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THE CASE OF GRACE JAMES (1827)

Stephen Waddams†

Abstract: In 1827, Lord Stowell, the judge of the High Court of Admiralty, was called upon to decide a controversial appeal from the Vice-Admiralty Court of Antigua. The issue was whether a person who had been a slave in Antigua, having resided in England for a period of time, reverted to a condition of slavery on returning to Antigua. Lord Stowell's decision, putting a restrictive interpretation on Lord Mansfield's celebrated decision in *Sommersett's Case*, was that the condition of slavery, though not recognized in England, revived on the former slave's return to Antigua. Lord Stowell's decision, usually referred to as the *Slave, Grace*, the name given to it in *Haggard's Reports*, soon became obsolete in British jurisdictions, but was influential for a longer period in the United States. The background documents reveal a number of important circumstances not apparent from a reading of the law report. The documents show that there was considerable anti-slavery sentiment among some of the officers of the Crown in Antigua and also in London. The law report states that Grace was "seized" by the customs officials, but the documents show that it was she who initiated the process, claiming protection from the customs officials in order to have her "right of freedom judicially declared and solemnly determined." The procedure had been used for this purpose in previous instances, and the dispute was perceived, both in Antigua and in London, as an important test case. The interests of the Crown, the anti-slavery movement, and Grace James herself were thus aligned in this case, which was strenuously argued for the Crown by Dr. Stephen Lushington, a leading member of the Anti-Slavery Society, well-known for his forceful anti-slavery sentiments.

Lord Mansfield's decision in *Sommersett's Case* (1772) established that the condition of slavery could not be enforced in England, but it did not clearly declare that a former slave, on reaching England, became permanently free for all purposes. Thus, it remained uncertain whether a former slave, having resided in England, who later returned to a jurisdiction where slavery was recognized, reverted to a condition of slavery.

In 1827, this question arose in the case reported as *The Slave, Grace*,¹ decided by Lord Stowell in the English High Court of Admiralty on appeal from the Vice-Admiralty Court of Antigua. This was almost Lord Stowell's last case; his retirement, at the age of 82, was announced three days after delivery of the judgment, and he actually retired the following February.² The facts of the case were that a slave, Grace James, had traveled with her mistress from Antigua to England in 1822 and returned to Antigua in the following year. Later she was "seized" by a customs officer on the ground that her owner had brought her into Antigua without proper documentation. It was

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1. *The Slave, Grace* (1827) 2 Hagg 94, 2 St Tr (NS) 273.

2. *The Times*, 10 Nov 1827, 2b, Henry J Bourignon, *Sir William Scott, Lord Stowell*, Cambridge University Press, Cambridge, 1987.

argued by the Crown, in answer to the owner's claim for restitution of Grace James, that she was not a slave at all, but a free woman. Stowell's decision was that James reverted to a condition of slavery on her return to Antigua. An examination of the circumstances surrounding this decision reveals several interesting features not apparent from a reading of the law report.

The case was perceived, both in Antigua and in London, as a test case on an important matter of principle, and one that had far-reaching, practical implications. Several other cases from Antigua raising the same point were also before Lord Stowell and were determined according to the decision in the Grace James case.³ The acting governor of Antigua, writing to Lord Bathurst, the Colonial Secretary, in September 1825, said that "these seizures appeared to me of a novel nature, and more than likely to involve to a great extent the interest and rights of many individuals, not only in this, but in all the other British West India islands, as regards their legal property in slaves." He added that "if such a measure, now for the first time agitated, be permitted, or allowed to be proceeded in, it is impossible to calculate or foresee the evil and mischievous consequences that must and will result, by the adoption of a principle, pernicious in the extreme, to every colonist similarly circumstanced. It must, I humbly presume, be evident to your Lordship, that no proprietor resident in the West Indies, when either public or private business called him to England, would have run the risk of taking with him one or more of his slaves as domestic servants, could he have foreseen or contemplated that, in doing so, he would forfeit all right and title in them upon their return." He concluded by saying that this was a matter "which has not a little roused the feelings of the inhabitants of this island."⁴

