THE

CASE,

TREVETT againſt *WEEDEN*:

On INFORMATION and COMPLAINT, for refuſing *Paper Bills* in Payment for *Butcher's Meat*, in Market, at Par with Specie.

Tried before the Honourable SUPERIOR COURT, in the County of *Newport*, *September* Term, 1786.

ALSO,

The Caſe of the Judges of ſaid Court,

Before the Honourable GENERAL ASSEMBLY, at *Providence*, *October* Seſſion, 1786, on Citation, for diſmiſſing ſaid Complaint.

Wherein the Rights of the People to *Trial by Jury*, *&c.* are ſtated and maintained, and the Legiſlative, Judiciary and Executive Powers of Government examined and defined.

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To the PUBLIC.

THE author consents to the following publication, by the request of many worthy citizens, which he cannot, with propriety, refuse. He doth not expect any particular advantage or applause thereby, but will be fully satisfied, if, by his endeavours, any new lights may be reflected upon the subjects contained therein. And indeed the novelty as well as importance of the trials, in which every individual was interested, might of themselves excuse his presumption.

WHY should I mention presumption, *when it is well known, that in this* free *country every one has a right to scribble, if he pleases, and no one can be injured, because no one is obliged to read. Reading however is the passion of many, as writing is that of some: If therefore the reader should find himself disgusted, he may derive one advantage, that of fixing in his mind the retention of more* useful *reading.*

IT may be objected, that writing and publishing, without affording instruction or pleasure, are detrimental to the Republic, as much time may have been consumed thereby, which ought to have been occupied for valuable purposes. Without denying the charge, let those who have directly or indirectly contributed to the late political measures reflect how their *time has been employed, in fabricating a system of revenue and finance, subversive of private contracts, and public faith!——Perhaps a view of contrasted blunder and absurdity may produce some good, when the force of argument would be exerted in vain.*

BUT why should the author impose upon the reader a recital of his own *tedious, indigested pleas?—Why did he not content himself with a simple relation of facts, and an enumeration of the principal arguments and authorities?———Because he is indolent, and found it less troublesome to himself to write from recollection, than to form a new*

new arrangement and detail of the ſubject. Beſides, the orators of Greece and Rome exhibited to the public, in the ſame way, their pleadings upon the moſt weighty occaſions. And although the author hath not the vanity to compare himſelf to any the leaſt of thoſe orators, yet he feels a pleaſure in attempting *to imitate them, and to revive that part of ancient learning.*

LET it be ſubmitted to the candid, whether the frequent publication of pleadings at the bar, upon cauſes of importance, would not have a ſalutary tendency to reform the preſent manner, ſo replete with inaccuracies, abſurdities, and (to the ſhame of ſome practitioners) ſcurrility itſelf?——

IT is cuſtomary, in ſome countries, for the ladies to attend upon the trial of popular cauſes. What an excellent practice, and how admirably calculated to produce elegance of ſentiment, delicacy of expreſſion, and a polite addreſs!—It is true, the preſence of the fair ſex may excite diffidence in the young practitioner; but how amiable is diffidence, how charming is modeſty, in oppoſition to thoſe ridiculous airs, which give to impudence an appearance of knowledge, and to pertneſs of ſpeech the reſemblance of elocution!——

WHETHER the preceding obſervations bear any relation to the matters contained in the following ſheets, is of very little conſequence. For cuſtom only renders any thing of the kind expedient.—To cuſtom we ſubmit, as a matter of courſe; but to riſe above this foible, perhaps cuſtom ſhould be treated in her own way.

THE AUTHOR.

UPON the laſt Monday of September, in the eleventh year of the Independence of the United States, in the city of Newport, and State of Rhode-Iſland, &c. was heard, before the Superior Court of Judicature, Court of Aſſize, and General Gaol-Delivery, a certain information, John Trevett againſt John Weeden, for refuſing to receive the paper bills of this State, in payment for meat ſold in market, equivalent to ſilver or gold: And upon the day following the Court delivered the unanimous opinion of the Judges, that the information was not cognizable before them.

THAT this important deciſion may be fully comprehended, it will be neceſſary to recur to the acts of the General Aſſembly, which ſuperinduced the trial.——At the laſt May ſeſſion, an act was made for emitting the ſum of one hundred thouſand pounds, lawful money, in bills, upon land ſecurity, which ſhould paſs in all kinds of buſineſs, and payments of former contracts, upon par with ſilver and gold, eſtimating an ounce of coined ſilver at ſix ſhillings and eightpence. Another act was paſſed in the June following, ſubjecting every perſon who ſhould refuſe the bills in payment for articles offered for ſale, or ſhould make a diſtinction in value between them and ſilver and gold, or who ſhould in any manner attempt to depreciate them, to a penalty of one hundred pounds, lawful money; one moiety to the State, and the other moiety to the informer; to be recovered before either of the Courts of General Seſſions of the Peace, or the Superior Court of Judicature, &c.

EXPERIENCE ſoon evinced the inadequacy of this meaſure to the objects of the Adminiſtration: And at a ſeſſion of the General Aſſembly, ſpecially convened by his Excellency the Governor, upon the third Monday of the following Auguſt, another act was paſſed, in addition to and amendment of that laſt mentioned, wherein it is provided, that the fine of one hundred pounds be varied; and that for the future the fine ſhould not be

leſs than ſix, nor exceed thirty pounds, for the firſt offence: The mode of proſecution and trial was alſo changed, agreeably to the following clauſes, "that the complainant ſhall apply to either of the Judges of the Superior Court of Judicature, &c. within this State, or to either of the Judges of the Inferior Court of Common Pleas within the county where ſuch offence ſhall be committed, and lodge his certain information, which ſhall be iſſued by the Judge in the following form," &c. It is then provided, that the perſon complained of come before a Court to be ſpecially convened by the Judge, in three days; "that the ſaid Court, when ſo convened, ſhall proceed to the trial of ſaid offender, and they are hereby authorized ſo to do, without any jury, by a majority of the Judges preſent, according to the laws of the land, and to make adjudication and determination, and that three members be ſufficient to conſtitute a Court, and that the judgment of the Court, if againſt the offender ſo complained of, be forthwith complied with, or that he ſtand committed to the county gaol, where the ſaid Court may be ſitting, till ſentence be performed, and that the ſaid judgment of ſaid Court ſhall be final and concluſive, and from which there ſhall be no appeal; and in ſaid proceſs no eſſoin, protection, privilege or injunction, ſhall be in anywiſe prayed, granted or allowed."

In conſequence of a ſuppoſed violation of this act, John Trevett exhibited his complaint to the Hon. Paul Mumford, Eſq; Chief Juſtice of the Superior Court, at his chamber, who cauſed a Special Court to be convened: But as the information was given during the term of the Court, it was referred into the term for conſideration and final determination.

John Weeden, being demanded and preſent in Court, made the following anſwer: "That it appears by the act of the General Aſſembly, whereon ſaid information is founded, that the ſaid act hath expired, and hath no force: Alſo, for that by the ſaid act the matters of complaint are made triable before Special Courts, incontroulable by the Supreme Judiciary Court of the State: And alſo for that the Court is not, by ſaid act, authorized and empowered

empowered to impannel a jury to try the facts charged in the information; and so the same is unconstitutional and void."

This answer was enforced, by the author of these strictures, nearly in the following words:

I do not appear, may it please the Honourable Court, upon the present occasion, so much in the line of my profession, as in the character of a citizen, deeply interested in the constitutional laws of a free, sovereign, independent State. And, indeed, whenever the rights of all the citizens appear to be essentially connected with a controverted question, conscious of the dignity of man, we exercise our legal talents only as means conducive to the great end of political society, general happiness. In this arduous, though pleasing pursuit, should my efforts appear too feeble to support the attempt, I shall derive a consolation in reflecting, that the learned and honourable gentleman at my right is with me in the defence.

