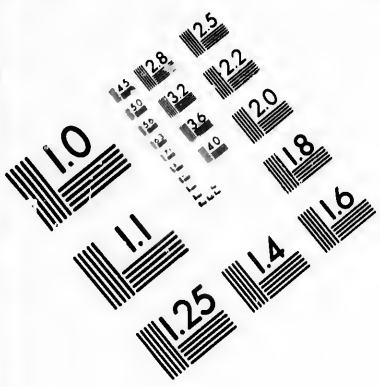

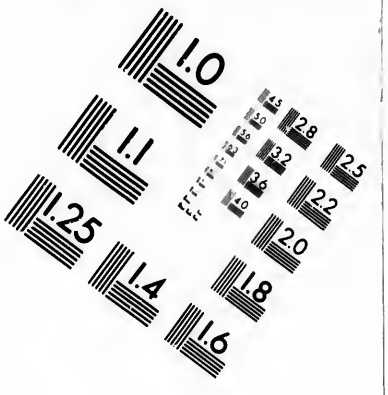

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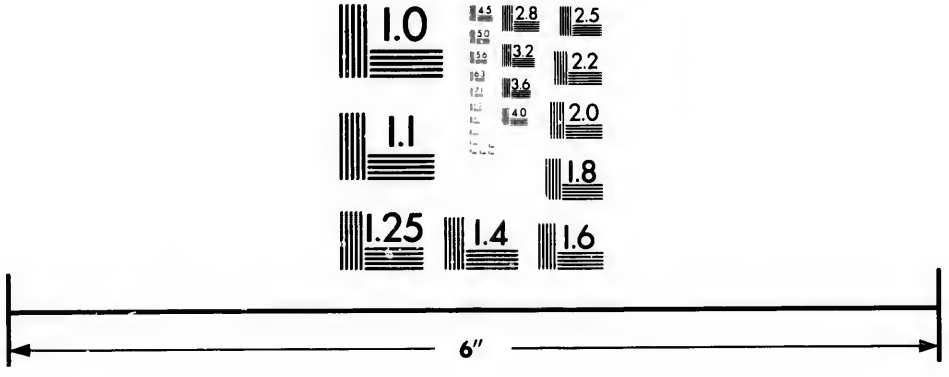

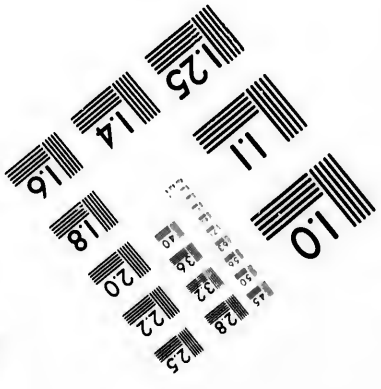

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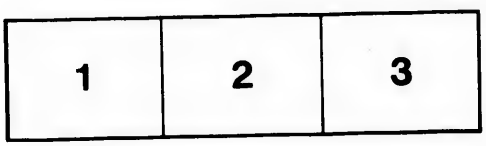

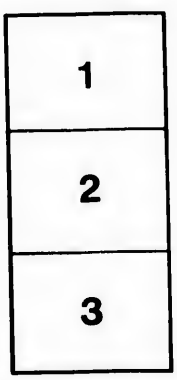

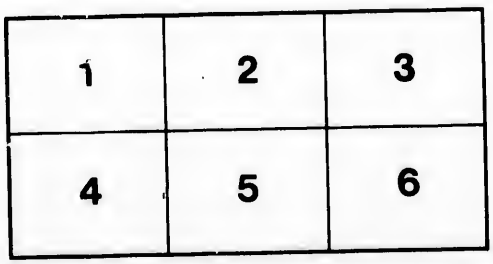

IX.—*The Loyalists and Slavery in New Brunswick.*

By I. ALLEN JACK, Q.C., D.C.L., of St. John, N.B.

(Communicated by Sir J. Bourinot, and read May 26, 1898.)

Any one who studies the history of the struggle for independence by the old British Colonies in North America cannot fail to wonder why no serious effort was then made to secure liberty for slaves. One would suppose that amongst those who not only protested, but fought against taxation without representation as a monstrous evil, at least some would have sought to eradicate a system which denied the semblance of freedom to a class of inoffensive beings, or would have strongly objected to the continuance of a glaring inconsistency. Perhaps, indeed, the slaves had sympathizers and friends among the revolutionists, who withheld from action, or even expression of sympathy from a fear of creating dissension among those whose strength depended on their unity. But if this was the case, how was it that these sympathizers and friends were not indeed voiceless, but nationally ineffective for so long a period after the war of independence was over? It was indeed little short of a century after the commencement of the revolution, and then rather as a matter of policy than of righteousness, that slavery was abolished in the United States.

To English-speaking people of to-day, excepting perhaps a few of those who reside in the former slave-holding states of North America, slavery generally seems to be so wholly indefensible that they find it hard to believe that it not only existed, but was approved by many of British descent within the present century.

We are disposed to regard it in the same way as we regard drunkenness and profanity in which our ancestors too often indulged, and not always privately, without public censure; to abandon any effort to fathom such anomalies; and to congratulate ourselves upon our disapproval and entire or partial renunciation of these evils.

Now those who believe that North Americans, a hundred years ago, owned and employed slaves either without or against ethical reason are in error. Without doubt many slave-owners never seriously considered the questions involved, and were content to accept the conclusions, without following the arguments of their fellows. But those who resorted to reason, although perhaps influenced by personal considerations, were supplied with arguments which had little or no semblance of being baseless, and which, if not baseless, fairly supported the maintenance of slavery.

Every student of social institutions, sooner or later, is sure to discover that, without some knowledge of the history and principal features of Roman law, he is placed at a serious disadvantage. The present Archbishop

of Canterbury, in one of a series of compositions written by him and others, which attracted much attention and some hostility when published, forcibly suggests the utility of such knowledge. Treating of the preparation of the world for the introduction of Christianity, he credits the Jews, the Greeks and the Romans each as playing an important part ; the first contributing to humanity morals ; the second, love for the beautiful in nature and art ; the third, respect and aptitude for order and law.

Both before and for centuries after the dawn of the Christian era, the only systematic law demanding close attention was that of Rome and, down through the centuries, it has influenced nearly every scheme of national jurisprudence, in some instances wholly, in others partially or indirectly, until to-day.

In a brief but necessary reference to the Roman system, it should be noted that the courts and processes of law were at first only available to Roman citizens or for police purposes. With the extension of the empire, however, and the appearance in the capital of persons of almost every nationality, the necessity arose for providing methods whereby their wrongs should be righted and their right secured. In consequence, a special official, the *Prætor Perigrinus*, was appointed, whose functions were, in part, to investigate and determine such matters as related to resident aliens, and demanded judicial intervention. As a result of the researches of this functionary, a great deal of knowledge was obtained of what related to the laws prevailing among many and divers peoples. Perhaps among the results of his investigations, which when digested were known as the *Jus Gentium*, the most important was the appearance, sometimes in several and occasionally in all, of common features. Among those in the latter class may be mentioned slavery which seems to have prevailed, although in some instances under more or less equitable regulations, among practically all the primitive races. Now it is generally admitted that, at least occasionally, injustice follows a persistent adherence to the teaching deducible from *vox populi vox Dei*, *quod semper quod ubique* and other classical or *quasi* classical commonplaces, and no one need be surprised to learn that such teaching is largely responsible for the maintenance of the institution under consideration. It is probable that the developments in connection with the administration of law for foreigners, at first, attracted little notice, but eventually they aroused a warm interest, and largely served to originate or support striking theories and methods. It should always be borne in mind that the Romans were very practical people, and that even their lawyers evinced but little tendency to draw upon the imagination to aid them in argument.

When, however, the Greeks, as is well-known, owing to their higher culture and acumen, led their conquerors into voluntary captivity in the realms of art and science, the Roman lawyers did not resist, or resisted ineffectually. Hence it followed that, thereafter, there appears in the

history and record of the evolution of theoretical and applied law in Rome, clear and not unabundant evidence of the influence of Greek philosophy. Now of all the philosophical systems emanating from Greece, that of the Stoics appealed most strongly to the best of the Romans, not merely by reason of its excellence, but because of what may, not inaptly, be termed its manliness. There is no reason to doubt that it was from the Stoics that the jurisconsults derived that conception of natural law which, directly or indirectly, in their day and through succeeding ages, has influenced both individual and national conduct to no inconsiderable extent. It is therefore necessary for the present purpose, to ascertain what was the creed of the Roman lawyers after they had accepted the doctrines indicated.

In common with other educated persons not of their profession, they seem to have considered that man was capable, by his unaided reason, to determine between absolute right and wrong; that when he did what was wrong, he consciously put himself in opposition to nature; and that, if he did not weaken his power by repeated acts of rebellion against nature, he was and always would be capable of acting and thinking in accordance with the terms of a perfect standard of excellence.

With such a premise as this, it is easy to conceive that some such syllogism as the following might be constructed. Man was originally created with a knowledge of the difference between right and wrong, and that the former was preferable to the latter, and with a perfect capacity, requiring effort, to follow the one or the other. Through a continuous failure to avail himself of his knowledge and power, although capable of regaining what he has lost, he has deprived himself of the benefit of both. Therefore that which was done or thought by man, prior to the commencement of his degeneration, was right.

Pride in his nationality would doubtless occasionally lead a Roman to hesitate before approving an ancient law or custom unknown to his most remote ancestors. But when placed upon the same level as legal fictions and equity, one aiding the procedure, the other claiming to smoothe or dissipate the asperities of law the new theory was generally readily accepted. This brief statement may serve to explain the origin and nature of the *Jus Gentium* and of the *Jus Naturæ*, and so make it manifest that, notwithstanding their occasional use as convertible terms, they were quite distinct from each other. It may, however, be observed that slavery, from the fact that it was an ancient and general, if not universal, usage was recognized and approved by both the *Jus Gentium* and the *Jus Naturæ*.

For hundreds of years, the principles of the *Jus Naturæ* had little or no influence upon civilization, and received but scant consideration. But at length, when the first half of the eighteenth century had passed, they were brought to light from their obscurity and exhibited for new purposes

and with fresh association and adornment, not to lawyers forming a limited class, but to the world. Rousseau, the prime evangelist in the movement, soon secured a large following of ardent disciples to whom he expounded his gospel. This comprised not only the law of nature as determined by research, but his own picturesque conception of conditions assumed to have prevailed among human beings living in a state of nature and subject only to her ordinances. Careful and thorough historical investigation, which would have exposed the fallacies in his teachings, as may well be supposed, found no portion of his method. Partly from antipathy to the Jews, but partly because it was approved by the clergy for whom they had no love, he and his fellows ignored even the pentateuch, notwithstanding its valuable rules for conduct. It is needless to state that such a work as the *Civitas Dei* was not consulted by them ; and that the assertion of Christians that perfect government cannot be secured till human hearts are made wholly subservient to God's will was vigorously denied by the members of this French school of thought. The retention of the Roman *Jus Naturæ*, based as it was upon facts, as a foundation for the new philosophy was, at the same time, a source of strength and weakness ; of strength, because it imparted to it that flavour of antiquity which always helps to render a claim authoritative ; of weakness, because the results of historical inquiry often conflict with the conclusions of daring theorists. If freedom and equality, for instance, are desirable and demandable, what becomes of the ancient and once general institution slavery ?[1]

It seems strange to us, who have heard much of evolution in the visible, if not invisible, world, that a system based upon so opposite a principle, and reflecting so superciliously and severely as it did upon the efforts and methods of society past and present, should meet with favour. That it did cannot be gainsaid, and although its bright garnishment and brighter promises probably attracted those who were guided by emotions rather than by knowledge or by reason, it did not fail to captivate many a thoughtful, educated man. Even to-day, the not infrequent application of the term unnatural, or contrary to nature, to an act or thought inconsistent with what is right, indicates that Rousseau's influence, though probably feeble, is not extinct.

But yet, while making allowance for the temporary ascendancy of the picturesque over the symmetrical, of phantasy over logic, it is hard to believe that people generally so religious as the people of the colonies in America who shook off the British yoke, should accept instruction from the French doctrinaires, embodied in the theory of a state of nature which if not wholly fantastic, was contrary to reason and, if not entirely irreligious, was certainly anti-christian.

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[1] It may not be necessary, but it is only proper, to state that much of what is set forth above, as to the history and character of the laws of nations and nature and of Roman system of philosophy has been obtained from Sir Henry Main's most valuable and interesting treatise on Ancient Law.

That such was the case is evident from the reported utterances and writings of their leaders and, above all, from the declarations made on behalf of the entire body of the revolutionists. Among these declarations, that relating to the equality of man is incomprehensible without glosses; and that which asserts his right to freedom, notwithstanding the ball given for the negroes of Boston by Governor Hancock, before the close of the eighteenth century, was practically denied by the permitted continuance of slavery.

The revolution of the old British colonies having been successful, two forms of government were thenceforth brought into contrast with each other; and a line divided two peoples largely of the same descent, and with the same language, common law and religious faith. On the one side of this line, however, were the professed champions of equality and freedom for mankind, on the other the supporters of the British connection with America. But, notwithstanding the assertions to the contrary of their excited and prejudiced neighbours, there was nothing in the principles or status of the king's American friends to preclude them from attaining the highest social rights and privileges.

The incident hereafter related which forms the motive of this paper, may be regarded as a partial proof of the propriety of this assertion.

The province of New Brunswick, now forming a part of the Dominion of Canada, was mainly peopled by loyalists, among whom were many families and representatives of families who had occupied most prominent positions, socially and politically, in the leading colonies before the war. In 1800, only seventeen years after their arrival on its shores, New Brunswick was but sparsely populated, and even its commercial metropolis contained but a few thousand souls. None of the inhabitants were wealthy and most of them were extremely poor, and it is quite certain that the hardest problems of material life demanded the time, attention, and energy of all of them.

The existing conditions would suggest the conclusion that any one in the province who possessed a slave, might then and there obtain the fullest benefit of the unremunerated labour of that slave without interference or protest. It so happened, however, that at this time, and in this place, a few of the tories supposed by their republican neighbours to favour all kinds of oppression, put their heads together and resolved that, God helping them, there should be no more slaves in New Brunswick. Before stating the results consequent upon their resolve, it is only fitting to give some account of the chief actors in this drama which, although enacted in a then unimportant locality and before a limited number of persons, deserves more attention than it has ever received.

Of the individual chiefly concerned little or nothing is known, except that she was a black woman named Nancy Morton. There is, however, recorded at the office of the registrar of deeds, Saint John, N. B., in accor-

dance with the idea that slaves savour of the realty, on the twelfth day of January, 1791, a bill of sale of a slave bearing her Christian name, who may, perhaps, have been she. The instrument is dated the thirteenth day of November, 1778, and executed by one John Johnson, of the township of Brooklyn, in King's County, Long Island, province of New York, who thereby conveyed, with a covenant to warrant and defend the sale, to Samuel Duffy, inn-keeper, in consideration of forty pounds of current money of that province, "a certain negro female abought fourteen years of age and goes by the name of Nancy." The highly original effort to spell about (abought) and other peculiarities in the document, indicate that it was probably the work of a rural justice of the peace.

