1877

James T. Fant v. The Auditor of Public Accounts

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the proceedings will be liable to reversal on a writ of error: *Hamilton* v. *The Commonwealth*, 4 Harris 129; *Dunn* v. *The Commonwealth*, 6 Barr 384; *Keely* v. *The State*, 3 Sm. & Mar. 518; *Graham* v. *The State*, 40 Ala. 660; *The State* v. *Matthews*, 20 Mo. 55.

In cases not capital, less strictness perhaps is required in insisting upon a direct statement in the record of the defendant's presence. See *Holmes* v. *The Commonwealth*, 25 Penn. St. 221. In ordinary cases it is sufficient if the presence of the prisoner may be inferred from the record by fair intendment. See *State* v. *Craton*, 6 Ired. 164; *Stephens* v. *The People*, 19 N. Y. 549; *Grimm* v. *The People*, 14 Mich. 300; *State* v. *Steeffle*, 13 Iowa 603.

It does not follow, however, that because a verdict is rendered in the defendant's absence he is to be *discharged;* it is merely a mis-trial, and the verdict should be set aside and the defendant tried again: *People* v. *Perkins*, 1 Wend. 91; *State* v. *Hughes*, 2 Alabama 102; *Younger* v. *State*, 2 W. Va. 579. And if present when the verdict is returned, but absent when sentence is pronounced, he is not entitled to a new trial, but only to a new *sentence*. If the former judgment is reversed on error for the prisoner's absence, he is simply remanded for sentence according to law: *Cole* v. *The State*, 5 Eng. 318; *Kelly* v. *The State*, 3 Sm. & Mar. 518.

So essential is it deemed that the prisoner should be present in court when the verdict is returned (especially in capital cases), that it has been thought that neither he nor his counsel could waive the right, and that it would be erroneous to proceed without him even by his own consent. See *Nomaque* v. *The People*, Breese 109; *Prine* v. *The Commonwealth*, 6 Harris 103.

But, as held in the principal case, it is not *necessary* on hearings in his own behalf, as on a writ of error, or motion for a new trial, that he should be personally present; certainly not, if not confined in jail, but out on bail, and when his absence is purely voluntary. See *The People* v. *Clark*, 1 Parker C. C. 360; *Rex* v. *Boltz*, 8 D. & R. 65, where he was in prison and too poor to pay the expenses of bringing him into court.

What has been said above in regard to the defendant's presence relates to *felonies*. In misdemeanors less strictness is required, and the trial may, by leave of court, often proceed, and the verdict be rendered, and sentence of a fine be pronounced, in the defendant's absence. See *United States* v. *Mayo*, 1 Curtis C. C. 433; *Sou* v. *The People*, 12 Wend. 344; *Canada* v. *The Commonwealth*, 9 Dana 304; *Warren* v. *The State*, 19 Ark. 214; *Holliday* v. *The People*, 4 Gilman 111.

EDMUND H. BENNETT.

Supreme Court of Mississippi.

JAMES T. FANT *v.* THE AUDITOR OF PUBLIC ACCOUNTS.

Where the term of a public office is fixed by the constitution the legislature cannot directly or indirectly remove the incumbent. The inability to do so proceeds rather from the absence of legislative power than from any idea of a contract between the incumbent and the state.

It is immaterial that the constitution has not prescribed the number of officials who are to hold for the prescribed term, but has left the number discretionary with the legislature. When by law provision has been made for a certain number,

and they have been lawfully chosen, they are protected for the term, as they would have been had the constitution itself indicated how many there should be.

Under such circumstances a reduction of the number of officers can only take effect at the end of the term of existing incumbents.

To take from an officer the authority to perform the duties of the office, is equivalent to a removal, and consequently is incompetent when a direct removal is forbidden.

Where therefore the term of office of district attorneys was prescribed by the constitution, and the statute had fixed the number of these officers at thirteen, with a salary of $1200 each, and the legislature afterwards reduced the districts to eleven, and provided that two of the incumbents should act only in the counties of their residence respectively, and only in the absence of the district attorney assigned to the district embracing such county, and should receive a salary of $100 each only: *Held*, that this action was void, as an indirect attempt to deprive two of the incumbents of their offices; and consequently those incumbents were entitled to the salaries previously established.

APPLICATION to compel payment of an official salary.

