

Report of the case : John Dorrance against Arthur Fenner, tried at the December term, of the court of common pleas, in the county of Providence, A.D. 1801 ; to which are added, the proceedings in the case [of] Arthur Fenner vs. John Dorrance / carefully compiled from notes correctly taken by several gentlemen who were present during the whole course of the trial.

Contributors

Dorrance, John, 1747-1813.

Fenner, Arthur, 1745-1805.

Rhode Island. Court of Common Pleas (Providence County)

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Publication/Creation

Providence : Printed by Bennett Wheeler, and sold at his office, in Westminster-Street, 1802.

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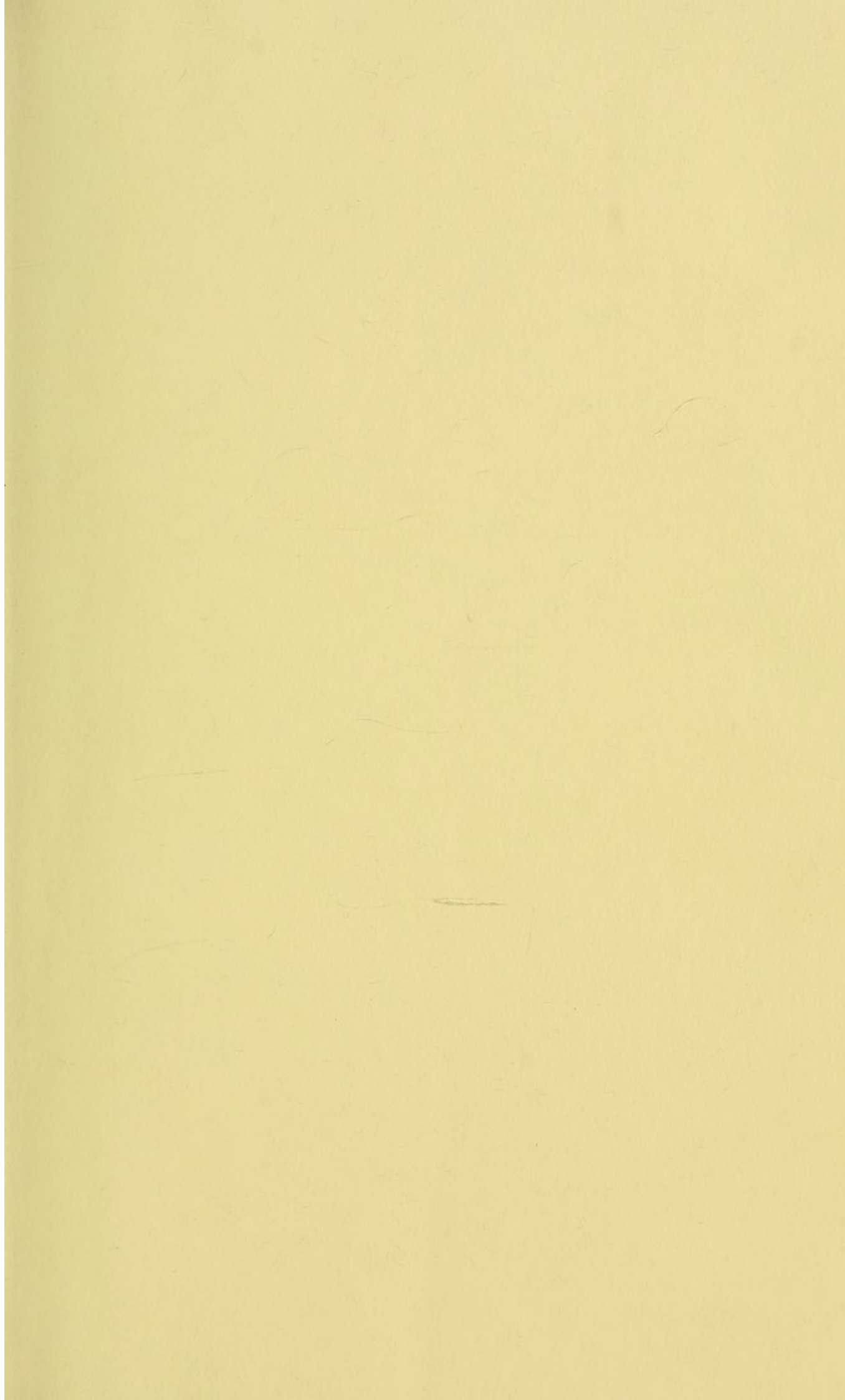
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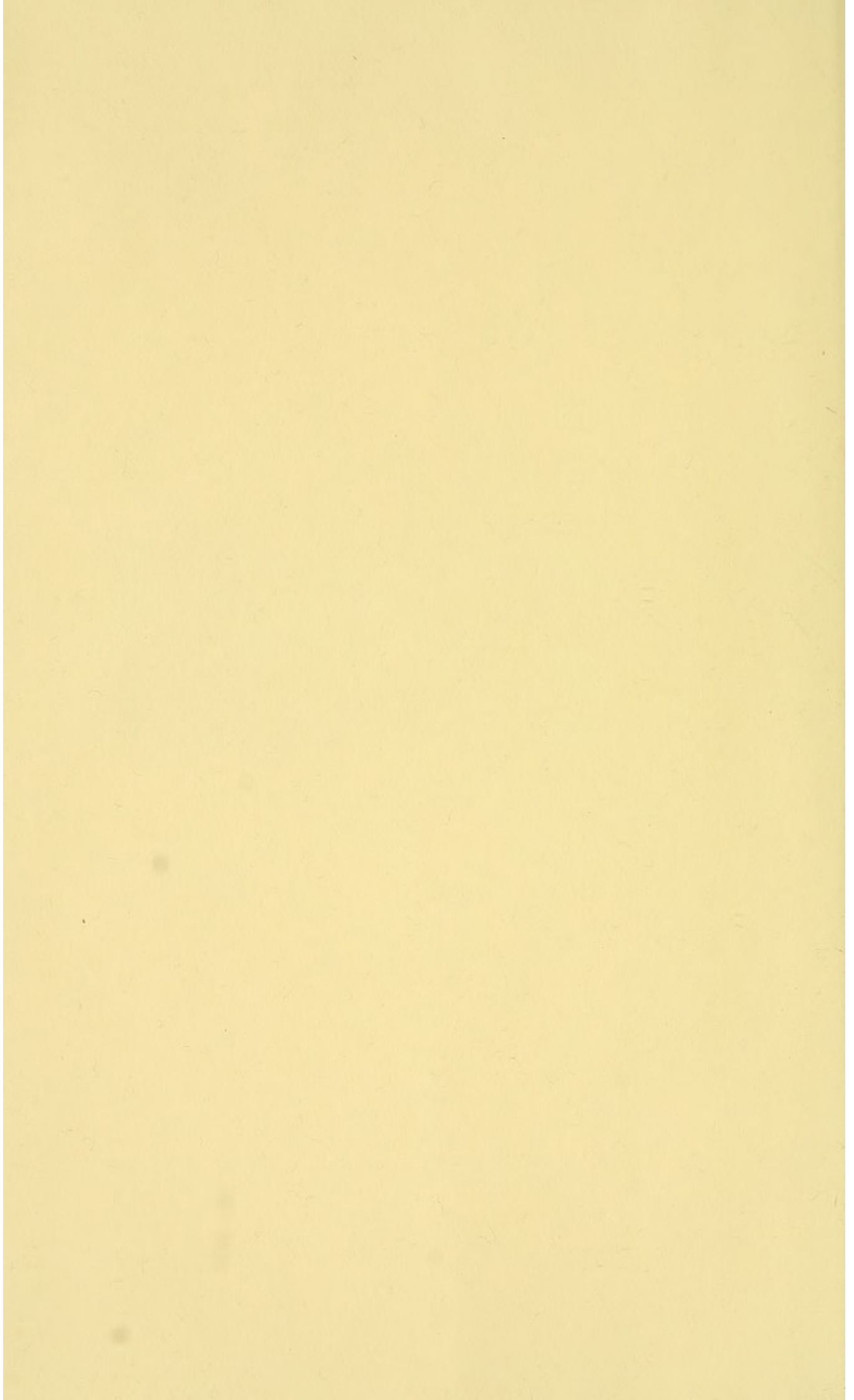
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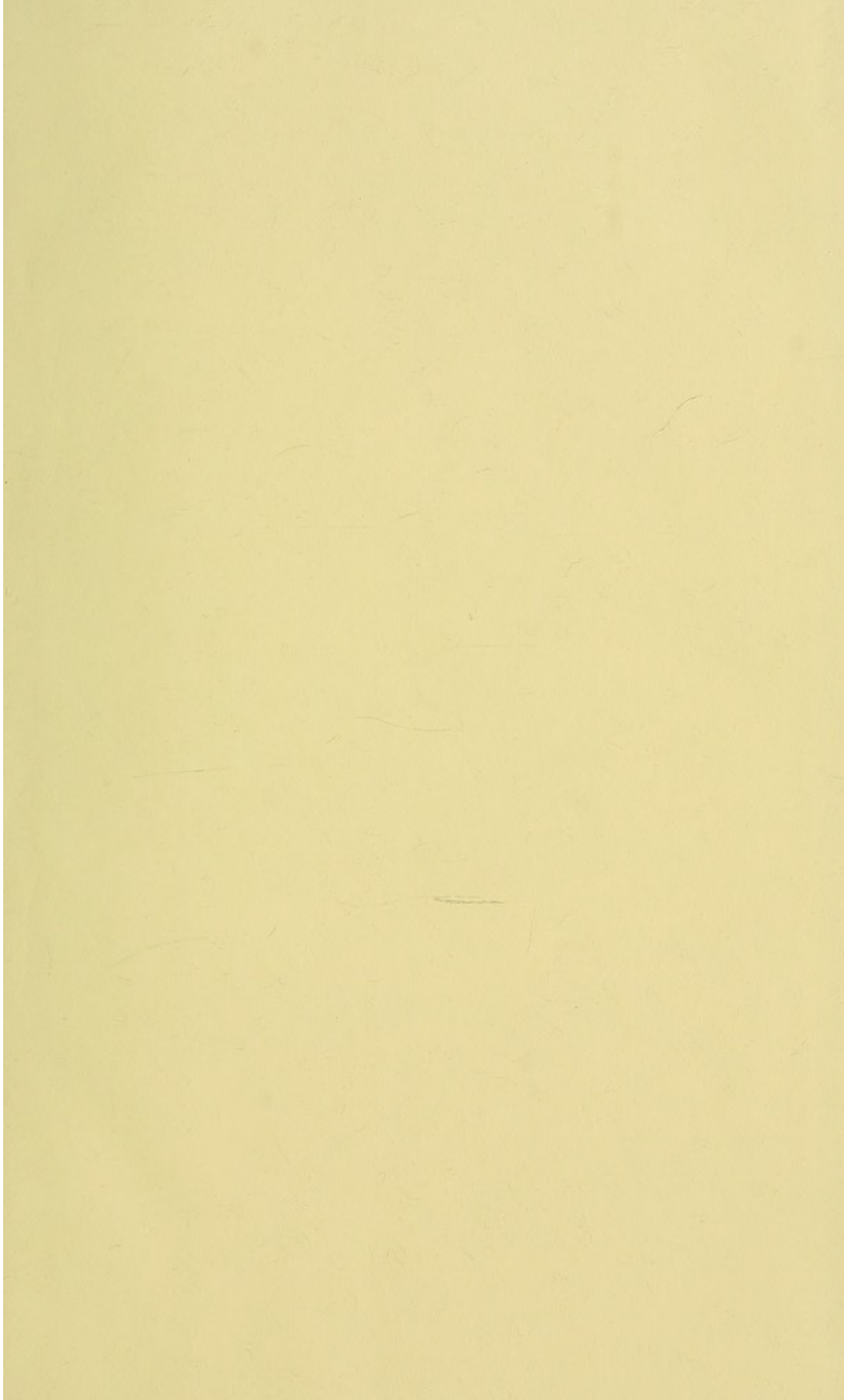
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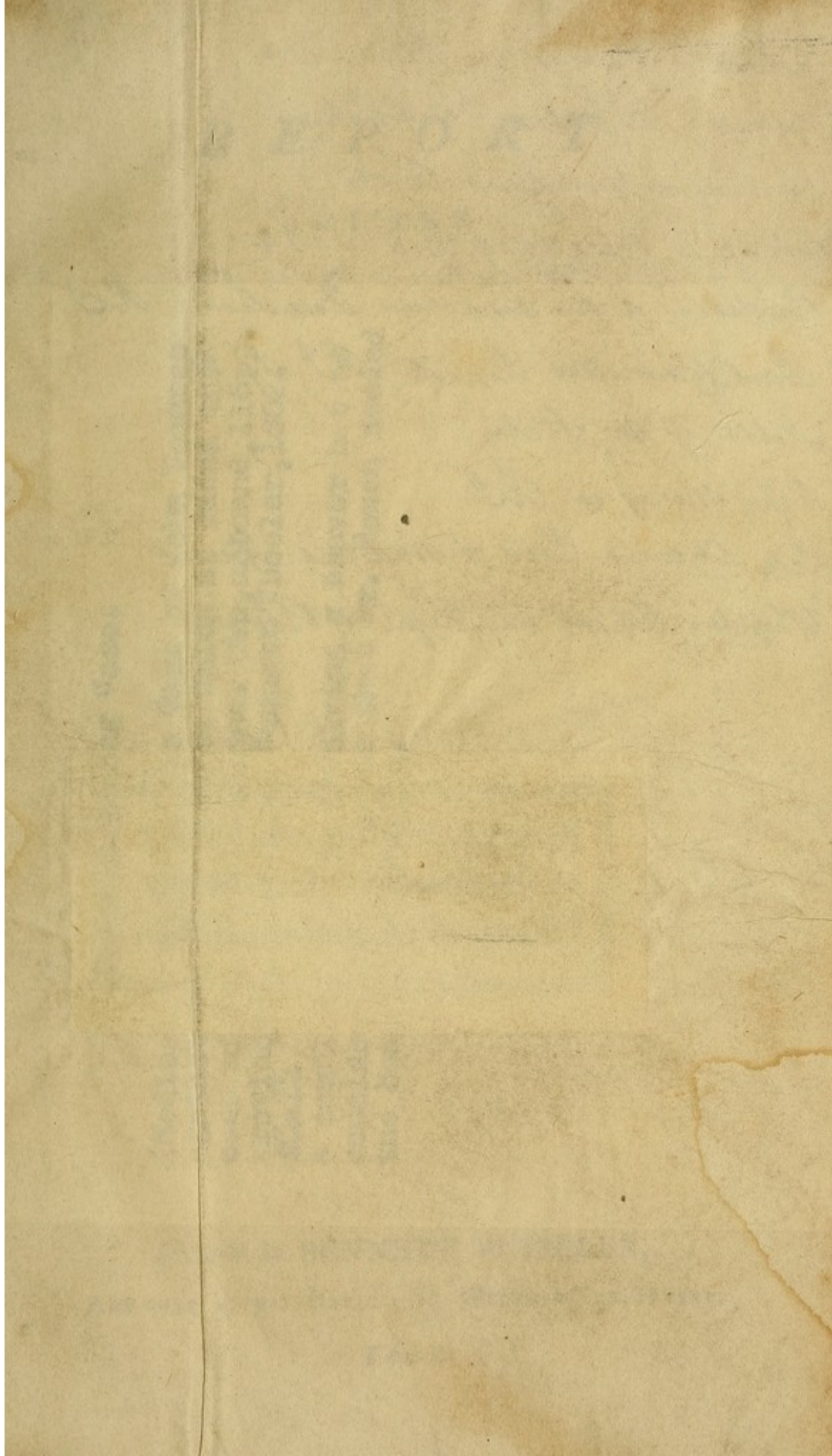








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Body-Snatching Case.

(Medical) Report of the Case of John Dorance
against Arthur Fenner; to which is added the
case of Fenner VS Dorance. 8vo, unbound, 116pp.
Providence, Printed by Bennett Wheeler, 1802.
\$2.75


A complicated case involving a beaver hat as
consideration; it seems that Dr. Bowen needed
the body for dissection.

Final - Henry vs. Donnell


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History of Providence Riots

Address to Members of R.S. 1832



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and
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172 1/2

R E P O R T

O F T H E

C A S E

JOHN DORRANCE against ARTHUR FENNER,

TRIED AT THE DECEMBER TERM, OF THE COURT OF
COMMON PLEAS, IN THE COUNTY OF
PROVIDENCE, A. D. 1801.

TO WHICH ARE ADDED,

T H E

P R O C E E D I N G S

I N T H E

C A S E

ARTHUR FENNER vs. JOHN DORRANCE.

*Carefully compiled from NOTES correctly taken by
several Gentlemen who were present during
the whole Course of the Trial.*

PROVIDENCE :

Printed by BENNETT WHEELER,

AND SOLD AT HIS OFFICE, IN WESTMINSTER-STREET;

1802.

R E P O R T

OF THE

C A S E

ANDREW BARNES, Plaintiff, vs. JOHN B. FENNER, Defendant.

TRIED AT THE BAR AND IN THE COURT OF

COMMONS IN THE COUNTY OF

32935-1-17

ANDREW BARNES, Plaintiff, vs. JOHN B. FENNER, Defendant.

PROVIDENCE:

In the year of our Lord one thousand eight hundred and...

TO THE PUBLIC.

THE principal object of the following publication is a desire to correct the strange misrepresentations of the evidence given, and the proceedings of the Court, at the trial here stated, which have been industriously circulated particularly in the country part of the State. Whatever may be our sentiments in regard to the merits of the Case, or the interests of the respective parties, we have uniformly been anxious that this work should be conducted with a strict regard to candour and correctness. It is submitted to the public, under a perfect recollection of the multitude of witnesses who are knowing to the truth, or the falsehood, of the facts here stated; and who will compare the representations here made with the transactions they saw and heard at the trial. It is also submitted, under a full consciousness, that party prejudices and interested inducements will probably seek out occasions for disapprobation and contradiction: However, as we believe that impartiality has been the constant guide throughout the whole compilation, it shall still govern, on our Part, in applying the proper corrections, when such shall be found necessary. If in the history of this long and intricate trial, conducted under peculiar circumstances of hurry and inconveniency, some errors have unwarily escaped the Compiler (or us) and shall be pointed out, they shall be candidly and cordially acknowledged and corrected.

In stating the testimony given at the trial, we believe strict precision has been observed, in giving to both the parties alike their full weight; and the
words

words of the witnesses themselves have been preserved as far as, in separating the applicable from the inapplicable, the propriety of the Case has required. The limits of the work have not permitted so full an intention of the arguments of the respective Counsel, by far, as is wished. The heads of the arguments only are laid down, and such particular declamatory effusions as seemed to wear the general colour of the whole. In reciting the different decisions of the Court, particular attention has been had to a full statement of the questions before them; and the words of the Court have been noted *verbatim*, where inferences might be equivocally drawn, and where important principles were concerned in a critical interpretation of words.

Providence, February 27, 1802.



In fixing the testimony given at the trial, we have had great attention has been bestowed, in giving to both the parties alike, the full weight of the words.



COURT of COMMON PLEAS

FOR THE

COUNTY of PROVIDENCE.

DECEMBER TERM, A. D. 1801.



P R E S E N T.

HON. DANIEL OWEN, Esq. Chief,
JOHN HARRIS,
WHEELER MARTIN, } Esquires,
DANIEL HOWARD, } JUSTICES.
ARNOLD PAIN, }



In the Case

JOHN DORRANCE vs. ARTHUR FENNER,

Ray Greene,
James Burrill, jun.
Nathaniel Searle, } Esq'rs. Counsel for the
Plaintiff.

David Howell,
Asber Robbins,
Daniel Lyman, } Esq'rs. Counsel for the
Defendant.

THIS

THIS was an Action of the Case commenced at the present Term by John Dorrance, Esq. against Arthur Fenner, Esq. Governor of the State of Rhode-Island, charging the Defendant with having, falsely and maliciously, slandered and defamed the good name, fame and reputation of the Plaintiff. The Declaration consisted of sixteen counts; the first of which charged the Defendant, that he, at " Providence, on the first day of May, A. D. 1801, then and there having discourse of and concerning the Plaintiff with divers good, faithful and credible citizens of said State, and of the United States, falsely and maliciously, openly and publicly, spoke, uttered, pronounced and published, in the presence and hearing of divers of the aforesaid good, faithful and credible citizens of said State, and the said United States, these false, feigned and scandalous words following, of and concerning the Plaintiff, to wit: John Dorrance (meaning the Plaintiff) has sold to Doctor Pardon Bowen, for the purpose of dissection, the dead body of a certain man, who hung himself in Scituate, in the county of Providence aforesaid, in the year, 1799: Which said dead body had been left in the care of the said John Dorrance (meaning the Plaintiff) by some of the inhabitants of said Scituate, to be decently buried, according to his (meaning the Plaintiff's) directions: That he the said John Dorrance (meaning the Plaintiff) had received from said Pardon Bowen a beaver hat, in payment for the aforesaid dead body, sold to the said Pardon Bowen as aforesaid, by the said John Dorrance (meaning the Plaintiff) and that the said John Dorrance (meaning the Plaintiff) had the impudence to wear the aforesaid hat on his (meaning the Plaintiff's) head, while he (meaning the Plaintiff) officiated as Moderator of a Town-Meeting of the town of Providence aforesaid." The second, third, fourth,

and

and fifth counts charged the Defendant with speaking, at other times, words of nearly the same import, varied only in the form of expression. The sixth, seventh and eighth counts charged him with having a discourse, at different times, with divers citizens, previous to the election in May, 1800, of and concerning the Plaintiff, and of and concerning his office of a Justice of the Court of Common Pleas for the County of Providence, and of the execution of said office by the Plaintiff; and in such discourse of falsely and maliciously speaking the aforesaid words, with an intent to deprive the Plaintiff of the said office, to bring him into disrepute, contempt and hatred, amongst the aforesaid citizens, and to prevent his re-election to the said office, by the General Assembly, at their Session, in May 1800.— The eight last counts charged him with having falsely and maliciously written and published, and causing to be written and published, certain false, malicious and scandalous libels, in the form of paper writings, containing the same words of and concerning the Plaintiff, and of and concerning his office aforesaid, his execution thereof, and his election thereto, in the same manner and with the same intent as declared in the eight first counts.

The Declaration, in setting forth special damages, stated, that the Plaintiff, by reason and means of the speaking and publishing, by the Defendant, said words, and of writing and publishing, and causing to be written and published the said libels, had been injured in his said good name, fame and reputation, by him gained and enjoyed among the said good, faithful and credible citizens: That divers of said citizens had withdrawn from him their esteem respect and confidence: That his said election to said office of Justice of the Court of Common Pleas was injured and affected; and that he, in the same election

tion, lost the good and legal votes of twenty of the members of said General Assembly who had good right to vote therein. The damages were laid at fifteen thousand dollars. To which Declaration, the Defendant filed the following Pleas.

