State v. Caesar, 31 N.C. 391 (1849)

If a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow or repeated blows, under unusual circumstances, and the slave, at the instant, strikes and kills, without evincing, by the means used, great wickedness or cruelty, he is only guilty of man-slaughter, giving due weight to motives of policy and the necessity for subordination.

The same principle of extenuation applies to the case of the beaten slave's comrade or friend, who is present and instantly kills the assailant, without, in like manner, evincing, by the means used, great wickedness or cruelty.

The cases of the State v Tackett, 1 Hawks. 217, State v. Hale, 2 Hawks. 582, State v. Will, 1 Dev. & Bat. 121, State v. Mann, 2 Dev. 263, and State v. Jarrott, 1 Ired. 86, cited, commented on and approved.

Appeal from the Superior Court of Law of Martin County, at the Fall Term 1848, his Honor Judge DICK presiding.

This was an indictment for murder in the words and figures following, to-wit:

STATE OF NORTH CAROLINA,	)	Superior Court of Law,
Martin County,	)	Fall Term, 1848.

The jurors for the State, upon their oath, present, that Cæsar, a slave, the property of John Latham and Thomas Latham, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fourteenth day of August, A. D. eighteen hundred and forty eight, with force and arms, at and in the County of Martin aforesaid, in and upon one Kenneth Mizell, in the peace of God and the State then and there being, feloniously, wilfully and of his malice aforethought, did make an assault, and that the said Cæsar, with a certain large stick, which he the said Cæsar in both his hands then and there had and held, him the said Kenneth Mizell, then and there feloniously, wilfully and of his malice aforethought, did strike and beat, giving to him the said Kenneth Mizell, then and there, by striking and beating him as aforesaid, with the stick aforesaid, in and upon the left jaw and the left side of the neck of him the said Kenneth Mizell, one mortal bruise, of the breadth of two inches and of the length of six inches, of which said mortal bruise the said Kenneth Mizell from the said fourteenth day of August in the year aforesaid, until the fifteenth day of the same month in the year aforesaid, at and in the County aforesaid, did languish and languishing did live; on which said fifteenth day of August in the year aforesaid, the said Kenneth Mizell in the County aforesaid died: And so, the jurors aforesaid, upon their oath aforesaid, do say that the said Cæsar the said Kenneth Mizell, in the manner and form aforesaid, feloniously, wilfully and of his malice aforethought, did kill and murder, contrary to the peace and dignity of the State.

On which indictment, the prisoner being arraigned, pleaded not guilty.

The prisoner being put on his trial, the State first examined one Brickhouse, who stated, that he went, in company with the deceased, to Jameston, in the County of Martin, in the afternoon of

the 14th of August, 1848: that the deceased and he (the witness) drank spirits in the town of Jameston, until they were both intoxicated: that they went to the house of Mr. Cahoon about dark for the purpose of staying all night: that he (the witness) and the deceased went to bed together, and, after sleeping some short time, he was awoke by the deceased, who proposed that they should get up and walk out: that they did so and crossed an old field and went into the town of Jameston: they had a bottle of spirits with them, and each took a drink while crossing the old field: that near a store house in Jameston they found two negro men lying on the ground: that the witness was not acquainted with either of them, but had since learned, that they were the prisoner and a man named Dick: the witness informed the prisoner and Dick, that he and the deceased were patrollers, and he (the witness) took up a piece of board and gave the prisoner and Dick each two or three slight blows: that he (the witness) then entered into a conversation with the prisoner and Dick, and, while conversing with them, a third negro came up, who, he has since understood, is named Charles: that he (the witness) asked Charles if he knew they were patrollers, and took hold of Charles and ordered Dick to go and get a whip for him to whip Charles with: Dick went off a few steps and stopped: witness let Charles go and took hold of Dick: witness then received a violent blow on his head, which made a wound about an inch in length, and stunned him: when he recovered, he saw the deceased lying on the ground at full length and the negroes all gone: witness called the deceased, but received no answer: witness then went to the house of Cahoon to get a gun, but failing to do so, returned where he had left the deceased, and found the deceased some twenty yards from where he left him: deceased was lying on the ground: the deceased got up and took his (witness') arm and witness conducted deceased to the house of Cahoon: deceased asked for some water, which witness procured for him, and he and the deceased went to bed together: after they were in bed, the deceased asked witness, if he would go with him on Thursday night after the negroes, and further remarked, that he could not talk much longer. Witness further stated, that, being considerably intoxicated, he fell asleep and was awoke about two or three o'clock in the morning by Mr. Cahoon. The deceased was dying, and blood and froth running out of his mouth and nose on the pillow where he lay. Deceased died in a few minutes after witness awoke.

The slave Dick was next examined on the part of the State. Dick stated, that he and the prisoner were lying on the ground near a store house about eleven o'clock at night: that two white men, strangers to him, came to the place where he and the prisoner were lying: that one of them, who, he has since learned, was Mr. Brickhouse, said they were patrollers, and Brickhouse took a piece of board and gave the witness and the prisoner each two or three slight blows, which did not hurt the witness, and the witness thought it was done in sport by Brickhouse. Brickhouse then asked the witness, if he could not get some girls for them, and further remarked, that he had money a plenty; witness declined doing so: about that time, Charles came up: Brickhouse asked Charles, if he knew they were patrollers, and took hold of Charles and ordered witness to go and get a whip to whip Charles with: witness moved off a few steps and stopped: Brickhouse then let go Charles and took hold of witness and the deceased also took hold of the hand of witness: Brickhouse then began to beat the witness with his fist and struck several blows on the head and in the side of witness, which hurt him, and he begged Brickhouse to quit. Witness further stated, that while Brickhouse was beating him with his fist and the deceased holding his hand, the prisoner went to the fence and got a rail, and struck in among them, and they all came down together, and he got up and ran off.

Charles was next examined by the State. Charles stated, that he heard a conversation and went to the place, where he found two white men and Cæsar and Dick, engaged in conversation: Brickhouse asked him (the witness,) if he knew they were patrollers and took hold of him (the witness,) and told Dick to go and get a whip: Dick moved off a few steps and stopped: Brickhouse let witness go and took hold of Dick and began to beat him with his fist, and the deceased also took hold of Dick: the prisoner remarked to witness, that he could not stand that, and run to the fence and got a rail, and with the rail in both hands struck Brickhouse on the head: the rail broke in two pieces, leaving a piece of the rail three or four feet long in the hands of the prisoner: the prisoner then struck Mizell, the deceased, with the piece in his hands and felled him to the ground at full length: the prisoner then ran off and Brickhouse pursued him; witness also ran off, leaving the deceased lying at full length on the ground. This witness was then examined as to the size and quality of the rail, used by the prisoner. He stated, that it was a fence rail of the usual length, was fit for fencing, and was part of a fence, when taken by the prisoner, and was about the size of a piece of timber in the Court House, pointed out by the witness; which piece of timber was about four inches wide by two and a half inches thick. The witness further stated, that the rail aforesaid was of sap timber and tolerably rotten; and that it had rained the day before.