The procedural background to the dispute is important and clearly influenced Lord Stowell. The law report states that in 1825 Grace was "seized" by a customs officer at Antigua on the ground of having been brought into the country without proper documents in 1823. This process occurred under an 1819 statute principally designed to control the inter-colonial transfer of slaves. The penalty for importing a slave without the proper documents was forfeiture of the slave to the Crown. As Lord Stowell pointed out, this was a peculiar framework for determination of whether a free person had been wrongly treated as a slave. A process designed to induce compliance with registration requirements by threat of forfeiture of property was being used for an entirely different purpose, viz to determine a claim of emancipation. But litigants use what legal tools are available, and it often happens that important principles come to be determined in the context of a

3. Cases of William Otto, William Robday, John Smith, Rachel, and Jack Martin. *The Times*, 14 Nov. 3e, 22 Nov. 3e, 10 Dec. 2f.

4. Samuel Athill to Earl Bathurst, September 2, 1825, British Parliamentary Papers [PP] 1826 xxvi 413.

legal framework very poorly suited to discussion of the principle. Lord Stowell suggested that the proper process for a free person to use would have been an action for damages: "What has he to do but to bring his action against the defamer of his rights, and who can doubt but that he would recover most overwhelming damages against the person who had assaulted his freedom, and compelled him to submit to a process that is only applicable to a slave, and to pour upon his gross wrongdoer the whole vengeance of the law?"⁵

It is probable that the reason why no direct claim was made by Grace, for example an action for damages for wrongful detention, or for habeas corpus, was that the common law courts of Antigua were known to be hostile to such claims. Richard Musgrave, the Antigua solicitor-general, who was evidently the moving force behind the proceedings, complained that several of the judges were members of the island's Privy Council who had, in effect, prejudged the issue:

It was moved by a member, Dr Coull, seconded by Mr Richard Weston Newton (*a judge of the Court of Common Pleas*, thus making the fourth member of this bench by whom the question at issue has been actually *prejudged*, viz; the right to freedom of persons brought from England into the colonies as slaves; which *he* strenuously denied, and which had been already previously declared in the resolution of the Privy Council, by Mr President Warner, Mr William Byam, and the Rev. S. W. Harman, *three other judges of that court*, in their characters as members of the council, to be a doctrine most dangerous to the interests of the colony.⁶

Musgrave later mentioned that the Court of Common Pleas consisted of five judges in total and was the court that dealt with applications for habeas corpus. Lord Stowell had this document before him. He was, of course, entitled to point out the anomalous nature of the forfeiture proceedings, but he lays himself open to observation when he suggests that an action for damages would have been a realistic alternative.

Among the papers is the petition of Grace James herself:

To the Right Honourable Henry Earl Bathurst, K.G., His Majesty's Principal Secretary of State for the Colonies.

The humble petition of Grace James, a free woman of colour of the Island of Antigua.

Sheweth, That your petitioner accompanied her mistress, Mrs John Allen, of this island, to London, as her slave, in the year 1822, and remained with her during her stay in England:

That when her mistress was about to return to this island, she was induced to accompany her as a servant, considering that by her residence in England she had acquired a right to freedom which had been vested in her, and relying upon the positive promise of her mistress that she should ever after be considered as free:

5. *The Slave*, *supra* note 1, at 102 (Hagg), 277 (St Tr).

6. Musgrave to Bathurst, 31 August 1825, PP 1826 xxvi 424.

That she embarked in the ship Killinbeck of London, and landed in the island of Antigua in January 1823, without observing such forms as the Abolition Acts require in removing slaves from one British territory to another; that she remained with her mistress as a free person until a short time since, when having the misfortune to offend her for a trifling cause, she was publicly flogged by her mistress's order, on the estate, and told that she was still a slave; that soon after your petitioner applied to an officer of His Majesty's Customs in this island, and claimed his protection under the laws regulating the importation of slaves; that her case was by him laid before the Honourable Richard Musgrave, the Procurator-General, who was of opinion that she was liable to forfeiture to the use of His Majesty, as having been illegally imported and dealt with as a slave; that in consequence the officer made seizure of her, delivered her to the care of the Collector, and caused her to be libelled in the Vice-Admiralty court under the consolidated slave law. That proceedings under the several clauses of the different acts of parliament were in the usual train, when her mistress, Mrs Allan, set forth the case in a memorial to the Honourable Samuel Athill, the Commander-in-Chief, in the absence of the Governor, who by the advice of his council, gave directions to the Crown-officer to stay proceedings until the pleasure of His Majesty's government should be known; that your petitioner is satisfied that there is no local law in usage by which she can be divested of that right to the enjoyment of her freedom which she has vested in her, and which she acquired by the acts, and with the assent of her mistress, who now seeks to establish the slavery of your petitioner.

