Henry M Shaw

A DIGEST

OF THE

ROAD-LAW OF THE STATE

OF SOUTH CAROLINA,

WITH

EXPLANATORY NOTES AND REFERENCES TO JUDICIAL DECISIONS.

PREPARED AT THE REQUEST

OF THE

STATE AGRICULTURAL SOCIETY.

BY JOSIAH J. EVANS,
ONE OF THE ASSOCIATE JUDGES OF THE STATE.

COLUMBIA, S. C.
A. S. JOHNSTON, PRINTER TO THE SENATE.

1850.

TO HIS EXCELLENCY W. B. SEABROOK.

Sir :—I herewith submit to your consideration, a digest of the Road-Law of the State, which I undertook to make at your request as President of the Agricultural Society. The plan pursued has been to copy, under proper heads and sections, all the various clauses of Acts of the Legislature, believed to be of force, which relate to the subject of roads and the powers and duties of the Commissioners of Roads. To these I have added, by notes, the decisions of our Courts, and such explanations as the subject seemed to require.—There has been much and very confused legislation on these subjects. So much that I do not hope I have been able to make every thing plain. I have omitted nothing which I supposed was still the law, and I flatter myself that the labor of determining what the law is, will be much lessened by what I have done. I have added a short compendium of the law on the subject of private ways, a subject becoming every day of increased interest to the people, and in general very little understood.

Your Excellency's obedient servant,

JOSIAH J. EVANS.

9th October, 1850.

OF WAYS OR ROADS.

Road, what is.

SEC. 1. A road is an open way or passage—ground appropriated for travel.

A road is an easement.

SEC. 2. A road existing over the land of another is a mere easement; and, therefore, if the road be discontinued, or the right in any way becomes extinct, the owner of the land is entitled to the soil over which the road passed, discharged from the easement. So, also, if a road be a dividing line between two proprietors, each is the owner of the soil on his side to the middle of the road. *Witter* v. *Harvey*, 1 McC. 67.

Roads are public or private.

SEC. 3. Roads or ways are of two kinds—public and private. All persons have a right to use a public way, but only particular individuals have a right to use a private way.

OF PUBLIC ROADS.

Path and road the same.

SEC. 4. In the early Acts of the Legislature, there is some confusion arising from the use of terms, not the most appropriate to convey the idea intended, such as *highways*, *paths*, *broad paths* and *private paths*. These are all manifestly used as descriptive of public ways, although private paths would seem to indicate what we now understand to be a private way. I find in several of the old Acts: see 9 Stat. p. 2, 18, 146, the word *path* used as synonymous with *road*. By the Act of 1703 (9 Stat. 3,) a common road or highway is directed to be laid off from the *broad path* on the north side of Ashley river, and another *common road or path* is ordered to be laid off from the plantation of Thomas Rose to Willtown.

Highways, what are.

Broad paths, what are.

From a careful examination of these old acts, I think it will appear that highways mean the larger roads, which, in general, are directed to be laid off of a particular width, and lead to market towns; and that broad paths are such other roads as were laid out and kept in repair at the equal charge of all the inhabitants residing within certain limits. It would be more difficult to determine what is meant by *private paths*,

Private paths, what, and how laid out, and kept in repair.

but for the legislative interpretation given by the act of 1741, (9 Stat. 127.) The 5th section recites that by a former act "high roads and private paths are so blended together as if both were designed to be kept in repair by the equal labor of the several persons inhabiting the said parishes respectively, which, it is conceived, was not the intention of the said act, nor ought to be so interpreted or understood; therefore, for removing doubts concerning the same, and to the intent that private paths may be made and kept in repair at the just and proportional expense of the several persons concerned and interested therein, and at whose application such private paths are, or shall be, hereafter laid out, Be it further enacted, That all roads laid out, or to be laid out, made, or to be made, at the *instance* or by the *application of particular persons*, are hereby declared to be private paths; and shall be made and kept in repair by the proportionable *labor and expense of such person or persons as shall apply for and shall use the same in common with that neighbourhood, and by no other person whatsoever;* which working upon such private paths shall not exempt or excuse the persons working thereon from working on the highways," &c. The 6th section authorizes the Commissioners to decide all disputes which might arise as to which shall be private paths, and which are highways. In the case of *Singelton* v. *Commissioners of Roads*, 2 N. & McC. 526, it was decided that these *private paths* did not mean individual roads or private ways. According to my understanding, they are not the great roads or paths leading to market towns or public places, but neighbourhood roads, connecting one highway with another, or leading to churches, mills, or villages. They are sometimes called thoroughfares. 1 McC. 404, *State* v. *Duncan*.

Private paths are not individual, but neighborhood roads.

20 years use, with occasional working on, evidence of public road by prescription.

Note 1. *State* v. *Sartor*. 2 Strob. 61. The road had been used for many years, more than twenty, by all persons who chose, and had been occasionally worked on by the neighbours. It led from one public road to another, but the Commissioners of the roads had never exercised any jurisdiction over it. It was decided that the public had a right to use the road by prescription, and the defendant was convicted for obstructing it.

2. In the case of the *State* v. *Mobley*, the road had been laid out by order of the County Court of Chester. It led from one public road to another—passing by a mill. It had not been under the control of the Commissioners, and there had been frequent changes made by those through whose lands it passed, but it was held to be a public road, which the defendant had no right to obstruct.

3. *Prince* v. *Welbourn*. 1 Rich. 58. This was an action for obstructing a private way. The evidence was that the plaintiff, and those under whom he claimed, had used the road for thirty years; but the road was common to all the surrounding country. Every one used it, and had the same right as the plaintiff. It was held

that such a use might establish the road as a public road, but not as a private way.

4. In the case of the *State* v. *Gregg*, it is intimated that the public character of a road depends on whether it is under the control of the Commissioners of roads. This is certainly a good test, and in general would be conclusive that the road was public. But in the more recent decisions, this has not been regarded as conclusive evidence that the road was not public. *State* v. *Sartor*. *State* v. *Mobley*, ante.

5. *Glover* v. *Simons*. 4 McC. 67. The Commissioners of Roads have authority over those roads in which there is a right in two or more persons, and which are called private paths; as contra-distinguished from public highways.

Private paths are public roads.

6. These authorities clearly establish that the private paths mentioned in the acts of 1721 and 1788 are not roads used by single individuals, but are a species of public road. They are public in their use and origin, but are called private because laid out for and kept in repair by a particular neighborhood or by those who use them. In relation to them, the Commissioners have the same power as to laying out, as in relation to other public roads. Whether the Commissioners have the power to designate who shall work on these private paths—whether a Commissioner would be liable to indictment for not keeping them in repair, or whether they are to be repaired by the voluntary contributions of labour by those who use them, are questions not decided.

Use makes a highway, which may be forfeited by non-user.

7. *Commissioners of Georgetown* v. *Taylor*. 2 Bay, 282. To constitute a street or a road it is necessary it should be laid off and used as such, for it is the use that makes it a highway, but non-user for twenty years or more will forfeit the right to a highway.

20 years use will authorize presumption.

State v. *Sartor*. 2 Strob. 61. From the use of a road for twenty years, it will be presumed it was laid out originally by competent authority.

One may dedicate his land to public use, and if accepted or used it becomes a highway or street.

8. *State* v. *Carver*. Columbia, May T. 1850. One Poole had laid out a piece of his land adjoining the village of Spartanburg, into lots, with streets, one of which the defendant obstructed. There was no proof of use by the public, or that the Town Council or the Commissioners had ever accepted the same. It was held that an individual may dedicate his land to the public use, as roads or streets, but to give them the character of public highways there must be use by the public, or some clear act of acceptance by those who are bound to repair. Otherwise, an individual, by his act of dedication, might impose a burden on the public without their consent.

Public roads of 3 kinds.

9. It would seem from these views, that roads are of three kinds: 1. Highways, which are laid out for the use of the public generally. 2. Private paths, laid out for, used, and kept in repair by particular persons. 3. Private ways, or individual roads. The two first are public, and the last entirely private. For an obstruction to a public road, the remedy is by indictment. For a private way by civil action.

Remedy for injury to each.

How Roads are Established, and of the powers of the Commissioners of Roads.

Originally all roads laid out by the Legislature.

Power granted to Commissioners to open and repair roads.

Must give notice of new road 3 months.

Cannot open new road if objected to.

How the Legislature to grant roads, and on what notice.

Sec. 5. In the early times of the Colony all roads were created by Act of the Legislature. I do not find any clear authority given to the Commissioners anterior to the acts of 1785 and the Act of 1788. The Act of 1721 gave the power to alter, but not to lay out an original road. By the 5th section of the act of 1825 (9 Stat. 559) the Commissioners of roads "are authorized and required to lay out, make and keep in repair, all such roads, bridges, causeways, and water courses, as have been, or shall hereafter be established by law, or as they shall judge necessary in their several parishes and districts; *provided, however*, that no Board of Commissioners of Roads shall hereafter have power to open any new road until they shall have given three months previous notice, by advertisement, in the settlement through which the intended road is to be opened; nor shall any new road be opened through the lands of any person who shall signify to the said Board of Commissioners any opposition, unless by permission of the Legislature; nor shall the Legislature hereafter grant any new road, unless upon the representation of the Board of Commissioners of the district, parish, or division, where the road is to be laid out, certifying the propriety and utility thereof, and also that three months notice had been given to the persons opposed thereto, to enable them to make counter representations to the same, if they see fit to do so."

Note 1. The powers granted by this Act are the same as by the former Act of 1785 (9 Stat. 293) and the Act of 1788, except that the words used are more general. The words of the Act of 1788 (9 Stat. 309, sec. 5) are: "lay out, make, and keep in repair, all such *high roads, private paths, bridges, causeways, and water courses* as have been established by law, or they shall judge necessary." The proviso is copied from the Act of 1817, 9 Stat. 438.

Commissioners may make slight alterations without consent or notice.

2 *Maddox* v. *Ware*. 2 Bailey, 314. The Commissioners, under the Act of 1825, have power to make slight alterations in the direction of an old road, for the bona fide purpose of avoiding obstacles, and remedying defects, without the consent of the owner of the land or giving the notice required by the Act.

May build bridges and alter the roads to them.

Under the authority to make bridges, the Commissioners are not obliged to make a bridge at the precise spot where the road crosses the water course, but may build or rebuild a bridge at the nearest suitable point, and may alter the road so as to afford access to the bridge by the nearest and best way.

May make alterations without notice.

3. *Commissioners of Roads* v. *Murray*. 1 Rich. 335. The Commissioners have a right to make alterations in a road without giving notice.

Alterations must be by the

Where a single Commissioner undertook to make an alteration in

a road, and summoned the hands to do it, it was held he had no right, and they were not bound to obey him, because a single Commissioner has no such power—it belongs to the Board. Board, and not by single Commissioner.

4. *State* v. *Commissioners of Roads.* 4 McC. 5. The Commissioners have power to alter or change a road for a short distance, particularly when the alteration is made at the request of him over whose land the road runs, and where it is productive of no great in convenience to the public. May make slight alterations.

5. *Capers* v. *Wilson.* 3 McC. 170. The prohibition which restrains the opening of roads through the land of any person, without his consent, extends to every description of roads. The restraints on power of Com'sioners to open new roads, extend to all roads.

6. When the Commissioners have opened a new road and shut up the old one, they have not the power to discontinue the new way, and re-open the old one. *Idem.* But I suppose they may, under the act of 1830, (9 Stat. 587) discontinue the new road, and re-open the old one as a new road, by pursuing the act of 1825. When Com'sioners have made a new road and discontinued the old, they cannot abandon the old and re-establish the new.

7. *Commissioners* v. *Murray.* 1 Rich. 335. The provisions of the Act of 1825 requiring three months notice to be given before opening a *new road*, cannot be dispensed with by obtaining the consent of the owner of the land, through which the road is to pass. But when the road has been opened, the presumption is that all legal prerequisites have been complied with; but this presumption may be rebutted by proof.

8. The fact that notice was given may be proved by any competent evidence. It is not required to be proved by the record of the order, or a copy of the notice. (*Idem.*) Notice, how proved.

Sec. 6. All public roads must be laid out by some competent authority; but there are many roads now existing, and especially those which come under the denomination of private paths, which cannot be traced in their origin to any act of the Legislature, or any order of the County Court (which during its existence had the control and supervision of the roads) or to any authority derived from the Commissioners of Roads. In such cases we must, as in other matters of antiquity, resort to legal presumptions to supply the evidence; and accordingly in the case of the *State* v. *Sartor*, and in other cases, it has been decided that where a road has been used and treated as a public road, and worked on as such, for twenty years and more, no other evidence of its origin need be given. The law will presume, from such use and acquiescence, that it had its origin in some legal authority.—*The State* v. *Sartor*, *ante.* Public road may be established by presumptive use.

Sec. 7. From the infancy of our colonial history the public roads have been under the control of certain persons styled Commissioners of Roads, except in those parts of the State where County Courts existed for a time. The earliest general law on the subject is the Act of 1721 (9 Stat. 49.) By that act Commissioners were appointed for such parts of the Commissioners formerly appointed by the Legislature.

State as were then settled; and as the settlements extended new road districts were laid out, and Commissioners appointed. The mode of appointment varied. In general, they were appointed by special Acts of the Legislature; but from 1783 to 1788 they were elected by the Freeholders. But by the Act of 1788 (9 Stat. 308) the power to fill up vacancies was given to a majority of each Board. From that time, with occasional alterations in special cases, by Act of the Legislature, this continued to be the law until the year 1843. By the 14th clause of the Road Act of that year, p. 269, it was enacted "that the Commissioners of Roads and Cuts of the several parishes and districts, shall hereafter be appointed by joint resolution of both branches of the Legislature, in the same manner as Commissioners of Free Schools now are. The term of office of the said Commissioners of Roads shall be the same as now required by law. They shall be liable to perform the same duties, and be subject to the same penalties, as are now prescribed by law; and that in case of the death of any Commissioner, or removal from the parish or district, or refusal to serve, the several and respective Boards of Commissioners shall appoint a Commissioner to fill such vacancy, who shall serve the unexpired term. The Commissioners now in office to continue in office until the first day of January, 1845; provided, that nothing herein contained shall be considered as applying to the Commissioners of Cross Roads of Charleston Neck."

Elected by people.

Empowered to fill vacancies.

By Act 1843, appointed by joint resolution.

Note 1. Before the passage of this act, the law was that every Commissioner, when appointed, was obliged to serve for three years, but the real tenure of the office was during pleasure. I presume, however, that the Legislature in saying the term of office shall be the same as heretofore, had reference to the three years for which the service was compulsory, and that the meaning was that each Commissioner, when appointed, should serve for that term, at the expiration of which, new appointments should be made. And such, I understand, has been the practice under the act. The first appointment was made in 1844, which has been continued every third year.

By the Act of 1835, (9 Stat. 604) whenever any Commissioner of the Roads in any of the Boards of this State shall be absent from his district or parish, so that the public roads in his division are neglected or badly repaired, it shall be the duty of the Chairman of the Board, where such neglect occurs, to appoint some fit and proper person as overseer of said division, and to cause the roads of such absent person to be put in proper repair.

If a Commissioner is absent the chairman to appoint an overseer over his roads.

Sec. 8. The powers, duties and liabilities of the Commissioners will be found in general to be embraced in the Act of 1825, which, as its title imports, was intended to embrace all

the law on the subject into one Act. The power to lay out, and the duty to repair the roads, bridges, causeways and water courses, given and required by the 5th section of that Act, has been already stated. The right of the Legislature to lay out roads through the lands of individuals, or to delegate that power to the Commissioners of roads or streets, has been recognized by a great many adjudications. All agree that private property may be taken for public use. This is a portion of the sovereign power, called the eminent domain, which is essential to every government. By the Constitution of the United States, it is provided that just compensation in such cases shall be made, and that is the law of many of the States. But except in one or two instances, I do not recollect that the Legislature has ever made compensation for land taken for public roads, or timber or earth used for repairing them. The instances which have occurred are a recognition of the duty of the Legislature to make compensation in certain cases, and there is certainly no good reason why compensation should not be made where valuable land or timber is appropriated to the public use, or the owner subjected to great inconvenience and expense in keeping up lane-fences in consequence of the opening of new roads through his land. In early times the roads were mostly laid out through the public domain, or when the land was of little value, and that was probably the reason why compensation was not made. But lands have now become valuable, and the same reason no longer exists for withholding compensation. Be this as it may, there is no doubt that according to all our cases the public right to lay out roads through any man's land, without his consent, is clearly established. The only difference of opinion is, whether the public are not bound to make compensation. If the right exists, there is no legal process by which it can be enforced. It rests, and must rest, in the justice of the Legislature, to grant or withhold it. See *Lindsay* v. *Commissioners*, 2 Bay, 38; *Stark* v. *McGowen*, 1 N. & McC. 387; *State* v. *Dawson*, Riley's Cases, 103; *Patrick* v. *Commissioners*, 4 McC. 541.

Legislature has power to lay out roads, and to delegate the power to Commissioners of roads.

Compensation.

Sec. 9. Each Board of Commissioners of Roads shall meet to form a Board for their respective parishes, districts and divisions, at least twice in each year, on such *days* and at such places as they have heretofore been directed by law to meet, and that a majority of each Board shall be necessary to constitute a legal meeting. (2 sec. Act 1825, 9 Stat. 558.)

Commissioners to meet twice a year.

Place of meeting.

Majority to form quorum.

Note 1. By the 30th section of the same Act, twelve members of the Board of Commissioners, for St. Paul's Parish, shall form a quorum to transact business. 9 Stat. 566. And by the 20th section of the Act of 1845, p. 349, twelve members of the general Board of St. John's Colleton, shall form a quorum.

Exception as to St. Paul's.

St. John's Colleton.

Each board to appoint time and place of meeting.

SEC. 10. Each Board, or a majority of such Board, shall have power to change the time and place of their meeting, to such time and place as any Board, or a majority of any Board, may appoint. Act 1825, 9 Stat. 558.

NOTE 1. Prior to this Act the times and places of meeting were regulated by various Acts of the Legislature. All of which are omitted, as each Board may now appoint its own time and place.

Fine on Commissioner for non-attendance.

SEC. 11. Whenever the Commissioners of the Roads, in any parish or district, shall fail to meet and form a Board as by law directed, the several persons being Commissioners, who shall fail to attend, for the purpose of forming such board, shall be fined twelve dollars; and if any person being a Commissioner of the Roads, shall neglect to appear at any time when the Board to which he belongs is required to meet, and such Board shall have formed a meeting, such absent Commissioner shall be fined in the sum of six dollars. Provided, nevertheless, that nothing in this Act contained shall be construed to impose any fine on any person who may have a reasonable excuse or justification, to be approved of by the Board of Commissioners. 4 sec. of Act 1825, 9 Stat. 558.

Fine for refusal to act, and neglect of duty.

SEC. 12. If any person who is now acting as a Commissioner of the Roads, or shall hereafter be elected or appointed a Commissioner of the Roads, shall refuse or fail to act, without a sufficient excuse, after having received notice of such election or appointment, or shall neglect his duty after acting, he shall forfeit and pay, for the use of the Roads, the sum of fifty dollars, to be recovered by indictment at law. 8 sec. Act 1825, 9 Stat. 559.

NOTE 1. *State* v. *Chappell*, 2 Hill, 391. Every road or bridge is the subject of a particular duty—a neglect of which subjects the Commissioner to a particular fine, and however long a road or bridge may be out of repair, it is but one offence. But if after indictment, the road or bridge is still neglected, the Commissioner may be indicted again. Where no particular penalty is provided, it is safest to conform to the punishment imposed by the 8th section of the Act of 1825.

Board dissolved if it does not meet in a year.

Penalty on Com'sioners.

SEC. 13. If the Commissioners of the Roads, for any district, parish or division, shall not form a Board to transact business in any one year, the said Board shall be considered as dissolved, and each member of the said Board, who shall fail to attend the meeting of the said Board, for the space of one year, when the Board becomes dissolved as aforesaid, shall be considered as refusing to act, and be subject to the penalty imposed by the 8th section of this Act, without he has a sufficient excuse for such absence. And in case of the

dissolution of any Board, then fit and proper persons shall be nominated and appointed by the members of the Legislature, for the time being, in such district or parish, as the case may be, which persons, when appointed, shall act as Commissioners of the Roads, and shall have the same power until the next meeting of the Legislature, and shall be subject to the same penalties, as are prescribed by the 8th section of this Act, in case he or they shall refuse to perform all the duties required of Commissioners of high Roads. 28 Sec. Act 1825, 9 Stat. 566.

New board to be appointed by the members of Legislature.

Sec. 14. All the male inhabitants of this State from 16 to 50 years of age, are declared liable to work on the public roads, bridges and causeways. That the Commissioners of the roads in the several parishes and districts in this State shall have power to direct and prescribe how far and on what roads the persons and slaves within their respective districts shall be compelled to work. Provided, nevertheless, that no person, or his or her or their slaves, shall be compelled to work on any road, unless some part of the said road shall be or pass within ten miles from his, her, or their place of residence, or within ten miles of the plantation whereon such slaves are employed the greater part of the year. 9 sec. Act 1825, 9 Stat. 559.

Who liable to work on roads.

Within what distance to work.

Note 1. The limitation as to distance in this proviso was altered by the Act of 1827 (9 Stat. 576) so as to exempt all persons from working on any part of a road at a greater distance than ten miles. This was repealed by the 8th sec. of the Act of 1828, (9 Stat. 581.) but by the 20th section of the Road Act of 1841, the Act of 1827 was re-enacted, and the 8th section of the Act of 1828 was repealed. By the 24th section of the Road Act of 1843, p. 270, the same proviso is made as by the Act of 1827, with the addition that where there is no public road within ten miles, the public hands may be summoned to work beyond ten miles, or to commute at the rate of fifty cents per day.

By the 20th sec. of the Act of 1846, p. 371, it is enacted that the 20th sec. of the Act of 1841 be amended to read as follows: "that from and after the passage of this Act, no person or persons, or his or her or their slave or slaves, shall be compelled to work on any part of any road at a greater distance than ten miles from his, her, or their place of residence, or the plantation whereon such slave or slaves usually reside or are employed the greater part of the year; and that the said distance be measured by a direct line running from the residence of such person or persons, or the plantation whereon such slave or slaves usually reside or are employed, to any part of the road, which such person or persons, slave or slaves, may be called on to work.

How distance to be computed.

NOTE 1. In the case of the *Commissioners of Roads* v. *King*, tried before me at Beaufort, the road in a straight line was seven miles from the plantation, but the straight line was through an impassable morass. The nearest that could be travelled was fourteen miles. I held the defendant was liable. The rule prescribed by the Act was an arbitrary one, and must be literally construed.

2. If no part of any road be within ten miles, measured in a straight line, then I presume such a contingency is provided for by the Act of 1843. The persons thus situated may be called on to work beyond that distance, or to commute at the rate of fifty cents per day.

Who exempt from road duty.

SEC. 15. By the 10th sec. of the Act of 1825, (9 Stat. 560) the following persons, and *no others*, shall be exempted from all liability to work on roads and bridges, viz: All Ministers of the Gospel, Millers and Ferrymen. By the Act of 1829, 6 Stat. 381, the Superintendent of Public Works, Toll Collectors, and Toll Keepers on Canals, are exempt from working on the roads.

NOTE. 1. By the 14th clause of the Act of 1824 (9 Stat.) shepherds were exempt from militia, patrol, and road duty; and by a decision of the Court, in the case of *Harrington* v. *the Commissioners of Roads*, 2 McC. 400, the Clerk of the Court was held to be exempt; but these, and all other exemptions, prior to the Act of 1825, must be considered as taken away by the words of the Act, "the following persons and no others." See Cheves, 210.

Persons working on Wall's Cut not exempt.

2. *Jenkins* v. *Commissioners*. Cheves R. 109. Persons required by law to work on Wall's Cut are not exempt from ordinary road duty.

Or on Rail Road.

Luten v. *Commissioners*. Cheves, 95. Persons working on the Rail Road are not exempt.

Nor Post Masters.

3. *Campbell* v. *Commissioners of Roads*. Cheves, 210. Post Masters are not exempt.

Nor those who work on Cuts.

4. *Commissioners* v. *Murray*. 1 Rich. 335. It is no exemption from road duty that a man works on a Cut, unless exempted by law from working on one because he works on the other.

Commissioners to divide the roads among themselves.

SEC. 16. The several Boards of Commissioners of Roads throughout this State, shall, at the first meeting after the passing of this Act (where it has not already been done) divide their respective districts and parishes into as many road divisions as there may be Commissioners, and assign to each Commissioner one division, over which he shall have the superintendence, and each Commissioner shall be responsible for the road in the division which shall be assigned to him. And if, at any time, the road shall be in such order as may require the interference of the judiciary of the State, the said Commissioner shall be liable to be proceeded against in the same manner and subject to the same penalty as the several

Each responsible for roads in his division.

Boards are now liable for similar delinquences; (1) and that each Board of Commissioners of Roads are hereby authorized to declare what inhabitants are liable to work on any road or part of a road, subject, nevertheless, to the restriction of time and place as aforesaid; and that each Commissioner, in his respective division, is hereby authorized to call on all the inhabitants within the same, to make a return (on oath, if required) of all the male slaves belonging to them, or under their management or direction, from 16 to 50 years of age, and who reside in such parish or district for the most part of the year, to such person, at such place, and within such time, as he shall appoint; and the said Commissioner is hereby authorized to administer this oath. I, A. B. do swear or affirm, that the return made by me of the number of male slaves from 16 to 50 years of age, owned by me, or under my management or direction, in this road division, belonging to C. D. is true, to the best of my knowledge. 11 sec. Act 1825, 9 Stat. 560.

Board to declare who to work on each road.

Each Com'sioner to call for return of hands liable to work.

Oath to return.

Note 1. *Keckley* ads. *Commissioners.* 4 McC. 463. Although the Act of 1825 requires the Commissioners to parcel out the road, yet where this had not been done, and a person required to make a return to the whole board, he was held to be bound to do so.

A Commissioner is not separately liable to be indicted for not repairing his division of a public road, which the Commissioners had discontinued, but all the members of the Board may be indicted jointly, because the discontinuance was the act of the whole Board, and they had no such authority. This was before the Act of 1830, 9 Stat. 587, which gave the Commissioners the power to discontinue. See post. sec. 32. *State* v. *Broyles*, 1 Bail. 311.

Commissioner not liable if road discontinued by board.

2. *State* v. *Chappell.* 1 Hill, 391. Where the repair of a bridge requires greater labor than is at the disposal of one Commissioner, or where a bridge requires to be rebuilt, for which the ordinary labor under the control of the Commissioner is insufficient, the Commissioner of that division is not alone indictable, but the whole board.

Quere. In such case would not the Commissioner be liable unless he had given notice to the whole Board that the bridge required repair or rebuilding, that they might make an assessment or appropriation for that purpose, and would the Board be liable without such notice?

3. The only mode of punishing a Commissioner for neglect of duty is by indictment; he is not liable to a private person, by civil action, for an injury sustained by reason of a bridge or road being out of repair. See *Young* v. *Commissioners of Roads*, 2 N. & McC. 537, and *McKenzie* v. *Chovin*, 1 McMul. 222.

Commissioner punishable by indictment only, not liable to civil action.

4. *Keckley* ads. *Commissioners.* 4 McC. 463. If a parish line run through a plantation, leaving the dwelling and some negro houses in one parish, and the rest in another parish, the slaves are bound to do road duty in the parish in which the dwelling house is.

5. *Luten* v. *Commissioners of Roads.* Cheves, 95. Where slaves, hired by the month, had been employed the greater part of

the year, working on the Rail Road, they are liable to road duty, where they are so employed, and the hirer is accountable to the Commissioner. The road duty of hired slaves is due where they are employed the greater part of the year.

For default of return, party to be assessed.

SEC. 17. If any inhabitant shall neglect or refuse to make such return as aforesaid, (sec. 16) the Commissioners, or a majority of them, for said district, parish or division, in which such default shall be made, are hereby authorized to make an assessment on such defaulter, according to the best information they shall receive, of four dollars, for every such male slave so refused or neglected to be returned.

Fine barred by stat. limitations.

NOTE 1. *Commissioners of Roads* v. *Morris.* The fine must be sued for within the period fixed by the Statute of Limitations.—The Statute begins to run from the time of the default. 2 *Rich.* 320.

These principles, I presume, will apply in all cases where fines are sought to be recovered for any default in road duty.

Quere. Is the period of limitation four years or six months? I suppose the latter.

Commissioner to summon hands by two days notice.

SEC. 18. Each Commissioner, in his respective road division, is hereby authorized, whenever he shall think it expedient and necessary, to summon, by two day's previous notice, (1) all the male inhabitants within his division, liable to road duty, to be and appear at such time and place as the Board of Commissioners may have assigned for such male inhabitants to work on, except on the following emergencies, viz:—

Exception.

where a bridge may require to be repaired, a tree removed, and other obstructions in the road requiring immediate removal, in any of which cases, one day's notice only shall be necessary; and the work done at one day's notice shall be credited to the hands that work at one days notice, when the hands are called out generally to work on the road. And if any person or persons shall neglect to go, or to send their male slaves, when thereunto summoned by the Commissioner aforesaid, or by any person by the Commissioner to be appointed, every such person shall forfeit and pay, for the use of the roads, the sum of two dollars for himself, and one dollar per day for every male slave so neglected or refused to be sent.—Provided, that it shall be lawful for each Commissioner, in his division, to exempt the domestic slaves employed as waiting men and house servants by any persons, on such persons substituting, in the room of every such male slave so exempted, one able-bodied female slave, and making oath, if required, before the Commissioner, that they are not field slaves or other labourers, whom they desire to screen from the operation of this law. 13 *sec. Act* 1825, 9 *Stat.* 560, 561.

Penalty for not working.

May exempt domestic servants.

Notice must be personal.

NOTE. 1. *Keckley* v. *Commissioners of Roads.* The notice required by the Act of 1825, must prescribe the time and place, and the service must be personal. Advertising in the newspaper will not do.

Quere. Must it be in writing, or will verbal notice suffice?

Notice to appear before board.

2. *Commissioners* v. *Murray*, 1 *Rich.* 335. The defendant was warned to work on the road, and at the same time was notified, in case of default, to appear before the Board at a certain time and place to make his excuse. This was held to be sufficient notice.

Hands liable for duty, 12 days work.

3. The 7th sec. of the Act of 1788, from which this clause seems to have been copied, contains a proviso, that "no white person or slave shall be liable to work on any road, path, bridge or causeway, for more than twelve days in one year," which, I presume, is still the law. 9 Stat. 310. It was, probably, omitted in the Act of 1825, as that Act professes, by its letter, to include only such Acts as related to the powers and duties of the Commissioners.

Each Commissioner to appoint warners.