Whitmell, a slave, was next examined by the State. He stated, that on the night of the homicide the prisoner came to his house in Jameston, and asked him (the witness) how he was. Witness replied, he was very well. Witness then asked the prisoner how he was. The prisoner replied, bad enough, and went on to say, that he had knocked down one white man and crippled another; and further said, the white men were beating Dick; that he took a rail and knocked them down, one for dead; that the other white man called the one he had knocked down, but he did not answer, and he (the prisoner) did not know whether he was dead or not; the prisoner further stated, that the white men gave them two or three licks round and walked off, and he (the prisoner) and Dick laughed: the white men came back and fell to beating Dick--that he (the prisoner) asked Charles if he could stand that--Charles said nothing--prisoner said to Charles with an oath, that he could not stand it--he got a rail and struck them, and left one of them for dead. The prisoner was a man of ordinary size; and it was in proof, that he was employed in getting timber. It was also in proof, that he was obedient to white persons, so far as the witness knew or had heard.

The Attorney General insisted, that, upon this evidence, it was a case of murder.

The prisoner's counsel contended, that whilst an ordinary assault and battery by a white man on a slave would not be sufficient to extenuate the crime from murder to manslaughter; yet this was a case, in which we were obliged to resort to the primary rule, which pronounces on the character of provocations, and that the application of this principle was left to the intelligence and conscience of the jury: That the circumstances of this case, the time, the manner, the drunken situation of the white men, their conduct on that occasion, being utter strangers to the negroes and the negroes to them, were naturally calculated to provoke a well disposed slave into a violent passion, and, therefore, the crime was extenuated to manslaughter.

The prisoner's counsel further contended, that, if the jury believed the deceased and Brickhouse having whipped the prisoner, then violently assaulted Dick, without provocation or justifiation, and was in the act of severely beating him (Dick begging) so as naturally to provoke the anger of the prisoner, being a well disposed negro, and, under the excitement of passion thus produced,

the prisoner gave the deceased a blow, which produced death, it was only manslaughter: That, if the jury believed the deceased and Brickhouse, without authority or justification, having whipped the prisoner, then were in the act of severely beating Dick, the comrade of the prisoner, (Dick then begging,) and the prisoner, with the intent of releasing Dick from further violence, struck the deceased, it was only man-slaughter: That, if the jury believed the deceased and Brickhouse, without authority or justification, whipped the prisoner, as stated by the witness, and then the deceased and Brickhouse, without authority, provocation, or justification, were violently beating Dick, the comrade of the prisoner, (Dick then begging) and the prisoner, under the excitement of passion thus produced and with an intent only to relieve his comrade, Dick, from further violence, struck the deceased, it was only manslaughter: That if the jury believed the prisoner struck with the intent only of preventing a felony upon Dick by Brickhouse and the deceased, it was only manslaughter: That, if the jury believed the prisoner struck, while smarting under the influence of passion, caused by the infliction of blows given him by Brickhouse or Mizell, under the circumstances it was only manslaughter. The prisoner's counsel further contended, that from the evidence in this case, the weapon used was not a deadly one; and that the jury were to decide that question, and argued to the jury, that at least it was doubtful, whether the weapon was deadly or not.

The Court charged the jury, that, if the evidence, submitted to them, satisfied their minds beyond a reasonable doubt, that the prisoner at the bar slew the deceased with a fence rail or a part of a fence rail, under the circumstances detailed by the witnesses, it was a case of murder.

If the witnesses had given a correct description of the rail or piece of rail, with which the prisoner inflicted the blow on the deceased, it was an instrument in the hands of a stout man calculated to produce death or great bodily harm; and was, therefore, in law, a deadly weapon. The Court further charged the jury, that, if the evidence of the witnesses Dick and Charles were true, as to what took place preceding the blow inflicted by the prisoner on the deceased, it would not amount to legal provocation, so as to extenuate the killing from murder to manslaughter--the prisoner being a slave and the deceased a free white man. The blows inflicted by Brickhouse on the prisoner, as detailed by the witness Dick, and the blows subsequently inflicted on Dick by Brickhouse, were, taking the evidence to be true, nothing more than ordinary assaults and batteries; and an ordinary assault and battery, inflicted by a free white man on a slave, would not amount to such legal provocation as would extenuate the killing of a free white man by the slave from murder to manslaughter, however worthless and degraded the white man might be.

The jury, under the charge of the Court, found the prisoner guilty, in manner and form, as charged in the bill of indictment. After sentence of death, the prisoner appealed to the Supreme Court.

Attorney General, for the State.

Biggs, for the defendant.

PEARSON, J.

The prisoner, a slave, is convicted of murder in killing a white man. The case presents the question, whether the rules of law, by which manslaughter is distinguished from murder, as between white men, are applicable, when the party killing is a slave. If not, then to what extent a difference is to be made?

The general question is now presented directly, for the first time. In "" Will's" case, the person killed was the overseer, who stood in the relation of master. In " Jarrott's" case, the general question was discussed, but the decision did not turn upon it.

These being the only two cases in this Court, where it was necessary to discuss the question, while it renders our duty the more difficult, cannot fail to strike every mind, as a convincing proof of the due subordination and good conduct of our slave population, and to suggest, that, if any departure from the known and ordinary rules of the law of homicide is to be made, it is called for to a very limited extent.

It is clear, that the killing of the deceased is neither a greater nor less offence, than would have been the killing of the witness, Brickhouse. He was the most forward and officious actor, but the deceased had identified him, self with him. They set out upon a common purpose. When a false word was told, in saying, "they were patrollers," the deceased acquiesced by silence--when the slight blows were given with the board, the deceased gave countenance to it-- when Brickhouse seized Dick and began to beat him, the deceased caught hold of his hands and held him, while his coadjutor beat him.

To present the general question by itself, and prevent confusion, it will be well to ascertain, what would have been the offence, if all the parties had been white men? Two friends are quietly talking together at night--two strangers come up--one strikes each of the friends several blows with a board; the blows are slight, but calculated to irritate--a third friend comes up--one of the strangers seizes him, and orders one of the former to go and get a whip that he might whip him. Upon his refusing thus to become an aider in their unlawful act, the two strangers set upon him--one holds his hands, while the other beats him with his fist upon the head and breast, he not venturing to make resistanee and begging for mercy--his friend yielding to a burst of generous indignation, exclaims, "I can't stand this," takes up a fence rail, knocks one down, and then knocks the other down, and without a repetition of the blow, the three friends make their escape. The blow given to one proves fatal. Is not the bare statement sufficient? Does it require argument, or a reference to adjudged cases to show, that this is not a case of murder? or, "of a black," diabolical heart, regardless of social duty and fatally bent on mischief? It is clearly a case of manslaughter in its most mitigated form. The provocation was grie yous. The blow was inflicted with the first thing that could be laid hold of: it was not repeated and must be attributed, not to malice, but to a generous impulse, excited by witnessing injury done to a friend. The adjudged cases fully sustain this conclusion. In 12 Coke. Rep. 87, "two are playing at bowls; they quarrel and engage in a fight: a friend of one, standing by, seizes a bowl and strikes a blow, whereof the man dies. This is manslaughter, because of the passion, which is excited, when one sees his friend assaulted." This is the leading case; it is referred to and approved by all the subsequent authorities. King v. Huygot, 1 Kel. 59. 1 Russ. on crimes, 500. 1 East. P. C. 328, 340.