“ And the said Arthur Fenner comes into Court and defends the force and injury when, &c. and as to the speaking and publishing all or any of the words; and as to the writing, or causing to be written, or publishing all or any of the said words or libels, in all or any of the counts of the Plaintiff's Declaration aforesaid, he the said Arthur saith, that he is not thereof, or of any part thereof, guilty, in manner and form as the Plaintiff, in his Declaration aforesaid, hath alledged and charged against him; and of this, &c. By David Howell, his Attorney.”

“ And the Defendant, by leave of the Honorable Court here, and according to the statute in this behalf provided, further pleads and says, as to the speaking, uttering and publishing the words mentioned and charged against the said Defendant, in the first, second, third, fourth, fifth, sixth, seventh, and eighth counts of his aforesaid Declaration, the Plaintiff his Action aforesaid thereof against him, ought not to have and maintain; but from having and maintaining the same ought to be precluded and barred; because he saith, that the said dead body in the last aforesaid counts of said Declaration mentioned, was the dead body of a stranger who died in said Scituate, and was there decently buried, by and under the direction, and at the expence of the aforesaid Town of Scituate, on the 17th day of February, A. D. 1799: That said dead body was taken up from the aforesaid place of its interment, and removed to and deposited in a certain building, in said Town of Providence, to wit; at said Providence

dence, on the 19th day of February, A. D. 1799; that at said Providence on the 20th day of Feb. A. D. 1799, a certain agreement and stipulation was made and entered into, by and between John Harris, Gideon Austin, and Joseph Knight, Esquires, Gideon Angell, Samuel Wilbour, jun. and Squire Franklin, Members of the Town Council and Agents for said Town of Scituate, on the one part; Pardon Bowen, of said Providence, Physician, on another part; and John Dorrance, of said Providence, Esquire, the Plaintiff aforesaid, on the last part, to the following substance and effect: The said John Dorrance, the now Plaintiff, then and there agreed to and with the other two contracting parties aforesaid, that he would take the said dead body into his care to be decently buried, in said Providence, under his care and direction. The said Pardon Bowen then and there agreed to and with the other contracting parties aforesaid, that he would procure a suitable coffin, and be at the expence of said funeral, to be conducted under the superintendance and direction of the said John Dorrance, as aforesaid; and that he would pay to the said John Harris, Gideon Austin and Joseph Knight, Esquires, Gideon Angell, Samuel Wilbour, jun. and Squire Franklin, Members of the Town Council and Agents for said Town of Scituate, the sum of forty dollars, as a compensation for the trouble and expence of said Town of Scituate, in the premises. And the said John Harris, Gideon Austin and Joseph Knight, Esquires, Gideon Angell, Samuel Wilbour, jun. and Squire Franklin, Members of the Town Council and Agents for said Town of Scituate, then and there agreed to and with the other contracting parties aforesaid, that in consideration of their several undertakings aforesaid, to be by them faithfully executed and performed, and of the said sum of forty dollars to them in hand paid by the said Pardon Bowen, they, the said John Harris, Gideon Austin and Joseph Knight, Esquires,

Gideon

Gideon Angell, Samuel Wilbour, jun. and Squire Franklin, Members of the Town Council and Agents for said Town of Scituate, would indemnify and save harmless the said Pardon Bowen and all others, of and from all manner of costs and damages, which might arise and fall on him or them; by means of any prosecution thereafter to be brought against him the said Pardon Bowen, or any other person or persons, by the said Town of Scituate or by any inhabitants thereof, on account of the taking up and removal of said dead body from Scituate as aforesaid; and that they the said John Harris, Gideon Austin and Joseph Knight, Esquires, Gideon Angell, Samuel Wilbour, jun. and Squire Franklin, Members of the Town Council and Agents for said Town of Scituate, would leave the said dead body under the care of the Plaintiff, to be decently buried, under his care, superintendance and direction. And the said John Harris, Gideon Austin and Joseph Knight, Esquires, Gideon Angell, Samuel Wilbour, jun. and Squire Franklin, then and there returned to their several homes, in said Scituate, fully trusting and confiding, that the several agreements aforesaid of the contracting parties aforesaid would be carried into effect, in every particular as aforesaid, in good faith and without any deceit or equivocation in any of said contracting parties. And the Defendant further in fact avers, that at said Providence, on the twentieth day of February, A. D. 1799, between the hours of 10 and 11, at night, the said dead body, without any shirt or any other covering other than its own skin and hair, was put into a straight, rough box made of pine boards, held together by nails partly driven into said boards, with room enough under their heads for the claws of an hammer to pass and easily draw them out:— Which said box and dead body was then and there put into the ground, eighteen inches below the surface and not deeper, and covered over with loose dirt.

dirt. And the Defendant further avers, that within three hours after the time last aforesaid, the said dead body was taken out of the earth, the said box being left behind, and was carried and deposited in a certain building, in said town of Providence, and then and there came to the use of the said Pardon Bowen, and was by him the said Pardon Bowen, then and there, appropriated and converted to his use as a Physician or Surgeon, and was then and there, under his superintendance and direction, dissected, the flesh and bones and entrails separated, and the bones framed again to their several places to exhibit a skeleton or anatomy of said human body. And the Defendant further avers in fact, that at said Providence, after the said dead body had been converted to the use of the said Pardon Bowen, in manner aforesaid, and within three weeks thereafter, he the said Pardon contracted with Benjamin Randall, of said Providence, Hatter, for a good Beaver-hat to be made by the said Randall, on the said Bowen's account, and at his the said Bowen's expence, and delivered to the now Plaintiff: For which said hat the said Pardon Bowen then and there paid and satisfied the said Benjamin Randall.

And the Defendant further in fact avers, that at said Providence, on the third Wednesday of April, 1800, the said Benjamin Randall delivered said Beaver-hat to the Plaintiff, who then and there accepted and received said hat, and converted the same to his use; and that he the Plaintiff then and there refused to give to said Randall, a receipt therefor, alleging that the transaction was of a delicate nature. And the Defendant further in fact avers, that at said Providence, at the said time when the said Pardon Bowen contracted with said Randall, for said hat, or on said third Wednesday of April, 1800, the said Pardon Bowen was not indebted to the Plaintiff for any cause, matter or thing, other than for
law-advice

law-advice given to the said Pardon Bowen by the Plaintiff, during the time in which he the Plaintiff held a commission, and acted as a Justice of the Court of Common Pleas for said County of Providence, and was under his oath of office as such justice, and other than for the services rendered to said Pardon Bowen, touching and concerning the said dead body's passing to the use of the said Pardon Bowen, in manner as aforesaid; for the former of which description of services, he the Plaintiff always refused to receive any pay from him the said Pardon Bowen, to wit; at said Providence. And the Defendant avers, that the Plaintiff, to wit; at said Providence, never paid, or promised to pay, or was liable to pay, to the said Pardon Bowen, any money or other valuable consideration, for said Beaver-hat, other than as by the one or by the other description of services last aforesaid. And of all the premises, the Plaintiff, at said Providence, on the aforesaid day when the said Pardon contracted with said Randall for said hat, and on the aforesaid day when said hat was delivered by said Randall to the Plaintiff, was well knowing. Wherefore the Defendant, at the said several times when, &c. did say the said several words against him the Defendant alledged and charged in the said first, second, third, fourth, fifth, sixth, seventh and eighth counts of the Plaintiff's aforesaid Declaration, not maliciously, but pleasantly, only meaning thereby, that the said Beaver-hat was for the Plaintiff's connivance and breach of trust as aforesaid: Which said words had been theretofore reported by others, as it was lawful for him to do, for the cause aforesaid; and this he is ready to verify. Wherefore, &c.

By David Howell, his Attorney."

To which Plea in Bar, the Plaintiff replied, in usual form, that the Defendant, at the several times mentioned in said eight first counts, *of his own wrong*

wrong, and without any such cause as by the Defendant alledged in said Plea, falsely and maliciously, openly and publicly, spoke, uttered, pronounced and published the words set forth in said counts; and thereon tendered an issue which was joined by the Defendant. The Plaintiff also joined the issue offered by the Defendant, denying the whole Declaration.

Pursuant to a motion by the Governor's Counsel, and the other party agreeing thereto, the Court anticipated the cause from the order of the Docket, and assigned it for trial on Wednesday, the thirtieth day of December, and the ninth day of the Term. The Cause being called, at the opening of the Court in the morning, the Clerk proceeded to empanel the Jury; and the first twelve on the list of drawn Jurors having been called and seated in their box, the parties were reminded of their respective challenges.

The Plaintiff did not seem disposed to make any challenge.

The Defendant objected to Nathan Dyer, and offered for cause, that the Juror was brother to Doctor Benjamin Dyer; and that Doctor Benjamin Dyer, at the time of the removal and dissection of the dead body, had certain pupils studying with him who were said to have been in some measure concerned in that transaction. Mr. Howell, for the Defendant, observed that a Juror, in any cause, ought to sit "neat and clean as a sheet of blank paper:" That it was reasonable to suppose that Doctor Dyer must have been somewhat interested or affected by the conduct of his pupils, and was therefore himself implicated in the business: That the Doctor's brother, the Juror challenged, must of necessity feel interested in the reputation of the Doctor,

and without doubt did entertain a partiality not only for him, but for all those to whom the Doctor himself was partial, and of course would be partial to Judge Dorrance who was so deeply involved in the affair. The Counsel in behalf of the Plaintiff observed, that the name of Doctor Dyer or any of his pupils was no where mentioned in the record of the Case: That he was in no way, directly or indirectly, interested, implicated or concerned in the cause at issue; but might have been himself, to every intent and purpose, a legal and competent Juror in this trial, and it would therefore be an absurdity in the extreme for the Court to hearken to such surmises against the Doctor's brother, to whom there could not possibly be made any legal or reasonable objection.

The Chief Justice observed, that the cause was of great importance as it concerned the reputation and feelings of the Chief Magistrate of the State. The trial had become a matter of great public anxiety, and on that account it became the Court to be vigilant and careful that the same should be conducted properly: He was therefore desirous of having "suitable men" for Jurors. He said, it was intimated from the Bar, that the Juror challenged did not come within any legal objection laid down in the books. For his part he should not strictly confine himself to any rigid maxims of Law, any precise principles stated in the Books, the common customs of this country, or the former practice of this Court; but should endeavour by every means to empanel a Jury in this Cause wholly free from interest and prejudice to the parties. The Court, after some private consultation, ordered the Juror off.

Mr. Howell suggested to the Plaintiff's Counsel, that Naaman Alorich, a Juror, was in some degree related to the family of Comstock's, to which family
the

the Governor's Wife was also related : He wished to know whether the Plaintiff on that account would object to the Juror. He was answered that the Plaintiff was disposed to trust his cause to a Jury empaneled according to the lot of the Law : That he then knew of no objection to any of the jurors who were regularly returned to serve at the present Term, and should not challenge a juror on any account but where law or practice should require ; and that to Mr. Aldrich in particular, he knew of no legal or customary objection, on account of any distant relationship that might possibly exist between him and the Governor. Mr. Aldrich appeared from the small knowledge he had of him, to be a gentleman firmly independent in mind, and wholly disinterested in the cause on trial ; and therefore he was perfectly contented with him. Mr. Aldrich was now called on to declare in what degree of relationship he stood with the Governor. The relationship however appeared to be so remote, and obscure, that neither he or the Governor were able to trace or explain it. Judge Pain declared from the bench, that he believed that the grandmother of Mr. Aldrich was sister to the mother of the Governor's wife, which made the Juror and the Governor's wife fourth cousins.* Mr. Howell then observed, that although the relationship did not come within any legal or practical rule of challenge mentioned in the Books ; and although the favour of relationship, if any, was on the side of the Governor ; yet as the other party seemed to well contented with the Juror, it seemed to betray some secret interest in him, which was a reasonable, if not a legal cause of challenge on the Defendant's side. He thereupon moved the court that the Juror be set aside.

The

* It proved that Judge Pain was totally mistaken, for it turned out, that the mother of the Governor's wife was in no way related to the Comitock family ; but that her father was really of that name.

The Chief Justice, in giving the decision of the Court, said, that he had known Jurors who were related to parties, in some instances, give their Verdict against the party to whom they were related. He had also known Verdicts annulled by the General Assembly by reason of relationship being after the trials discovered between the parties and the jurors. He was therefore of opinion with the other Justices that Mr. Aldrich should go off the Jury, which accordingly he did.

James Hammon, another Juror, was called on by the Defendant's Counsel to declare whether he had ever previously formed any opinion in this cause, or whether he had ever publicly expressed any such opinion. He answered that he did not perhaps precisely understand what might be deemed by the questioners an opinion formed in the Case. He said, he knew that the dispute which had originally caused the commencement of this action to have been a long time in agitation: That it had been continually a subject of general conversation in the town of Providence in which he belonged, and had naturally divided the citizens into different and opposite parties attached respectively to each party in the Case — That he was equally an acquaintance and friend to both parties in the Case, and had ever been, as he conceived was right, desirous that the animosities between them might subside, and that all their matters in dispute, including the Case on trial, should be settled by an amicable compromise, without any further recourse to the Law. To accomplish which desirable purpose, he had frequently joined in the current conversation upon the subject, and had several times suggested to his neighbours the beneficial consequences that might result from an attempt by disinterested persons to bring about such a settlement: That he had never been fully informed of the whole history of the dispute, nor was he precisely

ly acquainted with the grounds of complaint on either side; but from what knowledge he had acquired of the matter, he had been induced to believe that the whole dispute might possibly have been chiefly the result of passion, misinformation or political opposition, rather than real injury, on either side; and imagining that to have been the case, "*I have (said he) said that I thought neither party ought to recover very heavy damages.*" He said he was still imperfectly acquainted with the merits of the Case; was entirely ignorant on which party the blame mostly lay, and was wholly free from prejudice of any kind towards either party. The Defendant's Counsel challenged him on the ground, that he had prejudged the cause by having previously made the above decision thereon. The Plaintiff's Counsel observed, that it did not appear the Juror had ever really formed any opinion in the particular cause now in Court, nor had he ever been possessed of the facts of the cause, whereon he could possibly have formed such opinion. But if what the Juror had confessed to have said could possibly be construed into a decided opinion of the present cause, such opinion could by no means be considered as prejudicial to the Governor, because Judge Dorrance was the Plaintiff; and if the words of the Juror were to be allowed their utmost force, they could go no farther than to say that Judge Dorrance ought not "to recover very heavy damages" against the Governor. On the same side it was further observed, that the excellency of Mr. Hammoc's character rendered it desirable that he should remain on the Jury, unless substantial objections should be offered against him.

These observations however did not satisfy the Governor, and on his persisting in his challenge, the Court ordered the juror off.

Mr.

Mr. Howell then objected to Charles Low, another Juror; and for grounds of objection, suggested to the Court, that Charles Low was brother to the Wife of Charles Lippitt. That Charles Lippitt was a warm and intimate friend of Judge Dorrance, and was politically opposed to Governor Fenner, and had been heard to speak in approbation of the newspaper-publications which had lately appeared against the Governor. Mr. Howell also suggested, that Col. John Low, father of the Juror, had, some years since, been unsuccessful in a law-suit with his brother, and had attributed his ill-success to the influence of "Governor Fenner and his people." It was therefore, in his opinion, reasonable to suppose that the Juror might entertain a latent antipathy towards the Governor.

No proofs of the facts stated were however adduced.

The Juror, on being questioned, declared, that he had never in any manner prejudged the present cause. That he harboured no personal dislike whatever to Governor Fenner, and had but a very small and imperfect personal acquaintance with Judge Dorrance. He did not recollect even to have ever spoken to the Judge in his life: He further declared, that he had never before heard or thought of any suspicions his father entertained in regard to any influence of the Governor in the suit with his brother; neither did he hold any interest or concern in any attachments or antipathies of Charles Lippitt that might exist towards either of the parties in this Case. He observed that he was drawn by lot and returned by the Town of Providence, as a Juror to serve generally in the business of this Term, and he had accepted the undertaking with an intent to acquit himself of the duties thereof, to the best of his ability, according to the law of the State and the obligations

ligations he owed to society. As regarded this particular cause, he was equally indifferent and equally free from prejudice, as in any of the other causes in which he had served, and had no anxiety to sit as a Juror, or to be exempted from it. The sentiments of his heart, as well as the sacred oath he was under, forbid him to be solicitous to sit in a cause where any interest or prejudice could possibly influence his conduct; and on the other hand, where he was free from interest and prejudice, the same considerations forbid him to shrink from the performance of a duty which the law required of him, however arduous or important in itself. Such was the situation in which he stood, and as such he stood at the pleasure and disposal of the Court.

The Plaintiff's Counsel now observed, that Mr. Howell's objections to the Juror were of a singular and extraordinary nature. Ingenuity seemed to have been driven to the utmost stretch of exertion in seeking out laboured pretences and colourable surmises to effect a removal of the Juror. Mr. Low's marriage connection with Charles Lippitt by no means made him connected with Judge Dorrance. It was not in evidence that Charles Lippitt was in the least concerned with Judge Dorrance in the prosecution or event of this suit; nor was it even suggested that they were concerned together in any business or pursuit whatever. Mr. Lippitt being in no way related to Governor Fenner; his name no where mentioned in the case; no instance of his enmity towards the Governor shewn; and having no possible interest in the suit, he might himself have been, against the most rigid scrutiny, fully and perfectly competent to sit as a Juror. But on the part of Mr. Low, there was no shadow of impropriety or exception even hinted, either as regarded his sentiments, his character or conduct. His being distantly related to persons who might be supposed to entertain a
dislike

to Governor Fenner's political transactions, was an objection that would equally apply to every family in the County which had any considerable number of connections. If political opinions were to be taken into consideration, in the canvassing of this Jury, it would certainly be just that both parties should be equally indulged with the same privilege: In that case, both parties together would have cause of challenge against every Freeman in the County, and must necessarily exclude the possibility of ever being able to empannel a Jury in the case. The same Counsel further observed, that out of the thirty drawn Jurors returned to serve at the present term, only fourteen remained on the stand, besides those already excused in this trial; the others either not having attended at all, or were excused by the Court and returned home;—That it was an important right to Mr. Dorrance to preserve, if possible, the privilege of a Jury drawn by lot, according to Law. That was a mode of trial to which he was anxious to submit his cause, without regard to the political sentiments of the Jurors individually. But if unsubstantial surmises of the Defendant were thus allowed to prevail to the exclusion of a pannel of drawn Jurors, it would be necessary to supply the deficiency from a *venire* then already returned by the Sheriff. That the Sheriff, though his character as a gentleman might be without reproach, was well known to be an intimate and particular friend of the Governor, and was particularly decided and active in the Governor's views of political matters. He would therefore by no means be a suitable person to summon a *venire*, in an action against his most intimate friend. A regard to the delicacy of the Sheriff's own feelings should prevent a recourse to such a measure, while competent drawn Jurors could be possibly obtained. Such being the situation of the Sheriff, the Plaintiff held an interest in the drawn Jurors, generally: It was an interest

interest which the law gave him of right, and of which no idle, frivolous, or unreasonable surmise or suggestion ought to deprive him.

The Court, after some private consultation, dismissed Mr. Low from the Jury.

There was also another objection stated by the Defendant against Mr. Low, suggesting some irregularity in the mode of his being drawn, and in the certificate of his return by the Town-Clerk; but that objection the Court declared was overruled, and not considered in the grounds of his removal.

The pannel being thus canvassed and concluded, comprehended the following Jurors, viz.—Enos Mowry, Aretas Sweetland, Chad Sayles, John Remington, Amos Harrindeen, Nathan Walker, Stephen Hopkins, Joseph Hopkins, James Yerrington, James Arnold, George Burton, and Nathaniel Bailey.

On proceeding to trial, the Counsel did not precisely agree, as to the order of the arguments which the parties were respectively to pursue, in respect to the opening and closing of the Case; and the Court were referred to for their decision on the point. On the part of the Plaintiff it was suggested that the Defendant, though he had filed a special Plea to the eight first counts, to which the Plaintiff, in his replication had tendered an issue, yet as the Defendant had also tendered an issue to the whole Declaration, he thereby gave the Plaintiff a right to the opening and closing of the Case; which was agreeable to practice in this Court. On the other side, it was contended, that the general issue to the whole by no means deprived the Defendant of that privilege to which he was entitled, by reason of his special plea; but, Mr. Howell observing, that there were cross actions pending between the parties, in

which the order of the pleadings were similar, and whatever might be deemed a privilege in this respect would be mutual to the parties; and it was therefore immaterial which party obtained this point in the present trial. Whereupon the Court decided that the Plaintiff should have the opening and closing.

Upon this decision, Mr. Howell immediately moved for leave for the Defendant to strike out the general issue from the eight first counts; which was granted, and accordingly done. He then moved the Court to reverse their last decision, and grant the Defendant liberty to open and close the cause. The order of pleading being thus materially changed, the two issues being confined, the one to the eight first counts, and the other to the eight last, the Defendant's Counsel contended, that they were entitled to the opening and closing. After some considerable time was occupied in argument by both parties, it was ordered by the Court that the Defendant should have the opening and closing on the first issue, and the Plaintiff on the last.

Mr. Robbins, on the part of the Defendant, proceeded to open the case on the issue to the special Plea. After the declaration and pleadings were read, he observed to the Jury that their attention, on the present issue, would be wholly confined to the charges contained in the eight first counts of the Declaration, which concerned the speaking and publishing only of the words therein mentioned. He said, that in behalf of the Defendant, his general grounds of defence would be, first: That the words supposed to have been spoken by the Defendant were, in substance, true, which, in the course of the trial, would be evinced by the evidence to be produced. 2dly, that the words were not in themselves actionable, as would be shewn by authorities from the books.

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In order to prove the truth of the words, a number of witnesses were called by the Defendant; the first of whom was the Hon. John Harris, one of the Judges of the present Court, who descended from his seat, and gave his testimony, in substance, as follows :

“ On Saturday the 13th of February, 1799, I officiated as Coroner, and empaneled a Jury of Inquest, on the body of a man who had hanged himself in the town of Scituate. After the business of the Inquest was finished, the body was delivered to the care of Gideon Austin, Esq. who immediately caused the same to be decently buried, at the expence of the town. On the Monday following, I attended a Town-meeting in said Scituate, and in the course of the day I was informed, that the dead body had been by some persons taken up and carried away to Providence. After the Town-meeting was dissolved, Gideon Austin, with several others, arrived and informed me and the people present, that the body had been carried away in a sleigh; and that they, the informants, had tracked the sleigh on its way to Providence, and had followed it into the yard of Dr. Dyer. This report seemed to excite some considerable agitation in the people present, and the alarm spread, and affected the feelings of the inhabitants in general. I was requested, with several others, to proceed immediately to Providence, in order to detect the persons who had carried the body away.— On the next day we accordingly came to town, and applied directly to Gov. Fenner for his advice relative to the measures proper to be pursued. Governor Fenner was of opinion that we should apply to some authority for advice and assistance in pursuing the object of our business; and particularly recommended us to Judge Dorrance, who was President of the Town-Council, and Judge of the Court of Common Pleas. We thereupon, in the evening

of the same day, applied to Judge Dorrance, and requested of him a search warrant for the purpose of recovering the dead body. Judge Dorrance informed us, that a search warrant could not be legally executed in the night, and advised us to defer the business 'till next day. We informed Judge Dorrance that we suspected some young men, who were studying under Dr. Pardon Bowen and Dr. Benjamin Dyer, to have taken the body for the purpose of dissection; that the body was then in their possession, secreted in the store of Dr. Dyer; and that we wished to be as expeditious as possible, lest, by delay, our search might be eluded. Judge Dorrance seemed perfectly disposed to assist us in our enquiry, and after some further conversation on the subject, expressed his opinion that the whole affair might probably be satisfactorily adjusted, without resorting to the assistance of the law. He said, he was persuaded that if Dr. Bowen's pupils had conducted themselves improperly on the occasion, it was without the Doctor's knowledge or consent; and that the Doctor would willingly take measures that should again set every thing right. And for the purpose of some compromise in the case, the Judge advised us to meet Dr. Bowen, at his, the Judge's house, in the morning following; and said that in the mean time he would request the Doctor to attend. We agreed to this proposal; and in the morning we again returned to the Judge's house, but Dr. Bowen was not there. Judge Dorrance informed us that the Doctor could not then, conveniently attend to the business; but that he had seen him and conversed with him on the subject; and the Doctor was very desirous of the matter's being settled, and wished us to wait on him, at his house, for that purpose. We accordingly went to the Doctor's house, and found him at home; and after some considerable conversation, we came to a settlement on the subject, which we mutually agreed should be committed to writing.