Your petitioner begs leave to remark that three other slaves, named Ellen Christian and her child Sam, and Richard Daniel, have been recently seized under similar circumstances by the Collector of His Majesty's Customs at this island, and condemned by the Judge of the Vice-Admiralty Court, thereby having their right of freedom judicially decided and solemnly determined; and your petitioner being fearful if some measures are not taken to prevent it, that she may be returned to her mistress, whose angry feelings may lead her to acts of severity and violence, humbly presumes to pray that your lordship will take the extreme hardship of her case into your consideration, and extend to your petitioner the same advantage that others, under similar circumstances, are now quietly enjoying, or grant her such relief as to you wisdom may seem fit: And, as in duty bound, your petitioner will ever pray,

Antigua,

August 31st, 1825

Grace James

The within named Grace James made her cross, or mark, in my presence

(signed) *Nathaniel Hill*⁷

7. *Id.* at 422.

This petition was probably drafted by Richard Musgrave; it bears the same date as the covering letter enclosing it to Lord Bathurst and restates some of the legal arguments included in that letter. Musgrave's role in the matter is one of the most interesting features of the case. He evidently held strong anti-slavery sentiments and was willing to press them to the point of incurring the strong disapproval of the Antigua government and of the colonists. In a long letter to the Collector and Controller of Customs in Antigua, Musgrave set out the arguments he proposed to make to the Vice-Admiralty Court. In the course of the letter he spoke of "the very absurd principle that persons can be brought from England where slavery does not exist, nor is at all tolerated, in the character of slaves, and be afterwards dealt with and treated as such in the colonies."⁸ He spoke of a "virtual release from the yoke of slavery" and expressed the hope that "the totally erroneous principle formerly upheld in these colonies might gradually give place to a more liberal construction and interpretation of British law on the subject of personal liberty, in every civilized country under His Majesty's dominion."⁹ Musgrave complained that he had been threatened with imprisonment and suspension from office and been forced to resign from the House of Assembly. He was, he said, a West Indian by birth and a proprietor of a West India sugar estate, who had lived in Antigua for 13 years.¹⁰ He had nothing to gain from his course of action, personally or professionally, and much to lose.

Equally interesting is the role played by the customs officers, who evidently saw it as part of their duties to vindicate, through the process of "seizure," claims of persons wrongly treated as slaves. In her petition, Grace James makes it clear that several other persons had successfully used this procedure to vindicate their claim to freedom. In a letter to Musgrave of 16 April 1825, George Wyke, the Collector of Customs wrote:

The bearer, "Richard Daniel", came to me about three weeks ago to claim my protection, under nearly similar circumstances with the mulatto woman "Nelly Christian" who, with her child (born since her return to this island) I seized under the Abolition Act and for whose benefit you are about to institute proceedings in the Court of Vice-Admiralty. The only difference in the case of the present person to that of the woman in question is, as to time of return to this country, and which, at the period of the man's first coming to claim my protection, I thought did not entitle him to my interference to obtain his liberation from slavery, and I then hastily dismissed him, and desired him to return to his owner. But upon reflection since, it has occurred to me, that where so momentous a point as the liberty of the subject is concerned, I should be derelicting from my duty, did I not avail myself of the assistance of His Majesty's law officer

8. PP 1826 xxvi, 427.

9. *Id.* at 429-30.

10. *Id.* at 447-48.

[i.e., Musgrave], where a doubt existed in my mind. . . I think it right to state that I felt it my duty to send for this man, in order that he might have the benefit of telling his own story to you.¹¹

This indicates a high degree of anti-slavery sympathy and shows a close co-operation between the customs officers and the solicitor-general. In another letter to the Colonial, Officer Wyke explained the situation by saying, "These slaves having gone to England with their masters and mistresses, where they remained some time (and where of course they must have been considered free persons) have lately called upon the officers of this department to claim their emancipation; and although it appeared to us to be a good ground for restoring these persons again to freedom, 'their having once enjoyed the full rights of British subjects' yet we considered that it might moot a question in these islands which would occasion great discontent on this side of the water. . . ."¹² This is a way of putting the question that is very sympathetic to Grace James's claim.