Well may a profound silence mark the attention of this numerous and respectable assembly! Well may anxiety be displayed in every countenance! Well may the dignity of the Bench condescend to our solicitude for a most candid and serious attention, seeing that from the first settlement of this country until the present moment, a question of such magnitude as that upon which the judgment of the Court is now prayed, hath not been judicially agitated!

Happy am I, may it please your Honours, in making my warmest acknowledgments to the Court, for permitting the information and the plea to be considered by them in their supreme judiciary capacity!——By this indulgent concession, we feel ourselves at liberty to animadvert freely upon the illegality of the new-fangled jurisdictions erected by the General Assembly in the act more immediately in contemplation. The embarraſments naturally accompanying a plea to the jurisdiction, by removing the cause from the Special Court into this Court, are totally removed; and, with them, the painful necessity of considering

your Honours as individually compoſing ſo dangerous a tribunal. The idea of that neceſſity is truly alarming, and we cannot do juſtice to our own feelings, without expreſſing a fervent wiſh that it may hereafter be ever baniſhed from the human breaſt!

In diſcuſſing the ſeveral points ſtated in the plea, we muſt neceſſarily call in queſtion the validity of the legiſlative act upon which the information is grounded. We ſhall attempt moſt clearly to evince, that it is contrary to the fundamental laws of the State, and therefore, as the civilians expreſs it, a mere nullity, and void, *ab initio*. We ſhall treat, with decent firmneſs, upon the nature, limits and extent, of the legiſlative powers; and deduce, from a variety of obſervations and authorities, that the Legiſlature may err, do err; and that this act, if we confine ourſelves to the ſubject matter of it, can only be conſidered as an act of uſurpation; but having been enacted by Legiſlators of whoſe integrity and virtue we have the cleareſt conviction, and of whoſe good intentions we have not a doubt, it will be viewed as an haſty reſolution, inconſiderately adopted, and ſubject to legal reprehenſion.

The parties named in the proceſs are of no farther conſequence; than as the one repreſents the almoſt forlorn hopes of an hitherto diſappointed circle; the other as a victim; the firſt deſtined to the fury of their intemperate zeal and political phrenzy. Why ſhould the abettors of this ſalutary act, as many are pleaſed to call it, retire behind the curtain, in the day of trial, unleſs ſomething within them declares that all is not right? Or, dare they not appear in the character of informers? Why ſhould their artillery be levelled againſt an unfortunate man, who, not three weeks ſince, was an object of charity in the ſtreets of Newport; and now, "* poor penſioner upon the bounties of an hour," is called upon to anſwer, criminally, for refuſing beef at fourpence the pound, when it coſt him ſixpence upon the hoof, although purchaſed of ſome of the moſt influential promoters of the preſent meaſures?——Were they dubious of the event, or did they feel a reluctance in attacking gentlemen of

* Young.

of buſineſs, character and fortune, who daily and openly trample upon this favourite idol?—Were they not acquainted with a Gibbs, and are they not intimately connected with a Cooke?——

INCOMPARABLE was the ſentiment of a fine writer, "* that in a democratical government, the cuſtoms and manners controul the laws:" And whenever an attempt is made to force upon the people a ſyſtem repugnant to their principles, and at which every ſentiment of integrity muſt reluct, the authors themſelves, however ſanguine in their hopes, will ever betray an inſtability in the execution, that generally forebodes diſappointment and chagrin. To your Honours, however, it is ſubmitted to determine, how far the obſervation will apply to the cauſe on trial. The peace, the honour, the ſafety of the State, depend upon; and the fate of unborn millions may be affected by it.

THE firſt point to which we ſolicit the attention of the Hon. Court is, that the act of the Legiſlature, upon which the information is founded, hath expired.

IN the preamble to this act it is ſtated, "that the uſual and ſtated methods and times of holding Courts within this State are impracticable, inexpedient, and inapplicable to the true intent and meaning of the ſaid act (the act inflicting the hundred pounds penalty) and altogether inſufficient to carry into effect the good purpoſes of this Legiſlature, touching the ſame."

THEN follows: "Be it enacted, that the mode of procedure, and the method of law proceſs, againſt any perſon or perſons who ſhall be guilty of a breach of the *aforeſaid* act, &c. ſhall be as followeth." Hence, it is evident, that the principal aim in this act, is ſo to modify and vary the proceſs, as to enforce the ſanctions of the former; leſſening, however, the fine, to render proſecutions more familiar and practicable. Examine the act with the moſt critical exactneſs; there is not a clauſe in it which creates a crime, or defines or qualifies an action, ſo as to infer the idea of criminality. Obſerve therefore a ſubſequent clauſe, which enacts,

* Monteſquieu.

enacts, " that the legal mode of carrying the *afore-recited* act into execution ſhall be in force fully and completely, for every purpoſe therein mentioned and contained, until all offences againſt which have been committed and complained of, and which may be committed and complained of, until the expiration of ten days after the riſing of this Aſſembly, may be fully heard, tried and determined; any thing in this act to the contrary in anywiſe notwithſtanding." What then hath become of the *legal mode*, pointed out in the act, ſince the expiration of the *ten days* therein mentioned? What other legal mode, than that in queſtion, is taken notice of? That is the only antecedent to the limiting clauſe; at leaſt, it is the laſt antecedent; and ſo grammatically, as well as legally, is intended to continue in force the ſaid ſpace of *ten days*.

" THE legal mode" "ſhall be in force" "until the expiration of ten days;" conſequently, at the expiration of ten days there was an end of it.

* FOR penal ſtatutes are to be conſtrued ſtrictly; not only with regard to the crime and the penalty, but alſo with reſpect to the proceſs; more eſpecially when the manner of trial is repugnant to the common law.

I AM ſenſible that ſtatutes, made *pro publico bono* (not *malo*, as in the preſent inſtance) claim a liberal conſtruction. Of that kind may be deemed, in legal contemplation, the emitting act, whereby it may be ſuppoſed that the means of commerce and other buſineſs are enlarged: But this act and the former penal act becoming one, are altogether penal. They are not directed to the public good; nor are they ſo formed, as to be entitled to liberal conſtruction.

SHOULD it be objected, that this conſtruction would manifeſtly oppoſe and fruſtrate the general intent of the Legiſlature; I anſwer, the Courts of law will endeavour to eſtabliſh the actual meaning of the Legiſlature, if not oppoſed by a plain, legal conſtruction:

* 1 Blac. Com. 88.

ſtruction : But as they are ſworn to judge according to law, they cannot depart from this rule of deciſion.

But, may it pleaſe your Honours, we do not place our principal reliance upon this objection, although in legal propriety we might ſafely meet the conſequences. The whole frame of the act is ſo replete with blunders, contradictions and abſurdities, that not a trace of law-learning can be diſcovered in it. And to the honour of thoſe of the profeſſional gentlemen, who prefer the good of their country to the paltry gains of buſineſs, they had not any thing to do with it ; nor any one elſe who underſtood, or, if he underſtood, duly conſidered what he was about.

We now proceed to the ſecond point ſtated in the plea, " that by the act of the Legiſlature ſpecial trials are inſtituted, incontroulable by the Supreme Judiciary Court of the State."