“ The

“The substance of the agreement was, that Dr. Bowen, in behalf of the young men, should pay to us, for the purpose of defraying the expences of the town of Scituate in the premises, the sum of Forty Dollars; that he should procure a decent coffin and habiliments for the corpse, and, under the directions of Judge Dorrance, should cause the same to be decently buried in the town of Providence, which Judge Dorrance was to *see* done; and we, on our part, engaged to indemnify and save harmless the Doctor and all other persons, from all further trouble, and from all prosecutions that might be commenced by the town of Scituate, or any of its inhabitants, on account of the taking up of the dead body.”

[Here the Defendant's Counsel produced a paper which the witness declared to be, according to the best of his recollection, a copy of the agreement by them entered into, in writing, at that time.]

The Witness cross-examined.

Question by Plaintiff's Counsel. Was Judge Dorrance present at the time the agreement between you and Dr. Bowen was made?

Answer. No.

Q. Was the whole agreement, including every engagement entered into by each party, committed to writing, and signed by you and the other men who came with you from Scituate?

A. Yes.

Q. Did Judge Dorrance ever sign that written agreement?

A.

A. He never did to my knowledge.

Q. Did you understand by the terms of the agreement, that Judge Dorrance was to *see* the body buried, and became responsible for its being done, or that he only was to give directions for its burial?

A. It was agreed that he should only give directions.

Q. Did you, about that time, see Judge Dorrance, after the agreement with Dr. Bowen was made?

A. No.

Q. Had you, or those with you, any authority given you by the town of Scituate, authorizing you to proceed in any manner whatever relative to that transaction.

A. No.

Q. Were you and those with you, at that time, members of the Town-Council of Scituate?

A. No.

Q. Did you consider yourselves as being, in any manner, Agents for that town in the business?

A. We first proceeded on the business at the request of certain individuals, and from no other authority; and we governed ourselves, throughout the whole, according to our own discretion and on our own account, and did not consider ourselves as being in any manner employed by the town.

Q. Did you consider that the town of Scituate would

would be responsible for the engagements you entered into with Dr. Bowen ?

A. Not otherwise, than that we supposed the town would give their consent.

Q. *By the Defendant himself.* At the time you applied to me, previously to your going to Judge Dorrance, did I not advise, and urgently desire you to endeavour to make an amicable settlement with Dr. Bowen and the others concerned with him in that transaction ?

The Plaintiff's Counsel objected to the admission of evidence of what the Governor himself might have advised in that Case, as being impertinent to the issue on trial. They suggested that such questions were contrary to practice in this Court; and in the present Case could only be designed to give *colouring* to matters which *really* existed in a different view.

Upon this the Governor arose and declared to the Court, that his principal object in this trial was to have every fact, and every possible circumstance brought up to public view, in order that the public might fairly judge of his conduct, so far as he had been concerned in the business of the present enquiry. He wished the multitude of spectators, who crowded the galleries and floor of the house, would hearken to this his public declaration, and direct their attention to the trial, that they might be fully informed of the merits of his cause. He wished that every public transaction of his life might be proclaimed to the world; and that every deed, whether moral or political, public or private, might be, without reserve, submitted to the enquiry and scrutiny of that public, by whose judgment he wished to stand or to fall. He again looked upon the
spectators,

spectators, and again implored the attention of all those who were "within the hearing of his voice;" and solemnly submitted the cause to their candour, their judgment and *feelings*.

Whereupon the Chief Justice, after privately consulting with the Court, said, "It is the opinion of the Court that the witness tell all he knows." And desired the witness to proceed. He answered, that the Governor did give them some such advice as he mentioned.

Question by the Defendant's Counsel. Did you ever hear the story of Judge Dorrance's selling the dead body for a Beaver-hat, reported by any of the inhabitants of Scituate, or by any other people?

The Plaintiff's Counsel now objected to this question being answered by the witness; and further moved the Court, that the Defendant be not permitted to go into evidence to prove any hearsay report, that might have been circulated, relative to the issue on trial.

The Defendant's Counsel opposed the motion; and to shew the propriety of permitting such evidence, suggested, that their object was to prove that Governor Fenner did not himself originally fabricate the story of which he was charged; but that it had been a matter of current report and belief, throughout the country, long before Governor Fenner was ever heard to repeat it; which if they should be able to prove, Governor Fenner would be totally exculpated of the slander.

The Plaintiff's Counsel contended that such kind of evidence was illegal and improper. They suggested that testimony concerning such vague and general rumours could answer no purpose towards
decidealy

decidedly convincing the Jury, that Governor Fenner might not have been himself the original author of such rumours and reports. They further contended, that supposing Governor Fenner should be able to prove that the story originated from other people, if the Plaintiff should prove that the Governor repeated the same story, as being true, and with an intent to injure the Plaintiff, he would be no less culpable than if he had first invented the story himself. To establish this principle, they recited an authority from Espinasse, N. P. Page 517: Bull. N. P. 10. Where it is said, that "it is no justification of slanderous words that the Defendant heard them from another person, if he repeated them; for every one is answerable for the slander which he himself propagates of another." And a Case was there recited of words spoken in consequence of their being read from a letter written by another person; in which case the Defendant was held to be unjustifiable.

The Court were finally called on, by each party to decide whether the evidence should be admitted or not. The Chief Justice, after some considerable consultation in private, declared, "*It is the opinion of the Court, that the witness go on, and tell all he knows.*"

The Plaintiff's Counsel then desired the Court to give a regular decision upon the motion before them. They observed, that the motion involved a principle of the highest importance, as regarded the rules of evidence; and that the disposal of the present question would create, or establish a precedent, that must govern, in the like circumstances, thereafter.

The Defendant's Counsel insisted on the witness^b proceeding in his testimony, without any further interruption.

The Plaintiff's Counsel again called for a decision.

The Court again whispered for some length of time, as was supposed, upon the subject. The Chief Justice again repeated, "*It is the opinion of the Court, that the witness go on and tell all he knows.*"

The Plaintiff's Counsel then asked the Court, if no formal decision was to be given on the motion. To which enquiry the Court made no answer.

The Defendant's Counsel then repeated their question to the Witness, relative to his hearing the aforesaid Report. He answered that he had frequently heard the story reported in the Town of Scituate ; but at what times, or by whom in particular reported, he could not say. He could remember in particular that Governor Fenner had told him the story ; and was positive that he never had heard the story, from any person, previous to the month of May, 1800.

The next witness for the Defendant was GIDEON AUSTIN, who testified, in substance, as follows : " I was appointed to bury the dead man which I accordingly did, on Saturday, the 13th of February, 1799. On Monday following, I received information that the body had been taken up, the preceding night, by some persons, and carried away towards Providence. I immediately set out, with several other persons, and followed a sleigh-track from the grave to Providence, into Dr. Dyer's yard. We went in the first place to the Attorney-General's house, but he was not at home : We then went to Judge Dorrance's house, and he was not at home : Whereupon we went to the Govern-

our

our business. The Governor referred us back to Judge Dorrance for advice and assistance; but Judge Dorrance not being at home, we went to Dr. Bowen's house, and he was also gone from home. We then went to the young men whom we supposed to have taken the body, and I charged them pre-emptorily not to suffer the body to be dissected. Afterward we returned to Scituate, where we arrived just as the Town-Meeting was broken up. We found the people there much irritated and alarmed at the transaction. I was desired, with several others, to return to Providence, and make further enquiry in the case. The next day I accordingly came with Judge Harris, and others, to Providence. We waited on Judge Dorrance for his assistance, and requested of him a search warrant, in order to recover the dead body. But our application being in the evening, Judge Dorrance advised us to wait 'till the next day, as it would be illegal to serve a search warrant in the night. He said he would send for Dr. Bowen that he might meet us at the Judge's house next morning, in order that the affair might be compromised amicably and properly. In the morning we returned to Judge Dorrance's house, but Dr. Bowen not being there, Judge Dorrance informed us that Dr. Bowen had been prevented from coming, but desired to see us at his own house. We went to the Doctor's house and found him at home; and after acquainting him with the import of our business, he wished to know of us what we desired to have done in the case. After some conversation, I proposed that the body should be carried back to Scituate, and there buried, as decently as it was at first, at the expence of those who took it away; and that the town of Scituate be satisfied for the expences they had already been at. Dr. Bowen assured us, that he had no interest or concern in the dead body, or in bringing it away: That he had never seen the body,
and,

and, probably never should ; but as his young men appeared to have assisted in the transaction, he was disposed, in their behalf, to do every thing reasonable towards a satisfactory settlement. He observed, that it was probable the young men would not willingly be prevailed on to carry the body back themselves ; and proposed that we should convey the body ourselves to Scituate, and engaged to pay us therefor. This proposal we did not agree to. After some further discourse on the subject, we stated to the Doctor the sum of money we would take, and the measures we were willing should be pursued in regard to the dead man ; to which the Doctor finally agreed. The agreement was, that Dr. Bowen should pay us forty Dollars ; should cause the man to be decently buried in Providence, under the directions of Judge Dorrance, and should pledge his word that the body should there lie undisturbed. We then agreed that the terms of agreement should be committed to writing and signed by ourselves and several other persons who had come from Scituate, on the same business ; and for the purpose of executing the writing, we concluded to meet, the same day, at Hoyle's tavern, where all those who were to sign the paper would attend. Whereupon Dr. Bowen met us at Hoyle's, according to appointment, and there we executed a written agreement containing the whole of our engagements, according to the understanding of the respective parties. Dr. Bowen then informed us that he had conversed with Judge Dorrance concerning the part he was to perform in the agreement, and that the Judge had consented to the undertaking."

[The witness perused the copy of the agreement, in the Defendant's possession, and declared it to be, in his belief, correct.]

Cross

—
Cross-examined.

Question by Plaintiff's Counsel. Was Judge Dorrance present when the agreement was made ?

Answer. He was not present when the agreement was made, nor when it was signed ; neither did I see him afterwards.

Q. Did you consider Judge Dorrance as a party to the agreement ?

A. I did not.

Q. *By Defendant's Counsel.* When did you first hear the story of the dead body's being sold for a Beaver-hat ?

A. I do not precisely recollect, but believe it was about the first of May, 1800. At that time the Governor asked me concerning the agreement, and I gave him a copy of it, which I believe to be the same copy here produced. I do not remember when first I heard the story concerning the Beaver-hat.

The next witness examined was JOSEPH KNIGHT. He repeated the testimony of Gideon Aultin, so far as he was knowing to the same, with but little variation. He said he was present when the agreement was made with Dr. Bowen, and was one who signed the writing : That Judge Dorrance was to give directions concerning the manner of burying the body ; and from the terms of the agreement, he at the time, understood that Dr. Bowen was responsible for the body's remaining in the ground undisturbed. On being questioned, he said he never heard the story reported of the body's being sold, till some time *last* spring. The

The Defendant's next witness was GIDEON ANGELL. He testified to the following purport. "Mr. Austin had the care of the burial of the man, which was done on Saturday, the 13th of February, 1799. On the same day, after the burial, two men arrived at Scituate, and desired to examine the body, in order to ascertain whether it might not be a certain person of their acquaintance, who lived at some distance, and had been for some time missing. The body was immediately dug up for their inspection, but proved not to be the person they sought for, whereupon it was again committed to the same grave. During the time of the burial, a young man, supposed to belong at Providence was observed to be present. This circumstance excited suspicion in some, that there were intentions to privately take the body away; and that this young man had been sent for the purpose of discovering where the body was to be laid. With the expectation of such an attempt, and for the purpose of preventing its success, the grave was watched by the inhabitants, during the first night after the burial. But, on the night following, being Sunday night, the grave was not watched, and in the course of the night the body was taken up and carried away. I was one of the persons who followed the track of the sleigh to Providence, and with Mr. Austin and others, consulted the Governor on the subject. I was also present the next day, at Dr. Bowen's house, when the agreement was entered into. I recollect, at that time, that the Doctor observed that he had never seen the body, and had no concern, directly or indirectly, about it. The Doctor further observed, that the body had by that time, probably, become putrid, and unsuitable for anatomical purposes, if there were no objections to its being so appropriated. He was desirous the body should be again buried, and all difficulties cease. The agreement was finally concluded in the manner testified by the other witnesses."

Question

Question by Defendant's Counsel. Did Dr. Bowen first mention Judge Dorrance as the person to give directions for the burial?

A. I am not certain whether the Doctor, or another person, first mentioned Judge Dorrance, but the Judge was finally agreed upon.

Q. Did Dr. Bowen agree that the body should remain in the ground undisturbed?

A. Yes.

Q. When did you first hear the story of the body's being sold for a Beaver-hat?

A. I cannot positively recollect the time.

Question by Plaintiff's Counsel. Did you see Judge Dorrance after the agreement was made?

A. No.

SAMUEL WILBOUR, jun. "I came with the others to Providence, in search for the dead body. I did not go to Judge Dorrance's 'till after the conversation with him, which was mentioned by the other witnesses, was concluded. I went with them to Dr. Bowen's and was present when the agreement with him was made. Dr. Bowen was willing to cause the body to be delivered up, and was urgent that it should be returned to Scituate to be buried. He requested that we ourselves would undertake the conveying of the body to Scituate, and burying it, for which he offered us a sum of money; and observed that it would not, in his opinion, be prudent for the young men themselves to return to Scituate with the body, as they would probably be

in danger of violence from the resentment of the people. It was however agreed upon in manner testified by the former witnesses. Dr. Bowen agreed to bury the body "and let him lie and remain." I was one who signed the agreement." The witness did not remember when first he heard the report of Judge Dorrance's selling the body.

Question by Plaintiff's Counsel. Do you know what expence the town of Scituate suffered on account of the burial of the dead man?

A. No.

SQUIRE FRANKLIN, related the history of the two journies from Scituate in nearly the same manner as the witnesses had done before. He said, "Dr. Bowen proposed that the body should be returned to Scituate, in the night, and that we should assist in burying it; but we did not agree to the proposal. We finally came to an agreement that Dr. Bowen should defray the expences of the town of Scituate already incurred: That the body should be buried in Providence, under the direction of Judge Dorrance, in as decent a manner as it had before been in Scituate, and that the body should lie undisturbed. The Doctor enquired of us what the expences of the town would probably amount to? Judge Harris took a pen and ink, and after making some calculation upon paper, answered, that the expences amounted to about Forty Dollars, which the Doctor afterward paid. At the time the agreement was executed at Hoyle's, Dr. Bowen was present and informed us that he had seen Judge Dorrance who had accepted the undertaking as was proposed in our agreement." The witness said he had frequently heard the story of the Beaver-Hat reported in Scituate, but could not recollect by whom or at what time.

Cross

Cross-examined.

Question by Plaintiff's Counsel. Was Judge Dorrance present with you at any time in the course of the agreement?

A. He was not.

Q. Were Judge Dorrance and Dr. Bowen both together, present with you and those with you from Scituate, at any time in the course of the whole transaction?

A. No, they were not.

Q. Was you, or any of those with you authorized or employed by the town of Scituate to transact any part of that business?

A. No.

EZEKIEL KING testified to the execution of the agreement at Hoyle's, in the same manner as before related. He said Dr. Bowen agreed that "the man should lie." He said he had heard the report of the Beaver-hat, but when or by whom he could not tell.

The next witness called by the Defendant was BENJAMIN RANDALL. The substance of whose testimony was as follows: "I was called on by Dr. Pardon Bowen, and by him requested to make a good Beaver-hat, on his account, for Judge Dorrance. I then told him that I had not then on hand suitable fur for that purpose; but that I expected some soon from the northward, and as soon as I could obtain the fur I would make the hat. But more than a year elapsed before the hat was finished, by reason of my not obtaining the

fur before. As soon as the hat was finished, I sent it by my son, and at the same time directed my son to get of Judge Dorrance, either a receipt for the hat, or an order upon Dr. Bowen for the amount; but my son returned without obtaining either. Judge Dorrance, however, in the course of the same day, as he was passing my shop, called at the door and informed me, in the presence of Resolved Smith, John Beverly, William Brownell and Randall Briggs, that he had received the hat of my son, and that my son had requested of him a written acknowledgement of the same; and further said, as near as I can recollect, that the business between him and Dr. Bowen being of a *delicate nature*, he did not like to commit any thing to writing in order to charge Dr. Bowen with the hat. Judge Dorrance and John Beverly, while at my shop, soon got into a high dispute concerning an execution on which Beverly had been, a little before, committed to goal; in which transaction, Beverly accused the Judge of being concerned; and in the course of this dispute, many harsh and provoking terms were used on both sides, 'till Beverly hinted to the Judge, something of "the Beaver-hat." Judge Dorrance asked him, "what Beaver-hat?" Beverly replied, "the one on your head, for ought I know; if you want to know further about it go to Scituate." Soon after this the Judge departed from the shop."

Question by Defendant's Counsel. At what time did Dr. Bowen first speak to you for the hat?

A. I believe it was toward spring in 1799; probably in February or March,

Cross-examined.

Question by Plaintiff's Counsel. Do you know for what

what consideration Judge Dorrance received the hat of Dr. Bowen?

A. No.

Q. Do you know of any connivance of Judge Dorrance, or any improper understanding between him and Dr. Bowen, relative to the digging up of the dead man?

A. I do not.

Question by the Defendant. Did Dr. Bowen ever ask you any thing relative to the time when he first spoke to you for the hat?

The Plaintiff's Counsel objected to this question's being answered by the Witness, because Dr. Bowen was then present, and was the proper witness to enquire of concerning what he might have said to Mr. Randall.

The Defendant's Counsel contended that the evidence should be given by the present witness, as the object of the question was to shew, that Dr. Bowen had laboured and managed the witness in order to induce him to qualify the testimony he should give at this trial. Whereupon the Court ordered the witness to proceed in his answer.

A. Dr. Bowen, sometime since, met me, near my shop, and asked me whether I could remember in what season of the year it was when he saw me, in the street, near the Turk's Head, and first requested me to make the hat for Judge Dorrance. I answered him that I thought it was then cold weather. He replied, that he thought it might be in the summer.

Question

Question by Plaintiff's Counsel. Did Governor Fenner ever ask you any questions similar to those you have now mentioned of Dr. Bowen ?

A. Yes, I think he has. I remember that, after the meeting of Judge Dorrance and John Beverly, at my shop, John Beverly, Resolved Smith and myself were at the Governor's house. We there had conversation with the Governor concerning an execution on which Beverly had been committed to gaol, which execution had been issued in consequence of a suit in which Beverly, Smith and myself were all in some measure concerned ; and in which we entertained some dislike toward Judge Dorrance for the part we supposed him to have taken. In the course of the conversation, Beverly introduced the story of Judge Dorrance's felling the dead body for a Beaver-hat, as an additional circumstance to the business of the execution, against the character of Judge Dorrance. The Governor enquired of us particularly relative to the Beaver-hat, and we gave him all the information we possessed on the subject.

Then followed the testimony of JOHN BEVERLY. This witness, in order to stipulate with the Court for their protection against any prosecution he might subject himself to, on account of any thing he should testify to, which would criminate himself, proceeded to relate a story, particularly to the Court, to the following purport :

“ Some years since, I think about the year 1794, I was indebted to one James Atwood, to the amount of four or five hundred dollars, for goods received at his store ; and in order to secure the payment of which, Gershom Jones signed a note with me, payable to Atwood. This note was afterward

put

put in suit against Jones and myself. Judgment was obtained thereon and execution issued; but the execution expired without being satisfied, by reason that Nehemiah Knight, Esq. then Sheriff of the county, to whose hands the execution was committed for service, for some reason or other, did not make service of the same. A suit was thereafter commenced in the name of James Atwood as Trustee to Judge Dorrance, against Benjamin Randall as bail for me, in the former suit, for the amount of the same debt. Whereupon Randall, for his own security, caused me to be arrested and confined in gaol, 'till he should have an opportunity of surrendering me in his own discharge, which he accordingly did, before final judgment was obtained against him. I was then committed again to goal, by order of the Court, on the original judgment, and there remained 'till I availed myself of the law of the State permitting me to swear out of goal. I then supposed that Judge Dorrance had become possessed of the property of the judgment, and in the suit against Randall made use of Atwood's name as a necessary measure for recovering the debt: But I since have discovered that Gershom Jones was then the real owner of the judgment, by having privately satisfied Atwood therefor: That he was the cause of the suit being commenced thereon against Randall, and had made use of Judge Dorrance's name, in a fictitious assignment, in order to recover the debt from Randall, or from me, from whom it was wholly due; so that Judge Dorrance was entirely free from any active part in the business.

“ Soon after I had sworn out of goal, some irregularities were discovered in the transactions relative to my discharge therefrom, and another suit was immediately commenced, in the name of James Atwood as Trustee to Judge Dorrance, against Resol-
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ved Smith, who was then keeper of the goal, for the amount of the debt on which I had been committed. In this Action, judgment was finally obtained against Smith for the amount of the debt, by that time increased to a sum much larger than the original amount. Smith being thus unfortunately involved in a heavy debt, preferred a petition to the General Assembly for relief. An Act of the General Assembly was passed, discharging Smith of the Debt, and directing that execution should issue, on the same judgment for which I had been imprisoned, against Gershom Jones and me. The execution was accordingly issued, and Jones and I committed thereon to gaol. Jones immediately left the goal on a thirty per cent. bond, and I remained imprisoned till I was discharged by an act of the General Assembly, staying all civil proceedings against me, in consequence of a petition I have now pending before them for the benefit of the Insolvent Act.