As this would have been a case of manslaughter, if the parties had been white men; are the same rules applicable, the party killing being a slave? The lawmaking power has not expressed its will, but has left the law to be declared by the "Courts, as it may be deduced from the primary principles of the doctrine of homicide." The task is no easy one, yet it is the duty of the Court to ascertain and declare what the law is.

I think the same rules are not applicable; for, from the nature of the institution of slavery, a provocation, which, given by one white man to another, would excite the passions, and "dethrone reason for a time," would not and ought not to produce this effect, when given by a white man to a slave. Hence, although, if a white man, receiving a slight blow, kills with a deadly weapon, it is but manslaughter; if a slave, for such a blow, should kill a white man, it would be murder; for, accustomed as he is to constant humiliation, it would not be calculated to excite to such a degree as to ""dethrone reason," and must be ascribed to a "wicked heart, regardless of social duty."

That such is the law is not only to be deduced, as above, from primary principles, but is a necessary consequence of the doctrine laid down in Tacket's case, 1 Hawks. 217. "Words of reproach, used by a slave to a white man, may amount to a legal provocation, and extenuate a killing from murder to manslaughter."

The reason of this decision is, that, from our habits of association and modes of feeling, insolent words from a slave are as apt to provoke passion, as blows from a white man. The same reasoning, by which it is held, that the ordinary rules are not applicable to the case of a white man, who kills a slave, leads to the conclusion, that they are not applicable to the case of a slave, who kills a white man.

The announcement of this proposition, now directly made for the first time, may have somewhat the appearance of a law, made after the fact. It is, however, not a new law, but merely a new application of a well settled principle of the common law. The analogy holds in the other relations of life--parent and child, tutor and pupil, master and apprentice, master and slave. A blow, given to the child, pupil, apprentice, or slave, is less apt to excite passion, than when the parties are two white men "free and equal;" hence, a blow, given to persons, filling these relations, is not, under ordinary circumstances, a legal provocation. So, a blow, given by a white man to a slave, is not, under ordinary circumstances, a legal provocation, because it is less apt to excite passion, than between equals. The analogy fails only in this: in the cases above put, the law allows of the infliction of blows. A master is not indictable for a battery upon his slave; a parent, tutor, master of an apprentice, is not indictable, except there be an excess of force; whereas the law does not allow a white man to inflict blows upon a slave, who is not his property--he is liable to indictment for so doing. In other words, in this last case, the blow is not a legal provocation, although the party, giving it, is liable to indictment; while in the other cases, whenever the blow subjects one party to an indictment, it is a legal provocation for the other party. This is a departure from the legal analogy, to the prejudice of the slave. It is supposed, a regard to due subordination makes it necessary, but the application of the new principle, by which this departure is justified, should, I think, be made with great caution, because it adds to the list of constructive murders, or murders by "malice implied."

Assuming that there is a difference, to what extent is the difference to be carried? In prosecuting this enquiry, it should be borne in mind, that the reason of the difference is, that a blow inflicted upon a white man carries with it a feeling of degradation, as well as bodily pain, and a sense of injustice; all, or either of which are calculated to excite passion: whereas, a blow inflicted upon a slave is not attended with any feeling of degradation, by reason of his lowly condition, and is only calculated to excite passion from bodily pain and a sense of wrong; for, in the language of Chief Justice TAYLOR, in Hale's case, 2 Hawks, 582, "the instinct of a slave may be, and generally is, turned into subserviency to his master's will, and from him he receives chastisement, whether it be merited or not, with perfect submission, for, he knows the extent of the dominion assumed over him, and the law ratifies the claim. But when the same authority is wantonly usurped by a stranger, nature is disposed to assert her rights, and prompt the slave to resistance."

We have seen, that the general rule is, that whenever force is used upon the person of another, under circumstances amounting to an indictable offence, such force is a legal provocation; otherwise, it is not.

By this rule, " Will's case," 1 Dev. & Bat. 121, would have been a case of murder; for, it was settled in " Man's case," 2 Dev. 263, that a master is not indictable for a battery upon his own slave, however severe or unreasonable. But Will was held guilty of manslaughter only, the Court feeling itself constrained to make some allowance for the feelings of nature. By this rule, if a slave, who has been guilty of insolence, receives a blow from a white man, it is a legal provocation; for the white man has committed an indictable offence. Hale's case, 2 Hawks. 582. This case would be as strong an authority to show, that the case above put was but manslaughter, except for reasons of policy and the necessity of keeping up due subordination, as """""" Man's" case was to show, that " Will's" case was a case of murder, except for an allowance for the feelings of nature.

In the case above put, a blow is supposed, unaccompanied by bodily pain or unusual circumstances of oppression, the only incentive to passion being a sense of degradation, which a slave is not allowed to feel. When bodily pain or unusual circumstances of oppression occur, one or both is sufficient to account for passion, putting a sense of degradation out of the question, and there would be legal provocation.

I think it clearly deducible from Hale's case, and analogies of the common law, that, if a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow, or repeated blows under unusual circumstances, and the slave at the instant strikes and kills, without evincing, by the means used, great wickedness or cruelty, he is only guilty of manslaughter, giving due weight to motives of policy and the necessity for subordination.

This latter consideration, perhaps, requires the killing should be at the instant; for, it may not be consistent with due subordination to allow a slave, after he is extricated from his difficulty and is no longer receiving blows or in danger, to return and seek a combat. A wild beast wounded or in danger will turn upon a man, but he seldom so far forgets his sense of inferiority as to seek a combat. Upon this principle, which man has in common with the beast, a slave may, without

losing sight of his inferiority, strike a white man, when in danger or suffering wrong; but he will not seek a combat after he is extricated.

If the witness, Dick, while one white man was holding his hands, and the other was beating him, had killed either of them, there would have been no difficulty in making the application of the above principles, and deciding, that the killing was but manslaughter, and of a mitigated grade, contrasted with Will's case, who, although he did not seek the combat, but was trying to escape, killed his owner with a knife, after being guilty of wilful disobedience; and the conclusion would derive comfirmation from the reasoning of Judge GASTON, in Jarrott's case, where the prisoner had it in his power to avoid the combat, if he would, and struck several blows, after the white man was prostrated.

In making the application of the principles before stated to the case of the prisoner, another principle is involved. The prisoner was not engaged in the fight--he was the associate and friend of Dick, and was present and a witness to his wrongs and suffering.

We have seen, that had he been a white man, his offence would have been but manslaughter; "because of the passion, which is excited, when one sees his friend assaulted." (See the case cited from Coke's Rep'ts and the other authorities.) But he is a slave, and the question is, does that benignant principle of the law, by which allowance is made for the infirmity of our nature, prompting a parent, brother, kinsman, friend, or even a stranger to interfere in a fight and kill, and by which it is held, that, under such circumstances, the killing is ascribed to passion and not to malice, and is manslaughter, not murder; does this principle apply to a slave? or is he commanded, under pain of death, not to yield to these feelings and impulses of human nature, under any circumstances? I think the principle does apply, and am not willing, by excluding it from the case of slaves, to extend the doctrine of constructive murder beyond the limits, now given to it by well settled principles. The application of this principle will, of course, be restrained and qualified to the same extent and for the same reasons, as the application of the principle of legal provocation, before explained. A slight blow will not extenuate; but, if a white man wantonly inflicts upon a slave, over whom he has no authority, a severe blow, or repeated blows under unusual circumstances, and another, yielding to the impulse, natural to the relations above referred to, strikes at the instant and kills, without evincing, by the means used, great wickedness or cruelty, the offence is extenuated to manslaughter.