There are, in all free governments, three diſtinct ſources of power, the legiſlative, the judiciary and executive. The judiciary power is more or leſs perfect, as the formation of the Courts of law tends to produce certainty and uniformity in legal determinations. And indeed without certainty and uniformity in the judicial tribunals, the beſt poſſible ſyſtem of laws will prove entirely inadequate to the ſecurity of the people. For law itſelf is but a rule of action ; and conſequently its very exiſtence is deſtroyed, when contradictory deciſions are admitted upon the ſame point. From hence may clearly be inferred the neceſſity of a Supreme Judiciary Court, to whoſe judgments, as the only concluſive evidence in law queſtions, all ſubordinate juriſdictions muſt conform. Such is the Court before which I now have the honour of appearing. Into the nature and extent of whoſe juriſdiction permit me, with humble deference, to enquire.

In the charter, granted by King Charles the Second, it is granted, to the Governor and Company, when convened in their legiſlative capacity, " to appoint, order and direct, erect and ſettle, ſuch places and Courts of Juriſdiction, for the hearing and determining of all actions, matters and things, within the ſaid Colony

Colony and Plantation, and which ſhall be in diſpute, and depending there, as they ſhall think fit; and alſo to diſtinguiſh and ſet forth the ſeveral names and titles, duties, powers and limits, of each Court, office and officer, ſuperior and inferior." In conſequence whereof, the General Aſſembly, in the year 1729, eſtabliſhed this Court in its preſent form "‡ a Superior Court of Judicature, Court of Aſſize, and General Gaol-Delivery, over the whole Colony, for the regular hearing and trying all pleas, real, perſonal and mixed, and all pleas of the Crown." That they ſhall have "the ſame power and authority, in all matters and things in this Colony, as the Court of Common Pleas, King's Bench, or Exchequer, have, or ought to have, in that part of Great-Britain heretofore called England, and be empowered to give judgment in all matters and things before them cognizable, and to award execution thereon."

THIS eſtabliſhment hath never been varied, nor the juriſdiction of the Court diminiſhed. The powers annexed to it were derived from the charter, from our original conſtitution; and by an uninterrupted exerciſe have become matters of common right. In point of antiquity, we find them exiſting, in full vigour, in the earlieſt periods of which we have any regular traces of the Engliſh conſtitution. It is unneceſſary however to look any farther back than to the Norman reigns, when juſtice was exerciſed in one Court, called the "* *aula regis*;" "out of this Court the Courts of Common Pleas and Exchequer ſeem to have been derived, ſome time before the making the ſtatute of Magna Charta; the former of which Courts properly determines pleas merely civil, and the latter thoſe relating to the revenue of the Crown. And after the erection of theſe Courts, the Supreme Court ſeems by degrees to have obtained the name of the Court of King's Bench, and hath always retained a ſupreme juriſdiction in all criminal matters."

THE extent of theſe powers is well defined by the author laſt referred to, as well as by moſt of the writers upon the ſubject. "† There is no doubt but that this Court, being the higheſt Court of

‡ State laws, 51. * 2 Hawk. P. C. 6. † 2 Hawk. P. C. 8.

of common law, hath not only power to reverſe erroneous judgments, given by Inferior Courts, but alſo to puniſh all inferior Magiſtrates, and all officers of juſtice, for all wilful and corrupt abuſes of their authority."

It commands, prohibits and reſtrains, all inferior juriſdictions, whenever they attempt to exceed their authority, or refuſe to exerciſe it for the public good, or upon the application of individuals. There are many inſtances, I muſt confeſs, in which no appeal is allowed from other Courts to this Court; and in ſuch caſes it will not interpoſe its ſupreme controul, unleſs the other Courts exceed their authority, or otherwiſe, as before mentioned.

Let us illuſtrate the ſubject by reflecting, for a moment, upon the eſtabliſhment of our Courts of General Seſſions of the Peace. They are five in number, correſponding to the five counties of the State. They have cognizance of all crimes not capital, ariſing within their reſpective diſtricts, and their juriſdictions are perfectly equal. Suppoſe them exerciſing their legal judgments upon the ſame law; and that this law is of a complicated nature, admitting of different conſtructions, both in the definition of the crime, and the mode of puniſhment: May we not, muſt we not, conclude, that the ſame law would have different operations in the different counties?—Hence ariſes the neceſſity of a ſupreme controul, of a common ſtandard, to which the opinions of theſe five Judicatories ſhall be conformable. The citizens are entitled not only to liberty, ariſing from the ſecurity which the laws afford, but they are equally entitled, and entitled to equal liberty. They muſt, therefore, they will apply to one tribunal, as to a focal point, where the knowledge of the law is concentered, and from whence its voice will be heard with irreſiſtible conviction, confirming the principles of univerſal equality.

Had the cognizance of informations been confined to the Courts of Seſſions only, the evil might have been remedied, without appeal, by writs of Certiorari, Prohibition, Mandamus and Procedendo; but by an unheard of arrangement in the ſpecial

juriſdictions,

jurisdictions, the Judges of this Court are precisely upon a level with those of the Sessions. Their jurisdiction is concurrent, cumulative and equal. Consequently there would not be a propriety in applying to this Court, in their supreme judicial capaciety, to correct the errors and restrain the excesses that might arise from oppressive determinations. For in the second, they might counteract their first deliberations, or refuse to grant redress: But by their first decisions, as a Special Court, a legal prejudice would naturally be formed in the minds of the Judges individually, which might totally obstruct the avenues to justice. The pride of opinion is more or less prevalent in all men, however exalted their stations; and however conformably the intention may be to the principles of rectitude, the judgment will be biassed by pre-existing opinions.

MAKING every possible concession for the sake of the argument, the Supreme Judiciary Court could only correct the errors of its own Judges, determining in the Special Court; and therefore the extravagancies that might accompany the proceedings of the other five Courts, could not, in any possible case, be reprehended.

May it please your Honours,

As all the glory of the solar system is reflected from yonder resulgent luminary, so the irradiations of the inferior jurisdictions are derived from the resplendent controul of this *primum mobile* in the civil administration. Under its genial influence, therefore, we beg liberty to consider the last point submitted to the judgment of the Court, " that by the act of the Legislature the Court is not authorized or empowered to impannel a jury for trying the facts complained of in the information."

THE proposition cannot be controverted: The expressions in the act, " that the majority of the Judges present shall proceed to hear, &c. without any jury," do not require a comment.

SHOULD it be objected that this clause of the act only empowers the Judges to try the fact, when the parties will agree to wave the

the trial by jury, it will be ſufficient to anſwer, that the General Aſſembly intended directly the contrary. It is well known by all preſent, that on one day this clauſe was rejected, but on the day following (in conſequence of a nocturnal *imperium in imperio*, or convention of part of the members) a motion was made for receding, and they did recede accordingly. The general tenor of the act was ſo repugnant to the honeſt feelings of the people, when excited by ſober reflection, that the junto out of doors, and poſſibly ſome leading men within, were apprehenſive that convictions would not take place in the uſual mode of trial. They aimed therefore at a ſummary proceſs, flattering themſelves that the Judges, being elected by the Legiſlators, would blindly ſubmit to their ſovereign will and pleaſure. But, happy for the State, our Courts in general are not intimidated by the dread, nor influenced by the debauch of power !——

THIS part of the ſubject, and which is by far the moſt important, will require a more ample diſcuſſion than the preceding. I muſt therefore beg the attention of the Honourable Court to the following conſiderations: That the trial by jury is a fundamental right, a part of our legal conſtitution: That the Legiſlature cannot deprive the citizens of this right: And that your Honours can, and we truſt will, ſo determine.