“I had thus repeatedly been imprisoned, and persecuted with the vexation of law-suits, wherein Judge Dorrance’s name continually appeared, till I had conceived a hatred against him the most violent and implacable; and became resolved to stigmatize his character to the utmost gratification of rage and revenge. About the time when Smith’s petition was granted by the General Assembly, I related to the Governor, at his request, an account of the whole transaction relative to the Atwood business, and he then desired me to commit the whole story to writing for his use. I accordingly began the task, partly to gratify the Governor and partly with a desire to publish to the world what I then conceived to be Judge Dorrance’s injurious treatment towards me, and also the misconduct of others whom I suspected to have connived with and assisted him. I proceeded in my history, colouring the conduct of Judge Dorrance

rance in the most exaggerated and aggravated terms, till I had written many sheets of paper. In addition to the account of those law-suits, I collected every circumstance of Judge Dorrance's life, which I could discover to have been reported to his disadvantage; and as one of those circumstances, I made use of the story which I am now called on to testify concerning his felling the dead body for a Beaver-hat."

After the witness had obtained an assurance of the influence of the Court for his protection, he addressed himself to the Jury, in substance as follows :

"The Governor had desired me to commit the story of the Atwood debt to writing for his inspection, which I accordingly did. As Judge Dorrance was the principal character in my story, and the foremost object of my wrath, I sought for every thing which I thought might plausibly appear against him; I even surmised and *guessed* at many things and inserted them without any authority whatever. About three weeks after a report was circulated of a dead man's being brought from Scituate to Providence, and after being buried under Judge Dorrance's orders was dug up. I happened to have some conversation with Benjamin Randall relative to the law-suit with Atwood, in which his name was frequently used. In the course of this conversation, Randall informed me that he had been requested by a *Doctor* to make a Beaver-hat for Judge Dorrance, and one of us (I do not remember which) immediately suggested the idea, that this hat must have been a consideration for Judge Dorrance's conniving at the digging up of the body. As we were sitting by the fire together, *we guessed* between ourselves that this was "like enough the case." Randall *surmised* some things and I *guessed* at others, till, in our imaginations, we pretended to have unravelled another scandalous sto-

ry against Judge Dorrance. This I conceived to be a valuable acquisition to my history of Judge Dorrance's conduct, and accordingly improved it to the best advantage. Soon after this, Benjamin Randall, Resolved Smith and myself were at the Governor's house. The Governor enquired of me respecting the Atwood business, and I presented him with the writing, containing that story, and also informed him of the circumstances which had been surmised concerning the dead body and Beaver-hat. Randall and I informed the Governor of our suspicions respecting the hat, *and of our reasons why we suspected.* The Governor then declared to us, that he had never before heard any thing of the story of the Beaver-hat, and further enquired particularly of us respecting the transaction; but all the information we gave him on the subject was by way of "*guess.*" Some time in April, 1800, soon after Randall removed from North-Providence to Providence, I was at his shop, and he mentioned before me, and several others, his having finished Judge Dorrance's hat and sent it to him. In the course of Randall's narration Judge Dorrance stopped at the shop-door, and informed Randall that his (Randall's) son had brought him a hat, and had requested of him a receipt or an order; but that he did not give the writing, as he thought it was unnecessary, because the hat was to be charged to Dr. Bowen; and added, that he did not like to give any writing in the business, because the matter was of a *delicate nature*, and further said he had rather Randall would take the hat back, than that he should be obliged to draw upon Dr. Bowen for that which was designed as a present. In the mean time, I, in order to irritate Judge Dorrance, began relating to William Brownell, who was present, the circumstances concerning Judge Dorrance's conduct in the Atwood law-suit, and the history I had been writing of the
same.

same. Judge Dorrance, overhearing my conversation with Brownell, (as I intended he should) addressed himself to me, and told me, that if I had written any thing against him, as related to the Atwood business it was totally a falsehood, for he had had no personal concern whatever, directly or indirectly, in any part of that affair. This speech irritated me, and I retorted the falsehood. We continued the quarrel for sometime, mutually accusing each other in harsh and provoking language; and in the course of this turbulent conversation, I, in my anger, accused the Judge of sundry instances of misconduct, till after I had run over my whole catalogue of accusations, I hinted to him "the Beaver-hat." The Judge asked, "What hat?" I answered him, "the one on your head for ought I know, and for further particulars you may apply to the town of Scituate?" The Judge however seemed not to understand my meaning; and we soon after parted."

Q. By the Governor. Did you not understand, at the time I requested you to write that story of the Atwood execution, that my object was to procure an accommodation upon that subject?

A. There was something of an accommodation mentioned at the time.

Q. By the same. Did I, at the time you and Randall and Smith were at my house, discover any enmity towards Judge Dorrance?

A. I did not observe that you did; at least you did not discover it to me.

Cross-examined.

Q. By Plaintiff's Counsel. Have you any knowledge

edge of Judge Dorrance's selling the dead body for a Beaver-hat?

A. I have not.

Q. Have you any reason to believe that he sold the body for a hat? <

A. No.

Q. Did you first suggest the idea to Randall, that the hat was given for the body, or did Randall first suggest it to you?

A. The first word that ever passed between us, was while we were sitting by the fire together.— Randall first mentioned his making the hat; but which of us first suggested its being a consideration for the dead body, I do not recollect. For the same reasons that I had been busy in accumulating matters against Judge Dorrance for my history, I anxiously seized on this story as a new occasion against him. Randall “guessed,” and I “guessed;” we both understood each other, and neither of us cared much about the real truth of the grounds of our guessing. I was for avenging myself at any rate, of Judge Dorrance.

Q. Did you, at the time you told the Governor this story, tell it to him as a matter of fact, or of guess only?

A. I told him the whole story as a matter of guess and surmise; and at the same time told him of the manner in which Randall and I had hinted imaginary circumstances to each other, till we had contrived up the story between ourselves, and concluded to report it as a plausible truth; and from what the
Governor

Governor has told me, I do not think that he ever had any other information on the subject than what Randall and I communicated to him.

Q. Had not you and the Governor, previous to that transaction, been at variance with each other, and about that time became reconciled?

A. The Governor and I had not till then spoken to each other for nearly a year and a half: but at that time, of his own accord, he proffered a reconciliation, which I accepted, and was employed by him in the transactions I have related.

Q. *By Defendant's Counsel.* While you and Randall were guessing on the subject of the Beaver-hat, which of you guessed first?

A. I suppose it was he who thought of it first.

The next witness called was RESOLVED SMITH. This witness related the quarrel between Judge Dorrance and John Beverly, at Randall's shop; and also the conversation between Judge Dorrance and Randall, concerning the receipt or order for the hat. He further testified that he was several times at the Governor's house, in company with Beverly and Randall, and there heard several conversations relative to the dead body's being sold for a hat. He supposed that the Governor received all his information, on that subject, from Beverly and Randall, at the several times while the witness was present at the Governor's house. On being questioned, the witness said he had frequently heard the story reported in the town of Providence, and at other places.

JAMES ALDRICH. "Sometime in April 1800,
while

while I was at the Governor's house John Beverly and Benjamin Randall came in, and in the presence of the Governor and me, related the story of Judge Dorrance's selling the dead man for a Beaver-hat; and after the story of that transaction was finished, Beverly added, that Judge Dorrance had the impudence to wear the same hat on his head in Town-meeting, while he officiated as Moderator thereof. A few days after this, I was at the General Election at Newport, where Judge Dorrance also attended. He and I had there some conversation relative to the story then circulating, concerning his conduct in selling the dead man. The Judge observed that it was an absolute falsehood, invented, as he supposed, by John Beverly and Benjamin Randall, for the purpose of gratifying their malignity and resentment. He informed me that the hat was a present from Dr. Bowen, for services rendered in the settlement of Mr. Ward's estate. I have frequently heard the story in the country; and the person from whom I first heard it, I think was Resolved Smith; which, to the best of my remembrance, was not before April, 1800."

JOB RANDALL. "In April, 1800, I was at the Governor's house, and saw John Beverly and Benjamin Randall there. Beverly related the story of the dead body and Beaver-hat, and said that he believed that Judge Dorrance sold the body for the hat; and Randall also said he was of the same opinion. From the Governor's conversation, I had reason to think he had no information on that subject but what he received from Beverly and Randall. I had myself heard the story from Resolved Smith, about a week before I was at the Governor's, and have since heard it at sundry times."

THOMAS HAZARD. "In April, 1800, I was

was at the Governor's house while Beverly and Randall were there. Beverly, in my presence, read to the Governor a long story against Judge Dorrance, about an execution in which James Atwood, Resolved Smith and others were concerned. At the same time a conversation arose between the Governor and these men, concerning the digging up and selling the dead man for a hat. These men represented that Judge Dorrance had undertaken to see the man decently buried, but instead of performing the engagement, had had a sham funeral, and corruptly permitted Dr. Bowen to take the body and dissect it; and many observations were made on the subject which I do not recollect. After these men were gone, I conversed with the Governor on the subject of their conversation about the dead man; and he appeared to be much irritated with the transaction, and made use of many harsh and violent expressions. He said the people of Scituate might possibly reflect on him for some negligence he might be supposed to be guilty of. He said, "*if this is true*, Dorrance is no more fit for a Judge than the Devil." The story however appeared to be new to the Governor."

ESEK SMITH testified, that Resolved Smith was at his house in September or October, 1800, and related the story to him, which was the first time he ever heard it. He added, that little had ever been said about it in the neighbourhood where he belonged; but in Scituate, he had, since the information of Resolved Smith, heard the story many times."

DOCTOR ANTHONY testified, that he heard Dr. Benjamin Dyer inform a man by the name of Williams, that the bones of the dead man, after he was dissected by Pardon Bowen, were sold for *Five Dollars*

Dollars; and that he (the Dr.) paid *seven dollars* on account of his young men having been concerned in the business.—The witness first heard the story of selling the body in May, 1800.—[See Dr. Dyer's testimony.]

RICHARD ANGELL. This witness testified, that the young men who brought the body from Scituate stopped at his house, while on their way to that place. Among these young men he observed one who had stopped there in the evening after the man was buried at Scituate. While they were at his house, the witness heard one Anthony, who drove the sleigh for them, say, that he was to have ten dollars for his services. He heard the young men say they were then going out to Fish's tavern. The witness said, he afterward heard the body was brought to Providence, there again buried, dug up, and sold by Judge Dorrance for a Beaver-hat; and that Judge Dorrance wore the hat on his head in Town-meeting; but did not remember the exact time when he first heard the report.

RICHARD RHODES. This witness testified that he was coming from Scituate to Providence, and overtook the Scituate men in their first pursuit after the dead body. He went with these men to the Governor's house; and the Governor in his conversation with them, seemed desirous that the matter might be settled. The witness had since heard, in Scituate, the story reported of Judge Dorrance's selling the body for a hat; but he never believed the story, nor did he think enough of it to ever report the story to any person himself.

STEPHEN DAVIS. He testified, that in April or May, 1800, he first heard the story from Resolved Smith. He had since repeatedly heard the story

story, but knew nothing of the truth of it himself.

SAMUEL WILBOUR testified, that he first heard the story from James Aldrich, but at what time he did not recollect.

PARDON ANGELL thought he first heard the report at the Town-Council of Scituate, in April, 1800; but from whom he did not remember.

JAMES ANDREWS. "In April, 1800, I was in Providence, and saw John Beverly. He told me the story of his dispute with Judge Dorrance relative to the law-suit of Resolved Smith; and at the same time informed me of the circumstances relating to the dead body and Beaver-hat. I have frequently heard the report since."

WILLIAM RHODES heard the story of the Beaver-hat in April or May, 1800; but from whom he did not know. He knew nothing of the subject himself, and never gave any attention to the story.

WHEELER MARTIN, one of the Judges of the Court, testified as follows. "At the General Election in May, 1800, I was at Newport, and lodged at my Brother's, where Judge Dorrance also lodged. We there conversed together concerning an opposition that was intended to be made against him as Judge of the Court of Common Pleas. Judge Dorrance was however elected without any opposition.—The next day after the election, as the Judge and I were walking together, he asked me if I had ever heard the report of his selling the dead body for a Beaver-hat. He said that Governor Fenner had got John Beverly to write such a story concerning him. I understood him to mean, that Beverly had fabricated the story

story and the Governor procured him to commit it to writing. Judge Dorrance seemed much displeased with Gov. Fenner's conduct, and discovered much resentment towards him. He declared the story was a gross falshood, wholly originated through malignity : That the hat given by Doctor Bowen was a mere present, as a friendly acknowledgement, as he supposed, for assistance given in the settlement of Mr. Ward's estate."

Q. Had you ever heard the story of the Beaver-hat before the conversation with Judge Dorrance ?

A. I heard it on my passage to Newport at that time.

Q. Who was on board the packet with you, on that passage ?

A. I recollect Gov. Fenner, Dr. Comstock, David Sayles, and several others.

Q. Did you hear the story on the passage from Gov. Fenner himself, or was he present at any time when it was told to you ?

A. I understood that Judge Dorrance was to be opposed, and this story was suggested as a reason ; and I think the Governor was present when these circumstances were mentioned.

THOMAS SMITH. He testified as follows :
 "In March or April, 1800, I was at Providence, and saw John Beverly. He told me the story about the dead man who was buried in Providence after he was brought from Scituate ; and that he was afterwards dug up and dissected by the Surgeons. He then proceeded in these words : " This was a
 damned

damned trick acted by our noble Judge Dorrance; he sold the body to Dr. Bowen for a Beaver-hat." Since that time (said the witness) I have frequently heard the story mentioned by other people."

The next evidence introduced, on the part of the Defendant, was the deposition of Daniel Knight, which was read in the following words :

I, DANIEL KNIGHT, of Pomfret, in the County of Windham, and State of Connecticut, Physician, on Oath, do testify and say, that in the Month of February, in the year 1799, I assisted in taking from the Theatre, in the town of Providence, the body of a man *which* was said hung himself in the town of Scituate; which body had been clandestinely removed from the town of Scituate to Providence, for dissection; that said body was put into a coffin, or box; then myself and two other persons conveyed said body to the new burial ground on the west side of the river, and there buried it, it being to the best of my recollection, between ten and eleven o'clock at night. From thence returned to the shop in the house occupied by Dr. Pardon Bowen. After staying at said shop about two hours, myself and four other persons went to said burying-ground, and took up said body, leaving the coffin or box in the ground, and conveyed said body to a house belonging to Jabez Bowen, Esq. then in the occupation of Mr. Suggin.

Question asked the Deponent in behalf of Arthur Fenner, Esq. Who assisted you in taking said body from the Theatre, and conveying it to the burying-ground?

A. To the best of my recollection, Dr. Pardon Bowen, George W. Hoppin, William Spencer,
H John

John Eddy, and a person that lived with Dr. Dyer, whose name I do not recollect, assisted in putting the body into the coffin; and George W. Hoppin, William Spencer and myself, removed the body to the burying-ground.

Q. By the same. Was the body put into a coffin of the usual form?

A. The body was put into a rough, pine box, not made in the usual form of a coffin.

Q. By the same. Was the body, when put into the coffin, covered with a shirt, and otherwise laid out in a common and decent manner?

A. It had no shirt on, and to the best of my recollection no cover at all.

Q. By the same. How far below the surface of the earth was the coffin settled?

A. To the best of my recollection, not to exceed eighteen inches.

Q. By Ditto. Who were the four persons who assisted you in taking up the dead body, after you had buried it?

A. Horatio G. Bowen, George W. Hoppin, John Eddy, and a person who lived with Dr. Dyer, whose name I do not recollect.

Q. By Ditto. What operations were performed on the dead body the same night after you had removed it from the grave to Mr. Suggin's?

A. The body was opened and the entrails taken out.

Q. By Ditto. What was done with the entrails?

A. They were buried in said *Suggin's* shop, which had no floor.

Q. By Ditto. What knowledge have you of any operation which was performed on the dead body afterwards?

A. The operation of dissection was begun the next night following, which was continued for several nights until completed.

Q. By Ditto. Who was the principal operator in dissecting the dead body?

A. Dr. Pardon Bowen.

Q. By Ditto. What other persons attended and assisted in dissecting said dead body?

A. To the best of my recollection, Dr. Benjamin Dyer, Dr. Comfort A. Carpenter, Dr. James Mason, George W. Hoppin, John Eddy and Horatio G. Bowen.

Q. By Ditto. Had you any direction, either verbal or written, where to convey the dead body, after or before you removed from the place where it was interred?

A. Yes, before we took up the body, we received directions, in writing, in what manner to proceed, and to what place the body was to be carried; which to the best of my recollection was nearly as follows: That you come to the house, you will find a gate open; go through the gate, and proceed round

to

to the back side of the house, and you will find the door opened; go in at the door, you will see a flight of stairs, ascend them and turn to the right, and you will see a chamber door open, and a lighted candle standing on the floor; in that room deposit the body.

Q. By Ditto. Did John Dorrance, Esq. give you any directions in what manner, and at what time to bury the dead body?

A. No.

Q. By Ditto. Was the box in which the body was laid nailed closely or only tacked?

A. It was so nailed that the claws of the hammer would pass under the heads of the nails to draw them.

Q. By Ditto. Do you know what became of the flesh which was taken from that corpse, or the contents of the breast?

A. I was not present when the flesh was taken off, but the heart and lights were buried in the same shop that the entrails were, but not at the same time nor in same place. And further the Deponent saith not.

DANIEL KNIGHT.

Here closed the evidence produced on the part of the Defendant, in the opening of the first issue.

On finishing the examination of the Defendant's witnesses, Mr. Robbins proceeded in his defence in the opening of the Case. He rested the defence on the several different grounds following:

First.

First. That the words alledged to have been spoken by the Defendant were *true*; which he contended was fully evinced by the testimony adduced by the Defendant. He observed that Dr. Bowen had engaged to cause the body to be decently buried in Providence, and that it should forever lie undisturbed. Judge Dorrance had become obligated to see all the engagements of Dr. Bowen fulfilled, as respected the burial, and also became responsible for the body's remaining undisturbed: That instead of burying the body in a decent manner, and suffering it to lie undisturbed, as they had agreed, they had acted a kind of mockery of funeral ceremony, and buried it in a very indecent manner, scarcely eighteen inches under ground, and had it immediately after, taken up and dissected. "Judge Dorrance had the care, the custody, the controul and superintendance of the body." Dr. Bowen had no right to interfere with or dispose of it otherwise than according to Judge Dorrance's special permission.— Whether Dr. Bowen himself, or any other person was actually employed in the disposal of the body, was immaterial, because it must have been done through his agency, and from Judge Dorrance's authority. For Judge Dorrance to suffer the body to be dug up was a violation of trust, of promise, and duty, which could by no means happen by an act of mere negligence. In delivering the body from his own custody, he must have been guilty of connivance and collusion. These circumstances afforded an irrefutable presumption, that Judge Dorrance previously knew that the body would be dug up, and silently consented to it at the time.

Mr. Robbins proposed a case which he conceived to be parallel to the one in question. He said, "Suppose the driver of a mail stage should be prosecuted for *selling* the mail; but on the trial it should

not

not be proved that he actually made a formal bargain with any one ; but that he only permitted a thief to steal it. In such case it could not be doubted but that the stage driver must be convicted, though he should be directly charged in the indictment or suit with *selling* it ; because it would be presumed that he would not have suffered the thief to take it, unless he had received some compensation in return." So, in the present case, Judge Dorrance's connivance went to the full extent of making him a *principal* in the transaction of digging up the body.

In order to establish a presumption that the Beaver-hat was a consideration for Judge Dorrance's connivance, the Jury were called to a consideration of the testimony of Randall and Beverly. The pretended services in the matter of Mr. Ward's estate was a subterfuge of the Plaintiff's totally without foundation ; a mere pretence. The coincidence of the time of digging up the body with that of presenting the hat was a strong circumstance for presuming the hat to have been a payment for the body. Judge Dorrance himself had said the present of the hat was a *delicate matter*, and had refused to trust anything to writing on the occasion. If the hat was really given for services rendered in settling Mr. Ward's estate, where was the impropriety in giving a receipt ? There was no degree of infamy nor *indelicacy* attached to receiving a reasonable compensation for honest and legal services. No *delicacy* whatever could interfere with Judge Dorrance's receiving a present from a fair and honourable motive, or payment for a fair and honourable consideration. His scrupulous and cautious conduct was without doubt the effect of a consciousness of some impropriety in his own conduct.

The second ground of defence was, a denial of the
words

words being spoken *maliciously*.—As this was a necessary point for the Plaintiff to establish, he should leave the discussion of it till the evidence on the part of the Plaintiff should be disclosed, when Mr. Howell would consider it in the close of the case.

Mr. Robbins now placed the defence upon a third ground; which was that the words were not *actionable*. He observed, that although it should be proved that the Defendant did speak the words complained of; although the words had been the dictates of the foulest falsehood; and although the same words might have been breathed from the rancour of the blackest of infernal malice, still if they were not in themselves, independent of any consequent damages, actionable, the Plaintiff would not be entitled to recover of the Defendant. In order to shew what words the law distinguished as actionable, he cited *Es. pinasse, N. P. 496*. “Of words in themselves actionable—These are 1st. Which bring a man into any danger of legal punishment; as to say that he poisoned another: 2d. Which may operate to exclude a man from society; as to say, that he hath an infectious disease: 3d. Which injure a man in his trade or profession; as to call a *trader* a *Bankrupt*: 4th. Which charge a man in a public capacity or office with principles inconsistent with his office; as to say of a Justice of Peace, that he was a Jacobite and for bringing in the pretender.” Mr. Robbins contended that the words complained of did not come within any description pointed out in this authority. That the words imputed no offence to the Plaintiff whereby he could have been endangered of punishment. His being concerned in digging up a dead body was no offence for which he could have been indicted and punished. He recited 4 *Black. Com.* in these words. “No larceny can be committed unless there be some property in the thing taken,

taken, and an owner; yet if the owner be unknown, provided there is a property, it is larceny to steal it, and an indictment will lie for the goods of a person unknown.—This is the case of stealing a shroud out of a grave; which is the property of those, who ever they were, that buried the deceased; but stealing the corpse itself, which has no owner (though a matter of great indecency) is *no felony*, unless some of the grave clothes be stolen with it." Thus, said Mr. Robbins, it is considered by the laws of England, that when the human body is once divested of the functions of life, when once the power of death has rendered it useless and unprofitable to the surviving, it becomes a cast out beyond the reach of the laws or protection of society;—it becomes a loathsome object of abhorrence, disclaimed and deserted by all the living of the human race."—He cited 2 Black. Com. 429, 12 Rep. 113. Haynes's case. 3 Inst. 110. in order to shew that no civil action could be brought by any person, for damages, where a dead body should be disturbed, a monument defaced, or the grave-cloths taken away. He argued that the dead body supposed to be dug up, or permitted to be dug up, by Judge Dorrance, was of all dead bodies the most peculiarly unworthy the protection or notice of the law. It was, as if moral duty required it to be stigmatized and treated with indignity and neglect. It was the dead body of a total stranger in the land, who had wickedly and feloniously committed the crime of suicide, and had thereby forfeited all decent regard, and even the ordinary rites of christian sepulture. A suicide, by the common law, in a vindictive manner, is consigned to utter disgrace, his property to confiscation, and his body to an ignominious burial in the highway, with a stake driven thro' it, to exhibit a spectacle of infamy and abhorrence to his memory.—4 Black. Com. 190.—Such being the circumstances of the dead body in question, there could

could be no crime imputed, in saying that it was dug up and dissected.

