IMPORTANT DECISION!

From the Georgia Journal Extra, of Monday.

The following important decision will be read with deep interest by the people of this state. The Grand Jury of the county where it was delivered, recommend its publication in the following language.

Extract—"We the Grand Jury believing that the opinion of the presiding Judge of this Court, on the subject of the legality of the late removal of the Secretary of State is of importance to the citizens at large, do request that it be published, and we cannot omit this opportunity of expressing our approbation of the step that has been taken by the Court.—He as a public centinel, occupying a very important station in the government, designed to check the encroachments of either of the other branches, it is his bounden duty to suffer nothing to pass that important post, in violation of the law, or the true and just principles of our republican institutions, and that when such an event takes place, the people have a right to expect from the judiciary a firm and independent resistance."

An "opinion" delivered by Judge Clayton, at Jackson Superio. Court, on Tuesday the 10th inst. in a case reserved from Habersham.

The State vs. James Vessels, sen'r. } Habersham Superior Court Scr. Fa'

This is an action to avoid a grant under the Land Lottery act of 1818, founded as it is alledged on a fraudulent draw, and to support which, the first piece of evidence offered, is a grant to James Vessels sen'r. for Lot N°. 129, in the 3d district of Habersham county, dated 23d of August, 1822, and Registered by Simon Whitaker, Secretary.—It is objected to this grant's going in evidence to the Jury, on the ground, that it necessary to have the Secretary of State's name signed on the grant; it was not so signed by the proper Secretary of State, that according to the Governor's order, appointing the said Simon Whitaker, as Secretary, it appears there was no vacancy of that office, and that the true and proper Secretary of State is Abner Hammond.

Courts are often placed in a delicate situation by the motions of Counsel, who no doubt are impelled to these steps by an imperious regard for the interest of their clients This is one of those cases that is sensibly felt from the circumstance that it is not confined to the parties litigant, but occupies in a very sensitive manner the public mind. I am called upon however, to make a decision: to evade it would be judicial weakness, to meet it is official duty. Which course to take certainly cannot long be a matter of hesitation; but I may say without affectation of diffidence, that it is approached with that becoming decorum, for a high department of the government, which is surely due to the question.

The subject as presented by the documents, to my mind, naturally divides itself into two branches:

1st. What is such a vacancy of office as the Constitution *intended* the Executive should fill?

And 2d. How far an office may be discharged by deputy?

On the first point, I will lay it down as a principle, without an exception, that in all instruments whether public or private, whether constitutions or contracts, the true, plain and open intention of the framers of those instruments ought to be ascertained, and when ascertained, ought strictly to be pursued. I will lay down another principle, that no words in any instrument ought so to be tortured as to produce a meaning different from their obvious import, or original design.

With these confessedly just and safe rules, let us dispassionately investigate the question before us.—The clause of the Constitution under which the Executive has acted is in the following words: "When any office shall become vacant by death, resignation or *otherwise*, the Governor shall have the power to fill such vacancy." 9th sec. 2d art.

It is very clear that the alledged vacancy does not come under either of the two first causes which may produce one, and

therefore arises in some circumstance under the third. This unfortunately is divested of that precision and certainly which ought, if possible, to exist in all legal language, but nevertheless keeping in view our first principles, we can sufficiently arrive at the intention of our law makers. It is very obvious that the framers of the constitution intended to control in some degree, this very extensive power, and to keep separate and distinct the difference between *filling a vacancy* and *declaring a vacancy*, or they would not have given the two first instances of "death and resignation" as examples of the *kind* of vacancy which the Governor might fill. Some such cases different from these, but arising from inevitable necessity, they foresaw might happen which would make the third expression of "*otherwise*" necessary to vest the power. If this were not the case, if the expressions, "death and resignation" were not intended to shew the *nature and kind* of cause which ought to produce a vacancy, why not have declared at once that the Governor should fill all *vacancies*,* without specifying any event that should create a vacancy, leaving it entirely to the Executive to determine when one existed? If the expression "*otherwise*" is so general and unlimited as to give the Executive a perfect discretion to say when a vacancy exists, there was no use for the previous expressions. We must believe then, they were controlling expressions, designed to limit the third, and what were they designed to control? Why that the power should not be exercised capriciously, that temporary disease, for instance, of an officer, should not vacate his office, that casual absence should not produce that effect, and many other circumstances not now necessary to be mentioned, but that it should be some cause like "death or resignation," that evinced plainly a physical or legal *incapacity* or an *intention* not to discharge the duties of the office—Instances of the first are settled and incurable insanity, and such a conviction of crime as is mentioned in the 20th section of the first article of the constitution—of the last, promotion to an incompatible office, or such a desertion of the office as plainly implied the want of what in law is called, and is applied to similar cases, the *animus revertendi*, the *intention to return*.