Wyke was, of course, correct in saying that the colonists were discontented with the actions of Musgrave and of the customs officers. Athill, the acting governor, peremptorily stayed the proceedings in the Vice-Admiralty court and wrote to London for instructions. Bathurst's reply, dated 21 January 1826, refers to "a petition addressed to me by Grace James, a free woman of colour." She is referred to respectfully by her full name, and there are no quotation marks in the original document round the phrase "free woman of colour." Bathurst continues:

I have to inform you, that it will be expedient for you to withdraw those prohibitions which with the advice of your Council you have instituted against the proceedings in the Vice-Admiralty Court. . . That court is a tribunal before which, according to the law, these prosecutions must in the first instance be tried, and if the decision of the Vice-Admiralty Court be questionable, the law has provided an appeal to the High Court of Admiralty in England. I deeply regret that you were induced to stay proceedings on those questions, but I am at the same time ready to admit that you have to plead the unanimous opinion of your Council, to which, as you were acting only in the temporary administration of the government, you might think yourself more particularly bound to conform; and I cannot by any means approve of the unbecoming manner in which the Solicitor-General thought proper to address you in the course of the correspondence. But you ought to have recollected that in staying these proceedings you were suspending by your own authority the course of justice as by law directed to be administered; that on a decision on these proceedings, the liberty of your fellow creatures eventually depended; that it was far from being clear that the ab-

11. *Id.* at 449.

12. Wyke to Robert Wilmot Horton, colonial under-secretary, 30 August 1835, *id.* at 449-50.

stract question, from the decision on which by the Vice-Admiralty Court you and your council apprehended so much danger, was necessarily involved; and that if it were so, it was in truth a decision of right, on which it was not for the Secretary of State, but for the law to decide. Whether a slave having arrived in this country, and voluntarily returning to the West Indies, without misapprehension or fraud, be or be not to be dealt with there as a slave, is a question on which no legal decision has, I understand, hitherto been taken. But if in the course of these proceedings such a question should arise (and by these papers it is by no means clear that it will) you will cause an appeal to be brought before the High Court of Admiralty in this country, whatever may be the decision of the Vice-Admiralty Court in Antigua. It is fit that so grave a question should be pleaded by the eminent civilians [i.e., civil lawyers] in this country, and a decision pronounced by Lord Stowell, the most distinguished judge that ever sat in that court.¹³

The phrasing of this letter shows very strong anti-slavery sympathy; the reference to “the liberty of your fellow creatures” sounds like something drafted in the office of the Anti-Slavery Society, rather than in the Colonial Office. The letter, though recognizing mitigating factors, amounts to a severe reprimand of Athill for interfering with the regular course of legal proceedings.

The letter is significant also in showing a deliberate decision in the Colonial Office to have this question authoritatively resolved, not only for Antigua, but for the other British colonies. It is significant that Athill was instructed to appeal whatever might be the outcome in Antigua, showing that Bathurst anticipated that the Antigua court might decide against James’s claim to freedom and suggesting that Bathurst expected that she might expect a more favourable hearing from Lord Stowell.

On August 25, 1826, the judge of the Antigua court decreed, as reported by Haggard, “that the woman *Grace* be restored to the claimant [i.e., Allen] with costs and damages for her detention.”¹⁴ The Crown appealed, and the case was argued before Lord Stowell in June and July, 1827. The case for the appellants was argued by Sir Christopher Robinson, the King’s Advocate, soon to succeed Lord Stowell as Admiralty court judge and Dr Stephen Lushington, a leading figure in the British anti-slavery movement. The interests of the Crown, the anti-slavery movement, and of Grace James herself were thus aligned in this case. Although formally, as mentioned earlier, the dispute was between the claimant (Allen) and the Crown over a question of forfeiture of property; in substance it was, and was perceived to be, a claim for freedom by Grace James. *The Times* reporter wrote, in introducing the account of Lushington’s speech, “Dr Lushington was heard

13. *Id.* at 450-51.

14. *The Slave*, *supra* note 1, at 95 (Hagg).

this day, on behalf of the appellant (the slave) in this important case."¹⁵ Formally this statement was wrong (the appellant was the Crown, not James), but in substance it was true.

