STATE v. SHEPPARD.—Page 47.

In an indictment for an assault and battery, the court will not continue a cause for the absence of a witness who can prove great provocation only, on the part of the prosecutor, but after verdict will suspend the judgment.

Indictment for an assault and battery. At the trial the defendant prayed a continuance, on account of the absence of a material witness.

He was asked what that witness would prove? and on his answering that he intended to prove by the testimony of that witness that the prosecutor had given him very great provocation.

By the Court, ASHE, J., and WILLIAMS, J., this will only go in mitigation of the fine. Let the cause be tried, and if there be a verdict against you, we will postpone giving judgment until next term; in order that you may have the benefit of the testimony of your witness.

The cause was tried, and there being a verdict against the defendant, he was bound over to the next Court.

Ex relatione Arnett.

NEWBERN, *November Term*, 1787.

DEN ON THE DEM. OF BAYARD and wife v. SINGLETON.—Page 48.

By the constitution every citizen has a right to a decision in regard to his property by a trial by jury. The act of Assembly therefore of 1785, requiring the Court to dismiss on motion, the suits brought by persons, whose property had been confiscated, against the purchasers, on affidavit of the defendants that they were purchasers from the commissioners of confiscated property, is unconstitutional and void.

Aliens cannot hold land, and if they purchase, the land is forfeited to the sovereign.

An act of Assembly passed during a war and confiscating the property of an alien enemy *by name*, is at least as effectual in vesting the property in the State, as any *office found* according to the practice in England.

Ejectment. This action was brought for the recovery of

a valuable house and lot, with a wharf and other appurtenances, situate in the town of Newbern.

The defendant pleaded *not guilty*, under the common rule.

He held under a title derived from the State, by a deed, from a Superintendent Commissioner of confiscated estates.

At May Term, 1786, *Nash* for the defendant, moved that the suit be dismissed, according to an act of the last session, entitled an act to secure and quiet in their possession all such persons, their heirs and assigns, who have purchased or may hereafter purchase lands and tenements, goods and chattels, which have been sold or may hereafter be sold by commissioners of forfeited estates, legally appointed for that purpose, 1785, 7, 553.

The act requires the Courts, in all cases where the defendant makes affidavit that he holds the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion.

The defendant had filed an affidavit, setting forth that the property in dispute had been confiscated and sold by the Commissioner of the district.

This brought on long arguments from the counsel on each side, on constitutional points.

The Court made a few observations on our constitution and system of government.

ASHE, J., observed, that at the time of our separation from Great Britain, we were thrown into a similar situation with a set of people ship-wrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system or those fundamental principles comprised in the constitution, dividing the powers of government into separate and distinct branches, to-wit: the legislative, the judicial and executive, and assigning to each, several and distinct powers, and prescribing their several limits and boundaiers: this he said without disclosing a single sentiment

upon the cause of the proceeding, or the law introduced in support of it.

CURIA ADVISARE VULT.

At May term, 1787, Nash's motion was resumed, and produced a very lengthy debate from the bar.

Whereupon the Court recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant, the uncertainty, that would always attend his title, if this cause should be dismissed without a trial; as upon a repeal of the present act, (which would probably happen sooner or later) suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect.

Another mode was proposed for putting the matter in controversy on a more constitutional footing for a decision, than that of the motion under the aforesaid act. The Court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the Legislature and the Judicial powers of the State, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously for overruling the aforementioned motion for the dismission of the said suits.

In the course of which the Judges observed, that the obligation of their oaths, and the duty of their office required them in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

That they therefore were bound to declare that they considered, that whatever disabilities the persons under whom the plaintiffs were said to derive their titles, might justly

have incurred, against their maintaining or prosecuting any suits in the Courts of this State; yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs being citizens of one of the United States, or citizens of this State, by the confederation of all the States; which is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly.

That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.

Nash's motion was overruled.

And at this term the cause was tried.

Both the plaintiffs and the defendant admitted the title of the premises to have been in Samuel Cornell, Esq., at and before the time when the independence of this State commenced.

The case appeared to be this: Mr. Cornell, once an inhabitant of Newbern, leaving his family, together with the premises in question, and a variety of property in this town, took shipping on the 19th of August, 1775, and went to Great Britain, where he continued till some time in the latter part of the year 1777, when he came to New York, then occupied by a British garrison; and as a British subject came from thence and arrived in Newbern, on the 11th of December, 1777, and under the protection of a British flag.

His principal design, in coming to this State at that time, was to take his wife and family with him, to réside under the British Government, if he did not find our new government agreeable to his wishes. Not being pleased with the appearance of things here, and thereupon preparing to leave the State, and to carry with him his wife and family, he executed on board the vessel he came in, a deed to his daughter, one of the plaintiffs (under which they claim) for the premises in question, on the 19th of December, 1777.

This deed for the purpose of execution had been handed to him without a date, and being asked what date he chose it should bear, he hesitated and said he would look at the copy of a bill which was then in his possession, which bill he understood to be on its passage in the legislature, for confiscating the property of all persons of his description, who should not within a limited time come into this State, and be made citizens thereof, which bill afterwards in the same session passed into a law. After looking at the aforesaid copy of that bill, he chose that the deed should bear date on the 11th of the same month, being the day he arrived in the harbour of Newbern; which deed was accordingly dated that day. After which Mr. Cornell returned with his family from this State, and from thenceforth lived and died a British subject, under the British Government.