In 1 East. P. C. 292, and in 1 Russel on crimes, 502, it is said, "after all, the nearer or more remote connection of the parties with each other, seems more a matter of observation to the jury, as to the probable force of the provocation, and the motive, which induced the interference of a third person, than as furnishing any precise rule of law, grounded on such a distinction."

The prisoner was the associate or friend of Dick--his general character was shown to be that of an obedient slave, submissive to white men--he had himself received several slight blows, without offence on his part, to which he quietly submitted--he was present from the beginning--saw the wanton injury and suffering inflicted upon his helpless, unoffending and unresisting associate-- he must either run away and leave him at the mercy of two drunken ruffians, to suffer, he knew not how much, from their fury and disappointed lust--the hour of the night forbade the hope of aid from white men--or he must yield to a generous impulse and come to the

rescue. He used force enough to release his associate and they made their escape, without a repetition of the blow Does this show he has the heart of a murderer? On the contrary, are we not forced, in spite of stern policy, to admire, even in a slave, the generosity, which incurs danger to save a friend? The law requires a slave to tame down his feelings to suit his lowly condition, but it would be savage, to allow him, under no circumstances, to yield to a generous impulse.

I think his Honor erred in charging the jury, that, under the circumstances, the prisoner was guilty of murder, and that there was no legal provocation. For this error the prisoner is entitled to a new trial. He cannot, in my opinion, be convicted of murder, without overruling Hale's case and Will's case. It should be borne in mind, that in laying down rules upon this subject, they must apply to white men as a class, and not as individuals; must be suited to the most degraded, as well as the most orderly. Hence great caution is required to protect slave property from wanton outrages, while, at the same time, due subordination is preserved.

It should also be borne in mind, that a conviction of manslaughter is far from being an acquittal; it extenuates on account of human infirmity, but does not justify or excuse. Manslaughter is felony. For the second offence life is forfeited.

I think there ought to be a new trial.

NASH, J.

I concur with Judge PEARSON in the opinion, that the prisoner is entitled to have his cause reheard before another jury. The presiding Judge erred in instructing the jury, that the assault and battery, committed by the deceased and the witness Brickhouse upon the prisoner and his associate Dick, was an ordinary assault, and did not extenuate the homicide. The time, a late hour in the night, when all appeal to the interference of white men was cut off--the manner, two drunken men, strangers to the prisoner, with their passions inflamed by lust and spirits--all show, that it was not an ordinary assault and battery. It is not simply the force and instrument, that are actually used, which give to an assault its true character, but that character is derived in a great measure from the attending circumstances. Thus, the touching of the person of a female in an indecent manner, is considered as an aggravated offence--so a fillip on the nose. In each of these cases, no force but that of a legal character is used. And yet the perpetrator has so far lost the protection of the law, that, if slain immediately, the homicide is not murder, though a deadly weapon be used. His Honor, therefore, in my opinion, erred in telling the jury that the assault was an ordinary one. If he meant, that no instrument or weapon of a dangerous character was used by the deceased and the witness Brickhouse, it was a fact that did not, necessarily, enter into the grade of the offence committed by them, and his language was well calculated to mislead the jury--to lead them to the conclusion, that no assault upon a slave by a white man can be an aggravated one, or calculated to produce that furor brevis, which dethrones reason for the time being, and repels the idea of malice in the slayer, except when a deadly or dangerous weapon is used. If such an effect could be produced on the minds of the jury, and cases can be shown, in which the slaying of a white man by a slave will be extenuated from murder to manslaughter, where the assault and battery is an aggravated one, then there must be error in the charge, in point of law, and the prisoner is entitled to the benefit of the objection.

Suppose a parcel of drunken white men, say a dozen, meet a slave in the highway, in a lonely spot, and seize him, and while some hold him, others of the party proceed to beat him, and in his terror and pain, he kills one of them with a deadly weapon, could it be pretended the slayer would be guilty of murder? It is said, the law does not allow a slave to feel the degradation of a blow, when inflicted by a white man, to the point of dethroning reason; does the law equally deny him the privilege of pleading the dethronement of reason from the passion of fear and apprehension? If this be so, then there was error in the charge. His Honor ought to have instructed the jury, that an assault made by a white man upon a slave, which endangers his life or threatens great bodily harm, will amount to a legal provocation. State v. Jarrott, 1 Ire. Rep. 86. State v. Will, 1 Dev. & Bat. 163. The prisoner was entitled to have the law, bearing upon the case, fully and correctly laid down by the Court. This, in my judgment, has not been done in the matter now discussed; and as the verdict must have been affected by that error, the prisoner is entitled to a new trial.

But there is another and a graver question to be considered. At the time the prisoner struck the fatal blow, he was in no immediate danger of farther violence by the deceased and the witness Brickhouse. The witness Dick was, at the time of the killing, the sufferer--the blows were then being inflicted on him. If he had committed the homicide while being beaten, in my opinion, his crime would have been manslaughter--is the killing by Cæsar entitled to the same consideration? There is not the slightest evidence of any express malice-- will the law, under the circumstances of this case, imply malice? Most certainly to my mind it will not. I have, in my preceding remarks, treated the case as if the blows, inflicted on Dick, at the time the fatal blow was given, had been inflicted on the prisoner. I have so done, because, if the prisoner were a white man, there is no doubt, at common law, his offence would have been manslaughter, and not murder. Upon this point, the opinion of my brother PEARSON is clear and conclusive. Does the fact, that the prisoner and his associate Dick are slaves, alter the law? This point has not heretofore been decided by this Court. By the common law, the prisoner's offence would clearly be mitigated to manslaughter--by what legislative act, I mean by what act of the legislative power of this country, has that rule been altered as to slaves? Has this Court power to legislate, to establish “a rule of action,” by which the citizens of the country shall govern themselves? Is it not a legislative act to dispense with a rule of the common law, which, in mercy to human frailty, has been adopted to save life? But I am called on, not only to abrogate one rule, but, necessarily, to introduce another. If you say, the prisoner is not entitled to the rule of the common law, which knows no difference of caste, then you not only strip him of a defence, which the common law secured to him, but you establish another rule, that a slave shall, in no case, strike a white man for an assault and battery upon another slave, no matter in what relation he stands to him, or what the force used by the white man, or what the nature of the weapon used by him. I ask for the authority so to declare. I am referred to the degraded state of slaves; that what would rouse to phrensy a white man, he is brought up from infancy to bow to. I am told, that policy and necessity require that a different rule should exist in the case of a slave. Necessity is the tyrant's plea, and policy never yet stript, successfully, the bandage from the eyes of Justice. It does not belong to the bench, but to the halls of legislation. I fully admit, that the degraded state of our slaves requires laws different from those applicable to white men, but I see no authority in the Courts of justice, to make the alteration. The evil is not one, which calls upon the Court to abandon their appropriate duty, that of enforcing the law as they find it. The Legislature, and only the Legislature, can alter the law. It is not likely, however, that they will undertake the task,