Lushington's speech was described by the *Times* reporter as "most elaborate, argumentative, and powerful." In summary, his argument was that English law prevailed in Antigua except where expressly altered by statute; slavery was not recognized by English law; James had left England and entered Antigua in 1823 as a free woman; and there was no statute, either in England or Antigua, that expressly deprived her of her freedom. As earlier mentioned, the argument failed. Lord Stowell said that "I am sorry that it has fallen to my share to determine so great a question,"¹⁶ and there is no need to doubt his sincerity on this point: the issue was far removed from the questions of ecclesiastical and admiralty law that had formed the substance of Stowell's career. His judgment, given on November 6, dismissed the Crown appeal and affirmed the sentence of the Antigua court. In substance, Stowell's reasons were that, slavery being admittedly recognized as lawful in Antigua, and Grace James having admittedly been a slave until 1822, the burden lay on the Crown to show that, by the law of Antigua, she had gained her freedom. Reform of the law relating to slavery was for parliament, and it was not for Stowell, as a judge, to seek to make incremental reforms: "It may be a misfortune that she was a slave; but, being so, she, in the present constitution of society, had no right to be treated otherwise."¹⁷

Stowell's intense discomfort with the decision is shown in the newspaper report of the companion cases, decided in December, 1827. Stowell is reported as saying,

I have now finished the review of the cases brought before me. I have discharged them to the satisfaction of my own conscience, thought not perhaps satisfactorily to others: that I cannot help. It is a duty incumbent upon me to remind the parties who bring forward these prosecutions, that it is a matter which requires considerable caution, and more than they happen to have shown in these particular cases. I am unwilling to dwell upon the subject, and I impute no improper motives; they have been misled by their own views in proceeding to the extent they have.¹⁸

Stowell then expressed satisfaction that the cases were concluded, but Dr. Dodson (the advocate for the claimants) stated that another question remained whether the slaves or their value were to be restored. Stowell responded, with a degree of irritation rarely heard in the tranquil hall of Doctors' Commons, "Don't let me have any more questions, I beg." This shows that Stowell was near the end of his tether,

15. *The Times*, 27 June 1827, 3e.

16. *Id.* 25 July, 3e.

17. *The Slave*, *supra* note 1, at 99-100 (Hagg), 275 (St Tr).

18. *The Times* 10 Dec. 3a.

but it was probably as well for the interests of Grace James, as we shall see, that this question fell to be determined by Stowell's successor.

Stowell's decision was praised by *The Times* in a leading article on the ground that England had profited from the institution of slavery and should be prepared to pay compensation to slave-owners if slavery were to be abolished.¹⁹ This line of argument foreshadows the political compromise that facilitated the passage of the Slavery Abolition Act six years later. *The Times* said also that an appeal was expected,²⁰ but none was made, probably because the Crown's advisers thought that the appellate court (the High Court of Delegates, or the Prize Appeal Court²¹) was unlikely to reverse the decision and that, even if it did, it would establish no useful precedent because the court was constituted anew for each appeal and gave no reasons for its decisions. Lushington, not surprisingly, continued to oppose the substance of the decision. In the debates preliminary to the 1833 Act, he proposed to reverse the decision by specific legislation. Having described the decision, he said, "I am compelled . . . to admit, on the authority of my Lord Stowell, that such is the present iniquitous state of the law; and though I am compelled to submit to Lord Stowell's high legal authority, I cannot forbear from expressing my abomination of law so unjust. I admit, I say, the doctrine, coming as it does from so distinguished an authority; but I take the liberty of asserting that as I reprobate the injustice of such a principle of law, so I do not, for my own part, agree to the doctrine laid down."²²

Stowell himself was sensitive to criticisms of his judgment. In January, 1828, he wrote to the American scholar and judge, Joseph Story, for moral support. Having explained the legal issue, he wrote that "this question had never been examined since an end was put to slavery in England fifty years ago; but the practice has regularly been, that in his return to his country the slave resumed his original character of slave." He added that the case "has occasioned a good deal of attention and noise in England" and that it and the other related cases "have cost me a great deal of trouble and anxiety."²³ Not receiving a prompt answer, he wrote again in May, rather anxiously and defensively:

I desire to be understood as not at all deciding the question upon the lawfulness of the slave trade, upon which I am rather a stern Abolitionist, but merely this narrow question, whether the Court of

19. *The Times*, 8 November 1827, 2c.