Isaac Allen was the judge under whose fiat the proceedings on behalf of the slave were instituted. His grandfather, an Englishman by birth, came to America and became a judge of the Supreme Court of New Jersey, where Isaac was born in 1741. He was educated for and admitted to the bar, practised law in Philadelphia and at Trenton, N. J., and in 1769, married a Miss Campbell whose parents were Irish. He served during the rebellion under the Crown, as lieutenant-colonel of the New Jersey volunteers, and was present at the battles of King's Mountain and Eutaw Springs. He was possessed of valuable property in Pennsylvania of which he was deprived on account of his political course, and at the termination of the war he and his family went to Nova Scotia, subsequently removing to New Brunswick. When the supreme court of the latter province was established he was appointed one of the puisne judges, his commission bearing date the twenty-fifth day of November, 1784. He selected for his place of residence, a tract of land some seven miles above Fredericton on the River Saint John, on a part of which was an Indian village called Aucpaque, meaning tide head or tide level, this being the point at which the downward current was supposed to first encounter the influence of the Bay of Fundy. In 1786, when Judge Allen and his family were residing at this place, an incident occurred which caused them much anxiety, an Indian having been shot by one of the recent settlers. The very prompt trial, conviction and execution of the culprit, however, apparently satisfied the members of the tribe; and as the judge treated them with marked consideration, always remembering the interference of the pale faces with their rights, he soon acquired their entire confidence. As a matter of fact the exceedingly great friendliness of the tribes-men eventually became somewhat oppressive, especially as they deemed it necessary to prove their affection by very frequently, but not always conveniently, becoming his guests. The Indians, however, did not monopolize the interest which he was disposed to manifest in ill-used persons, and the condition of the negro slaves occupied his attention to a marked extent. He corresponded with Wilberforce, the distinguished abolitionist, and manumitted his own slaves, of whom some of the descen-

dants reside to-day, near the site of the judge's mansion which was burned to the ground many years ago. With it, unfortunately, his letters and manuscripts and much that would aid in writing of his life and character were for ever lost. Family tradition pictures him as a just, but kind hearted man, and dwells upon the fact that he insisted upon the members of his household living economically and without ostentation, so that less fortunate neighbours should have no reason to complain of marked differences in the condition of persons who were all at that time suffering by reason of their loyalty. He died, in his sixty-sixth year, in 1806, at his residence at Aucpaque, leaving one son and several daughters, most of whom lived to an extreme old age. A number of his descendants are now living in New Brunswick, among them Sir John C. Allen, the late respected chief justice of the province.[1]

Sampson Salter Blowers, although taking no part in the argument or hearing, was interested in the result, and assisted counsel for the slave with advice and authorities. Mr. Blowers was the son of a gentleman who had served as a lieutenant in the provincial forces raised for the first siege of Louisbourg, and was born in Boston, Massachusetts, in 1742. He graduated from Harvard College in 1763, and after studying law with James Otis, the somewhat famous anti-British pamphletier, according to Campbell in his history of Nova Scotia, or, as is more probable, with Thomas Hutchinson, the last governor of Massachusetts under the Crown, as Sabine states, was admitted to the bar in 1767. He practised law in Boston until 1774, when, to avoid political controversy, he sailed for England with his recently married wife who, Sabine thought, was a daughter of Benjamin Kent, of Massachusetts, at first a Whig, but afterwards a loyalist and refugee. Sabine states that in 1770 Mr. Blowers was associated with Messrs. Adams and Quincy as counsel on behalf of the British soldiers who were tried for their agency in the Boston massacre, so termed, in that year. He reached New York in 1778 and resided there or in Rhode Island, acting in various civil capacities under the Crown until the close of the war when he removed with his family to Halifax, Nova Scotia. He was appointed in 1785 attorney-general, in 1788 a member of the council, and in 1797 chief justice and president of the council of that province. He retired from public life in 1833, and died in 1841, in the ninety-ninth year of his age. He received a visit a year before his death, from ex-President Adams and his son Charles Francis, and is described by the latter in his diary, probably correctly, as "the last of the loyalists." Campbell, from whose history this abstract of the life of this striking personage is chiefly drawn, quotes the Honourable Joseph Howe for the statement that the chief justice never wore an overcoat in his life. This, in itself, suggests that he was a remarkable man physically, even if his mental and intellectual gifts and acquirements

[1] Sir John C. Allen died subsequent to the reading of this paper.

had not secured for him, as they did, a first place among the many worthies lost to the new republic, but gained for the loyal provinces. He died childless.

Ward Chipman, who acted as attorney and counsel for the slave, was the son of John Chipman, a member of the Massachusetts bar, and was born in Boston in 1753. After graduating at Harvard, he studied law, was duly admitted and practised as a lawyer in Boston until 1776. Before the evacuation of New York, he was employed as secretary of a commission to adjudicate upon claims for supplies for the Crown. That he was fairly remunerated for this service appears from the following extract from a letter to him from Jonathan Sewall the elder, who had ably controverted the political writings of James Otis, written at Bristol, England, the fifteenth of March, 1780: "Till you become a father, my dear Chipman, you will never realize the pleasure I received from your account of your situation at Mrs. Ogilvie's. Lodging and board with a servant and horse at £180 *per annum*, and your income £300 *per annum* —how much better this than to visit in England upon £100." When New York was evacuated Mr. Chipman went to England, whence, in the summer of 1784, he sailed for New Brunswick, receiving the honorary appointment of solicitor-general of that province and that of recorder of the city of Saint John. There is reason to believe that he had not then, or perhaps later, learned the art of living within his means, and, although his income at this time appears to have been limited to his half-pay, £91 per annum, before his embarkation, he expended £3 : 15 : 6d upon a dressing-box, 16 pounds of French hair powder and other toilet necessaries. He commenced the practice of law in the spring of 1785, his office hours being from 8 a.m. till 3 p.m. Jonathan Sewall the younger, who afterwards became attorney-general and chief justice of Lower Canada, entered as Mr. Chipman's student at this time and was admitted an attorney from his office. Stephen Sewall, brother of the embryo chief justice, also studied law till he became an attorney, under the solicitor-general, and the parents of the young men came to reside in Saint John, where their father died in 1796. In 1785, Mr. Chipman was selected as one of the government candidates for the city at the first general election for the provincial legislature, and, after an exciting and even riotous contest, he and his fellow-nominees for the city and city and county of Saint John were duly returned.

On the 24th of October, 1786, he married Elizabeth, the eldest daughter of William Hazen, one of the first grantees of St. John, and in residence there before the landing of the loyalists. Shortly after his marriage, Mr. Chipman purchased a plot of ground on Union street, at the northerly end of Prince William street, on which he erected a commodious house, in which he subsequently resided. This building is still standing, and possesses interest not only as the home of a leading

loyalist and his son during their lives, but as the temporary abiding-place of the Duke of Kent and also of the Prince of Wales. Whether Mr. Chipman failed in courting popularity or suffered from supporting measures not generally approved by his constituents is not apparent, but at the second general election he was returned for Northumberland county instead of the city of Saint John. He does not appear to have had a leaning to political life, and in a letter written about this time, he plainly intimates that he had sought election partly from deference to the wishes of his friends, and partly in the unfulfilled hope that he might secure the speaker's chair. He, for a short time, acted as attorney-general, but his appointment to the office by the governor was not confirmed by the Crown. In 1796, however, his services and abilities were substantially recognized by his being selected as agent and counsel for the Crown before the commission created to determine the true boundary between the United States and New Brunswick, and was paid £960 sterling per annum for his services. As the labours of this commission were continued for two years and nine months, and he was allowed to draw his half-pay as deputy muster master-general during this period, one would suppose that he fared better than most of his contemporary lawyers in the province. Yet in his letters he complains of poverty, although he had managed to increase the area of land about his dwelling to such an extent that it comprised a substantial block. On the other hand, as in 1802 he strongly protested, on behalf of himself and his brother practitioners, against the passage of an act which increased the jurisdiction of justices' courts from £3 to £5, which deprived lawyers of costs under the scale of the supreme court where amounts to be collected were under the latter sum, it certainly would seem that the practice of law in New Brunswick was not then remunerative. Indeed, from a statement in a letter from Mr. Chipman in 1808, it appears that his annual income did not then exceed £200. In 1806 he was made a member of the council, and in 1809, although somewhat disappointed in not being appointed chief justice, he became a puisne judge of the supreme court. It is a somewhat striking tribute to his capacity and fidelity, that he was again, in 1814, employed by the Crown in the same capacity as before, and appeared before the second commission to settle the international boundary, under the terms of the treaty between Great Britain and the United States of America.

In 1823 Judge Chipman, alleging as reasons his age and physical infirmity, applied for leave to retire from public service, but before any action was taken upon his request an event occurred which directly affected his intentions.

On the 27th of March, in the last-mentioned year, Major-General Smyth, lieutenant-governor of New Brunswick, after a short illness, died, and on the first of April following, a meeting of the council was

held to consider what should be done under the circumstances. The Honourable George Leonard, the senior member, was not present, but a letter from him was read in which he stated that, owing to his age and feebleness, he declined to act as administrator. The Honourable Christopher Billop, then in his eighty-sixth year, the next in seniority, wrote claiming the right, and summoning the members to attend before him at Saint John, but failed to appear at this meeting, which took place at Fredericton. Those who were present, while not disputing this claim, came to the conclusion that it was necessary to act promptly, and, with Judge Chipman's concurrence, selected him, as the senior member present, to administer the affairs of the province. A somewhat lively conflict ensued between Mr. Billop and the administrator *de facto*, and proclamations were issued by each, but the British government, while acknowledging the right of the former, declined to interfere with the action of the council.

Mr. President Chipman presided at a session of the legislature, which opened on the twenty-first of January, 1824, when he must have been greatly gratified, not only on account of his personal honours, but from the fact that his son, who subsequently distinguished himself as Chief Justice of New Brunswick, was presented for approval as speaker of the House of Assembly.

It is not improbable that the mental and physical labours of the last year of his life were too great for one who really needed rest, but, be that as it may, the end came on the ninth of February following his happy experience last mentioned.

Judge Chipman possessed an interesting and pleasing personality and abundance of natural and acquired powers. His abilities were perhaps greater than his contemporaries always perceived, and greater than posterity, specially attracted by the attainments of his brilliant son, has thought proper, as a rule, to concede.

All the data for the foregoing biographical sketch of Judge Chipman, most of the facts relating to Judge Allen, and the account of Nancy Morton's case and the immediate results, with the letters hereafter set forth have been collated from manuscript notes made by the late Joseph W. Lawrence of Saint John, N.B. It gives the present writer great pleasure to express his thanks to the representatives of this most worthy gentleman for the permission to make these extracts from this very valuable and important collection. Mr. Lawrence although unable to claim a loyalist ancestor, devoted all his energies for many years, to the task of gathering and recording all available material in relation to the loyalists, with far more enthusiasm than their descendants have generally exhibited.

The remainder of the story does not require many words.

Mr. Chipman, neither expecting nor receiving remuneration, and simply and solely as a labour of love, undertook to devote all his know-

ledge and mental energies to help to obtain liberty for the slave Nancy Morton, and faithfully fulfilled his undertaking. His Brief, as it may be called, although it is rather his speech written in advance, was acquired by Mr. Lawrence and presented by him to the writer of this paper some years ago. As a remarkable example of the result of steady indefatigable and well directed effort, if for no other reason, it deserves to be made public and is therefore printed herewith. It forms a conspicuous proof of the standard of knowledge of law attainable by American colonists, and in a department somewhat outside the routine of an ordinary practitioner. Moreover, considering the paucity of authorities which may be imagined to have been, and which, if Mr. Chipman's statement is correct, there was in the newly created, struggling province, the number, character, and variety of the citations, apart from their use and arrangement, are simply amazing. Surely had Shakespeare ever heard of so large and excellent a piece of gratuitous work by a member of the bar, he would never even have insinuated that "the breath of an unfee'd lawyer" is valueless.

It is most probably safe to state that the burthen of preparation for argument on behalf of the slave rested on Mr. Chipman's shoulders, although Mr. Samuel Denny Street was his associate counsel and Chief Justice Blowers rendered valuable assistance.

Mr. Bliss, attorney-general for New Brunswick, and four other members of the bar of that province, appeared for the master on the argument. The attorney-general's speech was divided into thirty-two heads, and in all probability fully presented his case for the consideration of the court. It is not necessary, however, to refer to his reasoning, nor to set out in detail the arguments at one time advanced in favour of slavery, of which one only has been mentioned; the intention of this paper being principally to show in what manner the loyalists dealt with the claim of the enslaved to be free.

The proceedings on behalf of Nancy Morton were commenced by *habeas corpus* addressed to one Caleb Jones, and the argument took place on its return. Why Jones was named is not clear, but he may have acted in some capacity on behalf of Stair Agnew, the real master of the slave. This gentleman was a captain in the Queen's Rangers, settled opposite Fredericton, for thirty years represented York county in the House of Assembly, and died in 1821, aged sixty-three years.

The four judges, constituting the court, were divided in opinion after the argument, Chief Justice Ludlow and Judge Upham holding that the return to the writ was sufficient, and Judges Allen and Saunders maintaining a contrary view and in favour of granting liberty to the slave.

The following are the letters mentioned above, and having a direct bearing upon the matter discussed. It is scarcely necessary to state that the Mr. Strange, mentioned in the letter from Chief Justice Blowers, was

his predecessor in office who had been removed to the chief justiceship of Bombay. The *suppressio veri*, acknowledged by Mr. Chipman, may be viewed differently by different persons, but no lawyer would be likely to condemn him, though opposing counsel might be censured for not discovering that which was apparently in favour of their contention.

St. John, N.B., December 15th, 1799.

Dear Blowers,

The occasion of this letter is a subject which has from time to time been under judicial discussion here, but has never yet received any final determination on principle.

At length an *habeas corpus* has been brought upon which the broad question is to be decided. It stands for argument at the next term of the supreme court, and I am a volunteer for the rights of human nature. The court is divided. The chief justice undertakes to vindicate the right of slavery, and Judge Allen as strenuously insists that it is beyond the power of human nature to justify it. I do not know that the opinion of the other judges is made upon the point, but I do not think it impossible that they will also be divided.

I do not mean to enter into the merits of this question in this letter, nor should I have troubled you on this occasion were it not that our chief justice grounds himself principally upon what he calls the "Common Law of the Colonies," by which, he says, this doctrine has been uniformly recognized and established without any act having ever passed in any one of them, directly authorizing slavery. How this fact is as it regards the other colonies and islands, I know not, but it becomes of the first importance to ascertain the law of Nova Scotia on this head, as, if there is any such principle of our Common Law, we must derive it immediately from you.

I confess the idea of any such Common Law in the colonies, not only unknown, but repugnant to the Common Law of England, it appears to me to be rather fanciful. I write, therefore, for information what the law and practice are with you. Whether the question has ever been judicially determined, whether there was ever any act of Assembly in your province upon the subject, and upon what ground the right of the master is supported, if slavery is recognized at all among you.

With respect to the question at large, we are very deficient here in any treatises upon it, having no public library and but indifferent private ones, and these very much scattered.

I have now only to beg you will forgive the freedom I have taken and to present my most affectionate regards to Mrs. Blowers and other friends at your fireside, permit me to assure you that I am

Most faithfully your devoted friend,

Ward Chipman.

Hon. S. S. Blowers,
Halifax.

HALIFAX, December 22nd, 1799.

MY DEAR CHIPMAN,

Yesterday I received yours of the 15th nst. by post. I often think with pleasure on the days we laboured together in our vocation at New York, when we lived in habits of friendly intercourse; and although we have been so long separated, still cherish with great warmth my affectionate esteem for you.

