NATIONAL INTELLIGENCER,

AND

WASHINGTON ADVERTISER.

Vol. V. | WASHINGTON CITY, PRINTED BY SAMUEL HARRISON SMITH, PENNSYLVANIA AVENUE. | NO. DCCLIII.

FIVE DOLLARS PER ANNUM. | WEDNESDAY, AUGUST 7, 1805. | *PAID IN ADVANCE.*

IMPEACHMENT OF *JUDGE CHASE.*

SATURDAY, February 23.

Mr. MARTIN, *concluded.*

I now, Mr. President, shall proceed to the fifth and 6th articles of impeachment. These relate to the process issued against Callender, and to the time at which it was made returnable. By the fifth article my client is charged with having "awarded a capias against Callender by which he was arrested and committed to close custody, although it is provided by an act of Congress, passed the 24th day of September, in the year 1789, that for any crime or offence against the United States the offender may be arrested, imprisoned or bailed agreeably to the usual mode of process in the state where such offender may be found, and although it is provided by the laws of Virginia, that upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons against the person or persons offending, to appear and answer at the next court."

The criminality alledged against my honorable client by this article as well as the sixth, consists in his violation of a law of the state of Virginia, by which it is supposed his conduct ought to have been regulated.

We find from the evidence in this cause, that the legal characters of that state, whether on the bench or at the bar, cannot agree among themselves as to what is the law of that state,—and that the practice has been and continues to be variant in various counties in Virginia. Nay, it is proved that two highly respectable legal characters who successively held the office of attorney general, (col. Innes and gen. Brooke,) were applied to by one of their deputies, and declared themselves incapable to decide what ought to be the practice, or in other words, to decide in which cases a summons ought to be issued and in what cases a capias was the proper process. Surely then Judge Chase, who was a stranger in Virginia, cannot be considered criminal nor even subject to reproach for not understanding a law of that state, the true construction of which remains even now a question, upon which the Virginia Judges and lawyers find it impossible to agree.

Upon these observations I think I might safely rest my client's defence, as to this charge—and even consent that he shall be convicted and removed from office, whenever they shall agree among themselves upon the construction of their law,—provided it should be against us.

But, sir, I must request to be indulged in an endeavor to investigate this subject which appears so intricate, and to try if I cannot throw such lights upon it as possibly may be serviceable to the gentlemen of the bar of that state, whose law is in question; and in this attempt I feel a confidence, that I shall be at least able to satisfy this honorable court, Judge Chase even if bound to conduct himself according to the laws of Virginia, which I utterly deny, and shall endeavor to disprove, acted not only free from criminality, but with the strictest propriety.

I shall lay down as a position, which will not be controverted, that in all personal actions, civil or criminal, instituted against individuals in Virginia as well as in Maryland, the process to bring them in to answer to the suits is, and hath always been a capias, or process to arrest the body,—except so far as by legislative acts of the respective states, the law hath in certain cases been altered and other process directed.—And I mean to shew that every case in Virginia, civil or criminal, and some there are of both, where a summons is the legal process, arises out of the legislative provisions, that is the acts of assembly of that state. And by examining the different acts, which have been passed upon this subject, we shall be able to ascertain, what are the cases, and the only cases, wherein a summons ought to be issued. I have, sir, before me the laws of Virginia antecedent to the American revolution; it is the edition printed at Williamsburgh, by Rind, Purdie and Dixon, in the year 1769. It appers, sir, that until the year seventeen hundred and forty eight, suits might be brought in the county court for any sum exceeding twenty five shillings current money, or two hundred pounds of tobacco; and actions of trover or detinue without regard to the value of the article converted or detained; in all such actions a capias ad respondendum was the first process issued, authorising the sheriff to take the body of the defendant into his custody, and have him before the court at the time when his writ was returnable—in that year a law was passed, cap. 4th—by the 26th sec. of which it is enacted, "that for the more speedy recovery of small debts, it shall be lawful for the justices of any county court to hear and determine all suits brought for any debt or demand, due by judgment, obligation, or account for any sum or sums of money or tobacco of the value of twenty five shillings current money, or two hundred pounds of tobacco, and not exceeding five pounds of like money, or one thousand pounds of tobacco, by *petition* without the *solemnity of a jury*; and where the demand shall not exceed the above mentioned sums, the plaintiff shall proceed by petition, and *not otherwise*." After directing in what manner the claim is to be set forth in the petition—the same section directs that "upon filing such petition in the clerk's office, a summons of course shall be issued returnable to the next court (the courts were then held monthly) a copy of which, together with a copy of the petition, and accounts shall be delivered to the defendant, or left at his or her usual place of abode, ten days at least before the next succeeding court, and the same being returned executed by a sworn officer, or oath made of the due service thereof, if the defendant do not then appear, it shall be lawful for the said justice to hear and examine into the truth of the matter so complained of, and to determine the cause on the evidence produced, or to dismiss the petition as to them shall seem just. And if the defendant do appear, he shall forthwith put in such answer or plea thereto as will bring the matter of complaint in issue thereupon: or if he fails to plead, the court shall instantly proceed to hear and determine the cause in a summary way upon such evidence as shall be given, and shall give judgment according as the very right of the cause and matter in law shall appear unto them without regard to form or want of form, &c."

