

Besides the ERRORS OF THE PRESS noticed in the table of ERRATA, at the end of the book, the reader is requested to correct the following:

Page 9, line 19, turn the bracket of the parenthesis towards the word
admitted.

10, line 12,	for <i>over-weaning</i>	read <i>overweening</i>
10, line 26,	for <i>virituos</i>	read <i>virtuous</i>
11, line 11,	for <i>sorte</i>	read <i>force</i>
15, line 11, notes,	for <i>distresful</i>	read <i>distressful</i>
18, line 26,	for <i>destinguished</i>	read <i>distinguished</i>
19, line 3,	for <i>uneversally</i>	read <i>universally</i>
22, line 1, notes,	for <i>ough</i>	read <i>ought</i>
22, line 9, notes,	for <i>varience</i>	read <i>variance</i>
23, line 2, note,	for <i>practices</i>	read <i>practice</i>
24, line 6, note,	for <i>know</i>	read <i>knew</i>
41, line 24,	for <i>constisute</i>	read <i>constitute</i>
42, line 1,	after <i>own</i> , put a comma instead of the semicolon	
44, line 7,	for <i>Commod</i>	read <i>Common</i>
47, line 10, notes,	prefix inverted commas to the word <i>that</i>	
47, line 24, notes,	for <i>Juridicales</i>	read <i>Juridiciales</i>
54, line 1, note,	for <i>ibat</i>	read <i>that</i>
58, line 6, note,	place an <i>initial</i> parenthesis-bracket before the word <i>under</i>	
60, line 7, note,	put a comma, after the word <i>universally</i>	
63, line 15,	put a comma, after the word <i>unjust</i>	
71, line 14,	erase the comma after <i>Common-law</i>	
72, line 17, notes,	for <i>juris consults</i>	read <i>jurisconsults</i>
91, line 5,	for <i>genious</i>	read <i>genius</i>
95, line 23, note,	for <i>Common Plea dela period</i> read only <i>Common Pleus</i>	
101, line 1, note,	for <i>Roberton</i>	read <i>Robertson</i>
103, line 5,	for <i>nder</i>	read <i>under</i>
107, line last,	for <i>Ligislator</i>	read <i>Legislator</i>
109, line 2,	for <i>againts</i>	read <i>against</i>
112, line 1,	for <i>fovorites</i>	read <i>favourites</i>
116, line 5,	for <i>took setting boys, copies</i> read <i>took him setting boys' copies</i>	
117, line 3, note,	for <i>factions</i>	read <i>factionis</i>
117, line 10, note,	close the parenthesis with a bracket, at the word <i>estate</i>	
118, line 1,	for <i>ancient</i>	read <i>recent</i>
122, line 8,	for <i>retrain</i>	read <i>restrain</i>
125, line 3,	for <i>Extention</i>	read <i>Extension</i>
141, line last but one	for <i>direction</i>	read <i>discretion</i>

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OBSERVATIONS
ON THE
TRIAL BY JURY:

WITH
MISCELLANEOUS REMARKS

CONCERNING

LEGISLATION & JURISPRUDENCE,

AND THE

PROFESSORS OF THE LAW;

ALSO,

SHEWING THE DANGEROUS CONSEQUENCES OF
INNOVATIONS,

IN THE FUNDAMENTAL INSTITUTIONS OF THE
CIVIL POLITY OF A STATE:

ILLUSTRATED BY AUTHORITIES AND MANIFESTED BY EXAMPLES.

Addressed to the Citizens of Pennsylvania.

BY AN AMERICAN.

Be assured...that THE LAWS, which protect us in our CIVIL RIGHTS,
grow out of THE CONSTITUTION; and that THEY must FALL OF
FLOURISH with IT. DEDIC. OF JUNIUS'S LETTERS.

STRASBURG:

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1803.

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PREFACE.

SOON after the commencement of the last session of the general assembly, the writer of the following tract threw together some general observations on the Right of Jury Trial, with a view of drawing the attention of the legislature to the subject—These were published in the Lancaster Intelligencer, of the 21st of December last;—but, as news-paper essays are generally fugitive, they are now republished herewith.

The inadequate organization of the judiciary department of government, to the existing exigencies of the state, had become so obvious to every man of discernment—and the great inconvenience, indeed injury, resulting to the citizens, from the incomplete establishment of the courts of justice, were so generally experienced—as to induce a belief in the minds of every one who was at all solicitous for the public welfare, that the magnitude and importance of the subject would have obtained for it, an early, wise, and liberal consideration.

In regard to this object, the present governor had faithfully discharged the duties of his station:—And no person could have been better qualified to form a correct judgment concerning it—or more capable, from experience, of duly appreciating its importance to the community, than this able magistrate.

In the governor's first address to the legislature, he briefly observes—that, “In the judiciary department, the number of the judges of the supreme court is, obviously, insufficient for performing the duties of their station,” &c. In the following year he says—“Adverting to the courts of law, you will readily perceive, that the extension of commerce and agriculture, the increase of population, and the multiplication of counties, have so accumulated the objects and duties of the judiciary department, that the existing system has proved to be no longer adequate to the regular and efficient administration of justice. An addition to the number of the judges of the supreme court, and a subdivision of the circuits of the courts of common pleas, appear, therefore, to be indispensably requisite, for the safety and accommodation of the people.”

In addressing the third legislative body, after his election to the chief magistracy—he says—“In the communications that were made to your predecessors, I stated the principal objects which required legislative attention: But an anxious sense of the importance of an immediate reform in the judiciary department impels me to repeat, that the administration of justice must soon become inefficient; unless the number of judges of the supreme court shall be increased, and the courts of common pleas shall be reorganised upon a plan adequate to the state of population and commerce.”

And finally, in December last, the governor thus reiterated his anxious wishes on the same subject, in his address to the legislature—“As powerful auxiliaries

to any plan for improving the state of society, you will, doubtless, endeavor to diffuse the blessings of education among the poor, and to invigorate the administration of justice. The former object will claim your care, under the obligations of a constitutional injunction; and the latter presses on your attention, with the force of the most imperious necessity. The defective organization of our courts, and the inadequate number of the judges of the supreme court, have become a public grievance; insomuch, that the inevitable delays of justice—from those causes alone—evidently amount to a denial. Nay, every advantage obtained by the cultivation of our soil, or the extension of our commerce, tends to increase the mischief; since it naturally increases the business of our tribunals. The industrious creditor is thus exposed to disappointment and ruin: the litigious debtor exults in the ready means of procrastination. Citizens and foreigners unite in clamor and reproach: Your governors, in succession, anxiously call for redress.—But let it be remembered, gentlemen, that, after all, the remedy can be supplied, and can only be supplied, by you.”

Such have been the repeated recommendations and admonitions offered to the legislative body of Pennsylvania, on this subject, by an enlightened and patriotic executive:—What has been the result, is well known!—

It is no longer possible for a doubt to exist, as to the views of those men, who have pertinaciously resisted every attempt to comply with the governor's recommendations, and the urgent necessities of the

community, respecting the judiciary. Some of them have thrown off the mask, and have openly avowed their design. A late anonymous writer, in the *National Intelligencer*, laments the failure of those very schemes of mischief and innovation, brought forward in our state legislature during the last session; the most monstrous of which, were happily defeated by the constitutional negative of the governor. He says "the most important measure, adopted by the legislature, but rejected by the governor, was the substitution, in *civil* cases, of arbitration, in the room of jury-trial."

Here, then, is complete evidence of a design to betray the people, by laying aside the right of jury-trial in civil cases. The writer is hardy enough to assert—what, indeed, some members of our late assembly were so weak and ill-informed as to declare, as their opinion—that, "the constitution was not meant to protect the right of trial by jury in civil cases:"—He says, "the governor of Pennsylvania has pronounced the law," (that is, the Adjustment-bill, as it was called) "unconstitutional, inasmuch as he conceived that it violates that part of the constitution, which says "the trial by jury shall be as heretofore;" and then modestly declares the governor's arguments to be "unfounded!"—It is immaterial, *who* is the author of the production here quoted, which was first made to appear in a paper printed in Washington city, and then republished in Lancaster: But it will be very evident to all, who will examine the subject with the least attention, that the thing called the Adjustment-bill was a palpable infringement of the con-

stitution; that the governor's construction of the constitution is plainly consonant to law and common sense, attested by indisputable authorities; and, that the writer in the National Intelligencer (if it can be supposed his *intentions* were good) undertook to decide on a subject, which either he had not considered, or was incapable of comprehending.