20. *Id.* 10 November 1827, 2b.

21. On the relationship between these courts, see G.I.O.DUNCAN, *THE HIGH COURT OF DELEGATES* 79-80 (1971).

22. *Mirror of Parliament* 1833, 3324a (25 July).

23. Stowell to Joseph Story, 9 January 1828, W.W. Story, *Life and Letters of Joseph Story*, Little and Brown, Boston, 1851, 2 vols, ii, 553.

King's Bench, in the case of *Sommersett*, meant to declare that our non-execution of the slave code in England was a new suspension of it as respected England, but left it in full operation with respect to the colonies – which some of our Abolitionists here and some of our judges there resolutely contend for. My clear opinion is for its limited effect. The execution of the Code laws is suspended in England, as being thought inconsistent with the nature as well as the institutions of this country. So far it goes, but no farther, it does not at all derogate from the law of the colonies upon the return of the person so far liberated in England, but left exposed to the severity of the law in the colonies, upon the return of the party so partially liberated here; this is the whole of the question which I had occasion to consider, and it is a question which has nothing to do with the general legality of the slave trade in the colonies. . . . I am a friend to abolition generally, but I wish it to be effected with justice to individuals. Our Parliaments have long recognized it and have not only invited, but actually compelled our colonists to adopt it, and how, under such circumstances, it is to be broken up at the sole expense of the colonist, I cannot see consistent with either common reason or common justice; it must be done at the common expense of both countries; and upon that part of the case very great difficulties exist. Our zealots are for leaping over them all, but in that disposition I cannot hold them to be within the wise or just part of this nation.²⁴

In September, Story replied:

I have read with great attention your judgment in the Slave Case from the Vice-Admiralty Court of Antigua. Upon the fullest consideration, which I have been able to give to the subject, I entirely concur in your views. If I had been called upon to pronounce a judgment in a like case, I should certainly have arrived at the same result, though I might not have been able to present the reasons which lead to it in such a striking and convincing manner. It appears to me that the decision is impregnable. In my native state, (Massachusetts,) the state of slavery is not recognized as legal; and yet, if a slave should come hither, and afterwards return to his own home, we should certainly think that the local law would re-attach upon him, and that his servile character would be reintegrated. I have had occasion to know that your judgment has been extensively read in America (where questions of this nature are not of unfrequent [sic.] discussion) and I never have heard any other opinion but that of approbation of it expressed among the profession of the Law.²⁵

Stowell's letters show that, as he saw the case, he thought that he was being pressed by "zealots" (among whom, no doubt, he would have included Lushington) to depart from settled practice, with consequences that he thought would be unjust to slave owners. Story's reply must have been of some comfort to him, as public opinion in

24. Stowell to Joseph Story, 17 May 1828, W.W. Story, *Life and Letters of Joseph Story*, Little and Brown, Boston, 1851, 2 vols, ii, 555.

25. Story to Stowell, 22 Sept 1828, *id.* at 558.

England began to turn decisively against slavery. As Story's letter shows, the issue remained relevant in the United States, where Stowell's judgment continued to be cited, notably in the *Dred Scott* case (1853).

As mentioned earlier, Lord Stowell refused to decide the question of whether the successful claimants were entitled to actual possession of the slaves or only to money compensation. In March, 1828, the case of Grace James came back to the High Court of Admiralty on this question.²⁶ Robinson, who had argued the case for the Crown, had now succeeded Stowell as admiralty court judge. His decision was that the claimant was entitled to a money payment only. It appears from this decision that Allen claimed actual possession of Grace and that the Crown successfully disputed the claim, a course of action that is difficult to explain except by the supposition of concern in the Colonial Office for James's personal welfare. It would have been an exceptional hardship, after being treated as a free person for nearly three years while the litigation was pending, for her to be returned into the actual power of an owner who had allegedly treated her with cruelty, and who had reason to blame her for the litigation. Thus, though Grace James did not obtain a declaration of her freedom, she may, in the end, have secured a significant part of the practical result that she had desired.

26. *The Times*, 13 March 1828, 4a.