difficult as it is admitted to be, while they find the Courts of justice willing to take from them the responsibility of providing for the evil. There are several cases decided by this Court, upon the subject of homicide, committed by white men on slaves, and by slaves on white men. It is not my purpose, nor would it become me to sit in judgment, on this occasion, upon their correctness--they were made by able men and profound lawyers--by good men, who could not be seduced from what they considered the path of duty; and when a case shall come before me, which is governed by them, I may find it my duty to conform to them. This is a new case, and I feel, not only justified, but commanded to adhere to the common law. It sheds a steady light upon the path of the jurist, and gives him a safe and fixed rule to govern himself by. In all the cases, to which my attention has been drawn, the Judges admit the difficulty of laying down any general rule different from that of the common law. The language of Chief Justice TAYLOR in Hale's case, is, "it is impossible to draw the line (speaking of what will constitute a legal provocation for a battery committed by a white man on a slave) with precision, or lay down the rule in the abstract, but, as was said in Tackett's case, the circumstances must be judged of by the Court and jury, with a due regard to the habits and feelings of society." And the late Judge GASTON, than whom an abler Judge or better man never sat upon the seat of Justice, in Jarrott's case, after admitting, that no precise rule had been laid down, by which to pronounce what interference of a white man, not the owner, shall be deemed a sufficient legal provocation, and remarking upon the difficulty of so doing, winds up by saying, "that is a legal provocation, of which it can be pronounced, having a due regard to the relative condition of the white man and the slave, and the obligation of the latter to conform his instinct and his passion to his condition of inferiority, that it would provoke well disposed slaves into a violent passion. And the application of the rule must be left, until a more precise rule can be formed, to the intelligence and conscience of the triers." The same profound Judge, in Will's case, furnishes me with a rule for my judgment in this case, of which I gladly avail myself. Will was indicted for the murder of his overseer. His language is, "in the absence then of all precedents directly in point, or strictly analogous, the question recurs: if the passions of the slave be excited into unlawful violence, by the inhumanity of his master or temporary owner, or one clothed with the master's authority, is it a conclusion of law, that such passions must spring from diabolical malice? Unless I see my way clear as a sunbeam, I cannot believe that this is the law." Not only do I not see my way clear as a sunbeam, but my path, the moment I desert the well known principles of the common law, is obscured by doubts and uncertainties. I look in vain to those, who have preceded me, for a safe guide. The common law tells me, that, although the passion excited in the mind of the prisoner, by witnessing the cruelty inflicted on his associate and companion, did not justify his killing, yet, springing as it did from the ordinary frailty of human nature, rebuts the idea of malice, and extenuates it to manslaughter. Why should I desert this safe guide, to wander in the mazes of judicial discretion, and that too, in a case of life and death; and which has been correctly designated by this Court, in a recent case, as the worst and most dangerous of tyrannies. The conclusion, to which I have been brought is, that this prisoner is entitled to a new trial for the error in the charge, as to the nature of the assault and battery committed by the white man. If I were called on to lay down a rule, by which a homicide committed by a slave on a white man in consequence of an assault and battery upon him, should be mitigated to manslaughter, and were at liberty to do so, I should adopt the one stated by Judge PEARSON in this case, as being safer and more distinct than any one yet suggested. Still in the language of Judge GASTON, in Jarrott's case, "the application of the principle must be left, until a more precise rule can be formed, to the intelligence and conscience of the triers."

In my opinion, the judgment must be reversed and a venire de novo awarded.

RUFFIN, C. J.

I am unable to concur in the judgment of the Court, and, upon a point of such general consequence, I conceive it to be a duty to state my dissent, and the grounds of it.

There are circumstances in the case which might be worthy of consideration, as being unlawful acts on the part of the slaves, prior to the violence on either side. They were from home without passes from their owners, and associated in the street of a village in the middle of the night. They were, thus, subject to be taken up by any one, and might be looked on as the first transgressors. But all observations upon those facts may properly be pretermitted; because, upon the supposition, that Brickhourse and Mizell were wrong-doers throughout, it appears to me, that upon adjudged cases and principles, their acts, as far as they had gone, did not amount to a legal provocation; such as ought, or would ordinarily, rouse the angry passion in negro slaves and carry them to such a pitch as to dethrone reason, and, under a sense of outrage and forgetfulness of their vast inferiority, prompt them, through the infirmity of nature, to slay a white man for the trespass.

It is very clear, that the question turns on the difference in the condition of the free white men and negro slaves. For, there is no doubt, if all the persons had been white men, that the conduct of the deceased would have palliated the killing by the person assaulted, or by his comrade, to manslaughter. It may also be assumed, that, if all the parties had been slaves, the homicide would have been of the same degree. But it has been repeatedly declared by the highest judicial authorities, and it is felt by every person, lay as well as legal, that the rule for determining what is a mitigating provocation cannot, in the nature of things, be the same between persons who are in equali jure, as two freemen, and those who stand in the very great disparity of free whites and black slaves. Thus in Hale's case, 2 Hawks, 582, the point was, whether a battery by a white man on the slave of another was indictable, and the language of the Court was, “that, as there was no positive law decisive of the question, a solution of it must be deduced from general principles, from reasonings founded on the common law, adapted to the existing condition and circumstances of our society, and indicating that result, which is best adapted to general expedience.” Hence the Court held, that such a battery was a breach of the peace and as such indictable: but explicitly declared further, “that, at the same time, it is undeniable, that such offence must be considered with a view to the actual condition of society, and the difference between a white man and a slave, securing the first from injury or insult, and the other from needless violence and outrage; and that from that difference it arises, that many circumstances, which would not constitute a legal provocation for a battery by one white man on another, would justify it, if committed on a slave, provided it were not excessive.” The learned Chief Justice TAYLOR would not pretend to frame a precise rule in the abstract, to be applied to every case, but added a reference to his own language in Tackett's case, 1 Hawks 210, “that the circumstances are to be judged of with a due regard to the habits and feelings of society.” In Tackett's case, although the statute of 1817 enacted, that the killing of a slave should partake of the same degree of guilt, when accompanied with the like circumstances, that homicide then did, it was held by the Court, that the purpose was merely to make the manslaughter of a slave