This writer is besides very unfortunate, in referring to the French revolution, for a specimen of the benefits resulting from an arbitration scheme.—In France, says he, “at an early period of the French revolution, the happiest effects flowed from it.” It will, undoubtedly, be very difficult for the people of this country to persuade themselves, at the present day, that any *happy* effects have flowed from the French revolution. That event might, indeed, have been attended with the happiest consequences to the people of France, if the desolating spirit of *innovation* had not led to a state of things that has produced effects, which, to an American mind, are the reverse of political happiness.—During the zeal for liberty which pervaded the French nation, in the earlier and more virtuous periods of the revolution, they had been wise enough to establish the institution of jury-trial: Yet within a few days past, the public prints have informed us, that the government of that country have *suspended* the right of trial by jury, in fourteen of their departments, and also in Savoy and Piedmont! —Such is the government held up, by an advocate for arbitration projects, as an example for *Americans*: —But, God forbid we should ever be mad enough to imitate such examples!—

The publication, here noticed, having first appeared in a Washington paper, has afforded a pretext for one writer, inimical to the existing federal administration, to infer from that circumstance, that the president gives countenance to such doctrines: But this cannot be believed by any impartial person, who knows his intimate acquaintance with our constitution and laws.—Besides Mr. Jefferson has, himself, borne the strongest testimony in favor of jury-trial, by his writings; as is shown in the following pages.

Another writer pretty strongly infected with the arbitration-mania, appeared in the Aurora of the 10th of May, under the signature of Philadelphiensis. Inimical, however, as he is to jury-trial, he has had discernment enough to perceive, and candor enough to admit, some very important truths—“I do not pretend,” says Philadelphiensis, “to say but the governor’s reasons against the bill (the Adjustment bill) deserve great attention; nor do I think it very much to the credit of republicanism, that its advocates are equally skilful, in construing away the plain meaning of the constitution, with their adversaries. I do not see,” continues he, “how the trial by jury can be (in the words of the constitution) “as heretofore,” if an intermediate court be erected, where there is no trial by jury at all: surely this is putting the trial by jury one court more distant, and making it different from what it was “heretofore.”—In another place, he admits the Twenty-pound law to be “entirely unconstitutional.” In this opinion he is most certainly correct: And it will be seen, by a reference to the journal of the house of representatives, of the

28th of January 1794, that many of the members then thought it so; for an attempt was made, though without success, to have a committee appointed—
“to wait on the judges of the supreme court of this commonwealth, in order to obtain the opinion of the said judges in writing, how far, or whether a law extending the jurisdiction of the justices of the peace in the commonwealth aforesaid, to actions of debt or other demands not exceeding twenty pounds, would be an infringement of the constitution of this state.”

This writer has, nevertheless, made a most extraordinary deduction from one position which he has assumed. He asserts that the major part of litigated cases are voluntarily submitted to arbitration by the parties. From this he infers, that a majority of the people prefer this mode of adjusting their disputes, concerning property, to trial by jury: and on this inference, thus made, from such premises, (the truth of which, by the bye, is not admitted, (he grounds his doctrine, that the minority may be rightfully compelled to yield to the mandates of an arbitration law;—for such undoubtedly is the purport of his language—But, whither do such monstrous tenets lead us? Independently of their absurdity in this instance, is it possible that any man should not be aware of their horrible tendency, when the principle is applied to other cases similarly circumstanced? Let it be supposed, for example, that the disciples of Calvin constitute the most numerous sect of Christians in Pennsylvania—or even, if not the most numerous, yet, by reason of their having more preachers and places of worship, that greater numbers of

Presbyterians and others resort to their churches, than to those of any other religious society,—or even of all the others, collectively;—and this, too, of their own free will:—Would Philadelphiensis, or any one in his sober senses, think it right, that, for such reasons, persons of every religious denomination in the state should be obliged by *law* to worship in the Presbyterian churches, only?—No: the idea is totally at variance with common sense and the rights of freemen—yet this is a fair illustration of the doctrine of Philadelphiensis! Indeed, this writer has run into great inconsistency, through his over-weaning zeal for his darling project: Yet it is strange, that, with so just notions of the constitutional provisions, respecting jury trial, as he seems to possess; he does not perceive that they oppose an insuperable bar to the substitution of any tribunal whatever, for the trial of facts,—in place of a jury of twelve men, as now established by the constitution. But, although he is evidently under the influence of some most unreasonable prejudices; he appears, nevertheless, not to be one of those who are desirous of “construing away the plain meaning of the constitution:”—and all men of understanding—if they are likewise virtuous—will zealously rally around the constitution as the standard of their political safety,—when they become convinced that their rights are invaded, betrayed, or even threatened, by open enemies or pretended friends.

LANCASTER, JUNE 4, 1803.

OBSERVATIONS

ON THE

TRIAL BY JURY, &c.

IT is an observation of the illustrious *Washington*—founded in reason and confirmed by the experience of mankind—that, “in proportion as the structure of a government gives force to public opinion, it is essential that public opinion should be enlightened.”—And Mr. *Jefferson*, in treating of the bill introduced into the assembly of Virginia, immediately after the revolution, for revising the whole code of their laws—dwells minutely on that part of the proposed system, which respected an extensive establishment of seminaries* of learning, throughout the

* “Good education,” says the learned and patriotic JOHN DICKINSON, “is the best institution for preventing corruption of manners;... and the progress of knowledge is the most successful foe to religious and civil despotism” (RABIUS, LET. 8. IN NOTE.)

The 1st and 2d Sections of Article VII. of the constitution of Pennsylvania, direct, that....“The Legislature shall, as soon as conveniently may be, provide, by law, for the establishment of schools throughout the state,....in such manner that the poor may be taught gratis”.... And, that “The arts and sciences shall be promoted, in one or more seminaries of learning.”

The framers of the former constitution of this commonwealth were, in like manner as their successors, impressed with a true sense of

state. "Of all the views of this law," says Mr. *Jefferson*, "none is more important, none more legitimate, than that of rendering the people the safe, as they are the ultimate, guardians of their own liberty."—"In every government on earth," continues this experienced statesman, "is some trace of human weakness, some germ of corruption and degeneracy, which cunning will discover, and wickedness insensibly open, cultivate and improve. Every government degenerates, when trusted to the rulers of the people; alone. The people themselves, therefore, are its only safe depositaries: and, to render them safe, their minds must be improved to a certain degree."

This safety must, however, depend on the virtue, as well as the information of the people, where the government emanates from their will. For, as that venerable patriot, Mr. *John Dickinson*, has justly observed, "by this superior will of the people, is meant a reasonable will:"—And correspondent to this sentiment, is that of president *Jefferson*, in his inaugural speech; in which he says—"All will bear in mind this sacred principle, that, though the will of the majority is in all cases to prevail,—that will, to be rightful, must be reasonable."

the importance of literature and knowledge, in a republican government. By the 44th section of the frame of government ordained by that constitution, the following provision was made.... "A school or schools shall be established in each county, by the legislature, for the convenient instruction of youth; with such salaries to the masters, paid by the public, as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted, in one or more universities."

Thus—in the language of *Washington*—“it is substantially true, that virtue, or morality, is a necessary spring of popular government:”—And hence, considering virtue to be inseparable from true wisdom, as undoubtedly it is—he recommends, “as an object of primary importance, institutions for the general diffusion of knowledge.”

What opinions can have an higher sanction than these?—It is not sufficient to ensure the liberties of a nation, that the constitution or form of government, under which they live, is free. It is indispensably necessary to the maintenance and preservation of their freedom, that the people make themselves acquainted with their rights; that they watch over them with a jealous eye; and that they resist, with a virtuous firmness, even the smallest encroachments upon them. Power, with its usual concomitants, possesses fascinating attractions for most minds; and both ambition and avarice, upon which that fascination operates with the greatest force, are strong incentives to the attainment of the object.—It happens not unfrequently, also, that either an ambitious or an avaricious disposition is found in men of very limited intellect and acquirements; or else, connected with a vigorous understanding, and perhaps one well stored with useful knowledge—but, at the same time, united with vicious propensities. There can be no hesitation in pronouncing, that characters of either description are ill suited to discharge the more important magisterial or ministerial functions, among a free and enlightened people;—much less

can they be fit for the high and important duties of a legislative trust.

The science of government is of an extensive nature, and of the highest concern: consequently, the due discharge of great official trusts is an arduous undertaking. The measure of knowledge necessary to qualify a man for the all-important station of a legislator* cannot, therefore, be supposed to be within the scope of every capacity. Some branches of science—even of those which admit of the clearest demonstration—are beyond the reach of many minds; and others are incapable^{of} being correctly attained, even by good understandings of a peculiar construction. But the acquisition of every species of human knowledge requires some exertion of the natural faculties of the mind,—some exercise and improvement† of the intellectual powers of man: and, there-

* “It is necessary,” says CICERO, “for a senator (or legislator) to be thoroughly acquainted with the constitution; and this (he declares) is a knowledge of the most extensive notice; a matter of science, of diligence, of reflection,....without which no man can possibly be fit for his office.”

The force of this observation is much enhanced, when it is considered, that “the Constitution”....in the sense the term is used by CICERO....comprehends the general and various political rights of the commonwealth, combined with its true interests; and, of consequence, the connected rights and interests of the individual citizens, relatively to the state and to each other.