It was further argued, that the words could not be actionable by reason of their being spoken against Judge Dorrance as a public officer. He was not charged with misconduct in his official capacity, either as Judge of the Court of Common Pleas, or as President of the Town-Council. His engagements in the contract for burying the body were entirely of a private and individual nature: For, though the words stated in the sixth, seventh and eighth counts of the Declaration, are said to be spoken of and concerning the Plaintiff in the execution of his office of Justice of the Court of Common Pleas, yet the words themselves cannot be construed to imply any want of integrity in him, in the execution of that office. The words were therefore not actionable by reason of his being a public officer.

The next point in Mr. Robbins' argument was to prove, that the Plaintiff ought not to recover on account of any special damage which he had sustained by reason of the words being spoken. He observed, that words must be in themselves actionable, or they must become so by reason of some special damage arising from them. The damage, stated in the Declaration, of the secession of the Plaintiff's friends from his society was a matter of mere form, and common to all declarations for slander. Such damages, when set forth, are never necessary to be proved, unless some pecuniary loss can be proved to have been sustained by reason of the departure of such friends. He contended, that the other damages stated in the Declaration, concerning the plaintiff's losing a number of votes at his election, were not proved; but on the contrary, it was proved that the Plaintiff was actually elected to the office for which

he was a candidate, without opposition. But the Plaintiff was guilty of an informality in his Declaration which effectually excluded from him all possible advantage from special damages, should he be able to prove them. This defect ought to prevent the Jury from hearing or making use of any evidence on the subject of special damages. If the Plaintiff had actually lost the society of his friends, or the votes which he pretended to have lost, it was necessary for him, or order to recover of the Defendant, on account of special damage, to have specially declared what persons had left his house, and what members of the General Assembly had withheld from him their votes, by reason of the words spoken. It was absolutely necessary to mention their names particularly, or he could not support his declaration. To establish this, he read *Espinasse N. P. 515.*— “Note, that saying generally *per quod* several persons left the house, without naming any in particular, is not special damage.” And also, *ibid. 520.* “So in such place of words, actionable, whatever special damage is laid the Plaintiff may go into evidence of it; but not more: As where the words were, “you are a thief and I’ll prove you so,” with a *per quod*, that by reason of them one *John Merry*, and several others, left off dealing with him; the Chief Justice allowed the Plaintiff to go into evidence as to *Merry*, but not as to the rest.” These authorities, in his opinion, excluded the Plaintiff, in the present Case, from all consideration of special damages.

In the evening of the second day of the trial, the Plaintiff’s Counsel first rose in support of the suit.

The Plaintiff’s Counsel, after some observations on the nature and object of the action, proceeded to the examination of their witnesses; the first of whom was *Dr. Pardon Bowen*, who testified in the following manner: “About

“ About the middle of February, 1799, I was informed by John Dorrance, Esq. that Mr. John Harris, and several other persons, from the town of Scituate, had been at his house, respecting the dead body of a man who had hung himself, in that town; and whom, they said, had been taken up, for the purpose of dissection, by the pupils of Dr. Dyer and my own, and was advised by Mr. Dorrance to call at his house, and see the gentlemen on the subject. I accordingly met them there, and entered into conversation with them on the subject, and endeavoured to convince them of the necessity of acquiring anatomical knowledge by dissection, if we meant to qualify ourselves to preserve the lives and limbs of our fellow-creatures, and the propriety of taking this person, as he was a stranger, entirely unknown, and had no friends nor relatives whose feelings could be hurt by his dissection. But, finding that my reasons had no effect to convince them, I then proposed an accommodation with them, on behalf of the young gentlemen concerned in the business, told them that I would see the young gentlemen, and afterward met them at my house. After seeing the young gentlemen, I met the Scituate gentlemen, at my house, where we had a long conversation on the subject; and after saying a great deal about the matter, we agreed to give them Forty Dollars, which I afterward paid them at Col. Hoyle's tavern. We also entered into a specific agreement respecting the disposal of the body, which was committed to writing, according to the understanding of the parties respectively.”

Here the witness produced a writing which he declared to be the same agreement, in the hand writing of Judge Harris, one of the signers; which which was read in the following words:

“ Know all men by these presents, that whereas
the

the dead body of a stranger, who, about a week ago, hung himself in the town of Scituate, was taken from Scituate by certain persons unknown. And whereas the people of said town are much alarmed about it: Therefore know ye, that in consideration of the sum of Forty Dollars to us in hand paid by Pardon Bowen, of Providence, Physician, we, John Harris, Gideon Austin, jun. Joseph Knight, Gideon Angell, Samuel Wilbour, jun. and Squire Franklin, all of said Scituate, Yeomen, do bind ourselves, our heirs, executors and administrators, that we will forever indemnify and save harmless, from all damages and costs whatsoever, all and every person or persons who shall or may, at any time hereafter, be prosecuted, in any manner whatever, by the said town of Scituate, or any inhabitant thereof, on account of the perpetration of the aforesaid deed, which is also in consideration of the said Pardon's agreeing to have the aforesd. body *Decently* buried, under the direction of John Dorrance, Esqr. of said Providence. Witness our hands, at Providence, the 20th day of February, A. D. 1799."

JOHN HARRIS,
 GIDEON AUSTIN,
 JOSEPH KNIGHT,
 GIDEON ANGELL,
 SAMUEL WILBOUR, jun.
 his
 SQUIRE X FRANKLIN,
 mark."

Witness,

JOSEPH MASON,
 GEO. W. HOPPIN."

The witness continued his relation as follows:—

"I conceived by this contract, that I was only to agree that the dead body should be decently buried,
 under

under the direction of Judge Dorrance. I accordingly took the directions from Mr. Dorrance, at his house, and, to the best of my remembrance, in presence of Mr. Harris and some others of the company; which were as follows, viz. That a coffin be procured, the dead body put therein, and be decently buried, in the western part of the new burying-ground allotted to strangers. I accordingly directed my eldest pupil, Dr. John M. Eddy, to see that a coffin be procured, which he afterward informed me Dr. Joseph Mason had obtained. I then directed Dr. Eddy and Mr. William Spencer to put the body into the coffin, and with their assistance, carry it and bury it, decently, in the western part of the new burying ground allotted to strangers, as before specified. Some time late in the night, when Dr. Eddy came home, I heard him come into the next room to where I was a-bed, and I called to him; he came to the door, and I enquired if my directions, respecting burying the dead man, had been complied with? And he said they had been, punctually. The next morning, I went to Mr. Dorrance's house, and reported to him, that his directions had been complied with, respecting burying the dead man, and thereby conceived that I had more than complied with the stipulations I had entered into with Mr. Harris and his company, which were only, that I should be willing that the body should be buried, under the directions of Mr. Dorrance; and I have reason to believe, that he never heard any thing respecting the body's being taken up till more than a year afterwards. That I ever bought this body or any other of Mr. Dorrance, for a Beaver-hat, for the purpose of dissection, or any other purpose, I solemnly declare to be totally false. At the same time, it is true that I presented to Mr. Dorrance a Beaver-hat; but this hat was for essential services rendered in the arrangement of my own affairs, previous to my embarking

embarking for Europe in the year 1797, and in the settlement of Mr. Ward's estate on which I administered. The facts were these: Finding my health very much impaired, in the year 1797, I had concluded to undertake a voyage to Europe, in hopes of deriving some benefit from the sea-voyage, and of obtaining medical aid from the Faculty in Europe, and from the change of climate. For this momentous undertaking I made the necessary arrangements respecting the settling my business, in my absence, and with some difficulty prevailed on Mr. Dorrance to undertake it. This led me to frequent conferences with him. I had now engaged a passage with Capt. Dring; and in the very week in which I expected to embark, I was seized with the yellow fever, which had made its appearance in Providence. Finding my situation becoming solemn and critical, I sent to Mr. Dorrance, requesting him to visit me; which he did, at a time when but a very few of my neighbours chose to come into my house. Mr. Dorrance sat by me, took the minutes respecting my will, which he wrote, and agreed to become Executor thereof, in case of my death. I however fortunately recovered, and as soon as I was able went into the country. After my return, still finding my health very infirm, I engaged a passage, and did actually embark, on board the ship Providence, of this port, bound for Hamburgh, in the latter part of November, 1797. The ship, in her passage to Newport, was cast away in a gale of wind, and was detained till the last of December following to repair the damages she had sustained. Then considering the advanced season of the year, my infirm health to encounter a winter's voyage, and the critical situation in which the estate of my father-in-law, Mr. Ward, was left, I concluded to give up the voyage, which I did, and administered on Mr. Ward's estate. It was now that I had occasion to call on Mr. Dorrance, to acquire

quire the information necessary to the punctual discharge of duties, to which I was quite a stranger. I was led to make this preference for these reasons; I supposed him to possess adequate law-knowledge, and he was President of the Town-Council, before whom all the business must necessarily come; and I had moreover the best opinion of his integrity. Under these circumstances, I frequently called upon him for advice, which he always cordially gave me in every thing appertaining to my business; and whenever I asked him what compensation I should make, he said that he had no demand against me, and that I was welcome to his advice. I several times observed to him, that I should not rest satisfied until I had made him some compensation for his trouble; and one day asked him if he would accept of a Beaver-hat as a present, as I could not find a freedom to trouble him further about my business, without doing something therefor. I must observe here, that my administration business was far from being settled at that time, and in fact is not to this day, owing to a law-suit now pending. Mr. Dorrance observed, that he should have no objection to accept the hat as a present, although he had no charge against me for his advice. I accordingly requested Mr. Benjamin Randall to make a Beaver-hat for Mr. Dorrance, and send it to him, and charge the same to my account. Whether this was before or after the stranger hung himself, I cannot positively say; as the idea of buying a dead body for a hat had never occurred to my imagination, I did not particularly charge my mind with the time when I ordered it. It would however appear to me to be previous to the suicide before alluded to; but whether it was before or after, or at the time, it cannot alter the fact, which was, that I never did buy of Mr. Dorrance a dead body for a hat; but that the hat which I presented him was for services rendered me in the
 adjustment

adjustment of my own affairs, when about taking a perilous voyage, under very infirm health, and for essential services rendered me in settling Mr. Ward's estate. I would also remark, that at the time of my embarkation, I put a great part of my notes and accounts into Mr. Dorrance's hands, together with these sheets" (shewing a bundle of papers to the Jury) "containing instructions and memorandums relative to the settlement of my affairs; and that all my books and papers were to have been sent to him after my departure."

Question by Plaintiff's Counsel. Had the dead body any impression on your mind, or did you think of it at the time you first mentioned the present of the hat to Mr. Dorrance?

A. Neither the dead body, nor any transaction, or thing in any manner relating to it, were in the least degree connected with the motives for my presenting the hat."

The next witness was Dr. HORATIO G. BOWEN, who was one of the pupils studying under Dr. Pardon Bowen at the time of the suicide. He testified, that immediately on the report being circulated, that a man had hung himself in Scituate, it was proposed amongst them to procure him for dissection; which was unanimously agreed to by the whole, and a night was appointed for bringing the body a-way. The witness himself was prevented from going on the business only by reason of indisposition. He never saw the body after it came to town until after it was removed from Dr. Dyer's store to the Theatre. He was present, and held the lamp while the body was put into the coffin, on the night of its burial in Providence.

Q. By the Plaintiff's Counsel. Did Dr. Pardon Bowen at the time, know any thing of the body's being taken up after it was buried in Providence, or that it was intended to be taken up?

A. I presume he did not, at the time it was taken up, nor till some days after; nor did Judge Dorrance in my opinion, know any thing whatever of the matter.

Cross-examined.

Q. By the Governor. Was you of the party that went up to Scituate after the body?

A. I was not.

Dr. GEORGE W. HOPPIN, one of the Students of Dr. Dyer, testified, that Dr. Joseph Mason had engaged to procure a coffin for the body, and William Spencer was sent for the coffin to the workman who made it, and brought it to the Theatre where the body lay, about eleven o'clock at night: That after waiting some time for fear of frightening or disturbing the neighbors by removing the body to the grave, the young gentlemen took the body, with a canvas cloth then wrapped round it, and put it into the coffin and nailed it up firmly. The body was then carried to that part of the west burying ground allotted to strangers, and there buried in a grave. The witness was at the grave, at the time, and saw every part of the burial. He observed that the grave, toward the bottom was rather shorter than the coffin which was uncommonly long. They pared the grave some, near the bottom, in order to let the coffin down; but by reason of the severity of the weather, they could not stay to complete it according to their intentions. The coffin therefore lay consi-

derably higher at one end than at the other. The young men stepped into the grave, and endeavoured to press the upper end of the coffin to a level with the other, by means of their weight. While the witness stood on the coffin in the grave, at the highest end, the surface of the ground was considerably higher than his knees. After endeavoring in vain to level the coffin, they covered it with dirt in the usual manner of filling up graves, and rounded off the top of the grave in decent and usual form. The coffin was straight, large, and much too long for the body; and after the body was put in, it was firmly nailed up; the nails were driven as hard and effectually as nails are usually driven into pine boards; the greater part of which the witness drove himself. The witness was the person who went to Scituate and saw the burial of the body there. He also was one of the party who went there to bring it away. He was present at several times in the course of the dissection which he observed was never fully completed. On being questioned, he said that Dr. Cleveland kept the bones, and carried them away with him when he removed from Providence. The witness was confident that Judge Dorrance had no knowledge, connivance or suspicion of the body's being by them dug up, as it was within an hour or two after burial; because it was, as the witness observed wholly unnecessary for their purpose that he should. He was also confident that Dr. Pardon Bowen knew no more of the matter than Judge Dorrance till nearly a week after the body was by the young men taken up, and after they themselves had performed a part of the dissection. The viscera were extracted the same night the body was buried and taken up; after which the body lay untouched for several days.

Q. By the Governor. After you had taken out the entrails, how much salt did you put into the body to preserve it from putrifaction? A.

A. I do not know.

The next witness was WILLIAM SPENCER. He testified as follows: "I received directions from Dr. Pardon Bowen to dig a grave for the dead man who was brought from Scituate. I accordingly went to the west part of the new burying-ground where strangers are usually buried, and there dug the grave. I returned back to town, and was immediately sent by several young men to the south part of the town to bring the coffin, which I brought to the Theatre. The young men went with me into the Theatre, and I assisted them in putting the body into the coffin, I then proceeded with the horse and sleigh with which I first brought the coffin, to the grave with the body. I was there assisted by two of the young gentlemen in burying the body."

Q. By Plaintiff's Counsel. Was Dr. Pardon Bowen present when the body was put into the coffin?

A. He was not present at any part of the business.

Q. In what manner was the coffin nailed up?

A. There were a great many nails used in nailing it up, and were all well driven, which I stood by and saw done.

Q. Was the body covered with any cloth?

A. It was wrapped in a canvas cloth.

Q. In what manner was he buried after you had carried him to the grave?

A. The grave was dug six feet deep, and of the usual length; but the coffin being longer than I expected

expected it would be when I dug the grave, we found it impossible to place the coffin horizontally at the bottom of the grave. We pared the ends of the grave as much as the severe cold weather would permit us, but still were obliged to leave one end of the coffin higher than the other. We finally filled up the grave with dirt and gravel, and rounded it up at the top as graves usually are.

Q. How far below the surface of the ground did you leave the highest part of the coffin?

A. When I stood on the upper end of the coffin the surface of the ground was nearly as high as my hips.

Q. Had Judge Dorrance any concern in that burial?

A. I did not see him nor hear his name mentioned in any part of the transaction?

Q. Had you any knowledge that the body was to be taken up again, at that time?

A. No.

EDWARD MANTON. "In the winter of 1799, I was one morning with Judge Dorrance at his shop, and while I was there, Dr. Pardon Bowen came in and informed Judge Dorrance that the man had been buried according to his directions. After the Doctor was gone, I enquired of Judge Dorrance the meaning of what the Doctor alluded to. The Judge told me the story of the application of the Scituate men, and their settlement with Dr. Bowen, wherein they had agreed that the body should be buried under his (the Judge's) directions. Which directions

directions he had given the day before, and that Dr. Bowen had then come to tell him the directions had been complied with."

JOHN RANDALL, son of Benjamin Randall. "I carried the Beaver-hat from my father to Judge Dorrance, and asked the Judge for a receipt or an order. The Judge said that Dr. Bowen owed him nothing, and it was very impolite to draw upon a man who owed him nothing. He told me I might leave the hat with him or carry it home again as I pleased."

WILLIAM MOWRY, a Member of the House of Representatives. "On the 7th of May, 1800, being at the election, at Newport, I went with Dr. Comstock to the Governor to consult him concerning the election of certain officers. The Governor spoke of the Court of Common Pleas for the County of Providence, to which Judge Dorrance then belonged. He wished Richard Jackson, jun. might be put in Mr. Dorrance's room. He told me that Mr. Dorrance had sold the dead body of a stranger who hung himself, and had received a Beaver-hat therefor, and related particularly some of the circumstances about it. I afterward told Judge Dorrance that unless he cleared up the Governor's imputation against him, I should vote against him. Judge Dorrance was however not opposed at that time; but was left out, the last year."

Q. By Defendant's Counsel. Did Governor Fenner tell you this story pleasantly?

A. "Yes, pleasantly."

EPHRAIM BOWEN, jun. "On or about the 23d day of April last, I went to the residence of
Governor

Governor Fenner to deliver a letter from Col. Robert Rogers, of Newport, which had come under cover to Mr. John I. Clark, soliciting the influence of the Governor, in Mr. Rogers' favour, at the ensuing election, for the appointment of Clerk of the Court of Common Pleas for the county of Newport. Mr. Clark being in Boston at the time the letter was delivered at his house, Mrs Clark sent it to me, with the cover, to be by me delivered to the Governor. As the letter to the Governor was open for Mr. Clark's perusal, I read it and then sealed it, as requested by Mr. Rogers, before I delivered it. It contained a Certificate from Judge Taber, highly in favour of Mr. Rogers, and was given in consequence of an act of government requiring certificates from the Chief Justices, concerning the conduct of the Clerks in their offices.

I found the Governor in the road passing his house, where I delivered the letter. He opened and read it, and then invited me into his house. After we were seated, the Governor again read the letter, and said, "*In regard to this affair of Mr. Rogers, I can inform you candidly, what I think of it. I think Mr Rogers will be beat. They have carried matters so high in that County, that I am sure he will not succeed; though I confess that ROGERS is a good officer; and in fact that PECKHAM is not fit for it. I shall not interfere in the election in that, or any of the other counties, except our own. But in this county I am determined to interfere in some cases. There are two or three damned whore's-birds whom I intend to pay for the ill-treatment I have received from them, and amongst the rest, your Judge Dorrance. I asked the Governor what Judge Dorrance had done to deserve being turned out? He replied, "Dorrance has treated me scandalously on several occasions, particularly one day in the Town-Council. Besides"* (said the Governor)

or)

or) “ I don’t think a man fit for an office who will be guilty of such a scandalous breach of confidence as Dorrance has been, in selling the man’s body who hung himself, to your brother Pardon, for a Beaver hat.”— I observed, that this was an affair that I never heard of, as perhaps it took place during my absence from home. The Governor replied, “ Why I believe it did; and will tell you how it was. Sometime in the winter before last, a stranger who appeared to be insane, hanged himself in Scituate. When he was found and about being buried, there was a young man present who lived with Dr. Dyer or Dr. Bowen, and by his conduct the people suspected that measures would be taken to carry away the body. Accordingly they watched the grave the first night; and nobody appearing, they omitted it on the second, when some persons went and took the body away. It caused considerable alarm in Scituate; and on enquiry, it was discovered that the body was brought to town. On which, John Harris, and two other of the members of the Town-Council of Scituate, came to me and informed me of the circumstance, and asked my advice how to proceed, saying they had discovered where the body lay, and would act according to my advice. I advised them to accomodate the affair, if any body appeared to indemnify them for the expences the town of Scituate had been at, and satisfy them for their own trouble and expence; which after some conversation, they consented to do. They went to Judge Dorrance, where your brother Pardon met them, and agreed to pay all the expences; and the body was confided to Judge Dorrance, by agreement, to be decently buried: Instead of doing which, he sold the body to your brother for a Beaver hat; and he had the impudence to wear the hat in Town-meeting, when he presided as Moderator.”

I observed, that I did not think the selling a man’s dead body for dissection was so criminal an act as
some

some people considered it : For that in all countries, the bodies of malefactors were frequently consigned to the Surgeons for dissection, that thereby the living might be benefited. But, if Judge Dorrance had been guilty of a breach of confidence, I thought him much to blame. The Governor observed, that John Beverly happened to be in Randall's shop when Randall's boy returned from carrying the hat : That Randall had ordered the boy not to deliver the hat without a receipt ; and the boy informed his father that Judge Dorrance refused to give a receipt, and said it was a delicate matter, and he did not like to give one ; That Beverly, on hearing the report of the boy, said, " G—d ! I know very well what the hat was given to Judge Dorrance for. It was for the dead man's body which he sold to Dr. Bowen."— After much other conversation impertinent to the present case, I left the Governor with a full determination of enquiring into the truth of his information. Accordingly, having met Judge Dorrance next day, I related to him what had been told me, and asked him if it was true. He replied, it was a scandalous falsehood which the Governor had before reported. He then related the circumstances exactly in substance as he has since published ; and observed, at the same time, that if the Governor did not desist from telling such scandalous lies about him, he would state the whole transaction in the newspapers. I gave full credit to the information I received from Judge Dorrance ; but considering that Dr. Bowen would, if requested, state the whole facts, if Judge Dorrance had not been correct, and relying on his veracity, I informed him of the report, and asked him if there was any foundation in truth for it ? He replied, that the report was totally false and groundless as respected the sale of the body of the dead man, and his giving a Beaver-hat for it to Judge Dorrance. He then gave me a full detail of the business, as published

published in his certificate. Thus believing positively that the Governor's information was groundless, and wishing to prevent any altercation in the newspapers, which I was persuaded would take place, unless the Governor modified his story, I went again to the Governor, a few days after, and stated to him the information I had received both from Mr. Dorrance and Dr. Bowen, and concluded by telling him that he had been deceived. The Governor replied, "*What I have told you is TRUE. My information is CORRECT; and the man has never been buried, but is now above ground. I am informed they are taking depositions in the business. I intend to take depositions also; and the people must judge.*" After some other conversation, we came into town together, and I said nothing more to him on the subject till, I think it was, the Monday preceding election; when I saw him near the Post-Office, and informed him that Judge Dorrance intended to publish a piece on the subject. I had previously informed the Judge, that the Governor adhered to his first declaration. I had also enquired of him whether he had any knowledge of the bones of the dead man being above ground. He informed me, that he had no knowledge of it. In a conversation I afterwards had with Dr. Pardon Bowen, I discovered, to my satisfaction, that the man's bones were then above ground. And at the time I informed the Governor that Judge Dorrance intended to publish his piece, I also informed him, that what he had said respecting the bones being above ground I thought was correct."