If some such reasonable construction of the word "otherwise" does not prevail, what would be the situation of *all officers* whose vacancies the Executive has a right to fill? And what sovereign in the world would have a greater power, in this regard, than the Executive? Their tenure of office would entirely depend on his construction of a vacancy; and if he can determine one act to produce a vacancy, he can with equal right determine any other act to do the same thing. For instance, take the present executive order, which is in the following words: "Abner Hammond, Esq. Secretary of State, having *absented* himself for some time past from the seat of government, without the permission or knowledge of the Executive, *on a visit*, as it is understood to the *sea board*, and thence to *St. Augustine*, which makes it very uncertain when he will return, &c." Now apply it to similar circumstances in and about the town of Milledgeville and it will be readily seen that no vacation of office would result, to wit, "Abner Hammond, Esq. Secretary of State, having *absented* himself this morning (for time nor distance cannot alter principle) from the seat of government without the permission or knowledge of the executive, *on a visit* as it is understood to *Scotsborough* and thence to the *Bont Yard*. (I mention these because they are well known and contiguous to the seat of government,) which makes it very *uncertain* when he will return &c.—ordered that his office be vacated, &c. Now does not plain, sober reason revolt at the idea of a man's losing perhaps his all, on account of so innocent an act, whether he left any one in his office or not? The most that could be made of it would be a neglect of duty, for which he was answerable to the people through their Legislature, and there is an immensely wide difference between a *neglect of duty* and a *vacation of office*. If every act of the former produces the latter, and the Executive has the broad discretion, under the term "otherwise" so to declare it, the *right of appointment in the first instance of all officers* might as well be given to the Executive, for in two hours after the Legislature should make the appointments some future Executive disposed to be arbitrary, could always find acts that, under his *unlimited* power of construction would amount to a vacation of office, and consequently he could and would displace every officer obnoxious to him.

But this case is still more striking, if you take any two places in the town of Milledgeville which is precisely the same in principle, and fit them to the order; for I maintain no vacation of office results so long as he has the *intention* to return to that office, and does not betray a desertion of it; and it matters not whether he goes to the sea board, or Mr. Jarratt's Tavern; distance can not as I before observed, alter the principle; it matters not whether it is for a month or an hour; time does not vary the power. The longer the time of absence the greater the *neglect of duty*, for which upon his bond, or by impeachment he would be responsible. It is no argument to say, that no Governor would ever abuse his privilege in the manner suggested. The form and princi-

*It is remarkable that by the 21st section of the constitution of 1777, when there was an Executive Council to aid the Governor, this was the very manner the power of filling vacancies was given. When by the constitution of 1789 the Executive Council was abolished, the power was taken from the Governor altogether, and restored in its present shape by the last constitution.

ples of our government never intended to place it in his power; for the people of this country are too well informed not to know that all men love power, and that when interest or passion has the ascendency, they are too apt "to feel might and forget right."

To vacate an office, under the most common and familiar acceptation of the term, is to annul it, to put an end to it.—Now if leaving it for an hour, and going to the outer door of the State House, with the *intention to return*, does not bring about either of the above consequences, who shall point out the exact time and distance that will produce the effect where there is an equal *intention of returning*. If this power is left to the Executive, it may very much vary according to the feelings, judgment, and I may add, the mental infirmities of the different incumbents of the office, and is by no means a power *to fill* but to *declare* a vacancy, which is clearly not the intention of the Constitution.