† The pious and learned Dr. WATTS justly observes, that “Reason, as to the powers and principles of it; is the common gift of God to man; though all are not favored with it, by nature, in an equal degree; But,” continues this venerable Christian, “the acquired improvements of it, in different men, make a much greater distinction between them, than

fore, the exalted science of governmental polity can no more be intuitive, than that of history* or of jurisprudence, of algebra or of chemistry. The same observation will, likewise, apply to the manual arts, and to mechanic occupations.

The inference is obvious. In a representative government, the people must inform themselves, fully, of the genius of their political institutions, and the quality and extent of their constitutional privileges, as well as inherent rights;—not only as these regard themselves, but—in order that they may be enabled to judge of the qualifications of those to whom they delegate the power of administering the one, and the trust of maintaining inviolate the others.

In the ordinary transactions of human affairs, we are not apt to confide, knowingly, any thing which immediately interests or concerns ourselves, to unskilful hands. In our spiritual concerns, we resort to enlightened, as well as pious ecclesiastics, for ad-

nature has made....I would even venture to say, that the improvement of reason hath raised the learned and the prudent in the European world, almost as much above the Hottentots, and other savages of Africa,---as those savages are by nature superior to the birds, the beasts and the fishes." [See his Introduction to the Right Use of Reason, &c.]

* Having mentioned HISTORY; among the examples adduced in this particular, the following quotation from the Supplement to Dr. Watts's work, just referred to, will not be considered inapplicable to the occasion.---"History," says the Doctor, "is a necessary study, in the supreme place, for gentlemen who deal in POLITICS. The government of nations, and the distressful and desolating events which have, in all ages, attended the MISTAKES of POLITICIANS, should ever be present on their minds,---to warn them to avoid like conduct : "---And he terms Geography and Chronology, "the EYES of History."

inonition and instruction. If we want medical assistance, to relieve us from bodily injury or disease, we call in a physician skilled in his profession. And, when we need counsel, to aid us in cases wherein a knowledge of the provisions and operations of the laws of the land is requisite--either for the maintenance of our rights, or redress of wrongs we have sustained,--we apply to a person of professional learning.--All wise and prudent men pursue a similar course, in other important affairs of life. No person, for instance, of that description, would employ an ignorant and inexperienced scrivener, to draw the deeds of conveyance for lands which he had purchased.--None would place the building of a ship in the hands of an unskilful shipwright,--or employ, in the erection of a house, an incompetent architect--Nor would any man, of the least prudence or understanding, commit the education of his children to an illiterate or immoral preceptor.

If, then, it is conceived to be necessary and proper, in the ordinary affairs of life, to place trusts and employments, which more immediately respect our private concerns, in the hands of such as are competent to fulfil and conduct them ; of how much more importance is it, that those who are deputed to represent the people, in a legislative capacity, should be upright and enlightened men?--The trust is a mighty one!--And ignorance, incapacity or depravity, in those to whom it is committed, must necessarily be attended, in its exercise, by the dishonor and injury, if not ruin, of the state. Even ignorance itself--though it should be accompanied with the best

intentions and dispositions—may be productive of the greatest mischief to individuals, and dangers to the community.

Were any thing further, than the reflections of a sound and deliberate judgment, requisite,* to evince the indispensable necessity of placing the affairs of government—and, more especially, the legislative trust—in the hands of wise, well-informed, and good men; a variety of reasons, besides those evidently applicable to the conduct of human affairs—as well as numerous authorities, might be adduced on the occasion. But the good sense of the generality of our citizens will, on due consideration, enable them to form a correct judgment on this highly important subject: Their rights, their interests, their safety—are implicated in the consideration; and, therefore, it claims and demands their serious attention.—Let, however, the following extract from sacred writ accompany their deliberations on the subject: it will be found in the 1st chapter of the 2d book of Chronicles—from the 7th to the 12th verse, both inclusive.

* It may appear strange to some, that there should be a NECESSITY for enforcing, by argument or examples, the importance of WISDOM and KNOWLEDGE, in a free country; and particularly among those invested with legislative functions, and many other public trusts;...in a country, too, where there is really a great portion of excellent good sense among the people. But, when we have witnessed something like a DENUNCIATION of useful learning, science, and learned men, by certain characters,...it seems necessary to recur to higher authority than ordinary human testimony, to evince the value of "Wisdom and Knowledge" to the community:...The testimony of Sacred Writ is therefore adduced, on the occasion.

“ In that night did God appear unto Solomon, and
 “ said unto him, ask what I shall give thee. And
 “ Solomon said unto God, Thou hast shown great
 “ mercy unto David my father, and hast made me
 “ to reign in his stead. Now, O Lord God, let thy
 “ promise unto David my father be established: for
 “ Thou hast made me king over a people, like the
 “ dust of the earth in multitude. Give me *Wisdom*
 “ and *Knowledge*, that I may go out and come in be-
 “ fore this people: for who can judge this thy peo-
 “ ple, that is so great? And God said unto Solo-
 “ mon, Because this was in thine heart, and thou
 “ hast not asked riches, wealth, or honor, nor the
 “ life of thine enemies, neither yet hast asked long
 “ life; but hast asked *Wisdom and Knowledge* for
 “ thyself, that thou mayest judge my people, over
 “ whom I have made thee king: *Wisdom and Know-*
 “ *ledge** are granted unto thee; and I will give thee
 “ riches and wealth, and honor, such as none of the
 “ kings have had, that have been before thee, nei-
 “ ther shall any after thee have the like.”

Here we are presented with incontrovertible autho-
 rity, to prove, that “ *Wisdom and Knowledge*” are
 of the first importance to *rulers of the people*; and
 manifesting, that the laudable desire expressed by the
 ruler of a distinguished people, to possess those *ne-*
cessary qualifications for his station, procured them
 for him, from the AUTHOR OF ALL GOOD,—together

Lord St. ALBAN remarks...that MOSES, the LAWGIVER and
 God’s first pen, is adorned by the Scriptures with this commendation...
 that he was seen in all the learning of the Egyptians.”

with the endowments of "*Riches, and Wealth, and Honor,*" as a remuneration for his virtuous request.

Ignorance and incorrect judgment are, unequivocally, the sources of prejudice and error. Men, who are, themselves, destitute of useful knowledge and literary acquirements, are too apt to despise learning; and, hence, they are induced to foster a spirit of hostility towards those of more enlarged views, more liberal minds, and more improved education: This is naturally productive of inconvenience and injury; as well to the public, generally as to individuals.

The state and hacknied imputations against professors of the law, which are sedulously inculcated by certain characters, are readily seen through. In order to propagare these illiberal prejudices the more extensively and with a greater effect, those persons, actuated by well known motives, have allied themselves, by practises of intrigue, with honest and unsuspecting individuals, too easily imposed upon. *The Law*, itself, is the main object aimed at. The measures which have been pursued, for the purpose of changing our established system of jurisprudence, breaking in upon the law of the land, and degrading the courts of judicature—leave no room for doubt, on this head: And if lawyers could be rendered obnoxious, among the intelligent part of the people; the projectors conceive that such an effect would be a powerful auxiliary, in the accomplishment of their plan to demolish the judiciary and overthrow the law.—The profession of the law has, however, ever been considered by men of understanding and probity, as an highly useful and respectable one. Like every oc-

cupation or calling in the affairs of human life, it is liable to be abused; for no one need be told, that there are unworthy characters in every station of society: Even in the church, we sometimes find ministers of religion who would disgrace Christianity,—if it could be disgraced by unworthy men, among its teachers and professors. But no argument can ever be fairly drawn against the excellence or use of any thing, from its abuse.

If the laws, themselves, be absolutely necessary in civil society, as well for the attainment, maintenance and security, both of our personal rights and the rights of property—as for the preservation of the public peace and order; then, are the professional aid and services of counsellors, and practitioners of law, of most important benefit to the community. It is not to be presumed, that persons engaged in other pursuits can be skilled in the law; any more than, that others than physicians, or clergymen, should be intimately acquainted with medicine, or the polemical points of divinity. In fact, few persons, excepting professional characters, know much of the two former—consequently, the services of these are often indispensable; and, even with regard to the last,—men of the most correct judgment do, occasionally, think proper to seek instruction from professional divines. They are all compensated* for their services—

* The fabricators of the Adjustment-bill, in our last Assembly, were not satisfied with attempting to violate the Constitution, in endeavoring to destroy the Trial by Jury: but, as if to serve as a MEMORIAL of their pitiful malevolence against all who UNDERSTAND the LAWS of

as it is fit they should be, by those who *choose* to avail themselves of them: But no one is under any *obligation* to resort to either, against his inclination.

Sir *Matthew Hale*, chief-justice of England, after the restoration of Charles II, was one of the ablest lawyers and most upright characters, that nation ever

their Country;—they interdicted the pleading for “*HIRE*,” as they termed it, before the new-fangled but MOST ENLIGHTENED JUDICATORIES, which they were about to erect!