SEC. 19. Each Commissioner of Roads, in his respective road division, shall be authorized to appoint warners, whose duty it shall be to warn the inhabitants when they are to work on the roads, (1) and to summon any freeman who makes default in road duty, to summon the owner or person who may have the management of any slave or slaves who may make default in road duty, by two days notice, to appear at the next meeting of the Commissioners of Roads, in the district, parish, or division, in which he may be appointed a warner. And if any person shall refuse to act as warner, or neglect his duty after acting, he shall forfeit and pay a sum not exceeding twelve dollas; provided no person shall be compelled to act as warner more than one year in three. And it shall be the duty of the warner to attend the meeting of the Board of Commissioners of the district, parish, or division, in which he may be appointed, to prove that any defaulter was warned to work or to appear and make his excuse for any default. (1.) And each Commissioner of the Road is authorized to appoint such overseers in his division, on such roads or parts of roads, whilst the inhabitants are working on the same, as to him shall seem necessary; and the overseer or overseers so appointed are hereby empowered moderately to correct all such slave or slaves as shall refuse or be negligent of their work. And if any white person liable to road duty shall fail to be and appear at the time and place to which he shall be warned to work, or shall refuse or neglect to work, or to do his duty when in place, (2) the said overseer shall return the names of such white persons to the next meeting of the Board of Commissioners of the Roads, in the district, parish, or division, in which he acts as overseer; and the overseer is also required either to warn the defaulters himself, or to furnish the warner with the name or names of all defaulters, in order that they may be warned to

Their duty.

Penalty.

To attend meeting of board.

Overseers to be appointed.

Power and duty of overseer.

To report white persons who fail to attend or refuse to work.

To warn defaulters, or to give their names to warner.

Fine on those who neglect or refuse to work.

Penalty on overseer for not serving or neglect.

No person to serve as overseer more than 1 year in 3, except in certain parishes.

appear and make their excuse or excuses for their default, before the next Board of Commissioners of Roads for the district, parish, or division, in which such default was made; and the said Board are authorized to fine the said persons two dollars for the first default, and ten dollars if repeated. And if any person shall refuse to act as overseer, or shall neglect his duty as an overseer, not giving a sufficient reason for such refusal or neglect, every such person shall forfeit and pay a sum not exceeding twelve dollars; provided that no person shall be compelled to serve as an overseer more than one year in three, except in the Parishes of St. Johns Berkley, St. James Santee, St. Thomas and St. Dennis, St. Stephens. St. Pauls and St. Andrews. 14th sec. Act 1825. 9 Stat. 561.

Note. 1. This clause of the Act does not give to each Commissioner the power to appoint warners to summon the inhabitants to make return of hands liable to road duty. This defect was supplied by the Act of 1845. See sec. 41, post.

Fine for drunkenness.

2. By the 1st section of the Act of 1741, if any white person shall get drunk during the time they are working on the road, he shall forfeit the sum of five pounds, current money, &c. This is omitted in the General Road Laws of 1785, 1788, and 1825.

Commissioner to prescribe tools.

Penalty for not bringing tools.

Except where the person has no such tools.

Sec. 20. Each Commissioner is authorized to prescribe what tool or tools each hand shall furnish himself with, and if any freeman liable to work on any road, having been regularly warned, shall fail so to be equipped, he shall forfeit and pay the sum of fifty cents; and if the owner or owners of any slaves, after due notice for that purpose, shall fail to furnish them with such tools as may be required, he or she shall in like manner forfeit and pay for each tool which they may so fail to furnish, the sum of fifty cents. Provided, that in cases where it shall be shewn to the satisfaction of such Commissioner, that the person complained of was not in possession of the tool or tools required, no forfeiture shall be exacted, but any other suitable tool or tools shall be received in lieu thereof.—15 sec. Act 1825, 9 Stat. 562.

Comm'rs. may use materials to make and mend Roads.

Penalty for opposing Comm'rs.

Penalty for obstructing Roads.

Sec. 21. The Commissioners of the Roads, or either of them, according to their respective divisions, shall have full power to cut down and make use of any timber, earth, wood or stone, in or near the roads, bridges or causeways, for the purpose of making or repairing the same, as to them shall seem necessary; (1) and if any person or persons, by themselves, slaves or servants, shall, by any ways or means, hinder, forbid or oppose the said Commissioners of Roads, or either of them, their servants or workmen, from cutting down and making use of any timber, wood, stone or earth, in or near the said roads, bridges or causeways, for the purpose of making or

repairing the same, or in any manner stop up or obstruct the passages on the said roads, bridges or causeways, by gates, ditches, fences, or any other obstruction, (except where they are authorized by law to do so,) or shall hinder, forbid or threaten any traveller from travelling any public road, every person, for every such offence, shall forfeit the sum of fifty dollars, to be recovered by indictment at law.—16 sec. Act 1825, 9 Stat. 562.

Or forbidding use of them by travellers.

This clause is restrained and restricted by the 23d sec. of the Road Act of 1826, by which it is enacted that the 16 sec. of the Act of 1825 shall not be construed to extend to authorize the said Commissioners to cut down any timber or trees reserved by the owner in clearing his land, or planted for the purpose of shade and ornament, either in the fields, around the spring or about the dwelling house and appurtenances, nor the cutting of any rail timber, when other timber, adequate to the purpose, may be procured at or near the same place; or to take stone or earth from within the grounds of any person enclosed for cultivation, without the consent of the owner of the same.—9 Stat. 569, 570.

Comm'r. not to take shade and ornamental trees, nor rail timber, nor earth or stone from cultivated lands, without consent of owner.

Note 1. The right of the Legislature to take the land as well as the timber of any person to make and repair the public roads, has already been considered.—Ante, sec. 8.

2. *Eaves* v. *Terry*, 4 McC, 125. The Commissioners of Roads are authorized, under the Act of 1788, (the Act of 1721 and the Act of 1825 give the same power,) to cut down and use such native forest trees as are unappropriated to any particular use and nearest to the highwasy, for the purpose of making and repairing them, notwithstanding the trees are enclosed in a fence: Trees for ornament and use have always been exempt.

This case was decided on the law as it stood before the Act of 1826.

3. *Dawson's* case, before referred to, was decided since the Act of 1826. The Commissioner set the hands to sawing boards of pine timber, to repair the bridges on the road leading through the defendant's land. The defendant drove them away. The trees were 150 yards from the road, and there was plenty of oak between these trees and the road, but the Commissioner refused to use them, as unsuitable. The Circuit Judge charged the jury, that under the Act of 1825, the Commissioner had a right to use any timber adjacent to the road, for the purpose of repairing it—that the Act of 1826, as applied to this case, restricted this general power as to rail timber only. The questions submitted to the jury were, 1: Was the timber rail timber? 2, If so, could other and adequate timber be procured at or near the road? The jury found the defendant guilty, and a new trial was refused.

In that case, the power of the Legislature to lay out roads and to use timber and other materials to repair them is discussed.—Riley's Law Cases, 103.

4. *State* v. *Huffman*, 2 Rich. 617. The power to use timber, earth &c., is given by the clause above quoted to the *Commissioner*, but where earth and gravel had been taken from the same place before, for the repair of the road, it was held that it might be presumed that the place had been set apart by the Commissioner for that purpose, and therefore that the *overseer* might use it for the repair of the road, without the presence or express direction of the Commissioner, and that an indictment would lie for obstructing the overseer in the use of them, under the 16 sec. of the Act of 1825.

Fine for stopping up, altering or injuring road.

Sec. 22. If any person or persons shall at any time stop up, alter, or do any maner of damage by stopping of water or any otherwise, to any of the highroads, private paths, bridges or water courses, which have been or shall be laid out by the Commissioners, every such person so offending shall be summoned and required by the Commissioner of that part or precinct where the default was committed, forthwith, to amend, repair and clear the same, and in case of their refusal or neglect, shall be fined in any sum not exceeding five pounds, for each time the commissioner shall give such persons notice to amend, repair and clear the same, allowing three days between each notice, and on nonpayment to issue an immediate warrant of distress against the goods and chattels of the said defaulter, and after ten days public notice, to sell the same, for payment of the fine aforesaid, and the charges accruing thereon. Returning the overplus, if any, to the said defaulter. (1) sec. 13 of Act 1788. 9 Stat. 311, 312.

Note 1. This is omitted in the Act of 1825, but as that Act only repeals so much of former Acts as are inconsistent, I apprehend it is not repealed. The mode of enforcing payment of the fine by warrant of distress, is inconsistent with the subsequent legislation, which requires that the Commissioners shall bring an action to recover all fines exceeding twenty dollars. This, I presume, must now be done, but in all other respects the Act is of force.

Of Bridges, and Assessments to Build them.

Commissioners to contract to build bridges.

May levy assessments.

How bridge over dividing stream to be built.

Sec. 23. The Commissioners of Roads, within their respective parishes and districts, shall have full power, and are hereby authorized, to agree with any person or persons to undertake the building of any bridge or bridges they may think necessary, and to levy, as hereinafter directed, such sum or sums of money for defraying the charges of the same, by an assessment, to be made as herein also afterwards directed. And where any river or creek lies between two parishes or districts, and either of the parishes or districts shall desire a bridge to be built over such river or creek for the convenience

of the inhabitants, or to repair any bridge heretofore built, lying as aforesaid, the Commissioners of the Roads, or a majority of each Board, of both the said parishes or districts, are hereby authorized and required to meet and assess all the taxable inhabitants of each of the said parishes or districts, in proportion to the last general tax paid by said taxable inhabitants, with such sums of money as may be necessary to build or to repair any bridge lying as aforesaid. 17 sec. of Act 1825. 9 Stat. 562.

Each board to make assessments.

All assessments to be made by any Board of Commissioners of Roads in this State, for the building or repairing of any bridge, causeway, or road, shall be assessed on the amount of the last general tax paid by the inhabitants of the district or parish where the assessment becomes necessary to be made. Provided, however, that where there are more than one board of Commissioners of Roads in any district or parish, it shall be the duty of all such Boards of Commissioners as may exist in any district or parish, to meet on the first Monday in January, in every year, to form a General Board, at the Court House of the district, or in the parish, at such place as the Boards may agree on, for the purpose of making assessments, where necessary to be made, and reporting the state of funds of each Board, and applying any balances that may exist, to the order and direction of the said General Board. 18 sec. Act 1825, 9 Stat. 562, 563. See note (3.)

Assessments to be made on last general tax.

If more than one board, all to meet to make assessments.

To enable any General Board, where there is more than one Board, or only one Board, to make correct assessments, where assessments are necessary, it shall be the duty of the several Tax Collectors in the district or parish, to furnish, when required, said general or single Board of Commissioners of Roads with the amount of the last general tax paid by the taxable inhabitants of the district or parish where the assessment may be necessary to be made. And it shall be the duty of the Tax Collector or Collectors in the district or parish where the assessment may be made, when furnished with the amount assessed by any General Board, where there is more than on Board, or by any single Board, where there is only one Board, to proceed to collect the same in proportion to the general tax as aforesaid. And the Tax Collector or Collectors shall have the same power and authority to enforce the payment thereof, as is authorized by law for collecting the public tax. And the Tax Collector or Collectors shall collect such assessments, and pay the same over to the Clerk of the said General Board, where there is more than one, or to the Clerk of the Board where there is only one Board of Commissioners, at or before the time fixed by law for paying the general taxes into the treasury of the State; and in case of default, he shall be liable to the same pains and penalties as are provided by law for any similar default in collecting and

Tax Collector to furnish the amount of general tax.

Duty of Tax Collectors to collect assessments.

To have same power and subject to same penalties as in relation to general tax.

When to be furnished with amount.

paying over the public tax. Provided that the Tax Collector or Collectors shall be furnished the amount of such assessment at least three months before the time fixed by law for making returns of the public taxes. And the Tax Collector shall receive for his services the same per centage on any sum he may collect for any single or general Board of Commissioners of Roads, as is now allowed him by law for collecting the public taxes. 19 sec. of the Act 1825, 9 Stat. 563.

His compensation.

Commissioners may appoint their own agent.

To give bond.

Liable as Tax Collector.

NOTE 1. By the 28th section of the Act of 1827, 9 Stat. 576, the Boards of Commissioners of Roads mentioned in this clause are authorized, after receiving the returns from the Tax Collectors, and making the assessment, "by their own agent, if they choose to do so, to collect the assessment so made, which said collector shall be obliged to enter into bond for the faithful discharge of his duty, and, in case of default, shall be liable to the same pains and penalties as are now provided by law, in the case of a default on the part of a Tax Collector."

Offices of Secretary and Treasurer disunited.

2. The 19th sec. of the Act of 1825 requires the assessment when made to be paid over to the Clerk; but by a subsequent Act passed in 1831, 9 Stat. 593, it is enacted that the offices of Secretary and Treasurer shall in no case be united in the same person by any of the Boards of Commissioners of Roads in this State. So that I suppose since that time all assessments and fines are paid to the Treasurer.

Power of Tax Collectors.

3. As to the powers and liability of the Tax Collectors in relation to the road tax, these are defined by "an Act to define the duties of the several officers in the collection of supplies," &c., passed the 19th December, 1843, page 248. By that Act it is declared to be "the duty of the Tax Collectors in the several districts and parishes respectively, to collect all sums of money assessed by any of the Boards of Commissioners of the said districts and parishes, who are, or may hereafter be, authorized by law to assess and levy moneys, for the furtherance and execution of the purposes for which such Boards, respectively, have been or may hereafter be established and appointed; which sums of money, so assessed, shall be collected in the same manner, and the Tax Collectors, respectively, shall have the same power and authority to enforce payment thereof, and have a right, for that purpose, to use the same compulsory means and process as are authorized by law for the collection of the general tax; but no execution shall be issued by any Tax Collector against the person or property of any person non-resident in the district or parish wherein such assessment is made, until written notice of such assessment, and the amount thereof, shall have been given to such person, or his or her agent, by personal service of such notice on such person, or his or her agent, or by leaving the same at his or her place of residence; and if such person shall have no known residence or agent within the State, then such notice shall be posted at the door of the Court House of the district wherein such assessment has been made. *Provided always*, that it shall be the duty of the said Board of Commissioners, respectively, to furnish to the Tax

Execution not to issue against non-residents till after notice.

Notice to be given of the amount to be collected on

Collector a notice, in writing, of the assessment to be collected by him, specifying the amount to be paid by each person liable therefor, or the rate per centum of the last general tax which is to be collected by him. And the Tax Collector of the Parishes of St. Philip and St. Michael shall also be furnished by the several Boards of Commissioners of the Poor, Commissioners of Roads, and Commissioners of Cross Roads for Charleston Neck, with a list of all the persons liable to the payment of any assessment made by them, respectively, and the amounts respectively for which each person is liable. And the said Tax Collectors, respectively, shall receive as a compensation for collecting such assessment, the same per centage as is allowed by law for collecting the general tax. And they shall make return to the said Board of Commissioners, respectively, of their collection of any such assessment, and shall pay over the amount of money collected by them to the said Boards of Commissioners, respectively, within three months after the day on which notice of such assessment shall have been given to them, respectively, as aforesaid, by any of the said Boards of Commissioners; but when any such assessment shall be made between the first day of January and the first day of March, in any year, then such return may be made at any time before the first day of June, then next ensuing. And if any Tax Collector shall make default in collecting any such assessment, or in making return thereof, or in paying over the money collected to any Board of Commissioners, he shall be liable to the said Board of Commissioners, in the same manner, and to the same extent, and be subject to the same remedies, as he is by law liable to, for a similar default in the collection, return or payment of the general tax.

the pro rata on the general tax.

Tax Collector of St. Phillip and St. Michael to be furnished with assessments.

To make return by 1st Jan. or within 3 months after notice of assessment made after the 1st of March.

For non-payment liable as for general tax.

NOTE A. The power of the Tax Collector, in the collection of the general tax, is to issue execution in default of payment, and by the clause above recited, it is presumed he has the same power in relation to any assessment made by any of the Boards of Commissioners.

Power of Collector to issue execution for taxes.

B. His liabilities, as declared by the 9th clause of the Act of 1843, are: 1. If any Tax Collector shall neglect or refuse to make his return and pay the tax within the time specified by law, which shall have been received by him, it shall be the duty of the Treasurer, within whose division such default has been made, in addition to the coercive power which he may now possess, to charge the said Tax Collector with interest at the rate of five per cent per month, from the time he ought to have made such return and paid the taxes, to the time of settlement. 2. By various Acts of the Legislature, the Treasurer, in case of default in paying the taxes, may issue execution against the Tax Collector for the amount, with interest at the rate of 5 per cent per month.

Liable for five per cent per month for not paying general tax.

Treasurer to issue execution.

C. By the Act of 1822, 6 Stat. 198, if any Tax Collector shall refuse or neglect to pay over such monies as he may have collected as a road or poor tax, within 5 days after the first Monday in July, in each and every year, if applied for by the proper authority, he shall be liable to pay 5 per cent. per month, and the Chairman of the Board of Commissioners of the Roads or of the Poor, shall bring suit, and should he recover, in any Court having jurisdiction thereof, he shall recover treble costs.

Collector may be sued, if he does not pay road tax.

Tax Collector of Abbeville to divide assessments equally.

D. I find in the Acts since and before 1825, some special provisions in relation to particular districts.

By the Act of 1822, 9 Stat. 523, the Tax Collector for Abbeville is required to divide the road tax equally between the four Boards of Commissioners for that district.

General Board of St. George's Dorchester, abolished.

E. By the Act of 1827, 9 Stat. 575, the General Board for St. George's, Dorchester, is abolished; and each Board in the parish to build and keep in repair all bridges within their respective divisions.

Assessments in St. John's Colleton, how made.

F. By the Act 1838, 9 Stat. 614, the Board of Commissioners for St. John's, Colleton, are required to make assessments on the inhabitants of Edisto alone, for the construction and repair of roads and bridges on that Island, and to assess the inhabitants of John's and Wadmalaw Island, for the construction and repair of roads and bridges on these Islands.

General Board of Pickens.

G. A General Board was established for Pickens and Anderson, separately, by the Act of 1830, 8 Stat. 558 By the Act of 1841, the General Board for Pickens was abolished, but was again re-established by the Act of 1843, p. 271, for the purpose of assessing the road tax and authorizing the expenditure thereof, but to continue separate for all other purposes, and to have but one Treasurer, charged with the receipts and disbursements of all monies arising from taxation by the General Board.

General Board of St. John's Colleton.

H. By an Act of 1845, p. 349, the General Board of St. John's, Colleton, is to consist of the Boards for Edisto, Wadmalaw, and John's Island, and the Commissioners of Newtown Haulover, and Wall's Cut, but a Commissioner of Newtown Cut is not to be a member, if an inhabitant of James Island.

I. *State of South Carolina* v. *Odam*, 1 Spears, 263. Where the Clerk and Treasurer of the Board verbally informed the Tax Collector that he was required to collect 25 per cent instead of 20 per cent., as directed by the resolution of the Board, and the Collector proceeded to act under the verbal direction, without taking exception to this informal notice, *it was held* that he and his securities were liable for the amount collected. The assessment for a certain per centage on the amount of a general tax, is sufficient, without assessing each inhabitant a particular sum. See also *Commissioners* v. *Guerard*, 1 Spears, 215.

No General Board for Sumter.

K. The 3d sec. of the Act of 1829, 9 Stat. 583, repeals the 18th sec. of the Act of 1825, so far as relates to the several Boards of Commissioners for Sumter District.

L. The general law in relation to assessments, is altered by the Act of 1846, p. 369, in relation to the *Bay road*, which authorizes the Commissioners of the parish of St. John's Colleton, to assess on the house-holders of Edingsville, at the rates of the general tax of each, such sums as may be necessary, from time to time, to build and keep in repair the bridges on the said road.

M. The Act of 1827, 9 Stat. 577, gives the Commissioners of Roads, Bridges and Ferries in the District of Edgefield, power to appoint a fit and proper person to collect all fines which shall be imposed by the said Commissioners for neglect of performance of

road duty, when required by the Commissioners to perform the same. Provided the said Commissioners take bond and sufficient security of said collector for the faithful performance of his duty.

SEC. 24. It shall be the duty of the Commissioners of the roads, in their respective parishes, districts and divisions, to cause all roads heretofore laid out or hereafter to be laid out, leading directly from any part of this State to Charleston, Columbia, Camden, Hamburgh or Cheraw, to be made and cleared 30 feet wide, and all other roads to be cleared 20 feet wide. 21 sec. Act 1825. 9 Stat. 563.

Width of roads.

NOTE 1. Before this Act all public highways were required to be laid out 20 feet wide. Some of the earliest Acts say 16 and some 40.

2. *State* v. *Caldwell*, 2 Spears, 162. 1. Where a road is laid out along a pre existing fence, the width must be measured from the outer extremity of the fence. 2. When a road exists without a fence on either side, no fence or other obstruction can be lawfully placed within half the width measured from the centre. 3. If the beaten tract be permanent and well defined, the measurement must be from the centre of it, however crooked it may be, but presumptions are in favor of a straight line. 4. Where a road between two parcels of land is required to be 30 feet wide, the occupant on neither side can lawfully place his fence within 15 feet of the centre.

How measurement to be made.

3. Ex rel. *Price* v. *Commissioners of Lancaster*.—Where the subject matter and the person are within the jurisdiction of the Commisioners of Roads, their decision is final and conclusive, unless they have exceeded their jurisdiction, admitted illegal evidence, or in some way violated the settled law.

If a question be within the jurisdiction of Com'rs. their decision final.

SEC. 25. Every Commissioner of roads, in his respective division, shall cause all the roads to be posted and numbered, and at each fork of said roads, a pointer declaring the direction of such roads; and that every commissioner failing or neglecting to do so, shall be liable to pay the sum of ten dollars, for each and every such neglect, to be recovered by indictment in the Court of General Sessions of the district wherein the same occurs, to be paid, when collected, to the Treasurer of the Board to which such delinquent belongs; provided that no Commissioner shall be liable to the said penalty who puts up the said pointers at such time as he works his road division. 15 sec. of the Act 1843, p. 269.

Each Com'r. to post and number the roads and to put up pointers.

NOTE 1. By the 22d sec. of the Act of 1825, 9 Stat. 563, this was the duty of the Board, but by the above clause it is now the duty of each Commissioner within his division.

And if any person or persons shall cut down, burn, or deface any mile post, or stone, or pointer, erected as aforesaid, he, she, or they, shall, upon conviction thereof, forfeit and pay the sum of ten dollars, to be recovered as hereinafter directed. (See next section.) 22 sec. Act 1825, 9 Stat. 563.

Fine for destroying posts and pointers.

Commissioners may summon defaulters and impose fines not exceeding 20 dollars.

Sec. 26. Each Board of Commissioners of roads in this State, in their respective districts, parishes and divisions, shall have power to summon, by two days notice, any person or persons who may make default in performing any duty or incur any penalty imposed by this Act, not exceeding 20 dollars, requiring such person or persons to be and appear before the Board of Commissioners of roads for the distinct, parish or division where the default was made, or fine or penalty incurred, and the said Board of Commissioners of roads, are hereby empowered to hear, try and determine the same, and to award execution for any default, fine or penalty imposed by this Act, not exceeding twenty dollars. 25 sec. Act 1825, 9 Stat. 565.

By the 27 sec. of the Act of 1826, 9 Stat. 570, the above clause is repealed, but I have inserted it because I understand the practice is to try all defaulters before the Board. The Act of 1826 is as follows "hereafter when any default shall be made in the performance of any road duty, or any fine or forfeiture imposed by said Act, (the Act of 1825) not exceeding twenty dollars, be incurred in any one of the divisions of roads in this State, it shall be the duty of the Commissioner who superintends said division, as soon as practicable after such default is made or fine or penalty incurred, to call to his assistance any two Commissioners of roads belonging to the same Board of which he is a member, and to summon, by two days notice at the least, the person or persons so defaulting or incurring such fine or penalty before them, and the said Commissioners or any two of them, are hereby authorized and empowered to hear, try and determine the same, and to award execution for any default, fine or penalty imposed by said Act, not exceeding 20 dollars; (1) provided that any person who may be dissatisfied with any such award, may at any time within 10 days thereafter, upon giving notice thereof in writing to said Commissioner, appeal to the General Board at its next meeting, and said Board shall hear, try and determine upon said appeal in the same manner as herein above directed."

Fines, how imposed and collected under Act of 1826.

Appeal to Board allowed.

Note 1. *Jenkins* v. *Commissioners of Roads.* Cheves, 109. The Commissioners of Roads have no power to impose or collect fines under twenty dollars.

They *may*, perhaps, assess fines of greater amount, but no mode of collecting them is pointed out by the Act.

The practice now is, to bring an action in the name of the Commissioners, where the amount claimed exceeds twenty dollars, and the case is tried according to the rules of the Court, by proof on both sides.

Defaulters must be summoned.

2. *Glover* v. *Simons and others*, 4 McC. 67. 1. Before the Com-

missioners can fine a defaulter, they must summon him to shew cause, at a certain time and place.

2. A warrant issued to collect a fine, is void if it does not specify the amount of the fine. 3. The Commissioners are liable in trespass if the above requisites are not complied with. 4. the Commissioners have no power to compel an individual to work on his own road.

3. In the case of *Murray*, 1 Rich. 335, it is said the 25 sec. of the Act of 1825, as well as other parts of the same Act which apply to roads, do not apply to the Commissioners of cuts and inland navigation along the sea coast. The same is re-affirmed in the case of *Seabrook*, 2 Strob. 560.

Warrants and executions may issue to sheriff.

Sheriff to serve them as in other cases and return to Cl'k.

To pay over money under penalty.

Sheriff to have cost as in other cases.

SEC. 27. It shall and may be lawful, from and after the passing of this Act, for every Board of Commissioners of roads in this State, to direct their warrants and executions, for any purpose herein authorized, to all and singular the sheriffs of this State, who shall be authorized and required to proceed to serve or execute the same, and when executed to return the same to the clerk who may issue the same, in a reasonable time, and the said sheriff shall pay over to the clerk (1) of the said Board of Commissioners of roads, all such fines as he may collect for the Board, in the same time and under the same penalties for detention as prescribed by law in other cases, and shall be allowed the same cost for entry, mileage, and serving any warrant or execution issued by order of any Board of Commissioners of roads, and also the same per centage for receiving and paying over any monies to any Board of Commissioners of roads, as he is now entitled to receive on executions from the Courts of Law. 27 sec. Act 1825. 9 Stat. 565.

NOTE 1. As the offices of Clerk and Treasurer are now disunited, the money must be paid to the Treasurer. Both offices were united by the Act of 1825.

Free Negroes for not working to be imprisoned.

SEC. 28. If any free negro, mulatto or mestizo, shall be summoned to work on the roads according to the provisions of this Act, and shall refuse or neglect to work thereon as required by the Commissioner or Commissioners of such road, he shall be liable to be fined, to the same extent as any other person, and in default of payment of such fine, it shall and may be lawful for the Commissioner or Commissioners, to issue his or their warrant to any constable, requiring and commanding him to take such free negro, mulatto or mestizo into his custody, and deliver him to the goaler of the district, to be confined for such time as the Commissioner or Commissioners in such warrant shall direct, not exceeding twelve days in any one year. Sec. 29 of Act of 1825. 9 Stat. 566.

Quere. Is this imperative? May not the Commissioners issue an execution, as in other cases?

Fines on white persons to be collected by levy and sale of goods and chattels.

NOTE 1. All fines imposed on white persons, are to be collected by levy and sale of the goods and chattels of the offender. The Act of 1825 authorizes the issuing of executions directed to the sheriff, but nothing is said as to the mode of collection. By the Act of 1795, 9 Stat. 368, all fines, penalties and forfeitures shall be recovered by immediate warrant of distress, under the hands of any three of the said Commissioners, against any of the goods and chattels of the person offending, which, after ten days notice, shall be sold, for the purpose of paying the fine inflicted, and the charges accruing thereon, and the overplus, if any, returned to the said person. This Act relates to fines imposed on Commissioners, warners, and overseers, for refusing to act, or neglect of duty, and on those who neglect or refuse to make return of their male slave.

Those who refuse to work or to do their duty when on the road, may be fined, and for non-payment, may be committed to jail.

By the Act of 1788, 9 Stat. 310, if any white person shall neglect or refuse to work, or to do his duty when in place, the said overseer shall return the name of such white person to the Commissioners, who are hereby authorized to fine the said person two dollars for the first default, and ten dollars if repeated, and on non-payment of the same, to be immediately committed to the goal of the district where the offender resides, there to remain for ten days, or until the fine be paid.

Those who fail to attend, to be proceeded against by warrant of distress.

By a prior section of the same Act, 9 Stat. 309, if any person or persons shall neglect or refuse to go, or to send their male slaves, when thereunto summoned by the Commissioner aforesaid, or by any person to be by *them* appointed, or any *three of them*, for that purpose, every such person shall forfeit and pay for the use of the said roads and bridges, two dollars for himself, and one dollar per day for every male slave so neglected or refused to be sent, *to be recovered by immediate warrant of distress, under the hand of any three of the Commissioners, against any of the goods and chattels of the defaulter, which, after ten days notice, shall be sold for the purpose of paying the fine aforesaid, and charges accruing thereon, and the overplus, if any, returned to such defaulter.*

difference.

I infer that the clause of the Act of 1788, first above quoted, relates to those who when summoned appear, but neglect or refuse to work; and the last section relates to those who fail to appear when summoned. The first may be imprisoned for non-payment of fine, the latter cannot, but can only be proceeded against by warrant of distress, and sale of goods and chattels.

Quere.—Does the authority to issue executions to the sheriff, enlarge the effect of the execution so as to authorize the sheriff to sell the land of the defaulter? I incline to the opinion it does not.

OFFICERS OF BOARD, AND THEIR DUTY.

Chairman and Clerk and Treasurer, to be elected, and duties of each.

SEC. 29. By the 26th sec. of the Act of 1825, 9 Stat. 565, each Board of Commissioners of roads in this State shall appoint a Chairman, whose duty it shall be to preside over all regular meetings of the Board, and to countersign all warrants or executions which may be ordered by the Board against defaulters, or for fines or penalties imposed by this

Act; and they shall also elect some fit person to act both as *Clerk and Treasurer* to the Board, and allow him such reasonable compensation for his services as they may deem fit and proper, who shall enter into bond, with securities to be approved by the Board of Commissioners of roads making such appointment, payable to the State of South Carolina, in such penal sum as the said Board shall deem sufficient to ensure the faithful discharge of all the duties of such Clerk and Treasurer imposed by this Act; which bond shall be deposited in the treasury of the division in which such Clerk and Treasurer may reside, and whose duty also it shall be to keep a regular journal of the transactions of the Board, to issue all such licenses to retailers of spiritous liquors, tavern keepers, and keepers of billiard tables, as the Board may direct, and also sign and issue all warrants or executions as may be ordered by the Board against any defaulter, to receive all such sums of money as may become due the said Board from fines, licenses, assessments, sales of estrays or otherwise, and pay over the same when ordered by the Board; and shall also keep a regular account of all monies received on account of and paid out to the order of the Board, which account shall always be open to the inspection of any citizen of the district or parish who may desire to see the same.

May elect a Treasurer and Secretary.

By the 26 sec. of the road Act of 1826, 9 Stat. 570, the Boards of Commissioners of Roads were authorized to elect a Treasurer and also a Secretary, or to assign the duties of both to one person, but by the 30 sec. of the Act of 1831, 9 Stat 593, it is enacted "that the offices of Secretary and Treasurer shall in no case be united by any of the Boards of Commissioners of Roads in this State. See sec. 30.

Offices of Secretary and Treasurer disunited.

Chairman to appoint overseer if Com'r. is absent from his division.

Note 1. By the Act of 1835, (9 Stat 604,) whenever any Commissioner of the Roads in any of the Boards of this State shall be absent from his district or parish, so that the public roads in his division are neglected or badly repaired, it shall be the duty of the Chairman of the Board where such neglect occurs, to appoint some fit and proper person as overseer of said division, and to cause the road of such absent person to be put in proper order.

Comm'rs. to elect Treas'r. who shall give bond if required—his duties.