The opinion of the court was delivered by

CHALMERS, J.—The proposition that the legislature cannot directly or indirectly remove the incumbent of an office created by the constitution during a term fixed by that instrument, needs no argument nor elucidation.

If not originally self-evident it has by a long and unbroken series of decisions become axiomatic. No one will contend, for instance, that any act of legislation could abridge the term of an incumbent of the gubernatorial office, or that of the attorney-general or auditor of public accounts.

No matter what disguise might be adopted or how plausible the means devised, it would be the duty of this court to scan rigidly any act that seemed to contemplate such an end, and to pronounce void any provision the practical effect of which was to accomplish such a result.

This doctrine does not proceed upon the idea that the state has entered into a contract with the incumbent by which she has irrevocably bound herself to accept his services for a specified period; though it is undoubtedly true that in some sense and for many purposes an office is a contract and the incumbency of it a right of property which the courts will protect.

But the fundamental principle which prohibits the removal by legislation of a constitutional officer during a constitutional term, is that the framers of the organic law, by creating the office and specifying the term, have unmistakably indicated their will, first,

that the state shall always have such an officer, and, secondly, that the duration of the term of each incumbent shall depend not on legislative will, but on the solid basis of an ordinance that cannot be changed save by a change in the constitution itself.

Incumbency for the prescribed term by each holder of the office is as important as that the office itself shall exist. The legislature can no more abridge the one than they can abolish the other.

It is needless to remark that if by any device it is permitted to oust an officer during his term, full control over the terms is acquired, for if one legislature can eject an obnoxious officer the succeeding one may dispense with the services of his successor, and thus, while nominally preserving the term, no incumbent will be allowed to enjoy it.

The inhibition against this proceeds rather from the absence of legislative power than from any idea of a contract between the state and the officeholder.

The correctness of these views will not be questioned where only one officer of a class is prescribed by the constitution, as in the case of the governor or attorney-general, nor where a fixed number is established, as is the case with the judges of this court and the supervisors of the several counties.

But it is suggested that where the constitution merely directs that a suitable number or a competent number of a certain designated class of officers shall be elected or appointed, and leaves that number to be determined by the legislature, the power to establish carries with it the power to change, and that therefore, even though a fixed term is prescribed, each legislature must judge of the number needed by the state, and that the judgment of one legislature on this question cannot bind a succeeding one.

It is said, for instance, that the constitution of this state gives terms of fixed duration to the judges, chancellors, district attorneys, justices of the peace and constables, but leaves the number of these officials to be wholly regulated by the legislative will and hence each legislature must determine for itself how many are necessary.

It is therefore insisted that whether all incumbents shall remain in office during the full constitutional terms for which they were chosen, must depend on whether the legislature deems that the state so long requires the services of the entire number.

This view we deem wholly untenable, because utterly subversive

of the end intended to be accomplished by the constitutional specification of terms. We cannot doubt that if such had been the intention of the framers of the constitution they would have left the duration of the terms, as well as the number, of those offices to legislative discretion.

Evidently two antagonistic evils which lurked on either side of the public weal were intended to be equally guarded against, by giving to these offices fixed terms, but leaving their number to legislative will. One of these was the imposition on the state of a horde of superfluous officers, who, holding their places for life or through long terms prescribed by the body that brought them into existence, should prove useless and costly burdens on the state. The other was the evil to some extent inseparable from republican institutions which springs from frequent and violent changes in the offices of the state with every variation in popular caprice.

Both of these ills were guarded against by affixing definite and short terms to these offices and leaving their number to be determined by the legislature. Thus at frequently recurring intervals the legislature could ascertain how many judges and district attorneys were necessary, and could order their election or appointment; but when chosen they must be permitted to serve out the full terms prescribed by the constitution, unless sooner removed in the modes pointed out in that instrument.

If the constitution had undertaken to determine the exact number of these offices it might have inflicted on us a number greatly in excess of our needs, or it might have crippled the entire judiciary system by a supply totally inadequate to the requirements of the public service.

On the other hand, if it had left their terms wholly at the legislative mercy, with every change of parties in that body, there would have been a wholesale change in the judiciary of the state. It is impossible to imagine anything more disastrous than this to the welfare of the Commonwealth, and we are unable to perceive any method of avoiding it wiser and better than the one adopted.

We would not abridge the power of the legislature to decide as to the number needed, but it must be exercised in subordination to the equally plain requirement that their terms when chosen shall not be interfered with.