" † BY the Great Charter of Liberties, which was obtained ſword in hand from King John; and afterwards, with ſome alterations, confirmed in Parliament by King Henry the Third, his ſon, which charter contained very few new grants; but, as Sir Edward Coke obſerves, was for the moſt part declaratory of the principal grounds of the fundamental laws of England. Afterwards, by the ſtatute called *Confirmatio Cartarum*, whereby the Great Charter is directed to be allowed as the common law, all judgments contrary to it are declared void; copies of it are ordered to be ſent to all cathedral churches, and read twice a year to the people; and ſentence of excommunication is directed to be conſtantly denounced againſt all thoſe that by word, deed or counſel, act contrary thereto, or in any degree infringe it.

† 1 Blac. Com. 127, 128.

Next by a multitude of ſubſequent corroborating ſtatutes (Sir Edward Coke, I think, reckons thirty-two) from the Firſt Edward to Henry the Fourth. Then, after a long interval, by the Petition of Right; which was a parliamentary declaration of the liberties of the people, aſſented to by King Charles the Firſt in the beginning of his reign. Which was cloſely followed by the ſtill more ample conceſſions made by that unhappy Prince to his Parliament, before the fatal rupture between them; and by the many ſalutary laws, particularly the *Habeas Corpus* act, paſſed under Charles the Second. To theſe ſucceeded the Bill of Rights, or declaration delivered by the Lords and Commons to the Prince and Princeſs of Orange, February 13, 1688; and afterwards enacted in Parliament, when they became King and Queen: Which declaration concludes in theſe remarkable words: "And they do claim, demand, and inſiſt, upon all and ſingular the premiſes, as their undoubted rights and liberties." And the act of Parliament itſelf recognizes "all and ſingular the rights and liberties, aſſerted and claimed in the ſaid declaration, to be the true, ancient and indubitable rights of the people of this kingdom." Laſtly, theſe liberties were again aſſerted, at the commencement of the preſent century, in the act of ſettlement, whereby the Crown was limited to his preſent Majeſty's illuſtrious houſe, and ſome new proviſions were added at the ſame fortunate æra, for better ſecuring our religion, laws, and liberties; which the ſtatute declares to be "the birthright of the people of England;" according to the ancient doctrine of the common law." The ſame elegant writer, who appears to poſſeſs the higheſt degree of information in legal hiſtory, obſerves, when ſpeaking of this palladium of liberty *, that "it is a trial that hath been uſed time out of mind in this nation, and ſeems to have been coeval with the firſt civil government thereof. Some authors have endeavoured to trace the original of juries up as high as the Britons themſelves, the firſt inhabitants of our iſland; but certain it is, that they were in uſe among the earlieſt Saxon Colonies, their inſtitution being aſcribed by Biſhop Nicholſon to Woden himſelf, their great Legiſlator and Captain. Hence it is, that we may find traces of juries in the laws of all thoſe nations.

* 3 Blac. Com. 349, 350.

nations which adopted the feodal ſyſtem, as in Germany, France, and Italy; who had all of them a tribunal compoſed of twelve good men and true, "*boni homines*," uſually the vaſſals or tenants of the Lord, being equals or peers of the parties litigant: And, as the Lord's vaſſals, judged each other in the Lord's Courts; ſo the King's vaſſals, or the Lords themſelves, judged each other in the King's Court. In England we find actual mention of them ſo early as the laws of King Ethelred, and that not as a new invention. Stiernhook aſcribes the invention of the jury, which in the Teutonic language is denominated *nembda*, to Regner, King of Sweden and Denmark, who was cotemporary with our King Egbert: Juſt as we are apt to impute the invention of this, and ſome other pieces of juridical polity, to the ſuperior genius of Alfred the Great; to whom, on account of his having done much, it is uſual to attribute every thing: And as the tradition of ancient Greece placed to the account of their own Hercules whatever atchievement was performed ſuperior to the ordinary proweſs of mankind. Whereas the truth ſeems to be, that this tribunal was univerſally eſtabliſhed among all the northern nations, and ſo interwoven in their very conſtitution, that the earlieſt accounts of the one give us alſo ſome traces of the other. Its eſtabliſhment however and uſe, in this iſland, of what date ſoever it be, though for a time greatly impaired and ſhaken by the introduction of the Norman trial by battle, was always ſo highly eſteemed and valued by the people, that no conqueſt, no change of government, could ever prevail to aboliſh it. In Magna Charta it is more than once inſiſted on as the principal bulwark of our liberties: But eſpecially, by cap. 29, that no freeman ſhall be hurt, in either his perſon or property, "*niſi per legale judicium parium ſuorum vel per legem terræ.*" A privilege which is couched in almoſt the ſame words with that of the Emperor Conrad, two hundred years before: "*Nemo beneficium ſuum perdat, niſi ſecundum conſuetudinem anteceſſorum noſtrorum et per judicium parium ſuorum.*" And it was ever eſteemed, in all countries, a privilege of the higheſt and moſt beneficial nature."

FROM theſe paſſages in Judge Blackſtone's Commentaries, from the variety of authorities to which he refers, and from many others

others of the greateſt reputation, it moſt clearly appears, that the trial by jury was ever eſteemed a firſt, a fundamental, and a moſt eſſential principle, in the Engliſh conſtitution. From England this ſacred right was transferred to this country, and hath continued, through all the changes in our government, the firm baſis of our liberty, the faireſt inheritance tranſmitted by our anceſtors!

THE ſettlers in this country, from whom we are deſcended, were Engliſhmen: They gloried in their rights as ſuch: But being perſecuted in matters of religion, over which no earthly tribunal can have the controul, they bravely determined to quit their native ſoil, to bid a final adieu to the alluring charms of their ſituation, and commit their future exiſtence to that Almighty Power, whoſe authority they dared not to infringe, but in whoſe protection they could ſafely confide. They tempted the foaming billows, they braved, they conquered the boiſterous Atlantic, and reſted in an howling wilderneſs, amidſt the horrid caverns of the untamed beaſts, and the more dangerous haunts of ſavage men! They retained their virtue, their religion, and their inviolable attachment to the conſtitutional rights of their former country. They did not withdraw or wiſh to withdraw themſelves from their allegiance to the Crown, but emigrated under a ſolemn aſſurance of receiving protection, ſo far as their ſituation might require, and other circumſtances render practicable.

THE laws of the realm, being the birthright of all the ſubjects, followed theſe pious adventurers to their new habitations, where, increaſing in numbers, amidſt innumerable difficulties, they were formed into Colonies by royal Charters, in nature of ſolemn compacts, confirming and enlarging their privileges.

IN the Charter granted to our forefathers, the following paragraph claims our particular attention: "That all and every the ſubjects of us, our heirs and ſucceſſors, which are already planted and ſettled within our ſaid Colony of Providence Plantations, which ſhall hereafter go to inhabit within the ſaid Colony, and all and every of their children, which have been born there, or

on

on the ſea going thither, or returning from thence, ſhall have and enjoy all liberties and immunities of free and natural ſubjects, within any of the dominions of us, our heirs or ſucceſſors, to all intents, conſtructions and purpoſes whatſoever, as if they, and every of them, were born within the realm of England."