Sec. 30. By the Act of 1845, p. 294-5, each Board of Commissioners of public buildings, of the poor, and of roads, bridges and ferries, shall appoint a treasurer, who shall hold his office during the pleasure of the Board, and shall receive, keep and disburse, under the direction of the Board, all monies under its control, and account in such manner and at such times as the Board may direct; such treasurer, before entering on his duties, shall (when such Board shall deem it expedient) give bond, with sureties to be approved by the Board, for the faithful performance of the duties of his office.

NOTE 1. The bond, I presume, should be according to the 26 sec. of the Act of 1825. See ante, sec. 29.

2. By the Act of 1843, p. 271, by which the two Boards for Pickens were united for certain purposes, it was enacted that there should be but one Treasurer charged with the receipt and disbursement of all monies arising from taxation by the general Board. But by the Act of 1849, p. 615, it is enacted, "that the Commissioners of the Roads, Bridges and Ferries of Pickens District, Fifth Regiment of South Carolina Militia, be, and are hereby authorized to appoint a Treasurer to each of the Boards of Commissioners of Roads, and that instead of five per cent., two and a half per cent. be allowed such Treasurer, for receiving and disbursing the monies collected by said Boards."

By the Act of 1818, 6 Stat., 109, the Treasurer is allowed 2½ per cent. for receiving, and 2½ per cent. for paying out all monies received and disbursed by him. (See Pickens.)

To report in writing to the Judge of the Circuit Court, at every fall term.

SEC. 21. By the 2d. section of the same Act, 1845, p. 294-5 each of the said Boards shall report in writing to the presiding Judge of the Court of Common Pleas of the district in which such Board exists, on the first day of each Fall Term, all transactions connected with its administration. The said report shall be accompanied with an exact account of all monies assessed and received by them from time to time, and all disbursements made,—and the said presiding Judge shall cause said report to be read in open Court by the Clerk on the first day of the Term, and to be filed in the Clerk's office.

Report to be read in open Court & filed.

Comm'rs. to publish report in newspaper, and if none, at Court House and 3 public places.

Sec. 3 of same Act. The said Boards shall, immediately after the adjournment of the Court, cause the said reports to be printed and published in the nearest newspaper, and if there be no newspaper, then to affix one copy of the said report to the Court House door, and three copies at three other conspicuous places within the parish or district, as the case may be.

Penalty for not making report or publication.

Sec. 4 of same Act. For neglect or refusal to make such report or publication, such Board neglecting or refusing shall forfeit and pay fifty dollars, to be recovered by action of debt in any Court of competent jurisdiction; and it shall be the duty of the Solicitor of the Circuit or of the Attorney General, as the case may be, and he is hereby required, to bring said action for the recovery of the said penalty.

Duty of Solicitors therein.

These clauses of the Act of 1845 must be considered as a repeal of the former Acts, which required the Commissioners to make an annual report to the Comptroller, and also of the Act requiring them to make a Report to the Clerk, to be laid before the grand jury. See Act 1842, page 228. The

Act of 1845 does not, as the Act of 1842, require the report to be laid before the grand jury, but that is the usual practice, and a very proper one.

Commissioners may discontinue a road, if not objected to.

Sec. 32. Act 1830, sec. ix, 9 Stat. 587. From and after the passing of this Act, the Board of Commissioners of Roads in each and every district and parish, shall have power to discontinue any road now established, or hereafter to be established, by law, after three months public notice shall have been given, by advertisement in the settlement through which the road proposed to be discontinued passes:—Provided no objection should be made thereto; but in case any objection should be made to the closing up or discontinuing of the said road, then the same shall be kept open and repaired, until discontinued according to law.

Commissioners may punish for contempt.

Sec. 33. Sec. xix of Act 1830, 9 Stat. 588. The several Boards of Commissioners of Roads, in the several districts and parishes throughout this State, constituted according to law, shall have power, whilst formed and sitting as such for the performance of their appropriate duties and the transaction of their legal business, to protect themselves from all undue interruption and disturbance, and from insult and contempt, in the same manner, by the same means, and to the same extent, as justices of the peace and quorum and other courts of limited and inferior jurisdiction now have, and are hereby vested with all the rights, powers and privileges, whilst sitting and transacting business as a board, which such justices and inferior courts now have, and by law may exercise, of preventing and punishing such interruption, disturbance, insult and contempt.

Note.—It is incident to every court to punish for contempt, any one who interrupts their proceedings whilst sitting as a court, by fine and imprisonment. It is a high misdemeanor, and punished in a summary way, on account of the necessity of prompt decisive action in such case. In the case of the *State* v. *Johnson*, 2 Bay, 385, it was decided that a justice of the peace may commit for contempt and abuse offered to his face, whilst in the execution of his office.

Commissioners to equalize.

Sec. 34. Sec. 9, Act 1841, p. 158. Each Commissioner shall so equalize the work to be done on his road division, that each person liable to road duty shall be required to work the same number of days.

Note 1. By the Act of 1825, the power to designate what hands shall work on the several roads, is given to the Board and not to the several Commissioners. The separate Commissioner cannot equalize the work as required by the Act, unless he has the power to apportion the work. Will not a fair interpretation of this Act

operate as a repeal of the Act of 1825, so as to give to each Commissioner the power to designate what hands shall work on the several roads within his division? I do not perceive that in any other way he can produce the equality which the Act requires.

Fines over $20, how collected.

SEC. 35. All sums of money over and above twenty dollars, which shall be due any Board of Commissioners of Roads in this State, by any person or persons whomsoever, for neglect to make return of hands, or to send hands on the road, or for any other causes, shall be recovered by action of debt, in any court of competent jurisdiction. Sec. 22, Act 1841, p. 160.

NOTE 1. The Act of 1825 gave the Commissioners the power to hear and determine all cases where the fine did not exceed twenty dollars, but contained no provision for collecting sums over that amount. The law remained thus until 1841. How such fines were collected in the mean time, I do not know. The question was first made, I believe, in the case of *Jenkins*, (Cheves, 109,) in the year 1840. The next year, the Act above recited was passed. The first case under it was the case of *Guerard*, (1 Spears, 215) in which the right of the Commissioners to sue in the Court of Common Pleas, was affirmed. The right was again affirmed in *Murray's* case, (1 Rich. 335) In this case a doubt is expressed, whether the Commissioners should sue by their title as Commissioners, or by their individual names, styling themselves Commissioners. They are not a corporation, (2 Brev. 293,) and have no corporate name. I believe the usual course is, to sue in the names of the Commissioners as Commissioners. But even if they were to sue by their official title, the objection must be by plea in abatement. 1 Rich. 335. In the same case it is stated as doubtful, whether there should be any action of the Board ascertaining the amount of the fine before action brought. The practice now is, to proceed without any assessment, and to prove on the trial every thing necessary to recover.

Trees to be left.

SEC. 36. When any road shall be laid out, altered or amended, the Commissioners of such road, if they think fit, may give directions for leaving such trees standing as shall be most convenient for shade to the said road; and if any person shall wilfully or wantonly cut down or kill any tree growing within ten feet of the road laid out as aforesaid, every such person shall, for each tree so cut down or killed, forfeit the sum of five pounds, to be recovered by warrant, from any three of the Commissioners. Sec. 14 of Act 1788, 9 Stat. 312.

Fine for destroying them.

NOTE 1. I have inserted this clause, because it may not be repealed by the Act of 1825. I incline to the opinion it is not repealed, except so far as relates to the mode of recovering the penalty. That, I presume, must be under the Act of 1841. See sec. 35.

Sec. 37. It shall and may be lawful for the several Boards of Commissioners throughout this State, to parcel out the high roads under their charge respectively, among such of the inhabitants and others liable to work on high roads, in such equal, convenient and just allotments and proportions as they shall judge proper; and the several persons aforesaid shall be obliged to keep in good order and repair the said roads so allotted to them respectively, under the same fines and penalties now imposed on persons neglecting to work on high roads, *as by law are subject*, any law, usage or custom to the contrary notwithstanding. Sec. 18 Act 1778, 9 Stat. 261.

Commissioners may parcel out the roads.

Note 1. I have inserted this clause, although it is omitted in the Act of 1825. There is no repugnance or inconsistency, and it is not, therefore, within the repealing clause. Both this and the preceding section, (36) are wise and proper provisions.

Each Commissioner, under the Act of 1825, has entire jurisdiction over the roads within his division, and, therefore, all the powers given the Board may, (if the Act be of force) be exercised by every Commissioner within his jurisdiction.

Sec. 38. On the completion of any new road in future, those persons who shall have been appointed to lay out and complete the same, shall cease to be and continue Commissioners of the same; and each and every new road so completed, shall henceforth fall under the authority of the judges of the county court, where county courts are established, or under the authority of the Board of Commissioners, in those parishes or election districts where no county courts are established. Sec. 49 Act 1795, 9 Stat. 371.

Power of Commissioners to open roads, to cease when road is opened.

Note 1. The county courts were abolished in the year 1798, and since then, the roads throughout the State have been under the jurisdiction of Commissioners.

The provision of the clause above quoted, would, I think, follow, of course, from the general law, but to remove all doubts it is inserted. There are similar provisions in other Acts.

Sec. 39. It shall not be lawful for any board of Commissioners of roads, at its regular semi-annual meeting, or at any other time, to have dinner provided, to be paid for out of the funds of the Board—and that upon the Treasurer, or any other member or members of any Board, so paying for such dinner out of such fund, he or they shall be liable to be fined fifty dollars, to be recovered by indictment; which said sum of fifty dollars so recovered, shall be paid to the Commissioners of Public Buildings for the district in which said Board shall be. Sec. 21 Act 1841, p. 158.

Not to provide dinner out of funds of the board.

Penalty.

Sec. 40. The South Carolina Canal and Rail Road Com- S. C. R. Road

and Canal Company may commute.

pany are authorized to commute at the rate of fifty cents per day, with the several Boards of Commissioners of Roads, for each hand liable to road duty employed by said company. Sec. 14, Act 1841, p. 158.

Each Commissioner to appoint warners to summon inhabitants to make return of hands.

Sec. 41. Each Commissioner of Roads, in his respective division, shall appoint warners, whose duty it shall be to warn the inhabitants in the division to make a return (on oath if required) of all the male slaves belonging to them, or under their care, management or direction, from sixteen to fifty years of age, liable to perform road duty in the said division.

Board to grant licenses to tavern keepers, retailers and keepers of billiard tables.

Sec. 42. (23 sec. Act 1825, 9 Stat. 564.) The sole and exclusive power of granting licenses to retailers of spirituous liquors, tavern-keepers and keepers of billiard tables, be and the same is hereby vested in the Commissioners of Roads, or a majority of them, in their respective districts, parishes or divisions, throughout the State, except in such cases where the Legislature has delegated, or may hereafter delegate, the same power to other persons; and that the Commissioners of Roads, or a majority of them, in their respective districts, parishes or divisions, shall, at any stated meeting, and at no other time, hear all applications for licenses to keep taverns and retail spirituous liquors and keep billiard table or tables, and shall reject or grant such license or licenses, for one year, as to them shall seem proper. *Provided, That it shall and may be lawful for the Clerk of any Board of Commissioners of Roads, in their respective district, parish or division, to grant a permit or license, under his hand and seal, to any person or persons, to keep a tavern or retail spirituous liquors during the recess of the sittings of their respective Boards, which permit or license shall remain in force only until the next meeting of said Board, respectively. And provided also, that the person or persons applying for said permit or license, shall produce to the Clerk of the Board the certificate of the Commissioner of Roads, residing in the division where the applicant intends to keep a tavern, or retail spirituous liquors, certifying that the person or persons applying, is or are proper persons to be permitted to keep a tavern or retail spirituous liquors, and shall give bond and security in the penal sum of four hundred dollars, payable to the said Board of Commissioners, for the district, parish or division where the application shall be made, conditioned that he will, at the next regular meeting of the Board of Commissioners for the district, parish or division where the application shall be made, make application to the said Board, for a license for one year, to take date from the regular meeting of the Board of Commissioners, and shall also, at the time of such application,*

Clerk to grant tavern and retailers license in recess.

Applicant to produce certificate of Commissioner of division.

Bond to be given.

pay to the said Clerk a sum that shall be equal to the rates of a license for the year, for the time that the said permit or license shall be in force. And that every tavern keeper and retailer of spiritous liquors shall pay for his license the sum of fifteen dollars to the Board of Commissioners of the Roads, and two dollars for the Clerk; and that any person or persons who shall retail spiritous liquors, contrary to the provisions of this Act, or keep tavern, without a license or licenses from said Board of Commissioners, shall, on conviction, forfeit and pay the sum of one hundred dollars. *Provided, however*, that nothing herein contained shall prevent any person from selling or retailing spiritous liquors not less than one quart, distilled on his own plantation, of the growth and produce of this State, and to be carried away from the same; and that every person applying for a license to keep a public billiard table or tables, shall pay for such license the sum of fifty dollars; and any person or persons who shall keep a billiard table or tables, without a license from the said Board of Commissioners, shall, on conviction, pay the sum of three hundred dollars, to be recovered in any District Court in this State.

Price of license to retail and keep tavern.

Penalty for retailing and keeping tavern.

Exception.

Price of license for billiard table.

Penalty for keeping billiard table.

By an Act passed anterior to 1822, no billiard table could be set up in Columbia, or within 15 miles of Columbia. By the Act of 1822, 9 Stat. 524, the distance was reduced to 10 miles. But the 11 sec. of the Act of 1826 allows billiard tables to be set up within 5 miles of Columbia during the months of July, August and September. 9 Stat. 568.

No billiard table in Columbia or within 10 miles.

By the Act 1835, 6 Stat. 528: 1. It shall not be lawful for any corporate body, or the Commissioners of the Roads, in their respective limits, to grant any license to retail spirituous liquors, unless the applicant for such license shall first enter into recognizance with two substantial freeholders, who are residents of the district, as sureties in the penalty of one thousand dollars, and conditioned for the observance of all laws in force in regard to retailing spirituous liquors, and the recognizance so given shall be liable to be estreated for all fines imposed by the Court, for any violation of the said laws, of which the party shall be convicted by indictment.

All retailers to enter recognizance with sureties.

Penalty of $1000.

Condition.

2. Every vender or retailer of spirituous liquors, who shall clandestinely, or behind or within any screen, booth or other place of concealment, exchange, give, deliver, sell or retail any spirituous liquors, shall, upon conviction, be fined in a sum not less than fifty nor more than two hundred dollars, according to the discretion of the Judge.

Not to retail clandestinely.

Fine.

3. That hereafter the sum of fifty dollars shall be paid for any license to retail spirituous liquors, in lieu of the sum heretofore required by law.

To pay $50 for license,

NOTE 1. The law in relation to licenses to retailers of spirituous liquors and tavern keepers, and especially the latter, was very much altered by the Act of 1849, p. 557. Instead of attempting to expunge from the previous Acts what is repugnant to and repealed by this Act, I have thought it best to give the whole entire, and to add by way of note such remarks as will indicate what the law now is.

No license to retail under 1 quart, except to tavern keepers.

The provisions of the Act of 1849 are, 1. No license shall be granted in this State for the sale of spiritous liquors in quantities less than one quart, or which shall authorize the drinking of such liquors at the place where sold, except to tavern keepers, in the manner prescribed by this Act.

To be recommended by 3 freeholders.

2. No person shall be licensed to keep a tavern, but such as shall be recommended by at least three respectable freeholders of the neighbourhood where such tavern is proposed to be kept, who shall certify that the person so recommended by them is of good repute for honesty and sobriety, and is known to the persons so recommending, to

To have two spare beds, house room, stabling and provender.

have at least two spare beds, and the necessary bedding, more than is necessary for the family of the said applicant, and is well provided with house-room, stabling and provender; and, thereupon, the Com-

Commissioners may grant or refuse application.

missioners of said Roads, to whom such application is made, may, in their discretion, grant the license prayed for, which shall continue for the term of one year and no longer.

To enter into recognizance for $1000.

3. That every person, before he or she shall receive a license to keep a tavern, shall become bound by recognizance to the State in the sum of one thousand dollars, with two good and sufficient sureties, being freeholders in the district, to be approved of by the Commissioners of roads granting such license, which recognizance shall be in the form or to the effect following. "Know all men by these presents, that we A. B., C. D. and E. F., of the district of acknowledge ourselves to owe the State of South Carolina the sum of one thousand dollars, to which payment, to be well and truly made, we bind ourselves and every of us, each and every of our heirs, executors and administrators, jointly and severally, firmly by these presents. Witness our hands and seals, this day of in the year of our Lord one thousand eight hundred and . The con-

Condition.

dition of this recognizance is such, that whereas the above bound A. B. is licensed to keep a tavern in the house occupied by him or her in (the location particularly described) for the space of one year from the date hereof. Now if the said A. B. during the continuance of the said license, shall not keep a disorderly house, nor suffer or permit any unlawful gaming in or about his or her said house, nor violate the laws concerning the traffic in spirituous liquors, but shall, during the said time, in all things, use and maintain good order and rule, and find and provide good, wholesome and sufficient lodging, diet and entertainment for man, and stabling and provender for horse, and observe the directions of the law in relation to slaves and free persons of color, and the keeping of taverns, then this recognizance to be void, or else to remain of full force and virtue."

To keep two beds and wholesome

4. Every licensed tavern keeper shall have and keep in his or her house so licensed, at least two good feather beds or matrasses, for guests, with good and sufficient bed clothes for the same, and pro-

vide and keep good, wholesome and sufficient diet for travellers, and stabling and provender for four horses, more than his or her own stock, upon pain of forfeiting his license and recognizance, and being subject to the like penalties as for selling without license.

food, and stabling and provender for four horses. Penalty.

5. That no license shall entitle any person to keep a tavern in any other place than that in which it was first kept, by virtue of said license, and such license in regard to all other persons or places, shall be void.

No license to authorize keeping tavern at a different place.

6. No license to keep a tavern shall authorize the person receiving the same, or any person by his or her authority or permission, to sell, or keep and expose for sale, spirituous liquors, in any store, shop or other place, where goods, wares and merchandise, of any kind or description, are sold, or at any stand, bar or other place out of the tavern house, for which license shall have been granted according to law, and any person offending against the provisions of this section shall forfeit his or her license and recognizance, and shall be liable to all the penalties imposed by law for selling without license.

No spirits to be sold except in the tavern house.

7. That from and after the passing of this Act, the price of tavern license shall be fifty dollars, and no such license shall be granted until the said sum shall have been paid to the Commissioners of Roads, by the person applying for the same.

Price of tavern license.

8. Every license to keep a tavern may, in the discretion of the Commissioners of Roads authorized by law to grant the same, be renewed yearly, upon the like recommendations, provisoes and penalties, and in the same manner, in every respect, as when such license was originally granted. And further: if any person who at the expiration of his or her license, shall neglect or refuse to renew the same, in manner aforesaid, shall, notwithstanding, sell and retail spirituous liquors, then such person shall be subject to the like penalties as for selling without license. Provided that no person once convicted, by any Court of competent jurisdiction in this State, of a violation of any law now of force, or hereafter passed, respecting the traffic in spirituous liquors, or the unlawful traffic with slaves and free persons of color, or of any of the provisions of this Act, shall ever thereafter receive a license to keep a tavern, or to retail spirituous liquors in any manner, place or quantity.

License may be renewed yearly. Penalty for selling without renewal. Not to be granted to those convicted of retailing or traffic with negroes.

9. That if any tavern keeper shall give credit to any person or persons, for spirituous liquors, he, she or they, so trusting or giving credit to any person or persons, as aforesaid, shall lose his debt, and be forever disabled from sueing for and recovering the same, or any part thereof. And any note, bill, bond or other security, which may be given for any spirituous liquors, sold or drank in or at his or her house, shall be void; and if any tavern keeper shall sue for any such debt, the person or persons sued shall and may plead this Act in bar thereof.

No credit to be given for spirits. Notes, bonds, &c. for spirits, void.

10. That the recognizance required to be given by the third section of this Act, shall be filed in the office of the Clerk of the Court of General Sessions, for the district in which said recognizance was taken, and in case of the breach of the condition thereof, it shall be lawful, in addition to the penalties now imposed by law in such cases,

Recognizance to be deposited with clerk.

On breach clerk to issue sci. fa.

Half of forfeiture to informer.

for any person to file an affidavit with the Clerk of the Court of General Sessions, in the district where such recognizance was given, stating the breach, and the Clerk of the said Court is hereby required to issue a scire-facias on said recognizance, requiring the principal and his sureties to shew cause at the next Court of General Sessions, why their recognizance should not be estreated. One-half the amount for which such recognizance shall be estreated, shall be given to the informer, and the other half to the use of the Board of Commissioners taking such recognizance.

Retailers not to sell under a quart. Nor to be drank at the place.

Penalty.

11. That it shall not be lawful for any person or persons, under a license to retail spirituous liquors, to sell or cause to be sold, directly or indirectly, in quantities less than one quart; nor shall such retail license authorize the drinking of such liquor at the place where sold, or on the premises of the vendor. And if any person or persons whomsoever, without a license first had and obtained according to the provisions of this Act, shall sell any spirituous liquors in quantities less than one quart, or shall allow the drinking of such liquor at the place of sale, or on the premises of the vendor, he, she or they, so offending, shall be subject to all the penalties now imposed by law for selling spirits without license.

Duty of Magistrate on view or information, to issue warrant.

To bind informer or witnesses.

12. That it shall be the duty of every magistrate, on view, or complaint on oath, that any tavern keeper, retailer or other person, hath committed any act or thing contrary to and in violation of this Act, to cause the arrest, by warrant under his hand and seal, of such tavern keeper, retailer or other person so offending, and require, as is prescribed by law, security for his appearance at the next Court of General Sessions, then and there to answer to the matter of such complaint, and in default of security, to commit to jail, there to be kept until discharged by due course of law, and also bind the persons making the complaint, or any others whose testimony may be material, to appear at the same time, to give evidence on the part of the State against such offenders.

This Act not to affect the powers of corporate towns to grant licenses.

Corporations to conform to the Act, and to require recommendation of 6 freeholders.

13. That nothing in this Act shall be taken, deemed or construed, to alter, change or in any manner affect the rights, powers, and privileges, vested by law in any city or town incorporate in this State, relative to the granting of tavern and retail licenses within their respective limits; such city or town corporate conforming to the directions, and being subject to the restrictions and provisions herein contained and provided for the Commissioners of Roads in the several districts of this State; except that the recommendations for tavern license in such towns and cities, shall be signed by at least six respectable freeholders residing therein.

Not to affect penalties now imposed.

14. That nothing in this Act contained shall be taken or construed in any manner to affect the penalties now imposed by law, for retailing spirituous liquors witnout license.

Repeal of 23d sec. of Act 1815, authorizing clerk to grant licenses.

Repealing clause.

15. That the 23d section of an Act entitled, "An Act to establish certain Roads, Bridges and Ferries," therein mentioned, passed on the 16th day of December, 1815, and which provides for the granting of tavern and retail licenses during the recess of the Commissioners, and also all Acts and parts of Acts repugnant to this Act, be and the same is hereby repealed.

Note 1. It is somewhat remarkable that the 23d section of the Act of 1815, should be expressly repealed without noticing the proviso of the 23d section of the Act of 1825, 9 Stat. 564, by which the same power is granted to the Clerk of the Board, as by the Act of 1815.

The important alterations made by this Act in the existing laws are:

1. That retailers are forbidden to sell any spiritous liquors, to be drank at the place of sale, in any quantity.

2. The selling in any quantity less than a quart, is confined to tavern keepers expressly.

3. There must accompany every application for a tavern license, a certificate, that the person applying is provided with the necessary means of keeping a house for the accommodation of travellers.

4. The price of a tavern license is fixed at 50 dollars, the same as a retailer's license.

N. By the 39 sec. of the Act of 1810, 9 Stat. 453. Whereas the Board of Commissioners of roads, in several parishes and districts in this State, are divided into two or more divisions, for the purpose of facilitating the business of such Commissioners. Be it further enacted, "that each division of such Commissioners shall have power to grant tavern licences in their respective divisions." Where two or more boards, each to grant licenses.

Note 1. This, I presume, gives authority only within the territorial limits of the Board granting license. In the case of pedlers the license extends to the whole district or parish. See sec. 43.

O. No license shall hereafter be granted for retailing spiritous liquors or keeping tavern by any Board of Commissioners of roads, or Corporation having power to grant such license, nor shall any permit be given by any Clerk of such Board or Corporation, unless the applicant shall have first taken and subscribed the following oath or affirmation, on his first application for a license after the passing of this Act. which oath shall be taken before a magistrate duly qualified to administer the same, and duly certified by him, and be by the applicant filed with the papers of the Board or Corporation as the case may be, to wit. I, A. B. do swear or affirm that I will not, directly or indirectly, during the period for which I may receive a license to retail spiritous liquors or keep a tavern, sell, give, exchange, barter, or in any otherwise deliver, any spiritous liquors to any slave or slaves, contrary to the true intent and meaning of the laws for preventing the selling, giving or delivering spiritous liquors to slaves, so help me God. And upon every subsequent application for such license, such person, in addition to the above oath or affirmation, shall in like manner take and file the following additional oath, "and I do further swear and affirm, that I have not, directly or indirectly at any time since the taking out my last license, sold, given, exchanged or bartered, or in any otherwise delivered any spiritous liquors to any slave, nor have I, directly or indirectly, traded, trafficked or dealt with any slave, contrary to the true intent and meaning of the laws to prevent the selling, giving,

bartering or delivering of spiritous liquors to slaves, and dealing, trading and trafficking with the same; so help me God. 4 sec of Act 1834, 7 Stat. 469.

P. As to who are tavern keepers, within the meaning of the Acts of the legislature, who are required to take out license, see the case of the *State* vs. *Chambless*, Cheves R. 220, wherein it is said that to keep a house for the entertainment of travellers or boarders requires no license. But if to such entertainment be added the vending of spiritous liquors, in small quantities, as is usually done at the bar of a tavern, then a license is necessary. The same doctrine is affirmed by the supreme Court of Equity, in the case of *Bonner* vs. *Welborn*, August T. 1849. See the case reported in 2 vol. of U. S. Law Mag. page 5. Any one may sell over 3 gallons, but to sell under that quantity, unless the vendor have a tavern license, he must take out a retailer's license. which will authorize the sale of any quantity from a quart to 3 gallons.

Sole power of granting license to hawkers and peddlers.

Sec. 43. (Act of 1843, p. 262.) The sole and exclusive power of granting licenses to hawkers and pedlers, be and the same is hereby vested in the Commissioners of roads in their respective districts and parishes, a majority of whom in their respective districts and parishes, shall at any stated meeting and at no other time, hear all applications for such licenses to hawk and peddle, and shall grant or reject such applications for one year, as to them shall seem proper; provided that such applicant shall, before he receives such license, pay into the hands of the said Commissioners for such district or parish, the sum of fifty dollars, and shall enter into bond as now provided by law, except that it be taken and approved by the body granting the license (2); provided also, such applicant shall have been a citizen of the district the preceding 10 years, and legally entitled to vote, at the time of such application, for members of the General Assembly; and provided likewise, that such license so granted, shall confer the privilege to hawk and peddle within the limits only of the district or parish for which the body granting it have themselves been appointed, and shall not be extended in any manner to enable any other person to hawk and peddle, saving the person actually named in the license; provided also that in any district or parish where there now exists or may hereafter exist more than one Board of Commissioners of roads, a license taken from any one of said Boards shall be sufficient to authorize any person who has complied with the provisions of this Act, to hawk and peddle within said district or parish. (1)

To give bond.

A citizen of the district 10 years, and entitled to vote.

Confined to the district or parish where granted, and to the person named.

Except where there are two or more boards then a license from one will do.

Note 1. Hawkers and peddlers are travelling traders, those who go from house to house or from village to village. Originally pedlers transported their goods in packs carried on their backs, but the mode of transportation does not enter essentially into the character. Peddling is a vocation, an employment, which is not established by

a single act of vending goods, from a pack or cart, but continued acts are evidence of the assumption of the character of a pedler.

2. Formerly pedlers were licensed for the whole State, and took out license from the the Treasurer. Afterwards, they were required to take out from the Clerk, a license for each district wherein they traded. Before granting the license the Clerk was required to take a recognizance from the pedler in the sum of one thousand dollars for himself, and two securities in the sum of five hundred dollars each, with a condition that he will be of good behaviour, and especially refrain from all violations of the laws of the State against trading with negroes, against seditious and inflamatory publications or conduct, against gaming and against retailing of spiritous liquors, without license. 6 Stat 433.

The penalty imposed for hawking and peddling without license, is one thousand dollars. 6 Stat. 529.

Copies of Acts to be furnished.

SEC. 44. Each Board of Commissioners of Roads is entitled to a copy of the Acts of the Legislature annually. 30th sec. of Act 1825. 9 Stat. 566.

No application to Legislature until after application to Commissioners, except.

SEC. 45. Whereas the county Courts and Commissioners of roads have, by an Act passed the 27th day of February 1788, the power of granting roads. Be it therefore enacted, that no petition shall hereafter be received by the Legislature, praying for the establishment of any road, unless application be first made to the Commissioners of roads, unless the same extend through more than one county or parish. Act 1797, 9 Stat. 379.

NOTE 1. This is a rule prescribed by the Legislature to itself. I believe it has not been uniformly adhered to. I have inserted it because I do not see any thing expressly repealing it.

Injury to road by breaking mill dam.

SEC. 46. Where any public road shall be injured in consequence of the breaking of any mill dam, or by letting off water from any gate or gates, it shall be the duty of the owner or owners of said mill-pond or dam, to repair such injury, when thereunto required by the Commissioner of roads in whose division the injury shall happen, within a reasonable time from such notice, and in default thereof the owner or owners of such mill-dam or pond shall be fined at the discretion of the Court, not exceeding one hundred dollars nor less than twenty. 20 sec. Act 1825. 9 Stat. 563.

NOTE 1. At Common Law, the owner of the soil was bound to repair any injury which the public may sustain, in the use of a highway, by any improvement or structure he may make on his own land. A mill dam is no exception to the general rule; the owner of which is liable for any injury to the highway by the accumulation of water, whether the excess be vented through a wasteway, or by reason of its insufficiency, through a break in the dam. In both cases the injury is caused by the dam's obstructing the natural flow of the water and thereby giving it greater force. *State* v *Knotts*, 2 Spears, 692.

2. Where the owner of a mill dam, during a freshet, cut his dam for the purpose of saving it, and the public road was injured thereby, he was held guilty of a nuisance, on an indictment at common law, and it was no excuse to allege that if the dam had not been cut it would have broken in another place, and the road injured as much, if not more. (Id.)

3. The defendant was bound to provide a sufficient wasteway by which the excess of water might have been discharged gradually and without injury. (Id.)

It would seem from this case that the statute did not create the offence, it only provided a remedy by regulating the punishment.

4. The public road passed over a dam across the rice field of the plaintiff, through which he had had a trunk for 20 years. The defendant, as Commissioner of the Road, cut the arms of the trunk in repairing an injury to the road above the trunk; *held*, 1. That the owner of the soil had a right to use his land in any way not inconsistent with the public easement. 2. That 20 years use of the trunk gave a right by prescription to the use of it, and the defendant was liable for any injury done to it unnecessarily. *Baring* v. *Heyward*, 2 Spears, 553.

Solicitor to prosecute those who alter a highway.

Sec. 47. (Sec. 33 Act 1797, 9 Stat. 379.) It shall be the duty of the Solicitor of the district, in which any part of the high road may have been or shall be diverted from its original course, unless by law, and he is hereby enjoined and required, on information of any two persons, to commence a suit against any person or persons who may have altered or shall hereafter alter the road, without authority, in order to compel the parties offending, as soon as may be, to restore, at their own expense, the highway in its course as established by law.