They should, however, have known, in the profundity of their wisdom,—that the *FEES*, which is paid for *COUNSEL* in a cause, is *GRATUITOUS*: No specific sum—not one cent—can be *DEMANDED* by a *COUNSELLOR AT LAW*, in *THAT* capacity; nor can be recovered by process of law, if not voluntarily paid,—for any services rendered by him, in the way of his profession. The Party, if he desires to have *COUNSEL* in law, goes to whom he pleases, for advice: he gives for it such compensation as he thinks proper; and it will hardly be denied, that he has *THE RIGHT OF DISPOSING OF HIS OWN MONEY*, as he pleases.—The *Fees of ATTORNIES* are established by law. They are such as *LEGISLATORS*, quite as enlightened as those who composed the major part of our *LAST* legislative body, deemed a *JUST REMUNERATION* for the services for which they are assigned.—*COUNSELLORS of LAW* are, however, bound to give counsel and help the *POOR*, *GRATIS*—in such cases wherein they are not able to prosecute law at their own charges; and this they do *INFORMA PAUPERIS*, by direction of the Judges.

It is not a little extraordinary, that those wonderful *ECONOMISTS*—who are so extremely fearful lest their *CONSTITUENTS* should expend their money improperly, by paying it to *LAWYERS*, &c.—should not have been so consistent as to give up *THEIR OWN WAGES*! But, no such thing— they knew better:—They had not the least objection, to sit *FOUR MONTHS*—most unnecessarily; and to receive from the purses of the people three dollars *PER DAY*,—while most of them were living (and that at a season, too, when they could do little or nothing in their ordinary occupations,) at as many dollars *PER WEEK*.

It is not meant to be insinuated, that the *Wages of members of assen-*

produced: he was deservedly esteemed an ornament to his profession, his country, and to humanity. This excellent man—in his *“Considerations touching the amendment or alteration of laws”*—enumerates various inducements, as “the grounds and reasons that ordinarily move men to the excess of over-hastiness and forwardness to *“Alterations in Laws”**—and itch-

bly are too high. All public functionaries, in a free government, ought to be **LIBERALLY COMPENSATED**: for it is a wise policy to allow them generous compensations---in order to obtain, for the public service, men of **CAPACITY, TALENTS and CHARACTER**.... Nevertheless, **CONSISTENCY** in that which professes to be right, is a virtue; and, as such, should be adhered to.... Those who deviate from it, must recollect, that the public are capable of comparing the **CONDUCT and PROFESSIONS** of men; and, that they will make their own comments upon them, when they find them **AT VARIANCE**.... Such people should also remember what we are told in sacred Writ,---that “**THE LABORER IS WORTHY OF HIS HIRE.**”.... Professors of the Law incur heavy expences, in **QUALIFYING** themselves for the **DUTIES** of their calling: And it is equally just that **THEY** should be compensated for the performance of **THOSE** duties (more especially, as they **UNDERSTAND** them,)---as, that the **Divine and Physician** should be paid for **THEIR** professional duties, by those who employ **THEM**; or, that the **MEMBER OF ASSEMBLY** should receive **HIS** daily “**HIRE,**” out of the pockets of the People, by whom **HE** is employed.... Yet Pay of every kind ought to be, in some measure, proportioned to the importance of the service rendered, and the dignity of the trust: Otherwise, worthless or incompetent agents must necessarily be resorted to.... Thus, when a preacher among the Indians mentioned to one, who had interrogated him on the subject of his mission, that his **SALARY** was **FIFTY POUNDS A YEAR,**---and was answered, “That is a **MISERABLE SALARY;**” he replied---“True, but then I give them **MISERABLE PREACHING FOR IT.**”

* Judge **HALE** observes, in his *History of the Common Law*, that---
“every entire new model of laws labours under two great difficulties and

ing after *changes* in them." And it is submitted to every candid mind, whether the following reason, which is one of those mentioned by Sir Matthew, has not a powerful influence upon those persons, who have been endeavoring to introduce dangerous and alarming *Innovations* into the system of our jurisprudence. It is expressed by the worthy judge in these words:—"Envy and malice at the professors and profession of the law; and that, upon these accounts—upon account of their wealth, number, wisdom, and the necessary use of them. Men (continues the judge) generally hate those whom they fear; or who have a great advantage, either of esteem for Wisdom or Knowledge, above themselves: And this very envy at the *professors*; many times discovers itself the *law* they profess; in contriving new systems and models, to put their hands out, that they think, at present, in:—Though this attempt commonly succeeds to the authors of it, with the like disadvantage

inconveniencies: viz. first---that though they seem specious, in the theory; yet, when they come to be put into practices, they are found to be extremely defective."---And he then proceeds to notice the other; namely---that, being unexperienced by the people, and contrary to their ancient habits and attachments,---they cannot, even on this ground, command a cheerful obedience and respect.

But, what would this virtuous judge have said of "new models of laws," tending to subvert the Rights of the People, and to infringe the Constitution of the Country?---The probability of such being attempted, was not, however, within his contemplation!

as the conspiracy of the limbs* against the stomach; they weaken, and sometimes destroy themselves, in the attempt."—[See *Hargrave's Law Tracts, Vol. I.*]

Nothing is more certain, than, that envy, resentment and malice, are the great sources of this hostility towards lawyers, and all that are connected with the courts of law in the administration of justice. And these hateful passions we know, are principally confined to weak and licentious characters. The man of understanding and probity, who wishes the prosperity of the whole community, relies on the laws of his country for the security of his property, as well as the protection of his liberty, and other personal rights;—as a good citizen—and having all his dearest temporal interests at stake—he respects the laws:

* The celebrated apologue of *THE BELLY AND THE MEMBERS*, here alluded to, by Sir MATTHEW HALE, is very apposite to this subject: it is thus given by LIVY, the historian.

“In times of old, when every part of the body could think for itself, and each had a separate will of its own,---they all, with one consent, resolved to revolt against the belly: They know no reason, they said, why they should toil from morning to night, in its service; while the belly, in the mean time, lay at its ease in the midst of them all, and indolently grew fat upon their labors;---accordingly, one and all, they agreed to befriend it no more. The feet vowed they would carry it no longer; the hands declared they would feed it no longer; and the teeth averred they would not chew a morsel of meat, though it were placed between them. Thus resolved, they all for some time shewed their spirit and kept their word: But soon they found, that, instead of mortifying the belly, by these means, they undid themselves; they languished for a while,---and perceived, when too late, that it was owing to the belly” (or rather, stomach, as Sir MATTHEW HALE expresses it,) “that they had strength to work or courage to mutiny.”

He is, therefore, anxiously solicitous to see them faithfully administered—in open and impartial tribunals—by men of respectability and competent skill—and according to our ancient, approved usages, and established rights.

On the other hand—the worthless, unjust, or profligate character, dreads a righteous dispensation of law; and, consequently, “hates” all those concerned in its administration: He fears its impartial lash—and, perhaps, may have experienced its just penalties. His hopes of exemption from these, and of success in his schemes of iniquity, must therefore depend, either, on ignorance, incompetency or fraud, in the constitution or construction of judicatory tribunals, and the mode of conducting them,—or, on the introduction of rapine, turbulence and disorder, among the people. How natural, then, for such men to abhor courts of justice, juries and lawyers,—who are ministers of the law!

But let every upright, intelligent citizen of Pennsylvania, possessed of character—and having property, or other important interests, to protect,—let every person of this description ask himself; whether *he* finds the ancient and constitutional laws of his country fraught with injustice or oppression? Does *he* dread judges, juries, attornies-general, advocates, marshals or sheriffs?—No! Such men as these, are perfectly satisfied with our great fundamental laws, and the construction of our judicatories: they know, that they are fully competent to the ends for which they were instituted; and they are

also aware they *cannot* be changed,—without a violation of that sacred and *primary* law, by which the hands of legislators themselves are bound—*the Constitution*; for a breach of the constitution, by a legislator, necessarily involves a falsification of his own oath.—If wise and good men have, sometimes, had occasion to feel dissatisfaction with the delays too frequently attendant on the administration of justice, in the courts of law,—they are well apprized that any evils they may have experienced therefrom, are not attributable to defects in our system of jurisprudence, nor to any radical error in the principles, upon which our judicatories are constructed:—They must be sensible that such evils result from *other* causes: They must perceive, that their cure lies within the reach of *the legislature*, alone; as the governor of the state pointedly observed to them, in his last communication;—and it is *their duty* to apply it.—A General Assembly of Pennsylvania, seriously disposed to supply the means of dispensing the blessings of substantial justice to every description of persons in the community—according to the law of the land, will place the existing system of our judiciary upon such an *establishment*,* as will render the faculties of our tribunals to perform the functions assigned them, commensurate to the greatly increased population of the state and multiplication of its counties.