Each clause in the constitution is equally important with every other clause, and no one clause can be sacrificed to another.

The authority to determine the number of these officials therefore must be exercised in harmony with their constitutionally prescribed terms; and this can only be done by holding that such determination must be arrived at before the commencement of the term, and cannot thereafter be changed until it has expired.

If this construction sometimes inflicts on the state for a few years one or more supernumerary officers, this is infinitely better than that this whole class of important officials, comprising almost the entire body of the judiciary of the state, should be at the mercy of the dominant party in each successive legislature.

It is said that no system of government is perfect, and that power must be lodged somewhere. The wisdom of the remark is undoubted, and its application may be found in the consideration that the legislature will not ordinarily provide for a horde of unnecessary officers, but if they should do so, the evil need only be endured until the expiration of the terms of those first chosen. Then and not till then the corrective can be applied.

These remarks of course have no application to offices created by the legislature as to which their power is unlimited.

If this precise question has not heretofore been decided in this state in a case where the number of officers to be chosen was left to legislative discretion, the views here announced have been so often and for so long a period foreshadowed in our decisions that we cannot think that they are novel either to the profession or to the people at large. They will be found intimated with more or less distinctness in *Runnels* v. *The State*, Walker 146; *Hughes* v. *Buckingham*, 5 S. & M. 647; *State* v. *Smedes & Marshall*, 26 Miss. 47; *McAfee* v. *Russel*, 29 Id. 96; *Brady* v. *Howe*, 50 Id. 621; *Cocke* v. *Newsom*, 44 Id. 361; *Brady* v. *West*, 50 Id. 68; *State* v. *French*, 52 Id. 759; *Hyde* v. *The State*, 53 Id.

In other states the exact question has been uniformly settled in consonance with these views, though not always upon grounds which meet our entire concurrence. We agree with these cases, however, in the result reached, namely, that a constitutional term is as much beyond legislative interference where the legislature has the power to fix the number of officers as where the number is fixed in the organic law: *People* v. *Dubois*, 23 Ill. 547; *Commonwealth* v. *Gamble*, 62 Penn. St. 343; *Lowe* v. *Commonwealth*, 3 Metc. (Ky.) 237; *State* v. *Messmore*, 14 Wis. 163.

Having arrived at the conclusion that no incumbent of a consti-

tutional office can be displaced during the continuance of a constitutional term, and that this principle is in no manner affected by the delegation to the legislature of the power to determine the number of officers required by the necessities of the state, let us apply this principle to the case at bar, keeping in view the further proposition that a constitutional inhibition of a certain result includes every possible method by which that result can be accomplished.

The relator was elected to the office of district attorney of the tenth judicial district for the constitutional term of four years, at the general election in November 1875, and having been duly commissioned, entered upon the duties of his office in January 1876. This term will expire 1st of January 1880.

There were at the date of his election thirteen judicial districts in the state, and there was one district attorney for each. They were each entitled, by the law then and still in force, to an annual salary of $1200, besides fees of office.

During the spring of 1876 the terms of office of all the circuit judges in the state expired, and the legislature perceiving that there was no necessity for so many as thirteen, on the 4th of April 1876 passed an act by which the number of the districts was reduced from thirteen to eleven, but they were careful to provide by a supplemental act that it would not take effect until the expiration of the terms of judges then in office. In the appointment of their successors, eleven judges only were commissioned, but no provision having been made with reference to the district attorneys, there were left in office three more of these officers than there were districts.

To remedy this supposed evil, the legislature, at its next session, passed an act entitled "An act to assign district attorneys in the judicial districts of the state." Approved February 1st 1876.

In the changes in the boundaries of the districts produced by the Act of April 1876, two or more district attorneys had been in some instances thrown into one district, while in other districts none were left.

The object of the Act of February 1st 1877 was twofold; first, to have one district attorney assigned to each district, and, second, to rid the public treasury as far as possible of the burden of supernumeraries.

This assignment was ordered to be made by the governor, who was directed by the law that where only one district attorney resided in a district he should be retained, and that where two or more

resided in the same district, that one should be retained that had been voted for by the electors of a plurality of the counties in the district. Those who should under this arrangement be left unassigned were not by special enactment displaced from office, but they were left without any duties or any territory within which they could officially act, except that it was provided that they might officiate in the counties of their residence in the absence of the assigned officer.