Note 1. The word suit, imports a civil action. I presume the meaning to be, that on the information of two persons, it should be the duty of the Solicitor to institute such legal proceeding as was appropriate to effect the restoration of the road.

Penalty on those who injure a bridge built over a river, &c. dividing two districts or parishes.

Sec. 48. (Sec. 9 Act 1785, 9 Stat. 294.) If any person or persons shall wilfully injure or destroy any bridge or bridges built as aforesaid, every such person or persons, on indictment and conviction in the Court of General Sessions, in the district or county court of the county where the offence was committed, shall be subject to such fine and imprisonment as either of the said courts shall direct.

Note 1. The bridges referred to are such as are built under the authority of the Commissioners, as set out in the 17th sec. of the Act of 1825, which is copied from the 7th and 8th sections of the Act of 1785, except as to the persons to be assessed, and from the 10th sec. of the Act of 1788, 9 Stat. 311.

Sec. 49. (Sec. 10 of Act 1785, 9 Stat. 294.) For the pre-

vention of injury to bridges by vessels, boats, and rafts passing under them,

Be it enacted, That all vessels, boats or rafts passing under any bridge, shall, before they come to the same, drop anchor and drag through under the same; and if any vessel, boat or raft shall pass, or attempt to pass, any bridge, without dragging as aforesaid, every such vessel, boat or raft, shall forfeit the sum of ten guineas; to be recovered by immediate seizure and detention of the said vessel, boat or raft, until the payment of the said sum, by warrant from one of the Commissioners of the said bridge, or by the person or persons to whom the Commissioners might have leased the same, or by information being given of the same, to one of the judges of the Court of Common Pleas in Charleston, or in the district or county where the offence was committed; the money, when so recovered, to be applied to the rebuilding or keeping in repair such bridge.

Every vessel, boat or raft to drag through under any bridge.

Penalty.

Note 1. There is no subsequent Act repealing this clause. I presume the summary mode of collecting the penalty could not now be used. Perhaps it might be recovered under the Act of 1841, or, perhaps, by indictment.

Sec. 50. (Sec. 27 Act 1809, 9 Stat. 443.) It shall be the duty of every person keeping a ferry, to keep in good order the banks of the river or creek at such ferry, and in case of neglect, shall be subject to a fine of three dollars, for each and every day of such neglect; the same to be recovered before any magistrate having competent jurisdiction.

Ferryman to keep banks in order.

Fine for neglect.

Note 1. If the sum be over twenty dollars, the fine must be recovered by action, under the Act of 1841.

43d sec. Act 1821, 9 Stat. 515. All persons who may have charters for any ferry, where it is necessary that slips should be used, shall keep the same in repair at their private expense.

Ferryman to keep slips, and keep them in repair.

50th sec. Act 1824, 9 Stat. 544. Each and every ferry owner or keeper in this State shall provide and keep attached to each end of his ferry flat or flats, a good and sufficient apron, or not having such aprons, shall keep at each and every landing place, a good and sufficient abutment or inclined plane for the same; and for default or neglect in so doing, that he be fined in a sum not exceeding ten dollars for every three days continuance of such default; to be recovered in any court having competent jurisdiction of the same— one-half to the use of the State, and the other half to the informer.

Ferryman to keep aprons or abuttments or inclined planes.

I have inserted these clauses, because the ferry banks are

a part of the public highway; and, for the same reason, I have inserted the following.

Penalty for demanding more than is due.

1. If any ferryman or owner of any ferry or bridge, shall demand and receive any greater sum of money for ferriage or toll at such ferry or bridge, every such person shall forfeit and pay the sum of twelve dollars; to be recovered before any justice of the peace or quorum—one-half to the informer, and the other half to the Commissioners of the Roads within whose jurisdiction such fine shall be recovered. Sec 20 Act 1822, 9 Stat. 520.

Toll bridges to have railing.

2. It shall be the duty of the owners of all toll bridges, which have been, or may hereafter be, chartered by the Legislature, to cause to be erected a good and sufficient railing, extending twenty feet from the ends of all such toll bridges, on each side of the road passing over such toll bridge. Sec. 17 Act 1823, 9 Stat. 528.

3. If any person or persons shall meet with unnecessary delay at any of the public ferries, toll-bridges or causeways, established by law, every such person or person may recover from the persons keeping such ferry, bridge or causeway, for every hour of such unnecessary delay, the sum of forty shillings; to be recovered on application from the party aggrieved, by warrant and execution from any neighbouring magistrate. Sec. 16 of Act 1788, 9 Stat. 312.

Commissioners to allow gates on certain Islands.

Sec. 51. (Act 1829, 9 Stat. 509.) 1. It shall be lawful for the Commissioners of the Roads, in the several islands aforesaid, (James Island, John's Island, Wadmalaw, Edisto, St. Helena, Lady's Island, and Hilton Head) to authorize and permit such persons as they, in their discretion, may think proper, to put up gates on the public roads that may pass through their grounds; such permission, in every case, to expire, unless renewed at the end of two years; and provided that no new gate be allowed, unless, in the judgment of the Commissioners, the same be necessary.

Penalty on those who cut or destroy gates, or leave them open.

2. If any person shall wilfully cut or destroy any gate, which may be put up by the authority of the Commissioners in pursuance of this Act, whilst the same is kept in good order, such person shall be fined in the sum of twenty dollars; to be recovered by warrant of distress, under the hands of any two of the Commissioners of Roads for said island or parish. And if any person shall wilfully leave open any gate as aforesaid, such person shall be liable to be fined in the sum of twenty dollars; to be recovered as aforesaid.

FINES—AND HOW APPROPRIATED.

How fines, &c. to be applied.

Sec. 52. (Sec. 24 Act 1825, 9 Stat. 564.) All the fines, forfeitures and penalties imposed by this Act, as also all such sums of money as may arise from the granting of licenses as aforesaid, (viz. to retailers, taverns and billiard tables) or

from the sale of estrays, shall belong to that Board of Commissioners of Roads within whose limits the fine, penalty or forfeiture may be imposed, the license granted, or estray sold, and constitute a fund to be applied by such Board to the repair of the roads, bridges or causeways, in such respective district, parish or division as aforesaid.

EXTINGUISHMENT OF HIGHWAYS.

Legislature may discontinue road, and so may Commissioners of roads.

SEC. 53. The power which creates a public benefit, may, in general, destroy it; and, therefore, the Legislature, by Act, may, at any time, discontinue a public road.

We have seen, also, that the Commissioners of the Roads may discontinue a road, if there be no objection.

Stat. of limitation will not run against public; but prescription.

Although the statute of limitations will not run against a public right, and non-user merely will not destroy the character of a public highway, yet if it were obstructed and enclosed for twenty years, I see no reason why a legal authority to obstruct it might not be presumed.

Right of owner of soil over which road passes.

SEC. 54. It has been before stated, that a highway is a mere easement, and that the right of the soil remains in the landlord; so also do the trees, and he may maintain trespass for the unlawful digging up the road or cutting down the trees. (Woolrych.)

NUISANCE.

Nuisance, what.

SEC. 55. Any thing placed in the highway which impedes the free use of it, is an obstruction, as any gate erected across it, a tree thrown into it, or a wagon left standing in it for a long time, or to dig ditches across it.

Remedy for nuisance, but private action will lie for injury.

The remedy is by indictment for a nuisance, but if any person has received an injury from the obstruction, or sustained any pecuniary loss by it, he may recover damages, in an action on the case. As if a man fall with his horse into a ditch dug in the highway, and sustains an injury, he may recover against the man who dug the ditch. See Woolrych on Ways, 2 vol. Law Lib. 53–4.

Injury direct.

But the injury must be direct and not merely consequential, unless special damage be alleged and proved. (*Id.*)

We have before seen (ante, sec. 16) that no action will lie against the Commissioner of Roads, for an injury sustained by his *neglect* to keep a road or bridge in repair.

Nuisance may be abated.

If any nuisance be placed in a highway, it has always been held for law, that the public might abate it by removal, as breaking down hedges or gates across it. (Woolrych, 52.)

Of necessity, one may unload his wagon in a street or road, but he has no right to continue his load or his wagon an unreasonable time in the street or road, to the hindrance and delay of other persons. Woolrych on Ways, 48.

Only one separate board for each district, county or parish.

Sec. 56. By the 20th sec. of Act of 1800, there shall be no more than one Board of Commissioners of Roads in each district, in this State, where such district is composed of but one county or parish; and where there are more than one county or parish in any district, the Commissioners of each county or parish shall form a distinct and separate Board.

Note 1. Since that time, several of the Boards have been divided. It appears from the Acts of the Legislature, and the Resolutions of 1844 and 1847, that there are six Boards for Edgefield, one for each of the battalions of militia in that district. There are four for Abbeville, one for each battalion. There are three for St. John's Colleton, one for each of the Islands of Edisto, Wadmalaw and John's.—There are three for Barnwell, one for the upper regiment, and two for the lower. There are two for Anderson, one for each regiment; two for Greenville, one for each regiment; two for Marion, one on each side of Pee Dee River; two for Pickens, and two for Chester, one for each regiment in those districts; one for each battalion in Richland district; two for St. Bartholomew's, divided by a line running from the mouth of Black Creek on Saltcatcher, direct to Island Creek bridge, thence along Island Creek swamp, until it intercepts the head of Red Bank Creek, and along it to Edisto. There are two for Clarendon, a part of Sumter district. The division line is to be collected from three Acts of the Legislature. The Act of 1815, 9 Stat. 481, describes it thus: "beginning at the county line nearest the plantation of Phineas Gibson, deceased, thence to Michael Blackwell's, thence to Capt. Dukes, thence to General Sumter's old well on Potato Creek, thence to Cuddoe's Lake on Santee, near Thomas Bosher's place." The Act of 1819, (9 Stat. 500.) alters the line so as to run from Captain Dukes's to Clarendon Court House, thence to the house of James A. Pearson inclusive, and thence down Wyboo Creek to Santee. The Act of 1820 (9 Stat. 502) directs the line to be run thus: "beginning at the county line, at or near the fork roads, thence direct to Benjamin P. West's saw mill, thence to Luke Bond's old place thence to William Dukes, deceased, and from thence to the Santee River, by the lines now established by law." For St. George's, two boards, divided by a line run from the north side of the Cypress swamp, where the St. James's Parish line crosses it, so as to intersect the parish line of St. Paul's and St George's, near Givham's ferry. For Kingston, (part of Horry,) two boards, the dividing line beginning at Council Bluff on Waccamaw, running thence by a direct line to the Big Swamp bridge, leaving Mrs. Jane Sudlam's plantation in the upper division, and thence to the intersection of Dog Bluff and Little Pee Dee, leaving William Hux's plantation in the upper, and Isaac Shepperd and Rawlins Hartsfield in the lower division. There are two for St. Luke's, divided by a direct line from Hazzard's bridge to the Great Swamp bridge; two for Prince William's, divided by the lines which separate the Whippy Swamp Beat Company from the lower Saltcatcher Company; and two for St. Peter's, the division line beginning at the parish line, at the lower end of Walnut Hill plantation, and running by Quince's Hill to the Frying Pan on Savannah river.

Two other parishes, St. Paul's and St. John's Berkley, have the power to divide, but I do not know if it has been done. Only one board was appointed by the Resolution of 1847.

For each of the other districts and parishes, there is but one Board, and one Board for Claremont and Salem counties, parts of Sumter district.

Powers of Commissioners of roads granted to municipal corporations.

Sec. 57. Within the last twenty years most of the Court Houses, villages and other towns have been incorporated, and the control and supervision of the roads within the corporate limits, has been given to the municipal authorities. They are invested with the powers of Commissioners of Roads in working on roads, imposing fines, and granting licenses to retailers, &c. In general the money arising from these sources, is expended by them in carrying into execution these corporate powers. The only exception that I have noticed is, that by the 8th section of the Act of 1837, the Town Council of Darlington are required to pay over to the Commissioners of Roads, all monies arising from licenses to retailers, tavern keepers, or keepers of billiard tables. See 9 Stat. 608.

Town Council of Darlington to pay for licenses to Com'rs.

Com'rs. may hire persons to make and repair roads, and assess the amount.

Sec. 58. (Act 1723, 3 Stat. 224, sec. 11.) The Commissioners for highways, for the several districts in this Province, shall have power, and they are hereby empowered, to agree with any person or persons to make, mend and repair the several roads, causeways and bridges in their districts; and they are also hereby empowered, agreeable to the Act for making, mending and altering the high roads, to assess and levy on the inhabitants of the said parish, all such sum or sums of money as they shall agree for about or concerning the roads, paths, causeways and bridges as aforesaid; and that no Commissioner of highways shall alter, by moving, any highway, after the first day of January next.

By the 10th section of the same Act, the power is given to hire slaves to work on Cuts and Creeks, and to assess the same on the inhabitants of the several divisions where the Cuts are.

Note 1. I think it doubtful if the above be of force. I do not see any express repeal, but I think it contrary to what seems to be the meaning of the subsequent Acts, which seem to contemplate the repair and making of roads, by equal contributions of labor, but I have inserted it because others may think it of force. It seems to me to be the only mode by which the road duty can be equalized.

Sec. 59. Besides the general Board of Commissioners of Roads and Bridges, there are some special Boards, which it is necessary I should notice, to make this manual complete.

LYNCH'S CAUSEWAY.

1. That part of the road from Charleston to Georgetown, which crosses a marshy island in the Santee river, is called Lynch's causay or causeway. The road was laid out in 1737, and this part of it has been the subject of much and frequent legislation, which will be found in the Statutes at Large, 9 vol. p. 104, 120, 164, 243, 312, 366, 403, 520. In 1825, 9 Stat. 556, a special Act was passed in relation to this Causeway, and the Canal on the side of it, which had been cut under the direction of a former Board of Commissioners. The first section directs that the canal be kept open, and deemed a public canal; "and that should any person or persons whomsoever, obstruct, impede or injure the said canal, or shall attempt, at any time or in any manner, to impede or hinder or obstruct the passage thereof, every such person or persons so offending, shall be subject and made liable to all and every penalty which have been or shall hereafter be imposed or inflicted by any law or laws of this State, on such person or persons as shall impede, obstruct or injure any of the public canals, or any public road, or any canal which has been or shall be established by law; and the said penalty or penalties shall be recovered and applied in such manner as the law or laws of the State have directed, or shall hereafter direct."

The second section appoints three persons Commissioners, with authority to fill up vacancies in the Board according to the road Acts, and declares that they, or a majority of them forming a Board, shall have full power to commence or institute any proceeding, and to issue all and every order or process mentioned in the said Road Acts, or contemplated by them. And they shall have full power, under the said Acts, and by this Act, and full jurisdiction as a Board of Commissioners is hereby given to them over the aforementioned canal and causeway, and over all and every road or roads, public or *neighbourly*, in the parish of Prince George, Winyaw, within ten miles of the said causeway. And they are hereby authorized and required, agreeably to the said road Acts, to keep in order and repair, the said canal, causeway and roads, by calling out all the male inhabitants and male slaves from the age of sixteen to fifty years, or such parts thereof, at any one time, as they shall judge proper, to work thereon and put the same in order. *Provided*, however, that the said inhabitants or slaves shall not be liable to be called out for a longer time, collectively, than twelve days in one year. And the said inhabitants and male slaves, hereby made liable to work on the said canal, causeway and roads, shall not be liable to work on any other canals, causeways

or roads, whatever, within the said parish, or any other parish; and *provided also*, that no inhabitant or slave residing without the limits of ten miles from the said causeway, shall be compelled to work on any part of the aforementioned roads, leading to the said causeway. The third section abolishes the allotments formerly made, and directs when the hands are called out they shall work collectively, or "in such manner as shall be directed by the said Commissioners, or by their order or agents, overseers and superintendants. And the said Commissioners are hereby fully empowered and authorized, from time to time, to appoint agents or overseers or superintendants to execute any particular work or order, under this Act, and to do and perform the duty required, subject to their order. And any overseer, superintendant or agent, neglecting to perform the duty which shall be required by the said Commissioners, shall be subject to such penalty or penalties, and the same to be applied as the Road Acts aforesaid shall or may inflict or direct."

By the 6th section, the toll for passing through the canal, and periods for using the said canal, shall be fixed and regulated by the aforesaid Commissioners, or their successors in office, in such manner as they shall from time to time judge best both for individuals concerned therein, and for the public.

By the 12th section of the Act of 1834, 9 Stat. 600, the Board appointed by the above Act are declared subject to the operation of the 18th section of the Act of 1825, which directs the manner in which assessments are to be made. (See ante, sec. 23.)

By the 16th section of the Act of 1843, the Commissioners of Lynch's causeway are authorized to lay a tax of one dollar per year, for each and every hand liable to work on said causeway, in lieu of the labor of said hands. *Provided*, that nothing herein contained shall affect the liability of said hands to perform any other road duty now required of them by law.

Since the Act of 1843, which directs that the Commissioners of Roads shall be appointed by joint resolution, Commissioners for Lynch's causeway have been regularly appointed.

BLACK MINGO CREEK BRIDGE.

2. This bridge is on the road from Lenud's ferry on Santee, to Britton's ferry on Pee Dee, which road divides Williamsburgh from Prince George, Winyaw. How the bridge was formerly repaired or built, I do not know, but in 1820, by the 38th clause of the Road Act, certain Commissioners on the part of Georgetown, and certain others on the part of Williams-

burgh, were appointed, "with power and authority to contract for, and have repaired, the bridge over Black Mingo creek, at the joint expense of the said districts; and the said Commissioners are hereby invested with all the powers of Commissioners of high roads, as far as relates to repairing and keeping in order said bridge."

How this Board has been perpetuated, I have no means of ascertaining, but by the resolution appointing Commissioners of Roads in 1847, two Commissioners were appointed for Winyaw, but none for Williamsburgh.

By the 30th sec. of the Road Act of 1849, Robert H. Wilson, Thomas N. Britton and E. H. Miller, are appointed for the district of Williamsburgh, and Blackwell Haselden, Samuel M'Ginney and Henry F. Heriot, are appointed for the district of Georgetown, Commissioners of Black Mingo bridge, with all the powers, privileges and liabilities of such Commissioners, as now by law provided.

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PRIVATE WAY.

1. Is a right of passage over another's land. It is a mere easement, wholly disconnected with any right to the soil. By the Civil Law, such rights were called servitudes, because they were charges on one estate for the benefit of another. By reason of this, the owner of an estate is bound to permit certain acts in relation to his own estate for the benefit of others. What is a private way.

2. A private right of way may arise or be created in three ways—1. Grant. 2. Prescription. 3. Necessity. How many kinds.

3. It is created by grant, when the owner of the estate, by deed, conveys the right. In all such cases, the terms of the grant must define and limit its extent. By grant.

4. In matters of antiquity, where the evidences of rights have been lost or are incapable of proof, the law allows presumptions to supply the place of muniments of title. It is fair and reasonable to presume, that what has been done unobjected to for a long period of time, has been done rightfully. If one has held and occupied land as his own for a long time, exercising dominion over it as his own, the law presumes, from the long use and the acquiescence of others, that his possession was originally with a title. This period is now generally understood to be twenty years. So if one has used a way over another's land for twenty years or more, the law presumes that the owner of the soil had originally granted it to him. In such case, as the law presumes the title from the use, the nature of the use must, therefore, determine the nature and extent of the right. By presumption. Use for 20 years will give the right.

5. If the use be such as is consistent with the title of the proprietor of the land, or if it be by the permission of the owner, then no title can arise, because, from the use, no inference of right can be drawn. But not if use be permissive.

6. It would seem that, by our law, all uninclosed lands are commons, upon which all persons may pasture their cattle and travel at their pleasure. It follows from this, that the use of a road through uninclosed lands will not confer a right of way, because such a use is not inconsistent with the rights of the owner. He had no right to object, and could maintain no action, because the travelling on such a road was no trespass. See *McConico* v. *Singleton*, 2 McC. 244; *Garrett* v. *McKee*, 1 Bail.341; *Rowland* v. *Wolfe*, 1 Bail. 56; *Broughton* v. *Singleton*, 2 N. & McC. 338. Uninclosed woodlands are commons. No action for traveling over them.

7. It was once supposed, that for the reason above stated, a right of way could not be presumed through uninclosed

woodlands, but subsequent cases have, somewhat, modified the rule. In the case of *Sims* v. *Davis*, Cheves, 1, and of *Hogg* v. *Gill*, 1 McMul. 329, the limitation is thus stated. "A right of way, by prescription, implies an adverse use for twenty years, and the use must be such as indicates that the user was exercising a right in himself, uncontrollable by the owner of the soil over which it passes." The same principle is affirmed in the subsequent case of *Nash* v. *Peden*. The illustrations given in the cases are, where the claimant, or those from whom he derives his title, opened the road or worked on it, and kept it in repair from time to time, as men are accustomed to do with that to which they have a right. But the mere cutting of a tree out which had fallen across the road, would not be such use as would be evidence of title. *Nash* v. *Peden*.

But if such use be adverse, the right will accrue.

The use must be adverse, that is, such acts must be done by the claimant, as shew he is exercising a right. *Sims* v. *Davis* and *Nash* v. *Peden*, *ante*.

8. The presumption does not depend on the use merely, but on the use unopposed or acquiesced in by the owner. If the claimant opened the road, or if he cut down trees and dug ditches for the purpose of draining or repairing the road, and the owner made no objection, this acquiescence would be evidence that the use was rightful; and a road used under such circumstances, would be established as a private way. Thus, in *Turnbull* v. *Rivers*, 3 McCord, 131, it is said, in order to presume a grant of a right of way, uninterrupted use, for at least twenty years, is necessary, and the identity of the road must be established, and an acquiescence shown on the part of the owner of the land; but very slight deviations, it is apprehended, would not prevent the presumption.

The use must be unopposed by the owner.

9. The use and acquiescence must be for twenty years at least, and if, during that time, the owner of the soil was an infant, no presumption of a grant could arise until the infancy was at an end; because nothing is presumed against an infant during his minority. No case has been decided by our courts, as to what shall be the effect of infancy in cases of presumption. In the case of *Boykin* v. *Cantey*, tried at Camden, in 1848, the question arose, whether an intervening infancy suspended the presumption; my own opinion was, in conformity with the decisions in Massachusetts, that the period of infancy was to be deducted from the whole period of use, and if there was still remaining twenty years, during which the owners were adults, then the presumption would arise, otherwise not. But this case was settled by the parties, and no decision of the point was made by the Appeal Court.

The effect of infancy.

10. The identity of the way must be established for the whole period of twenty years. If, during that time, it was ob-

The identity of the way

structed by the owner, and diverted in its course by fences, these acts would shew a use by permission—the obstructions would be inconsistent with the idea of adverse use. But when the title to the way is once perfected by twenty years adverse use, then it can only be defeated by some of those means by which a man loses his title, as by the statute of limitations, or a presumption of re-conveyance from twenty years obstruction—as in *Cuthbert* v. *Lawton*, 3 McC. 194. There the way had been uninterruptedly used from 1769 to 1800, but after that period had not been much used, and had been obstructed several times in different years, and some wide deviations had been made from its original course. The court held the right not destroyed by these obstructions and deviations. But if the title had only begun to accrue since 1800, then such obstructions would defeat it. Thus, it will be seen that the effect of obstructions or deviations in the road, after the title has accrued, is different from the effect of the same before the right accrues. In the former, they go to defeat a title. In the latter, they shew that no title existed.

must be established for 20 years.

11. After a title has accrued, slight variations or obstructions will not defeat it, and it is presumed that such would not prevent the title from accruing, if the owner of the soil, when he made them, did any act by which he shewed his acquiescence in the fact that the right of way existed. As if, when he obstructed in one place, he made a good and sufficient way in another place.

Slight variations will not defeat after the title has accrued.

12. The soil, notwithstanding the servitude, still remains in the owner, and he may use it in any way which is not inconsistent with the easement; and in the case of *Capers* v. *Wilson*, 3 McCord, 170, it is said that the erection of a gate was not such an obstruction as would give a right of action. I think there would be no doubt of this where the way was one by necessity.

The soil still remains in the owner.

13. As the use is the evidence of right, nothing passes beyond what the party has used for twenty years. If the owner of the soil has, during the time, kept up a gate across the way, the claimant has no right to object; *Barnwell* v. *McGrath*, 1 McMul. 174. His right is limited strictly to the line of the way he has used, and he has no right to vary it; or in case it becomes impassable, to go on the adjoining lands, because he is bound to repair his own road, (3 Kent Com. 419.) Nor has he any right to use the soil or timber from the adjoining land, unless he shews a prescriptive right to do so, or that he has used them for that purpose for twenty years. *McKee* v. *Capers*, 1 Strob. 164.

A right of way may exist with a gate if so used.

If impassable the owner has no right to go on adjoining lands.

14. In case a public road be out of repair or impassable, as by a flood, there is a temporary right of way over the adjoining land, but this applies only to highways. The owner of a

private way has no such right, and the reason is, that he is bound to repair, and it may be his fault that his road is impassable; *Douglas*, 745, (*Taylor* v. *Whitehead*,) 3 Kent, 424, 2d edition.

15. There are some dicta that those who are entitled to a private way by necessity, may, in case his private way is destroyed, go on the adjoining land. (See 3 Kent Com. 424–5, Douglas, 749. This seems to be on the principle, that as the owner of the land is bound to furnish a convenient way, if that is destroyed, as by floods, the person entitled may go on the adjoining land; but, I apprehend, no such right will exist if the way is rendered impassable for the want of repair. I do not suppose the owner of the soil is bound both to give the road and keep it in repair.

A RIGHT OF WAY BY NECESSITY.

Right of way of necessity.

15. The necessity from which a person derives a right of way is when one person sells to another land, enclosed on all sides by the seller's land, there the law imposes an obligation on the seller, to allow the buyer a way over his adjoining lands. *Turnbull* v. *Rivers*, 3 McC. 131. This necessity is not mere inconvenience, for that may exist when the land be surrounded by the lands of other persons as well as the seller's, and the idea would be preposterous, that if A buy land, surrounded by the land of others, he can, on the ground of necessity, compel the owner on that side most convenient to him to give him a road. If it could, then if he sold the same land to a third person, residing on another side, such person would have an equal right to a way on his side. If the right of way by necessity could arise in this manner, then it would change whenever the owner should change his residence. Sergeant Williams, in his notes to 1 Sanders' Rep. 323, note 6, expresses the opinion that the right of way, when claimed by necessity, is founded entirely upon grant, and derives its force and origin from it. The land would be useless if the purchaser has no ingress or egress to and from it; and therefore the law annexes as a condition of necessity that the purchaser shall have a right of way. This view has the sanction of Chancellor Kent, 3 Com. 425, as resting on a reasonable foundation and consistent with the general principles of law; and of Lord Ellenborough, 4 Maule & Selwyn, 393, and a late work on Ways, by Woolrych, 2 Law Lib. 21.

The necessity must not be mere inconvenience.

Every right of way founded on contract.

17. It follows from this, that every right of private way is founded on contract, 1. Where there is a deed in fact. 2. Where a deed is presumed from use. 3. Where the road is granted as necessarily incident to a deed. There is no such thing as a road of necessity existing merely because the

owner of land has no other way. If his land be surrounded by the land of A, B and C, which of them shall give him a road? Shall he have a road to his mansion through A's land, to market through B's, and to the church through C's? In the case of *Lindsay* v. *Commissioners*, 2 Bay, 28, it is said to be a tacit condition of all grants that the public should appropriate so much as was necessary to establish public roads. I do not think the right of the public to appropriate private lands to public use need be put on any such ground. But I have heard it said, that as the sovereign power, which we now call the State, was once the owner of all the land, the condition was implied in every grant that the grantee should have a right of way to and from his land through the public domain which surrounded it. But this is liable to many objections, and would be found very difficult, if not impossible, in practice. We have no decided case authorizing any such doctrine as applied to private ways.

18. Even in the cases where a party is entitled to a right of way of necessity, it must be an absolute necessity, not a mere inconvenience. If he has any other way, the necessity does not exist. Thus, in *Turnbull* v. *Rivers*, before quoted, it is said the mere inconvenience of going to one's plantation by water is not such a necessity as will give a right of way, for necessity and not inconvenience gives the way. Also, if a person owns land lying between two roads, one on the east and the other on the west, and he shall sell the land on the west side to A, this would not give to A a right of way through the seller's lands to the road on the east, whatever might be the distance or difficulty of getting to that road. These are but the *dicta* of the Judge who delivered the judgment of the Court, but they are strikingly illustrative of the principle, that no right of way arises by implication from the grant but such as exists in necessity, and not mere inconvenience.

Seller may lay off the way.

19. The law does not imply in such cases a right of way such as the purchaser may choose, but such as the seller may lay off for him. The only limitation is that it be a convenient way. *Capers* v. *Wilson*, 3 McC. 170.

Must be convenient.

If the seller refuse to lay off such way or obstruct it, he may be sued. (Id.)

The right may exist in the seller.

20. The right of way by necessity may be in the seller as well as the buyer, as where A had three parcels of land, and there was a private way out of the first to the second, and through that to the third, B purchased all these parcels and sold the two first to C, there was no way to the third but through the other two, and the Court adjudged that the way continued of necessity. The law in such case presumes a right of way reserved in the deed. 3 Kent Com. 422; 2 Lutw. R. 187; 5 Taunton, 311.

HOW EXTINGUISHED.

If appurtenant to a freehold will pass with the land.

21. If a right of way be granted to a person, like other rights merely personal, it ceases at his death; but if, as is usual, it be appurtenant to a freehold, then it survives to the heir, and passes with the freehold, under the word appurtenances, to a purchaser.

Adverse use will bar a right of way.

May be defeated by stat. lim.

22. A right of way will be extinguished by any of the means whereby it is acquired. 1. It may be released or surrendered to the owner of the freehold. 2. In general, mere non-user for any length of time, unless it amounts to abandonment, will not destroy a right of way; but, where there is an adverse possession of 20 years, that will defeat the title, and an actual possession, as by enclosing the road, would, I apprehend, bar the right, if continued to the period of limitation fixed by the statute. In *Cuthbert* v. *Lawton* it is said the right of way would be defeated by an adverse and continued obstruction for five years; that was then the period of limitation for action to recover land. It is now ten years.—(*Quere.* As the action for disturbance of ways is case, would not the action be barred, as other actions on the case are, in four years?)

Destroyed by merger.

3. But the most usual way of extinguishment is by uniting in one person the right of way and the title to the land over which the way exists. This is called *merger*, and is on the principle that the greater absorbs the less.—When the same person becomes the owner of both, the very essence of a private way, viz: the right of passage over another's land, is destroyed. A man cannot be said to have a right of way over his own land; so if a man have a right of way appurtenant to his freehold over the land of another, and he then purchase that land, and if afterwards the same becomes the property of a stranger, the way is gone forever. Woolrych, 70. In such case, if the owner had no other way from his close but through that which he had sold, he might have a new way by necessity, but the old right would be extinct.

23. A testator who, for more than 20 years, had used a way to the public road through his own land, died in 1831, having devised his land to be equally divided among his sons C, W and B. Under a parol partition W acquired that part on which the house stood, and sold to the plaintiff. C acquired the part next to the highway, through which the road ran. He made a lane and sold to defendant, who permitted the lane to remain open for some time, but finally closed it up, for which an action was brought. It was held, 1. That whilst there was unity of possession in the testator, no right of way arose, on the principle above stated.