That absence is nothing more than a neglect of duty, all are well convinced, who have done business at the different offices of state, from the Governor's down and been delayed or disappointed in that business; for even under the vexation of such their delay, they never dreamed the office to be vacated, and in giving vent to the humours of perhaps a just provocation they have never gone further than to say that such officers were unfit for their station. An officer might be absent every other hour in the day, and produce quite as much inconvenience to the public as if he were absent a month at a time, and yet in the first case no one would pretend that his office would be vacant. The evil would be obliged to be redressed in the same way that all other delinquencies of public functionaries are remedied, by a withdrawal of confidence at the proper time, removal impeachment and prosecution of their pledges. Suppose Colonel Hammond had remained at home and regularly attended his office, from day to day, and should transact business for some, while for others he would pertinaciously refuse to do any thing? Would that amount to a vacation of his office? I will be readily answered, certainly not. What is it? A gross neglect of duty.—How is it to be punished? The answer has already been given.

Again, if *temporary* absence amounts to a vacation of office, at what individual point of time does it take place? Is it at the moment when the officer leaves his office, or after he has been gone fifteen, twenty, or thirty days? If it be the latter, it is a very arbitrary rule for ascertaining a vacancy, and if the former, the act of vacation was complete on the day Col. Hammond left his office and ought to have been filled, because if the *intention to return* is not to enter into the question, no expedients that the officer may devise which are not authorized by law, can save his office for him during his absence and if the first act of leaving it amounts to a vacation of it, his return can never afterrestore it to him—Under this rule how many officers about the State House have become vacant, is a matter of curious speculation.

In the distribution of powers among the several departments of government, by the Constitution, it surely never was the intention of its framers to give the Executive more power over officers than the Legislature, and to authorise the former to displace an officer for a cause which the Legislature could not do. Will any one believe? Put it to the candour of every sober judgment that the Legislature would *impeach, remove,* or even *non elect* an officer who had been guilty of no other offence than merely to go on "a visit to the sea board," although it should be uncertain when he should return, and had left *no one* to do his business, provided he had *an intention to return*, and his reason for his absence should be such as to satisfy any reasonable man?—Can any reflecting mind believe that under a government like ours, so moderate, so temporate, so jealous of arbitrary power, so mindful of the rights of its citizens, so generous in its principles, and so equal in its privileges, that such a cause as is here alledged, was *intended* to work a forfeiture of office and expel the incumbent from his post without notice, and without what is allowed to the meanest criminal a hearing? In the powers given to the Legislature over offences, so watchful is the Constitution of their rights, that it will not trust their impeachment or removal even to a majority of that considerable body, but in order to guard against prejudice, revenge, and many other baneful passions that too often usurp the seat of reason and expose the frailty of our selfish nature, two thirds are indispensibly necessary to effect either of those objects.

The loss of a man's office, is often inflicted as a punishment for some crime; and if one should be charged against an officer affecting his office, he would be notified of it, heard, and his *motives* of conduct would be duly appreciated. This is the case in all offences; the *quo animo, the intent* is thoroughly examined. Now will any one pretend to say, that in an act, less than a crime, supposed at the time to be perfectly innocent, and which is to produce so serious an injury as the loss of office, that the *intention* of the officer should not be taken into view? And does any one believe that it was the intention of Col. Hammond to *vacate* his office when he left it? What kind of reasoning is that, that will suffer a guiltless intention to excuse a man from *crime*, that will not save him from an *harmless act*?

There is one more remark under this head, and I shall conclude it—If the "visit" of the officer was lawful under "the permission or knowledge of the Executive" as is plainly and evidently implied in the order, I am clear to say, it was a

quite so without it; for there is no law in this land of equal rights that requires such official subservicncy. Every officer stands upon his own responsibility, and is alike amenable, first to the laws and then to the people; and he often finds that notwithstanding he has passed the reckoning of the one, he is not exempt from the scrutiny of the other.

From the foregoing view, therefore, of this point, I am of the opinion, there was not such a vacancy of office as the Constitution intended the Executive should fill.