Here, then, is the obvious and effectual remedy

* “The tribunals give effect, force, and life to the Laws; it is an essential part of Legislation, to see that they be established on a wise and solid foundation.”—-Bielsfeld’s Elem. of Stud.

that is required, in order to render the administration of justice efficient and complete. Let *this* be applied, agreeably to the governor's repeated recommendations,—and we shall hear little more about such wretched and unjustifiable projects as the *Adjustment bill*. Men will return to their sober reason, and become sensible of the importance of their constitutional rights. They will no longer view courts of justice with a jealous eye;—unless, indeed, they may have cause to dread the just vengeance of the law. In fine, they will cease to revile lawyers; and will be conscious how ill-founded were their prejudices against them:—For they will discover, when they come to a dispassionate reflection, that lawyers are highly useful in their sphere: that, like clergymen, physicians, farmers, tradesmen and merchants—nay, like even Assembly-men themselves, and all other public functionaries—they earn their living by their lawful occupation: that they are compensated—or, if the term pleases *some* people better, “hired”—for their services; as well as the Assembly-man and others:—In fact, that the lawyer expends his earnings among those from whom he receives them;—contributing his full proportion to the support of government, and other public exigencies; using his share of the fruits of the earth; and paying as well as employing, in his turn—in like manner with his fellow-citizens,—the clergyman, the physician, the farmer, the merchant, the mechanic and the tradesman.

The foregoing observations have arisen from the utter disregard of one of our great constitutional

rights, which has been manifested, among other extraordinary measures,—during the late and preceding sessions of the General Assembly, by many* of the members:—That right is—*the Trial by Jury*. Sundry bills have been repeatedly brought forward, and strenuously supported, by certain men,—tending not only to change and undermine this ancient and rightful mode of trial; but so calculated as eventually to overthrow it: And a large portion of the time of the legislature—consequently, of the people's money—has been wasted,† in fruitless attempts to carry these schemes into effect.

* It is both just and proper to discriminate between such men in the last legislative body of the State, as seemed disposed to run headlong into the visionary, disorganizing and unconstitutional projects, that were attempted,—and a respectable number of those faithful and intelligent members, on the other hand, who—steadfast to their trust, and aware of the great evils that would necessarily result, both to the people and the government, from the operation of those schemes—firmly withstood their adoption. The Journals of the two houses will greatly assist the good people of Pennsylvania, in making this important Discrimination.

† The late Session of Assembly continued four Months; at an expense to the State of not less, it is presumed, than SIXTY-SEVEN THOUSAND DOLLARS. In this long period, 94 Acts were passed;—85 under the denomination of Laws—and the others of Resolutions. Of these 85 Laws, 14 are private Acts—20 are Acts respecting Election-districts, Wing and Mill Dams, and the institution of Lotteries—and the remainder comprizes 51 Acts, all of a local and special nature: And, of these last 51 Laws, not more than 10 or 15, at the utmost, are of much importance to the State at large. In the whole number enacted, we perceive very few, indeed, of great and immediate concern to the citizens of Pennsylvania, generally: Yet we readily discern many of very little moment to the Community; and one if not two, of an unconstitu-

If the object of these men, and their advisers, were really to remedy any existing evil in our an-

tional complexion. But what measures were adopted, for improving the natural and political condition of the State, on a great and extensive scale—for cultivating the resources of public wealth and general prosperity, which we possess—and for applying RATIONAL and CONSTITUTIONAL remedies to evils, which actually exist; without resorting to POLITICAL EMPYRICISM, for the cure of IMAGINARY ones?

Such, however, have been the labors of a four months Session of the General Assembly of Pennsylvania, of 1802--3!

Let every intelligent man in the state ask himself,—whether much more, and much more important, business—and such, too, as the necessities of the Commonwealth, and general interest of the People, imperiously demand—might not have been accomplished in MUCH LESS TIME, by SENSIBLE, JUDICIOUS, PUBLIC-SPIRITED men? It is notorious, that many of the regulations, meant to be effected by special ACTS, might be better accomplished—either by one or two general Laws for the purpose, or through the medium of the Judiciary department, as the nature of the case might render most proper; than by numerous legislative acts, referring to each particular case: and this, likewise, without much expense to the public, or any interference with our Constitutional provisions.

The miserable expedient of borrowing money, for meeting the public Exigencies, must be resorted to; because no fiscal arrangements were made, for the purpose of supplying the Public Treasury.

A complete organization of the Courts, so as render them competent to the SPEEDY Administration of Justice—an object of high importance to the community, and one earnestly recommended by the Governor to the attention of the Legislature—was worse than neglected: It was TRIFLED with; and the Judiciary-bill reported by a Committee, which they had so framed as to afford some relief to the people in this particular, was, in its progress, made to assume so MONSTROUS a shape, that some of those who contributed to its deformity, becoming ashamed of it, finally concurred with the RATIONAL and WELL-MEANING PART OF THE HOUSE, in destroying it!

But, unfortunately also, much of the Session was consumed, in the unceasing endeavors of a few men to obtrude upon the People of Penn-

cient mode of administering justice; or if any of their plans had been capable of producing that end, consistently with the rights of the people;—the endeavors of the projectors to accomplish their purpose would have been meritorious, and ought to have

Pennsylvania their wild, visionary, and mischievous schemes—clothed in the formalities of LAWS—for UNDERMINING THE RIGHT OF TRIAL BY JURY; in the face of the Constitution of their Country—contrary to our ancient habits and approved maxims—and in direct violation, as well, of the personal Rights of Individuals, as the legitimate security of Property.

These, and some others of the unconstitutional and absurd projects of CERTAIN PERSONS—of men, too, ASSUMING the truly dignified title of REPUBLICANS, and acting as AMERICAN LEGISLATORS—were, however, happily frustrated, by the VIRTUE and GOOD SENSE of many of the members of both Houses; assisted by the wisdom, vigilance and firmness of the Executive. It is, nevertheless, to be lamented, that a majority of them could be so far misled, by the artifices of cunning—the suggestions of individuals actuated by their particular interests—or the unfounded insinuations of prejudiced Ignorance,—as to countenance such proceedings. Yet there is reason to believe, that not a few really good and well-intentioned men were, unwarily, drawn into these snares; and led into gross errors, by crafty intriguers, in whom they had reposed a confidence, of which their conduct has shewn them to be wholly unworthy.

Let us, therefore, be upon our guard IN FUTURE, against such persons as have, either through FOLLY OR WICKEDNESS, had the hardiness to contend, “ THAT THE CONSTITUTION DOES NOT CONTEMPLATE THE SECURING OF JURY-TRIAL IN CIVIL cases :”—And likewise against such—holding seats in the Councils of their Country—as have DARED, without a blush, to vilify SCIENCE and LITERATURE—to scandalize the JURISPRUDENCE and JURIDICAL INSTITUTIONS of the Land—and to scoff at SCHOOLS and SEMINARIES OF LEARNING! FOR THE HONOR OF THE STATE, AND THE WELFARE OF ITS CITIZENS, let people of THIS description STAY AT HOME; that may employ themselves about their PRIVATE concerns, which they MAY possibly understand.

succeeded. But when, under specious* pretences of reforming what *they* affect to consider as abuses or errors in the law, and of remedying *supposed* evils in the administration of justice,—attempts are made to strike a mortal blow at the vitals of our jurisprudence; in defiance, not only of a system sanctioned by the experience of ages—but, of *the Constitution* itself;—every citizen of Pennsylvania has serious ground for alarm.†

Yet, thank Heaven! these wild and fanciful projects have been frustrated, by the wisdom, uprightness and firmness, of our worthy governor,—in the constitutional exercise of his qualified negative. And it is confidently hoped, that the virtue and good sense of the community will suggest the necessity of sending forward, to the next and succeeding legislatures, men of more understanding and knowledge, than those implicated in such schemes—men who entertain more respect for the people's rights. Thus,

* “Few men,” says an ingenious writer on jury trial, “at first see the danger even of little changes in fundamentals; and those who design them usually act with so much craft, that, besides the giving specious reasons, they take great care that the TRUE reason shall not appear: Every design therefore,” says this writer, “of CHANGING THE CONSTITUTION, ought to be most invariably observed and timely opposed.”

† “Time only, and long experience, can bring remedies to the defects in the customs of a state, whose form is already determined; and this ought always to be attempted with a view to the plan of its original Constitution. This is so certain, that whenever we see a state conducted by measures, contrary to those made use of in its first foundation, we may be assured a great Revolution is at hand.” SULLY'S MEMOIRS.

they will avoid a repetition of the same hazards, and same unworthy conduct, which have so greatly discredited the legislative body of the state:—For, not only will the citizens of Pennsylvania be cajoled out of their most inestimable rights and privileges: but the government will be dishonored, and the commonwealth be sunk into irretrievable contempt and ultimate ruin; if those persons to whom the people shall have confided the high trust of representing them, in the legislature, should either betray that trust, through design,—or exercise it injuriously, through want of capacity:—the miserable consequences to the community, in either case, would be pretty much the same. When the dearest interests of the country are at stake, Truth ought to be proclaimed by all who feel a real concern for the public welfare— We must not suffer our constitutional, legal, and established Rights to be invaded, for the gratification of any set of men whatever: For ours is a government of Laws; not of Men.