By the 22d sec. of the same law, it is enacted "that when any person entitled to an action of trover or detinue shall set forth the value of the thing demanded to be *under the value of five pounds* in a *petition* to any county court, a *summons* shall issue, and the same proceedings shall be had as in cases for the recovery of small debts." But for the recovery of *any penalty* for the *breaches* of the *penal laws* of the then colony, no change was made as to the mode of instituting the action.—The process of capias to arrest the offender, the right of trial by jury in such actions,—as to these subjects, the law was left as before: and yet actions of this nature were under the consideration of the legislature; for we find in sec. 23, of the same law, "that for the easier, speedier, and better advancement of justice in obtaining judgments in any such suit or action, where the penalty sued for shall not *exceed five pounds*, current money, or *one thousand pounds* of tobacco, if in such suit any *demurrer* shall be joined and entered therein, in any court of record within said *dominion*, the Judges shall proceed and give judgment according to the very right of the case, and as the matter of law shall appear to them, without regarding any imperfection, omission or defect, &c. except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same notwithstanding, &c. And that if any *verdict should be given* in any such action or suit, in any court of record in said dominion, the judgment thereupon shall not be staid or reversed for or by reason of any default in the form or want of form, of any writ, &c. any law, statute or usage to the contrary notwithstanding."

And here, sir, it may perhaps be proper to observe, that in Virginia, at least before the revolution, the *penalties* inflicted for the breach of their *penal* laws, were commonly by the acts themselves directed in what mode to be recovered, which mode was almost universally directed to be "by *information*, bill, plaint, or action of debt, in any court of record within said dominion, wherein no essoin, protection, or wager of law, privilege or any more than one imparlance shall be allowed." [Mr. Martin turned to a variety of the penal laws to shew such were the provisions.] This honorable court will perceive that under *these provisions*, the penalties could not be recovered by presentment and indictment as hath frequently been determined; hence the usual suits or actions resorted to in the courts of Virginia, for the recovery of those penalties from the smallest to the greatest, were *informations* or *actions of debts*. And the twenty third section which I have just read relates to such informations or actions of debt, where the penalty should not exceed *five pounds*, and to those only applies such regulations as are thereby made, which however do not alter the form of action or the nature of the process to be issued, even in those cases, but leaves the law in those respects as it was before.

However, during the same session, in their legislatorial disquisitions, they thought proper to take away the trial by jury in proceedings *by presentment*, to recover penalties not exceeding five pounds,—to give the courts summary jurisdiction in *those cases*; and to take away the process of a capias therein.—And hence having by the first section of chapter 7, (see page 188, laws of Virginia) enabled *grand juries to present breaches* of all *penal laws* of that then colony: by the second section it is thus enacted, "that when any offence or offences should be *presented by a grand jury*, and the penalty or forfeiture by law, inflicted thereon, shall not exceed five pounds current money, or one thousand pounds of tobacco, be it to the king and informer, or to the party and informer only, or appropriated to any other use whatever, such *presentment* need not be drawn up in *other form* than as the same stands *presented by the grand jury*, and thereupon the court shall order a *summons* forthwith to issue, to summons any person, so presented, to appear and answer such *presentment* at the next court, (as I have before observed, the courts were then held monthly) and shall not admit of any exception or pleading to the form or manner thereof, but shall proceed to trial, without *the formality of a jury*, and give judgment upon such *presentment*, according as the very right of the cause and matter in law shall appear to them; and if the party summoned fails to appear, the court may give judgment for the penalty."

Thus, sir, the law of Virginia remained until the revolution, and from this view it will appear that the only cases, where, in personal civil actions, the process was to be by summons, and not by capias, were where debts were claimed not exceeding five pounds, or one thousand pounds of tobacco, or property converted or detained not exceeding the same value, in all which cases the suit or action was to be instituted by *petition* and the *court* was to decide in a *summary* manner, without the *intervention of a jury*.