The Court, ASHE, J., SPENCER, J., and WILLIAMS, J., gave their opinion *seriatim*, but unanimously.

They observed that the cause turned chiefly on the point of *alienage* in Mr. Cornell. For this gentleman, having from his birth to the time of his death, been always a British

subject, and having always lived under the British government, he owed allegiance to the King of Great Britain, and consequently was never a citizen of this, or any other of the United States, nor owed allegiance thereto. For when here, at the time of the transaction aforementioned, he was under the protection of a British flag. That he was therefore, in contemplation of law, as much an *alien*, and at the time of executing the deed, and, from the time of our independence as much an *alien* ENEMY, as if we had been a separate and independent nation, for any number of years or ages before the commencement of the war which was then carried on.

That it is the policy of all Nations and States, that the lands within their government should not be held by foreigners. And therefore it is a general maxim, that the allegiance of a person who holds land ought to be as permanent to the government who holds it, as the tenure of the soil itself.—That therefore by the civil, as well as by the common law of England, *aliens* are incapacitated to hold lands. For that purpose the civil law has made the contracts with *aliens* void. The law of England, which we have adopted, allows them to purchase, but subjects them to forfeiture immediately; and does not allow an *alien* ENEMY any political rights at all.

That the premises in question, upon these invariable principles of law, could not from the time our government commenced, have been held by Mr. Cornell; because that in consequence of his owing no allegiance to the State, he had no capacity to hold them, and according to the letter of the law of the land, they must have consequently been forfeited to the sovereignty of the State. That the act of confiscation, in which Mr. Cornell was expressly named, and more particularly the act which especially directed the sale of the very premises in question, must have been at least as effectual in vesting them in the State, as any *office found*, according to the practice in England can be, for vesting any forfeited property in the King.

That the circumstances and limited privileges of persons who were sent out of this State under a particular act of our General Assembly, are not applicable to this case.

That the case in Vattel, of the majority of the inhabitants of any country deliberately dissolving their old government, and setting up a new one, is neither in reason, nor in the most essential circumstances, anyways similar to this case. That *Calvin's* case, reported in Coke, does by no means reach the leading and characteristic circumstances of this case.

The jury found a verdict for the defendant.

Iredell, *Johnston* and *Davie*, for the plaintiffs.

Moore and *Nash*, for the defendant.

*** On the decision of this cause, twenty-seven others depending in the same Court, and subsisting upon similar, or less substantial grounds, were all swept off the docket, by nonsuits voluntarily suffered.

Ex relatione SPENCER, J.

NOTE—As to an alien holding land in this State, see *University* v. *Miller*, 3 Dev. Rep., 188. On the last point see *Farris* v. *Simpson*, Conf. Rep., 178.

NEWBERN, *September Term*, 1795.

WILLIS v. BROWN'S EXECUTORS.—Page 52.

Davie, for the plaintiff, moved that a commission *de bene-esse* might be read upon the plaintiff's affidavit, that the deponent was sick and unable to attend.

The defendant objected to this: and

By the Court, WILLIAMS, J., and HAYWOOD, J. A party cannot entitle himself, by his own affidavit, to introduce this weaker kind of evidence. The disability of the deponent to attend the Court must be proved by indifferent testimony.

And the deposition was set aside.

NOTICE.—See —— v. *Brown's Ex'rs.*, 1 Hay. Rep., 227, (which is probably the same case with this,) and *Anonymous*, 2 Hay. Rep., 74.

NEWBERN, *September Term*, 1795.

MOORING v. STANTON.—Page 52.

Case on a promissory note, the consideration of which appeared to be money paid by the plaintiff to a third person, for money lost at gaming by the defendant.

On a plea of the statute of gaming. 1788, 5, 633.

HAYWOOD, J. Money lent to play with, or to pay, at the time of loss, is not recoverable. But it is otherwise of a gaming debt paid by a third person, at the request of the loser.

NOTE.—See act of 1788 (1 Rev. tat., ch. 51,) and the cases upon the construction of it, *Anonymous*, 2 Hay. Rep., 1. *Stowell* v. *Guthrie*, Ibid., 297. *Hodges* v. *Pitman*, 2 Car. Law Repos., 394. 1 *rner* v. *Peacock*, 2 Dev. Rep., 303. *Hudspeth* v. *Wilson*, Ibid., 372. *Dunn* v. *Ho* *way*, 1 Dev. Eq. Rep., 322.

NEWBERN, *November Term*, 1780.

GORHAM and Wife v. ———.—Page 52.

Where a testator bequeathed as follows: "I give and bequeath all the rest of my negroes and their increase to be equally divided among my children, the survivor or survivors of them, and their heirs forever," and died, leaving a wife and three children, two of whom died infants, *it was held* that on the death of the first child, the mother was entitled to an equal share of its part of the said legacy with the two surviving children, and on the death of the second, she was entitled to share its estate with the survivor.

Petition. The following case was reserved for the opinion of the Court, viz:

"John Speir of Pitt county, in his last will and testament, among other things, bequeathed as follows, to-wit:

Item, I give and bequeath all the rest of my negroes and