The question respecting the slavery of negroes has been often agitated here in different ways, but has not received a direct decision.

My immediate predecessor dexterously avoided an adjudication of the principal point, yet as he required the fullest proof of the master's claim in point of fact, it was found generally very easy to succeed in favour of the negro, by taking some exceptions material to the general question, and therefore that course was taken.

The right to hold a negro by this tenure is supposed by us to be maintainable, either by the Common Law of England, the Statute Law of England and the Colony, or upon adjudged cases, and such seemed always to be Mr. Strange's opinion.

No lawyer ever talked with us of Common Law of the Colonies, as distinguished from that of England, nor would our late chief justice have countenanced a position of that kind.

The Common Law of England has been claimed and recognized as the birthright of every British subject in the colonies and has been so considered by the most eminent lawyers in England, as well as by the supreme court of judicature in most, if not all, the British colonies in America before the Revolution.

The Act of Federation, which establishes the present constitution of the United States recognizes the Common Law of England as the basis of it.

Agreeable to the practice which formerly obtained in case of Villenage in England, a summary decision of the question of slavery between master and negro here has always been resisted, and the party claiming the slave has been put to his action; and several trials have been had in which the jury has decided against the master, which has so discouraged them that a limited service by Indenture has been generally substituted by mutual consent. Mr. Strange always aimed to effect this, and generally succeeded.

We have no Act of the province recognizing the slavery of negroes as a statute right. An attempt was once made in the House of Assembly to introduce a clause of the kind in a Bill for the regulation of servants, but it was rejected by a great majority.

Some years ago I had determined to prosecute one for sending a negro out of the province against his will, who had found means to get back again, but the master being willing to acknowledge his right to freedom nothing further was done.

On that occasion I made a few short notes which I send you enclosed in their very rough state. They will shew you the ground on which I intended to proceed. When you have done with them be so good as to send them back to me.

Since I have been Chief Justice, a black woman was brought before me on *Habeas Corpus* from the gaol at Annapolis. The return was defective and she was discharged, but as she was claimed as a slave I intimated that an action should be brought to try the right, and one was brought against a person who had received and hired the wench.

At the trial, the plaintiff proved a purchase of the negro in New York as a slave, but as he could not prove that the seller had a legal right so to dispose of her, I directed the jury to find for the defendant which they did.

Though the question of slavery was much agitated at the Bar, I did not think it necessary to give any opinion upon it. I had frequent conversations with Mr. Strange on the question, and always found that he wished to wear out the claim gradually, than to throw so much property as it is called into the air at once. I have wrote fully and hope what I have sent you may be of use.

God bless you,

I am truly yours,

S. S. BLOWERS.

WARD CHIPMAN, ESQ.,
St. John, N.B.

ST. JOHN, N.B., 27th February, 1800.

DEAR SIR,

Accept my best thanks for your letter of 7th ult., which came to hand in season for me to avail myself of all the valuable information contained in it. I had proposed to argue the cause upon the same general grounds stated in your notes you enclosed, but they were of great assistance to me.

The cause was very fully argued, and lasted two whole days. The Court was finally as I anticipated, divided. The Chief Justice and Judge Upham supported the master's right, Judge Allen and Judge Saunders being against the sufficiency of the return, so that no judgment or order was entered and the master took back his slave.

Our Chief Justice is very strenuous in support of the master's rights, as being founded on immemorial usages and customs in all parts of America ever since its discovery, he contends that customs in all countries are the foundation of laws and acquire their force.

The principal difficulty seemed to be the not finding any Act of Assembly of your province recognising the condition of slavery there.

Had the counsel for the master stumbled upon your Act passed in 1762, as revised in 1783, in the second section of which negro slaves are mentioned, the conclusiveness of their reasoning on their principles would have been considered as demonstrated. In searching your laws upon this occasion, I found this clause, but carefully avoided mentioning it.

Respectfully yours,

WARD CHIPMAN.

Hon. S. S. BLOWERS,
Halifax.

Freedom and equality have been so linked together, that anything relating to the latter may, without impropriety, be mentioned in the discussion of slavery. There are many letters extant which prove that the American loyalists when temporarily in England were impatient of English social conditions, and longed to be back in the land where class distinctions were not defined by very rigid lines. The following extract from a letter, in the possession of the writer of this paper, from Mr. Blowers, when Attorney-General of Nova Scotia, to Jonathan Bliss, Attorney-General of New Brunswick, in January, 1795, apropos of the presence of certain personages not named but guessable, is sufficiently democratic and unexpected when it is remembered that both the writer and recipient of the missive were aristocrats. "You are right in supposing we do not enter into the fashions of this place. We have not visited the great Lady and are not (of course) in favour with the great Man. I have often thought one of the best consolations in a new country is the equality of condition which prevails among the inhabitants; and I own I think it much against a residence in the British colonies that high rank and title swarm so much in England that it has become necessary to spread them over the Dominions abroad." It is instructive to compare this expression of opinion with the statements of Joseph T. Buckingham in "Specimens of Newspaper Literature." Referring to the *Massachusetts Spy*, when under the management of Isaiah Thomas, he observes:—"Its editor was strenuous in favor of the use of titles. For a year or two after the organization of the Federal government, it seldom spoke of the President, but as "His Highness George Washington" or "His Highness the President General." (Vol. I., p. 243). Again the same author informs us (Vol. II., p. 57) that Benjamin Russell, editor of the *Massachusetts Centinel*, in that paper, yielded his cordial assent to a proposal that the President should be addressed as "His Majesty the President of the United States" and proposed that the address of the Vice-President should be "His Excellency," that of a Senator "Most Honorable," and that of a Representative "Honorable."

It may be assumed that the discussion before the court on the return of the *habeas corpus* was not without some flights of oratory, and it is

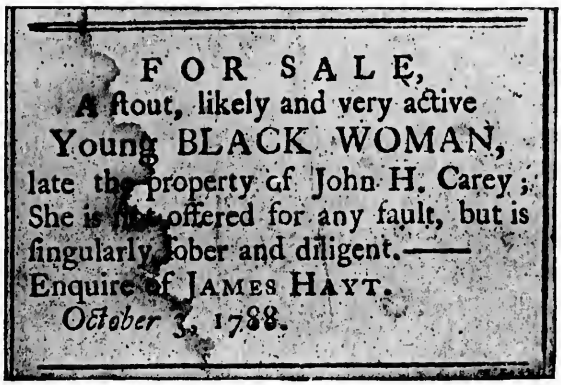
not unlikely that members of the bar and even the bench may then have felt warmly and not always spoken guardedly. Stair Agnew, at all events, with or without a cause, was so deeply offended with what was said that he seems to have fairly thirsted for blood. He first sent a challenge by John Murray Bliss, one of his counsel, to Judge Allen, and when it was, with the truest courage, declined, invited Mr. Street, who was associate counsel with Mr. Chipman, to meet him in mortal combat. The latter accepted, and he and Mr. Agnew fought, but without fatal result. They and their seconds were indicted, but the case never came to trial, the proceedings being quashed for some irregularity.

Mr. Agnew reconveyed Nancy Morton to William Bailey from whom he had purchased her, and she bound herself to the latter for fifteen years and disappeared from history.

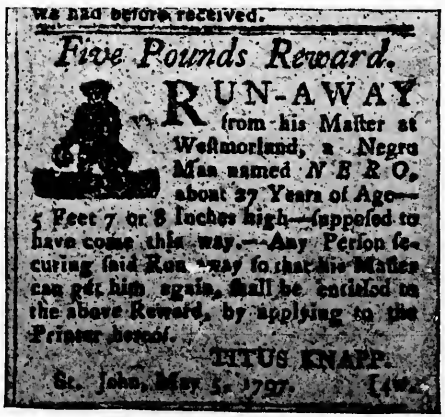
Although the argument in her case was not followed by a judicial conclusion, slavery thereafter practically ceased to exist, not only in New Brunswick, but in the maritime provinces, leaving behind it a memory so faint, that the mere suggestion that there ever was a slave in either of these provinces is very generally received with surprise, if not with incredulity.

NOTE.

As some evidence of the real existence of slavery in the place and time mentioned in the foregoing paper, the following facsimiles of advertisements are presented, of which the originals appeared, at the dates stated, in the St. John *Gazette and Weekly Advertiser:*



FOR SALE,
A ſtout, likely and very active
Young BLACK WOMAN,
late the property of John H. Carey;
She is not offered for any fault, but is
ſingularly ſober and diligent.——
Enquire of JAMES HAYT.
October 3, 1788.



We had before received.

Five Pounds Reward.

RUN-AWAY from his Maſter at Weſtmorland, a Negro Man named *NERO*, about 27 Years of Age—5 Feet 7 or 8 Inches high—ſuppoſed to have come this way.—Any Perſon ſecuring ſaid Run-away ſo that his Maſter can get him again, ſhall be entitled to the above Reward, by applying to the Printer hereof.

TITUS KNAPP.

St. John, May 1, 1797. [4w.]

BRIEF.

SUPREME COURT, New Brunswick, Hilary Term, 1800, 40, George III.

The case of Nancy, a black woman, claimed as a slave; upon Habeas Corpus against the master.

For the writ and return see Fol. 42 (Page 204).

1. What are the grounds upon which the right of slavery is supported, as a general question?

2. The utility of its introduction, if this were a matter in the discretion of the Court.

3. How far slavery has at any time been tolerated in England?

4. What is the law of England at this day upon the subject?

5. What is the condition of slavery in the Colonies where it is tolerated and in what manner and how far has it been recognized by Acts of Parliament?

6. What is the law of this Province respecting slavery?

First Point.

Slavery, properly so called, is the establishment of a right which gives to one man such a power over another as renders him absolutely master of his life and fortune. Montesq: Sp.L. B. 15, C. 1.

Another definition of slavery is, "A service for life for bare necessaries." "Harsh and terrible to human nature, as even such a condition is, slavery is very insufficiently described by these circumstances—it includes not the power of the master over the slave's person, property and limbs, life only excepted; it includes not the right over all acquirements of the slave's labor; nor includes the alienation of the unhappy object from his original master to whatever absolute lord, interest, caprice, malice, may choose to transfer him; it includes not the descendible property from father to son, and in like manner continually of the slave and all his descendants." Yet such a state of servitude or slavery as is contended for, by the return to the present writ, involves most, if not all, these cruel and inhuman consequences. Lofft's Rep.: 2.

Montesquieu very forcibly observes that one would never have imagined that slavery should owe its birth to pity, and that this should have been excited three different ways. B. 15. C. 2.

1. The law of nations to prevent prisoners being put to death has allowed them to be made slaves.

2. The civil law of the Romans empowered debtors who were subject to be ill-used by their creditors, to sell themselves.

3. The law of nature requires that children whom a father in a state of servitude, is no longer able to maintain, should be reduced to the same state as the father.

Or, as it is expressed in the Institutes:— 1 Bl. Com. 4, 23.

Servi aut fiunt, aut nascuntur; fiunt jure gentium, aut jure civili: nascuntur ex ancillis nostris.

These reasons Montesquieu, and Judge Blackstone after him, nearly in the same words, observe, are all of them built upon false foundations. It is an untrue position when taken generally, that by the law of nature or nations, a man may kill his enemy, he has only a right to kill him in particular

cases; in cases of absolute necessity for self-defence, and it is plain this absolute necessity did not subsist, since the victor did not actually kill him but made him prisoner. War is itself justifiable only on principles of self-preservation; and, therefore, it gives no other right over prisoners, but merely to disable them from doing harm to us, by confining their persons, much less can it give a right to kill, torture, abuse, plunder or even to enslave an enemy when the war is over. Since, therefore, the right of making slaves by captivity depends on a supposed right of slaughter, that foundation falling, the consequence drawn from it must fall likewise.

From this origin alone, slavery, as known in England, seems to have been derived. The word "slave", Dr. Johnson, in his dictionary, tells us "is said to have its original from the 'Slavi' or 'Sclavonians,' subdued and sold by the Venetians," and Guthrie, in his geographical grammar, observes — "The Sclavonians formerly gave so much work to the Roman Arms that it is thought the word slave took its original from them, on account of the great numbers of them who were carried into bondage so late as the reign of Charlemagne."

Salk. 667. Lofft, 3.

And "Villenage," in England, arose from captivity. Villains were originally captives at the Conquest or troubles before.

Montesq. 6, 15. C. 2. 1 Bl. Com. 424.

2. With regard to the second ground—that slavery may begin "Jure civili," by one man's selling himself to another: "Neither is this true—sale implies a price, now, when a person sells himself his whole substance immediately devolves to his master—the master, therefore, in that case gives nothing, and the slave receives nothing. You will say he has a *peculium*. But this *peculium* goes along with his person. If it is not lawful for a man to kill himself because he robs his country of his person, for the same reason he is not allowed to barter his freedom. The freedom of every citizen constitutes a part of the public liberty. To sell one's freedom in the sense of modern slavery is so repugnant to all reason as can scarcely be supposed in any man. If liberty may be rated with respect to the buyer, it is beyond all price to the seller. The Civil Law which authorizes a division of goods among men, cannot be thought to rank among such goods, a part of the men who were to make this division." And it is laid down in our books: "That men may be the owners, and cannot, therefore, be the subject of property." "The same law," Montesquieu goes on to observe, "annuls all iniquitous contracts; surely then it affords redress in a contract where the grievance is most enormous." "If it is only meant," says Judge Blackstone, "of contracts to serve or work for another, it is very just, but when applied to strict slavery it is impossible. What equivalent can be given for life and liberty, both of which (in absolute slavery) are held to be in the master's disposal. His property also, the very price he seems to receive devolves *ipso facto* to his master, the instant he becomes his slave. Nothing is given or received, of what validity then can a sale be which destroys the very principles upon which all sales are founded?"

Salk. 667.

Montesq.

3. The third way, is birth, which falls with the two former, for if a man could not sell himself, much less could he sell an unborn infant. If a prisoner of war is not to be reduced to slavery much less are his children.

The lawfulness of putting a malefactor to death arises from this circumstance; the law by which he is punished was made for his security. A murderer, for instance, has enjoyed the benefit of the very law which condemns him; it has been a continual protection to him; he cannot, therefore, object

against it. But it is not so with the slave. The law of slavery can never be beneficial to him—it is in all cases against him, without ever being for his advantage; and, therefore, this law is contrary to the fundamental principles of all societies.

"If it be pretended that it has been beneficial to him, as his master has provided for his subsistence; slavery at this rate should be limited to those who are incapable of earning their livelihood. But who will take up with such slaves? As to infants, nature who has supplied their mothers with milk, had provided for their sustenance; and the remainder of their childhood approaches so near the age in which they are most capable of being of service, that he who supports them cannot be said to give them an equivalent which can entitle him to be their master."

"Nor is slavery less opposite to the Civil Law than to that of nature. What Civil Law can restrain a slave from running away, since he is not a member of society, and, consequently, has no interest in any civil institutions?" But if it should be contended that the Negroes upon the Coast of Guinea, from whence slaves are imported into America, are of dispositions so fierce and barbarous that they would put their prisoners to death did they not from their intercourse with the nations of Europe, derive great advantages from sparing the lives of their enemies, and that on this account their wars are rendered less bloody; it cannot at the same time be doubted that they have been rendered more frequent—from the great demand for slaves to supply the European market they have the same motives to seize the person of their neighbors, which may excite the inhabitants of other countries to rob one another of their property. Millar on Ranks p. 258.