punishable in the same manner with that of a white person: and that the statute did not mean to declare that homicide, where a slave is killed, could only be extenuated by such a provocation as would have the same effect, where a white person was killed. The Chief Justice says: "the different degrees of homicide, they, (the Legislature,) left to be ascertained by the common Law--a system which adapts itself to the habits, institutions, and actual condition of the citizens, and which is not the result of the wisdom of any one man or society of men, in any one age, but of the wisdom and experience of many ages of wise and discreet men. It exists in the nature of things, that, where slavery prevails, the relation between a white man and a slave differs from that, which exists between free persons; and every individual in the community feels and understands, that the homicide of a slave may be extenuated by acts, which would not produce a legal provocation, if done by a white person. To define and limit those acts would be impossible; but the sense and feeling of jurors and the grave discretion of Courts cannot be at a loss in estimating their force and applying them to each case, with a due regard to the rights respectively belonging to the slave and white man--to the just claims of humanity, and the supreme law, the safety of the citizens." The rules thus laid down, though not professing to assume the form of definitions, and to suffice, in themselves, for the determination of every case, are rendered intelligible and material aids upon the point before us by the example, which the Chief Justice adduces to illustrate his meaning." "It is," says he, "a rule of law, that neither words of reproach, insulting gestures, nor a trespass on goods or lands, are provocations sufficient to free the party killing from the guilt of murder, where he used a deadly weapon. But it cannot be laid down, that some of those provocations, if offered by a slave, would not extenuate the killing, if it were instantly done, under the heat of passion, and without circumstances of cruelty." The soundness of the reasoning, on which the Court proceeded in those cases, and of the principles established by it, must be acknowledged, I think, by every candid mind. The dissimilarity in the condition of slaves from any thing known at the common law cannot be denied; and, therefore, as it appears to me, the rules upon this, as upon all other kinds of intercourse between white men and slaves, must vary from those applied by the common law, between persons so essentially differing in their relations, education, rights, principles of action, habits, and motives for resentment. Judges cannot, indeed, be too sensible of the difficulty and delicacy of the task of adjusting the rules of law to new subjects; and therefore they should be and are proportionally cautious against rash expositions, not suited to the actual state of things, and not calculated to promote the security of persons, the stability of national institutions, and the common welfare. It was but an instance of the practical wisdom, which is characteristic of the common law and its judicial ministers as a body, that the Courts should, in those cases, have shown themselves so explicit in stating the general principle, on which the rules of law on this subject must ultimately be placed, and yet so guarded in respect to the rules themselves in detail. Yet it is of the utmost importance, nay, of the most pressing necessity, that there should be rules, which, as rules of law, should be known; so that all persons, of whatever race or condition, may understand their rights and responsibilities in respect to acts, by which blood is shed and life taken, and for which the slayer may be called to answer at the peril of his own life. Whenever, then, the highest judicial tribunal of the country gravely declares its opinion upon a point applicable to a subject thus novel and difficult, great respect is due to it from succeeding Judges. And when a case is brought directly into judgment before such a tribunal, and, in its decision, certain principles are, after full deliberation, solemnly announced and acted on, the judgment ought to be regarded as settling the point decided. If upon any question, it is upon one like this, that a well considered precedent is of utility and binding force. The certainty of the law, in respect to all matters of high importance, requires, especially

upon a question of this kind, that the Court should adhere to what is once resolved: more particularly, when the resolution is of some years standing, and the sanction of the legislature may be implied, from the omission of that body, the source of the law, to abrogate or modify it. And when an intelligible principle is explicitly laid down in an adjudication, or necessarily results from it, every consideration of judicial prudence, of the security of the citizen, and of that quiet of mind, which a known law inspires in contradistinction to unknown and uncertain opinions, which successive Judges may individually entertain, should impart to such principle the authority of law. It is under such impressions, that I am led to the opinion, that the prisoner is guilty of murder. It results almost necessarily, as it seems to me, from the doctrine of Tackett's and Hale's cases, as already quoted. But I consider that, in pursuance of the reasons and rules of those cases, it was expressly decided and the rule laid down in Jarrott's case, 1 Ired. 76, nearly in the very language, in which the instructions were given to the jury in this case. After stating that no precise rule had been before laid down, as to the unlawful interference with the person of a slave by a white man, which should be deemed a legal provocation, extenuating the killing of the assailant to manslaughter, and after acknowledging it to be no easy task to prescribe one for all cases, consistent at once with the policy and the humanity of the law, the Court explicitly declared, that the law "clearly forbids, that an ordinary assault and battery should be deemed, as it is between white men, a legal provocation." To my apprehension, that is directly applicable to the case before the Court and decisive of it. The proposition is conceived with clearness and expressed with precision; and as far as it goes, it affords a safe footing upon firm ground gained in a morass. Why abandon it, not knowing on what we are next to tread? It is said, indeed, that the principle laid down is not obligatory, because the adjudication in the case was not in conformity to it, inasmuch as a venire de novo was awarded. Certainly, it was not considered at the time to be an extra judicial dictum of the Judge, who delivered the opinion; but the point was deliberately discussed and the conclusion clearly concurred in by every member of the Court. Indeed, whoever will take the pains to examine the case carefully, will find it to be a mistaken supposition, that the point was not in judgment there. The opinion given may be erroneous; but undoubtedly it was not an unadvised nor an extrajudicial determination. For it will be noticed, that there were four exceptions taken for the prisoner, each one of which it was alike the duty of the Court to consider; and that, in reference to one of them, the position under consideration was relevant, and as such was laid down. The judgment was indeed reversed; but it was because the Judge refused to instruct the jury, upon the prisoner's prayer, that, for the insolent language given by the prisoner, the deceased had no right to assault him with a sharp knife and a fence rail, as the deceased repeatedly did. That refusal was the ground of one of the exceptions; and the Court held, that although insult in words or manner, from a slave to a white person, may excuse or justify a moderate battery, yet it would not authorise one that was excessive or one with the dangerous weapons, which the deceased attempted to use. For such an assault, the party assailed, though a slave, might, upon the instinct of self-preservation, or under the fury which so wanton an attempt upon his limb or life would excite, slay the assailant, without incurring the guilt of murder. But, upon the reversal of the judgment upon that exception, the prisoner was not discharged, but was sent back to another trial; and hence the Court was called on to dispose of the other exceptions, in order to meet the case as, it was seen, it must appear on the next trial. Hence the Court said, that, under a sense of duty they could not forbear examining the case on the other points, nor rightfully decline the declaration of "the decided judgment they had formed on them." This question of the provocation of a slave by a white man is not, then, directly presented in the present case for the first time. It was the subject of the three other exceptions in