WILLIAM HUNTER. "At the election in May, 1800, while I was a member of the General Assembly, the Governor and I lodged at the same house. The Governor and I, with several others, in an evening, had some conversation respecting the

choice of certain officers to be made at that election. In the course of which conversation, the Governor expressed a wish that Gen. William Allen might be elected to the office of Sheriff of the county of Providence. We then discoursed on the election of Judge Dorrance to the office of Justice of the Court of Common Pleas for the same county. I observed, that Judge Dorrance was a respectable literary character, for whom I entertained a highly favourable opinion, and had no objection to his being elected to that office. The Governor insinuated some objections. He finally related the story of the dead body that was brought from Scituate to Providence, and left to the care of Judge Dorrance to be decently buried; that through the connivance and collusion of Judge Dorrance, Dr. Pardon Bowen had been permitted to take the body for dissection; and that Judge Dorrance had received a Beaver-hat as a compensation for that breach of confidence. For the particulars of this story, the Governor referred to a paper which he said he had carried with him to the election, but, at the time of our conversation, he said, was in the hands of one of the members of the Assembly. This paper he said contained the whole story of the body's being dug up and dissected, and of Judge Dorrance's receiving the Beaver-hat for his connivance. He said the same paper also contained an account of Judge Dorrance's conduct in the affair of the law-suit between Atwood and Beverly.

“This story related by the Governor made a deep impression on my mind, and excited in me sensations unfavourable towards Judge Dorrance. I immediately applied to several members of the General Assembly for further information on the subject. I however found that the character of Dr. Pardon Bowen was opposed to the story, and of course I did not believe it.”

Q. By Plaintiff's Counsel. Did the Governor relate the story to you as a matter of fact, or as a report from John Beverly?

A. He related it as a matter of fact, and referred to John Beverly as a witness. He urged the story with great apparent zeal against Judge Dorrance, and expressed himself as if he believed it. The conversation on the subject lasted half or three quarters of an hour; in the course of which the Governor repeated the matter of the Beaver-hat several times, and sometimes he mentioned Beverly as a witness, and sometimes he related the fact without any authority whatever.

DAVID SAYLES. "In May, 1800, I was a member of the General Assembly, and went to the General Election, at Newport, on board the same Packet with Governor Fenner. In the course of the passage, there was some conversation between the Governor and me relative to the election of Richard Jackson, jun. in the place of Judge Dorrance. The Governor was urgent for the election of Mr. Jackson. He told me he had a paper in his pocket containing a statement very black against John Dorrance. I requested him to let me see the paper, which he accordingly did. I read the first part of the paper which contained a story charging Judge Dorrance with having contracted with some gentlemen of Scituate to bury the dead body of a man who had hanged himself; but instead of performing his contract, had sold the body to Dr. Pardon Bowen for a Beaver-hat. According to the story related in this paper, the body was not buried at all, but delivered by Judge Dorrance directly to Dr. Bowen. The story further comprehended a long detail concerning the delivery of the hat to Judge Dorrance by Randall's son, and of the boy's demanding a receipt

ceipt for the hat which Judge Dorrance refused to give. Previously to my beginning to read, the Governor began to relate the story verbally, which he continued during some part of the time while I was reading. I read the paper only as far as pertained to the story of the dead man and Beaver-hat, but this was only a part of what was written on the paper. The Governor observed, that the remainder of the writing pertained to the story of the law-suit between Atwood and Beverly, and was not concerning the dead man; and as I was then for some reason or other in some haste (I do not recollect on what account) I handed the paper to the Governor."

Q. By the Governor. Was there any name signed to the paper which I then shewed you?

A. I believe there was not.

[The Governor here produced a copy of the agreement made between Dr. Bowen and the Scituate men, concerning the burial of the body, and asked the witness if that was the paper?

The witness after examining it, declared that it was not.]

Q. By Defendant's Counsel. For what reasons do you know that the paper here shewn by the Governor is not the one which he shewed you on board the packet?

A. This is a small piece of paper written only on one side, and that was a whole sheet of paper nearly covered with writing on every side. This paper is written by a different hand from that by which the other paper was written. It does not contain the
story

story which I read in that paper; neither did that paper contain the agreement written on this.

[The Governor now declared, positively, that the paper now shewn to the witness was the only one he ever had in his possession, which in any manner concerned the dead man.]

Q. By the Governor. Is it not possible, Colonel Sayles, that you may be mistaken about this paper's being different from the other?

A. I am clear, positive, and absolutely certain that it is not the same paper.

(The Governor, after pausing a few moments, said, "Aye, I think I can now shew you the very same paper which I shewed you on board the Packet."—He then produced a paper which was a duplicate of the same copy he had been then shewing the witness, and asked him whether that was the paper he alluded to?—The witness denied this paper also with the same positive certainty.)

Q. By Plaintiff's Counsel. What appeared to be the reason of the Governor's shewing you that paper on board the Packet, at the time he mentioned the story of the dead man to you?

A. The Governor told me that the paper contained the whole story of selling the dead body for a Beaver-hat, and gave me the paper, by reason, he said, that it was more particular in the account than what he could then recollect to relate verbally.

Q. By Ditto. Had you ever heard the story before the Governor told it you on board the Packet?

A.

A. No. I never before heard any thing of selling the body for a hat. While I was in Providence, on my way to election, I was told, in the street, that Judge Dorrance was to be opposed, but did not understand on what account.

Q. By Ditto. Do you say, on your oath, that the paper which Governor Fenner shewed you contained a story of Judge Dorrance's selling that dead body for a Beaver-hat?

A. I have already said, that I read such a story written on the paper which the Governor shewed me. I again repeat, on my oath, that the paper contained a story purporting that Judge Dorrance sold the dead body of a man who hung himself, to Dr. Bowen, for a Beaver-hat.—I am positively certain in my recollection, and it is impossible that I can be mistaken.

Q. By Ditto. In what part of your passage from Providence to Newport, did Governor Fenner shew you that paper?

A. It was a little before we arrived at Newport. We had then performed considerably more than half the passage.

Dr. EZEKIEL COMSTOCK. "In May, 1800, I went to Newport, as a Representative in the General Assembly, at the election. While on my passage, in the Packet, I was in company with Gov. Fenner, Gen. Barton and others. A conversation was introduced, between Gen. Barton and me, concerning the competition which was expected between Judge Dorrance and Richard Jackson, jun. for the office of Justice of the Court of Common Pleas.—Gen. Barton told me he was confident that Judge
Dorrance

Dorrance would loose his election, because "*the Beaver-hat business was a Devil of a stroke at him.*" I asked him for an explanation of his meaning, and he told me that Governor Fenner had a writing which contained the whole story from beginning to end. He referred me to the Governor for a perusal of the paper; upon which I immediately applied to the Governor, and asked him to let me see it.— The manner in which Gen. Barton had communicated the subject of the paper was so unintelligible to me, that I scarcely knew how to describe to the Governor the paper which I wished to see. The Governor however soon understood my meaning, and told me he had a paper in his possession which contained a full statement of the whole transaction relative to the selling of the dead body for a Beaver-hat; and after searching some time among his papers in order to find it, he told me that he recollected to have lent it to one of the members of the General Assembly, and desired me to call upon him at his lodgings, after we should arrive at Newport, and he would shew me the paper. I did not however pay much regard to the story, and never called on the Governor for the paper."

Q. By Plaintiff's Counsel.— Did Governor Fenner tell you, that the paper which he referred to contained the story of selling the body for a Beaver-hat?

A. I understood him that the whole story was particularly detailed in that writing.

Q. In what part of your passage did you have this conversation with the Governor?

A. Soon after we left the wharf at Providence.

Q. Had you ever heard this story before the Governor related it to you at that time?

A. No.

Dr. BENJAMIN DYER. This witness was called solely for the purpose of meeting the testimony of Dr. Anthony, and testified as follows:—

“The day before yesterday, several gentlemen were in my store, and I was asked by one of them why I did not attend at this Court? I answered, that I was not concerned in the contest between Judge Dorrance and Governor Fenner, and did not suppose that my name would be made use of in the case; but that I was always angry with myself for paying six or seven dollars to the Scituate men to settle the business, in behalf of the young men who lived with me; and that I now grudged it to them more than ever, because I *then* thought they were the Town-Council, or a committee appointed by the town, but had since learnt that they were a self-created committee: That they were I thought much to blame for interfering in the business, as the dissection of dead bodies was certainly an advantage to the living, and that there never was a more proper subject than the one in question. We talked some upon the subject of Surgeon’s dissecting bodies for the purpose of gain in selling the bones. I observed that many people entertained that idea, and that it was very erroneous. As an instance of this I mentioned the only subject in which I was ever concerned in dissecting, which was perhaps ten or twelve years since; the bones of which were sold to one of the young men who attended, for about four or five dollars, which went in part to defray the little expences which had accrued, such as liquors, &c.”

CALEB

CALEB ORMSBEE testified, that he was applied to to make the coffin for the dead man, and was directed to make it six feet long; and one and a half foot wide: That he directed his young man to make the coffin, who afterward informed the witness that he had made it accordingly: That it was made of good wide boards; was wider at one end than the other; and was worth more than two dollars.

Dr. JOSEPH MASON. "Sometime in the winter of 1799, a young man who was a pupil of Dr. Pardon Bowen, called on me, and informed me that a stranger had hanged himself in Scituate, and that it was proposed to procure the body for dissection; and also asked my opinion as to the manner in which it was best to proceed. I advised him to send some one to observe where they buried the body, and afterward to go out in the night and take it up and bring it into town. One of the Students, I think Mr. George W. Hoppin, went out on the business, and on his return, the second evening following was fixed for going after the body. I had agreed to be one of the party, but was prevented by a professional call. On the next day it was reported, that some men in Scituate were in town in search of the body. On the following day, I was informed that Dr. Pardon Bowen was before a Court of Justices, at Hoyle's tavern, for examination respecting the stranger's body. Conceiving myself to be more implicated in the transaction than Dr. Bowen, I immediately went to Hoyle's; where, instead of finding the Doctor before a Court, I found him in the company of several men from Scituate, who called themselves "*a committee of agents*" from that town, and with whom Dr. Bowen had just made an agreement, wherein he was to pay them forty dollars by way of compromise. I tried every method in my power to prevent the Doctor from consenting to any

such agreement, and observed to him, that it appeared to me that the town of Scituate had nothing to do with the business, and if it had, that those men had shewn no authority from the town: That I believed they had come with the sole view of picking money out of our pockets for their own private use. But Dr. Bowen, unwilling to have any further controversy with them, conversed with me alone, and persuaded me to give up my objections. He finished the agreement with them which was in writing, and paid them the money; whereupon the Scituate men signed the writing, which contained the exact engagement as I understood it, of the parties respectively, and is I believe the same paper produced here in Court. Among the signers of the agreement, I recollect, John Harris, Gideon Austin, I think a Samuel Wilbour, and a man who called himself a member of the Town-Council of Scituate, and made his mark for his signature to the paper. As it was late before this business was finished, I went immediately to Mr. Caleb Ormsbee, whose shop was in Capt. Godfrey's store, and requested him to make a coffin, to be ready at 11 o'clock that night. He said a coffin could not be made in that time. I then told him to make a box, six feet and an half long and large in proportion, and leave it at the out-side of the shop. I also left my sleigh and harness, with directions where those, with the box, might be found. About a week after this, I went to the house of Mr. George Sugden, in Westminster-Street, and found the body prepared for dissection. I there met several of the gentlemen who were to assist in the operations; but the body was in so frozen a state that it was impossible to do any thing with it at that time; and that was the only time that I ever saw the body."

Q. By Plaintiff's Counsel. Was Judge Dorrance knowing to any part of the transaction in taking up the body and dissecting it?

A. I do not know that he had any knowledge of any part of the transaction, in any manner whatever, either directly or indirectly.

Dr. HARDING HARRIS. "In the winter of 1799, at a small distance from town. I met Dr. Daniel Knight. He told me he was coming into town to see some parts of the dead man dissected.— He said the body was then at Sugden's, and invited me to attend the operation with him. He observed that he thought they had a right to dissect the body as they had bought it of the mob that came from Scituate, at such an extravagant price; and that the whole expence of the business had been as much as sixty or seventy dollars. He related to me the particulars respecting the burial of the body by the students; and I understood him that Dr. Bowen was not present at the burial, and that he did not see any part of the proceedings. He told me the body was then partly dissected by the young gentlemen themselves, and that Dr. Pardon Bowen had been prevailed on to instruct them in a further operation, which Mr. Knight considered as a politeness in the Doctor, and for which he was thankful."

The Witnesses being thus far examined, the Counsel for the Plaintiff continued the arguments in support of the action against the Defendant's Plea in Bar.

It was observed, that as the Defendant had by his Plea confessed the speaking of the words, and had undertaken to justify himself in speaking them, it only remained, to be determined, first, what might be a sufficient justification

tification of the words spoken; secondly, whether the Defendant had made out that justification for himself. The Defendant, in his Plea in justification, had no where averred the words to have been *true*; but he had merely set forth a history of circumstances, apparently for the purpose of shewing, that from the existence of these circumstances, he, at the time the words were spoken, *had reason to believe* them to be true. The insufficiency of the Plea, supposing it to be substantiated, could be incontrovertibly shewn from an abundance of authorities at hand.— The Plaintiff however, *for certain reasons*, had not demurred to the Plea, and the jury were of course to try its sufficiency. In the first place it was contended that the most material facts stated in the Plea were by no means proved. The Plea had stated that the Plaintiff had *agreed to and with the other contracting parties, that he would take the body in his care to be decently buried in Providence, under his care, superintendance and direction*. The evidence had proved no such agreement on the part of the Plaintiff. Nothing more had been proved, than that the Plaintiff had *consented to give directions* merely respecting the manner of the burial; and in this, he had not assumed the least degree of responsibility.— The body was never in his custody or controul; nor did he ever promise any care or superintendance, in any part of the business.

It was said, that the Counsel for the Defendant had gone beyond their Plea, which did not pretend to the truth of the words, and had laboured to induce in the Jury a presumption of their being true: That this was more than the Defendant himself could have expected the Jury to presume, or he would have ventured to assert in his plea that the words were true. The Plea itself, allowing it to be proved, could only avail the Defendant in mitigation of damages;

images; but by the arguments of his Counsel, in support of that Plea, he was to be entirely justified and the action barred: But so far from having demonstrated the words to be true, or shewing a probability of their being true, the Defendant had neither pleaded or proved a fact, that could excite a presumption worthy of refutation. The extreme absurdity of supposing Dr. Bowen to have so unnecessarily bribed Judge Dorrance to a mean and scandalous connivance in the disposal of a dead body, of which he had not the care, and of which he knew not the existence but by hearsay, was a miserable subterfuge that could be adopted only by a Defendant, in the utmost extremity of a desperate cause. It was an unpardonable outrage upon common sense, to suppose that those Surgeons, while they actually had the dead body in their possession, and at their entire disposal, should think of purchasing it of Judge Dorrance, who had not the least possible controul over it, or even any positive knowledge of its existence. Still more contemptibly ridiculous would it be, to suppose, that Judge Dorrance ever made himself responsible for that body's remaining in its grave undisturbed. That would have been an engagement of an immense responsibility, and of which he could not have acquitted himself, but by perpetually and eternally watching the grave. However, there could not be reasonably any controversy respecting the nature of Judge Dorrance's engagement in that business. The agreement, containing every part and parcel of his undertaking was in writing, signed by the Scituate gentlemen themselves, and there in Court ready to speak for itself. In regard to Dr. Bowen, if the exalted opinion which society uniformly acknowledged of his character, his talents and prudence, was insufficient to rescue his understanding from the pitiful imputation of stupidly purchasing a dead body which he already had in

his

his own possession, and at his own disposal, of Judge Dorrance, who had no pretensions to authority for selling it, the clear, positive and absolute declarations of his testimony must be acknowledged sufficient, unless the Doctor had unfortunately further transacted a still more unthrifty speculation, in being guilty of *wilful and deliberate perjury*; and that without the least possible temptation.

The Defendant had set forth in his Plea that he had circulated the slander in consequence of his having previously heard it from others. John Beverly had told him that he *guessed* the Beaver-hat was given for the dead body. Those circumstances the Plaintiff's Counsel contended afforded the Defendant no justification whatever. It was a principle laid down in all the books, that every man shall be answerable for his own slander. They cited 6 Bac. Abr. 239, Esp. N. P. 517, Cro. Eliz. 400, 7 Term Rep. 19, Bul. N. P. 10, 12 Rep. 133, the Earl of Northampton's case.

It was said, that the attempt of the Defendant to shift the slander from himself upon John Beverly, was an expedient as futile as it was mean and unmanly. At the time Beverly communicated to him his surmises respecting the Beaver-hat, he also explained to him the circumstances and reasons why he had guessed that the hat was given for the dead body. The Governor had no more reason to believe the words to be true than Beverly had; because he was equally with Beverly possessed of the grounds of their truth. It was in evidence that the Governor and Beverly had been so much at variance, that they had not spoken to each other for nearly a year and a half; yet at the time of propagating this slander, they had become strangely reconciled. The Gov. was now courting an intimacy with Beverly, to whom

he

he had not before, for a long time, deigned to speak, Beverly was now continually at the Governor's house, publicly repeating the slander, in the Governor's presence, in unqualified terms, to every person who came in; provided they came from a distant part of the State. The Governor was as constantly seconding Beverly's imputations, and encouraging and enforcing a belief of their truth; although Beverly had secretly explained to him the inconsistency and improbability attending the supposition of the fact. While the slander remained only in the mouth of Beverly, and in the circle of his acquaintance, it could never have found credit, or be followed by any injury, and would have remained wholly unworthy the notice of the Plaintiff; but as soon as the Governor seized with avidity upon the scandalous story, and contributed his own name to give it authenticity, it then began originally to be slander, and the character of Judge Dorrance then began to be affected. Till then, the story was but a base coin refused by every one to whom it was offered, but the moment it received the Governor's stamp, it obtained credit and currency. The Governor was acquainted with Beverly as well as with the manner in which he had fabricated the story, and could not possibly believe the story to be true. But, admitting that the Governor could possibly have believed the story, still he was little more justifiable in reporting it in the manner he did. He did not with a delicate and manly regard to the reputation of his neighbour, an officer who held an important commission in the government, endeavor to acquire satisfactory information upon the idle and malicious report; though he might, at any time, in the course of a few minutes, have abundantly obtained it.— He did not with a rectitude of heart, as a chief magistrate in whom an honest indignation was kindled by a belief of scandalous conduct in Judge Dorrance, require of him an explanation, reprove him to his face,

face, publicly declare him to his neighbour's an object of censure, or openly denounce him in the Legislature as an offender unworthy of public trust.— Instead of resorting to such direct and honourable measures, he secretly and equivocally, in a distant part of the State, insinuated the miserable falsehood to such particular members of the General Assembly as he conceived he would be able to persuade to give credit to it; and all for the express purpose of indirectly preventing Judge Dorrance's re-election. These insinuations he always made without disclosing the grounds of his own informations. The name of John Beverly was never mentioned, but as a witness whose testimony would corroborate the Governor's own assertions. There was no evidence of the Governor's reporting the story to the people of Providence, to whom the character of Judge Dorrance, the Governor and John Beverly were well known, till more than a year after he had reported it in other parts of the State where Beverly was totally unknown. From a consideration of all these circumstances, it was proper to pronounce the words complained of not only a falsehood in every sense of the term, but also a cruel and *malicious* falsehood.

On the question, whether the words were *actionable* it was admitted that the words did not impute a *felony* to the Plaintiff, a crime for which he would be liable to suffer death. But it was contended that digging up a dead body for the purpose of dissection was an indictable *misdemeanor*, for which the offender might be liable to fine and imprisonment. To establish this, an authority in point was produced: 2 Term, Rep. 733, Lynn's Case. The case was as follows: "The Defendant having been convicted on an indictment charging him with entering on a certain burying-ground, and taking a coffin out of
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the earth, from which he took a dead body, and carried it away for the purpose of dissecting it."—"Garrow, who was to support this motion" (in arrest of judgment) "mentioned that perhaps the circumstance, stated in this indictment, of the Defendant's taking the body for *the purpose of dissection*, might differ this from the common case of taking up dead bodies for any indecent exhibitions."—"The Court said that common decency required that the practice should be put a stop to. That the offence was cognizable in a criminal court, as being highly indecent, and *contra bonos mores*; at the bare idea alone of which nature revolted. That the purpose of taking up the body for dissection did not make it less an indictable offence. And that as it had been the regular practice of the *Old Bailey* in modern times to try charges of this nature, many of which had induced punishment, the circumstance of no writ of error having been brought to reverse any of these judgments, was a strong proof of the universal opinion of the profession upon this subject. They therefore refused even to grant a rule to shew cause, lest that alone should convey to the public an idea that they entertained a doubt respecting the crime alledged. But inasmuch as this Defendant might have committed the crime merely from ignorance, no person having been before punished in this Court for this offence, they only fined him five marks."

This decision of the Court of King's Bench, as it was conceived, placed the matter beyond all doubt or hesitation, that the words spoken against Judge Dorrance were actionable; as Mr. Robbins had admitted that Judge Dorrance's connivance had made him as much a principal as if he had dug the body up with his own hands. It was observed, that what had been argued by the Counsel on the other side relative to the body's being unprotected by law, by

reason of the suicide, was frivolous, and of no substance whatever. It was unnecessary to enquire whether the laws of England respecting the burial of the body of a suicide in the highway with a stake driven through it, applied at present in this State. It was sufficient to observe that it was not done even in England, except in case of a *felo de se*; and it was not in evidence that the man who hanged himself at Scituate was declared by the Jury of Inquest to be a *felo de se*; but it was said that the Inquest had pronounced his violence upon himself to have been the consequence of *insanity*.

[Here the Hon. Judge Martin interrupted the Counsel, and desired him to repeat his last observation in clear English, that the Court might understand the meaning of *felo de se*. Upon which the Counsel gave the Court the necessary explanation, which they acknowledged they at last understood.]

It was further said, that to dig up the body of a suicide whom the law had deposited in the highway, for a particular purpose, would be a greater offence than the digging up of an ordinary person; because in that case, the body would be totally in the custody of the law, and entirely at its disposal. The law, by such particular appropriation, would make the body a particular property of government. And to take such a body away would be to directly obstruct the operation of a sentence of the law.

In regard to special damages, it was contended that they were sufficiently set out and proved: yet, as the words were plainly shewn to be actionable in themselves, it was entirely unnecessary for the Plaintiff to prove special damage. Actionable words implied malice; and the law presumed them to be followed by damage to the person slandered. The
Jury

Jury were therefore to consider the wickedness of the disposition which induced the slander, the enormity of the offence in society, and the injury which the Plaintiff had sustained; and would assess the Defendant in damages commensurate with the crime and the injury.