On the other head, it would seem unnecessary to say any thing, as the above opinion settles the question. But it is due to the community to know what the law is on this subject, as determined by their courts of justice, and as far as I understand the decisions, will proceed to give them.

I will however first premise, that the common law made this distinction; all *ministerial* officers, whose duties were particularly defined, in which there was neither skill or judgment to be exercised, but their business being merely clerical or mechanical, were entitled to *deputies*, but that all *judicial* officers, where discretion skill and judgment were necessary to the execution of their trust, were not allowed deputies.—To both of these rules, however, there are some exceptions, but not such as materially to alter the distinction, †

Upon this principle it will be obvious, that whenever the question presents itself, its main difficulty will be to determine what is a *ministerial* and what a *judicial* office. If we take the decisions of our own courts, and they must certainly be respected, this question is at rest.—It has been determined by Judge Walton, in the country of Greene, and acquiesced in by succeeding Judges, that a clerkship of either of the courts is not a ministerial office, and therefore not entitled to deputy. Hence subsequent laws have been passed to legalize the acts of deputies, of sundry cases, and also to allow deputies Upon that decision, I presume, another has been made (by whom I am not able to say,) that the Secretary of State's office is not a ministerial office; for I find the acts of his deputy legalized, by an act passed in 1810, section 3d. "All grants, copy grants, testimonials, or any other document or paper whatsoever, heretofore issued out of the Secretary of States' office, purporting to be signed by a deputy Secretary of State, shall be held and taken as legal," &c.

But at the same time that these officers were determined not to be entitled to deputies, and when a paper was certified *as such*, would be rejected by the court, yet if the name *alone* of the *principal* appeared upon the paper, though *done* by *another*, it would be good. This is pronounce to be the uniform practice of the court, and as well settled as any point that has ever been adjudicated. The authority to sign the principal's, name is between himself and his agent, it is the officer's act if he empowers it to be done. It is not forgery in the agent, and if it is not forgery it must be genuine. Repeated instances have taken place under this decision, within the Court's, own observation, where before the law allowed a clerk to have a deputy, his name has been officially signed by an assistant, having his express authority to do so. So that the law as now settled, is this, if a grant were introduced, certified by a deputy Secretary of State, I should reject it, but if his name *alone* appeared there, no matter *by whom* signed, it would be received; and the authority for signing it would not be enquired into on the civil side of the court.

The subscription of a paper is not an act of the *mind* but of the *hand*. It is merely mechanical, and there is no custom so familiar as one man's doing this act for another, and there is no maxim of law so just and so well known as that, "he who does a thing by *another*, does it by *himself*," and while confined to mere clerical acts, applies with equal reason, to public as well as private transactions.

Will any one say that an officer sitting in his office, who from palsy or any other disabling cause, is unable to write, could not authorise his clerk to put his official signature to a paper, and would not the act bind him? Could a conviction for forgery be had against the clerk?

What then is the difference if he authorise it by his solemn instrument? There is only this, that the evidence of the authority is *better* established, and the clerk is therefore safer; for I repeat the only difficulty is between him and his principal. All law is founded upon reason, and all reason revolts at the idea that one man cannot empower another to sign his name.

I find, by the act of 1783, sec. 4, the following words, "that the grant when signed by the Governor, shall be returned to the Secretary's office to be there sealed with the great seal *and registered*."—If necessary to be registered, it must be certified by the Secretary, and the court being of the opinion, that as it is not certified by the lawful Secretary of State, *it is not certified at all*.—The grant may be good, but the court is not legally informed that it is *registered* in terms of the law. If according to the decisions heretofore, grants have been rejected in evidence, because certified by a deputy Secretary, much more strongly should they be rejected when certified by *no Secretary*. The motion therefore of Mr. Holt, supported by Mr. Underwood must prevail.

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† I have no doubt whenever the term *deputy* is incidentally mentioned in any of our statutes, as in the law establishing the fee bill, it is subject to the common-law distinction, or some private law expressly authorising them, and not intended to *create* deputies by implication.