The salaries of the unassigned officials were fixed at $100, while those of the others were left at $1200. The fees of the office would of course belong to the officers left on active duty.

The relator, Fant, was unassigned. He brings this writ of mandamus to compel the payment of his full salary of $1200, and it is agreed by counsel that we shall consider and pass upon the constitutionality of the Act of February 1877, without regard to matters of form.

It is at once evident that we are not called upon to pass upon the constitutionality of so much of the act as directs the assignment of district attorneys, except in so far as its effect is to displace some incumbent, and it is unnecessary therefore to decide whether such assignments are valid in districts where no collisions are created.

We would remark, however, that we are not inclined to adopt the views announced by some of the courts to the effect that an officer can have a vested territorial right in the particular counties composing the district in which he was elected. We entertain no doubt of the legislative power to change the boundaries of districts.

Let us inquire into the validity of the act with reference to those officers left unassigned. It is evident that its constitutionality in this respect must depend on whether it amounts to a practical displacement of such officers.

Sect. 25 of art. 6 of the constitution is in these words: "There shall be an attorney-general elected by the qualified electors of the state, and a competent number of district attorneys shall be elected by the qualified electors of the respective districts, whose term of service shall be four years and whose duty and compensation shall be prescribed by law."

It will be noted that full authority is confided to the legislature to regulate the duties and compensation of the district attorneys and to create the districts in which they shall be elected. Their term alone seems to be beyond legislative control.

But a grant of power to regulate specified matters of detail, so far from including the authority to abolish them, amounts frequently to an express negation of authority. Thus when it is in effect declared by this section that the legislature may prescribe the duties and compensation of district attorneys and lay off their districts, it is an implied prohibition of the power to deprive them of all duties and all compensation and leave them without districts.

It may enlarge or curtail their districts, but it must leave some district. It may add to or subtract from their duties, but it must leave some duties. It may increase or diminish their compensation, but it must leave some compensation.

It is evident that the law in question violates, with reference to the relator, two of these requirements. It has left him neither district nor duties. There is not a court in the state in which he has the right to prosecute a criminal or enter a *nolle prosequi*. There is not a grand jury room in which his presence would not be an unauthorized and unlawful intrusion.

He may indeed, in the absence of the district attorney, who has been assigned to his district, appear in the county of his residence, but this is wholly independent of his own volition or that of the presiding judge, and rests wholly on the caprice or convenience of the assigned officer. Certainly this is neither giving him a district nor permitting him to exercise any of the duties of office.

If he can be said to be an officer at all he certainly occupies a most anomalous position.

Can a man be said to be an officer of the state when there is not within the limits a spot where he is allowed to perform any function of the office which he is supposed to fill? Has not the relator been as effectually removed from office as if the legislature had declared in explicit terms that from and after a certain date James T. Fant should cease to be a district attorney? To ask these questions is to answer them. We conclude, therefore, that the act is clearly unconstitutional in depriving him of the right to perform any official acts.

But it is said that the legislature has the right to diminish his compensation at pleasure, that a salary of $100 per annum has been left him, and that as this writ is only prosecuted to assert a right to an undiminished salary, we can consider no other question than this.

The point is not free from difficulty and has cost us much thought. It is true that the legislature has full control over the salary as well as over the duties and the districts. We are not prepared to say that it may not graduate the compensation according to the labor imposed, and if it had seen fit to reduce the tenth district to a single county and to have fixed the salary of the incumbent at $100, we are not prepared to say that the act would have been invalid, though upon this point we express no opinion, because it may be that the framers of the constitution, in speaking of the districts of district attorneys, must, in view of the past history of the state, be held to have contemplated districts co-extensive with the territory presided over by a single circuit judge.

But we are not presented such a case and we must look at the whole law in its practical effects on the relator.

He has neither duties nor district, and the salary left him must therefore be regarded either as a pension or as a compensation for possible duties which he may never be called upon to perform. In either aspect it is wholly at war with the genius of our institutions.

The legislature has exclusive control over the salary of the attorney-general. Suppose then that it should enact that all the duties of that officer should be performed by the district attorney residing in the Jackson district, but in the absence of that officer the attorney-general might continue to act, and that his salary should be $100, could this court hesitate to declare such an act unconstitutional? And yet that is, *mutatis mutandis*, the case at bar.