And that the only case, in *criminal* proceedings, where a summons was directed to issue, is where a *presentment* hath been made by a *grand jury*, for an offence, *the penalty* whereon shall not *exceed* five pounds current money, or one thousand pounds of tobacco, which *presentment* need not be drawn up in any *other form*; and on which presentment the court was to decide in a *summary* manner without the *intervention of a jury*.—This honorable court will also perceive, that the provision of this act directing summons to issue in the case I have stated can only apply to presentments made under the local, penal laws of Virginia, where the penalty is restrained to a sum not exceeding five pounds current money, or a thousand pounds of tobacco, and cannot extend to presentments for offences at *common law*, such as assaults, riots, libels, &c. since in all such cases the courts have a discretionary power to fine what sum they think reasonable, and therefore may fine beyond five pounds current money, or a thousand pounds of tobacco.—Nor doth the provision extend to any case even under the penal laws of Virginia, where the court may punish by *imprisonment*. Upon this examination of the subject, it appears that until the time of the American revolution, according to the laws of Virginia, a capias remained the proper process in all personal civil actions, except where the claim was for money or debts due not exceeding five pounds current money, or one thousand pounds of tobacco—or where, in detinue or trover, the plaintiff laid the value of the property not exceeding the aforesaid sum—and that in *criminal* cases a capias remained the proper process in all proceedings for offences at common law;—and for all offences against the acts of the state of Virginia where the court may inflict a fine of more than five pounds current money, or which were punishable by imprisonment. Having thus shewn what was the law on this subject at the time of the American revolution, I have, sir, to examine what changes and alterations have been made therein since that period.

The first law made since the revolution was passed in the year 1792, and is to be found in the edition of the Virginia laws, published by Augustine Davis, in the year 1794, page 96:—the 37th sec. increases the amount of the debt, which may be recovered by petition in the county, city or borough court, to a sum not exceeding twenty dollars, or eight hundred pounds of tobacco, directing process to be by summons and the mode of procedure for recovery of the same as for recovery of small debts before and at the time of the revolution.—The 38th sec. also increases the value of the property where in trover and detinue, petition may be filed and proceedings be had as before the revolution, to the sum of twenty dollars, or eight hundred pounds of tobacco.

In the same year an act was passed, to be found page 106, by the 6th sec. of which it is enacted, "that in a *presentment* to the county or corporation courts, if the penalty of the offence exceed not five dollars, or three hundred pounds of tobacco; or to the district court, if the penalty exceed not twenty dollars, or one thousand pounds of tobacco, *no information* thereupon shall be filed, but a *summons* shall thereupon be issued against the defendant to answer the said *presentment*, and such summons having been served upon him, or a copy thereof having been left at his usual place of abode, and if he doth not appear, judgment shall be given by the court against him for the penalty, and if he doth appear, the court shall in a *summary way*, without the *intervention of a jury*, hear and determine, &c." And by the 37th sec. of chapter 74, page 113, there is a general provision, that where no presentment may be made, yet where the penalty incurred by the breach of any penal law shall not exceed twenty dollars, or eight hundred pounds of tobacco, the same may be used for and recovered in the manner, directed by law for debts of like amount.

This clause was designed to prevent informations or actions of debt to be originally instituted for the recovery of penalties not exceeding that sum, where no presentments should be made, and to direct a procedure by petition in which also the process must be a summons, and the decision by the court in a summary manner.

One other provision, and one only, hath been made for issuing a summons, this is found in the twenty fourth section of the same act, and runs thus. "No information for a trespass or misdemeanor, shall be filed in any court, but by express order of the court entered on record, nor unless the party supposed to be culpable shall have failed to appear and show good cause to the contrary, having been required to do so by a summons, appointed a convenient time for that purpose, served upon him, or left at his usual place of abode."