2. That since the partition, the time had been too short to confer any title. *Payne* v. *Williams*, 2 Spears, 15.

24. But this doctrine of merger by unity of title is materially different when applied to ways by necessity. Where the close over which a way exists by necessity becomes united with the close to which the way is appurtenant, this is rather a suspension than an extinguishment, and revives when the possession becomes disunited. Woolrych, 71. (See the cases referred to in Woolrych at 71.)

Right of way by necessity ceases with the necessity.

25. A right of way by necessity ceases with the necessity. The defendant was possessed of four closes, and conveyed by feofment one of them to G. D. At the time of the feoffment, he had no other way to his other closes except through it. But by a subsequent purchase, he was enabled to approach his own property without going along this way. It was decided that his way by necessity over another's land ceased, when he might have a way over his own. *Holmes* v. *Goring*, 2 Bingham, 76.

26. The correctness of this doctrine is questioned by Woolrych, who argues with plausability that the necessity arises out of the grant, and not out of any state of facts subsequent to it; and the right is not, therefore, affected by any subsequent modifications of property. If the party had a right at the date of the grant, how can that right be taken away by any subsequent act?

Remedy for injury to way.

27. The remedy for any obstruction to the use of a private way is by action on the case; so also if one, bound to lay off a private way for a person entitled to one by necessity, refuse to do so, he may be sued on case.

This compend is so concise that it is not thought necessary to add an index. The only motive for compiling it, was to impart some knowledge to the community at large on a subject which is daily becoming one of great interest, and of which very little is known.

THE

NEGRO LAW

OF

SOUTH CAROLINA,

COLLECTED AND DIGESTED BY

JOHN BELTON O'NEALL,

One of the Judges of the Courts of Law and Errors of the said State,

UNDER A RESOLUTION OF THE STATE AGRICULTURAL SOCIETY OF SOUTH CAROLINA:

Read before them, at their September Semi-Annual Meeting, 1848, at Spartanburg Court House—by them directed to be submitted to the Governor, with a request that he would lay it before the Legislature, at its approaching Session, November, 1848, and by him ordered to be published for the information of the Members.

COLUMBIA:

PRINTED BY JOHN G. BOWMAN.

1848

TO HIS EXCELLENCY, DAVID JOHNSON,

Governor and Commander-in-Chief in and over South Carolina.

This work, passing through your hands to the Legislature of the State, may, I trust, be appropriately dedicated to you, as a slight testimonial of the friendship which, for more than thirty years, at the Bar, on the Bench, in your present high and dignified office, and in all the relations of life, has existed, and I hope ever will exist between us.

JOHN BELTON O'NEALL.

Springfield, Oct. 3, 1848.

To the State Agricultural Society of South Carolina:

The undersigned, charged with the preparation of a digest of the Law in relation to Negroes, (slave or free,) and directed to make such suggestions of amendment as to him may seem expedient, begs leave to submit the following as the result of an examination of the subject committed to him, so far as his time and opportunity allowed.

JOHN BELTON O'NEALL.

Springfield, August 14, 1848.

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$$5 \cdot 71$$

$$\frac{11}{20} + \frac{57}{60} = \frac{660}{1200} + \frac{1020}{1200} = \frac{1680}{1200} = 1\frac{3}{20} = \frac{2}{5}$$

$$\frac{1}{2} + \frac{11}{140} = \frac{140}{280} + \frac{22}{280} = \frac{212}{280} =$$

NEGRO LAW OF SOUTH CAROLINA.

CHAPTER I.

The Status of the Negro, his Rights and Disabilities.

SECTION 1. The Act of 1740, sec. 1, declares all negroes and Indians, (free Indians in amity with this Government, negroes, mulattoes and mestizoes, who now are free, excepted) to be slaves:— the offspring to follow the condition of the mother: and that such slaves are chattels personal.

P. L. 163. 7 Stat. 397.

SEC. 2. Under this provision it has been uniformly held, that color is prima facie evidence, that the party bearing the color of a negro, mulatto or mestizo, is a slave: but the same prima facie result does not follow from the Indian color.

The State vs. Harden, (note,) 2 Speer's. 155. Nelson vs Whetmore, 1 Rich'n, 324.

SEC. 3. Indians, and descendants of Indians are regarded as free Indians, in amity with this government, until the contrary be shown. In the second proviso of sec. 1, of the Act of 1740, it is declared that "every negro, Indian, mulatto and mestizo is a slave unless the contrary can be made to appear"—yet, in the same it is immediately thereafter provided—"the Indians in amity with this government, excepted, in which case the burden of proof shall lie on the defendant," that is, on the person claiming the Indian plaintiff to be a slave. This latter clause of the proviso is now regarded as furnishing the rule. The race of slave Indians, or of Indians not in amity to this government, (the State,) is extinct, and hence the previous part of the proviso has no application.

Miller vs. Dawson & Brown, Dudley's Rep. 174. State vs. Belmont, decided in Charleston, Jan, 1848. P. L. 164. 7 Stat. 398.

SEC. 4. The term negro is confined to slave Africans, (the ancient Berbers) and their descendants. It does not embrace the free inhabitants of Africa, such as the Egyptians, Moors, or the negro Asiatics, such as the Lascars.

Gliddon's Egypt. Exparte Ferrett and others, 1 Con. Rep. by Mill. 194-5. The State vs. Scott, 1 Bail. 273. State vs. Hayes, 1 Bail. 276.

SEC. 5. Mulatto is the issue of the white and the negro.

SEC. 6. When the mulatto ceases, and a party bearing some slight taint of the African blood, ranks as white, is a question for the solution of a Jury.

The State vs. Scott, 1 Bail. 274. The State vs. Davis & Hanna, 2 Bail 558. The State vs. Cantey, 2 Hill, 615.

The State vs. Cantey, 2 Hill, 615, 616. Johnson vs. Boon, 1 Speer's, 270-1. White & Bass vs. the Tax Collector of Kershaw, 3 Rich'n, 136-7-8-9, 140-1. The State vs Davis & Hanna, 2 Bail. 560. Turner vs. the Tax Collector of Marion, decided in Charleston, Feb. 1841.

SEC. 7. Whenever the African taint is so far removed, that upon inspection a party may be fairly pronounced to be white, and such has been his or her previous reception into society, and enjoyment of the privileges usually enjoyed by white people, the Jury may rate and regard the party as white.

SEC. 8. No specific rule, as to the quantity of negro blood which will compel a Jury to find one to be a mulatto, has ever been adopted. Between $\frac{1}{4}$ and $\frac{1}{8}$ seems fairly to be debateable ground. When the blood is reduced to, or below $\frac{1}{8}$, the Jury ought always to find the party *white*. When the blood is $\frac{1}{4}$ or more African, the Jury must find the party a mulatto.

The State vs. Hayes, 1 Bail. 276. The State vs. Scott, 1 Bail. 273. The State vs. Cantey, 2 Hill, 614.

SEC. 9 The question of color, and of course of caste, arises in various ways, and may in some cases be decided without the intervention of a Jury. As when a party is convicted and brought up for sentence, or a witness on the stand objected to as a free negro, mulatto, or mestizo, in these cases, if the color be so obvious that there can be no mistake about it, the Judge may refuse to sentence, or may exclude the witness; still if the party against whose color the decision may be made, should claim to have the question tried by a Jury, it must, I apprehend, be so tried.

2d Sec. 9th Art. Con. of S. C. 1 Stat. 191.

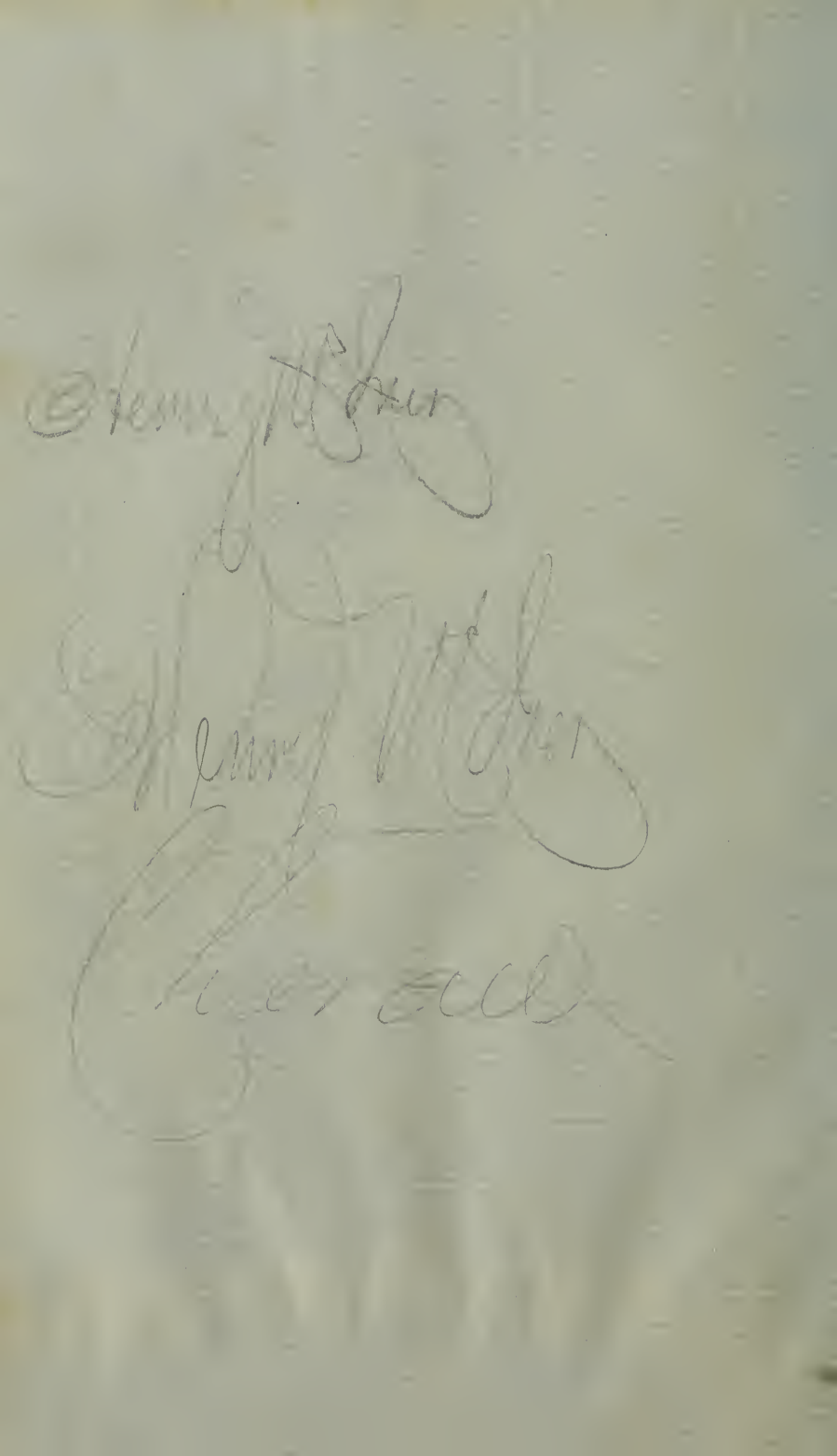
State vs. B. Scott, 1 Bail, 296. Johnson vs. Boon, 1 Speer's, 270-1. The State vs. Cantey, 2 Hill 614. Cromer vs. Miller, N. P. Decis. Charleston, May, '47.

SEC. 10. There are three classes of cases, in which the question of color, and of course, of caste, most commonly occurs. 1st. Prohibition against inferior Courts, or the Tax Collector. 2d. Objections to witnesses offered to testify in the Superior Courts. 3d. Actions of slander for words charging the plaintiff with being a mulatto.

The State vs. Scott, 1 Bail. 296.

SEC. 11. In the first class, free negroes, mulattoes and mestizoes are liable to be tried for all offences, by a magistrate, and five free holders, (except in Charleston, where two magistrates must sit,) and of course, any person claiming to be white, (over whom, if that be true, they have no jurisdiction,) charged before them criminally, may object to their jurisdiction, and if they persist in trying him or her, may apply for, and on making good the allegation, is entitled to have the writ of prohibition. It seems if the party submits to have the question of jurisdiction tried by the Inferior Court, he will be concluded.

SEC. 12. The writ of prohibition is generally granted, nisi, on a suggestion sworn to by the relator, by any Judge at Chambers, on notice being given to the Court claiming jurisdiction; but if the fact be uncontroverted. or so plain as not to admit of doubt, that the relator is white, the Judge may at once grant an absolute prohibition. Generally, however, an issue is ordered to be made up on granting the prohibition, nisi, in which the relator is plaintiff, and on the Jury finding the relator to be a free white person, the prohibition is made absolute.



SEC. 13. In this class, too, the Tax Collectors frequently issue tax executions for capitation taxes, against persons whom they suppose to be free negroes, mulattoes, or mestizoes, ("free persons of color," as they are sometimes loosely called.) If the person or persons against whom they be issued, be not liable to the tax, they may, on a suggestion, move for, and have the writ of prohibition.

Burger, Tax Collector, &c. Cartler, 1 M Mull. 118.
Johnson vs. Boon, 1 Speers, 270-1. White & Bass vs. the Tax Collector of Kershaw, 3 Rich'n, 136.

SEC. 14. In such cases, where, from the affidavits accompanying he suggeston, it appears that the relator or relators has or have been received in society as white, and has or have enjoyed the privileges of a white person, or of white people, I have uniformly made the order for prohibition to become absolute, if the Tax Collector did not within a given time, file his suggestions contesting the status of the relator or relators. This course has been adopted, because the Tax Collector has no jurisdiction over the person of the relator, and has no judicial authority whatever to decide the question of caste. His execution is predicated of an assumed fact. He is, therefore, bound to make that good, before he can collect the tax. This course has been found extremely convenient, as it has cut off an immense amount of litigation. For, generally, the Tax Collectors exercise a sound and honest discretion, in pursuing only those cases where there seems to be no room to doubt the degraded caste of the relator or relators.

SEC. 15. Where, however, there is to be a question as to the color of the relator or relators, the Court may in its discretion cast the burden of proof on the Tax Collector, or the relator. Generally, I think, it should be cast on the Tax Collector, as his execution is the first allegation of the color of the relator. As the issue may result, the writ of prohibition is made absolute or dissolved.

SEC. 16. In all the cases of the first class, the decision is conclusive; in all subsequent cases, civil or criminal. For the prohibition is in the nature of a criminal proceeding, operating *in rem*, and binds not only the parties, but also all the people of the Commonwealth. So it seems, that any decision made in favor of the caste of the relator, as white, may be given in evidence in his favor.

See Reporter's note A, to M'Collum vs. Fitzsimons, 1 Rich'n, 251.
M'Collum vs. Fitzsimons, 1 Rich'n, 252.

SEC. 17. In the 2d class, the objection to the competency of the witness, makes the issue collateral, and it is tried instanter, without any formal issue being made up, and the finding is upon the record on trial. The verdict, in such a case, concludes nothing beyond the question of competency in that case. It, however, might be given in evidence for or against the witness, not as conclusive, but as a circumstance having weight in settling the question of status, in all other cases.

SEC. 18. In the 3d class, where justification is pleaded and found, it would seem to forever conclude the Plaintiff from re-agitating the

Cromer vs. Miller, N. P. Decis. Charleston, May, 1847.

question. But, where the defence is as usual, that the Defendant had good reason to suspect and believe that the Plaintiff was, as he alleged, a mulatto, in such case, a finding of nominal damages sustains the defence, yet it concludes not the Plaintiff from afterwards averring and proving that he was white.

SEC. 19. Free Indians and their descendants, unmixed by African blood, are entitled to all the privileges of white men, except that of suffrage and office. The former, and of consequence the latter, has been denied to a pure Indian, living among the whites. The foregoing principle resulting from the case cited in the margin, is, I am persuaded, wrong. The term white, ("free white man,") used in our Constitution, is comparative merely: it was intended to be used in opposition to the colors resulting from the slave blood. The case should be reviewed, and I trust the decision will be reversed; for the case in which it was made, will always condemn it. The relator, the Rev. John Mush, was an Indian of the Pawmunki tribe of Indians, in Virginia; he was a soldier of the Revolution, he had as such, taken the oath of allegiance. He was sent out as a Missionary to the Catawbas. He, however, did not reside among them; he lived among the white inhabitants of York District, where he had resided for many years. He was a man of unexceptionable character. Yet, strange to say, he was held not to be entitled to vote. If that decision be right, how long is the objection to prevail? When is the descendant of an Indian to be regarded as white? Is it, that he is not to be so regarded, until a jury shall find him to be white, on account of the great preponderance of the white blood? But the Indian blood, like that of the white, is the blood of freedom; there is nothing degrading in it, and hence, therefore, the Indian and his descendants may well claim to be white within the legal meaning of our Constitution.

The State ex relatione, John Marsh, (the name should be John Mush,) vs. the Managers of election for York Dist. 1st Bail 215

SEC. 20. A mestizo is the issue of a negro and an Indian, and is subject to all the disabilities of a free negro and mulatto.

Miller vs. Dawson and Brown, Dudley's Report, 174, 176. 2d Proviso of 1st Sec. of the Act of 1740, P. L. 164. 7 Stat. 393.

SEC. 21. The burden of proof of freedom rests upon the negro, mulatto, or mestizo, claiming to be free.

SEC. 22. Under the Act of 1740. 1st sec. 1st proviso, and the Act of 1799, it is provided, if any negro, mulatto, or mestizo shall claim his or her freedom, he may on application to the Clerk of the Court of Common Pleas of the District, have a guardian appointed, who is authorized to bring an action of trespass, in the nature of ravishment of ward, against any person claiming property in the said negro, mulatto or mestizo, or having possession of the same; in which action, the general issue may be pleaded, and the special circumstances given in evidence; and upon a general or special verdict found, judgment shall be given according to the very right of the case, without any

2d Faust, 324.

Wesner ads. Guardian of Tom Brister, 1st M'Mull., 135.

regard to defects in the proceeding, in form or substance. In such case, if the verdict be that the ward of the Plaintiff is free, a special entry shall be made declaring him to be free—and the jury is authorized to assess damages which the Plaintiff's ward may have sustained, and the Court is directed to give judgment, and award execution for the damages and cost; but if judgment is given for the Defendant, then the Court is authorized to inflict corporal punishment on the ward of the Plaintiff, not extending to life or limb. Under the 2d sec. of the Act of 1740. it is provided that the Defendant in such action, shall enter into a recognizance with one or more sufficient sureties to the Plaintiff, in such sum as the Court of Common Pleas may direct, conditioned to produce the ward of the Plaintiff, at all times when required by the Court, and that while the action or suit is pending, he shall not be eloigned, abused or misused. P. L. 164.

Sec. 23. Under the 1st proviso, the action of trepass in the nature of ravishment of ward, is an action sounding altogether in damages. The finding for the Plaintiff, is altogther of damages, which may be made up of the value of the services of the Plaintiff's ward, and recompense for any abuse, or injury, which he may sustain. For such damages and the costs, the judgment is entered up, and execution issues.

Sec. 24. Under the Act, the Court is authorized, on such finding for the Plaintiff, to make a special entry, that the ward of the Plaintiff is free. This entry ought to recite the action, the finding of the Jury, and then should follow the order of the Court, that the Plaintiff's ward is free, and that he be discharged from the service of the Defendant. This should be spread on the minutes of the Court. This entry is, it seems, evidence of the freedom of the Plaintiff's ward in all other cases, and against all other persons. It is only conclusive, however, against the Defendant; against all other persons, it is *prima facie* merely. Under the 2d sec., the proceeding is by petition, setting out the action brought to recover the freedom of the negro, the possession by the Defendant, with a prayer, that the Defendant enter into the recognizance required by law. If this order be disobeyed, the Defendant may be attached for a contempt, until it be obeyed; or it may be in analogy to the decision under the Trover Act, that the Sheriff might arrest the Defendant under the order, and keep him in custody until he entered into the recognizance. I never knew the order made but once, and that was in the case of Spear and Galbreath, Guardians of Charles, vs. Rice, Harp. 20. In that case, the order was complied with by the Defendant on notice of it.

Rice ads. Spear and Galbreath, Harp. Report, 20.

The State vs. Hill, 2d Speers, 160.

Poole vs. Vernon, 2d Hill, 669.

Sec. 25. The evidence of freedom is as various as the cases.

Sec. 26. Proof that a negro has been suffered to live in a community for years as a freeman, is *prima facie* proof of freedom.

State vs. Harden, 2d Speer, 156, (note.)

Miller, Adm'r. of Bennett, vs. Reigne, et al, 2d. Hill, 592. The State vs. Hill, 2d Speers, 161.

SEC. 27. If before the Act of 1820, a negro was at large, without an owner, and acting as a freeman for twenty years, the Court would presume *omnia esse rita acta*, and every muniment necessary to give effect to freedom to have been properly executed.

SEC. 28. This rule applies also, when freedom has been begun to be enjoyed before the Act of 1820, and the 20 years are completed after.

Cooper's Justinian Notes, 416 Salley vs. Beatty, 1. Bay, 260. Bowers vs. Newman. 2. M'Mull. 491-2.

SEC. 29. Before the Act of 1800, (hereafter to be adverted to,) any thing which shewed that the owner had deliberately parted with his property, and dissolved the *vinculum suvitii*, was enough to establish freedom.

Monk vs. Jenkins. 2 Hill, C. R. 13, Rice ads. Spear and Galbreath, Harper's Law Report 20.

SEC. 30. The validity of freedom depends upon the law of the place where it begins. Hence, when slaves have been manumitted in other States, and are found in this State, their freedom *here*, will depend on the validity of the manumission at the place whence they came.

7 Stat. 442, 443.

SEC. 31. By the 7th, 8th and 9th sections of the Act of 1800, it was provided, that emancipation could only take effect by deed; that the owner intending to emancipate a slave, should, with the slave, appear before a Justice of the Quorum, and five Freeholders of the vicinage, and upon oath, answer all such questions as they might ask touching the character and capability of the slave to gain a livelihood in an honest way. And if, upon such examination, it appeared to them the slave was not of bad character, and was capable of gaining a livelihood in an honest way, they were directed to indorse a certificate upon the deed to that effect; and upon the said deed and certificate being recorded in the Clerk's office, within 6 months from the execution, the emancipation was declared to be legal and valid, otherwise, that it was void. The person emancipating was directed by the 8th section, to deliver to the slave a copy of the deed of emancipation, attested by the Clerk, within 10 days after such deed shall have been executed.

SEC. 32. The person emancipating, neglecting or refusing to deliver such copy, was, by the 9th section, declared to be liable to a fine of $50, with costs, to be recovered by any one who shall sue for the same.

SEC. 33. It was also provided by the 9th section, that a slave emancipated contrary to this Act, may be seized, and made property by any one.

SEC. 34. It was held, for a long time, that when a will directed slaves to be free, or to be set free, that they were liable to seizure, as illegally emancipated. But the cases of Lenoir vs. Sylvester, and Young vs. the same, put that matter right. In them, it was held, that a bequest of freedom was not void, under the Act of 1800—that it could have no effect until the Executor assented—that when he did

1st Bail. 632, 633.

assent, it was his duty to so assent as to give legal effect to the bequest. As legal owner, he could execute the deed, appear before the Magistrate and Freeholders, answer the questions, and do every act required by the law, and thus make the emancipation legal.

SEC. 35. A slave illegally emancipated, was free, as against the rights of the owner, under the Act of 1800; he could only restore himself to his rights by capture. The Act of 1820, declares that no slave shall be emancipated but by Act of the Legislature. Still it has been held, in Linam vs. Johnson, and many subsequent cases, that if a slave be in any other way emancipated, he may, under the provision of the Act of 1800, be seized as derelict.

Linam vs. Johnson, 2nd Bail. 140.

Monk vs. Jenkins, 2 Hill, C. R. 13. 7 Stat. 459.

SEC. 36. The delivery of the deed of emancipation to the Clerk to be recorded, is all the delivery necessary to give it legal effect; and the delivery to the Clerk is equivalent to recording.

Monk vs. Jenkins, 2 Hill, C. R. 14-15.

SEC. 37 The Act of 1820, declaring that no slave should hereafter be emancipated, but by Act of the Legislature, introduced a new, and, as I think, an unfortunate provision in our law. All laws unnecessarily restraining the rights of owners are unwise. So far as may be necessary to preserve the peace and good order of the community, they may be properly restrained. The Act of 1800 was of that kind. The Act of 1820, instead of regulating, cut off the power of emancipation. Like all of its class, it has done harm instead of good. It has caused evasions without number. These have been successful, by vesting the ownership in persons legally capable of holding it, and thus substantially conferring freedom, when it was legally denied.

Cline vs. Caldwell, 1 Hill, 423.

State vs. Singletary and others, Dudley's Rep. 220.

Carmille vs. Admr. of Carmille et al. 2d McMull, 424.

The State vs. Singletary and Rhame, Dud. 220.

SEC. 38. So too, bequests or gifts, for the use of such slaves, were supported under the rule, that whatever is given to the slave belongs to the master.

Carmille vs Admr. of Carmille, 2 McMull, 424.

SEC. 39. Since the Act of 1820, if a negro be at large, and enjoy freedom for twenty years, he or she is still a slave; as an Act of Emancipation passed by the Legislature, will not be presumed.

Vingard vs. Passalaigue, 2 Strob.

SEC. 40. The Act of 1820, was plainly intended to restrain emancipation within the State; it was, therefore, held by the Court of Appeals, that where a testator directed slaves to be sent out of the State, and there set free, such bequest was good.

Frazier vs. Frazier, 2 Hill C. R. 305.

SEC. 41. In '41, the Legislature, by a sweeping Act, declared, 1st. That any bequest, deed of trust, or conveyance, intended to take effect after the death of the owner, whereby the removal of any slave or slaves without the State, is secured or intended, with a view to the emancipation of such slave or slaves, shall be void—and the slave or slaves' assets, in the hands of any Executor or Administrator. 2d. That any gift of any slave or slaves, by deed, or otherwise, accompanied by a trust, secret or implied, that the donee shall remove such slaves from the State to be emancipated, shall be void, and directed

11 Stat. 151.

the donee to deliver up the slave or slaves, or account to the distributees, or next of kin, for their value. 3d. That any bequest, gift, or conveyance of any slave or slaves, with a trust or confidence, either secret or expressed, that such slave or slaves shall be held in nominal servitude only, shall be void, and the donee is directed to deliver the slave or slaves, or to account for their value to the distributees, or next of kin. 4th. That every devise or bequest to a slave or slaves, or to any person upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be void.

Carmille vs. the Admr. of Carmille, 2d McMull 424.

SEC. 42. This Act, reversing the whole body of the law, which had been settled by various decisions from 1830, can have no effect on any deed, will, gift, or conveyance, made prior to its passage, 17th December, 1841.

SEC. 43. This Act, it has been always said, was passed to control a rich gentleman in the disposition of his estate. Like everything of the kind, he defeated it, and the expectations of his next of kin, by devising his estate to one of his kindred, to the exclusion of all the rest.

SEC. 44. My experience as a man, and a Judge, leads me to condemn the Acts of 1820 and 1841. They ought to be repealed, and the Act of 1800 restored. The State has nothing to fear from emancipation, regulated as that law directs it to be. Many a master knows that he has a slave or slaves, for whom he feels it to be his duty to provide. As the law now stands, that cannot be done. In a slave country, the good should be especially rewarded. Who are to judge of this, but the master? Give him the power of emancipation, under well regulated guards, and he can dispense the only reward, which either he, or his slave appreciates. In the present state of the world, it is especially our duty, and that of slave owners, to be just and merciful, and in all things to be *exceptione majori*. With well regulated and mercifully applied slave laws, we have nothing to fear for negro slavery. Fanatics of our own, or foreign countries, will be in the condition of the viper biting the file. They, not us, will be the sufferers. Let me, however, assure my countrymen, and fellow-slaveholders, that unjust laws, or unmerciful management of slaves, fall upon us, and our institutions, with more withering effect than anything else. I would see South Carolina, the kind mother, and mistress of all her people, free and slave. To all, extending justice and mercy. As against our enemies, I would say to her, *be just, and fear not.* Her sons faltered not on a foreign shore; at home, they will die in the last trench, rather than her rights should be invaded or despoiled.

SEC. 45. Free negroes, mulattoes, and mestizoes, are entitled to all the rights of property, and protection in their persons and property, by action or indictment, which the white inhabitants of this State are entitled to.

SEC. 46. They are legally sui juris. (The Act of '23, section 8, requires every male free negro, above the age of 15, to have a guardian, who must be a respectable freeholder of the District, who may be appointed by the Clerk.) Notwithstanding this provision, the free negro is still, as I have said sui juris, when of and above the age of 21. The guardian is a mere protector of the negro, and a guarantor of his good conduct to the public. 7 S at. 462.

SEC. 47. They may contract, and be contracted with. Their marriages with one another, and even with white people, are legal.— They may purchase, hold, and transmit, by descent, real estate.— They can mortgage, aliene, or devise the same. They may sue, and be sued, without noticing their respective guardians. Bowers vs. Newman, 2d McMull, 472. Real Estate of Mrs. Hardcastle, ads. the Escheator of Pineville, reported in the arg't. Bowers vs. Newman, 2d McMull. 479--480.

SEC. 48. They are entitled to protect their persons by action, indictment, and the writ of Habeas Corpus, (except that the writ of Habeas Corpus is denied to those who enter the State contrary to the Act of 1835.) They cannot repel force by force; that is, they cannot strike a white man, who may strike any of them. The State vs. Harden, note A. 2 Speers, 152. The State vs. Hill, Idem, 150--151.

SEC. 49. It has, however, been held, in a case decided in the Court of Appeals, and not reported, that insolence on the part of a free negro, would not excuse an Assault and Battery. From that decision, I dissented, holding as in the State vs. Harden, 2d Speers (note) 155, "That words of impertinence or insolence addressed by a free negro to a white man, would justify an Assault and Battery." "As a general rule, I should say, that whatever, in the opinion of the Jury, would induce them, as reasonable men, to strike a free negro, should in all cases be regarded as a legal justification, in an indictment." The State vs. B. Scott, 1 Bail 294. 1st sec. Act of 1844, 11 Stat. 293.

SEC. 50. In addition to the common law, remedies, by action of Assault and Battery, and False Imprisonment, and indictments for the same, the Act of '37 furnishes another guaranty for the protection of free negroes, mulattoes, or mestizoes, by declaring any one convicted of their forcible abduction, or assisting therein, to be liable to a fine not less than $1000, and imprisonment not less than 12 months. 6 Stat. 674.

SEC. 51. Free negroes, mulattoes, and mestizoes, cannot be witnesses or jurors in the Superior Courts. They can be jurors no where. They cannot even be witnesses in Inferior Courts, with the single exception of a Magistrate's and Freeholders' Court, trying slaves or free negroes, mulattoes or mestizoes, for criminal offences, and then without oath. This was however, not always the case, to the entire extent which I have stated. It was at one time held, that any *person of color*, if the issue of a free white woman, is entitled to give evidence, and ought to be admitted as a witness, in our Courts. This was predicated of a clear mistake of the civil law maxim of partus sequitur ventrem, and of the provision in the 1st section of the Act of 1740, that the offspring should follow the condition of the mother, which only mean, that slavery or freedom should be the condi- White vs. Holmes, McC. 430. Groning vs. Devana, 2d Bail. 192. 13th and 14th sec. of Act of 1740. P. L. 166. The State vs. Dowell, 2 Brev. 146. The State vs. B. Scott, 1 Bail. 273. The State vs. Hays, 1 Bail. 275.

tion of the offspring, but where the words mulatto or mestizo are ever used as designating a class, they are to be interpreted by their common acceptation.