THIS conceſſion was declaratory of, and fully confirmed to the people the Magna Charta, and other fundamental laws of England. And accordingly, in the very firſt meeting of the General Aſſembly, after receiving the charter, in the year one thouſand ſix hundred and ſixty-three, they made and paſſed an act, " declaring the rights and privileges of his Majeſty's ſubjects within this Colony," whereby it is enacted, " * that no freeman ſhall be taken or impriſoned, or be deprived of his freehold or liberty, or free cuſtoms, or be outlawed, or exiled, or otherwiſe deſtroyed, nor ſhall be paſſed upon, judged or condemned, but by the lawful judgment of his peers, or by the laws of this Colony: And that no man, of what eſtate or condition ſoever, ſhall be put out of his lands and tenements, nor taken, nor impriſoned, nor diſinherited, nor baniſhed, nor any ways deſtroyed, nor moleſted, without for it being brought to anſwer by due courſe of law. And that all rights and privileges, granted to this Colony by his Majeſty's Charter, be entirely kept and preſerved to all his Majeſty's ſubjects, reſiding in or belonging to the ſame."

THIS act, may it pleaſe the Honourable Court, was not creative of a new law, but declaratory of the rights of all the people, as derived through the Charter from their progenitors, time out of mind. It exhibited the moſt valuable part of their political conſtitution, and formed a ſacred ſtipulation that it ſhould never be violated. It would be a pleaſing, and perhaps an uſeful employment, to trace and point out the numerous inſtances wherein the General Aſſembly have re-aſſerted theſe ſolemn rights; but time will not admit of a minute detail. I cannot however be entirely ſilent upon this head.

AT

* State Laws, 226.

At their September ſeſſion, in the year one thouſand ſeven hundred and ſixty-five, "the General Aſſembly taking into the moſt ſerious conſideration an act, paſſed by the Britiſh Parliament at their laſt ſeſſion, for levying ſtamp-duties, and other internal duties, in North-America, reſolved,

"* That the firſt adventurers, ſettlers of this his Majeſty's Colony and Dominion of Rhode-Iſland and Providence Plantations, brought with them, and tranſmitted to their poſterity, and all other his Majeſty's ſubjects, ſince inhabiting in this his Majeſty's Colony, all the privileges and immunities that have at any time been held, enjoyed and poſſeſſed, by the people of Great-Britain."

Afterwards, at October ſeſſion, in the year one thouſand ſeven hundred and ſixty-nine, they unanimouſly paſſed the following reſolution: "† That all trials for treaſon, miſpriſion of treaſon, or for any felony or crime whatſoever, committed and done in his Majeſty's ſaid Colony and Dominion, by any perſon or perſons reſiding therein, ought of right to be had and conducted in and before his Majeſty's Courts held within the ſaid Colony, according to the fixed and known courſe of proceeding; and that the ſeizing any perſon or perſons, reſiding in this Colony, ſuſpected of any crime whatſoever, committed therein, and ſending ſuch perſon or perſons to places beyond the ſea to be tried, is highly derogatory of the rights of Britiſh ſubjects; as thereby the ineſtimable privilege of being tried by a jury from the vicinage, as well as the liberty of ſummoning and producing witneſſes on ſuch trial, will be taken away from the party accuſed."

The attempts of the Britiſh Parliament to deprive us of this mode of trial were among the principal cauſes that united the Colonies in a defenſive war, and finally effected the glorious revolution. This is evident from the Declaration of Rights made by the firſt Congreſs, in October, in the year one thouſand ſeven hundred and ſeventy-four: The preamble ſtates, "that the inhabitants of the Engliſh Colonies, in North-America, by the

* State Laws, 227. † State Laws, new digeſt.

the immutable laws of nature, the principles of the Engliſh conſtitution, and the ſeveral charters and compacts, have the following rights," the fifth of which is,

"THAT the reſpective Colonies are entitled to the common law of England, and more eſpecially to the great and ineſtimable privilege of being tried by their peers of the vicinage, according to the courſe of that law."

AT the ſame time they enumerated the ſeveral acts of the Britiſh Parliament to which they declared they could not ſubmit, particularly "12 Geo. 3, chap. 24, intituled, "an act for the better ſecuring his Majeſty's dock-yards, magazines, ſhips, ammunition and ſtores," which declares a new offence in America, and deprives the American ſubject of a conſtitutional trial by jury of the vicinage, by authorizing the trial of any perſon charged with the committing any offence deſcribed in the act out of the realm, to be indicted and tried for the ſame in any ſhire or county within the realm."

IN purſuance of the ſame principle, upon the ever memorable fourth of July, in the year one thouſand ſeven hundred and ſeventy-ſix, when the rights of the United States were exhibited in a new blaze of glory! When, to ſupport them, the fathers of their country, "with a firm reliance on the protection of Divine Providence, mutually pledged to each other their lives, their fortunes, and their ſacred honour!" When they ſubmitted "to a candid world" the catalogue of their complaints againſt the King of Great-Britain, they charged him with "depriving us, in many inſtances, of the benefits of trial by jury *."

HERE let us pauſe!

IF the firſt act of the Engliſh Parliament now upon record, containing the great charter of the privileges of the ſubjects:—If the exerciſe of thoſe privileges for ages:—If the ſettlement of a new world to preſerve them:—If the firſt ſolemn compact of the people

 of

* Art. Confederation.

of this State:—If the ſacred declarations of the Legiſlature at different periods, and upon the moſt important occaſions:—If the ſolemn appeal to heaven of the United States:—In ſhort, if the torrents of blood that have been ſhed in defence of our invaded rights, are proofs, then have we triumphed in the cauſe of humanity, then have we ſhewn that the trial by jury is the birthright of the people!

ASTONISHED am I, may it pleaſe the Honourable Court, that a doubt ſhould have ariſen in the mind of any, reſpecting the legal conſtruction of our Magna Charta, our declaration of rights! Some of our warmeſt politicians, whoſe heads are undoubtedly wrong, and it is greatly to be feared their hearts are not right, have boldly aſſerted, that the clauſe which declares "that no freeman, &c. ſhall be tried, &c. but by the lawful judgment of his peers, or by the laws of the Colony," &c. clearly authorizes any other mode of trial than that by jury, ſhould the Legiſlature frame a law for that purpoſe. That their act would become the law of the land, and ſo the ſpecial juriſdictions are perfectly conformable to the letter and ſpirit of our conſtitution.

Is it poſſible that theſe pretenders to the knowledge of law ſhould be ſerious, when they avow ſo dangerous an opinion?—If they are, let them be informed that they contradict the wiſdom and the practice of ages. That whenever a ſtatute makes mention of "the law of the land;" it refers either to a particular pre-exiſting law, to the ſyſtem of laws in general, or to the mode of legal proceſs.

LORD Coke, in his readings upon the ſtatute, hath fully demonſtrated that the clauſe "or by the law of the land," regards the proceſs only. That the particle *or* is to be conſtrued conjunctively. And ſo the ſentence will read, "by the lawful judgment of his peers, by, or according to, the law of the land," or, "and by the law of the land:" That is to ſay, by bill, plaint, information, or in any other legal manner.

THERE are many inſtances in the books of a ſimilar conſtruction. I ſhall produce only one, * the caſe of Barker againſt Sureties.

"ON

* 2 Strange, 1175.

"ON a ſpecial verdict in ejectment, the queſtion turned upon theſe words in a will, viz. I give the ſaid premiſes to my grandſon, his heirs and aſſigns; but in caſe he dies before he attains the age of twenty-one years, *or* marriage, *and* without iſſue, then, and in ſuch caſe, he deviſed the ſame to the defendant. The fact was, the grandſon attained twenty-one, and died, having never been married. And it was inſiſted, that the attaining twenty-one was a performance of the condition, and veſted the eſtate abſolutely in the grandſon, under whom the leſſor of the plaintiff claimed. And judgment was accordingly given in the county Palatine of Durham, whereof error was brought in *banco regis*.