In the close of the first issue, Mr. Howell argued for the Defendant. He recapitulated and enforced the arguments of Mr. Robbins in the opening, excepting where Mr. Robbins argued that Judge Dorrance, by his connivance, at the taking up of the body, had made himself a principal in the transaction. Mr. Howell, in his comments on the case of the indictment for taking up a dead body, cited by the Plaintiff's Counsel, in 2 Term, Rep. 733, contended that Judge Dorrance in permitting other people to take up the body, did not make himself even an *accessary* to the offence. He said that the indictment mentioned in 2 Term, Rep. 733, was for breaking and digging up the ground, and not for taking up and dissecting the body. He produced another authority from Term Reports, in order to shew that breaking up the ground was what constituted the offence. (As this was a new authority introduced in the close of the issue, the Counsel for the Plaintiff rose to explain it on their part. But Mr. Howell insisted upon not being interrupted, and thereupon the Chief Justice commanded them to be silent. However on the motion being strenuously repeated, the Court consented that the Plaintiff should be heard on that point after Mr. Howell had ended his argument.)

Mr. Howell observed, that his age, experience, and the character he was ambitious of supporting as a lawyer, were motives sufficient to prevent him from asserting any matter to be law, which was contrary

trary to his opinion. His sincerity therefore could not be scrupled when he pronounced the words complained of not to be actionable. He observed that in the present Case, the grounds of complaint were trifling: That Judge Dorrance had received no damage of consequence: That the Governor had said no more of him than what any freeman had a right to say of his neighbors: That such principles as the Plaintiff contended for were tying the tongues of the citizens. It was a peculiar privilege which every free American citizen possessed, to say what he pleased of his fellow-citizens: The freedom of speech was a blessing to the community which the present patriotic administration of the United States had long contended for, and had obtained. The official character of the Defendant ought to be considered by the Jury, and ought to shield him against light presumptions, and even from accountability for petty faults. He was the first magistrate of the State, in whose character the Jury themselves had an interest, which they were not under obligation, in the discharge of their duty to sacrifice. He was the servant of the people; and every freeman had an interest in the character of his servant, which he could not be compelled to surrender. The character of the chief magistrate ought to be scrutinized with awe and with caution. His character was the hallowed repository of the honour, the dignity and sovereignty of the State; and the interests and happiness of the State existed in the respect and obedience due to the dignity and authority of his office. His office ought to secure him from the indignity of revengeful attacks upon his private reputation, under the cover of groundless lawsuits. The Jury ought to be careful how they trifled with a superior power. "What?" (said Mr. Hewell) "What I say? Are you to set up your first magistrate, like a Shrove-Tuesday-Cock, to be thrown

thrown at, and knocked down for sport?" He observed, that the Governor had descended from a long and illustrious line of ancestors, who had thro' all ages stood above the common classes of people. He possessed an independent fortune which also descended from those illustrious ancestors. He possessed an unparalleled brilliancy of talents, and a boundless capaciousness of mind, adorned with every valuable accomplishment, and replete with the moral and social virtues. His heart flowed with the milk of human kindness, and was an exhaustless treasure of holy charity everlastingly flowing for the improvement and benefit of all mankind. Above all, he had, till the commencement of this wanton lawsuit of Judge Dorrance, uniformly enjoyed the confidence and affections of his fellow-citizens. Till now he had been the idol of the State, and there had never been any one so hardy as to publicly impeach his character. "Who is he who has now done it? Is he one of the Browns, the Angels, the Arnolds, the Olneys, or one of the respectable descendants of good old Roger Williams? No: He is a stranger in the land; a growth of a foreign soil, of whom the State does not contain the bones of a single illustrious ancestor; a man whose fortune is of his own making. The private merits and public services of his Excellency Governor Fenner, can be equalled only by his magnanimity and generosity. To my shame, I confess, that I have myself entertained illiberal prejudices against him; but the great and good man has been indulgent to my errors, and has forgiven me."

Mr. Howell concluded his defence by insisting to the Jury that the Plaintiff had no cause of action: But if the Jury should think otherwise, he was confident they would not find for the Plaintiff more than nominal damages.

On the second Issue the Counsel for the Plaintiff spoke in the opening. The matter in issue was simply whether the Defendant did publish a scandalous libel purporting that the Plaintiff sold the dead body for a Beaver-hat. It was admitted by both parties, that if it should be proved that the Defendant actually shewed to any person a paper containing such a story, it would be a sufficient publication to charge the Defendant with the slander.

In order to prove the publication of the libel by the Defendant, the Plaintiff's Counsel called the attention of the Jury to the testimony of Col. David Sayles, Dr. Ezekiel Comstock and William Hunter, Esq. who had given their testimony in the former issue. It was observed that the testimony of Col. Sayles was so positive, so correct and consistent, that it absolutely established the fact, beyond a possibility of being otherwise, unless the Witness was wilfully perjured. The only question that remained was, whether Col. Sayles was perjured or not. To secure that gentleman from so foul an imputation, there was in addition to his unblemished character, and the many instances of public confidence with which he had been honoured, the testimony of Dr. Comstock and Mr. Hunter which strongly corroborated that of his own.

The Defendant, in the course of the Defence, called several Witnesses for the purpose of doing away the testimony of the Plaintiff's witnesses; the first of whom was JUDGE HARRIS, who testified as follows. "I was on board the Packet with the Governor in the passage to Election in May, 1800. I applied to the Governor for the written agreement concerning the dead body. He handed it to me, and desired me to hand it to him again."

JUDGE MARTIN. "Three or four weeks ago, I had often heard that Governor Fenner had shewn a paper on board the packet, and that Col. Sayles had said so. I asked Sayles if it was true.— He said yes. He said the writing was on a whole sheet of paper, and related the story as particularly as he did yesterday in this trial. He said he did not hear the story first on board the Packet, but a friend of Richard Jackson, jun. had told it to him before he went on board."

SYLVANUS MARTIN. *Q. By the Governor.* Had not you some conversation with one David Sayles respecting this Case?

A. "Yes. In June last I was at Cumberland and saw David Sayles at his house. He informed me that he saw a paper on board the Packet relating the story of the Beaver-hat. He said that the story had gone out of his mind, till Judge Dorrance's publication in the newspaper revived it. He told me the paper did not appear to be in the Governor's hand writing."

DAVID SAYLES, called by the Plaintiff. "Sometime ago I saw Judge Martin, and he invited me into his house. He conducted me into a private room, and after shutting the door, cautioned me strictly not to mention that he had spoken to me. He then enquired of me particularly what I knew of the dispute between the Governor and Judge Dorrance. I was not perfectly satisfied with the manner in which Judge Martin conducted his enquiries, and did not therefore feel much disposed to be communicative to him. I however recollect to have told him that a gentleman had mentioned to me that something black had turned up.

"Sylvanus

“Sylvanus Martin came to my house one Monday morning. I was in the field at work ; and when I came home, at noon, I found him there again. After he went away, my wife and mother-in-law informed me of Mr. Martin’s being there in the morning, and that he had questioned them particularly whether they had ever heard me tell what I knew relative to the controversy between the Governor and Judge Dorrance, but they gave him but little information about it. While Mr. Martin was present with me, he told me that the old matter had broken out again, and the Governor was going that day to compliment Judge Dorrance with a writ. He then asked me what I knew about the paper, and said that he supposed I should be summoned as a witness in the Case. I told him I had seen a paper, respecting the Beaver-hat, in the Governor’s hands ; and that it did not appear to have been in the Governor’s hand writing. He observed, that I could of course know nothing about the matter. He soon after went away.”

CALEB HARRIS, called by the Plaintiff. “At the Election in May, 1800, I slept in the same room with Col. Sayles. One night, after we were a-bed, Sayles began to talk of Judge Dorrance, and highly disapproved of his conduct. He said that Governor Fenner, on their passage to Election, had shewn him a paper which contained an account of Judge Dorrance’s selling a dead body for a Beaver-hat. He described the paper to me in much the same words which he has used in his testimony here. The story was entirely new to me ; and next morning I acquainted Judge Dorrance with what Sayles had told me. The judge said he had never heard of it before.”

CHARLES DYER. “Sometime after the appearance of Judge Dorrance’s publication, Benjamin

min Randall was at our store, when there happened to be some conversation respecting the Beaver-hat and dead body. I asked him some thing about his testimony which he had given in a deposition taken by the Governor concerning the business. Randall laid they had lied about him like the Devil: That he knew not what the hat was given for; and that he was sorry for what he had said, and would not have said it, had he foreseen the consequences. He said that Dr. Bowen spoke to him for the hat before the man hung himself."

HENRY ALLEN. " Benjamin Randall was at our shop to buy some oil of vitriol. I heard him say that the Beaver-hat was spoken for before the man hung himself."

Q. By Defendant's Counsel. Did Randall pay you for the vitriol at that time?

A. Yes.

NEHEMIAH KNIGHT, called by the Governor. " I know nothing pertaining to the issue before the Jury. I received a letter from Governor Fenner, and went to his house. He shewed me a writing containing as much as twenty pages in folio, relating to the case of Atwood and Smith. I wished to see the other gentlemen concerned in the business, and the Governor wished it also. The gentlemen were accordingly sent for, and attended. A great deal was said about a settlement in that case; and the Governor seemed desirous to promote a settlement in an easy way to the parties. The Governor said the reason why he requested Beverly to commit the history of the case to writing, was that the matter might be made known to the parties. The Governor was of opinion that if Smith could

not be relieved by the General Assembly, the Judges of the Court would have the debt to pay. Judge Dorrance said that he never had any thing to do in the business. I was Sheriff at that time and had the service of the execution; but had no intercourse with Judge Dorrance about it, and do not know of his ever paying any of the expences of the process. The Governor appeared satisfied with Judge Dorrance's conduct."

JASON NEWELL, called by the Governor. "I know George W. Heppin, I saw him several days ago. He said he was a witness in this case; and wished that Governor Fenner might be so beaten in the cause that he could not be able to look his own son in the face. I asked him if he was not willing that justice should be done. He answered, that he wished by all means to have justice done.

JOHN CARPENTER, called by the Governor. "I heard Charles Dyer say, that Benjamin Randall told him that the Beaver-hat was spoken for before the man hung himself, he observed also that Randall was intoxicated when he told him so."

Q. By Plaintiff's Counsel. Was you present when Randall gave a deposition respecting this business, for the Governor's use, about the time of the commencement of his action against Judge Dorrance?

A. I was.

Q. Was Randall sober at that time?

A. We took his first deposition in an evening. He was then very much in liquor; and the next day we took his deposition over again.

Q. Who applied to him for his deposition ?

A. I applied to him at that time.

Q. At whose request did you undertake this business ?

A. I don't know but it was Judge Martin's—
No, it was not Judge Martin.

Q. Did Governor Fenner employ you ?

A. No.

Q. Did you undertake it all of your own head ?

A. Y—N—N—No.

(Here Mr. Howell interfered, and requested the protection of the Court for the Witness, that he might not be compelled to answer questions that tend to criminate himself.)

JUDGE MARTIN. "I recollect about the taking of Randall's deposition. John Carpenter applied to me and told me he wanted the deposition taken, I considered the matter over, and concluded not to take it myself. We then concluded to apply to Squire Thurber, for him to do that business.— Randall at that time was very drunk."

WANTON STEERE. "Sometime past, I was with Mr. Thomas Brown at Col. Hoyle's, and saw Benjamin Randall there. We had some conversation respecting this suit, and the matter of the Beaver-hat. Randall told us that the Governor had privately talked with him a great many times, and desired him when he should come to testify in
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he Trial, to say things that were not true; and which Randall said he should not consent to do. Truth; he said, was the best policy."

THOMAS BROWN testified that he was present, and heard the same conversation with Randall, in the same manner as Capt. Steere had testified.

BENJAMIN RANDALL, called by the Governor, testified that the Governor never spoke to him in private *on the subject of the Beaver-hat.*

RESOLVED SMITH, called by the Governor, testified that he never heard the Governor direct Randall to misstate any fact in Court.

WILLIAM PECKHAM, called by the Governor, testified that he first gave Randall's deposition to the Governor, while he was at Newport.

JOEL METCALF testified, that in the time of the yellow fever in 1800, he was a member of the Town-Council, and was present when the Governor had a dispute with Judge Dorrance, who was then President of the Town-Council.

CALEB HARRIS re-examined. Q. Did Governor Fenner ever tell you the reason why he employed Beverly to write that story of the law-suit?

A. He told me that he desired Beverly to commit the story to writing, that he might see if Beverly could tell the story twice alike.

The Counsel for the Defendant agreed, that as the evidence of the Defendant's publishing the libel depended chiefly on the testimony of Col. Sayles, the jury would not be warrantable in convicting him of
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the slander on such slight grounds; because it was probable that in such a length of time his memory had failed him. The integrity of Col. Sayles however was, in unlimited terms, by them acknowledged to be immoveable. They insisted that the copy of the agreement was the paper which he had mistaken for the libel.

The Plaintiff's Counsel, in the close of the Case, confidently contended that there never was a case more fully and substantially proved. Col. Sayles, a man whose veracity or candour had never been questioned, had been so stubbornly positive in his testimony, that no ingenuity or management could evade it. It was in vain for the Defendant to trifle with his own character, by endeavoring to palm upon the Jury a presumption that the copy of the agreement was actually the paper which he shewed to Col. Sayles. It was in vain to perplex the intelligence of common sense by cavilling surmises of the insufficiency of Sayles' memory. Col. Sayles, the very next day after he saw and read the paper on board the Packet, gave the same account of it to Judge Caleb Harris, which he had given in Court. Sylvanus Martin had also heard the witness relate the story in the same manner. Dr. Comstock and Mr. Hunter had both heard the Governor refer to a paper of the same description. The question wholly rested on this point: Either those witnesses were guilty of deliberate perjury, or the Governor was really guilty of the slander.

On Saturday evening, being the fourth day of the trial, the arguments were closed, and the cause committed to the Jury. About nine o'clock, the same evening, the Jury retired to their room. They there continued, without agreeing on a verdict, till after the Court was opened, on Monday morning, when they appeared and informed the Court that
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there was no probability of their ever agreeing, and requested the Court to receive the papers of the Case. The Chief Justice refused to take the papers. He was of opinion that their disagreement was owing chiefly to an unaccommodating party spirit, which they ought to endeavour to qualify and subdue. He told them it was their duty to agree, and that they ought not to relinquish the cause till they were all of one opinion. He thereupon ordered them to retire a second time, which they accordingly did; and between three and four o'clock, in the afternoon, they returned, and informed the court that they had signed a verdict.—The Clerk took the verdict and read it aloud, in the following words “*We find for the Defendant bis cost.*” The Counsel for the Defendant upon this, requested the Clerk to enter the Verdict according to the two issues joined, and asked the Plaintiff’s Council if they had any objection. They were answered that the verdict was expected to be entered according to the intentions of the Jury. Whereupon several of the Jury declared to the Court that they did not mean to find the truth of the Defendant’s Plea in Bar to the eight first Counts, and that they believed the Plaintiff entirely innocent of the facts charged against him in the Plea; and the foreman told the Court that the whole Jury had uniformly expressed the same opinion. While this conversation was passing, Mr. Howell had drawn the form of a verdict to be entered, which was nearly in these words: “We find for the Defendant upon the first issue: We also find for the Defendant on the second issue, with cost.” This form was read and objected to. The Court ordered the Clerk to enter the verdict. The Clerk was at a loss to know how to make the entry, and applied to the Court for their instructions. The Chief Justice said, “*Write the verdict in the common manner. I don’t know what else to say.*” Another

Another controversy arose between the Counsel, when one of the Plaintiff's Counsel desired the Jury to inform the Court what they meant to find in their verdict. Upon this the Chief Justice said, "*The JURORS ought to be dismissed, because they've been shut up so long, and haven't had no refreshment, that they can't stand it any longer. The Court can do about the verdict, I guess*" Several of the Jurors did not seem willing that the Jury should leave the stand till the verdict was decided. One of them vehemently begged the attention of the Court, and told them that he meant to find for the Defendant only on the eight last counts, and offered to give his reasons for signing the verdict in the manner he did. But the Court did not look towards the Juror, or take any notice of what he said;—and the Juror therefore desisted. The Court were again applied to, to decide the form of entering the verdict. The Chief Justice said, "*Write it as you commonly do. I don't know what else to say, n't I*" The Clerk finally entered the verdict in his minute book, in the words of the Jury, viz: "We find for the Defendant his cost." He then spoke to the Jury in these words: "*Gentlemen of the jury, hearken to your verdict as the Court have recorded it. We find for the Defendant his cost. Is this your verdict, Gentlemen.*" Upon which, Nathaniel Bailey, one of the Jury, immediately rose and said, "No, it is not my opinion, I meant to find for the Defendant only on the last eight counts." He was proceeding further, while two or three other Jurors rose to make their explanations. The Chief Justice, however, stopped the Jurors, and told them they were dismissed, and must immediately retire.—Nathaniel Bailey still urgently desired to be heard; but the Court told him the Jury were regularly discharged of the cause; and that it was improper for the Court to hear them any more upon the subject.

The Counsel for the Plaintiff now asked the Court if the verdict was, at all events, to be recorded in its present situation. The Chief Justice said, "*Why the JURIEES has all signed it, and I can't see why 'tisn't a good verdict. I am willing tho', and I suppose the Court is, to bear all that can be said upon it. What ha' ye got to say for yourself, Mr. Burrill?*" Mr. Burrill told the Court that his duty to his client required him to object to the verdict's been recorded; because the Jury, when solemnly called on, according to the practice and usage of that Court, had declared it not to be their verdict; and that it was totally against their sentiments and intentions: That the Jury seemed to have signed the verdict for the very purpose of defeating its operation, by an explanation in Court; and they had been permitted to explain themselves sufficiently, in his opinion, to destroy the verdict.

(Here the Chief Justice interrupted and said, "*speak louder, Mr. Burrill, I'm some deaf, an'ts like I've not heard all'ts been said. The Court has a mind to do that's right. For matter o' that we'll bear you patiently, Mr. Burrill and Mr. Greene too. Proceed Mr. Burrill.*")

Upon this, the Counsel for the Defendant moved the Court that the Plaintiff's Counsel be not permitted to say any thing further upon the subject of the verdict. They said the verdict was already recorded in the minute book, the Jury were discharged, and the Plaintiff was therefore entirely foreclosed in any objections he could make to the verdict's standing on record as it then was. The Plaintiff's Counsel insisted on being heard, and offered to produce, in addition to the practice of the Court, sundry authorities from the books, to shew the absolute necessity of the verdict's being annulled.

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The Court, after whispering among themselves for about the space of fifteen minutes, declared they would hear nothing further said upon the matter at that time. They however said they would at a future day hear some further arguments, *if the Plaintiff insisted on it.*

Such being the situation of the cause, the Counsel for the Plaintiff drew up a remonstrance against the establishment of the verdict, praying that the same might be annulled and held for nought.*— For reasons, they set forth the circumstances attending the delivery of the verdict, the conduct of the Jury, and the proceedings of the Court thereon. This paper the Counsel for the Plaintiff presented to the Court, and requested that the same might be received on file, in order that the subject of its contents might be argued at such time as the Court should appoint. The paper being read to the Court, the Counsel for the Defendant objected to its being received by the Court. They declared it to be a libel on the Court, inasmuch as it contained insinuations of irregular proceedings of the Court. They said the verdict was already entered on the minutes as a record of Court, and the Court themselves had not power to alter it.

The Counsel on the other side declared they had stated facts precisely as they occurred, and offered to prove every fact by them stated on the paper; but they were answered that they could not be permitted

* A copy of this paper would have been inserted here, had it been possible to have obtained it. The Plaintiff's Counsel applied to the Court for the paper, after they had refused to receive it on file; but, the paper was unaccountably mislaid. Some of the Judges examined their pockets over and over again, but all to no purpose. They finally declared that it was not to be found !!

mitted to prove things done in the presence, and under the view of the Court itself.

The Court, after whispering some time, declared that the paper should not at that time be entered on file, but that they would take it, and carry it a few days in their pockets, and at a convenient time would say whether they would formally receive it. The Chief Justice said "*The Court has no objection to let the paper be. I'll put the paper in my pocket till the Court can see about it. We'll hear what the parties ha'to say before the Court's done. Ye ha'nt no objection I'spose to that, ha'ye? Heb!*"

The Court refused to appoint a particular day for hearing the motion for their receiving the paper; but they said they would *see about it* before the rising of the Court. They kept the paper in their possession till the tenth day after the return of the verdict, when the motion was again brought before them, and they consented to hear the arguments upon the subject. The Defendant's Counsel again repeated their objections to the paper's being received, or the Plaintiff's being suffered to say any thing more against the propriety of the verdict. The Plaintiff's Counsel insisted, that the verdict was incomplete, irregular, and absolutely void of itself. They said it had always been the uniform practice, and custom of the Court, not to consider a verdict complete till the Jury had solemnly acknowledged it as their verdict, and persisted in it, after the Court had entered it in their minute-book. That such was the practice also in the Supreme Court, where several verdicts were recollected to have been set aside, by reason of some of the Jurors dissenting to it after the Court had entered it on the minute-book: That in the present Case, several of the Jury had solemnly declared their utter dissent to the verdict, before they were
dismissed

dismissed from the cause ; and it could not therefore be said to be the verdict of twelve men.

Here the Chief Justice interrupted, and said, "*What d'ye say, Mr. Greene? If I understand the matter right, the question now afore the Court is, whether there shall be no more said about the verdict, and whether o'no the Court shall receive the paper. For my part, I wish to do one thing to a time.*"

After this the arguments were confined to the question of receiving the paper ; and when the opinion of the court was taken the Chief Justice, after whispering a few minutes with the Court, spoke nearly as follows : "*'Tis the 'pinion of the Court the paper dont ought to be received in its present form. Ye may though make another motion to the Court as ye will, an the Court will bear ye.*"

The Counsel observed, that the four days from the return of the verdict had expired, which the law allowed for filing motions for setting aside verdicts ; and the Court, they well knew could not hear another motion upon the subject. They also observed, that they knew of no other form different from the one already decided on. They had set forth all the facts on which their motion was grounded, and it was impossible to draw a different form without misstating facts ; they therefore informed the Court that they should not trouble their honours with any more motions on the subject. Upon this the Chief Justice said "*The Court's quite willing to keep a bearing motions as long as there's any thing to say.*" There was however nothing further said ; and the verdict was established, and entered on record.