"Slavery in Christendom", says Molloy, "is now become obsolete, and in these latter ages the minds of princes and States have, as it were, universally agreed to esteem the words, Slaves, bondman, or villain, barbarous, and not to be used, and that such as are taken in war between Christian princes should not become servants, nor be sold or forced to work, or otherwise subjected to such servile things, but remain till an exchange of prisoners happen or a ransom paid." Molloy de jure Marit. b. 3, C. 1, § 6.

Thus the social origins of slavery not only appear to be built upon false foundations, but to be exploded among the civilized nations of the world at this day.

Montesquieu very justly considers as an equally well-founded origin of slavery with any of the foregoing "the contempt of one nation for another founded on a difference in customs," and tells us that Lopez de Gamar, a Spanish writer, after relating that the Spaniards found, near St. Martha several baskets full of crabs, snails, grasshoppers and locusts, which proved to be the ordinary provision of the natives, owns that this, with their smoking and trimming their beards, in a different manner, gave rise to the law by which the Americans became slaves to the Spaniards. To this account the Baron subjoins the following beautiful remark:— B. 15, C. 3.

"Knowledge humanizes mankind, and reason inclines to mildness, but prejudices eradicate every tender disposition."

The same enlightened author adds another origin of the right of slavery—in his opinion as tenable as those he has refuted. "I would," he proceeds, "as soon say that religion gives its professors a right to enslave those who dissent from it, in order to render its propagation more easy." "This was the notion that encouraged the ravagers of America in their inquity, under the

influence of this idea they founded their right of enslaving so many nations; for these robbers, who would absolutely be both robbers and Christians, were superlatively devout."

"Louis XIII. was extremely uneasy at a law by which all the Negroes of his Colonies were to be made slaves, but it being strongly urged to him as the readiest means for their conversion, he acquiesced without further scruple."

To such miserable pretexts have the advocates of slavery at different times been reduced to justify a measure so subversive of the natural unalienable rights of mankind.

B. 15, C. 5. Montesquieu goes on in an incomparable vein of satire to ridicule the grounds upon which the slavery of Negroes is justified.

"Were I," says he, "to vindicate our right to make slaves of the Negroes, these should be my arguments: "The Europeans having extirpated the Americans, were obliged to make slaves of the Africans for clearing such vast tracts of land." "Sugar would be too dear, if the plants which produce it were cultivated by any other than slaves." What is here ludicrously suggested, seems to have been seriously adopted by the British Legislature as a justifiable ground of slavery in the Colonies, vid. post. 29.6. Preamble to Stat. 23 G. 2, C. 31 (1750). Montesquieu, I believe, wrote after this, if so and he had seen this Stat. he might have intended to satirize it.

"These creatures are all over black, and with such a flat nose that they can scarcely be pitied. It is hardly to be believed that God, Who is a wise being, should place a soul, especially a good soul, in such a black ugly body."

"The negroes prefer a glass necklace to that gold which polite nations so highly value, can there be a greater proof of their wanting common sense?"

"It is impossible for us to suppose these creatures to be men, because, allowing them to be men, a suspicion would follow that we ourselves are not Christians."

"Weak minds exaggerate too much the wrong done to the Africans, for were the case as they state it, would the European powers who make so many needless conventions among themselves, have failed to enter into a general one, in behalf of humanity and compassion?"

These, with other writings, have at length so much exposed the iniquity of this traffic in human flesh that the greatest exertions are making in the civilized world, and particularly in Great Britain, to effect its utter abolition, and I trust that we shall not in this province, whose pride it is to copy the example of the Parent State, introduce into our political system a practice so derogatory to every principle of law and justice.

Millar on Ranks p. 256. It surely will not be pretended that the establishment of slavery among the nations of antiquity—among the Egyptians, the Phoenicians, the Jews, the Babylonians, the Persians, the Greeks, and the Romans, will render the practice more justifiable, as well might we avail ourselves of their example, to introduce and vindicate all the other enormities in their civil and religious institutions.

From the example of the Jews we might as well introduce the severity of their law in the treatment of their slaves, as vindicate the establishment of slavery. By the law of Moses, "If a man struck his servant so that he died under his hand, he was to be punished; but if he survived a day or two, no punishment ensued, because he was his money." Strange, says Montesquieu, "that a civil institution should thus relax the law of nature."

Ex. xxi., 20.

But among the Romans during the commonwealth, and afterwards among the emperors, no free citizen was allowed by contract to become the slave of another, for the law did not support those unequal contracts. And, therefore, a man could not be obliged to fulfill a bargain by which he had surrendered all his rights to a master without any return, but at the will of his master. Though, if a man fraudulently sold, or suffered himself to be sold, in order to share in the price, he then became the slave of the purchaser who was defrauded. Ch. J. Blowers

Millar on Ranks, cites Heineccius syntagma, antiquitatum Romanum?

II. But supposing this were a matter in the discretion of the court, to adopt or reject, which is a point I shall presently speak of, it may not be amiss to inquire into the utility of the establishment of slavery in this Province. "In computing the price of the labour which is performed by those who live in a state of servitude, not only the charge of their maintenance, but also the expense of their first acquisition, together with all the hazard to which their life is exposed, must necessarily be taken into the account. When these circumstances are duly considered, it will be found that the work of a slave who receives nothing but a bare subsistence, is really dearer than that of a free man to whom constant wages are given in proportion to his industry." Millar, p. 205.

"A slave who receives no wages in return for his labour, can never be supposed to exert much vigour or activity in the exercise of any employment. He obtains a livelihood at any rate, and by his utmost assiduity he is able to produce no more, as he works merely in consequence of the terror in which he is held; it may be imagined he will be idle as often as he can with impunity."

"In whatever light we regard the institution of slavery, it appears equally inconvenient and pernicious. No conclusion seems more certain than this, that men will commonly exert more activity when they work for their own benefit than when they are compelled to labour for the benefit merely of another. The introduction of personal liberty has, therefore, an infallible tendency to render the inhabitants of a country more industrious." Ib. 306.

"But slavery is not more hurtful to the industry than to the good morals of a people. To cast a man out from the privileges of society and to mark his condition with infamy, is to deprive him of the most powerful incitements to virtue, and very often to render him worthy of that contempt with which he is treated. What a painful and humbling comparison, what mortifying reflections does this afford to those wretches who are reduced into a state of bondage! Reflections that cannot fail to sour their temper, to inspire them with malevolent dispositions, and to produce an untoward and stubborn behaviour. A more severe discipline is thus rendered necessary in order to conquer their obstinacy, and oblige them to labour in their employments—it becomes requisite that they should be strictly watched and kept in the utmost subjection, in order to prevent those desperate attempts to which they are frequently instigated in revenge of their sufferings."

"What effects, on the other hand, may we expect that this debasement of the servants will produce on the temper and disposition of the master? In how many different ways is it possible to abuse that absolute power with which he is invested, and what vicious habits may be contracted by a train of such abuses, unrestrained by the laws, and palliated by the influence of example."

Lofft. 2.

These effects are thus summed up by Mr. Hargrave in his argument in the case of Somerset: "Corruption of manners in the master, from the entire subjection of the slaves he possesses to his sole will; from whence spring forth luxury, pride, cruelty, with the infinite enormities appertaining to their train. The danger to the master from the revenge of his much-injured and unredressed dependent; debasement of the mind of the slave for want of means and motives of improvement; and peril to the Constitution, under which the slave cannot but suffer, and which he will naturally endeavour to subvert, as the only means of retrieving comfort and security to himself." "The humanity of modern times," he adds, "has much mitigated this extreme rigour of slavery — shall an attempt to introduce perpetual servitude to this island," and I will, in my turn, on this occasion, say to this province, "hope for countenance? Will not all these other mischiefs of mere servitude revive, if once the idea of absolute property under the immediate sanction of the laws, extend itself to those who may be claimed as slaves in this Province, which, I must contend in this instance, partakes of the nature of the soil of England, whose air is deemed too pure for slaves to breathe in."

Montesq., B. 15. C. 8.
Millar, 310.

Were it necessary on this occasion, it might be easily shewn that there never was any such necessity as is pretended for the introduction of slavery into any part of America, or the West Indies. Be that however as it may, none of the reasons which have operated to establish it there, exist at all in this country, and, therefore, its introduction here should be resisted upon the same grounds that it has been so successfully opposed in the Parent State.

Millar, 266.

The practice of slavery being once introduced, it will, with us, as in other countries, be afterwards "regarded with that blind prepossession which is commonly acquired in favour of established usages, the inconveniences of it will be overlooked, and every innovation be considered as a dangerous measure. We find, accordingly, that this institution, however inconsistent with the right of humanity, however pernicious and contrary to the true interest of the master, has generally remained in those countries where it was once established, and has been handed down from one generation to another, during all the successive improvements of society, in knowledge, arts and manufactures."

Page 312.

"It affords a curious spectacle," says Mr. Millar, "to observe that the inhabitants of the British plantations in America who talk in so high a strain of political liberty, and who consider the privileges of imposing their own taxes as one of the unalienable rights of mankind, should make no scruple of reducing a great proportion of the inhabitants into circumstances by which they are not only deprived of property, but almost of every right whatsoever. Fortune, perhaps, never produced a situation more calculated to ridicule a grave and even a liberal hypothesis, or to know how little the conduct of men is at the bottom directed by any philosophical principles."

I come now under the third point of my argument, to inquire:

III. How far slavery has at any time been tolerated in England.

And here it is to be observed that strict, absolute slavery in the sense of the laws of Old Rome, or modern Barbary, or as it was established among the ancient German nations who invaded the Roman Provinces, never did exist in England.

Millar, p. 274.

"When these latter nations invaded the Roman Empire and settled in the different provinces, they were enabled by their repeated victories to procure

an immense number of captives, whom they reduced into servitude, and by whose assistance they occupied landed estates of proportionable extent. From the manners which prevail universally among rude people, their domestic business was usually performed by the members of each family, and their slaves, under the absolute dominion of the master, were occupied in the various branches of husbandry which he had occasion to exercise. As the numerous servants belonging to a single person could not conveniently be maintained in his house, so the nature of their employment required that they should be sent to a distance and have a fixed residence upon those parts of the estate which they were obliged to cultivate. Separate habitations were, therefore, assigned them, and particular farms were committed to the care of different individuals, who frequently residing in the neighbourhood of one another, and forming small villages or hamlets, received the appellation of Villani, Villains, or Villagers."

And Bracton tells us: *Fiunt etiam servi liberi homines captivitate de jure gentium.* We read in Blackstone that "There were, under the Saxon Government, a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the Folkland, from which they were removable at the Lord's pleasure. On the arrival of the Romans here it seems not improbable, that they who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition. This they called Villenage, and the tenants Villeins, either from the word villis, or else, as Sir Edward Coke tells us, a villa, because they lived chiefly in villages. B. 1, C. 6. 2 Bl. Com., 92.

These Villeins, belonging principally to lords of manors, were either villeins regardant, that is, annexed to the manor or land; or else they were in gross or at large, that is annexed to the person of the lord, and transferrable by deed from one owner to another."

"These villeins were originally captives at the conquest, or troubles before." And it is laid down by the court, in the case of Smith v. Gould, that "Villenage arose from captivity." Lofft, 3. Mr. Hargrave's original. Salk, 667.

But Villenage could commence nowhere but in England; it was necessary to have prescription for it. And the lord had not such an absolute property over his slave but that in some cases that very slave might have an action against his lord, as an appeal for the death of his father, so when the lord was indebted to the testator of his villein, he might bring an action against him as executor. The lord had no power over his life, nor could he send a villein ir gross out of the kingdom, so careful was the law of the liberties of men under its protection. Lofft, 3. 5 Mod., 189. Chamberlyne v. Harvey 2 Bl. Com. 94. 5 Mod., 190.

Thus, altho the law of England at that time did not wholly disregard the right of slavery, as recognized by the law of nations in cases of captives made in war, yet it admitted it with many qualifications, in the first instance, and Judge Blackstone tells us: "That if the lord became bound to his villein—if he granted him an annuity or gave him an estate, either in fee for life or years, or brought an action against him, or in any instance dealt with his villein on the footing of a free man—he was at once enfranchised— 2 Bl. Com., 93.

the law being always ready to catch at anything in favor of liberty." "Also if a villein enter into religion the lord may not seize his body nor put him to no manner of labour, but must suffer him to abide in his religion as other religious persons do that be not bond men." That by these and many other means, villeins, in process of time, gained considerable ground on their lords, and in particular strengthened the tenure of their estates in that degree that they came to have in them an interest, in many places full as good; in others better, than their lords; at length began to be called tenants by copy of Court Roll, and their tenure itself a copyhold which subsists at this day in the manors in every part of the Kingdom. These encroachments grew to be so universal that when tenure in villenage was virtually abolished (though copyholds were reserved) by the Stat. of Ch. 2, there was hardly a pure villein left in the nation. For Sir Thomas Smith testifies that in all his time (and he was Secretary to Edward 6) he never knew any villein in gross throughout the realm." Lord Mansfield mentions an assertion, but does not recollect the author, that only two villeins regardant were in England in the time of Charles II., at the time of abolition of tenures.

Dr. & Stud.: D. 2, C. 43.

2 Bl. Com., 95.

Lofft, 8.

This villenage is the only species of slavery that was ever tolerated in England, in consequence of the *jus gentium* recognized as law by Bracton, but this differed, as we have seen, very essentially, from the domestic slavery of modern times.

But in whatever degree villenage may have resembled the kind of slavery now contended for, it has not only expired in England, but expired never to revive, as that very law of nations upon which it was founded is become obsolete, and the principles upon which that law rested are declared by Judge Blackstone, as well as all other modern writers, to be built upon false foundations.

Co. Lit. 117, 6. Hargrave's Notes.

Fit etiam servus liber homo per confessionem in curio regis fact: "From our law (says Mr. Hargrave), thus permitting a person to be a villein by acknowledgment in a court of record, some have argued that it is a legal mode of creating personal bondage, with a view to prove that there is not anything so repugnant in our law to domestic slavery as is generally imagined, and thence to lay a foundation for more easily inferring the lawfulness of importing slavery from our Colonies. But in another place we have had occasion to object to this way of considering the acknowledgment, and to explain why it should be deemed merely a confession of that immemorial antiquity in the villein's slavery, which was otherwise necesary to be proved." See the editor's argument in the case of Somerset, a Negro, 60 to 65, and Hob. 99, agreably hereto.

Fitz. Nat. Brev 77 C.D.

So carefully in old times did the law regard the liberty of the subject that if the lord sued out his writ *de nativo habendo*, and shewed the sheriff his slave, he could not touch him if he only claimed his freedom, but in that case the lord was obliged to count or declare against him, and state his title and prove it before he could take him.

I come naturally now to the fourth point of the argument:

IV. What is the law of England at this day upon the subject of slavery?

Dial. 1, c. 2.

In St. Germin's treatise, intitled "Doctor and Student," a book of great learning and approved authority, written expressly to inquire into the grounds and reasons of the common law of England, it is laid down that the law of reason or nature is the first ground of the law of England; and the law of

nature, says this treatise, "specially considered, which is also called the law of reason, pertaineth only to creatures reasonable, because it is written in the heart, therefore, it may not be put away, nor it is never changeable by no diversity of time nor place. And, therefore, against this law, prescription, statute nor custom, may not prevail, and if any be brought in against it, they be not prescriptions, statutes nor customs, but things void and against justice."