The measures alluded to—lately pursued by many of the members of assembly—have undoubtedly; attached great disrepute to their *authors*: And it is notorious, that there is scarcely a real and intelligent Republican in the state, who does not reprobate their proceedings in those instances;—their conduct has, indeed, excited disgust, in the minds of all thinking, well-meaning people.

But, as it is not intended, at present, to go into a detailed notice of their plans,—the most prominent feature of their proposed measures—that is, their hostility to the judiciary department of govern-

ment, and particularly, their endeavors to *destroy* in effect, the established Right of Jury-trial—claims our more immediate attention.

It was on the ruins of this liberal and truly republican institution, that these innovators wished to erect their numerous, petty, and obscure tribunals, for the trial of causes; composed of stationary or fixed members. Their plans were wholly incompetent to the end of promoting a wise and impartial administration of justice; even if they had been compatible with the constitution: they were highly aristocratical in their principles, and equally mischievous to the community, in their unavoidable tendency. They were, in fact, adapted to a state of society, and an order of things, very different from ours at the present day;—and seemed to be founded on the crude and monstrous scheme of government, framed by Mr. *Locke* for the English colony of S. Carolina,—or at least to be a resuscitation, in the minds of men destitute of talents and discernment, of some of the notions contained in that scheme.

Such, however, was the general complexion of these new-fangled* plans:—While, on the other hand, the Trial by Jury—that venerable fabric, which has withstood the ruthless power of despotism, the underminings of corruption, and the stormy as-

* Dr. WATTS, in his Treatise on the Right use of Reason, lays down various Rules to direct our reasoning: he then says...“After all other rules, remember this; that MERE SPECULATION, in matters of human prudence, can never be a proper director, without Experience and Observation.”

saults of anarchy,—nay, the ravages of time itself—
was meant to be *prostrated*—in order to pave the way
for new-modelling, entirely, the main structure of
our juridical institutions; and to erect in their stead,
temples of Confusion, Injustice and Oppression.

But let it be borne in remembrance, that Trial
by Jury is, in truth, the *only* fortress by which the
poor man can be effectually secured from oppression
—the rich and poor, equally protected in their pro-
perty—the people, generally, confirmed in their rights
—and the nation in their liberties.—How necessary
is it, then, for all descriptions of men in the com-
munity, that are *friends to their country*, to unite in
supporting this inestimable institution, in its full vi-
gor; and in discountenancing every effort, open or
indirect, to paralyze its energies!

In order, therefore, that the origin, nature, and
extent of this Right may be more fully understood;
and, for the purpose of our being duly enabled to
appreciate its importance—as it regards our country,
ourselves, and our posterity; a careful and dispa-
sionate consideration of the following observations is
most respectfully solicited.

Our Right to the Trial by Jury is deduced from
the **Common Law* of England. But as the charac-

* “The Common Law,” says GERARD MALYNES (in his *LEX MER-
CATORIA*,) “is excellent for having fewer faults and imperfections, than
any other law.”—And in another place, he says—“Great is the antiqui-
ty of the common-law of England, and the trial by juries of twelve men.”
—Malynes (who was a merchant) wrote his *LEX MERCATORIA*, or *Ant-
ient Law-Merchant*, 180 years ago.

teristics and obligation of this law—which constitutes a great part of our own municipal laws—are very imperfectly understood by many of our citizens; and as some persons, by reason of their entire misconception* of what the common law is, appear to have been influenced by the most unfounded prejudices on the subject; it seems proper to take a cursory view of this, as a preliminary, before we proceed further.

The Common Law,† or *lex non scripta*, in

* It is asserted, that one of the Adjustment-bill men, in the last session of assembly, was heard to say—“The Common Law is a very bad law: it is high time to REPEAL it, and AN ACT A NEW ONE.”—What disgraceful ignorance in a legislator! How could this man be said to REPRESENT any portion of the AMERICAN PEOPLE?

† Although the Common Law is styled *Lex non scripta*—or Law not written, this is principally meant to distinguish it from Statute Law. The Common Law of England (as Sir Matthew Hale observes, in his preface to Rolle’s Abridgement,) “is settled and well known:”—it has been committed to writing, at various periods; and is transmitted to us, in the works of many eminent and learned men. Indeed, many of its provisions are understood to have been, originally, instituted by Statutes; the existence of which, cannot be now traced: for there are no records or authentic transcripts of acts of Parliament, anterior to Henry III. And it is known that Alfred, the first sole monarch of England after the Saxon heptarchy, collected all the Laws of England into one book, and enforced the observance of them throughout the Kingdom: and after him, Edward the confessor composed a system out of the former Laws, which he called the Common Law.

Gilbert Glanville—who was chief-justice of England, in the reign of Henry II, and also bishop of Rochester, from 1185 to 1215—compiled a book of Common Law; said to be the most ancient work on that subject, now extant. Andrew Horne lived about the time of Edward II, though the book called Horne’s Mirror of Justice, is said by Sir Edward Coke to have been written, in part at least, before the conquest.

England—thus denominated in contradistinction as

Bracton, who was a judge in the reign of Henry III, wrote a very learned treatise of the Common Law, towards the conclusion of that reign---a book still held in high estimation. John de Breton (usually called Britton) was a judge in the times of Henry III, and Edward I.---He was, like Glanville, also an ecclesiastic; and was bishop of Hereford from 1269 to 1275. About two years after this latter period, he published a learned work on the Common Law of England.

The book called *Fleta* likewise treats learnedly on the same subject: Its author is not now known, though the title of the book is sometimes mistaken for the name of the author. He appears to have lived in the reigns of Edward I. II. & III.

In the reign of Edward IV. THOMAS LITTLETON, a judge of the common pleas, wrote his treatise on Tenures.

Besides these, and some other ancient writers on the Common Law, Sir JOHN FORTESCUE—who was chancellor to Henry VI—composed a celebrated work on the Laws of England, entitled—*De LAUDIBUS LEGUM ANGLIÆ*:—And ANTHONY FITZHERBERT, a judge of the common pleas in the reign of Henry VIII, wrote several learned treatises on the Law.

From these, and other writings on the Common Law—as well as from original records, and other authentic documents of antiquity—Sir EDWARD COKE, chief-justice of England in the reign of James I, compiled, at that more modern period, his four books of Institutes, (the first of which professes to be, entirely, a Commentary on Littleton's Tenures;) a work deservedly esteemed one of the most valuable repositories of the Common Law.—A late systematic work of the same nature, are the celebrated Commentaries of Sir WILLIAM BLACKSTONE, on the Laws of England.

But in addition to these, and such-like authorities, the Common Law is to be deduced from well-known Judicial Decisions, or Determinations in the Courts of Justice,—which are reported by many able juriconsults. Dr. BURN has, however, when noticing the Common Law, very properly observed with respect to these, (in the preface to his work on the English Ecclesiastical Law,) that—“ Altho' by virtue of the laws of the realm (of England,) they bind as a Law between the

well to the Statute, as the Civil Law*—is so called, because it has very long continued to be the *common* municipal law, or rule of justice throughout that realm. It is founded on ancient, immemorial usage, and common consent; and derives its sanction from its reasonableness, the equity of its maxims, and

parties thereto, as to the particular case in question, unless reversed by writ of error; yet they do not make a Law, properly so called, (for that only the King and parliament can do, in England:)—Yet they have a great weight and authority, in expounding, declaring, and publishing what the Law of the Kingdom is; especially, when such decisions hold a consonancy and congruity with resolutions and decisions of former times." The same observation—very nearly, too, in the same words—will be found in the 4th chap. of Hale's Hist. of the Com. Law.—We have an illustration of the principle on which this doctrine is grounded, in the remark made by chief-justice M'KEAN, respecting the Law of Nations—stated in 1 Dall. Rep. 232—3.

Thus it is evident, that the Maxims and Principles, which form the ground-work of the Common Law, are written, published and known. They are Rules, deduced from Reason, Natural Law and Justice; and, as such, constitute the foundation of our Municipal Law:—For it is the legitimate characteristic of all Laws, properly so called, that they be conformable to right Reason, and the invariable principles of common or equal Justice.

The excellence of this system of Laws is testified by that learned and most upright judge, Sir MATTHEW HALE: And, in his preface to Rolle's Abridgment, he remarks—-that "the Common Law (of England) hath had the suffrage of the whole Kingdom in all ages, for many hundred years; for, according to it, the public justice of this Kingdom (England) hath been administered, in all times, with great success and contentment."

* The Civil Law is comprehended under the head of unwritten law, because it is of force only so far as it has been received by immemorial custom.

justness of its fundamental principles. The Common Law is styled by *Wood*, in his *Institutes*,—common right, common reason, or common justice. It is that law which is common to the generality of all persons, places and things, (with the exception of particular local customs) within the sphere of its existence: And the laws of *nature*, of *nations*, and of *religion*, constitute parts of it. It is, in reality, the *substratum* of our whole system of jurisprudence, in Pennsylvania, as well as every other state in the union; and the foundation of the style of process and modes of proceeding, in our courts of law,—both with respect to property and offences: And although the system itself has, in *this** country, *necessarily* undergone great alterations from its original, or prototype; it forms, nevertheless, as it *now* stands—and many of its provisions are constitutionally established, whilst others rest on a foundation immutable in its own nature—a main part of our jurisprudential polity.