"AND, after ſeveral arguments, the Court affirmed the judgment, upon the authority of Price againſt Hunt in Pollexf. 645, where the word *or* was conſtrued conjunctively. And they ſaid they would read this without the word *or*, as if it run, "and if he dies before twenty-one, unmarried and without iſſue;" which he did not do, for one of the circumſtances failed. And all put together are but in the nature of one contingency; and it was conſiderable, that this was not a condition precedent, but to deſtroy an eſtate deviſed by the former words in fee."

* I RECOLLECT in an excellent treatiſe of law in general, ſubjoined to the memoirs of the Houſe of Brandenburgh, written by that great legiſlator, the illuſtrious Frederick, when ſpeaking of the laws of England, he quotes the heads of Magna Charta; and when ſpeaking of this part in particular, his words are, "that nobody ſhall be impriſoned, or deprived either of life or eſtate, without being judged by his peers, and according to the laws of the kingdom."

THE framers of this act however, and the ſupporters of the preſent meaſure, are not without a precedent; and ſo cannot engroſs all the honour to themſelves. And leſt they ſhould endeavour to palm themſelves upon the deluded as originals, we will produce them an inſtance from the reign of Henry VII. as ſimilar to the preſent, as the image in the mirror is to the ſubſtance.

* P. 316.

THAT great oracle of the law, Lord Coke, records it in the following manner: "* Againſt this ancient and fundamental law, (trial by jury) and in the face thereof, I find an act of Parliament made, that as well Juſtices of Aſſize, as Juſtices of Peace (without any finding or preſentment of twelve men) upon a bare information for the King before them made, ſhould have full power and authority, by their diſcretion, to hear and determine all offences and contempts, committed or done by any perſon or perſons, againſt the form, ordinance and effect, of any ſtatute made and not repealed, &c.—By colour of which act, ſhaking this fundamental law, it is not credible what horrid oppreſſion and exactions, to the undoing of infinite numbers of people, were committed by Sir Richard Empſon and Edmund Dudley, being Juſtices of Peace through England. And upon this unjuſt and injurious act (as commonly in like caſes it falleth out) a new office was erected, and they made maſters of the King's forfeitures. But at the Parliament holden in the firſt year of Henry VIII. this act of the eleventh of Henry VII. is recited and made void. For that by force of ſaid act it was manifeſtly known, that many ſiniſter and crafty, feigned and forged, informations had been purſued againſt divers of the King's ſubjects, to their great damage and wrongful vexation. And the ill ſucceſs hereof, and the fearful end of thoſe two oppreſſors, ſhould deter others from doing the like, and ſhould admoniſh Parliaments, that inſtead of this precious trial by jury, they bring not in abſolute and partial trials by diſcretion."

WELL may the countenances of certain gentlemen be changed.——Well may their trembling limbs denote the perturbation of their minds.——Well may "their hearts quake within them."——For all others, who, like Empſon and Dudley, violate the conſtitutional laws of their country, deſerve, and, if they perſiſt in their career, will probably meet their fate!

BUT we ſhall proceed, with the permiſſion of your Honours, to enquire, whether the Legiſlature can deprive the citizens of their conſtitutional right, the trial by jury.

WHEN

* 2 Inſt. 50, 51.

When mankind entered into a ſtate of civil ſociety, they ſurrendered a part of their natural rights into the hands of the community, that they might enjoy the remainder with greater ſecurity. The aggregate of this ſurrender forms the power of government; the firſt and greateſt exerciſe of which conſtitutes legiſlation, or the power of making laws. Conſequently the Legiſlature cannot intermeddle with the retained rights of the people.

In the infant ſtate of ſociety, when the community conſiſted of but few members, when their wants and deſires were circumſcribed within narrow bounds, the power of making laws was exerciſed by all the people aſſembled for that purpoſe, or at leaſt by the heads of families, who derived from nature a temporary authority over their offspring. Whatever was neceſſary for the good or ſafety of the whole was agreed to, and each individual engaged to abide by the opinion of the majority. Such was the ſituation of our anceſtors, when they firſt ſettled in this country.

As ſociety increaſed in numbers and wealth, as their ſettlements were extended, and their views enlarged, it became neceſſary to delegate the powers of legiſlation, and veſt them in one perſon, in a few, or in many, as the community deemed moſt conducive to their common advantage. Such was the ſituation of our anceſtors, when they petitioned to King Charles II. to be incorporated into a company, with the power of governing themſelves. Firſt by making of laws in a General Aſſembly, to be convened twice in each year, compoſed of magiſtrates elected annually by the freemen at large, and of deputies choſen ſemi-annually from the reſpective towns as their repreſentatives. And ſecondly, by carrying thoſe laws into execution, by judiciary eſtabliſhments.

The powers of legiſlation, in every poſſible inſtance, are derived from the people at large, are altogether fiduciary, and ſubordinate to the aſſociation by which they are formed. Were there no bounds to limit and circumſcribe the Legiſlature; were they to be actuated by their own will, independent of the fundamental rules of the community, the government would be a

government

government of men, and not of laws. And whenever the legiſlators depart from their original engagements, and attempt to make laws derogatory to the general principles they were bound to ſupport, they become tyrants. " * For ſince it can never be ſuppoſed, as Mr. Locke well obſerves, to be the will of the ſociety, that the Legiſlative ſhould have a power to deſtroy that which every one deſigns to ſecure, by entering into ſociety, and for which the people ſubmitted themſelves to legiſlators of their own making; whenever the legiſlators endeavour to take away and deſtroy the property of the people, or to reduce them to ſlavery under arbitrary power, they put themſelves into a ſtate of war with the people." And again ‡, " when the legiſlators act contrary to the end for which they were conſtituted, thoſe who are guilty, are guilty of rebellion."

THE powers of our Legiſlature are ſo clearly defined in the Charter, which is concluſive evidence of the compact of the people, as well as of the royal intention, that a recurrence to them will greatly aſſiſt us in the preſent queſtion. Let us attend therefore to the following paſſage: " And that they (the General Aſſembly) or the greateſt part of them then preſent, whereof the Governor or Deputy-Governor, and ſix of the Aſſiſtants, at leaſt to be ſeven, ſhall have, and have hereby, given and granted unto them, full power and authority, from time to time, and at all times hereafter, to make, ordain, conſtitute, or repeal ſuch laws, ſtatutes, orders and ordinances, forms and ceremonies of government and magiſtracy, as to them ſhall ſeem meet, for the good and welfare of the ſaid Company, and for the government and ordering the lands and hereditaments herein after mentioned to be granted, and of the people that do, or at any time hereafter ſhall, inhabit or be within the ſame; ſo as ſuch laws, ordinances and conſtitutions, ſo made, be not contrary and repugnant unto, but, as near as may be, agreeable to the laws of this our realm of England, conſidering the nature and conſtitution of the place and people there."

THIS

* Locke on Gov. 392. ‡ P. 398.

THIS grant, which was obtained in conſequence of an aſſociation of all the people for that purpoſe, expreſsly limits the legiſlative powers; and by invariable cuſtom and uſage they are ſtill ſo confined, that they cannot make any laws repugnant to the general ſyſtem of laws which governed the realm of England at the time of the grant. The revolution hath made no change in this reſpect, ſo as to abridge the people of the means of ſecuring their lives, liberty and property: To preſerve which they have ever conſidered the trial by jury the moſt effectual.

THERE are certain general principles that are equally binding in all governments, more eſpecially thoſe which define the nature and extent of legiſlation. I do not recollect of having ever obſerved them ſo clearly and elegantly deſcribed, as in a treatiſe written by M. de Vattel, upon the laws of nations and of nature. I ſhall introduce him, therefore, as he is tranſlated, in his own words.