"Every man's law must be consonant to the law of God, and therefore the laws of princes, the commandments of prelates, the statutes of commonalties, nor yet the ordinance of the Church is not righteous nor obligatory, but it be consonant to the law of God." Dial: 1, c. 4.

"By the law of nature or reason primary, be prohibited in the laws of England, murder (that is, the death of him that is innocent), perjury, deceit, breaking of the peace and many other like. And by the same law also it is lawful for a man to defend himself against an unjust power, so he keep due circumstance, and also if any promise be made by man as to the body, it is by the law of reason, void in the law of England." Ib. c. 5.

"If any general custom were directly against the law of God, or if any statute were made directly against it; as if it were ordained that no alms should be given for no necessity, the custom and statute were void." "The third ground of the law of England, standeth upon divers general customs of old times, used through all the realm, which have been accepted and approved by our Sovereign Lord the King and his progenitors, and all his subjects. And because the said customs be neither against the law of God nor the law of reason, and have been always taken to be good and necessary for the commonwealth of the realm, therefore they have obtained the strength of a law insomuch that he that doth against them doth against justice; and these be the customs that properly be called the Common Law." Ib., c. 6. Ib., c. 7.

By the old custom of the realm, no man shall be taken, imprisoned, disseized, nor otherwise destroyed, but he be put to answer by the law of the land. And this custom is confirmed by the statute of Magna Charta, C. 26.

Lord Chief Justice Hobart has also advanced that even an Act of Parliament made against natural justice, as to make a man judge in his own cause, is void in itself, for *Jura naturæ sunt immutabilia*, and they are *legus legum*. Hob., 87.

And Judge Blackstone tells us "this law of nature being co-eval with mankind, and dictated by God Himself, is, of course, superior in obligation to any other, it is binding over all the globe, in all countries, and at all times, no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority from this original." 1 Bl. Com., 40.

And again: "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human law should be suffered to contradict these. In the case of murder, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we must offend both the natural and the divine." Ib., p. 42.

"Those rights which God and Nature have established, and are, therefore, called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in any man than they are, neither do they receive any additional strength when declared by the municipal law to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forefuture." "On the whole, the declaratory part of the municipal law Ib., p. 54.

has no force or operation at all, with regard to actions that are intrinsically right or wrong."

1 Bl. Com., 124

"The principal aim of society, and the first and primary end of human laws, is to maintain and regulate the absolute rights of individuals, which were vested in them by the immutable laws of nature, and to protect them in the enjoyment of those rights."

Ib., 125.

"The absolute rights of man, considered as a free agent, are usually summed up in one general appellation and denominated the natural liberty of mankind; which consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature."

"Political or civil liberty is no other than natural liberty, so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public."

Professor Christian, in his edition of the Commentaries, in a very learned note upon this part of the text, very properly and forcibly remarks that "in the definition of civil liberty it ought to be understood, or, rather, expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit."

"This spirit of liberty," Judge Blackstone goes on to say, "is so deeply implanted in our Constitution, and rooted, even in our very soil, that a slave or a Negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a free man."

It is indeed added in this place: "Though the master's right to his service may possibly still continue." But Professor Christian denies this, in his notes he says: "I don ot see how the master's right to the service can possibly continue; it can only arise from contract which the Negro, in a state of slavery, is incapable of entering into with his master. It is not to the soil or to the air of England that Negroes are indebted for their liberty, but to the efficacy of the writ of Habeas Corpus, which can only be executed by the sheriff of an English county."

P. 424.

Judge Blackstone, in a subsequent part of the same volume, says:—

"And now it is laid down that a slave or Negro, the instant he lands in England, becomes a free man, that is, the law will protect him in the enjoyment of his person and his property. Yet, with regard to any right which the master may have lawfully acquired to the perpetual service of John or Thomas, they will remain exactly in the same state as before, for this is no more than the same state of subjection for life which every apprentice submits to for the space of seven years, or, sometimes, for a longer time." Upon this Mr. Christian observes: "The meaning of this sentence is not very intelligible. If a right to perpetual service can be acquired lawfully at all, it must be acquired by a contract with one who is free, who is *sui juris* and competent to contract. Such a hiring may not, perhaps, be illegal and void. If a man can contract to serve for one year, there seems to be no reason to prevent his contracting to serve for one hundred years, if he should so long live, tho' in general, the courts would be inclined to consider it as an improvident engagement, and would not be very strict in enforcing it. But there could be no doubt but such a contract with a person in a state of slavery would be absolutely null and void."

N. B.—The law of Scotland annuls the contract to serve for life. Lofft, p. 5.

The sentence of Judge Blackstone appears to me to be very intelligible. He says that the right which the master may lawfully acquire to the perpetual service, of John or Thomas is the same state of subjection for life which every

apprentice submits to for seven years. Now apprentices are no otherwise bound than by contract, they cannot be said to submit in any other way, it must therefore be here intended by Judge Blackstone that the right to perpetual service must be acquired by contract, as the only lawful way of acquiring it; this reconciles the expression he had before made use of. "Tho' the master's right to his service may possibly still continue," meaning that it is scarcely possible to suppose that a man would voluntarily contract to serve another for life; and, perhaps, to express the same doubt that Professor Christian entertains, whether such a contract would not be set aside as an improvident engagement, tho not ipso facto, illegal and void. And that this is Judge Blackstone's meaning is evident from what follows in the same paragraph: "The slave is entitled to the same protection in England, before as after baptism, and whatever service the heathen Negro owed of right to his American master by general, not by local, law, the same, whatever it be, is he bound to render when brought to England and made a Christian."

A case is to be found in the history of the decisions where a term of years was discharged as exceeding the usual limits of human life. Ib.

Here Judge Blackstone evidently disclaims all authority or right derived to the master from local law; that is, the laws of the place from whence he was brought, or where he was made a slave, and confines the right of the master to such service as he is entitled to by the principles of general law, by virtue of which the right can be founded upon or supported by contract only. There is peculiar caution in Judge Blackstone's expressions upon this subject, perhaps because at the time he wrote, there had been no solemn decision of the law upon it, and he feared to excite such an alarm as might have been occasioned by declaring in unqualified terms that Negroes were free upon their coming into England; for, in Somerset's case, which happened a few years afterwards (in the year 1772), Lord Mansfield seemed at first to entertain some doubt, and expressed great reluctance at coming to a decision upon the point. He said, in the course of the cause: "The distinction was difficult as to slavery, which could not be resumed after emancipation, and yet the condition of slavery in its full extent could not be tolerated here. Much consideration was necessary to define how far the point should be carried. The court must consider the great detriment to proprietors, there being so great a number in the ports of this Kingdom, that many thousands of pounds would be lost to the owners by setting them free." Mr. Dunning, in his argument in that cause, states that about 14,000 slaves, from the most exact intelligence he was able to procure, were then in England. Lofft, p. 8.

Lord Mansfield, in giving the judgment of the court, says: "In five or six cases of this nature, I have known it to be accommodated by agreement between the parties; on its coming before me I strongly recommended it here. But if the parties will have it decided, we must give our opinion. Compassion will not, on the one hand, nor inconvenience on the other, be to decide, but the law. The setting 14,000 or 15,000 men at once free by a solemn opinion is much disagreable in the effects it threatens. If the parties will have judgment, *fiat justitia, ruat cœlum*. Let justice be done, whatever be the consequence." He then goes on to say: "I think it right the matter should stand over; and if we are called on for a decision, proper notice shall be given."

Can it be wondered then, that Judge Blackstone should speak in the very cautious manner he does on this subject, when he uses the expression above cited: "Tho' the master's right to his service may possibly still continue?" But when we look to the case cited by Judge Blackstone in

support of this doctrine, Salk. 666, we find that the expression was, in fact, made use of in this place merely because there had been no solemn decision of the question. In that case, which was an action of Trover for a Negro, which it was adjudged would not lie. The Council for the Plt. insisted: "If I imprison my Negro, a Habeas Corpus will not lie to deliver him for by 'Magna Charta,' he must be *liber homo*, 2 Inst.: 45. *Sed curia contra*, men may be the owners, and, therefore, cannot be the subject, of property. Villeinage arose from captivity, and a man may have trespass *quare captivum suum cepit*, but cannot have Trover *de gallico suo*. And the court seemed to think that in trespass *quare captivum suum cepit*, the plaintiff might give in evidence that the party was his Negro and he bought him." All, therefore, that Judge Blackstone could mean by this expression was that possibly when the question should be settled by a solemn decision at law, it might be decided that the master's right to the service of the Negro should continue after his being brought to England.

This, however, did not happen, for when the question was solemnly decided in the case of Somerset, as we shall presently see, it was determined that this right of the master did not continue.

But Judge Blackstone, in considering the question, upon principles at large, in the subsequent part of his book, which has been so fully remarked upon, most clearly gives it as his opinion in conformity to the doctrine he had advanced upon the subject of laws in general, and agreably to the fundamental principles of the common law of England, that the freedom of the Negro upon his being brought into England, was one of those rights which God and Nature had established, which needed not the aid of human laws to be more effectually invested in him, and which could not be abridged or destroyed by any human legislation unless he should himself commit some act that amounted to a forfeiture; or, being *sui juris*, and competent to contract, had voluntarily engaged to serve or work for the master claiming his service, in the manner that apprentices are bound.

And here I presume I might safely rest the cause before this court, in full confidence that they would declare, in the judgment they may give, that it is beyond the power of human laws to establish that condition of slavery which is contended for on the present occasion.

But I shall not stop here. It shall now be my business to inquire how the law has been solemnly settled upon the subject in England. The first case that is to be found in the books upon this point, is in Trinity Term, 9 Car. 2 (1657)—Butts vs. Penny, when it was held that Trover would lie for a Negro, but no judgment was entered in that case. It is said there was another case of the same kind in that reign, but in a subsequent case, Easter, 5, Ann (1706.) The court denied the opinion in the case of Butts and Penny to be law.

2 Lev., 201.
3 Keb.) 785.

5 Mod., 187.
Lofft, 4.
2 Ld Raym. 1274

The next case is Smith vs. Brown & Cooper, in which Lord Holt, Ch. Justice, says: "As soon as a Negro comes into England, he becomes free; and one may be a villein in England, but not a slave. Powel, J. In a villein the owner has a property, but an inheritance. The law takes no notice of a Negro."

Holt, 495.
Salk, 666.

5 Mod., 186.
1 Ld. Raym. 146

The next case is Chamberline vs. Harvey, Easter, 8 W. 3 (1697), which was — trespass for taking a Negro slave of the value of £100. Upon not guilty pleaded, the jury found a special verdict at the Guildhall, in London.

That the father of the plaintiff was possessed of this Negro, and of such a manor in Barbadoes, and that there is a law in that country making the

Negroes part of the real estate—that the father died seized, whereby the manor descended to the plaintiff, as son and heir—that he endowed his mother of this Negro and one-third of the manor—that the mother married Watkins, who brought the Negro to England, where he was baptized, without the knowledge of the mother; that Watkins and his wife are dead, and that the Negro continued several years in England, and at the time when the trespass was supposed to be committed, was in the service of the defendant, and had for his wages £6 per annum. But whether, upon the whole matter, the defendant be guilty of the trespass they refer to the court.

Three questions were made upon this verdict: 1. Whether upon this finding there was any legal property vested in the plaintiff.

2. If any such property be vested in him, then whether the bringing this Negro into England be not a manumission, and the property thereby divested.

3. Whether an action of trespass will lie for taking a man, of the price of £100?

In support of the first point, the doctrine of villenage was insisted upon—also the Act of Assembly of the Island of Barbadoes, which makes these slaves part of the real estate, and that this Negro was born of Negro parents there: That this ordinance being made in Barbadoes, a place subject to the Crown of England, has the same force there as an Act of Parliament here. And the case of Butts and Penny, which had not then been over-ruled, was acted upon.

On the second, it was insisted that nothing was found that amounted to a manumission. It was argued upon the ground of villenage that a villein could in no case be enfranchised, but when the lord is an actor—that nothing of the lord's consent was found in this verdict, but the contrary; that the bringing him into England by Watkins will not make him free, because he was a trespasser in so doing, for he ought not to have removed him from the plantation to which he was regardant. If, therefore, taking him from the plantation was tortious, then the finding that he continued in his service, and that he afterwards turned him away, will not amount to a manumission.

It was argued on the other side—"That it is against the law of Nature for one man to be a slave to another. It is true that a man may lose his liberty by a particular law of his country, or by being taken in war, for then he owes his life to those who preserve him, or when a man voluntarily sells himself for sustenance or alimony, but no such thing is found in this verdict, and nothing shall be presumed but what is in favour of liberty. It is by the constitution of nations, and not by the law of nature, that the freedom of mankind has been turned into slavery. But our laws are called *Libertates Anglice* because they made men free.

"If slavery in Barbadoes and Villenage here were the same sort of servitude, the plaintiff may be seized of this Negro, as a villein in gross, or as regardant to the plantation, for there were but two sorts of villeins here, either in gross or regardant, to particular manors. Now this cannot be a villein regardant to the plantation, for then the plaintiff and his ancestors must be seized of this Negro, and his ancestors, time out of the memory of man, which could not be, because Barbadoes was acquired to the English within time of memory, and he cannot be a villein in gross because it is found he was born of parents belonging to the plantation. But if the plaintiff have any property in this Negro, he must either have an

absolute or qualified property in him at the time of the trespass supposed to be committed. He could not have an absolute or general property, because by 'Magna Charta' and the laws of England no man can have such a property over another. And if he had only a qualified property, then an action of trespass will not lie, but an action *per quod servitium amisit*."

"But if the plaintiff had any right to the servitude of this Negro, that right is now divested by his coming into England; for the ordinance made in Barbadoes shall not make him so regardant to the plantation there, as to go to the heir, because that is only *lex loci*, and adapted to that particular place (as the law of Stannaries in Cornwall) and extends only to that country, so long as he is occupied in service on that plantation; and if he be brought into another country, where that law has no effect, that amounts to a manumission, so that the bringing him into England discharges him of all servitude or bondage." "If the lord have still an absolute property over him, then he might send him into any other country, but the law is so careful of the liberties of men under its protection that the King himself, who has so great a right to the duty and service of his subjects, cannot send anyone out of England against his will to serve in any other place, even in his own dominions, for this My Lord Coke says would be *perdere patriam*, and therefore, the lord could not send a villein in gross out of the Kingdom, because the King had a right to him. Thus it is also in the case of apprentices, who, though they voluntarily submit to serve their masters for a certain number of years, yet they cannot be sent out of the Kingdom, though it be to their master's house, and in his service, unless it be the agreement, or the nature of the apprenticeship is such." Agreably to this doctrine,

1 Bl. Com. 137. Blackstone tells us that "no power on earth, except the authority of Parliament, can send any subject out of the land against his will; no, not even a criminal." In this case the court avoided giving any opinion upon the two first points made in the cause, but determined it upon the third point, that the bill should abate; for the court were of opinion that no action of trespass would lie for taking a man generally, but that there might be a special action of trespass for taking his servant *per quod servitium amisit*, and per Holt Chief Justice, Trover will not lie for a Negro—Contra to 3, Keble, 785, 2 Lev., 201, Butts vs. Penny.

N.B.—The court do not say there might have been an action *per quod*, etc., in the case before them, but that there might be such an action when the facts would support it.