P. L. 166--167. 7 Stat. 401--402.

SEC. 52. It is singular that the 13th and 14th sections of the Act of 1740, directing who may be witnesses against slaves, free negroes, &c., should have been confined to free Indians and slaves, who are to be examined without oath. From which it would seem, that free negroes, mulattoes, &c., might be examined in such cases, as at common law, upon oath. But the practice under the Act has been uniform, as I have before stated it. I think it a very unwise provision, and course of practice, to examine any witnesses in any court, or case, without the sanction of an oath. Negroes, (slaves or free) will feel the sanctions of an oath, with as much force as any of the ignorant classes of white people, in a Christian country. They ought, too, to be made to know, if they testify falsely, they are to be punished for it, by human laws. The course pursued on the trial of negroes, in the adduction and obtaining testimony, leads to none of the certainties of truth. Falsehood is often the result, and innocence is thus often sacrificed on the shrine of prejudice.

Glenn vs. Lopez, Harp. Rep. 109.

SEC. 53. Free negroes, mulattoes, and mestizoes, may make all necessary affidavits on collateral matters, in cases in the Superior Courts, in which they may be parties, as on motions of postponement, &c. So too, they may in such Court take the oaths under the Insolvent Debtor's or Prison Bounds Act, and under the Acts of Congress to obtain a pension.

Act of '47, p. 426. The State vs. Graham, 2d Hill. 457. 2d sec. Act of '45, 11 Stat. 343.

SEC. 54. Free negroes, mulattoes, and mestizoes, (except such as are proved to the satisfaction of the Tax Collector, to be incapable of making a livelihood,) are liable to a capitation tax, (fixed by each tax Act;) they may make a return personally—or any member of the family may make a return for the rest; or if one be sick, he or she may make such return by agent. They are liable to be double taxed for not making a return of themselves.

Acts of 1805, p. 6. Act of '33, 2d sec. p. 4. The State vs. Graham, 2d Hill, 458.

SEC. 55. This tax seems to have originated in 1805. The Act of 1833 directs the issuing of executions against free negroes, mulattoes and mestizoes, who may fail to pay the tax, and that under *them*, they may be sold for a term, not exceeding one year; provided, however, that they shall in no instance be sold for a longer term than may be necessary to pay the taxes due; but they cannot be sold under the double tax executions to be issued against them for not making returns of themselves. Such executions go against property merely. The constitutionality of the provision for the sale of free negroes in payment of their taxes, is exceedingly questionable.

2d sec. 9th Art. Con. S. C.

SEC. 56. The term "*free person of color*," used in many of our Acts, since 1840, has given rise to many imperfect and improper notions. Its meaning is confirmed by the Act of 1740, and all proper

constructions of our *code noir* to *negroes, mulattoes and mestizoes.* In common parlance, it has a much wider signification, *hence the danger of its use*; for all who have to execute the Acts of the Legislature are not *learned lawyers*, or Judges. The Legislature ought to use the words of the Act of 1740. "Free negroes, mulattoes and mestizoes," and then every one would have a certain guide to understand the words used.

SEC. 57. The Act of '35, declares it to be unlawful for any free negro, *or person of color*, to migrate into this State, or to be brought or introduced within its limits, by land or water. Act of 1835. 1st sec. 7 Stat. 470.

SEC. 58. Any free negro, or person of color, not being a seaman on board any vessel arriving in this State, violating this law, shall and may be seized by any white person, or by the Sheriff or Constable of the district, and carried before any Magistrate of the district, city or parish—who is authorized to bail or commit the said free negro—and to summon three freeholders, and form a Court for the trial and examination of the said free negro, or person of color, within six days after his arrest; and on conviction, order him to leave the State—and at the time of conviction, to commit him to jail, until he can leave the State, or to release him on bail, not longer than 15 days. And, if after being bailed and ordered to leave the State, the free negro or person of color, shall not leave within 15 days, or having left shall return, shall be arrested, and on conviction before a Court of one Magistrate and three freeholders, he shall be liable to such corporal punishment as the court shall order; if after such punishment, the offender shall still remain in the State "longer than the time allowed," (which is, I suppose, the time previously fixed, 15 days.) or shall return, upon proof and conviction before a court of one Magistrate and three freeholders, the free negro or person of color may be sold, and the proceeds appropriated, one half to the use of the State, the other half to the use of the informer.

SEC. 59. If the free negro or person of color come into this State, on board any vessel, as a cook, steward, mariner, or in any other employment, the Sheriff of the district is to apprehend, and confine in jail, such free negro or person of color, until the vessel be hauled off from the wharf, and ready for sea. The Act provides, that on the apprehension of any free negro or person of color, on board any vessel, the Sheriff shall cause the Captain to enter into a recognizance with good and sufficient security, in the sum of $1000 for each free negro or person of color, who may be on board his said vessel, that he will comply with the requisitions of this Act, which are, that he will, when ready for sea, carry away the said free negro or person of color, and pay the costs of his detension; but if the Captain be unable or refuse so to do, he is to be required by the Sheriff to haul his vessel in the stream, 100 yards distance from the shore, and there remain until ready for sea. If this be not complied with, in 24 hours, 2d sec. 7 Stat. 471.

the Captain is liable to be indicted, and on conviction, is to be fined not exceeding $1000, and imprisoned not exceeding 6 months.

3d sec. 7 Stat. 471.

SEC. 60. Whenever any free negro or person of color, shall be apprehended and committed for coming into this State by sea, it is the duty of the Sheriff to call upon some Magistrate to warn the offender, never again to enter the State, and at the time of giving such warning, the Magistrate is to enter the name of such free negro or person of color, in a book to be kept by the Sheriff, with a description of his person and occupation, which book is evidence of the warning, and is to be deposited in the Clerk's office, as a public record. If the offender shall not depart the State, in case the Captain shall refuse or neglect to carry him or her away, or having departed, shall ever again enter into the State, he or she is liable to be dealt with, and incur the forfeiture prescribed in the 1st sec.

5th sec. 7 Stat. 472.

SEC. 61 If any free negro or person of color, before the passage of the Act of '35, or since, has left, or shall leave the State, they are forever prohibited from returning, under the penalty of the 1st sec.

8th sec. 7 Stat. 473.

SEC. 62. The 8th sec. of the Act, excepts from its operation free negroes and persons of color, coming into the State from shipwreck, but declares them liable to arrest and imprisonment, as provided in the 2d sec., and to incur all its penalties, if within thirty days they shall not leave the State.

9th sec. 7 Stat. 473.

SEC. 63. The 9th sec. excepts free negroes and persons of color, who shall arrive as cooks, stewards or mariners, or in other employment, in any vessel of the United States; or on board any national vessel of the navies of any of the European or other powers in amity with the United States, unless they shall be found on shore, after being warned by the Sheriff to keep on board their vessels. The Act does not extend to free American Indians, free Moors, or Lascars, or other colored subjects beyond the Cape of Goop Hope, who may arrive in any merchant vessel.

14th sec. 7 Stat. 474.

SEC. 64. Free negroes, and *free persons of color*, (meaning of course mulattoes and mestizoes,) are prohibited, (unless they have a ticket from their guardian,) from carrying any fire arms, or other military or dangerous weapons, under pain of forfeiture, and being whipped at the discretion of a Magistrate and three freeholders. They cannot be employed as pioneers, though they may be subjected to military fatigue duty.

3d paragrah 8th sec. 1st art. Con. U. S. 2d. sec. 9th art. Con. S. C. Chapman vs. Miller, 2d Speers 769.

SEC. 65. The first, second, third and fifth sections of the Act of '35, are to my mind, of so questionable policy, that I should be disposed to repeal them. They carry with them so many elements of discord with our sister States, and foreign nations, that, unless they were of paramount necessity, which I have never believed, we should at once strike them out. I am afraid too, there are many grave constitutional objections to them, in whole or in part.

CHAPTER II.

Slaves, their Civil Rights, Liabilities, and Disabilities.

SEC. 1. In a previous part of this digest, I have had occasion incidentally to state the meaning of the civil law maxim, "*partus sequitur ventrem*," and of the provision of the 1st section of the Act of 1740, "the offspring to follow the condition of the mother." Both mean, that the offspring of a slave mother must also be a slave.

SEC. 2. The maxim, as well as the provision of the Act, has a further meaning in relation to property. It determines to whom the issue belongs. The owner of the mother has the same right in her issue, born while she belongs to him, which he has in her. If for example, the person in possession is tenant for life, then such an one takes an estate for life in the issue. If there be a vested estate in remainder, or one which takes effect on the termination of the life estate, the remainder man is entitled to the issue, on the falling in of the life estate, as he is entitled to the mother. If there be no estate carved out beyond the life estate, then as the mother reverts, so also does the issue.

M'Vaughter vs. Eld-r, 2d Brev. Rep. 314. Ellis vs. Shell, Eq. Rep. (DeS.) 611.

Geiger vs. Brown, 4 M'C. 418.

SEC. 3. The estate of a tenant for life in slaves, engaged in making a crop, if he die after the 1st of March, is continued by the Act of '89, until the crop be finished, or until the last day of December, in the year in which the tenant dies.

P. L. 499. Lenoir vs Sylvester, Young vs. the same, 1 Bail. 645.

SEC. 4. The issue of a white woman and a negro, is a mulatto within the meaning of that term, and is subjected to all the disabilities of the degraded caste, into which his color thrusts him. The rule "*partus sequitur ventrem*" makes him a free man. The result of mingling the white and negro blood is to make him a mulatto, and that carries with it, the disqualifications heretofore pointed out.

The State vs. R. Scott, 1 Bail. 273. The State vs. Hayes, 1 Bail. 275.

SEC. 5. The 1st section of the Act of 1740, declares slaves to be chattels personal.

SEC. 6. The first consequence legally resulting from this provision would have been without any Act of the Legislature, that the stealing of a slave, should be a larceny (grand or petit) at common law.

SEC. 7. But in 1754, an Act was passed, which, by its first section, made it a felony without the benefit of clergy, to inveigle, steal *and* carry away, or to hire, aid or counsel, any person or persons to inveigle, steal *or* carry away, any slave or slaves, or to aid any slave in running away, or departing from his master's or employer's service.

P. L. 235. 7 Stat. 426. The State vs. Miles, 2 N. & M'C. 1. The State vs. Whyte, et. al. 2 N. & M'C. 174. The State vs. Covington, 2d Bail. 569.

SEC. 8. This law, beginning in our Colonial times, and made for us by our rulers, given to us by Great Britain, has remained ever since unchanged, and has been sternly enforced as a most valuable safeguard to property. Yet public opinion was gradually inclining to the belief, that its provisions were too sanguinary, and that they might be *safely* mitigated when the torrents of abuse poured upon the

The State vs LaCreux. 1 M'Mull. 48.8 State vs, M'Coy, 2 Speers, 711. The State vs. John L. Brown, 2 Speers, 129.

State, and the Judge presiding on the trial from abroad, and the free States of the Union, on account of the conviction of a worthless man, John L. Brown, for aiding a slave to run away and depart from her master's service, *stopped the whole movement of mercy.* It is *now*, however, due to ourselves, that this matter should be taken up, the law changed, and a punishment less than death be assigned for the offence.

SEC. 9. Slaves are in our law, treated as other personal chattels, so far as relates to questions of property, or liability to the payment of debts, except that by the county court Act, (which in this respect is perhaps still of force,) slaves are exempted from levy when other property be shown; and also by the Act of '87, for recovering fines and forfeited recognizances, the sheriff is directed to sell under the executions to be issued, every other part of the personal estate, before he shall sell any negro or negroes.

P. L. 379.

P. L. 420.

SEC. 10. In consequence of this slight character which they bear in legal estimation, as compared with real estate, (which has itself, in our State, become of too easy disposition,) slaves are subjected to continual change—they are sold and given by their masters without writing; they are sold by administrators and executors, and by the sheriff, (and may even be sold by constables.) These public sales by administrators, executors or the sheriff, may be for payment of debts or partition—they (slaves) are often sold under the order of the Ordinary, without any inquiry, whether it be necessary for payment of debts or division. This continual change of the relation of master and slave, with the consequent rending of family ties among them, has induced me to think, that if by law, they were annexed to the freeholds of their owners, and when sold for partition among distributees, tenants in common, joint tenants and coparceners, they should be sold with the freehold, and not otherwise—it might be a wise and wholesome change of the law. Some provision, too, might be made, which would prevent, in a great degree, sales for debts. A debtor's lands and slaves, instead of being sold, might be sequestered until, like *virum vadium*, they would pay all his debts in execution, by the annual profits. If this should be impossible on account of the amount of the indebtedness, then either court, law or equity, might be empowered to order the sale of the plantation and slaves together or separately; the slaves to be sold in families.

Act of 1789, P. L. 493.

SEC. 11. Although slaves, by the Act of 1740, are declared to be chattels personal, yet, they are also in our law, considered as persons with many rights, and liabilities, civil and criminal.

SEC. 12. The right of protection, which would belong to a slave, as a human being, is by the law of slavery, transferred to the master.

Tennent vs. Dendy, Dudley's Rep. 83. Helton vs. Casion, 2d Bail. 98, 99.

SEC. 13. A master may protect the person of his slave from injury, by repelling force with force, or by action, and in some cases by indictment.

SEC. 14. Any injury done to the person of his slave, he may redress by action of trespass, *vi et armis*, without laying the injury done, with a *per quod servitium amisit*, and this even though he may have hired the slave to another. Caston vs. Murray, Harp 113. Helton vs. Caston, 2d Bail 95. Tennent vs. Dendy, Dudley's Rep. 83.

SEC. 15. By the Act of 1821, the murder of a slave is declared to be a felony, without the benefit of clergy; and by the same Act, to kill any slave, on sudden heat and passion, subjects the offender, on conviction, to a fine not exceeding $500, and imprisonment not exceeding 6 months. Acts of 1821, p. 12.

SEC. 16. To constitute the murder of a slave, no other ingredients are necessary than such as enter into the offence of murder at common law. So the killing, on sudden heat and passion, is the same as manslaughter, and a finding by the jury on an indictment for the murder of a slave, of a killing on sudden heat and passion, is good, and subjects the offender to the punishment of the act; or on an indictment for the murder of a slave, if the verdict be guilty of manslaughter, it is good, and the offender is to receive judgment under the Act. The State vs. Cheatwood, 2d Hill, 459. The State vs. Gaffney, Rice's Rep. 432. The State vs. Fleming, decided at Columbia, Spring, 1848.

SEC. 17. An attempt to kill and murder a slave by shooting at him, was held to be a misdemeanor, and indictable as an assault with an intent to kill and murder. This was a consequence of making it murder to kill a slave. The State vs. Mann, 2 Hill 453.

SEC. 18. The Act of 1841 makes the *unlawful* whipping or beating of any slave, without sufficient provocation by word or act, a misdemeanor, and subjects the offender, on conviction, to imprisonment not exceeding 6 months, and a fine not exceeding $500. 11 Stat. 155.

SEC. 19. This Act has received no judicial construction by our Court of Appeals. It has been several times presented to me on Circuit, and I have given it construction. The terms "shall *unlawfully* whip or beat any slave not under his charge," "without reasonable provocation," seem to me convertible. For if the beating be excusable from reasonable provocation, it cannot be unlawful. So if the beating be either without provocation, or is so enormous, that the provocation can be no excuse, then it is unlawful. What is sufficient provocation by word or deed, is a question for the jury. The question is, whether as slave owners, and reasonable men, if they had been in the place of the defendant, they would have inflicted the whipping or beating which the defendant did? If they answer this question in the affirmative, then the defendant must be acquitted, otherwise, convicted.

SEC. 20. The Acts of 1821 and 1841, are eminently wise, just, and humane. They protect slaves, who dare not raise their own hands in defence, against brutal violence. They teach men, who are wholly irresponsible in property, to keep their hands off the property of other people. They have wiped away a shameful reproach upon us, that we were indifferent to the lives or persons of our slaves. They

have had too, a most happy effect on slaves themselves. They know *now*, that the shield of the law is over them, and thus protected, they yield a more hearty obedience and effective service to their masters.

P. L. 173.

SEC. 21. By the last clause of the 37th section of the Act of 1740, it is provided if any person shall wilfully cut out the tongue, put out the eye, castrate, or cruelly scald, burn, or deprive any slave of any limb, or member, or shall inflict any other cruel punishment, other than by whipping, or beating with a horse-whip, cowskin, switch, or small stick, or by putting irons on, or confining or imprisoning such slave, every such person shall, for every such offence, forfeit the sum of £100 current money, equal to $61 23-100. This provision it has been held extends to any cruel beating of a slave.

The State vs. Wilson. Chev. Rep. (So. Ca. Rep.) p. 168.

SEC. 22. The provision is humane, but the punishment is too slight for such scandalous offences.

SEC. 23. To secure convictions under this part of the 37th section, and also where slaves were killed, it was provided, in the 39th section, that if a slave suffered in life or limb, or was cruelly beaten or abused, where no white person was present, or being present, shall neglect or refuse to give evidence—in every such case the owner or person having the care and management of the slave, and in whose possession or power the slave shall be, shall be adjudged guilty, unless he can make the contrary appear by good and sufficient evidence, or *shall, by his own oath, clear and exculpate himself.* This provision has been considered as applicable to trials under the Act of 1821, and a prisoner charged with the murder of a slave, has been allowed to exculpate himself.

P. L. 173.

The State vs. Rains, 3d McC. 533.

SEC. 24. This is the greatest temptation ever presented to perjury, and the Legislature ought to speedily remove it.

SEC. 25. The 38th section of the Act of 1740, requires the owners of slaves to provide them with sufficient *clothing, covering and food*, and if they should fail to do so, the owners respectively are declared to be liable to be informed against to the next nearest Justice of the Peace, (Magistrate now,) who is authorized to hear and determine the complaint; and if found to be true, or in the absence of proof, if the owner will not exculpate himself by his own oath, the magistrate may make such order as will give relief, and may set a fine not exceeding £20, current money, equal to $13 66-100, on the owner, to be levied by warrant of distress and sale of the offender's goods.

P. L. 173. 7 Stat. 411.

SEC. 26. This provision, it must be remarked, (leaving out the exculpatory part) is a very wise, and humane one, *except that the penalty is entirely too slight.* I regret to say, *that there is in such a State as ours*, great occasion for the enforcement of such a law, *accompanied by severe penalties.* It might be proper, that this matter should by the direction of an Act, hereafter to be passed, be given in charge to the Grand Jury, at each and every term, and they be

solemnly enjoined to enquire of all violations of duty, on the part of masters, owners, or employers of slaves, in furnishing them with sufficient clothing, covering, and food; and the law might also direct that every one by them reported, should be ordered instantly to be indicted.

SEC. 27. It is the settled law of this State, that an owner cannot abandon a slave needing either medical treatment, care, food or raiment. If he does, he will be liable to any one who may furnish the same. In Fairchild vs. Bell, that good man, and great Judge, Wilds, whose early death, South Carolina had good cause to deplore, said, in the noble language of a Christian and patriot, "the law would infer a contract against the evidence of the fact, to compel a cruel and capricious individual to discharge that duty, which he ought to have performed voluntarily. For as the master is bound by the most solemn obligation to protect his slave from suffering, he is bound by the same obligation to defray the expenses or services of another to preserve the life of his slave, or to relieve the slave from pain and danger. *The slave lives for his master's service. His time, his labor, his comforts, are all at his master's disposal.* The duty of humane treatment and of medical assistance, (when clearly necessary) ought not to be withholden.

Fairchild vs. Bell, 2 Brev. Rep. 129.

City Council vs. Cohen, 2d Speer's, 408.

SEC. 28. By the 22nd section of the Act of 1740, slaves are protected from labor on the Sabbath day. The violation of the law in this respect subjects the offender to a fine of £5 current money, equal to $3 7-100, for every slave so worked.

P. L. 168. 7 Stat. 404

SEC. 29. By the 44th section of the same Act, owners or other persons having the care and management of slaves, are prohibited from working or putting the said slaves to work for more than 15 hours from the 25th March to 25th September, and 14 hours from 25th September to 25th March, under a penalty of £20 current money, equal to $13 66-100 for every offence.

P. L. 174. 7 Stat. 413.

SEC. 30. The time limited and allowed for labor in this section is too much. Few masters now demand more than 12 hours labor from 1st March to 1st October, and 10 hours from the 1st October to 1st March. This, after allowing suitable intervals for eating and rest, is about as much as humane prudent masters will demand.

SEC. 31. A slave may, by the consent of his master, acquire and hold *personal* property. All, thus acquired, is regarded in law as that of the master.

Hobson vs. Perry. 1 Hill, 277. Carmille vs. the Adm'r. of Carmille, 2 McMull 470--471.

SEC. 32. The only exception is under the 34th section of the Act of 1740, which makes goods acquired by traffic and barter for the particular and peculiar benefit of such slave, boats, canoes, or periaugers in the possession of a slave, as his own, and for his own use; horses, mares, neat cattle, sheep or goats, kept, raised or bred for the use of any slave, liable to be seized by any one, and forfeited by the judg-

P. L. 171. The State vs. Mazyck, 3d Rich. 291 Norwood vs. Mazyck, 3d Rich. 296.

ment of any Justice (magistrate) before whom they may be brought.

Richardson vs. Broughton. Cola. Spring, 1848. 1 Law Reporter, new series. 120. Clarke ads. Blake. 3d McC. 179.

SEC. 33. Under this section, it has been lately held, that no one can enter on the plantation of the master to make such seizure.

SEC. 34. A seizure can therefore only be made when a slave is found, as owner, in possession of the contraband articles, outside of his master's plantation.

SEC. 35. This qualification may render the law harmless. Still it ought to be repealed. The reasons which led to its enactment have all passed away. It is only resorted to, *now*, to gratify the worst passions of our nature. The right of the master, to provide as comfortably as he pleases for his slave, could not be, and ought not to be abridged in the present state of public opinion. The law may very well compel a master to furnish his slave with proper, necessary, wholesome, and abundant raiment and food; but certainly no legislator *now*, would venture to say to a master, you shall not allow your slave to have a canoe to fish with, or to carry vegetables to market, or that he should not be allowed to have a horse to attend to his duties as a stock-minder in the swamps, savannas, and pine forests of the lower part of the State, or that a family of slaves should not have a cow to furnish them with milk, or a hog to make for them meat, beyond their usual allowance. All these are matters between the master and the slave, in which neither the public nor any prying, meddling, mischievous neighbor, has any thing to do. Experience and observation fully satisfy me that the first law of slavery is that of kindness from the master to the slave. With that properly inculcated, enforced by law, and judiciously applied, slavery becomes a family relation, next in its attachments to that of parent and child.—It leads to instances of devotion on the part of the slave, which would do honor to the heroism of Rome herself.* With such feelings on our plantations, what have we to fear from fanaticism? Our slaves would be our sentinels to watch over us; our defenders to protect our firesides from *those prowling harpies, who preach freedom, and steal slaves from their happy homes.*

2 Moultrie's Mem. 355-356.

SEC. 36. A slave cannot contract, and be contracted with. This principle was broadly laid down by the Constitutional Court, in a case in which a note was given by the defendant to the plaintiff's slave by name, and the plaintiff brought the action upon it. From this decision, Judge Cheves dissented, upon, I presume, the ground that the master had the right to affirm the contract, and make it his own, and consider it for his own benefit. In it, I think, he was right, on

Gregg vs. Thomson. 2d Con. Rep. (Mill 331.)

* In 1812, February, Professor Chas. Dewar Simmons on his return to Columbia from Charleston, found the Haughabook Swamp entirely over the road. In attempting to cross on horseback, he was washed off the road and separated from his horse. He first succeeded in reaching a tree, then constructed a raft of rails tied with his comfort. Three times his slave Marcus, swam in to his rescue. His master told him he could not help him, save himself; but he persisted until both perished together.

the principle that the acquisition of the slave is his master's, and that a slave's contract is like an infant's with an adult. It is not binding on the slave, but if the master affirm it, the defendant cannot be discharged.

SEC. 37. A slave cannot even legally contract marriage. The marriage of such an one is morally good, but in point of law, the union of slave and slave, or slave and free negro, is concubinage *merely*.

SEC. 38. The consequence is, that the issue of a marriage between a slave and a free negro, are illegitimate, and cannot inherit from father or mother, who may be free.

The hardship of such a case, where the issue of free negroes married to one another can inherit, might very well lead to a judicious enactment to remedy it.

SEC. 39. A slave cannot testify, except as against another slave, free negro, mulatto, or mestizo, and that without oath. 13 and 14th sec. of Act of 1740. P. L. 166--7.

SEC. 40. The propriety of this is *now* so doubtful, that I think the Legislature would do well to repeal this provision, and provide that slaves in all cases against other slaves, free negroes, mulattoes, and mestizoes, may be examined *on oath*. 7 Stat. 401--2.

SEC. 41. By the Act of 1834, slaves are prohibited to be taught to read or write, under a penalty (if a white person may offend) not exceeding $100 fine and six months imprisonment, if a "*free person of color*," not exceeding 50 lashes and a fine of $50. Acts of '34, p 13. P. L. 174. 45th sec. of 1740.

SEC. 42. This Act grew out of a feverish state of excitement produced by the *impudent* meddling of persons out of the slave States, with their peculiar institutions. That has, however, subsided, and I trust we are now prepared to act the part of wise, humane and fearless masters, and that this law, and all of kindred character, will be repealed. When we reflect, *as Christians, how can we justify it, that a slave is not to be permitted to read the Bible?* It is in vain to say there is danger in it. The best slaves in the State, are those who can and do read the Scriptures. Again, who is it that teach your slaves to read? It generally is done by the children of the owners. Who would tolerate an indictment against his son or daughter for teaching a favorite slave to read? *Such laws look to me as rather cowardly.* It seems as if we were afraid of our slaves. Such a feeling is unworthy of a Carolina master.

SEC. 43. The 2d section of the Act of 1834, prohibits the employment of a slave, or free person of color, as a clerk or salesman, under a penalty not exceeding $100 fine, and imprisonment not exceeding 6 months. 7 Stat. 468--469.

SEC. 44. The 1st section of the Act of 1800, prohibits the assemblies of slaves, free negroes, mulattoes, or mestizoes, with or without white persons, in a confined or secret place of meeting, or with gates 7 Stat. 440--1.

11th sec. of the Patrol Act of '39. 11 Stat. 59-60.

or doors of such place of meeting barred or bolted, so as to prevent the free ingress and egress to and from the same; and Magistrates, Sheriffs, Militia Officers and Officers of the patrol, are authorized to enter, and if necessary, to break open doors, gates, or windows, (if resisted) and to disperse the slaves, free negroes, mulattoes or mestizoes, found there assembled. And the officers mentioned in the Act are authorized to call such force and assistance from the neighborhood, as they may deem necessary; and may, if they think necessary, impose corporal punishment on such slaves, free negroes, mulattoes, or mestizoes, and if within Charleston, they may deliver them to the Master of the Work House, who is required to receive them and inflict any such punishment as any two Magistrates of the City may award, not exceeding 20 lashes. If out of the City, the slaves, free negroes, mulattoes and mestizoes found assembled contrary to this Act, may be delivered to the nearest Constable, who is to convey them to the nearest Magistrate, and to inflict under his order, punishment not exceeding 20 lashes.

7 Stat. 441.

7 Stat. 448. Bell ads. Graham, 1 N. and Mc. 278.

13th sec. of Patrol Act of '39, 11 Stat. 60.

SEC. 45. The 2d section of the Act of 1800, which prohibited meetings for the religious or mental instruction of slaves, or free negroes, mulattoes or mestizoes, before the rising of the sun, or after the going down of the same, was very properly altered by the Act of 1803, so as to prohibit the breaking into any place of meeting, wherein the members of any religious society are assembled, before 9 o'clock at night, provided a majority are white people. After 9 o'clock at night, or before, if the meeting be composed of a majority of negroes, (although white persons may be present,) it may be dispersed by Magistrates, Sheriffs, Militia Officers, and Officers of the patrol, and slaves, free negroes, mulattoes and mestizoes may be punished not exceeding 20 lashes.

1 N. and McC. 278.

SEC. 46. In the case of Bell ads. Graham, it was held that these Acts could not justify a patrol in intruding on a religious meeting, *in the day time*, in an open meeting-house, where there were some white people, although there might be a majority of negroes.

SEC. 47. The 2d section of the Act of 1800, and the amendatory Act of 1803, are treated now, as dead letters. Religious meetings of negroes, with only one or more white persons, are permitted by night as well as by day. They ought to be repealed. They operate as a reproach upon us in the mouths of our enemies, in that we do not afford our slaves that free worship of God, which he demands for all his people. They, if ever resorted to, are not for doing good, but to gratify hatred, malice, cruelty or tyranny. This was not intended, and ought to have no countenance or support, in our Statute law.

SEC. 48. The 40th section of the Act of 1740, regulates the apparel of slaves, (except livery men or boys) and prohibits them from wearing any thing finer, other or of greater value than negro cloth,

duffils, kerseys, osnaburgs, blue linen, check linen, or *coarse garlix*, or calicoes, checked cottons or Scotch plaids; and declares all garments of finer or other kind, to be liable to seizure by any constable as forfeited. P. L. 173.

Sec. 49. This section has not, within my knowledge, ever been enforced. Indeed, if enforced now, it would make an immense booty to some hungry, unprincipled seeker of spoils. It ought to be repealed.

Sec. 50. The 42d section of the Act of 1740, prohibits a slave or slaves from renting or hiring any house, room, store or plantation, on his own account. Any person offending against this Act, by renting or hiring to a slave or slaves, is liable to a fine of £20 currency, equal to $13 66-100, to be recovered on complaint made to any magistrate, as is directed in the Act for the trial of small and mean causes. P. L. 174. P. L. 213.

Sec. 51. The 43d section of the Act of 1740, which declares it to be unlawful for more than 7 male slaves in company, without some white person accompanying them, to travel together any of the public roads, and on doing so, makes it lawful for any white person to take them up and punish them by whipping, not exceeding 20 stripes, is, I am afraid, of force, unless it be considered as impliedly repealed by the restriction on the patrol, to whip slaves found out of their owner's plantation without a ticket in writing. P. L. 174. 13th sec. of Act of '39, 11 Stat. 60.

Sec. 52. The occasion for such a law has passed away. Public opinion has considered it unnecessary, and like every useless severity, mercy has condemned it. It would be well that it should be repealed.

Sec. 53. The Act of 1819, 5th section, repeals the 23d section of the Act of 1740. The law now, makes it unlawful for any slave, except in the company and presence of some white person, to carry or make use of any fire arms or other offensive weapon, without a ticket or license, in writing, from his owner or overseer; or unless such slave be employed to hunt and kill game, mischievous birds or beasts of prey, within the limits of his master's plantation, or unless such slave shall be a watchman in and over his owner's fields and plantation. If this law be violated, any white person finding a slave carrying or using a gun or other offensive weapon, without a ticket or license in writing, from his owner or overseer, or not used to hunt game, &c. within the plantation, or as a watchman in the same, may seize and appropriate to his own use, such gun or offensive weapon. But to make the forfeiture complete and legal, the party making the seizure, must, within 48 hours after the seizure, go before the next Magistrate, and make oath of the manner of taking, and then, after 48 hours notice to the owner or overseer having charge of the slave, by summons to shew cause why the articles should not be condemned, (the service of the summons being proved on oath,) the Magistrate Acts of 1819 p. 31. P. L. 168. The State vs. Cattel, 2d Hill, 291.

may, by certificate under his hand and seal, (if he be satisfied that the arms have been seized according to the Act of 1819) declare the same to be forfeited.