* In England also, antecedently to the settlement of our ancestors in this continent,—the common law underwent considerable alterations in some of its parts, since the time of Edward the confessor; and even, in a less degree, from the Norman conquest: Yet, for many centuries past, the most valuable of its fundamental institutions have not been essentially changed.—Sir MATTHEW HALE, after adverting to such variations as took place in the earlier annals of the jurisprudence of his country, says—“But though these particular variations and accessions have happened in the laws, we may justly say, they are the same English laws now, that they were six hundred years since, in the general.” When it is considered that Judge Hale wrote about 137 years since, the time he has stated will carry us back to the conquest; which seems to be the period he had in view.

We find "The Common Law of England" claimed—as a Right, to which the American people are "entitled,"—by an *unanimous* RESOLUTION OF CONGRESS, passed the 14th of Oct. 1774: And the existence of that Law in this country, subsequent to the revolution, is expressly recognized in the 9th article of the amendments to the constitution of the United States; independently of its recognition in *other* instances.

But, although the Common Law of England is, to a certain extent, the law of *each state** in the Union, respectively—that is, so far as each state had adopted and retained it; the *United States*, as a federal government, have no "common law," *as such*; further than as the *law of nations* is a part of it,—or, than as their Laws expressly recognize and adopt any of its provisions. In the case of *Chisholm ex'r, v. Georgia* (2. Dall. Rep. 419) judge *Iredell* justly observed—"that all the courts of the United States must receive, not merely *their organization* as to the number of judges of which they are to consist,—but, *all their authority*, as to the manner of their proceeding, *from the legislature*."—The Common Law authority (merely as such) relating to *crimes and punishments*, it is

* In the case of *CHISHOLM, EX'R. v. GEORGIA*, judge *Iredell* says—"The Common Law is a law which, I presume, is the Ground-work of the laws of every State in the Union; and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of legislation controls it, to be in force in each State,—as it existed in England, (unaltered by any statute,) at the time of the first settlement of the country."

clear, is not vested in the national government: Yet this now applies, in suits *between citizen and citizen*, whether they be instituted in a *federal* or a *state* court. In Pennsylvania—*that* may be considered, as the Common Law, in force among *us*, which comprehends such portions of the English common law existing here prior to the 4th of July 1776 (and which had not been changed at any time anterior to that day, by any positive statute law, obligatory upon us,)—as were applicable to our circumstances, and political condition and relations; and such, also, as have not been since changed or abrogated,—either by the primary and constitutional law of the land—by our own acts of assembly, conformable thereto—or, by those laws of congress which are obligatory on our people, as citizens of the Union:—But, what is properly called *the common law* is, with these restrictions and within these limits, necessarily a part of our system of jurisprudence.—Hence, in the case of the Commonwealth against de Longchamps—reported in 1. Dall. 111.—chief-justice *M'Kean* justly remarked, that the Law of Nations, which is a constituent part of the Common Law, formed a part of the *municipal* law of Pennsylvania—This was in 1784: But, since that period the people of the United States have established a *national* government; to the jurisdiction of which, the cognizance of causes arising under the law of Nations properly belongs. Four years afterwards, the same learned judge observed—that “mutual conveniency, policy, the consent of nations and the general principles of justice, form a code which pervades all nations,

and must be every where acknowledged and pursued."

See 1. Dall. Rep. 232-3.

The principles of General Mercantile Law are incorporated into the body of our jurisprudence, as a *common law*--that is, common to trading nations; and therefore they constitute a *part* of our municipal law. Hence it was ruled, in the cause of *Steinmetz & al. v. Currie* (in the supreme court of Pennsylvania--*M. Kean*, chief-justice)--that the case in Term Reports (*cited in that cause*) being a determination upon general mercantile law, was of authority here; and that it would have been so, had it been determined in France, Spain, or Holland, as well as in England.--

See 1. Dall. Rep. 270-2.

The *Lex Parliamentaria* is part of the law of England; and parliament is, in general, the sole and exclusive judge and expositor of its own privileges. In like manner, Congress and the State Legislatures, exercising the legislative powers of their respective governments, are necessarily and inherently possessed of certain privileges and powers, of a similar nature--All of them have, likewise, certain rules and regulations, for conducting and governing their own proceedings: These constitute what may be termed *our "Lex Parliamentaria,"* or Parliamentary Law.--Mr. *Hatsell* has recently collected and published a great variety of cases, founded on the rules, orders, and usage of the British parliament; which are admitted as authorities in England, being viewed in the light of *established precedents*: And Mr. *Jefferson* has avowedly made *Hatsell's* book (which, in the preface

to his own; he styles "a most valuable book") the ground-work of his *MANUAL* of the *lex parliamentaria* of Congress. Indeed, the rules and principles that constitute the *lex parliamentaria* of all our legislative bodies, in this country, are derived from the law and custom of the British parliament.

Thus, too, our Courts of Justice have their peculiar and established rules, for their own government: These tribunals possess powers which are essential to their existence and preservation; and they, as well as their officers, enjoy certain and appropriate privileges, necessary to them in their respective spheres.

All these Rules of Right enter into the composition of *the Law of the Land*; and, being either portions of the English common law,—or customs and usages of our own, analogous thereto, and sanctioned by long experience,—they may, collectively, be considered as *our Common Law*.

But, besides all these—by an act of assembly passed soon after the revolution, such of the *statute laws of England*, as had *theretofore* been in force in Pennsylvania, were extended hither.* Such provisions of these as are still adopted here, may *now*, in relation to *us*, be considered in some sort as *leges non scriptæ*.

Notwithstanding this great body of laws—which in *one* sense may be termed *leges non scriptæ*—(excepting, perhaps, the English *statutes* last mentioned)—thus comprehended in what may be emphatically styled, among us, *the law of the land*; we well know,

* Sec 1. Dall. Rep. 159.

that neither the specific provisions of the common-law, or the law of nations, could be—nor any portions of them, as such, ever have been definitely incorporated into our written municipal code, by any act of the legislature. Both, however, have been recognized by our statutes.—For instance : The act of assembly, which, before the institution of the federal government, regulated and established an admiralty-jurisdiction in this state, declared—that the court should be governed by “*the law of nations.*” The preamble of this act (which was passed the 8th of March, 1780, and afterwards repealed) recites the then existing necessity, that due provision should be made—“for the trial of offences, crimes, controversies and suits, within the cognizance of the maritime law, and *not enquirable at Common Law**: and afterwards declares, that the court shall pass their sentences and decrees”—“according as the maritime law and the *Law of Nations*, and the laws of this commonwealth, should require.” Further : In the

* In the United States, the District Courts have original jurisdiction of all civil causes of Admiralty and Maritime jurisdiction; and excepting these, the trial of all issues in fact, must be by jury :—yet saving to fruitors in those Courts, in all cases, the right of a Common-Law remedy,—where the Common-Law is competent to give it.—See the act of Congress entitled—“An act to establish the Judicial Courts of the United States, sect. 9.—The same Law declares, that suits in Equity shall not be sustained in either of the courts of the United States, in any case, where plain, adequate and complete remedy may be had at Law.—sect. 16.

preamble to a law of the *Province* which was passed in the 4th year of George I. entitled, “*An Act for the advancement of Justice &c.*” it is declared to be “*a settled point,*” that—“*as the Common Law is the Birth-right of British subjects, so it ought to be their Rule in British dominions.*”

Hence it is apparent, that the Common Law—so far from being a new thing among us, as some people are led to believe—has been ever since the first settlement of the country, and uninterruptedly, *the Law of the Land*; and is an essential, as well as a most valuable part, of our system of jurisprudence.

The Common Law TRIAL BY JURY is of great antiquity. It is noticed by *Duncombe* in *Trials per pais*, and also by Judge *Blackstone* in his *Commentaries*, that we discover by the laws of King Ethelred, (who began his reign in the year 978,) Juries were in use in England, long before the Norman conquest,—and then, not as a new invention :—“*And,*” say these writers, “*they are as it were incorporated with the English constitution, being the most valuable part of it; for without them, no man’s life can be impeached (unless it be by parliament,) and no one’s liberty, or property, ought to be taken from him.*”

Lord chief-justice *Coke* likewise refers to the laws of Ethelred, respecting juries—in his *Commentaries on Littleton* (pa. 155.) and in the 3d and 4th volumes of his *Reports*. And this early origin of juries, in England, is also verified by that learned antiquary, Mr. *Camden*; in opposition to the erroneous assertion of Polydore Virgil.

Sir *Henry Spelman*, further, mentions the use of

the trial by jury, in England,* long before the conquest,—in his reference to the laws of Edward the confessor. This prince—who, in 1041, preceeded Harold, the last of the Saxon Kings—compiled a system out of the pre-existing laws of the country, which he denominated *the common law*: And these laws of Edward the confessor were expressly confirmed, by the charter of William the conqueror.