In this case, as reported in Lord Raymond, is the following note: Hill, 5 W. & M. C. B., between Selly and Cleve, adjudged that Trover will lie for a Negro boy, for they are heathens, and, therefore, a man may have property in them, and that the court, without averment made, will take notice that they are heathens." *Ex relatione M. place.*

This note has occasioned a very severe reprehension of the practice it gave rise to by Judge Blackstone, in the following words: "The infamous

1 Bl. Com. 425. and unchristian practice of withholding baptism from Negro servants lest they should thereby gain their liberty, is totally without foundation, as well as without excuse." Upon which Professor Christian observes: "We might have been surprised that the learned commentator should condescend to treat this ridiculous notion and practice with so much seriousness, if we were not apprized that the Court of Common Pleas, so late as the 5 W. & M. held that a man might have a property in a Negro boy, and might bring an action of trover for him, because Negroes are heathens. A strange principle to found a right of property upon!"

2 Ld Raym. 1274 The next case upon this point is in Easter Term, 5 Anne (1706), Smith vs. Gould.

In an action of trover for a Negro, and several goods, the defendant let judgment go by default, and the writ of inquiry of damages was executed before the Lord Ch. Justice Holt, at Guildhall in London. Upon which the jury gave several damages as to the goods, and the Negro, and a motion as to the Negro was made in arrest of judgment that trover could not lie for it, because one could not have such a property in another, as to maintain this action.

Mr. Salkeld, for the plaintiff, argued that a Negro was a chattel by the law of the plantations, and, therefore, trover would lie for him. That by the Levitical law, the master had power to kill his slave, and in Exodus 20, v. 21, it is said he is but the master's money, that if a lord confines his villein the court cannot set him at liberty—and he relied on the case of Butts vs. Penny. *Sed non allocatur*, for *per totum curiam*—this action does not lie for a Negro no more than for any other man, for the common law takes no notice of Negroes being different from other men. By the common law no man can have a property in another, but in special cases, as in a villein, etc. There is no such thing as a slave by the law of England, and if a man's servant is taken from him, the master cannot maintain an action for taking him, unless it is laid *per quod servitium amisit*. And the court denied the opinion in the case of Butts vs. Penny.

It may, indeed, be safely contended that the very bringing an action of trespass *per quod servitium amisit* is incompatible with the condition of slavery insisted upon in the present case—for Judge Blackstone tells us, "that the reason and foundation upon which all this doctrine is built, seems to be the property that every man has in the service of his domestics, acquired by the contract of hiring, and purchased by giving them wages." And to support such an action the plaintiff, I apprehend, must declare upon and prove the contract, whether parol or written, by which he is entitled to the service of the servant in question, and damages for the loss of such service. Unless in the instance of master and servant commencing without contract, and that of apprentices, against the will of the parties, both which are provided by special statutes of municipal law. In the case, then, of a Negro the plaintiff in such an action must fail, for default of proving a legal retainer of him in his service. 1 Bl. Com. 429.

The next case is one mentioned in the case of Somerset, Stanley and Hervey, which must have been between 1761 and 1765, while Lord Northington was Chancellor. On a bequest to a slave, by a person whom he had served some years by his former master's permission, the master claims the bequest; Lord Northington decides for the slave and gives him costs. Lofft, 4.

We now come to the celebrated case of Somerset, decided in the Court of King's Bench in the year 1772, in which, says Professor Christian, "it was decided that a heathen Negro, when brought to England, owes no service to an American, or any other master." "The case was this: James Somerset had been made a slave in Africa, and was sold there; from thence he was carried to Virginia, where he was bought, and brought by his master to England; here he ran away from his master, who seized him and carried him on board a ship, where he was confined, in order to be sent to Jamaica to be sold as a slave. While he was thus confined, Lord Mansfield granted a Habeas Corpus, ordering the captain of the ship to bring up the body of James Somersett, with the cause of his detainer. The above-mentioned circumstances being stated upon the return to the writ, after much learned

discussion in the Court of King's Bench, the Court were unanimously of opinion that the return was insufficient, and that Somersett ought to be discharged."

Much may be learned of the grounds and principles of this decision from the arguments made use of the counsel in the cause. It is but indifferently reported by Lofft, and I have not been able to obtain Mr. Hargrave's learned argument for the Negro, printed in 11 State Trials, 340. From the report, however, many important observations may be collected. "Domestic slavery," says Mr. Hargrave, "took its origin very early among the barbarous nations, continued in the state of the Jews, Greeks, Romans and Germans, was propagated by the last over the numerous and extensive countries they subdued. Incompatible with the mild and humane precepts of Christianity, it began to be abolished in Spain, as the inhabitants grew enlightened and civilized in the eighth century, its decay extended over Europe in the fourteenth, was pretty well perfected in the beginning of the sixteenth century. Soon after that period, the discovery of America revived those tyrannic doctrines of servitude with their wretched consequences. There is now at last an attempt to introduce it into England. Long and uninterrupted usage from the common law stands to oppose its revival. All kinds of domestic slavery were prohibited, except Villenage. A new species has never arisen till now; for had it, remedies and powers there would have been at law. Therefore, the most violent presumption against it is the silence of the laws, were there nothing more. 'Tis very doubtful whether the laws of England will permit a man to bind himself by contract to serve for life; certainly will not suffer him to invest another man with despotism, nor prevent his own right to dispose of property, if disallowed, when by consent of parties, much more when by force; if made void when commenced here, much more when imported."

Mr. Alleyne.

"What power can there be in any man to dispose of all the rights vested by nature and society in him and his descendants? He cannot consent to part with them without ceasing to be a man, for they immediately flow from him and are essential to his condition as such. They cannot be taken from him, for they are not his, as a citizen or a member of society merely; and are not to be resigned to a power inferior to that which gave them."

"Slavery is not a natural, 'tis a municipal relation, an institution, therefore confined to certain places and necessarily dropt by a passage into a country where such municipal regulations do not subsist. The Negro making choice of his habitation here has subjected himself to the penalties, and is therefore intitled to the protection of our laws."

"The Court approved of Mr. Alleyne's opinion of the distinction how far municipal laws were to be regarded, instanced the right of marriage; which, properly solemnized, was in all places the same, but the regulations of power over children from it and other circumstances, very various; and advised, if the merchants thought it so necessary, to apply to Parliament, who could make laws."

Lord Mansfield.—"Contract for the sale of a slave is good here. The sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of enquiry, which makes a very material difference. The now question is, whether any dominion, authority, or coercion can be exercised in this country on a slave according to the

American laws? The difficulty of adopting the relation, without adopting it in all its consequences is indeed extreme; and yet many of those consequences are absolutely contrary to the municipal law of England. We have no authority to regulate conditions in which law shall operate." "On the other hand," (by which must be intended, we have authority), "should we think the coercive power cannot be exercised." "Mr. Stewart advances no claim on contract. He rests his whole demand on the right to the Negro as a slave, and mentions the purpose of detainure to be the sending of him over to be sold in Jamaica. If the parties will have judgment *fiat justitia ruat coelum*." "An application to Parliament, if the merchants think the question of great commercial concern, is the best, and, perhaps, the only method of settling the point for the future." "The only question before us is, whether the cause on the return is sufficient? If it is, the Negro must be remanded; if it is not, he must be discharged. Accordingly, the return states that the slave departed and refused to serve; whereupon he was kept to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over a slave has been extremely different in different countries. The state of slavery is of such a nature that it is incapable of being introduced upon any reasons moral or political; but only positive law which preserves its force long after the reasons, occasion and time itself from whence it was created, are erased from memory. It's so odious that nothing can be suffered to support it but positive law. Whatever inconvenience, therefore, may follow from a decision I cannot say this case is allowed or approved by the Law of England, and, therefore, the black must be discharged."

From this decision may be collected:—

1st. That the Court had no power to modify the condition of the slave—that is, to recognize him and his master under the known relation of master and servant, by the municipal law of England, but they were bound to remand him as a slave according to the American Laws, or discharge him.

"We have no authority to regulate the conditions in which law shall operate."

2ly. That such a state of slavery is so odious, that it can only be supported by the positive law of the place where the right is exercised.

3ly. That if any inconveniences resulted from this decision, "an application to Parliament was the only method of settling the point for the future."

No application, however, has been made to Parliament, in consequence of this decision, and England still remains the happy country in whose very soil the spirit of liberty is so deeply rooted that a slave or Negro, the moment he lands upon it, falls under the protection of the laws and becomes a free man.

In consequence of this decision, says the learned Professor Christian, "if a ship loaden with slaves was obliged to put into an English harbour, all the slaves on board might and ought to be set at liberty. Though there are some acts of Parliament which recognize and regulate the slavery of Negroes, yet it exists not in the contemplation of the common law; and the reason why they are not declared free before they reach an English harbour, is only because their complaints cannot be sooner heard and redressed by the process of an English Court of Justice."

"Liberty by the English law depends not upon the complection; and what was said, even in the time of Queen Elizabeth, is now substantially true, that the air of England is too pure for a slave to breathe in." 2 Rushw. 468.

Ch. Just. Blowers. And in a later decision in Scotland, in 1778, Knight vs. Wedderburne, it was declared that the dominion assumed over the Negro under the law of Jamaica, being unjust, could not be supported in Scotland to any extent; that, therefore, the master had no right to the Negro's service for any space of time, nor to send him out of the country against his consent. Millar on Ranks.

N.B.—This must be a later edition than mine, which was published in 1773.

V. The fifth point of the argument is—What is the condition of slavery in the Colonies where it is tolerated, and in what manner and how far has it been recognized by Acts of Parliament? "After domestic liberty," says Prof. Millar, "had been, in a great measure established in those European nations which had made the greatest improvements in agriculture, America was discovered; the first settlers of which, from their distance, and from the little attention that was paid to them by the Government of their Mother Countries, were under no necessity of conforming to the laws and customs of Europe. The acquisition of gold and silver was the great object by which the Spaniards were directed in the settlements which they made upon that continent; and the native inhabitants, whom they had conquered, were reduced into slavery and put to work in the mines. But being either exhausted by the severity with which they were treated, or not being thought sufficiently robust for that kind of labour, Negro slaves were afterwards purchased for this purpose from the Portuguese settlements on the Coast of Africa. When sugar plantations were erected, the same people were employed in these, and in most other kinds of work which came to be performed in that part of the world. Thus, the practice of slavery was no sooner extinguished by the inhabitants in one quarter of the globe, than it was revived by the very same people in another, where it has remained ever since, without being much regarded by the public, or exciting any effectual regulations in order to suppress it."

Millar on Ranks

P. 306. "Considering the many advantages which a country derives from the freedom of the labouring people, it is matter of regret that any species of slavery should still remain in the dominions of Great Britain, in which liberty is generally so well understood and so highly valued."

"The first importation of Negro slaves into Hispaniola was in the year 1508." Anderson's History of Commerce, vol. 1, p. 336.

Guthrie's Geo. Grammar W. Indies. "The Negroes in the plantations are subsisted at a very easy rate. This is generally by allotting to each family of them a small portion of land, and allowing them two days in the week, Saturday and Sunday, to cultivate it. Some are subsisted in this manner, but others find their Negroes a certain portion of guinia and Indian corn, and to some a salt herring or a small portion of bacon or salt pork, a day. All the rest of the charge consists in a cap, a shirt, a pair of breeches and a blanket; and the profit of their labor yields £10 or £12 annually."

Ib. "The English landed in Barbadoes about the year 1625. In 1650 it contained more than 50,000 whites, and a much greater number of Negroes and Indian slaves, the latter they acquired by means not at all to their honour, for they seized upon all those unhappy men without any pretense, in the neighbouring islands, and carried them into slavery, a practice which has rendered the Caribbee Indian irreconcilable to us ever since."

An account of European set- "The Negroes in our colonies endure a slavery more compleat, and attended with far worse circumstances than what any people in their condition

suffer in any other part of the world, or have suffered in any other period of time. Proofs of this are not wanting."

tl ements in America. Vol. 2, p. 124

In the year 1668 an Act of Assembly was passed in the Island of Barbadoes, declaring the Negro slaves of that island to be real estates, by which it was enacted that "all Negro slaves in all Courts of Judicature, and other places within that island, should be held, taken and adjudged to be estates real, and not chattels, within that island, and should descend unto the heir or widow of any person dying, according to the manor and custom of lands of inheritance held in fee simple."

5 Mod., 182.

"Slaves pass by descent and dower as lands do, slaves as well as lands were entailable during the monarchy, but by an Act of the first Republican Assembly, all dower, entail, present and future, were vested with the absolute dominion of the entailed subject."

Morse Amer. Geo. Virginia.

"In October, 1786, an act was passed by the Assembly, prohibiting the importation of slaves into the Commonwealth, upon penalty of the forfeiture of £1,000 for each slave, and the slave became free."

By a law of the Province of New York, passed in 1706, it was enacted that the baptizing a Negro, Indian, or Mulatto slave, should not make them free, and that all and every Negro, Indian, Mulatto and mestic, bastard child and children, who is, are and shall be born of any Negro, Indian, Mulatto or Mestic, shall follow the state and condition of the mother, and be esteemed and adjudged a slave and slaves to all intents and purposes whatsoever. And that no slave should be admitted a witness for or against any free man in any cause whatever, civil or criminal. By another Act, passed in 1730, any master or mistress might punish his, her or their slave or slaves for their crimes and offences, at discretion, not extending to life or limb.

Every town to appoint a common whipper for slaves, who was not to be allowed above 3s a head for whipping.

This Act afterwards declaring that slaves are the property of Christians or Jews, and that they cannot, without great loss to their owners, be subjected in all cases criminal to the strict rules of the laws of England, enacts that if a slave shall, by theft or other trespass, damnify any person to the value of £5, or under, the owner of such slave shall make satisfaction to the party injured, and the slave shall be whipped at the discretion of a Justice of the Peace, and the owner paying the charges of such punishment, shall receive his slave again without further punishment. It is then enacted that no slave shall be admitted an evidence in any cause, except in cases of plotting among themselves to run away, kill or destroy their master, mistress, or some other person; or burning of houses, barns, barracks, or stackes of hay or corn, or killing their master or mistresses cattle or horses, and that only against one another, in which cases the evidence of one slave shall be good against another slave.

The Act then proceeds to declare that if any Negro, Indian or Mulatto slave shall be guilty of murder, rape, arson, mayhem or conspiracy, one justice, upon complaint, shall call to his aid two other justices, which three justices shall summon five freeholders to meet at the time and place they shall appoint, when and where the justices shall appoint some person to accuse the person, without the intervention of a grand jury—to which accusation the party accused shall be obliged immediately to plead, or receive sentence, as if convicted by verdict or confession; and upon pleading, the justices and the five freeholders to whom no peremptory challenge shall be allowed, shall proceed to

trial (the freeholders being first sworn to judge according to evidence), and if they, or seven of them, shall find the party accused guilty, shall give sentence of death and warrant for immediate execution.

The Act then provides for reimbursement to the owner of the slave executed, of the price, not to exceed £25, by assessment upon the county.

An Act of Assembly of the Province of Massachusetts Bay, passed in 1706, imposes a duty of £4 per head upon every Negro imported, allowing a drawback of the duty in case such Negro shall be re-expected within twelve months, and bona fide sold in any other plantation. In this Province there were several other Acts of Assembly respecting the Negro and Mulatto slaves in it.