7 Stat. 462. SEC. 54. The 6th section of the Act of 1822 declares it to be unlawful to hire to male slaves their own time; and if this law be violated, the slaves are declared liable to seizure and forfeiture according to the provisions of the Act in the case of slaves coming into this State.

SEC. 55. Whether this provision relates to the 4th section of the Act of 1816, 7 Stat. 453, or to the 5th section of the Act of 1803, 7 Stat. 450, is indeed somewhat uncertain. The Act of 1816, and all its provisions were repealed by the Act of 1818, 7 Stat. 458. The Act of 1803, seems to be unrepealed, and hence, therefore, I presume the proceeding to forfeit must be under it. By it the proceeding is to be in the name of the State, in the nature of an action of detinue.

P. L. 172. SEC. 56. The latter part of the 36th section of the Act of 1740, declares that any master, or overseer, who shall permit or suffer his or their negro or other slave or slaves, at any time to beat drums, blow horns, or use any other loud instruments, or whosoever shall suffer and countenance any public meeting or feastings of strange negroes or slaves, on their plantation, shall forfeit £10 current money, equal to $6 88-100 upon conviction, or proof, provided information or suit be commenced within one month.

SEC. 57. This provision is one so utterly unnecessary, that the sooner it is expunged from the Statute book, the better. Indeed it is not only unnecessary, but it is one under which most masters will be liable, whether they will or not. Who can keep his slaves from blowing horns or using other loud instruments?

7 Stat. 450. SEC. 58. The 2d section of the Act of 1803, prohibits the importation of any negro, mulatto, mestizo, or other person of color, bond or free, from the Bahama, West India Islands, or South America, and also from other parts, of all of those persons who have been resident in any of the French West India Islands.

SEC. 59. The 3d section provides that no male slave above the age of 15 years shall be brought into this State from any of our sister States, unless the person importing such negro shall produce and file in the office of the Clerk of the District, where the person so importing may reside, a certificate under the hands of two magistrates, and the seal of the Court of the District where the slave so imported resided for the last twelve months previous to the date of the certificate, that he is of good character, and has not been concerned in any insurrection, or rebellion.

SEC. 60. Under the 5th section, if slaves be brought into this State in violation of the provisions of the 2nd and 3d sections, they are declared to be forfeited, one half to the State, the other half to the informer; to be recovered in the name of the State, by action in the

nature of an action of detinue, in which it is not necessary to prove that the defendant was in possession, at the commencement of the suit, and the informer is a competent witness.

SEC. 61. The 3d section of this Act has been so often violated, that it could hardly be enforced at present, without great injustice. Still the provision is a wise one. No greater curse has ever been inflicted on South Carolina, than the pouring upon her of the criminal slaves of our sister States. It might be well for the Legislature, in revising (which I hope they will speedily do) our *Code Noir*, to re-enact this provision.

SEC. 62. The Act of '35, makes it unlawful to bring into this State originally or to bring back into this State, after being carried out of it, any slave from any port or place in the West Indies, or Mexico, or any part of South America, or from Europe, or from any sister State, situated to the north of the Potomac River, or city of Washington, under the penalty of $1000, for each slave, to be recovered in an action of debt, and forfeiture of the slave. 6th sec. 7 Stat. 472.

This provision does not extend to runaway slaves.

SEC. 63. By the Act of '47, any slave carried out of this State, in the capacity of Steward, Cook, Fireman, Engineer, Pilot, or Mariner, on board any steamer, or other vessel trading with any port or place in the Island of Cuba, may be brought back into this State, if he may not in his absence have visited some other port or place in the West Indies other than the Island of Cuba, or a port or place in Europe, Mexico, South America or any State north of the river Potomac and City of Washington. Act of '47, 11 Stat. 438.

SEC. 64. The 7th section of the Act of '35, providing for the condemnation and forfeiture of a slave by a Court of a Magistrate and Freeholders, was declared by the whole Court of Errors, in the State vs. Simmons, et al., to be unconstitutional. How the forfeiture declared in the 6th section is to be carried out, is somewhat doubtful. I suppose it might be a part of the judgment on the indictment and conviction of the owner for bringing back a slave, which he had carried to the prohibited places. The whole provision had better be repealed. Slaves visiting free States find nothing to enamour them of negro freedom *there:* in general, after all the *labors of love* of our negro-loving brethren of the free States, they, in general, return to their Southern homes, better slaves. Forfeitures, too, may occur under this Act, which none of us would bear. Every servant, (negro, mulatto, or mestizo,) who has been in Mexico during the war, and who has returned, is liable to be forfeited, and his master to pay a fine of $1000. Could the law be enforced in such a case? We have nothing to fear, if the whole Act of '35 be repealed. It ought to be, for no law should stand, which public opinion, in many cases, would not suffer to be enforced. Indeed there are few, very few cases, where the The State vs. Simmons, et al. 2 Speers, 761.

Act of '35 could meet with public favor. I speak unreservedly, for I am talking to friends, slave-holders—citizens of a State, whom I love, and whom I would have to be, "without fear, and without reproach."

CHAPTER III.

Crimes of Free Negroes, Mulattoes, Mestizoes, and Slaves—Their Punishment and Mode of Trial, including the Law as to Runaways and the Patrol.

SEC. 1. The general rule is, that whatever would be a crime at common law, or by Statute, in a white person, is also a crime of the same degree, in a free negro, mulatto, mestizo, or slave. In some instances the punishment has been altered, in others new offences have been created. There are also cases, in which the slave or free negro, mulatto or mestizo, from his status, would be guilty of a higher crime than a white person would be, under the same circumstances. These will be tried to be fully noticed, in this digest. Whenever a slave commits a crime by the command, and coercion of the master, mistress, owner, employer, or overseer, it is regarded as the crime of the master, mistress, owner, employer, or overseer; and the slave is not criminally answerable.

The State vs. Crank, 2d Bail. 76.

SEC. 2. A free negro, mulatto or mestizo, cannot lawfully strike any white person, even if he be first stricken, and therefore, if he commit homicide of a white person, generally, he cannot be guilty of manslaughter; he is either guilty of murder, or altogether excused. *I suppose* if one without authority to govern or control a free negro, mulatto, or mestizo, were in the act of endangering life or limb of the free negro, mulatto, or mestizo, and he, to defend himself and save life or limb, were to slay his assailant, *it might* be excusable. A free negro, mulatto, mestizo, or slave, slaying one of the same *status*, would be guilty of murder, manslaughter, or be excused, se defendendo, as in the case of white people, at common law.

SEC. 3. The 17th section of the Act of 1740 declares a slave who shall be guilty of homicide of any sort upon any white person, except it be *by misadventure*, or in defence of his master or other person, under whose care and government such slave shall be, shall, upon conviction, suffer death.

P. L. 167. 7 Stat. 402.

This seems to conflict in some degree, with what is said, 3d chap. 1st section. Still, I think what is affirmed *there*, is law. A homicide committed by the command and coercion of the master, is not one of which the slave is guilty, but the master is alone guilty of it.

Sec. 4. By the 24th section of the Act of 1740, it is provided, if *a slave* shall grievously wound, maim, or bruise any white person, unless it be by the command, and in the defence of the person or property of the owner, or other person having the care or government of such slave, such slave on conviction, shall suffer death. P. L. 169. 7 Stat. 405.

Sec. 5. The 18th section of the Act of 1751 (which having altered the Act of 1740, is by the Act of 1783, continuing the Act of 1740, continued, instead of the parts altered) gives to the Courts trying any negro or other slave, for any offence under the Acts of 1740. or 1751. where any favorable circumstances appear, the power to mitigate the punishment by law directed to be inflicted. 7 Stat. 425. P. L. 312. 1st sec. State vs. Nicholas. Charleston, Jan. 1848, 2 Strob.

Sec. 6. The meaning of the words grievously wound, maim. or bruise, has never received any precise adjudication. In the case of the State vs. Nicholas, a portion of the Court indicated their opinion to be, that to grievously wound, maim, or bruise, meant such an injury as might endanger life or limb. This is, I think, the true meaning. The subject, before '48, passed under my review, in the unfortunate case, in York, which led to the passage of the Act of '43. In that case, the lady on whose body the outrage was attempted, was seriously bruised, yet so, as in no way to endanger life. I thought, and so decided, that the slave was not guilty of a capital felony.

Sec. 7. By the Act of 1843, any slave or *free person of color*, (meaning any free negro, mulatto, or mestizo) who shall commit an assault and battery on a white woman, with intent to commit a rape, shall on conviction, suffer death, without the benefit of clergy. 11 Stat. 258.

Sec. 8. The 24th section of the Act of 1740, declares any slave, who shall strike any person, unless it be by the command and in defence of the person and property of the master, or other person having the care and government of such slave, for the 1st and 2nd offence, liable to such punishment as the Court may think fit, not extending to life or limb, and for the 3d offence, to the punishment of death. Under the 4th section, and this of the 3d chapter, it ought to be remarked, that *that portion* of the 24th section of the Act of 1740, which exempts a slave from punishment for acting in obedience to his master and in his defence, requires more to make out his exemption than the Act intended. For it not only requires that the striking, wounding, maiming, and bruising, should be under the command of the master, but also in defence of his person or property. Either the command of the owner or other person having the care or government of the slave, the defence of his person or property should be enough. *The law ought to be so amended.* Any slave seeing a white P. L. 169. 7 Stat. 405

man about to knock his master down, or in the act of stealing his property, ought not to wait for a command—his blow in defence, under such circumstances, is good and ought to be lawful.

P. L. 167. 7 Stat. 390.

SEC. 9. The 16th section of the Act of 1740, provides that any slave, free negro, mulatto, Indian, or mestizo, who shall *wilfully* and *maliciously*, burn or destroy any stack of rice, corn, or other grain, of the produce, growth, or manufacture of this State, or shall wilfully and maliciously set fire to, burn or destroy any tar kiln, barrels of pitch, tar, *turpentine* or rosin, or any other goods or commodities, the growth, produce or manufacture of this State, or shall feloniously steal, take, or carry away any slave, being the property of another, *with intent to carry such slave out of the State*, or shall willfully and maliciously poison, or administer any poison to any person, *freeman*, woman, servant, or slave, shall suffer death. Over these and all other offences, for which, under the Act of 1740, death may be the punishment, the Court, under the 18th section of the Act of 1751, mentioned in the 5th section of the 3d Chapter of this Digest, have the power of mitigating the punishment. The term Indian, used in this 16th section of the Act of 1740, means either a freed Indian, (one who was once a slave) or an Indian not in amity with this government. (See 3d section of 1st Chap.) In the case of the State vs. Whyte and Sadler, it was held that the Act of 1754, making it a felony without clergy, to inveigle, steal, or carry away any slave, applied to slaves, as well as to free people, and hence therefore, that it repeals that provision of the Act of 1740, which made it capital, on the part of a slave, "to steal, take, or carry away any slave, the property of another, *with intent to carry such slave out of the State*. I think the decision very questionable. For in 1783, the Act of 1740 was continued as law, without noticing this supposed repeal of 1754. If the Act of '54, in this respect, and not the Act of '40, is to govern slaves, then every slave aiding another in running away, is liable to be hanged. This certainly is rather a hard consequence.

1 N. and McC. 175.

P. L. 167. 7 Stat. 390, 424, 425.

SEC. 10. By the 17th section of the Act of 1740, and the 14th section of the Act of 1751, amending the same, any slave, who shall raise or attempt to raise an insurrection, or shall delude and intice any slave to run away and leave this State, and shall have actually prepared provisions, arms, ammunition, horse or horses, or any boat, canoe, or other vessel, whereby the guilty intention is manifested, is liable, on conviction, to be hanged, unless the Court, from favorable circumstances, should mitigate the sentence, or from several being concerned, should be disposed to select some, on whom they would inflict other corporal punishment.

P. L. 29th sec. 170—7 Stat, 407.

SEC. 11. A slave who shall harbor, conceal or entertain any slave that shall run away, or shall be charged or accused with any crimi-

nal matter, shall suffer such corporal punishment, not extending to life or limb, as the Court may direct.

SEC. 12. A free negro, mulatto, or mestizo, who in 29th section of the Act of 1740, was liable to a penalty for harboring a slave, is by the Act of 1821, (which operates as an implied repeal,) if he or she harbor, conceal or entertain any fugitive or run away slave, liable on conviction to such corporal punishment, not extending to life or limb, as the Court may in their discretion think fit. Acts of 1821, p. 29. 7 Stat. 460, Righton vs. Wood, Dud. 164.

SEC. 13. The 30th section of the Act of 1740, prohibits any slave residing in Charleston from buying, selling, dealing, trafficking, bartering, exchanging or using commerce for any goods, wares, provisions, grain, victuals of any sort or kind whatsoever, (except slaves who, with a ticket in writing from their owner or employer, may buy or sell fruit, fish and garden stuff, or may be employed as porters, carters, or fishermen—or may purchase any thing for the use of their masters, owners, or other person, who may have the care and government of such slaves in open market.) All goods, wares, provisions, grain, victuals or commodities, in which such traffic by slaves is carried on, are liable to be seized and forfeited, and may be sued for and recovered before any Magistrate of Charleston, one half to the informer, the other half to the poor of the parish of St. Philip's, and the Magistrate by whom the forfeiture is adjudged, is authorized to inflict corporal punishment on the slave engaged in such traffic, not exceeding twenty stripes. The 31st section prohibits any slave belonging to Charleston, from buying any thing to sell again, or from selling any thing on their own account in Charleston. All goods, wares and merchandize purchased or sold in contravention of this section, are liable to be forfeited by the judgment of any Magistrate of Charleston, one half to the use of the poor, the other half to the informer. P. L. 170, 171, 7 Stat, 407–8. 31st sec. Act of 1740, 7 Stat. 409.

SEC. 14. If any slave, (without the command of his or her master, mistress, or overseer, evidenced by a ticket in writing,) shall shoot or kill between the 1st of January, and the last day of July in each year, any fawn, (deer,) or any buck, (deer,) between the 1st of Sept. and last day of Oct., and between the 1st day of March and last day of April, such slave, upon conviction before a Magistrate, by the oath of a sufficient witness, or the confession of the said slave, shall, by order of the Magistrate, receive 20 lashes on the bare back, unless security be given for the payment within one month of the fine imposed by the Act, on white or free persons, £2 proclamation money, equal to $6 44-100 for each fawn or buck killed. If the slave shall kill a doe, between the 1st day of March, and the 1st of Sept., without the consent and privity of the owner or overseer, such slave is liable, on conviction before a Magistrate and four P. L. 275. P. L. 497, 498, 3d and 7th sec. Act of '89.

freeholders (sworn according to the 4th section) to receive 39 lashes on the bare back.

P. L. 497. SEC. 15. A slave detected in fire hunting, or who shall kill in the night-time, any deer, horse or neat cattle, or stock of any kind, not the property of his master or owner, without the privity or consent of the owner or overseer of the said slave, such slave, on conviction before a Court of one Magistrate and four freeholders, sworn to the best of their judgment, without partiality, favor or affection, to try the cause now depending between the State, Plaintiff, and B. the slave of C. Defendant, and a true verdict give, according to evidence, is liable to receive 39 lashes on the bare back.

P. L. 486. 6th sec. Act of '89. SEC. 16. Any slave, who, not in the presence and by the direction of some white person, shall mark or brand any horse, mare, gelding, colt, filly, ass, mule, bull, cow, steer, ox, calf, sheep, goat or hog, is liable to be whipped, not exceeding 50 lashes, by the order of any Magistrate before whom the offence shall be proved by the evidence of any white person or slave.

Acts of '34, p. 12. SEC. 17. The Act of 1834, authorizes the Court, before which a slave or free person of color is convicted of any offence, not capital, to punish the offender by imprisonment, provided this Act shall not abolish the punishments which were then by law imposed. Under this Act, the question will arise, whether the punishment by imprisonment is cumulative; or whether, when resorted to, it is in place of the other punishment to which the offender is liable. I incline to the opinion, that the punishment is not cumulative, but may be substituted for other punishment, at the discretion of the Court.

The State, ex relatione, Boylston vs. Mag. and freeholders of Marion, Dist. 2 Strob. SEC. 18. A slave guilty of insolence to a white person, may be tried by a Court of a Magistrate and freeholders, and punished at their discretion not extending to life or limb.

SEC. 19. "*No free person of color*," (meaning, I suppose, "no free negro mulatto, or mestizo") or slave, can keep, use or employ a still, or other vessel, on his own account, for the distillation of spirituous liquors, or be employed or concerned in vending spirituous liquors of any kind or description, and on conviction thereof, is regarded as guilty of a misdemeanor, and is to be punished not exceeding fifty lashes, at the discretion of the Court; and the still or other vessel is forfeited, and the same is to be sold under an execution to be issued by the Magistrate granting the warrant to apprehend the free negro or slave, and the proceeds of the sale are directed to be paid to the Commissioners of the Poor.

Act of 1831, 1st and 2d sec. p. 13.

Act of 31, 4th sec. p. 13. SEC. 20. A slave, or free person of color, (meaning as is above suggested) who shall commit a trespass, which would subject a white person to a civil action, and for which no other penalty is prescribed, is regarded as guilty of a misdemeanor, and is to be punished at the discretion of the Court trying him, not extending to life or limb. A

question will arise under this Act, whether any civil remedy by way of trespass, can now be had against any negro, mulatto, or mestizo, for a trespass by him or her committed?

SEC. 21. A free negro, mulatto, mestizo, or slave, being a distiller, vendor, or retailer of spirituous liquors, who shall sell, exchange, give or otherwise deliver spirituous liquors to a slave, except upon the written and express order of the owner, or person having the care of the slave, shall, upon conviction, (if a slave) be whipped not exceeding fifty lashes; if a free negro, mulatto, or mestizo, be also whipped not exceeding fifty lashes, and fined not exceeding $50; one half of the fine to the informer, the other half to the State. Act of '34, last paragraph, 3d sec. 11 Stat. 469. Act of '44, 11 Stat. 294.

SEC. 22. A slave, or free person of color, (meaning as before suggested) convicted of a capital offence, is to be punished by hanging; if convicted of an offence not capital, a slave is to be punished by whipping, confinement in the stocks, or treadmill, or as is prescribed by the Act of '34, (see ante 1st sec.) imprisonment may be resorted to. A free negro, mulatto, or mestizo, is liable to the same punishment, *or may be fined.* Act of '33, 2d sec. p. 41. p. 40.

SEC. 23. In all parts of the State, (except in Charleston,) slaves or free persons of color, (meaning as suggested ante 19th sec.) are to be tried for all offences by a Magistrate and five freeholders; the freeholders are to be obtained by the Magistrate, who issues the warrant, summoning eight neighboring freeholders, out of whom the prisoner, (if he be a free negro, mulatto, or mestizo) or the owner or overseer, (if a slave) may select five to sit upon the trial, and upon good cause shewn against any freeholder, to be determined by the Magistrate, another shall be substituted in his place. If the prisoner, the owner, or overseer, should refuse or neglect to make the selection of the five freeholders to sit, the Magistrate may himself make the selection. Act of '39, sec. 28 and 32. The State vs. Nicholas, Charleston, Jan. 1848.

SEC. 24. In Charleston, (including the Parishes of St. Philips and St. Michael's) slaves, free negroes, mulattoes and mestizoes, are liable to be tried for capital offences by two Judicial Magistrates and five freeholders, *or slaveholders*, who, I suppose, ought to be obtained as directed—ante 22nd section—and in such cases there must be a concurrence of all of the freeholders, and one of the Magistrates; in cases not capital, they are to be tried by two Judicial Magistrates and three freeholders or slaveholders, a concurrence of a majority of the jurors and the presiding Magistrate, is enough for conviction; if the jurors be unanimous, then in that case the concurrence of the Magistrate is dispensed with. In all cases, the ministerial Magistrate, issuing the warrant, is to attend the Court, and act as prosecuting officer. 6th sec. Act of '27, p. 63. 15th sec. Act of '29, p. 30. Act of 1830, sec. 4-5. p. 30. Act of '32, sec. 1-2. p. 59-60. The State vs. Nicholas, Charleston, Jan. 1848.

SEC. 25. The anomaly is presented *here* of two different systems of

jurisprudence for the State and Charleston. Both cannot be right, one should give way to the other.

Act of '39, sec. 28, p. 22.

SEC. 26. The jurors when organized, should be sworn by the Magistrate, to well and truly try the case now pending before you, and adjudge the same according to evidence. So help you God.

Act of 1751, sec. 4. 7 Stat. 427. Act of '39, sec. 28, p. 22.

SEC. 27. A slave, free negro, mulatto or mestizo, charged with a criminal offence, is to be tried within six days, if it be practicable to give at least one day's notice of the time and place of trial to the free negro, mulatto, mestizo, the owner, overseer, or other person having the care and government of the slave—*which notice must, in all cases, be fairly given before the trial can proceed.*

Act of '39, p. 22.

SEC. 28. On the trial of a slave, free negro, mulatto, or mestizo, it is the duty of the Magistrate to state in writing, plainly and distinctly, the offence charged against the prisoner, and for which he is on trial; to this charge the prisoner ought to be required to answer, either by himself, or through his guardian, master, owner, overseer, or other person having the care and government of such slave on trial, or by the attorney employed to defend such prisoner. In every such trial, the prisoner is entitled to the benefit of the services of an attorney at law, to defend him. The Magistrate is bound to keep a correct statement of the testimony given against and for the prisoner, and to annex it to *the charge*, (the accusation.) The judgment of the Court in the country Districts and Parishes, must be in writing, and signed by the Magistrate and any four of the freeholders, or by the whole, if they agree. In Charleston, it must be made up as directed, (ante sec. 23,) and must be signed by those required to concur in it. It is in all parts of the State to be returned to the Clerk's office of each judicial district, and be there filed.

Act of '33, sec. 3. p. 41. Act of '30, sec. 28, p. 23.

SEC. 29. When a slave, free negro, mulatto or mestizo, is capitally convicted, an application may be made to any one of the Judges of the Courts of Law of this State, in open Court, or at Chambers, for a new trial. The Magistrate presiding, is required for such purpose, to furnish a full report of the trial; and if from that, as well as from affidavits on the part of the prisoner, (which before being laid before the Judge must be shewn to the Magistrate presiding,) the Judge should be satisfied the conviction is erroneous, a new trial is to be ordered, on which neither the Magistrate, nor Magistrates, nor any of the freeholders, who before sat on the case, are to sit again. To afford opportunity for this appeal to be made, or for an application to the Governor for a pardon, time, reasonable time, must be allowed by the Court between the conviction and the execution of the sentence.

SEC. 30. Under these provisions, there is not any very well settled practice. Before a motion for new trial ought to be heard, reasonable notice of the time and place of such motion should be given to the

Magistrate presiding. When a new trial is ordered, I have always directed the Clerk of the Court to summon the Magistrate and freeholders, who should try the case *de novo*, and to give notice to all concerned, of the time and place of trial, and if necessary, to issue summons for the witnesses. This seemed to secure, in the best way I could devise, consistently with the law, an impartial administration of it.

Sec. 31. The right of appeal, in cases not capital, and to afford sufficient time in such cases, for an application for pardon, ought to be provided for. For many are the errors and abuses of power committed in this behalf. The whippings inflicted by the sentence of Courts trying slaves and free negroes, are most enormous—utterly disproportioned to offences, and should be prevented by all the means in our power. In all cases where whipping is to be resorted to, I would limit the punishment by law, in all cases affecting both black and white, to forty, save one, and direct it to be inflicted in portions, and at considerable intervals of time. Thus mingling imprisonment and whipping together, and holding the rod suspended, in the contemplation of the party, until the delay itself would be worse punishment than the infliction.

Sec. 32. The tribunal for the trial of slaves and free negroes, (a Magistrate and freeholders of the vicinage) is the worst system which could be devised. The consequence is, that the passions and prejudices of the neighborhood, arising from a recent offence, enter into the trial, and often lead to the condemnation of the innocent.—The Charleston scheme is better than that which prevails in the country. Still I think it none of the best. I would establish a tribunal to consist of one judicial Magistrate, to be appointed by the Legislature, to try all criminal cases against free negroes, mulattoes, mestizoes or slaves. He should be compelled to hold his Court on the first Wednesday in every month, at the Court House; and he should have the power to direct a Constable, (whom he should be authorized to appoint to attend his Courts) to summon 24 freeholders or slaveholders of the District, and out of them a jury of 12 should be empannelled to try the prisoner, allowing him as far as ten, a peremptory challenge, and on cause shewn, to the balance of the pannel. The Magistrate issuing the warrant, should be required to state the offence and act as prosecuting officer. To the charge thus presented, the prisoner should be required to answer; and he should have the benefit of an attorney's services, to defend him, on the law and evidence. The judicial Magistrate should be required to charge the jury on the law and the facts, as a Judge of the Law Courts now does. The jury should simply say guilty or not guilty. The Magistrate presiding, should pronounce the judgment of the law. The prisoner on conviction should have the right of appeal to the Court of Appeals, and no sentence should be passed until the case was

there heard, and the prisoner remanded for judgment. The judicial Magistrate, his Constable, and the Magistrate issuing the warrant, should be compensated by fees, to be paid, in all cases, by the State.

Act of '29, p. 28, sec. 1.

SEC. 33. Under the law, as it now stands, the State is liable for all the costs attending negro trials, (except free negroes, mulattoes, and mestizoes, in the Parishes of St. Philips, and St. Michael's, who if convicted, and able to pay, are declared liable to pay the same, and also under the 21st section of the Act of 1740, if the prosecution against a slave, free negro, mulatto, or mestizo, appears to be malicious, the Court trying the case, and satisfied of that fact, may order and compel the prosecutor to pay the costs.) This provision of the 21st section of the Act of 1740, is re-enacted, as to slaves, in the Magistrates' and Constables' Acts for St. Philip's and St. Michael's, passed in 1829.

P. L. 168.

Acts of '29, p. 28, sec. 2.

Exparte Brown, 2d Bail. 323.

SEC. 34. A slave cannot be twice tried, and punished, for the same offence.

5th sec. Act 1740. P. L. 165.

SEC. 35. If a slave be out of the house or plantation, where such slave resides, or without some white person in company, and should refuse to submit to, and undergo the examination of any white person, it is lawful for such white person to pursue, apprehend, and moderately correct such slave, and if such slave shall assault and strike such white person, *such slave may be lawfully killed.*

Sec. 36, Act of 1740. P. L. 172.

SEC. 36. Masters, overseers, or other persons, have the power to apprehend and take up any slave found out of his or her master's or owner's plantation at any time, but more especially on Saturday nights or Sundays, or other holidays, not being on lawful business, or not with a ticket from the master, or not having some white person in company, and even with a ticket, if armed with wooden swords or other mischievous and dangerous weapons, and to disarm such slave, and all such mentioned in this section, to whip.

35th sec. of the Act of 1740. P. L. 169. 1st sec. Act of '88. P. L. 441. 53d sec. Act of 11 Stat. 16.

18th sec. Ordinance of the city of Charleston, '39, City Laws, 315.

SEC. 37. Any person is authorized to take up any runaway slave, and it seems, it is *now* the duty of the person taking up a runaway, (when he knows, or can be informed without difficulty, to whom such slave belongs) to send such slave to the said owner, but if the owner be unknown, then in Charleston District, it is the duty of the person taking up such runaway slave to send within five days, the same to the Work House in the city of Charleston, the master of the Work House is to admit every such slave upon a certificate from a Magistrate of the District, or Mayor, or one of the Aldermen of the city, containing the particulars of the apprehension of such fugitive slave, and requiring his confinement; in all other parts of the State the runaway slave is to be sent to the Gaol of the District. It is the duty of the Master, Gaoler or Sheriff, to securely keep the slave so committed, and if the same escape by negligence, the Master or Sheriff, (for the gaoler is merely the Sheriff's keeper,) is liable to the owner

for the value of the slave, or such damages as may be sustained by such escape. Information of the slave so committed to the care of the Master of the Work House, is to be by him sent to the owner, if known; if he be unknown, the Master of the Work House is to advertise such slave in the city paper, (under the advice of the City Att'y.) giving the name, age, and other further description, so that the owner may be informed the slave is in custody. In other parts of the State, the runaway is to be advertised once a week for 3 months, in some public gazette, by the Sheriff or Gaoler, who is also required, if the owner's name and address can be obtained, to give him specific notice of the confinement of the said runaway. The advertisement must contain the name, age, and other particular description of such slave, and the name of the person said to be the owner. The Gaoler or Sheriff, and the Master of the Work House, is liable to a fine of 10*s.* or $2 14 for such slave committed as a runaway, neglected to be advertised. The runaway is to be kept for 12 months, if not claimed by the owner, and in Charleston, proof of property made on oath before one of the Judges of the Common Pleas, or any Magistrate, within twelve months from the date of the advertisement in Charleston, in other parts of the State, from the commitment, the runaway is to be sold. In Charleston the sale is to be made by the City Sheriff, he giving one month's notice of the time, place, and reason of such sale; he is to give to the purchaser a receipt for the money arising from such sale, specifying the reasons of the sale, and he (the City Sheriff) is directed to pay the said proceeds to the City Treasury. Out of the fund so paid over, is to be deducted the expenses of the said runaway, as provided and allowed by law. The balance is to be retained by the City Treasurer, for the owner, but if not claimed within a year and a day it is to be paid into the State Treasury, and out of it, I presume, the Commissioners of Public Buildings of Charleston District are entitled to draw it, under the general law of '39. In other parts of the State, the Sheriff of the District is to advertise the runaway for a month, and then to sell; and after paying the charges or expenses allowed by law, the balance is to be paid to the Commissioners of Public Buildings, and is to belong to them absolutely, if not claimed by the owner of the slave so runaway, within two years. The title to be executed by the Sheriff to the purchaser of such runaway, is good, and bars the rights of the owner. Any neglect or default in the duties required by the 53d section of the Act of '39, subjects a Gaoler or Sheriff to an action on the case.

18th sec. Ord. '39, City of Charleston, City Laws, 315.

18th and 19th sec. Ord. of Charleston, '39. City Laws, 315.

53d sec. of Act of '39. 11 Stat. 36.

Sec. 38. A person taking up a runaway, and failing to send the same to the work house, or the District gaol within five days, is liable to pay 20*s.* or $4 28-100 for every day the same may be retained. The person taking up a runaway, is entitled to 10*s.* or $2 14-100 for taking up such runaway, 4*d.* or 7-100 for every mile from the place

Act of '88. P. L. 441.

18th sec. Ord. city Charleston, City Laws, 315.

where taken to the owner's residence, (if the runaway be carried to the owner,) or to the district gaol or the work house, and half a dollar per day for the travel, computing the journey at 25 miles to the day. To entitle the person taking up a runaway, to these allowances, he must carry the slave to a neighboring Magistrate, who may examine on oath the captor, touching the time and distance he has necessarily travelled, and shall go with such slave, and the said Magistrate shall give a certificate on a just estimate of such time and distance, and on presenting such certificate, the gaoler is to give his note for the same payable to the bearer. The Master of the Work House is to pay the same, instead of giving a note. These fees are to be paid to the Gaoler, or Master of the Work House, by the owner, or out of the sale of the said runaway, if he should not be claimed by the owner and be sold.

36th and 37th sec. of the Act of 1740. P. L. 169.

