at a Conference. Seld. Jud. Parl. 30, 31, 32. (3 Vol. 2. p. 1598, 1599.)

The Right of Impeachment by the Commons was allowed by the Lords, 20 June 1701.

In the Proceedings upon an Impeachment, by the Commons, a Member stands with others at the Bar of the Lords, there, in the Name of all the Commons of England, impeaches such an one, and acquaints the House,
Impeachment of Public Officers.

that the Commons in due Time will exhibit Articles against him, and maintain them. Lords Journ. 1. 15. Ap. 1751, 1701.

Though the Commons impeach only for a particular Grievance, they may afterwards exhibit other Articles against him. Seld. Jud. Parl. 21. (3 Vol. 2. p. 1595.)

And the Delivery of such Articles is not necessary till the Party appears. Seld. Jud. Parl. 23. (3 Vol. 2. p. 1596.)

If Articles are not exhibited against the Lords impeached, the Lords, by Message, remind the Commons of it. Lords Journ. 5 May 1701. 15 May 1701. 4 June 1701.

But the Commons are Judges of the proper Time for exhibiting them. 31 May 1701. Yet the Lords claimed a Power to limit the Time. 4 June 1701.

Articles of impeachment need not pursue the strict Forms of Law. Seld. Jud. Parl. 22, 27. (3 Vol. 2. p. 1595, 7.)

Where an Impeachment is for a capital Offence, he shall be committed to Custody. Seld. Jud. Parl. 97. (3 Vol. 2. p. 1624.)

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And when an Impeachment is for High Treason, generally, without special Matter, it is usually omitted. It was omitted in the Case of Ld. Clarendon, though the Commons complained of it. Life of Clar. 251 & 302.

After Answer by a Lord impeached, a Copy is made, and sent to the Commons. Lords Journ. 14. 24.

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And may consider whether they will reply or not. Seld. Jud. Parl. 199. (3 Vol. 2. p. 1628.)

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The Earl of Oxford for exercising incompatible Offices. 8 May 1701.
So Lord Halifax. 9 June 1701.
The Spencers, Father and Son, were Impeached, for that they prevented the great Men of the Realm from giving their Counsel to the King, except in their Presence. 4 Inst. 53.
That they put good Magistrates out of Office, and advanced bad. 4 Inst. 53.
Lord Finch was impeached for threatening the other Judges to subscribe to his Opinion. Art. 4. 5. 6. Vide Rush. Part. 3. Vol. 1. 137.

Is the Sword of Justice become pointless, that the Wicked go unpunish’d? Why is the Sabre of the Law sheathed, when the exhorbitant Crimes of the peerless Man demand the arm of the Executioner? — Woe unto the Land, when the Greatness of the Criminal shall dismay his Accusers, and his Authority shall make the righteous Man to tremble; when the enormous Power of Guilt shall exalt itself above the Judgment-Seat, and bid Defiance to the Tribunal of Justice!

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2. To my son S. and his heirs forever, provided that my said son shall maintain myself and his mother during our lives with sufficient and convenient maintenance. Also whereas it is expressed that my son shall have this my living to him and his forever, my will and meaning is, and I do hereby appoint my grandson R., son of said S., to be the next immediate heir unto this my living after his father, to enjoy the same to him and his heirs forever. And, in case that said R. do die without heir, it shall then fall to the next eldest of my grandsons surviving, and so in like case of mortality one from another to the next eldest of my grandsons surviving. Held, that S. took an estate in fee-fimple. Etwell v. Pierpont, 42.

3. To my three sons, T., S., and J., to be equally divided among them in three equal shares or proportions after my debts, legacies, and funeral expenses are paid; and if either of my sons die without heirs lawfully begotten in wedlock, I will their share or proportion to the surviving sons or son and their heirs forever. Held, that the brothers took an equal tenancy in common in fee in the real estate, determinable on either dying without issue in the life of some other son, and an executory devise over of such deceased's share to the survivor or survivors. Banister v. Henderson, 119.


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