I have not had it in my power to procure the municipal laws of any other of His Majesty's Provinces, now included in the United States of America, or of any other of His Majesty's islands in the West Indies, but no doubt can be entertained that local laws establishing or recognizing this species of slavery were passed in all of them in which this right was exercised.

It is abundantly clear that in all those islands and Provinces, the condition of slavery invested the master with the absolute and unqualified property in the slave, to all intents and purposes, not extending to life, or perhaps, in some places to limb; that it included the power of the master over the slave's person and property, the right of the master over all acquirements of the slave's labour, a right of alienation and transportation to any other master and country; that it included the descendible property from parents to children, and in like manner continually of the slave and all his descendants.

The only distinction that appears to have taken place is that in some of the Colonies they were considered as personal chattels, and in others were made estates real, descendible to the heir or widow in like manner as lands of inheritance, in fee simple. And the several Acts of Parliament which have been made respecting it, have recognized the condition of slavery in the plantations in which it was established, as attended with all the consequences above stated.

The first Act that we find in the Statute Book upon this subject is the Act 5, Geo. II., c. 7, intitled "An Act for the more easy recovery of debts in His Majesty's plantations and Colonies in America," by which it is enacted that the houses, lands, Negroes, and other hereditaments and real estates, shall be liable to the payment of debts, and shall be subject to the like remedies, proceedings and process in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, Negroes, and other hereditaments and real estates towards the satisfaction of such debts, and in like manner as personal estates in any of the said plantations respectively, are seized, extended, sold or disposed of for the satisfaction of debts. This Act was meant only to make lands, tenements and hereditaments equally liable to the payment of debts due to British subjects, with goods and chattels,—and so far as it respects Negroes, was probably made in consequence of the Acts of Assembly above mentioned, in Barbadoes and Virginia, and probably Acts of a similar nature in other Islands and Colonies where slavery was established, by which Negroes were made estates real descendible as lands of inheritance in fee simple.

But the Act by no means intimates or implies an idea that the slavery of Negroes was in practice in all or even generally in the Colonies; on the

contrary, the preamble of the Act states: "Whereas His Majesty's subjects trading to the British plantations in America lie under great difficulties for want of more easy methods of proving, recovering and levying of debts due to them, than are now used in some of the said plantations." And the enacting part, as we have seen, limits the operation of it to the plantations respectively, to which the different subjects of it apply. But no inference can be drawn from it to extend the laws of slavery from colony to colony, wherever the Negro may be found, any more than to give operation to any other law of Barbadoes or Virginia.

The next Act of Parliament respecting this subject is the Act of 23, George II., c. 31: "An Act for extending and improving the trade to Africa."

There is no enacting clause respecting slaves in this Act, excepting the first—the preamble is in the words following: "Whereas the trade to and from Africa is very advantageous to Great Britain, and necessary for the supplying the plantations and Colonies thereunto belonging with a sufficient number of Negroes at reasonable rates, and for that purpose the said trade ought to be free and open to all His Majesty's subjects." The Act then proceeds to lay this trade open to all His Majesty's subjects.

This Act evidently refers to those Colonies and plantations where Negro slaves were considered as necessary for the cultivation of the staple commodities produced in them, and even in these it does not establish the condition of slavery, but supposes it to exist by the provision of their municipal laws.

These Acts of Parliament evidently recognize the condition of slavery in the plantations in which it was tolerated to be attended with all the consequences above enumerated, and accordingly Mr. Dunning in his argument in the case of Somersett, says: "That his condition was that of servitude in Africa; the law of the land of that country disposed of him as property, with all the consequences of transmission and alienation; the statutes of the British Legislature confirm this condition, and thus he was a slave both in law and fact." Lofft, 11.

The only remaining Act of Parliament relating to the question is the Act of the 30th of the present reign, entitled "An Act for encouraging new settlers in His Majesty's Colonies and plantations in America," which is in the following words: "Whereas it is expedient that encouragement shall be given to persons that are disposed to come and settle in certain of His Majesty's Colonies and plantations in America and the West Indies Be it therefore enacted by the King's most excellent majesty, by and with the advice and consent of the Lords spiritual and temporal and commons in this present parliament assembled and by the authority of the same That from and after the first day of August one thousand seven hundred and ninety if any person or persons being a subject or subjects of the territories or countries belonging to the United States of America shall come from thence together with his or their family or families to any of the Bahama, Bermuda or Somers Islands or to any part of the Province of Quebec or Nova Scotia, or any of the Territories belonging to his Majesty in North America for the purpose of residing and settling there it shall be lawfull for any such person or persons having first obtained a licence for that purpose from the Governor or in his absence the Lieutenant Governor of the said Islands, Colonies or Provinces respectively to import into the same in British ships, owned by his Majesty's subjects and navigated according to 30 Geo. III., c. 27.

law, any Negroes, household furniture, utensils of husbandry and clothing, free from duty. Provided always that such household furniture, utensils of husbandry and clothing shall not in the whole exceed the value of fifty pounds for every white person that shall belong to such family and the value of forty shillings for every Negro brought by such white person, and if any dispute shall arise as to the value of such household furniture, utensils of husbandry or clothing the same shall be heard and determined by the Arbitration of three British merchants at the port the same shall be imported, one of such british merchants to be appointed by the Governor, or in his absence the Lieutenant Governor of such Island or Province, one by the Collector of the Customs of such port, and one by the person so coming with his family.

"II. And be it further enacted. That all sales or bargains for the sale of any Negro, household furiture, utensils of husbandry or clothing so imported, which shall be made within twelve calender months after the importation of the same (except in cases of the bankruptcy or death of the owners thereof) shall be null and void to all intents and purposes whatsoever.

"III. And be it further enacted that every white person so coming to reside if above the age of fourteen years shall and he is hereby required immediately after his arrival to take and subscribe the oath of allegiance to his Majesty his heirs and successors, before the Governor, Lieutenant Governor or Chief Magistrate of the place where such person shall arrive, and at the same time swear that it is his intention to reside and settle in such Island or Province for which oaths such Governor Lieutenant Governor or Chief Magistrate shall receive the same fee and no more as is payable by law on administrating the Oath of Allegiance, in cases where the same is now by law required."

This Act does not establish slavery in any Colony in which it did not exist antecedently thereto, nor does it convey an idea that slavery was established in all the Colonies mentioned in it—on the contrary, the clause requiring a license to be obtained from the Governor, for the importation of the articles mentioned in it, may be fairly considered as being inserted, with a view to guard against any difficulty that might arise from bringing Negroes into a Province where slavery was not sanctioned by law.

This brings me to the last and principal point of the argument:—

VI. What is the law of this Province respecting the slavery of Negroes?

And here it must be premised that they are either free or absolute slaves, with all the consequences of transmission and alienation, and incapacity to acquire any property of their own.

For it was very strenuously and ably contended in the case or Somersett by the Counsel for his master, that the Court had a right to qualify the terms and conditions upon which he should be held as a servant. Mr. Dunning agreed to Mr. Alleyne's observation, that the municipal regulations of one country are not binding on another, but goes on to say: "Does the relation cease where the modes of creating it, the degrees in which it subsists vary?" "I have not heard, nor, I fancy, is there any intention, to affirm the relation of master and servant ceases here. I understand the municipal relations differ in different colonies, according to humanity and otherwise." "Contract is not the only means of producing the relation of master and servant; the Magistrates are empowered to oblige persons under certain circumstances to serve." "Villenage has existed in this country—and are not the

Lofft, 12.

laws existing by which it was created?" "Whichever way it was formed, the consequences, good or ill, follow the relation, not the manner of producing it. I may observe there is an establishment by which Magistrates compel idle or dissolute persons of various ranks and denominations to serve. In the case of apprentices bound out by the parish, neither the trade is left to the choice of those who are to serve, nor the consent of parties necessary; no contract, therefore, is made in the former instance, none in the latter; the duty remains the same. The case of contract for life, quoted from the Year Books, was recognized as valid; the solemnity only of an instrument judged requisite. Your Lordships (this variety of service, with divers other sorts, existing by law here), have the option of classing him amongst those servants which he most resembles in condition: Therefore (it seems to me) are by law authorized to enforce a service for life in the slave, that being a part of his situation before his coming hither, which is not incompatible, but agreeing with our laws, may justly subsist here, I think, I might say, must necessarily subsist as a consequence of a previous right in Mr. Stewart, which our institutions not dissolving, confirm. I don't insist on all the consequences of villenage, enough is established for our cause by supporting the continuance of the service." "Our Legislature, when it finds a relation existing, supports it in all suitable consequences, without using to inquire how it commenced. A man enlists for no specified time; the contract, in construction of law, is for a year. The Legislature, when once the man is enlisted, interposes annually to continue him in the service as long as the public has need of him, etc." "The opinion cited to prove the Negroes free on coming hither, only declares them not saleable, does not take away their service." In answer to this reasoning, Sergeant Davy, in the course of his argument, among other things, mentions the case of Thorn & Watkins—as follows:—

"In the case of Thorn and Watkins, in which Your Lordship was counsel, determined before Lord Hardwicke. A man died in England with effects in Scotland, having a brother of the whole and a sister of the half blood, the latter by the laws of Scotland could not take. The brother applies for administration to take the whole estate, real and personal, into his own hands, for his own use; the sister files a bill in Chancery, the then Attorney-General puts in an answer for the defendant and affirms the estate as being in Scotland and descending from a Scotchman, should be governed by that law. Lord Hardwicke over-ruled the objection against the sister's taking, declared there was no pretense for it, and spoke nearly in the following words: Suppose a foreigner has effects in our stockes and dies abroad, they must be distributed according to the laws not of the place where his effects were, but of that to which, as a subject, he belonged at the time of his death. All relations governed by municipal laws must be so far dependent on them, that if the parties change their country, the municipal laws give way, if contradictory to the political regulations of that other country. In the case of master and slave being no moral obligation, but founded on principles and supported by practice, utterly foreign to the laws and customs of this country, the law cannot recognize such relation."

Lord Mansfield, in giving the opinion of the Court, says, as we have seen, "The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme." "We have no authority to regulate the conditions in which law shall operate." (Vide Ante, p. 23, b. 24.)

The question, therefore, before this Court is simply this: Whether any dominion, authority or coercion can be exercised in this province on a slave,

according to the municipal laws of those plantations in which slavery is established as lawful.

This will necessarily lead us into an inquiry. By what laws is this Province governed, or to what laws is it subject? And to facilitate this inquiry it must first be determined whether it is to be considered in the light of a colony claimed by right of occupancy, by finding it desart and uncultivated, and peopling it from the Mother Country—or as gained by conquest or ceded by treaty.

Cowp., 204. Campbell v. Hall.

There is, in Cowper's reports, an elaborate and learned argument by Lord Mansfield, to prove the King's legislative authority by his prerogative alone over a ceded or conquered country, from which I think it may be fairly deduced that this Province is not to be considered in that light. In the course of the argument Lord Mansfield says:—

"The authority of two great names has been cited, who take the proposition for granted. In the year 1722, the Assembly of Jamaica being refractory, it was referred to Sir Philip Yorke and Sir Clement Wearge, to know what could be done if the Assembly should obstinately continue to withhold all the usual supplies." They reported thus: "If Jamaica was still to be considered as a conquered island, the King had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other Colonies, no tax could be imposed on the inhabitants, but by an Assembly of the Island or by an act of Parliament. They considered the distinction in law as clear, and an indisputable consequence of the Island being in the one state or the other. Whether it remained a conquest or was made a colony, they did not examine. I have, upon former occasions traced the Constitution of Jamaica as far as there are papers and records in the offices, and cannot find that any Spaniard remained upon the Island so late as the Restoration; if any, there were very few. To a question I lately put to a person well-informed and acquainted with the country, his answer was, there were no Spanish names among the white inhabitants, there were among the Negroes. King Charles the Second by proclamation invited settlers there, he made grants of lands. He appointed at first a Governor and Council only; afterwards he granted a commission to the Governor to call an Assembly."

"The Constitution of every Province immediately under the King has arisen in the same manner, not from grants, but from commissions to call Assemblies; and therefore all the Spaniards having left the Island, or been driven out, Jamaica from the first settling, was an English Colony, who, under the authority of the King planted a vacant island belonging to him in right of his crown—like the cases of the Island of St. Helena and St. John, mentioned by Mr. Attorney-General."

If the Islands of Jamaica and St. John are to be considered in the light of vacant or uninhabited countries discovered and planted by English subjects, there can remain no doubt that this Province is to be considered in the same light.

1 Bl. Com. p 106

Salk., 411.

Judge Blackstone says: "If an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately then in force." He cites Salk. 411, where it is laid down per Holt, Chief Justice and Cur; in case of an uninhabited country, newly found out by English subjects, all laws in force in England are in force there. "But this," says Judge Blackstone, "must be understood with very many and very great restrictions. Such colonists carry

with them only so much of the English law as is applicable to their own situation, and the condition of an infant colony, such, for instance, as the general rules of inheritance and of protection from personal injuries." The common law of England has been claimed and recognized as the birthright of every British subject in the colonies, and has been so considered, as well by the most eminent lawyers in England as by the Supreme Court of Judicature in most, if not all, the British Colonies in North America before the Revolution. The Act of Federation which established the present Constitution of the United States, recognizes the Common Law of England as the basis of it.

It will not then be contended but that the inhabitants of this Province are subject to and intitled to the benefits and privileges of the Common Law of England.

If so, the same judgment must be given in this case as in the case of Somerset in England, unless slavery is established by some municipal law in force here.

It will not be contended that any of the local laws passed by the Legislatures of the different Colonies and Islands are binding here.

Perhaps it may be said that the custom of tolerating slavery in many of the Colonies is binding in this Province. Let us examine this position. "By the old custom of the realm," says St. Germin, "no man shall be taken, imprisoned, desseized, nor otherwise destroyed, but he be put to answer by the law of the land, and this custom is confirmed by the stat. of Magna Charta, Cap. 26." "Every general custom of the realm is a part of the Common Law." D. & St. D. 1, c. 7

Co. Lit. 1 & 5. 6 lb.

It will not be denied that this part of the common law extends to this province as an English Colony, planted by English subjects. It is equally clear that this law cannot be altered, but by some direct positive law of a Legislature having authority for that purpose, either the Parliament of Great Britain or the General Assembly of the Province. "The Common Law," says Lord Coke, "hath no controller in any part of it, but the High Court of Parliament, and if it be not abrogated or altered by Parliament, it remains still as Littleton saith." "The Common Law appeareth in the Statute of 'Magna Charta,' and other ancient statutes, which, for the most parts, are affirmations of the Common Law."

It is true that particular customs or laws which affect only the inhabitants of particular districts, are also a branch of the unwritten laws of England.

1 Bl. Com. 74.

Consuetudo ex certa causa rationabili usitata privat communem legem. Quia consuetudo contra rationem introducta, potius usurpatio, quam consuetudo appellari debet. Consuetudo præscripta et legitima vincet legem.

Co. Lit. 113a.

All particular customs must be particularly pleaded, and as well the existence of such customs must be shewn as that the thing in dispute is within the custom alledged.

1 Bl. Com. 76.

"When a custom is actually proved to exist, the next inquiry is into the legality of it; for if it is not a good custom, it ought to be no longer used. *Malus usus abolendus est* is an established maxim of the law."

With regard to the existence of the custom of slavery in this Province, it is presumed it never has existed, and that of course no proof can be produced of it.