These are the only acts of the Virginia legislature I find on this subject—I believe there are no others.—If there are any more, the honorable managers will be so obliging as to point them out; but presuming that they can produce no further provisions, what is the result of this investigation? That even at this time, the only instances in personal civil actions where summons is the proper process, are where the demand for money due—or on account of trover or detinue doth not exceed twenty dollars, or eight hundred pounds of tobacco, in which case the proceeding is to be by petition and the court determine in a summary manner without the intervention of jury:—And in criminal cases, or for recovery of penalties for the breach of their penal laws, the only cases where a summons is the regular process are where the actions are instituted by presentment of a grand jury, on which presentment no information is to be filed,—or without such presentment by petition, for the recovery of penalties not exceeding twenty dollars, or its correspondent value in tobacco; which cases can only arise under the acts of assembly of Virginia, and not where the offences are at common law nor in any case even under the laws of Virginia, where punishment may be by imprisonment—that the only additional instance, in which a summons is to be used in a criminal case, is where application is made for an information—and there it is directed in order that the party may have an opportunity to shew cause why an information shall not be ordered against him; but even in this case, if the information is ordered, a capias is the process to bring the party to answer the charge contained in such information,—as it *remains to be in every other criminal prosecution or suit, except those which I have already particularly designate.*

I will now, sir, turn to the law of the state of Virginia, with the violation of which we are charged; but first let me premise it is most erroneously stated in the article of impeachment, how this hath happened is not for me to say, but such is the fact, the article of impeachment sets forth, that "it is provided by the laws of Virginia, that upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons against the person or persons offending to appear, &c." whereas in truth the words of the law are "upon presentment made by the grand jury of an offence not capital, the court shall order the clerk to issue a summons *or other proper process* against the person or persons, &c." (See page 112, sec. 28, same edition, laws of Virginia.)

Thus then the very law points out that upon such presentments a summons is not in all cases a proper process, but that a summons is to issue or other proper process, according to the nature of the offences presented. That is, as I have already shewn, a summons is to be issued where presentments are made for a violation of the penal laws of their state punishable by a fine of not more than twenty dollars, or its corresponding quantity of tobacco, not by imprisonment; but in all presentments for offences at common law, or for breaches of their penal laws punishable by fine beyond twenty dollars or by imprisonment, in such cases the clerk must issue a capias, that being the proper process. And upon these principles it has been determined in the circuit court of Columbia, sitting at Alexandria, acting under the laws of Virginia, that on presentments for assaults and battery, and other common law offences, a capias is the proper process to be issued; and this determination has been made while a gentleman of great legal knowledge, a native of Virginia, and who received his legal education in that state, (John Thompson Mason, Esq.) prosecuted in that court for the United States, upon whose application, I presume, the determination was made.

I will now examine the law of the United States, passed the 24th of September, 1789, entitled "An act to establish the judicial courts of the United States," section 33, "And be it further enacted, That for any crime or offence against the United States, the offender may by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States, where he may be found, agreeably to the usual mode of process against such offenders in such state, and at the expence of the United States, be *arrested*, and *imprisoned* or *bailed*, as the case may be, for trial before *such court* of the United States, as by this act has cognizance of the offence: and copies of the process shall be returned, as speedily as may be, into the clerk's office of such court, *together with the recognizances of the witnesses for their appearance to testify in the case*, which recognizance the magistrate, before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or of the witnesses shall be *in a district other than that in which the offence is to be tried*, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the said district to execute *a warrant* for the removal of the offender and the witnesses or either of them, as the case may be, to the district into which the trial is to be had. And upon all *arrests* in criminal cases, bail shall be admitted, &c." This is the law of the United States mentioned in the fifth article as governing the question now before us, the basis on which this article is founded. The least examination will shew that it provides only for the manner in which offenders shall be arrested under warrants issued by the judicial officers of the United States or of the different states upon complaint made to them, in order that such offender may be bailed or committed, and witnesses bound over to the approaching proper courts, that the offences may be enquired of by a grand jury; and hath no relation to the manner in which process shall be issued *by a court* to bring in offenders to answer to presentments which are depending in the court.—And a similar provision for arrests in such cases is made by the acts of assembly of Virginia, in that state. [See the 17th sect. of chap. 67, page 96, same edition of Virginia laws.]

But that the aforesaid act of Congress can in no manner relate to or be regulated by any law of Virginia, directing a summons to be issued as the proper process, appears clearly from this, that the offender is to be *arrested* and imprisoned or bailed, according to the nature of his offence; but no person can be *arrested* on *process of summons*, or on such process be compelled to give bail, under pain of imprisonment. This can only be done when a *capias*, or a similar process, such as a magistrate's warrant, or the warrant of a court, called a bench warrant, is issued!—And here, sir, let me explain what is meant by a *bench warrant*. When a presentment is made by a grand jury against a person not imprisoned, nor recognised, process is issued to arrest the offender and bring him before the court then in session; as when an application is made to a judge or justice out of court, and oath made of an offence committed, it becomes the duty of such judge or justice to issue *his warrant* to take the offender into custody, and thereby secure his appearance at court to answer to any presentment which may be made against him; so when a