* So early as the reign of ALFRED (nearly 200 years before the conquest,) we find that some of the institutions of that great prince had reference to the Trial by Jury. The measure of the jurisdiction allotted to juries, at that very remote period, is however quite uncertain; and so indeed, is the precise construction of the tribunal itself. RAPIN says, that, to prevent the poor from being oppressed by men in power, he ordered, that in all criminal actions the trial of the fact should be by twelve men. Before the time of Alfred, the number of the jurors was indefinite: He seems to have done little more than fix the number; at least in criminal matters. Yet, in many cases, the number appears to have been indeterminate, till long afterwards.

We know with certainty, notwithstanding, that the number of which a jury, for the trial of both civil and criminal causes, must consist—and also the authority of that tribunal—were well ascertained at the time of the grant of MAGNA CHARTA; and that the law of England, in these respects, has been settled and uniformly established, ever since the re-confirmation of King John's two charters (which constitute the basis of the liberty of the English) by Henry III.

But at the present day, the trial by jury has one great advantage on the side of popular rights, which the institution did not anciently possess: It is now settled law—and a valuable acquisition in modern jurisprudence,—that the jury may, in all cases, if they think proper to do so, decide both the Law and the Fact. And they are, besides, placed on a much better footing than they were formerly, in many important particulars.

The Challenges which the law allows to be made to jurors, in cases of exceptions which, on different grounds, may subject them to legal

Sir *Thomas Smith*, in his treatise on the English Republic, observes, that there were (in his time) three sorts of trials; one by Parliament, another by Battle, and the third by Assise or *Jury*. The Trial

objection, are such as render the tribunal a pure, impartial, and competent one: And the necessity of an agreement of all its members, in their decision, "gives," as Sir MATTHEW HALE observes, "a great weight, value and credit, to such a verdict, wherein twelve men must unanimously agree."---Even by the laws of Scotland---where, in general, the decision of a majority of the jurors constitutes the verdict---unanimity is required in Revenue causes, before their court of Exchequer.

The great and excellent person just quoted---"in order," as he expresses it, to "evidence the excellency of the laws of England once those of other nations"---introduces "the trial by a jury of twelve men; which," continues the learned judge, "upon all accounts, as it is settled here in this Kingdom, seems to be the best trial in the world." [See Hale's Hist. of the Comm. Law.]

The unanimity required in the verdict of a jury, seems to be somewhat objectionable, in theory; though in the uniform practice of many centuries, the utility of this provision has been amply demonstrated by experience, and it has been found to be attended with comparatively trifling inconveniencies.---While it was considered to be the province of the jury, to judge only of the facts ascertained by the evidence, in a cause---leaving the decision on the law, and its application to the particular case, exclusively to the judges; jurors were more likely to be embarrassed in determining on an unanimous verdict, than at present: cases sometimes occurred, in which they felt an unwillingness to confide the construction and application of the law, under peculiar circumstances to the court. But since it has been settled, that juries have a right to decide both the law and the fact, such difficulty is almost entirely removed. For if they choose to found their deliberations on a combined view of both, they have great latitude for the formation of their decision: if, on the other hand, they should be doubtful of the expediency of exercising their right to interpret and apply the law, in the case before them; then they are at liberty to find a special verdict, ground-

by *Jury*, says he, be the action* *civil or criminal, public or private, personal or real, is referred for the fact, to a Jury,—and as they find it, so passeth the*

ed on the facts alone, in all civil cases: And it cannot be very difficult for twelve impartial men—of common intelligence, to agree on a statement of facts, verified by evidence before them,—in any possible case.

All the provisions, both of the common and statute law, respecting juries, are admirably adapted to the formation of a tribunal, suited to the generality of cases,—a judicatory composed of persons of impartiality and competent capacity; and, for cases of special or more than ordinary importance,—of men endowed with proportionate understanding and acquirements.—“It has been alleged,” says the writer of the celebrated letters of JUNIUS (when treating of trials for libels,) that although a common jury are sufficient to determine a plain matter of fact, they are not qualified to comprehend the meaning, or to judge of the tendency, of a seditious libel. In answer to this objection—which, if well founded would prove nothing as to the strict right of returning a general verdict—I might,” continues JUNIUS, “safely deny the truth of the assertion. Englishmen,” says he, “of that rank from which juries are usually taken, are not so illiterate, as (to serve a particular purpose) they are now represented: Or, admitting the fact, let a special jury be summoned, in all cases of difficulty and importance,—and the objection is removed.”

Here, moreover, it will be observed we have the testimony of JUNIUS, that, “to serve a particular purpose,” it was not long since attempted to cry down Juries, in England—as it has recently been, among us.

* * DUGDALE says, in his *ORIGINES JURIDICALES*—it cannot be doubted but that the decision of facts, by a Jury, according to the testimony given, is “the most ancient form of Trials in civil cases, as well as criminal.”

The high antiquity of this mode of trial is incontrovertibly established, by the testimony of authentic records and numerous annals. And those persons, who have been laboring to undermine this great privilege, betray a profound ignorance of the English history and jurisprudence. We every where meet with incontestable proof, that the Right

judgment.”—Glanville calls it—A royal privilege,* conferred on the people by the Great Council of a beneficent prince ; so well adapted to the personal security of individuals and the welfare of the state, that whatsoever any one holds in his right, as a freeman, (or, in his freehold,) none are under the necessity of submitting to the doubtful issue of *Combat*,† &c.

was common to civil and criminal cases, equally appertaining to both.—GLANVILLE is one of the most ancient writers on the English law, whose works are now extant. He composed his *Tractatus de Legibus and Consuetudinibus Angliæ*, 34 years before the date of *Magna Charta* : and this author—as also BRACTON, in the reign of Henry III.—treats of Jurics as well in Common Pleas, as in Pleas of the Crown ; that is, both in civil actions and criminal prosecutions.—[See GLANVILLE, lib. 2. cap. 14. and BRACTON, fol. 116.]

Indeed we every where find, that this was the ancient, as it is the modern, Law of the Land.

* “ REGALE BENEFICIUM, CLEMENTIS PRINCIPIS DE CONSILIO PRO-CERUM POPULIS INDULTUM, QUO VITÆ HOMINUM ET STATUS INTEGRITATI TAM SALUBRITER CONSULITUR, UT IN JURE, QUOD QUIS IN LIBERO SOLI TENEMENTO POSSIDET, RETINENDŌ DUELLI CASUM DECLINARE POSSINT HOMINES AMBIGUUM,” &c.

† Anciently, the demandant in a Writ of Right might, if he chose, prosecute his claim, in the Court Baron, even to the termination of the controversy, either by telling his story (*per narrationem narratam*;) or by the conflict of battle (*feriationem duelli* :) But if the tenant should put himself upon the Grand Assise of the King, in his court, (a trial by a special kind of Jury,) the cause would then be determined in that way. The tenant would, in this case, go into court, with the King’s writ, directed to the sheriff of the bailiwick ; by which the Baron, or Lord of the fee or of the manor, would be prohibited to hold the plea in his court, unless battle had been waged, in that manner which the King

But the ancient mode of trial by Battle—as well as

commanded, when a plea of this sort was brought in the county-court. Yet, it was also at the option of the demandant, whether he chose to continue his plea so long in the same court, or not. If he chose to withdraw therefrom, he was to go to the King's bailiff, and prove, either by his own oath or by two witnesses, that the court of his lord was defective in justice to him (*sibi de recto deficisse*;) and thus, with or without the consent of the lord of that court—and even of the tenant himself, might the cause be transferred to the county-court (*comitatum*.)

See HENGHAM MAGNA, cap. 3.

This was the mode of proceeding in a Writ of Right, in the time of Edw. I. at which period, all causes were usually terminated in the County-court (which was a tribunal superior to the Court-baron,) according to the Saxon custom. It must however be observed, that what is called “the county-court,” in England, bears no resemblance to our county-courts.—It is a court incident to the jurisdiction of the sheriff: It is not a court of record; but may hold pleas, at present, of debt or damages under the value of forty-shillings. Henry II. instituted the justices in eyre—that is, itinerant or circuit judges; and authorized them to administer justice and try writs of assise, in the several counties: since which, the ancient jurisdiction of the county-courts in that action, and of other matters of which they had cognizance, has been either abrogated or fallen into disuse.—These county-courts, “however proper,” as judge BLACKSTONE observes, “for little debts and minute actions, where even injustice is better than procrastination, were become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment.” [4. Bl. Com. 422.]

As to the Courts-Baron,—where each party conducted his cause, by telling his story (“*per narrationem narratam*”) according to HENGHAM, or, as Mr. HUME expresses it—“deciding a cause from one debate or altercation of the parties;”—there was even less chance of obtaining justice in these judicatories: for it is to be presumed, that, in these, there was still more “ignorance of the law”—still more “partiality,” than even in the County-courts. And, especially, since HENG-