By sect. 7 of art. 12, it is made the duty of the legislature "to provide suitable compensation for all officers."

It would be an exceedingly delicate matter for this court to declare, that the compensation provided for any officer was not suitable, and would certainly never do so, where the salary, however low, had been fixed on a basis deemed by the legislature to be sufficient, but where it was clearly not so fixed, but was a mere partisan device to get rid of an obnoxious officer, it might be our duty to interfere.

Suppose, for instance, that a legislature dominated by a political party different from that of the officers belonging to the state departments in the capitol should reduce their salaries to five dollars per annum. In such a case we might feel compelled to interpose.

We rest our objection, however, to the law under review upon the ground that it is clearly unconstitutional, in depriving the relator of both duties and a district, and inasmuch as the compensation left is manifestly based upon this absence of duties, it must be condemned also.

We cannot imagine, for a moment, that the legislature would have prescribed such a salary except upon the idea that the remaining portions of the act were valid, and inasmuch as the one is dependent upon the other, they must stand or fall together. While it is true that one portion of a law may be upheld while the rest is overthrown, this is only true when they are so far independent propositions that it may be presumed that the legislature intended one to subsist even though the balance perished.

But where the entire scheme must fail because of want of power to enact it, there can be no possible good in upholding an isolated provision which was perhaps competent for the lawgiver to enact, but which is unreasonable and unjust if left to stand alone.

Some years ago this court pronounced unconstitutional a statute which undertook to create the office of tax-collector in the several counties, and to deprive the sheriffs of the duty of collecting the public revenue. Suppose that there had been a salary attached to the collection of taxes and that this act had contained a provision that thereafter the sheriffs should receive no such salary. Such a clause by itself would have been constitutional. But can there be any doubt that it would have fallen with the balance of the act, and that the sheriff who in defiance of the act had collected the taxes would have been entitled to the salary? The principle is that where a particular clause of the statute is manifestly based upon certain other clauses, which are pronounced unconstitutional, it will fall with them, though itself not obnoxious to constitutional objections.

If the legislature annex certain duties to a particular office, with an added compensation therefor, and the addition of the duties is declared unconstitutional, it is manifest that the officer cannot claim the compensation.

The converse of the proposition must also be true, that if they attempt to strip an officer of all duty, and consequently, and as part of the same act, abolish his salary, he will not lose the salary even though they had a right to abolish it, if the attempt to strip

him of duties was invalid. The two are so dependent, each upon the other, that they must stand or fall together.

The reader of the foregoing opinion will naturally call to mind the instances in which judges chosen for a constitutional term have been deprived of their offices by a legislative act abolishing the courts. The cases here particularly referred to are the repeal of the act creating United States district courts at the close of the administration of John Adams, and the acts previously passed in Maryland and Virginia, and afterwards in the New England states, during the pendency of the war of 1812, by which courts composed of judges obnoxious to the existing political majority were legislated out of existence. In those cases, however, the rightfulness of the legislation was not judicially passed upon, for the reason that, with both the legislative and executive departments of the government refusing to recognise the judges thus legislated against, redress, if they were wronged, was practically impossible. Any court is powerless when it thus stands alone.

Some cases are referred to in the above opinion which have considerable analogy to the one decided. In *Commonwealth* v. *Gamble*, 63 Penn. St. 343, where a judge had been commissioned to hold for a constitutional term of ten years, "if he should behave himself well," it was held that the legislature had no power to determine that a breach in this condition had occurred, and that an act annexing the judge's district to that of another judge, thereby depriving him of his office, was void. In the course of the opinion the court say: "It seems like a solecism to regard that to be an office in this country to which there are no duties assigned. 'An office,' says Kent (vol. 3, p. 454), 'consists in a right and correspondent duty to execute a public or private trust and to take the emoluments.'" *People* v. *Dubois*, 23 Ill. 547, was somewhat similar on its facts, and the conclusion was the same. See also *Howard* v. *State*, 10 Ind. 99; *State* v. *Wiltz*, 11 La. Ann. 439; *People* v. *Kelsey*, 34 Cal. 470. The case of *State* v. *Messmore*, 14 Wis. 163, is not so directly in point, but the principle declared is substantially the same, and this was followed in *State* v. *Brunst*, 26 Wis. 412, by the decision that the legislature cannot take from a constitutional officer the duties and functions usually pertaining to his office, and confer them upon an officer appointed in a different manner and holding office by a different tenure. The office in question was that of sheriff, and the duties and functions of which he was to be deprived were those regarding the custody and care of prisoners sentenced to the county jail. *Warner* v. *People*, 2 Denio 272, is some authority for this conclusion, and the case of *King* v. *Hunter*, 65 N. C. 603, decides that where one of the duties of the office of sheriff was the collection of taxes, the legislature could not provide for the appointment of a tax-collector to whom those duties should be transferred from the incumbent in office when the act was passed. The doctrine declared is obviously the same with that on which is rested the principal case. The cases of *People* v. *Bull*, 46 N. Y. 57, and *People* v. *McKinney*, 52 Id. 374, have also some bearing, in this: that they both hold that the legislature cannot by indirection avoid and defeat a constitutional provision. In both it was held that where an office was by the constitution to be filled by popular election the legislature could not prolong the term of an incumbent; this being equivalent to a legislative election for the enlarged term. Compare *Oregon* v. *Pyle*, 1 Ore. 149. In *Allen* v. *McKeen*, 1 Sumner 276, an inclination was evinced to hold that one hold-