"* IN the act of aſſociation, in virtue of which a multitude of men form together a ſtate or nation, each individual has entered into engagements with all, to procure the common welfare; and all have entered into engagements with each individual to facilitate for him the means of ſupplying his neceſſities, and to protect and defend him. It is manifeſt that theſe reciprocal engagements can no otherwiſe be fulfilled, than by maintaining the political aſſociation. The entire nation is then obliged to maintain that aſſociation; and as in its duration the preſervation of the nation conſiſts, it follows from thence that every nation is obliged to perform the duty of ſelf-preſervation."

"‖ THE conſtitution and its laws are the baſis of the public tranquility, the firmeſt ſupport of the public authority, and pledge of the liberty of the citizens. But this conſtitution is a vain phantom, and the beſt laws are uſeleſs, if they are not religiouſly obſerved. The nation ought then to watch very attentively, in order to render them equally reſpected by thoſe who govern, and by the people deſtined to obey. To attack the conſtitution

* Vattel, P. 12. ‖ Vattel, P. 37.

conſtitution of the State, and to violate its laws, is a capital crime againſt ſociety; and if thoſe guilty of it are inveſted with authority, they add to this crime a perfidious abuſe of the power with which they are intruſted. The nation ought conſtantly to ſuppreſs theſe abuſes with its utmoſt vigour and vigilance, as the importance of the caſe requires. It is very uncommon to ſee the laws and conſtitution of a State openly and boldly oppoſed: It is againſt ſilent and ſlow attacks that a nation ought to be particularly on its guard."

BUT here, the attack is open and bold;——it comes with violence;——it moves with huge gigantic ſtrides, and threatens ſlavery or death!——

"* A VERY important queſtion here preſents itſelf. It eſſentially belongs to the ſociety to make laws, both in relation to the manner in which it deſires to be governed, and to the conduct of the citizens. This is called the legiſlative power. The nation may entruſt the exerciſe of it to the Prince, or to an Aſſembly; or to that Aſſembly and the Prince jointly; who have then a right of making new, and abrogating old laws. It is here demanded, whether, if their power extends ſo far as to the fundamental laws, they may change the conſtitution of the State? The principles we have laid down lead us to decide this point with certainty, that the authority of theſe legiſlators does not extend ſo far; and that they ought to conſider the fundamental laws as ſacred, if the nation has not, in very expreſs terms, given them the power to change them. For the conſtitution of the State ought to be fixed; and ſince that was firſt eſtabliſhed by the nation, which afterwards truſted certain perſons with the legiſlative power, the fundamental laws are excepted from their commiſſion. It appears that the ſociety had only reſolved to make proviſion for the State's being always furniſhed with laws ſuited to particular conjunctures; and gave the Legiſlature, for that purpoſe, the power of abrogating the ancient, civil and political laws that were not fundamental, and of making new ones; but nothing leads us to think that it was willing to ſubmit the conſtitution

* Vattel, P. 13.

ſtitution itſelf to their pleaſure. In ſhort, theſe legiſlators derive their power from the conſtitution; how then can they change it, without deſtroying the foundation of their authority?"

HAVE the citizens of this State ever entruſted their legiſlators with the power of altering their conſtitution?—If they have, when and where was the ſolemn meeting of all the people for that purpoſe?—By what public inſtrument have they declared it, or in what part of their conduct have they betrayed ſuch extravagance and folly?——For what have they contended through a long, painful and bloody war, but to ſecure inviolate, and tranſmit unſullied to poſterity, the ineſtimable privileges they received from their forefathers?—Will they ſuffer the glorious price of all their toils to be wreſted from them, and loſt forever, by the men of their own creating?—They who have ſnatched their liberty from the jaws of the Britiſh lion, amidſt the thunders of contending nations, will they baſely ſurrender it to the Adminiſtration of a year?——As ſoon may the great Michael kick the beam, and Lucifer riot in the ſpoils of angels!——

CONSTITUTION!——we have none:——Who dares to ſay that?—None but a Britiſh emiſſary, or a traitor to his country.——Are there any ſuch amongſt us?——The language hath been heard, and God forbid that they ſhould continue!

IF we have not a conſtitution, by what authority doth our General Aſſembly convene to make laws, and levy taxes? Their appointment by the freemen of the towns, excluding the idea of a pre-exiſting ſocial compact, cannot ſeparately give them power to make laws compulſory upon the other towns. They could only meet, in that caſe, to form a ſocial compact between the people of the towns. But they do meet by the appointment of their reſpective towns, at ſuch times and places, and in ſuch numbers, as they have been accuſtomed to do from the beginning. When met, they make laws and levy taxes, and their conſtituents obey thoſe laws, and pay their taxes. Conſequently they meet, deliberate and enact, in virtue of a conſtitution, which, if they attempt to deſtroy, or in any manner infringe, they violate the

truſt

truſt repoſed in them, and ſo their acts are not to be conſidered as laws, or binding upon the people.

But as the Legiſlative is the ſupreme power in government, who is to judge whether they have violated the conſtitutional rights of the people?—I anſwer, their ſupremacy (conſiſting in the power of making laws, agreeably to their appointment) is derived from the conſtitution, is ſubordinate to it, and therefore, whenever they attempt to enſlave the people, and carry their attempts into execution, the people themſelves will judge, as the only reſort in the laſt ſtages of oppreſſion. But when they proceed no farther than merely to enact what they may call laws, and refer thoſe to the Judiciary Courts for determination, then, (in diſcharge of the great truſt repoſed in them, and to prevent the horrors of a civil war, as in the preſent caſe) the Judges can, and we truſt your Honours will, decide upon them.——

In deſpotic countries, where the ſovereign mandate iſſues from the throne ſurrounded by ſervile flatterers, ſycophants and knaves, the Judge hath nothing more to do than execute. His office is altogether miniſterial, being the paſſive tool of that lawleſs domination by which he was appointed. Properly ſpeaking, the judiciary power cannot exiſt where political freedom is baniſhed from the adminiſtration. For without a ſyſtem of laws, defining and protecting the rights of the people, there can be no fixed principles or rules of deciſion. Hence it is, that wherever the diſtinct powers of government are united in one head, whether that head conſiſts of one, or of many, the ſubjects groan under perpetual ſervitude.

I say of one or of many: For it is very immaterial by whom ſcourges, chains and tortures, are inflicted, provided we muſt ſubmit to them. The ſtudied and unheard of cruelties of a Dionyſius, who violated every right of humanity in his tyranny over the Syracuſians during the ſpace of thirty-eight years, were not more horrid and execrable than the united barbarities of the Council of Thirty, eſtabliſhed at Athens, who cauſed more citizens to be murdered in eight months of peace, than their enemies had deſtroyed in a thirty years war!

Nor am I capable of diſtinguiſhing between an eſtabliſhed tyranny, and that government where the Legiſlative makes the law, and dictates to the Judges their adjudication. For in that caſe, were they to enact tyrannical laws, they would be ſure to have them executed in a tyrannical manner. The ſervility of the Courts would render them totally ſubſervient to the will of their maſters, and the people muſt be inſlaved, or fly to arms.

In civil as well as moral agency there is a freedom of the will neceſſarily exerted in forming the judgment. Without the exerciſe of this, we cannot be ſaid to determine at all, but our actions are wholly paſſive; and ſo, in a moral ſenſe, we could not be accountable, and in a civil point of view we ſhould be deprived of all liberty.

Every being naturally endeavours its own preſervation; and the more conformably its actions are to its nature, the nearer it approaches to perfection: But when its actions are impelled by external force, it is deprived of the means both of preſervation and of perfection.