SEC. 39. It is the duty of the Master of the Work House, Gaoler, or Sheriff, to provide sufficient food, drink, clothing and covering, for every runaway slave delivered into the custody of either. The

11 Stat. 11.

Gaoler or Sheriff is entitled to charge 20 cents per day for each runaway confined, and also for all necessary expenses in providing

20th sec. Ord. of '39. City Laws, 315.

clothes or blankets. In the Work House, a runaway slave is directed to be put to labor on the tread-mill, and therefore no charge for diet is made.

1st, 2d, and 3d sec. Act of '39. 11 Stat. 58.

SEC. 40. Each militia beat company, by its commander, (except the company or companies on Charleston Neck,) is divided into convenient patrol districts. All the free white male inhabitants, above the age of eighteen years, of each patrol district, are liable to do patrol duty, except aliens or transient persons above the age of forty-five years, or who have not resided within the State for six months, or persons who are above the age of forty-five, who do not own slaves, or alien enemies. Persons liable to do patrol duty, may send in their places, respectively, an able-bodied white man, between the ages of sixteen and sixty, as a substitute; and for failing to discharge patrol duty, in person or by substitute, each person liable to do the same, without a legal excuse, is liable to pay a fine of $2 for each default, and ten per cent. on his general tax of the preceding year.

3d and 4th sec. Act of '39 11 Stat. 58.

SEC. 41. It is the duty of the commanding officer of each beat company, to make out a roll of the inhabitants of each patrol division, liable to do patrol duty, and from such roll, at each regular muster of his company, to prick off, *at his discretion*, any number of persons to do patrol duty until the next muster, and appoint *some prudent and discreet person* to command the said patrol. If the officer commanding the beat company, fails to prick off, at each muster, the patrol of each division, or the commandant of the patrol fails in his duty, each of them is liable to a fine not exceeding $30.

SEC. 42. It is the duty of the commandant of the patrol to call them out at least once a fortnight, and to take up, and correct with stripes, not exceeding 20, with a switch or cowskin, all slaves found outside of their owner's or employer's plantation, without a ticket or letter to shew the reasonableness of his absence, or some white person in company to give an account of the business of such slave; and also, if the slave have a ticket, and has in his possession, a gun, pistol or other offensive weapon, unless such slave be on lawful business, or in company with some white person not less than ten years of age. Fire arms, and other offensive weapons, found by the patrol in the possession of a slave, in violation of the above provisions, are liable to seizure by them, and condemnation and forfeiture to the use of the regiment to which the patrol may belong. To obtain such forfeiture, the leader of the patrol making the seizure, must, within ten days, go before the nearest Magistrate, and make oath of the manner, time and place of taking, and if the Magistrate shall be satisfied of the legality of the seizure, he shall summon the owner of the slave from whom the arms have been taken, to appear before him within ten days, to shew cause why the arms should not be condemned. If the owner should fail to appear, or appearing, should shew insufficient cause, the said arms or weapons shall, by certificate under the hand of the Magistrate, be "*declared condemned*," and may be sold within ten days, and the proceeds, after payment of the costs, paid to the paymaster of the regiment.

5th and 13th sec. Act of '39. 11 Stat. 58—60.

Act of '43, 11 Stat. 258.

SEC. 43. The patrol have the power, and are required to enter into any disorderly house, vessel or boat, suspected of harboring, trafficking or dealing with negroes, whether the same be occupied by white persons, free negroes, mulattoes, mestizoes or slaves; and to apprehend and correct all slaves found there, by whipping, (unless, as I apprehend, such slaves shall have not only a ticket to be absent, but also a ticket to trade.) The patrol is required to inform a Magistrate of such white persons, free negroes, mulattoes or mestizoes, as may be found in such house, vessel or boat, and to detain, until recovered by law, such produce or articles for trafficking, as may be therein found, if such detention be authorized by any three freeholders or any Magistrate. It is the duty of the owner of each boat or vessel navigating the public rivers or canals of this State, to keep and produce to the Magistrates or patrols, when required, a list of all the negroes composing the crew, with their owners' names, and a description of their persons.

6th sec Act of '39, p. 59. 11 Stat.

SEC. 44. The patrol may, as is stated in the 44th and 45th sections of chapter 2nd of this digest, break up unlawful assemblies of slaves, and inflict punishment on slaves there found, not exceeding 20 stripes, with a switch or cowskin.

11th and 14th sec Act of '39, 11 Stat. 59, 60, 61.

SEC. 45. Every owner of a settled plantation, who does not live on

15th sec. of Act of '39. p. 61. 11 Stat.

the same six months in every year, and who employs upon the same fifteen or more slaves, is required to keep upon the same, some white man, capable of performing patrol duty, under a penalty of fifty cents per month for each and every working slave employed on the said plantation.

16th sec. Act of '39. 11 Stat. p. 61.

SEC. 46. Patrols are not liable, in the discharge of their duty, to the payment of any tolls.

18th sec. Act of '39. 11 Stat. p. 61.

SEC. 47. In incorporated towns and villages, the power and duty of regulating the patrol in the same, is vested in and devolved upon the municipal authorities of the same.

The State vs. Cole and others, 2 McC. 122.

SEC. 48. The Captain of a Beat Company, cannot constitute himself the Captain of a Patrol.

Hogg vs. Keller, et. al. 2 N. & McC. 113. P. L. 164, 3d sec. 1740.

SEC. 49. The ticket or pass to a slave, need not state the place to which he or she is to go, and a patrol whipping a slave, with such a pass, are trespassers. The form given in the Act of 1740, "Permit this slave to be absent from the plantation of A. B. until ———," or any other equivalent form, will be sufficient.

7th and 8th sec. Act of '39. 11 Stat. 59.

SEC. 50. It is the duty of Captains or Commanders of Patrol, to keep their respective commands in good order and demeanor, when on duty; and any patrol man misbehaving himself or neglecting or disobeying the orders of his commandant, is liable to a fine of not less than $2, nor more than $20. If the Captain of a Patrol acts disorderly, so as to defeat the proper execution of the patrol laws, he is liable to be returned by any member of his command, or any other person competent to give evidence, to the commanding officer of the Beat Company, who is to return him to a Court Martial for trial, and if found guilty, he may be fined not less than $5, nor more than $50.

10th sec. Act of '39. 11 Stat. p. 59.

SEC. 51. Each Captain of the Patrol is required, at the net regular muster of the Beat Company, after his appointment, to make a return, on oath, of the performance of his duties. Failing to make such return, he is liable to a fine of $20.

17th sec. Act. of '39. p. 61. 11 Stat.

SEC. 52. The penalties to be incurred by the commanding officers of Beat Companies, commandants of the patrols, and patrol men, for neglect of duty, or violation of law, may be imposed by Courts Martial.

19th sec. Act of '39. 11 Stat. 61.

SEC. 53. If the patrol be sued, and the party suing, fail to recover, he is liable to treble costs; which is full costs, to which is added one half, and then half of that half.

SEC. 54. The Act of '39 in repealing all other laws on the subject of the patrol, *unfortunately* excepts the Act regulating the performance of patrol duty on Charleston Neck. The Act of '23, so saved from repeal, differs in many respects from the general law, which it is now necessary to state. 1st. A majority of the company officers is to direct how the company is to be divided into patrol districts, and the Captain is so to divide it, and it is so to continue

Act of '23, sec. 1, p. 53.

until altered by a majority of said officers. The officers failing to do this duty, are liable to a fine of $30, to be recovered in the Court of Law. (by indictment) as no mode is appointed by the Act. 2d. All white males above 18 and under 60, residing in said patrol districts, (except ministers of the Gospel) all females owning ten slaves above the age of ten years, and *all persons* having settled farms, or a house and lot, with five or more slaves above the age of 16. residing within the said *companies*, are liable to do patrol duty. Females required to do patrol duty, must of course do so by substitute. 3d. The commanding officer. or officers of a company are to appoint *in writing*, the leader of the patrol, whose qualification and term of office is the same as pointed out in section 40. The person so appointed refusing to accept, the commanding officer or officers of companies or the leaders of patrol, not performing the duties required, are liable to a fine of $20, to be recovered by indictment, in the Court of Law. and paid to the Commissioners of Cross Roads. No person can be compelled to serve as leader, more than once in 12 months. 4th. The patrol is not only authorized to enter disorderly houses, &c., as stated in section 42; but if resisted, they are authorized to break open doors, windows, and locks; they are required to produce to the Magistrate, whom they may inform of white persons, free negroes, mulattoes and mestizoes, found in such houses, the produce or articles for trafficking found there, *to be disposed of according to law.* 5th. The leader of a patrol is, as is stated in section 49, to keep his command in good order, &c.; any patrol man, misbehaving, &c.. is liable to a fine of $2, to be imposed by the officers of the company to which he belongs. and to be paid to the Commissioners of Cross Roads, Charleston Neck.—A leader acting disorderly may be proceeded against as stated in section 49; he is to be tried by a Court consisting of the officers of his company, or any 3 officers of the Regiment, and may be fined $10, to be paid to the same authorities, Commissioners of Cross Roads, Charleston Neck. 6th. A substitute for patrol must be between 18 and 60. 7th. Free negroes, mulattoes, or mestizoes, found on Charleston Neck, are to be treated by the patrol. as slaves, unless they produce their free papers, office copies, or other satisfactory evidence of freedom. If found out of their own houses, or the enclosure of their employer, not having a regular ticket from their guardian after 9 P. M., from 20th Sept. to 20th March, and 10 P. M., from 20th March to 20th Sept. they are declared liable to be treated as slaves without a pass. 8th. No grocery, retail shop, or any store, shop, or place, wherein are vended spirituous liquors, is to be kept open on the Sabbath day or any other day after 9 P. M., from 20th Sept. to 20th March, and after 10 P. M., from 20th March to 20th Sept., any owner, or occupant violating this law, or trading, trafficking, or bartering therein, with any slaves, free negroes, mulattoes, or mestizoes, is

2d section.

3d section.

5th section.

6th and 7th section.

8th section.

10th section.

11th section.

liable to a fine of $50, to be recovered by indictment, in the Court of Law, and paid to the Commissioners of Cross Roads, Charleston
12th section. Neck. 9th. Each inhabitant of Charleston Neck, liable to patrol duty, is required to provide and carry with him on service, a good gun or pistol, in order, with at least 6 ball cartridges for the same, or cutlass, under the penalty of $2, and 10 per cent on his general tax of
13th section. the year preceding. 10th. The commanding officer of the company or companies on Charleston Neck, may appoint a Secretary, whose duty it shall be to prepare and lay before the Military Courts herein
14th section. before mentioned, all necessary papers, and to keep a record of the proceedings of the same, which is to be open to the inspection of all interested. For this duty, he is exempted from patrol duty. 11th.
15th section. The leader of each patrol may appoint a warner to summon the patrol; and for this duty he is exempted from the patrol. 12th. It is the duty of the officers commanding the companies on Charleston
16th section. Neck, and all Magistrates, to inform the leaders of the patrols, of unlawful assemblies, of negroes, (slaves,) free negroes, mulattoes, and mestizoes. The leaders on receipt of this information, are to turn out their patrols, and discharge the duty required by law; failing to do this, they are respectively liable to a fine of $20, to be paid to the Commissioners of Cross Roads, Charleston Neck. For uniformity sake, I think this Act of '23 should be repealed.

Act of '45, 1st and 2d sec. 11 Stat. 344. SEC. 55. The Commissioners of Cross Roads on Charleston Neck, by the Act of '45, were authorized to build a Guard House, and it provides that all free negroes, mulattoes, mestizoes, and slaves, on Charleston Neck, charged or found guilty of violating the law, shall be therein confined, and *there* punished; and also slaves, free negroes, mulattoes, and mestizoes, taken up by the patrol, shall there be whipped according to the patrol law, unless the owner or person having charge of such slaves, free negroes, mulattoes or mestizoes, or their guardians, shall pay to the Commissioners of Cross Roads, one dollar for each of said slaves, free negroes, mulattoes or mestizoes.

CHAPTER IV.

The Rights—Civil and Criminal Remedies—And Liabilities of the Master. Also the Law to Prevent the Disturbance of the Peace in relation to Slaves and Free Negroes.

Sec. 1. The right of a master in a slave and all which appertains or belongs to him, is that of property. If the slave be in the possession of another, his owner may maintain detinue for his specific delivery, or may have a bill in Equity, to compel his possession to be restored, (unless he may have been bought for sale, in which case the owner is left to his remedy at law.) or may bring trover to recover the damages sustained in his conversion. The owner may bring trespass for any forcible taking of the slave from his possession, or for any forcible injury done to his person. So too, if a slave wander from the possession of the owner, and another employ him, the owner may bring assumpsit for his labor, or trover for the time he may be in the employment of a third person, or if such person *knew he was a slave*, the action on the case might be sustained. So too, if a bailee abuse or employ a slave differently from the contract of bailment, and he is killed or injured, the bailee would be liable to the owner.—So too, a common carrier transporting a slave from one place to another, is liable for an injury to, the death, or loss of the slave, as he would be for other articles with this exception, if he shews that he used proper care and diligence, and the injury, loss, or death, resulted from the act of the slave, then he would not be liable. Any employment of a slave, without the consent of the master, by which the slave is killed, or injured, makes the person so employing him, liable for the damages sustained by the owner. For personal property, in the possession of the slave, and commonly called the property of the slave, the master may maintain the same actions against one possessing himself of it, as he could for the slave himself. For harboring a runaway slave, knowing him to be such, an action on the case can be maintained by the owner.

Carter vs. Gordon, 2d Hill C. R. 121.

Bell vs. Lakin, 1 McMill. 364, 370—2.

Helton vs. Caston. 2d Bail, 95. Duncan vs. Rail Road Co. 2d Rich. 613. Clark ads. McDonald, 4 McC. 223.

Wright vs. Gray, 2d Bay, 464.

Sec. 2. A contract for the hire of a slave for a year is an entire contract, yet if the slave die, his wages will be apportioned. But if the slave be sick, or runaway, no deduction is to be made on either account. The owner is not liable generally, for medical services rendered to his slave, while in the possession of one to whom he may be hired. The master is liable for medical services rendered to his slave without his knowledge, if the slave be in great danger.

Faco' vs. Parneil, 2d Bail. 424.

Wells vs. Kennerly, 4 McC. 123.

Johnston vs. Barrett, 2d Bail. 562.

Sec. 3. By the 5th section of the Act of '39, provision is made, if any white man shall beat or abuse any slave, quietly and peaceably being in his master's plantation, or found any where without the same, with a lawful ticket, that he shall forfeit $50, to be recovered by and to the use of the owner, by action of debt, besides being liable

5th sec. Act of '39. 11 Stat. 58.

Caldwell et. al. ads. Langford, 1 McMull. 275.

to the owner, in an action of trespass for damages. Under this provision, it has been held, that where a slave was found out of his master's plantation, but had a ticket, and was whipped by the party finding him, that the master could maintain the action under the Act, and recover.

Acts of 1823, p. 54.

SEC. 4. The Act of '23, for the regulation of patrol duty on Charleston Neck, section 4, provides if any white man shall *wantonly* beat, or abuse any slave, quietly and peaceably being in his or her owner's enclosure, or found anywhere without the same, with a lawful ticket, he shall forfeit $50, to be recovered by the owner, and to his use, besides being liable to the owner in an action of trespass for damages. This provision is identical with that of '29, except that in the Act of '23, the beating or abusing must be *wantonly*. In the Act of '39, no such word is used. It may be under the Act of '23, malice, or cruelty, would have to be shewn.

3d sec. Act of 1747. P. L. 215.

SEC. 5. The 3rd section of the Act of 1747, provides, that if any overseer or manager shall employ upon his own account or business, any of the negroes committed to his care, by sending them on errands, or in any other manner whatever, such overseer or manager shall pay the sum of 10*s*. (equal to $2 14-100,) for every day he or they shall so employ any negro committed to the care of such overseer or manager. (This penalty, another part of the Act, section 1st, directs to be recovered before a Justice of the Peace, Magistrate now, in the manner and form prescribed for the recovery of small debts and damages.) The 3rd section further provides, that to establish the fact of the employment of the owner's slaves by the overseer or manager, *the information of the negroes* shall be sufficient, unless *the overseer or manager* will exculpate himself on oath.

1st section.

Last paragraph 3d section.

1 McMull. Rep. 480.

In the case of Dillard vs. Wallace, I ruled that this provision was obsolete from non-user. The Court of Appeals, admitting that its enforcement had been hitherto unknown, and ninety years had then elapsed from its enactment, held that it was still not obsolete. It is therefore a law, however anomalous in its provision about evidence, still to be enforced.

6th sec. Act of 1740. P. L. 165.

SEC. 6. If any slave shall be beat, bruised, maimed or disabled, in the lawful business or service of his master, owner, overseer or other person having charge of such slave, by any person or persons, not having sufficient cause or authority, (of which cause the Magistrate trying the case is to judge,) he or they shall forfeit 40*s*. current money, equal to 5*s*. 8*d*. sterling, or $1 20-100, to the use of the poor of the District or Parish. If the slave or slaves be maimed or disabled from performing his or her or their work, the person or persons beating the slave, shall also forfeit and pay to the owner, 15*s*. current money, equal to about 44 cents, for every day he may be unable to discharge his usual service, and the charge of the cure of such slave.

If the damages in the whole do not exceed £20 current money, equal to $12 27-100 they, as also the penalty for the use of the poor, may be recovered before a Magistrate; and if the offender shall produce no goods on which the same may be levied, the Magistrate is authorized to commit him to gaol until the same be paid.

These provisions have been very little noticed, and furnish so poor a relief for the abuse to which they apply, that they will rarely be resorted to. The action of trespass is an abundantly better remedy. Still, this law exists, and may, in the case described in the Act, be resorted to by owners, if they choose so to do. They cannot, however, have this remedy, and also an action of trespass.

SEC. 7. Any person who shall give a ticket or written permit to a slave, the property of or under the charge of another, (without the consent, or against the will of such owner, or person having charge,) authorizing such slave to be absent, or to deal, trade or traffic, such person is liable to be indicted, and on conviction, to be punished by fine not exceeding $1000, and imprisonment not exceeding 12 months. Acts of '36, p. 83.

Notwithstanding this Act, a person who might give a ticket to a slave, with a view to aid a slave in running away and departing from his master's service, might be tried and capitally convicted under the Act of 1754. The State vs. Blease, 1 McMull. 472.

SEC. 8. If a white person *harbor, conceal or entertain* any runaway or fugitive slave, he or she is liable to be indicted for a misdemeanor, or prosecuted in a civil action for damages, at the election of the owner or person injured. If indicted and convicted, the offender is liable to a fine not exceeding $1000, and imprisonment not exceeding 12 months. The owner may proceed by indictment, and also civilly; at the same time, he cannot be put to his election until the trial. Acts of '21, p. 20. The State vs. Stein, 1 Rich. 189.

SEC. 9. If a person be maimed, wounded or disabled, in pursuing apprehending or taking any slave that is run away, or charged with any criminal offence, or in doing any thing else, in obedience to the Act of 1740, he shall receive such reward from the public as the General Assembly may think fit; and if he be killed, his heirs, executors or administrators shall receive the same. 8th sec. Act of 1740. P. L. 165.

I do not know that any claim has ever been made under this law. Still, however, it seems to be of force, and a claimant would be entitled to the benefit of its provisions.

SEC. 10. The Court trying and capitally convicting a slave, is to appraise the same, not exceeding $200, and certify such appraisement to the Treasurer of the Division within which the slave may be condemned; and in the event of the slave being executed, in pursuance of the sentence, the Treasurer is directed to pay the appraisement to the owner. Act of '43. 1st sec. 11 Stat. 264.

SEC. 11. If a white person game with a free negro, mulatto or mestizo, or slave, or shall bet upon any game played, wherein one of Act of 1834. 6th sec. 7 Stat. 469.

The State vs. Nates, 3d Hill, 200.

the parties is a free negro, mulatto, mestizo or slave, or shall be willingly present, aiding and abetting, where any game of chance is played, as aforesaid, in such case, such white person, upon conviction by indictment, is liable to receive 39 lashes, and to be fined and imprisoned at the discretion of the Court; one half of the fine is to go to the informer, the other half to the State.

Act of '44, 11 Stat. 294.

1st sec. Act of '17. 7 Stat. 454.

SEC. 12. Any shop-keeper, trader or other person, by himself or any other person acting for him or her, who shall buy or purchase from any slave, in any part of this State, any corn, rice, peas, or other grain, bacon, flour, tobacco, indigo, cotton, blades, hay, or any other article whatsoever, or shall otherwise deal, trade or traffic with any slave not having a permit so to deal, trade or traffic, or to sell any such article, from or under the hand of his master or owner, or such other person as may have the care and management of such slave, upon conviction, is liable to be fined not exceeding $1000, and to be imprisoned not more than 12 months, nor less than 1 month. It is the business of the party trading with a slave, to produce and prove the permit.

2d section.

5th sec. Act of '34. 7 Stat. 469. State vs. S one, Rice's Rep. 147

SEC. 13. If a slave enter a shop, store, or house of any kind, used for dealing trading and trafficking, with an article, and come out without the same, or enter without an article, and come out with one, it is sufficient evidence to convict the owner or person occupying the same for trade, in an indictment under the Act of 1817.

3d sec Act. of '34. 7 Stat. 469.

SEC. 14. If a white person, being a distiller, vendor or retailer of spirituous liquors, shall sell, exchange, give, or in any otherwise deliver any spirituous liquors to any slave, except upon the written and express order of the owner or person having the care and management of the slave, he shall, upon conviction, be fined not exceeding $100, and imprisoned not exceeding six months; one half of the said fine to the use of the informer, and the other half to the use of the State.

Act of '44. 11 Stat. 294.

The State vs. Evans, 3d Hill, 191.

SEC. 15. One effect resulting from the Act, and certainly neither intended nor anticipated by the Legislature, was to repeal the penalty of the Act of 1817, quoad distillers, vendors and retailers, (the very persons who, above all others ought to bear the heaviest penalties) in relation to the sale or exchange of spirituous liquors. The rule of evidence established by the Act of 1817, as to the production and proof of the permit, still remains in force.

The State vs. S one. Rice's Rep. 147.

The State vs. Schroder, 3d Hill, 61

SEC. 16. In an indictment for trading with a slave, or giving or delivering spirituous liquors to a slave, it is necessary that the slave should be described, when possible, by his own and his owner's name, or if that be not possible, by some equivalent description of the slave.

The State vs. Avants, 2d S.rob

SEC. 17. In indictments under the Act of 1834, although the rule of evidence established by its 5th section does not apply, and so, too, under the Act of 1817, where the trading is not in "a shop, store, or

house of any kind, used for trading" yet if the slave be seen to enter with an article, and come out without it, or to enter without an article, and come out with one, it is a fact, from which, at common law, a presumption may arise of guilt, and on which the jury may convict.

The State vs. Saber. Fall Term, 1818.

SEC. 18. It was decided immediately after the passage of the Act of 1817, that the sale to a slave, *of any article whatsoever*, or purchase from a slave of any *article whatsoever*, belonging to the slave, his master, or any other person, was a violation of the law.

The State vs. Von Glon. 1 McMull. 187. The State vs. Anone. 2 N. and McC. 27.

SEC. 19. If the master, or overseer, or other person having charge of the slave, send a slave with goods to detect another, in dealing trading or trafficking with a slave, and stand by and see the trading, it does not excuse the defendant, he still is guilty.

The State vs. Stroud. 2 N. and McC. 34 Note. The State vs. Anone. 2 N. and McC. 27.

SEC. 20. If the owner, or overseer, or other person having charge of the slave, go with him to make the sale or purchase, and stand by and assent to the same, the vendor would not be guilty. For then the trading might be regarded as that of the master by his slave.

The State vs Coleman, (not reported.) The State vs. Isaacs, 1 Speers, 224.

SEC. 21. If the trader be in the habit of trading with slaves and had authorized his clerk so to trade, he may be convicted for a trading with a slave, by his clerk in his absence. But the principal cannot be criminally answerable for the act of his clerk, unless done with his knowledge and consent actual, or implied. The same rule holds as to a partner.

The State vs. Anone. 2 N. and McC. 27. The State vs. Mathieu, decided at Columbia, May '35. The State vs. Coleman, Dud. 32.

SEC. 22. An overseer trading with his employer's slaves may be indicted and convicted, under the Act of 1817.

The State vs. Chandler, 2 Strob.

SEC. 23. Before the Act of '34, a person who sold liquor to a slave might be indicted for trading with a slave without a ticket, and also for retailing. It follows, since the Act of '34 is substituted for that of '17, so far as the penalty is concerned, that a person now may be indicted for selling, giving, exchanging or delivering spirituous liquors to a slave, and for retailing without a license, although there be but one sale and delivery.

The State vs. Somerkalb, 2 N. and McC 280. The State vs. O'Sullivan, at Nisi Prius.

SEC. 24. If one sell spirituous liquor to a slave, or to another for him, without a permit from his owner, employer, or other person having charge of him, and the slave die in consequence of the too free use of the liquor so sold, the person so selling, is liable, in an action on the case, for the value of the slave to the owner.

Harrison vs. Berkley, 1 Strob. 525.

SEC. 25. A license to retail, cannot be granted to an applicant, unless he will swear that he will not, during his license, sell, give, exchange, barter or otherwise deliver spirituous liquors to any slave contrary to the law on that subject. If he has been engaged before in the business, he must also swear, that he has not during his past license, sold, given, delivered, exchanged, bartered, or otherwise delivered spirituous liquors to a slave contrary to law.

4th section Act of '34, 11 Stat. p. 469.

SEC. 26. If a master or other person having charge of a slave who may be accused of any capital or other crime, shall conceal or convey

20th sec. Act of 1740. P. L. 168.

away such slave, so he cannot be brought to trial and punishment, such master or other person shall be liable to forfeit £250 current money, equal to £35 16*s.* 5*d.* or $153 58-100, if the crime be capital; if not capital, then the forfeiture is £50 currency, equal to £7 3*s.* 3*d.* or $30 70. This provision, in capital felonies, supersedes the common law offence of accessory, after the fact in a crime committed by a slave, so far as owners and other persons having charge of a slave may be concerned.

The State vs. McAliley, Col'a. May 1840.

SEC. 27. A master is liable for the acts of his slave, done negligently, unskilfully, or wilfully, in the course of any public employment or business carried on by him, under the authority or with the consent of his master. *As where*, a slave navigating his master's vessel, so *negligently* managed his craft as to injure a wharf, or to run down a car of fish, or where a slave carpenter, with his master's assent, actual or implied, undertakes to repair a house, and in doing it, does it so *unskilfully*, that the whole building falls down, or where a slave blacksmith, in shoeing a horse, becomes enraged with him, and *wilfully* knocks out the horse's eye with his shoeing hammer, in all these cases, the master is liable, according to the principles which I have above stated.

Drayton ads. Moore. Parker vs. Gordon, Dud. 263. O'Connell vs. S rong, Dud. 263. Snee vs. Trice, 1 Brev. 178.

SEC. 28. The master is not liable for the unauthorized acts of his slave, done without his knowledge or consent, actual or implied, and not in any public business or employment, in which he has placed his slave.

Snee vs. Trice, 2 Bay 345. Wingis vs. Smith, 3 McC. 400.

SEC. 29. Any person or persons, who shall, on his, her, or their own behalf, or under color, or in virtue of any commission, or authority from any State or public authority of any State in this Union, or any foreign power, come within this State, with the intent to disturb, hinder, or counteract the operation of laws made or to be made, in relation to slaves, free negroes, mulattoes, and mestizoes, are liable to be arrested, and if not bailed, committed to gaol by any of the Judges of this State, including the Recorder, for a high misdemeanor, and on conviction is liable to be sentenced to banishment from the State, and to be fined and imprisoned at the discretion of the Court.

1st sec. Act '44. 11 S at. 292.

SEC. 30. Any person within this State, who shall at any time accept any commission or authority from any State, or public authority of any State in this Union, or from any foreign power, in relation to slaves or free persons of color, and who shall commit any overt act with an intent to disturb the peace or security of this State, or with intent to disturb, counteract, or hinder the laws of this State, made or to be made, in relation to slaves or free negroes, mulattoes, or mestizoes, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay for the first offence, a fine not exceeding $1000, and to be imprisoned not exceeding one year; and for the second offence, he shall be

2nd sec. Act of '44. 11 Stat. 292

imprisoned 7 years, and pay a fine not less than $1000, or be banished from the State, as the Court shall see fit.

SEC. 31. The Governor's duty is to require all persons who come into this State, for the purposes, and under the circumstances stated in the 1st section of the Act of '44, and the preceding 29th section of this digest, to depart from the State in 48 hours after such notice, and such persons shall thereupon be bound to depart, and failing to do so, they are guilty of a high misdemeanor, and upon conviction, are to be sentenced to be banished from the State, and to such fine and imprisonment, as the Court may think expedient. 3d section.

SEC. 32. Any person convicted a second or any subsequent time, under the 1st and 3d sections of the Act of '44, set out in the preceding 29th and 31st sections of this digest, is to be imprisoned not less than 7 years, to pay a fine not less than $1000, and to be banished from the State. 4th section.

SEC. 33. It is the duty of the Sheriff of the District to execute the sentence of banishment, by sending the offender out of the State; and if he shall return, (unless by unavoidable accident,) the Sheriff of the District where he may be found is "*to hold*" him in close confinement under the original sentence, until he shall enter into a recognizance to leave the State and never to return. 5th section.

SEC. 34. Free negroes, mulattoes, and mestizoes, entering this State as cook, steward, or mariner, or in any other employment, on board any vessel, in violation of the provisions of the 2d section of the Act of '35, and which is set out and prescribed in the 59th section of Chapter 1, of this digest, and who may be apprehended and confined by the Sheriff, are not entitled to the writ of Habeas Corpus. 1st sec. Act of '44, 11 Stat. 293.

SEC. 35. If the Sheriff shall by the usual posse comitatus and the civil authorities, not be able to enforce the provisions of the Act of '35, the Governor, on a requisition made on him, and signed by the Sheriff, is required to order out a sufficient number of the militia, to meet the exigency of the case, to be placed under the command of discreet officers, who shall be ordered to give the Sheriff the aid necessary to execute the said Act. 2d sec. Act of '44. 11 Stat. 293.

ERRATA.

In the unavoidable hurry of revising the proof-sheets, a few errors escaped correction. Slight verbal inaccuracies, and those merely involving an inversion or omission of a letter, the intelligence of the reader will easily correct.

Page 10, line 3, for "*rita,*" read "*rite.*"
" " " 10, for "*suvitii,*" read "*servitii.*"

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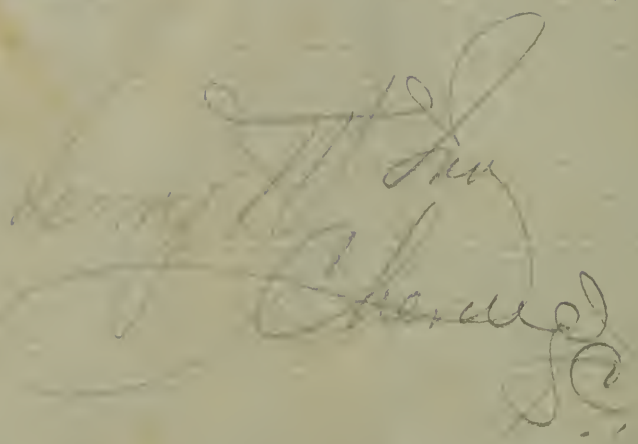

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