Jarrott's case in different forms, and it was discussed and the point decided by the Court in reference, expressly, to the effect the judgment was to have on that very man's life or death on his next trial. It was a decision demanded by the prisoner, and one which directly concerned the public justice to be administered to him, and which the Court was obliged to make. What was said on that occasion was, therefore, as little like an extrajudicial dictum as anything that ever fell from a Court; and, as an authority, it is entitled to as much weight as any adjudication ever made by the Court. What, then, were the decisions on those exceptions? They were: first, that some matters, which would be sufficient, as provocations, to free a white man from the guilt of murder, would not be sufficient to have the same effect, when the party slain is a white man, and the slayer is a slave: Secondly, that the distinction arose from the vast difference in the social condition of the whites and the slaves, and was inherent in the castes and not dependent on the character or merits or demerits of different white men: And thirdly, and specifically, that a battery by a white man, which endangers a slave's life or great bodily harm will amount to a legal provocation; but that clearly an ordinary assault and battery is not such a provocation. What an ordinary battery is, as meant by the Court, it cannot be difficult to ascertain. The signification would seem naturally to be pointed out, by its being used in immediate and direct contradistinction to a battery, endangering life or causing great bodily harm. The Court cannot be supposed to have an allusion to any act of indignity merely, such as giving a slave a fillip, or pulling his nose, in public; as that would be an absurd contradiction to the scope of all the reasoning on which the opinion rests, which was declared. An ordinary battery plainly means one, which is described in the books by the term “moderate” in contrast to that of “excessive,” used likewise in the text books and in the passages quoted from the cases in this Court. There may be other instances, in which, from the severity of chastisement or its cruel protraction, the smart of pain, and the uncertainty of the extent of suffering, to which the unoffending negro may suppose an intention to subject him, may properly be allowed to be a provocation transporting the slave beyond the control of his reason and habitual subordination, and endurance of personal wrongs from the whites. To instances of that kind allusion is made in Jarrott's case, as being injuries of various grades between the two extremes before mentioned; and as to them the Court, without undertaking a priori to frame a precise rule, ventures only to advance the general doctrine, that an act is to be deemed a legal provocation, of which it can be pronounced, having due regard to the relative condition of the white man and the slave, and to the obligation of the latter to conform his instinct and his passions to his condition of inferiority, that it would provoke well disposed slaves into a violent passion. Without attempting to enumerate all the instances falling within those observations, or even to give further examples, it is sufficient, that I should say, as his Honor did, that there were here nothing more than ordinary batteries. If they be not of that character, it is difficult to conceive such as would fall within the description. At first some slight slaps with a light board were given, which were evidently in sport, or, if it be liked better, in wantonness, and certainly not to chastise or provoke the slaves--as the witness explicitly stated, that they did not hurt him, and the prisoner told another witness, that he laughed at them. It is true, that the blows afterwards given with the first did hurt. But no wounds are described or serious injury mentioned--the witness saying only, that the first blows did not, and that the last did, hurt. The extent of the hurt must, then, be estimated from the conduct the blows produced in the man, on whom they were inflicted; and by those means it may be correctly estimated. Did they make his blood boil and transport him, so that, being wrought into a tempest of passion, he attempted in retaliation to slay his assailant, or even to join battle with him with their natural weapons? Far from it. On the contrary, he acted precisely as slaves ordinarily do

under such circumstances--in that very manner, indeed, which proves, that the Courts have hitherto rightly judged, that slaves, not dangerously or excessively and cruelly beaten, will not so feel the degradation and outrage of a battery by a white man, as to be prompted instantly to seek redress at the expense of the other's life. He sought no assistance, but submitted without a struggle, and begged; and, when freed from forcible detention, he made no effort to be revenged, nor showed any resentment, but merely escaped quietly. How, then, can a Court by possibility hold, that such a battery is legally a provocation to kill, when, from the evidence of the man upon whom it was made, we see clearly, that in fact it was not, and produced in him no such impulse? As it appears to me, then, according to the rule of

Jarrott's case, there was no such battery by either Brickhouse or Mizell, as would have mitigated to manslaughter the killing of either by the person assailed.

If, however, that rule were not to be deemed law in virtue of an adjudication, its intrinsic correctness is sufficient to sustain it. As has been already stated, it is founded on the difference of condition of free white men and slaves, according to our institutions and habits. There is nothing analogous to it in the relations recognised by the common law. Tackett's case, and Mann's case, 2 Dev. 260. It involves a necessity, not only for the discipline on the part of the owner requisite to procure productive labor from them, but for enforcing a subordination to the white race, which alone is compatible with the contentment of the slaves with their destiny, the acknowledged superiority of the whites, and the public quiet and security. The whites forever feel and assert a superiority, and exact an humble submission from the slaves; and the latter, in all they say and do, not only profess, but plainly exhibit a corresponding deep and abiding sense of legal and personal inferiority Negroes--at least the great mass of them--born with deference to the white man, take the most contumelious language without answering again, and generally submit tamely to his buffets, though unlawful and unmerited. Such are the habits of the country. It is not now the question, whether these things are naturally right and proper to exist. They do exist actually, legally, and inveterately. Indeed, they are inseparable from the state of slavery; and are only to be deemed wrong upon the admission that slavery is fundamentally wrong. Now, they must necessarily modify the rules of law, regulating the relation of man to man, so as to render them applicable, without injustice, to the two classes and races of our people, and suit them to the exigencies arising out of their living together, with such different passions, prejudices, pursuits, and privileges. How is that to be effected? In reference to the point in hand, it would seem that but one method could be devised or thought of; which is that, to which every Judge has resorted, who has been called to make up a judgment on it. It is to ascertain, from careful observation, the actual effect on the bulk of one race of certain conduct on the part of those belonging to the other. Indeed, that is, alone, the ground, on which the law classifies the different kinds of homicide. It is on that principle the law holds, that, when one free person is smitten by another and kills him on the sudden, it is not murder; because the act is not fairly and generally attributable to malignity of heart, but to that infirmity which is common to men in general in that condition; and, therefore it is fit, that there should be a compassionate consideration for it. That principle is as applicable to contests arising between the white and slave castes, as to the whites by themselves. The cases of children and apprentices, at the common law, do not rest upon an independent arbitrary rule, but are examples merely of the principle under consideration. It is found that, when fathers and mothers correct those under their tutelage, they are not ordinarily prone to resent by violent retaliation, much less to attempt to kill;

but that, on the contrary, the young do the elder reverence. If, then, a child under punishment slays his parent, the conclusion is, that he was not moved to it by heat of blood on the sudden, but by a malignant and diabolical spirit of vengeance. That is the effect of applying that test of common experience between persons in those relations. What will be the effect of applying it by a calm observer between free whites and negro slaves? Why, as laid down in the cases of Tackett and Mann, in respect to a provocation from a slave to a white man, upon which death takes place, "every individual in the community feels and understands, that the homicide of a slave may be extenuated by acts, which would not constitute a legal provocation, if done by a white person;" and that "many circumstances, which would not constitute such a provocation for a battery by one white man upon another, would justify it, if committed on a slave." That, we see, is the result of an application of the principle of the common law to the homicide of a slave by a white man--of that fruit of "the wisdom and experience of many ages of wise and discreet men, adapted to the habits, institutions, and actual condition of our citizens." And I think a Judge in this country will find himself compelled to adhere to that rule, whenever he is called to consider, whether the offence of a white man, whom he is trying for killing a slave, is or is not extenuated by the abusive and insolent reproaches of the slave and his trespass on his property before his face. So, it follows, as certainly as day follows night, that many things, which drive a white man to madness, will not have the like effect, if done by a white man to a slave; and, particularly, it is true, that slaves are not ordinarily moved to kill a white man for a common beating. For, it is an incontestable fact, that the great mass of slaves--nearly all of them--are the least turbulent of all men; that, when sober, they never attack a white man; and seldom, very seldom, exhibit any temper or sense of provocation at even gross and violent injuries from white men. They sometimes deliberately murder; oftener at the instigation of others, than on their own motive. They sometimes kill each other in heat of blood, being sensible to the dishonor in their own caste of crouching in submission to one of themselves. That, however, is much less frequent than among whites; for they have a duller sensibility to degradation. But hardly such a thing is known, as that a slave turns in retaliation on a white man, and, especially, that he attempts to take life for even a wanton battery, unless it be carried to such extremity as to render resistance proper in defence of his own life. Crowds of negroes in public places are often dispersed with blows by white men, and no one remembers a homicide of a white man on such occasions. The inference is, that the generality of slaves--those who are well disposed towards the whites, as are almost all--do not in truth and fact find themselves impelled to a bloody vengeance, upon the provocation of blows with the fist or a switch from a white man. That is the experience of the whole country. In the course of nearly forty-two years of personal experience in the profession and a very extensive intercourse with other members of the profession from every part of the State, I have not known or heard of half a dozen instances of killing or attempting to kill a white man by a negro in a scuffle, although the batteries on them by whites have been without number, and often without cause or excessive. Desperate runaways sometimes resist apprehension by a resort to deadly weapons. But the fact certainly is, negro slaves can hardly be said to be at all sensible to the provocation of an assault from a white man, as an incentive to spill blood. Such being the real state of things, it is a just conclusion of reason, when a slave kills a white man for a battery not likely to kill, maim, or do permanent injury, nor accompanied by unusual cruelty, that the act did not flow from generous and uncontrollable resentment, but from a bad heart--one, intent upon the assertion of an equality, social and personal, with the white, and bent on mortal mischief in support of the assertion. It is but the pretence of a provocation, not usually felt. Therefore, it cannot be tolerated in the law, though acted on in this particular instance by the