ing an office for the term of good behavior was to be regarded as holding by contract with the state for that term. But see *Butler* v. *Pennsylvania*, 10 How. 402; *Barker* v. *Pittsburgh*, 4 Penn. St. 49; *Conner* v. *New York*, 2 Sandf. 353; s. c. in error, 5 N. Y. 285; *Bryan* v. *Cattell*, 15 Iowa 538; *People* v. *Haskell*, 5 Cal. 357; *Darb* v. *Houston*, 22 Geo. 506; *Wilcox* v. *Rodman*, 46 Mo. 323; *Perkins* v. *Corbin*, 45 Ala. 103; *Taft* v. *Adams*, 3 Gray 126; *Standiford* v. *Wingate*, 2 Duvall 443; *Robinson* v. *White*, 26 Ark. 139; *Oregon* v. *Pyle*, 1 Ore. 149; *Alexander* v. *McKenzie*, 2 S. C. N. S. 81. Where the term of office is prescribed by law, the appointing power cannot limit it to a shorter term by a provision in the commission or appointment: *Stadler* v. *Detroit*, 13 Mich. 346.

T. M. C.

Supreme Court of Vermont.

BRAGG v. MORRILL.

The vendor of an article sold for a particular purpose does not impliedly warrant it against latent defects to him unknown, and caused by the unskilfulness or negligence of the manufacturer or previous owner, except when the sale is, in itself, equivalent to an affirmation that the article has certain inherent qualities inconsistent with the alleged defects. Thus, when defendant, a machinist and founder, sold a piece of wrought iron shafting, of which he was not the maker, but which he turned and prepared for the reception of pulleys, and which he supposed to be sound, to be used in running machinery in a carriage shop, and the shaft upon being put to the described use broke because of a flaw and an imperfect weld, it was *held* that there was no implied warranty of its soundness.

ASSUMPSIT upon a warranty of a piece of wrought iron shafting. The case was referred, and the court rendered judgment on the report for the defendant. Exceptions by the plaintiff. The case appears from the opinion.

Young, for the plaintiff, cited *Beals* v. *Olmstead*, 24 Vt. 114; *Pease* v. *Sabin*, 38 Id. 432; *Jones* v. *Bright*, 5 Bing. 533; *Brown* v. *Edgington*, 2 M. & G. 279; *Shepherd* v. *Pybus*, 3 Id. 868; *Gray* v. *Cox*, 4 B. & C. 108; 1 Parsons Cont. 469.

Edwards and *Dickerman*, for the defendant, cited *Goslin* v. *Hodson and Fisk*, 24 Vt. 140; *Paddock* v. *Strobridge*, 29 Id. 470; *Sanborn* v. *Herring et al.*, 6 Am. Law Reg. N. S. 457; *Emerton* v. *Mathews*, 1 Id. 231; *Bradford* v. *Manly*, 13 Mass. 139; *Brown* v. *Edgington*, 2 M. & G. 279; *Bluett* v. *Osborne*, 1 Stark. 384.

The opinion of the court was delivered by

ROSS, J.—The plaintiff claims to recover of the defendant damages sustained by two defects—one an imperfect weld and the other a flaw—in a wrought iron shaft, twenty-four feet long and two