The following Certificates are presented by two of the Jurors, for the purpose of publicly vindicating their own conduct in signing the verdict :

“ I certify that I was a Juror in the Case of John Dorrance, Esq. against Arthur Fenner, Esq. tried at the December Term of the Court of Common Pleas in the County of Providence, 1801—That I with the other Jurors signed the verdict in the following words, “ We find for the Defendant his cost :”— My signing this verdict was owing wholly to the absolute necessity at the time of my being immediately relieved from the cause. I was shut up with the Jury from 9 o’clock on Saturday evening till late in the forenoon of the Monday following, more then six and thirty hours, suffering under severe indisposition from the pleurisy, before we could be permitted to appear before Court. We had not then agreed on a verdict, and the Court insisted on our retiring again, for the purpose of agreeing, if possible. We again retired, and continued in debating upon the verdict, myself refusing to sign it in favour of the Defendant on the eight first Counts of the Declaration, till some time in the afternoon of the same day, when my indisposition was encreasing upon me, I was compelled, at all events, to get rid of the business. I therefore set my name to the verdict, with an intention of explaining myself to the Court when the verdict should be delivered to them ; and with an expectation of being able to prevent its operation as a verdict by expressing my dissent to it, after it should be read by the Clerk, and offered to the Jury on the stand for their acknowledgment. But when the Clerk read the verdict before the Court, and asked the Jury if it was their verdict ? The Court ordered the jury to immediately retire from the stand. I at the same time declared my dissent to the verdict,
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but was refused a hearing. Had not the Court compelled the Jury to suddenly depart, I should have immediately told the Court my situation in regard to my health, my reasons for signing the verdict, and my utter dissent to its being recorded; as it was intirely against my opinion and intention.

NATHANIEL BAILEY."

"I certify, that I was a Juror in the Case of John Dorrance, Esq. against Arthur Fenner, Esq. tried at the December Term of the Court of Common Pleas in the county of Providence, 1801. That I with the other Jurors signed the verdict in the following words. "We find for the Defendant his cost."— My signing this verdict was owing to the long time we were confined in the Case, and seeing no prospect of being relieved by the Court, when we were called before them on Monday, late in the forenoon. At this time we had not agreed on a verdict, and the Court directed us to retire again, and agree if possible. We again retired and continued debating on the verdict, myself and Capt. Bailey refusing to sign it in favour of the Defendant, till sometime in the afternoon of the same day, when being very much fatigued in debating on the subject I was compelled to sign the verdict to get relieved from the business, with an expectation that there would have been something said by some of the Jurors that would have induced the court to reject the verdict.

GEORGE BURTON."



IN THE CASE
ARTHUR FENNER vs. JOHN DORRANCE,
Commenced at the December Term of the
Court of Common Pleas, in the Coun-
ty of Providence, A. D. 1801.

THIS was an Action of the Case commenced by His Excellency Arthur Fenner, Esq. against John Dorrance, Esq. charging the Defendant with having published a false and scandalous Libel against the Plaintiff, which appeared in the Providence Journal of the 6th of May, 1801. The Case was called for trial in the morning of the 21st day of the Term, and the 13th day of January, 1802. The same Jurors were first called who were originally called in the former case between the same parties, as stated in the former part of this publication. Naaman Aldrich, Nathan Dyer, James Hammon and Charles Low were challenged by the Governor, on the same grounds that they were challenged formerly; and the same arguments upon the challenges were repeated, excepting the observations of Mr. Dorrance's Counsel, that the same grounds for the challenge of Mr. Hammon did not exist as in the former Case; because, as he was challenged for having made up a previous judgment of the Case, the same objection must certainly now equally applied to all the Jurors who heard the other Case, and were to decide in this also, for the same principles, facts and evidences were to be investigated in this as in the other Case. The Court however dismissed these four Jurors in the same manner as before. At the time
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the court adjourned to dine, the Jury was completed and consisted of the same Jurors as in the other case, excepting Nathaniel Bailey, who had, at the time the verdict in the other case was returned, obtained a temporary excuse on account of his being unwell.— His place was supplied by *George Nicholas*, another of the drawn Jurors.

At the opening of the Court at three o'Clock, P. M. after Mr. Burrill had begun the opening of the Case on the part of the Defendant, Mr. Howell interrupted him, and challenged *George Nicholas*, a Juror. He suggested its having been discovered that Mr. Nicholas had publicly expressed his sentiments upon the merits of the Case. He thereupon questioned the Juror on the subject. The Juror declared that to his recollection and confident belief, he had never expressed any opinion, or any thing whatever, to any person, concerning the Case, nor had he ever conversed upon the subject in any manner. He was almost entirely ignorant of the subject of the suit. He was then informed that the action was concerning a libel by Judge Dorrance against the Governor, which was published in a newspaper; and was asked if he had ever read the publication.— He answered, that he had never read the publication or heard it read. On being questioned, he declared he had no bias upon his mind that could possibly operate to prejudice or favour either of the parties: He observed, that he made these explanations merely to do away the insinuations against his honour and rectitude, which implied that he had concealed his situation for the purpose of holding a place on the Jury to manage the interests of a particular party.— He desired heartily to be released from the cause; and as there existed, in one of the parties, scruples in regard to his competency, he conceived there was a strong propriety in his being discharged.—BENJA-

MIN JENKS was then called, by the Governor, as a witness. He testified that he lived in the village of Pawtucket, in the neighborhood of Mr. Nicholas. That he (the witness) was one day, in the fore part of last May, at the time of the first appearance of Judge Dorrance's publication, at a place called *Poet's Corner*, in company with Abraham Wilkinson, Timothy Greene, Samuel Slater and George Nicholas, the Juror: That some of the company talked about Judge Dorrance's publication;—some of them commended it, and some condemned it: That during this conversation, Mr. Nicholas stood by, said nothing, and seemed to take but little notice of what was said. At last Nicholas left the company, and just as he was going, one Bagley happened to be passing by. Nicholas spoke to Bagley, but so low, and in such a manner, that the *witness could not distinguish a word that he said*; but it seemed to imply as much as to lay "*The publication was good enough for Governor Fenner; or something to that purport.*" The Juror was asked if he recollected the conversation spoken of by Jenks. He however declared himself absolutely certain that no such conversation ever happened; and that Jenks was totally mistaken (to speak the best of it) in every thing he had said. He said that Benjamin Jenks was a man with whom he did not associate, and such a conversation could not have happened without his remembering it.

TIMOTHY GREENE was called by Mr. Dorrance, and after taking his affirmation, was asked if he remembered any such conversation in the presence of Jenks. He said that he did not; and said he was perfectly sure that no such conversation ever happened in his (the witness's) presence. He added that Jenks was a person uniformly shunned by all the people whom he mentioned to have conversed with at *Poet's Corner*. ABRAHAM

ABRAHAM WILKINSON also positively denied the possibility of any such conversation's taking place in his presence. He scarcely ever spoke to Jenks, and avoided his company as much as possible. He repeated the testimony of Timothy Greene in much the same manner.*

Timothy Greene, Abraham Wilkinson, Sylvanus Brown, John Jenckes and Elisha Olney, were all questioned respecting the general reputation of Benjamin Jenks in regard to *truth* and *veracity*. They all unanimously testified, that they were acquainted with him, and that he was generally considered in his neighbourhood as a man unworthy of belief, and as one who had but little regard to his own reputation.

Mr. Howell insisted on the witnesses testifying to their opinion, whether Benjamin Jenks was to be believed when under oath. Some of the witnesses hesitated in giving their opinion upon that point. Mr. John Jenckes, however, declared that he should have no kind of confidence or belief in what he said, whether he was under oath or not. He said he had no kind of grudge against him, but he so well knew the man, as well as his character for truth, that he did not scruple to pronounce him totally unworthy of belief. Mr. Howell was now called on to produce some person to speak in favour of Benjamin Jenks. He however produced nobody.

The Governor's Counsel now insisted that Mr. Nicholas ought to be removed from the Jury, as Benjamin Jenks had seen him betray gestures, and
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heard

* Slater and Bagley, who were not present at the trial, have since declared positively, that no such conversation or meeting ever happened at Poet's Corner, or any other place to their knowledge.

heard him mutter unintelligible words, which seemed to be unfavourable to the Governor. Mr. Dorrance's Counsel observed, that they hardly knew what arguments to use against the motion for removing the Juror. There were such gross and glaring marks of falshood in what Benjamin Jenks had sworn to, and such palpable grounds for presumption, that he was procured as a suitable man to swear Nicholas off the Jury, that they conceived the Court would not hesitate in pronouncing it wholly unworthy of their regard. Some time late in the evening, the Court were called on for their decision. They whispered an unusual length of time, till at last the Chief Justice spoke aloud, in nearly the following words:—

“Why I do’na what to say, n’t I. It seems there’s not quite evidence enough against the JURIER to dismiss him, but some of the Court seems to think so for all. They seem to want him off. For my part, I’m for having it right. I do’na what’s best to do. Governor Fenner, I would ask you if any of the Wilkinson’s, has ever affronted you, or the like o’ that; in particular the one here?”

Hereupon the Governor rose up, and talked to the Court in a voice so low that it could not be distinctly heard by the audience. Part of his information however amounted to say that Oziel Wilkinson, father of the young gentleman present, was generally opposed to him (the Governor) in public matters.— Upon this Judge Martin questioned the Juror, whether he was not sometimes employed by some of the Wilkinsons, or some of their connections. The Juror answered, that he had sometimes worked in the business of his trade, a houle-carpenter, for Samuel Slater: That Samuel Slater married the daughter of Oziel Wilkinson, who was father to the young man present in Court. He was then asked if he had ever conversed with Mr. Slater respecting the case on trial. He answered that he had not; and that he did not recollect to have ever heard Mr. Slater, or
any

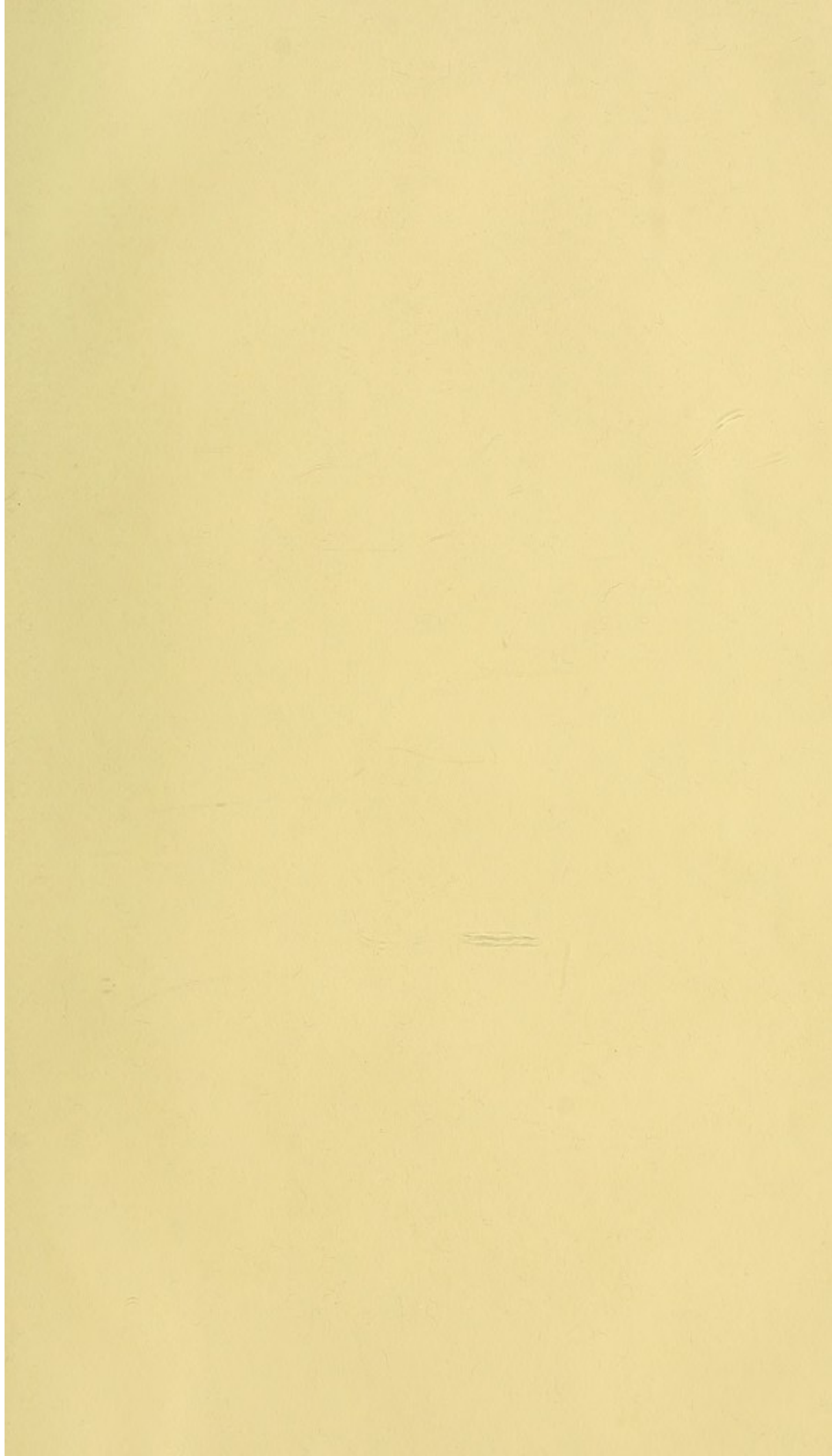
any of the Wilkinson's speak concerning the case.—
The Court at length came to a decision. After
whispering a few minutes, the Chief Justice said,
“*Aye, the Court thinks it best that the JURIER come
off.*”

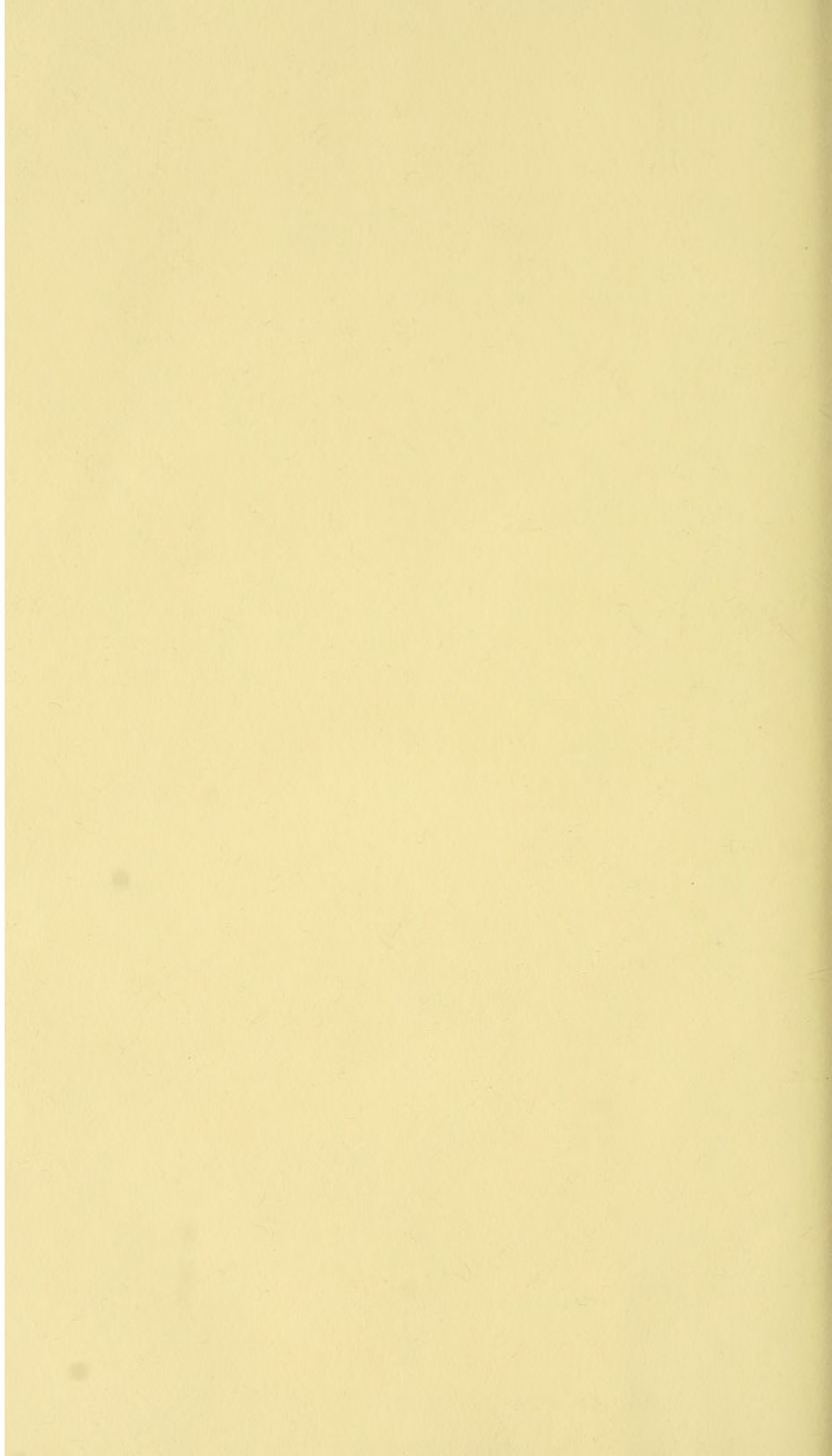
By the voluntary information of George Burton,
a Juror, to the Court, that he had expressed an opin-
ion of the merits of the case to certain persons, he
was also excused by the Court. Two Jurors were
thereupon wanting to supply the places of Nicholas
and Burton, when the Clerk called Nathaniel Bailey,
who had officiated as Juror in the former case, and
was now again present. But the Chief Justice said,
“*The Court has excused all the drawn JURIERS, and
I don't see as how Mr. Bailey can be one now.*” A
venire was now ordered, out of which the Jury was
filled up. Whereupon the Counsel for Mr. Dor-
rance observed, that from the manner in which the
Jury had been empannelled, and the sentiments which
the Jurors were known to entertain, there was no hope
of a fair trial. They therefore SUBMITTED
JUDGEMENT and appealed.

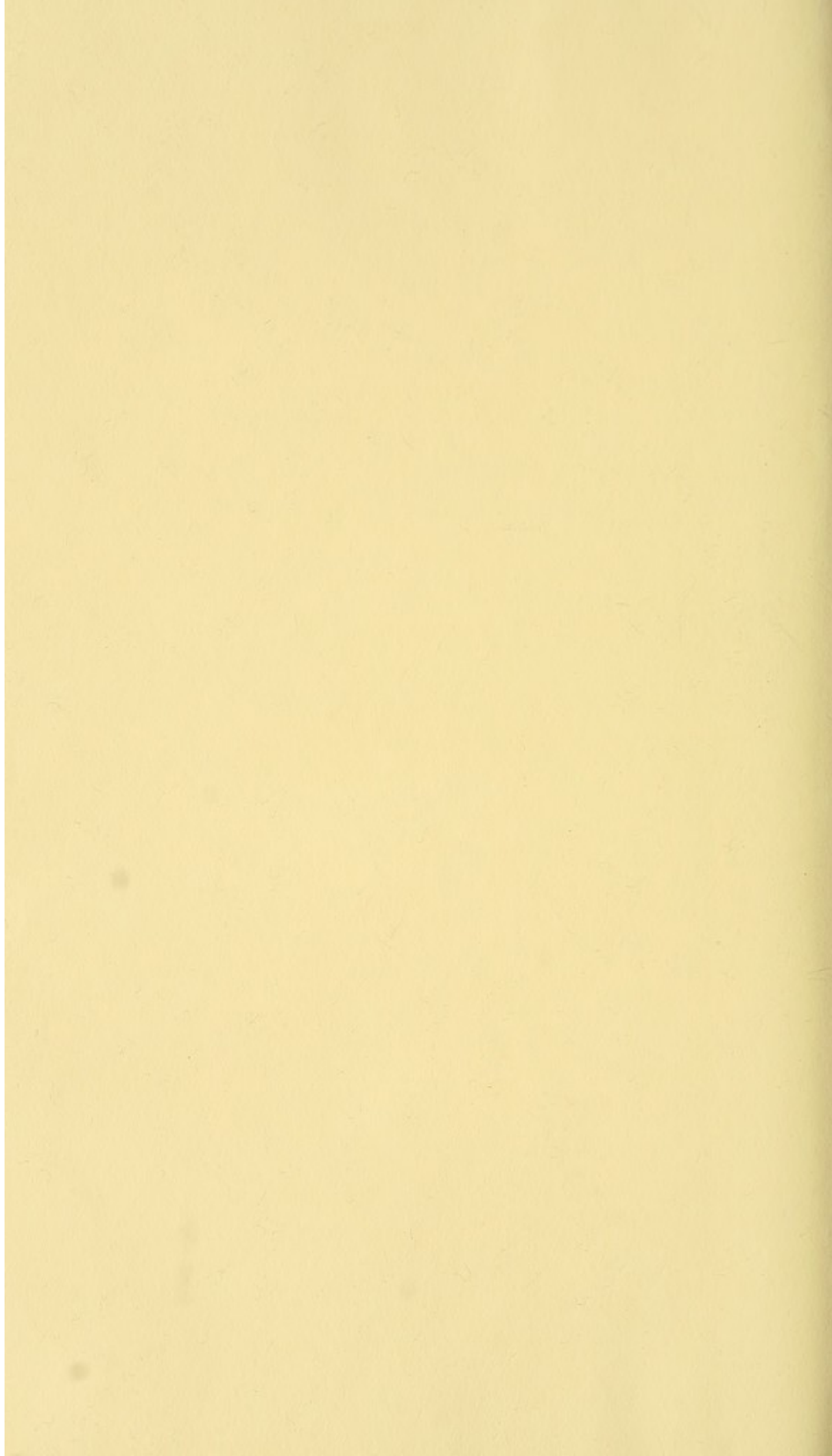
At the opening of this Trial, Judge Dorrance
read before the Court a proposal to submit this
Cause together with the former one, “*to the deter-
mination of either three of the Judges of the Supreme
Court of the State of Massachusetts or Connecticut, or
to any three good men living out of this State;*” Mr.
Dorrance agreeing at the same time to pay all the
Costs up to the time of the proposal.—To this pro-
posal the Governor utterly refused to accede. Mr.
Howell observed that he should not endeavor to
prevent an amicable accommodation between the
parties; but for Governor Fenner to remove the
cause from among his affectionate constituents to
the State of Massachusetts or Connecticut, would, in
his

his opinion, be an extremely impolitic step. As to the Governor's going to Connecticut, Mr. Howell observed, that he would make a "pretty figure."— He said, "*Why your Honours know that Governor Fenner is uniformly the scorn and derision of the people in Connecticut. Ha! Their Poet Laureat, as your Honours have seen in the newspaper, has doggrelled him off with peculiar scurrility, about white-washing old Fenner's smoaky coat.*"—In regard to the Judges of the Supreme Court in Massachusetts, Mr. Howell said, "*The Judges of the Supreme Court of Massachusetts I am personally acquainted with. They are, like those of Connecticut, what are called good Federalists. They must of necessity be biassed towards the interests of their party. Why my Federalism has been so much doubted, that I should not myself consent to submit a cause of my own to the Judges of the Supreme Court of Massachusetts. Why are all these Federalists particularly pitched upon to decide in this cause? Are they willing to submit the cause to Mr. Jefferson and Col. Burr?*" Mr. Dorrance said he would with all his heart, submit the cause to Mr. Jefferson and Col. Burr. This it was said on the other side would be improper. Mr. Dorrance then proposed the Judges of the Supreme Court of Pennsylvania, or any State other than Rhode-Island; or even any three respectable disinterested men of Rhode-Island.— It was all however totally REJECTED.

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