prisoner--just as the law will not allow any provocation of words, gestures, or trespass on land or goods from one in equali jure--however grievous sometimes to be borne, and however they may have actually transported a particular individual--to extenuate a homicide, because, as it holds, a rational being is not too infirm to withstand such acts of provocation. Therefore we concluded in Jarrott's case, as I would now hold, "that the law will not permit the slave to resist"--that is, in a case of an ordinary assault and battery on him--"but that it is his duty to submit, or flee, or seek the protection of his master:" as in almost every instance he would in fact do.

But it was further argued for the prisoner, that Jarrott's case is not in conformity with the previous cases of Hale, and of Will, 1 Dev. & Bat. 121, and that for that reason it cannot stand. But I must say, that it seems to me to be consistent with those two and all the other cases on this subject. I aided in the decision of most of them, and thought I understood them, and certainly I was not conscious of any conflict between them; nor am I yet. Hale's case decides that a battery on a slave by a stranger is indictable; and it decides nothing more. It was before my time; but I acknowledge its authority, and, indeed, heartily concur in it. But it proceeds further, upon a course of reasoning, to lay down a rule modifying that of the common law, as applicable to free equals, by saying--also correctly, as I think--that many things will excuse or justify a battery on a slave, that would not have the same operation in the case of a white person; and it refers to Tackett's case as containing, in the passages already quoted from it, the true doctrine of our law, as held by the Court, on this subject. All that, as far as it goes, is but what was said precisely in Jarrott's case. Neither Hale's case, nor Tackett's has a word, as to what redress a slave may take into his own hands for a battery on him by a white man. On the contrary, as was said in Jarrott's case, it clearly follows e converso from the decision and rule of Tackett's and the doctrine of Hale's case, that many things, which, between white persons, are greivous provocations, will not and cannot be so regarded, when proceeding from a white person to a slave, whose passions ought to be and are tamed down to his lowly condition. No one has thought, that there could not be a provocation from a white man to a slave, which would not extenuate a killing of the latter. It was, indeed, at one time held, that there could be no manslaughter of a slave by a white man, and that what would be only an extenuation of the killing of a white man by another, would excuse the killing of a slave by him. That, however, was altered by the Legislature; and the question, in relation to both kinds of homicide, has since been, what are legal provocations. With respect to the killing of a white man by a slave, we have thought those acts ought not to be recognised as provocations, which, according to common experience, do not, in the actual condition of these people among us, produce in them that furor brevis which the law mercifully regards; and that a moderate chastisement was of that character; but, on the other hand, that, as in Will's case, forcible injuries might be so wantonly and excessively inflicted on a slave, as to palliate his killing his opposer, though a white man. That case strikes me as having as little similitude to the present, as can exist between two cases of homicide in a sudden combat. There, in order to avoid threatened punishment, a negro man ran off from an overseer, who within a few steps brutally shot a whole load of his gun into his back, giving him a most dangerous and painful wound. The slave did not then turn on the assailant, but still endeavored to escape, and the deceased, with a party of slaves pursued and headed him, and, after the prisoner had gone as far as he could, he was overtaken--all within a short period of six or eight minutes--when the overseer seized him for further punishment, and commanded the negroes to lay hold, when the prisoner drew a knife and first struck at one of the negroes and then at the overseer and killed the latter. Upon those facts the Court held, there was a legal provocation; and there certainly was, if human nature has

any terror of death, instinct of self-preservation, or any sense, mental or corporeal, of the pain and injury of an unlawful and atrocious attempt to take life. Those were real provocations to any man, even one in his condition. But is it to follow therefrom, that a slave, who for a stroke with a switch or a few blows with the fist, kills a white man with a deadly weapon, did so under provocation, which might reasonably and in fact did rouse him to a pitch of furious passion, which drove him to the deed? Far from it, in my opinion; and I fear that it is giving occasion unnecessarily to much bloodshed, when it is so held. My conclusion is, that, if the man Dick had killed either of the white men concerned in this unfortunate affair, it would have been murder. And I must express the hope, that it will thus be seen, that my opinion does not proceed upon a cold and rigorous policy of repressing in a slave an actual sense of the wrong done him by a wanton battery, in order more effectually to subjugate him; but that it rests on the fact, that a common battery from a white man--such as was in this case committed--does not ordinarily provoke a slave to go to the extremity of taking life.

All the foregoing reasons apply with yet more force against the prisoner; as he was not engaged in any way, but was a mere looker on. I believe, this is the very first instance in which a slave has ventured to interpose, either between white men, or between a white man and a slave, taking part against the white man. Why should he intermeddle upon the plea of resisting the unlawful power, or redressing the wanton wrong, of a white man, when he, to whom the wrong was done, is admitted to have been unresisting? Shall one slave be the arbiter of the quarrels witnessed by him between another slave and the whites? It seems to me to be dangerous to the last degree to hold the doctrine, that negro slaves may assume to themselves the judgment as to the right or propriety of resistance, by one of his own race, to the authority taken over them by the whites, and, upon the notion of a generous sympathy with their oppressed fellow servants, may step forward to secure them from the hands of a white man, and much less to avenge their wrongs. First denying their general subordination to the whites, it may be apprehended that they will end in denouncing the injustice of slavery itself, and, upon that pretext, band together to throw off their common bondage entirely. The rule, which extenuates the assistance given by a white man to his friend, in a conflict between him and another white man-- all being in equali jure--cannot, I think, be safely or fairly extended, so as to allow a slave, upon supposed generous impulses, to do the noble duty of killing a white man, because he tyrannizes over a negro man, so far as to give him a rap with a ratan and a few blows with his fists. I have never heard such a position advanced before, either as a doctrine of our law or as an opinion of any portion of our people.

For these reasons, the judgment, I think, ought to be affirmed.

PER CURIAM. Ordered that the opinion of the majority of the Court be certified to the Superior Court of Law of Martin County, that it may proceed accordingly.

RUFFIN, C. J., dissented.