That some masters have brought slaves here is true, and that the slaves have, in some instances, continued with their masters without disputing the right of their masters to their service, is also true. But it must also be

admitted that the slaves have in many instances controverted this right, and have been manumitted, or indented themselves voluntarily to serve for a term of years upon condition of being discharged at the expiration of it.

The question is now for the first time brought forward for a legal decision in this Court.

It's merits have never yet been discussed nor any determination had upon it. No Act of Assembly has ever passed in this Province in the smallest degree recognizing any such custom or condition as slavery. On the other hand, the general opinion, if that were of any consequence, I believe I may venture to assert, is against its admission or toleration here.

Will it be contended because Indians and Negroes were made slaves in Barbadoes and Virginia, in the last century and laws were made there establishing this condition, that that custom and those laws are binding here?

Will the existence of such a custom and such laws in any other of the English Colonies, render them binding here?

It may as well be asserted that the local laws and customs of those Colonies in every other instance, and respecting every other object, are in force here.

But perhaps it will be said that the laws and customs of Nova Scotia are binding here, and that slavery is recognized by the laws of that Province.

I deny their existence in that Province. There is no Act of Assembly of that Province recognizing any such state or condition there, nor do we know of any decision of their Supreme Judicial Court upon the point. The presumption is violent that there has been none, and that the practice there has been the same that has obtained in this Province.

But it must be observed that whatever number of slaves may have been brought to that or this Province, and continued in a state of servitude, this will not affect the right, any more than the same practice in England, before the case of Somersett was determined; at the time of which decision there were 14,000 or 15,000 slaves of the same description in different parts of the Kingdom.

Had the condition of slavery been recognized as lawful in that Province, there would have been regulations, remedies and powers provided by Acts of Assembly, as in the other Colonies, when slavery was established or recognized. Therefore, as was said by Mr. Hargrave, in the case of Somersett, "The most violent presumption against it is the silence of the laws, were there nothing more."

But, even admitting there had been a decision of the Supreme Court of Nova Scotia in support of slavery, such a decision could be no more binding here than any other decision they may have made upon any other question.

If, however, the existence of the custom of slavery in Nova Scotia is material to the establishment or support of slavery in this Province, it is indispensably necessary it should be proved.

When this shall be proved, the next inquiry will be into the legality of it. Upon inquiry, I am well informed that an attempt was once made in the House of Assembly of Nova Scotia to introduce a clause of the kind into a bill for the regulation of servants, but that it was rejected by a great majority. That agreably to the practice which formerly obtained in cases of villenage in England, a summary decision of the question of slavery in that Province has always been resisted, and the party claiming the slave has been put to his action, and that several trials have been had in which the jury has decided against the masters, which have so discouraged them that a limited

service by indenture has been very generally substituted by mutual consent. That the general question respecting the slavery of Negroes has been often agitated there in different ways, but has never received a direct decision; that altho the Court there has avoided an adjudication of the principal point, yet as they required the fullest proof of the master's claim in point of fact, it has been generally found very easy to succeed in favor of the Negro, by taking some exception collateral to the general question, and, therefore, that course has been taken.

In a late case in that province, a black woman was brought before the Court on *Habeas Corpus*, from the jail at Annapolis, the return being defective she was discharged, but as she was claimed as a slave, the Court intimated that an action should be brought to try the right, and one was brought against a person who had received and hired the wench. At the trial the plaintiff proved a purchase of the Negro in New York as a slave, but as he could not prove that the seller had a legal right to dispose of her, the Court directed the jury to find for the defendant, which they readily did.

But let us inquire into the legality of the custom of slavery where it does exist.

To make a particular custom good, the following requisites, says Judge Blackstone, are necessary:— 1 Bl. Com. 76.

"1. That it have been used so long that the memory of man runneth not be the contrary, so that if anyone can shew the beginning of it within legal memory, that is within any time since the first year of the reign of King Richard I., it is no good custom."

Now, as no English Colonies were in existence in America till since the commencement of the seventeenth century, the custom contended for must have commenced since that time, and must, therefore, be void.

"2. It must have continued. As the custom in question could have had no legal commencement, it can have had no legal continuance."

"3. It must have been peaceable and acquiesced in, for as customs owe their original to common consent, there being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting."

The custom in the present instance never obtained, and, of course, never had continuance in the Province of Nova Scotia, the inhabitants of which equally with us, claim the Common Law of England as their birthright, and it has been disputed, and has not been acquiesced in, in this Province, from its erection to the present day.

4. Customs must be reasonable, or rather taken negatively they must not be unreasonable, *quia consuetudo contra rationem introducta, potius usurpatio quam consuetudo appellari debet.*

"Now, this custom of American slavery," says Lord Mansfield, "is of such a nature that it is incapable of being introduced on any reasons, moral or political. It is so odious that nothing can be suffered to support it but positive law." And, I may add, it is such an usurpation upon the natural rights of mankind that no human laws can justify or support it. Lofft. 19.

5. Customs must be consistent. Now the custom insisted upon, even if good in other respects, is utterly inconsistent with the ancient and immemorial customs of the Common Law, which are a part of the law of this land.

If it shall be said that a decision in favor of the Negroes in this Province would do great injustice to their masters, who have brought them here in full faith in the Government of the country, that they should be protected in the enjoyment of this as well as their other property.

Lofft. 17.

The same objection, as we have seen, was made in England in the case of Somersett but what said the Court to it? "The setting 14,000 or 15,000 men at once free by a solemn opinion is much disagreable in the effects it threatens. £50 a head may not be a high price; then follows a loss to the proprietors of above £700,000 sterling. But if the parties will have judgment, *fiat justitia ruat cœlum*. Let Justice be done, whatever be the consequence. An application to Parliament, if the merchants think the question of great commercial concern, is the best and perhaps the only method of settling the question for the future."

Now this has been a question agitated from the very origin of this Province, and if there were anything like a general acquiescence in the toleration of slavery here, is it not to be presumed that some Act of Assembly would have been passed, or at least been attempted, by which the rights of the master would have been recognized and regulated? Does not the silence on this subject afford a violent presumption, that there is no such acquiescence in it, except of the very few who are the owners of slaves in the Province? And will this Court, under these circumstances, declare slavery to be a part of the law of the land; declare it to be an immemorial usage, of uniform, uninterrupted continuance, just and reasonable in itself, and consistent with the immemorial customs and usages of the Common Law, which are our birthright? Should this be the case, we shall have little reason to boast of the Constitution in the defence of which we pride ourselves in having done and suffered so much. Will not the Court rather say, in the words of Lord Mansfield: "Whatever inconveniences may follow from a decision we cannot say this case is allowed by the law of this Province, and, therefore, the black must be discharged."

There is not even the plausible ground in support of the practice in this Province which has been adduced in its justification in other plantations, where the culture of sugar and other products of the tropical climates is said to make the use of slaves necessary. Under a conviction of this truth, in addition to the other much more important reasons which have been suggested in the course of this argument; slavery has been abolished in all the Eastern States of the United States of America since their independence, and even in Virginia, a law was passed so long ago as the year 1786, forbidding the future importation of slaves into that State. Self-preservation rendered it inexpedient in that State immediately to abolish it altogether; and may, perhaps, justify it's continuance for some time longer in other parts of America and the West Indies, where the same reason operates on account of the number of the slaves. But when efforts are making in every country where it has been introduced for it's eventual abolition; shall it be admitted here as a necessary part of the original constitution of an English Colony, without any reason, moral or political, to justify it?

Were we for a moment to place ourselves in the situation of the unhappy Africans and suppose ourselves kidnapped and transported and sold as slaves by the subjects of another nation, and there is a nation whose strides to universal domination, if not successfully checked may not, perhaps, terminate less fatally for us; would all the reasoning and pretences which we hear urged in favor of the slavery of this unfortunate people reconcile us to our fate? Let every man's reason and feelings give an answer to this question.

But, perhaps, it will be said, the liberty of these slaves has been originally forfeited by the crimes they have committed in their own country, in the same

manner as for offences in other countries, labour for a certain period is imposed, and in some places perpetual labour, and thus a right to their servitude is acquired.

This, if true in any instance, is very rarely the case, but admitting it were so, it is an acknowledged principle of general law, "that the laws of one country have not whereby to condemn offences supposed to be committed against those of another; agreably to which we have the account cited in the case of Somersett of some criminals who, having escaped execution in Spain, were set free in France—upon which it is forcibly observed by Serjeant Davy: "To punish not even a criminal for offences against the laws of another country, to set free a galley slave, who is a slave by his crime, and make a slave of a Negro who is one by his complexion, is a cruelty and absurdity, which, I trust, will never take place here, such as, if promulged, would make England a disgrace to all the nations upon earth for reducing a man guiltless of any offence against the laws, to the condition of slavery, the worst and most abject state of human nature." Lofft. 5.

The only question then that can remain is whether the condition of slavery is established by positive law, by provisions binding for this purpose in any Acts of the British Parliament? The only Acts that have been passed relating to the subject are those that have been already observed upon, and upon these the inquiry is, whether those Acts recognizing the slavery of Negroes as existing in some of the plantations, or to put the case in the strongest terms, considering it as existing in all of them by the local and municipal laws, will establish that condition in each and every colony and plantation, whether forbidden, abolished or recognized by the municipal laws of such plantations or not?

The establishment of slavery is most certainly local, it's consequences local, and it is the law only of such plantations in which it has been established by local laws.

To make a bare recognition of the existence of such laws in the plantations in the preamble of an Act of Parliament as tantamount to the establishment of those laws in all the plantations, whether such laws existed or not, independently of such act, would be violating every legal principle of construction. This consequence would inevitably follow, that in case the local laws of any of the plantations forbad the introduction of slaves, or declared them free upon their importation, the Act of Parliament would operate as a repeal of those laws, and thus it would be out of the power of the local Legislature to prevent the condition of slavery being established in any colony; or even to ameliorate it's condition, as the Act of Parliament recognizes the state of slavery, with all its consequences of transmission and alienation. An adventurer from Great Britain to the Coast of Africa might bring a cargo of slaves into such colony and sell them as slaves in defiance of all the municipal laws made to declare them free.

It would be reversing every principle of English Law to say that the presumption is in favor of slavery, when by that law it is declared to be so odious that nothing but positive law can be suffered to support it.

"It was one of the laws of the twelve tables of Rome that whenever there was a question between liberty and slavery, the presumption should be on the side of liberty." "This excellent principle," says Professor Christian, "our law has adopted in the construction of penal statutes, wherein the decision must be on the side of lenity and mercy in favor of natural right and liberty." 1 Bl. Com. p. 88. Christian's Notes.

2 Bl. Com. 93. And Judge Blackstone tells us in his treatise on villenage tenures, "that the law is ready to catch at anything in favor of liberty," and among the rules for the construction of statutes, it is laid down, "If there arise
1 Bl. Com. 91. any absurd consequences manifestly contradictory to common reason, out of Acts of Parliament, they are, with regard to those consequences, void." Upon which Mr. Christian remarks: "If the expression will admit of doubt, it will not then be presumed that that construction can be agreable to the intent of the Legislature, the consequences of which are unreasonable."

What can be more contradictory to reason and to every principle of justice than to make the Acts of Parliament in the present instance operate to establish and inflict so severe a condition and penalty as slavery, in any part of the dominions where no such condition existed when the words can be so fairly construed to extend to those plantations only, where slavery was established by law, and where the nature of the climate and of its products was thought to render the use of slaves necessary?

With regard to the late Act of Parliament, passed in the year 1790, it does not apply to the present case, as it is not pretended that the Negro in question was brought here under the authority of that Act, nor is it to be supposed that any case will ever arise in this Province under it, as no Negroes have ever been, or (I trust that the decision in this cause will determine) ever can be, imported here as slaves under that Act.

But the same rule of construction would apply to that Act that has been contended for with regard to the others, more especially as it authorizes the importation into the British Provinces of any Negroes from any of the territories belonging to the United States, when, in fact, at the time the Act passed, the slavery of Negroes was abolished in several of those States. As the Act, therefore, could apply only to those States in which this slavery was established by law, as places from whence such Negroes might be brought, so it can reasonably be supposed to apply only to such of the British plantations as had adopted and recognized this condition of slavery as places into which they might be legally imported under the Act.

RECAPITULATION.

This cause was argued at the Supreme Court at Fredericton, at the Hilary Term, in February, 1860. Mr. Street, Mr. Chipman, for the slave; the Attor-
(L.S.) ney-General Mr. Bliss, Mr. T. Wetmore, Mr. J. M. Bliss, Mr. Peters, and Mr. Botsford for the master. The Court divided—the Chief Justice and Judge Upham in support of the return; Judge Allen and Judge Saunders against its sufficiency. No judgments entered.

The writ and return were as follows:—

George the Third, by the Grace of God of Great Britain, France and Ireland King Defender of the Faith, etc. To Caleb Jones of the Parish of Saint Marys in the County of York Esquire, Greeting: We command you that you have the body of Ann otherwise called Nancy a black woman detained in your custody as it is said together with the cause of her being detained before our Justices of our Supreme Court at the Court House in Fredericton on Thursday the eighteenth of July instant at twelve o'clock in the forenoon of the same day to do and receive all and singular those things which our said Justices shall then and there consider of her in this behalf and have then there

this writ. Witness George Duncan Ludlow Esquire at Fredericton the sixteenth day of July in the thirty ninth year of our reign.

Signed ODELL Junr.

Caleb Jones within named in obedience to the within writ of the Lord the King brings here into Court the body of the within-named Ann or Nancy a black woman and hereunto certifies that the cause of detaining the said Ann or Nancy, appears in the schedule to this writ annexed.

Signed CALEB JONES.

Caleb Jones of the Parish of Saint Marys in the County of York Esquire in obedience to the King's writ of "Habeas Corpus" to him directed and hereunto annexed humbly shows cause to the Court of the Lord the King why the said Caleb Jones detains the Negro a black woman Ann otherwise called Nancy in the same writ, named as follows. That long before the coming of the King's writ aforesaid to him, the said Caleb Jones there were and still are slaves to a great number in Africa and the trade in them between the Africa Coast and the Colonies plantations and islands now and heretofore belonging to the Crown of Great Britain was and is authorized and sanctioned by a variety of statutes of the Kingdom of Great Britain in that case made and provided That the said Caleb Jones formerly and before and during and after the war between Great Britain and the thirteen United Colonies, which terminated in the seperation of the same Colonies from the Mother Country the said Caleb Jones was an inhabitant and freeholder of and in the late Province, now State of Mary Land, then one of the Colonies belonging to the Crown of Great Britain aforesaid. That the said Ann or Nancy was, at the time of her birth and ever since hath been a female Negro slave or servant for life born of an African Negro slave, and before the removal of the said Caleb Jones from Mary Land to New Brunswick was and became by purchase the lawful and proper Negro slave or servant for life of him the said Caleb Jones and so being by the laws of Maryland, and consistently with the laws of all his Majesty's Colonies and plantations in America the proper Negro slave or servant for life of him the said Caleb Jones. That the said Caleb Jones, in the year of our Lord one thousand seven hundred and eighty five brought and imported the said Ann or Nancy his Negro slave or servant for life into the Province of New Brunswick as it was lawful for him to do and has always hitherto held the said Ann or Nancy as his proper Negro slave or servant for life in the said Province of New Brunswick as by law he has good right and authority to do and the said Caleb Jones now renders her the said Ann or Nancy to the orders of the Court, as by the said writ he is commanded.

Signed CALEB JONES.