A nation may be conſidered as a moral being, whoſe health and ſtrength conſiſt in the due proportion, nice adjuſtment and equal preſervation, of all its parts: And when one branch of the government ſteps into the place of another, and uſurps its functions, the health and the ſtrength of the nation are impaired: And ſhould the evil be continued, ſo as that the one be deſtroyed by the other, the nation itſelf would be in danger of diſſolution.

Have the Judges a power to repeal, to amend, to alter laws; or to make new laws?—God forbid!—In that caſe they would become Legiſlators.——Have the Legiſlators power to direct the Judges how they ſhall determine upon the laws already made?—God forbid!—In that caſe they would become Judges.——The true diſtinction lies in this, that the Legiſlative have the incontroulable power of making laws not repugnant to the conſtitution:—The Judiciary have the ſole power of judging of thoſe laws, and are bound to execute them; but cannot admit any act of the Legiſlative as law, which is againſt the conſtitution.

THE Judges are ſworn "truly and impartially to execute the laws that now are or ſhall hereafter be made, according to the beſt of their ſkill and underſtanding." They are alſo ſworn "to bear true allegiance and fidelity to this State of Rhode-Iſland and Providence Plantations, as a free, ſovereign and independent State." But this became a State in order to ſupport its fundamental, conſtitutional laws, againſt the encroachments of Great-Britain. The trial by jury, as hath been fully ſhewn, is a fundamental, a conſtitutional law; and therefore is binding upon the Judges by a double tie, the oath of allegiance, and the oath of office.

IT is a rule in ethics, "that if two duties or obligations, both of which cannot be performed, urge us at the ſame time, we muſt omit the leſſer, and embrace the greater."

LET the queſtion then fairly be ſtated. The General Aſſembly have made a law, and directed the Judges to execute it by a mode of trial repugnant to the conſtitution. What are the Judges to reſolve?—Did the nature of their juriſdiction admit of ſuch a mode of trial at the times of their appointment and taking the oath of office?—Surely it did not. The act of Aſſembly then erects a new office, the exerciſe of which, other things equal, they may undertake, or refuſe, at their own option. There is no duty, no obligation in the way. In refuſing, they incur no penalty; nor can their ſo doing work a forfeiture of their offices as Judges of the Supreme Judiciary Court. But when it is conſidered that the exerciſe of this office would be acting contrary to their oath of allegiance, and the oath of office, they are bound to reject it, unleſs the General Aſſembly have power to abſolve them from theſe oaths, and compel them to accept of any appointment they may be pleaſed to make.

I HAVE heard ſome gentlemen ſpeak of the laws of the General Aſſembly.—I know of no ſuch laws, diſtinct from the laws of the State. The idea is dangerous; it borders upon treaſon!—"* 'tis rank—it ſmells to heaven!"

LAWS

* Shakeſpeare.

Laws are *made* by the General Assembly under the powers they derive from the constitution, but when made they become the laws of the land, and as such the Court is sworn to execute them. But if the General Assembly attempt to make laws contrary hereunto, the Court cannot receive them as laws; they cannot submit to them. If they should, let me speak it with reverence, they would incur the guilt of a double perjury!

The life, liberty and property of the citizens are secured by the general law of the State. We will then suppose (as the very nature of the argument allows us to view the subject in every possible light) that the General Assembly should pass an act directing that no citizen should leave his house, nor suffer any of his family to move out of the same, for the space of six months, upon the pain of death. This would be contrary to the laws of nature.—Suppose they should enact that every parent should destroy his first-born child. This would be contrary to the laws of God.—But, upon the common principles, the Court would be as much bound to execute these acts as any others. For if they can determine upon any act, that it is not law, and so reject it, they must necessarily have the power of determining *what* acts are laws, and so on the contrary. There is no middle line. The Legislative hath power to go all lengths, or not to overleap the bounds of its appointment at all. So it is with the Judiciary; it must reject all acts of the Legislative that are contrary to the trust reposed in them by the people, or it must adopt all.

But the Judges, and all others, are bound by the laws of nature in preference to any human laws, because they were ordained by God himself anterior to any civil or political institutions. They are bound, in like manner, by the principles of the constitution in preference to any acts of the General Assembly, because they were ordained by the people anterior to and created the powers of the General Assembly.

This mode of reasoning will equally apply in law as in philosophy. For wherever there is a given force applied to put a body in motion, that motion will continue until the body is opposed by an

an equal or a greater force. And the Judges being ſworn to execute the fundamental laws, they muſt continue to execute them until they ſhall be controuled by laws of a ſuperior nature. But that can never happen until all the people aſſemble for the purpoſe of making a new conſtitution. And indeed I very much doubt if the citizens of any one State have power to adopt ſuch a kind of government, as to exclude the trial by jury, conſiſtently with the principles of the confederation.

It having been ſhewn that this Court poſſeſſes all the powers in this State, that the Courts of King's Bench, Common Pleas, and Exchequer, poſſeſs in England, let us turn to the authorities, and obſerve the adjudications of thoſe Courts in ſimilar caſes.

* Judge Blackſtone informs us, that "acts of Parliament that are impoſſible to be performed; and if there ariſe out of them collaterally any abſurd conſequences, manifeſtly contradictory to common reaſon, they are, with regard to thoſe collateral conſequences, void." The ſame author having previouſly obſerved, that "the Judges are the depoſitory of the laws; the living oracles, who muſt decide in all caſes of doubt, and who are bound by oath to decide according to the law of the land."

In Bacon's abridgment we read, † "if a ſtatute be againſt common right or reaſon, or repugnant, or impoſſible to be performed, the common law ſhall controul it, and adjudge it to be void."

Here permit me, may it pleaſe your Honours, to apply the authority to the act, and ſee how exactly it correſponds.

Is it conſiſtent with common right or reaſon, that any man ſhall be compelled to receive paper, when he hath contracted to receive ſilver?—That for bread he ſhall receive a ſtone, or for fiſh a ſerpent?—Is it conſiſtent with common right or reaſon that he ſhall receive the paper dollar for dollar with ſilver, when it is fully known that the diſcount in general is from three to four for one, among thoſe who receive the paper at all, and that there are very many

* 1 Blac. Com. 91. † 4 Vol. 625.

many who totally refuſe it?—That he ſhould be called from his buſineſs, and ſubjected to a fine for his refuſal, when there is not a man in the State, but upon principles of juſtice to himſelf and family would have done the ſame?—Is it right or reaſonable that for ſuch refuſal he ſhould be called to trial in a ſummary manner, in three days, and that no eſſoin, protection, privilege or injunction, ſhall be in anywiſe prayed, granted or allowed?—Suppoſe him to be confined to his bed by ſickneſs, is he to be paſſed upon *ex parte*?—No man is to be injured by the act of God, or by the act of the law.—Suppoſe his witneſſes are ſick or abſent, and cannot be procured by the time, he is not allowed even to pray for an indulgence; or if he ſhould pray ever ſo fervently, he cannot be heard.—Suppoſe him to be ſummoned to attend at two, or at all the counties at the ſame time, upon different informations, he is ſtill to be condemned unheard.—Even ſuppoſe him to ſtand in need of profeſſional aſſiſtance, but that he cannot obtain at the moment, the gentlemen of the law being all neceſſarily attending upon a ſpecial ſeſſion of the General Aſſembly, is he to be deprived of council?

"REPUGNANT, or impoſſible to be performed." Is not the act repugnant when it authorizes the Judges to "proceed to trial without any jury, according to the laws of the land?" The laws of the land conſtitute the jurors the triers of facts, and the Judges the triers of law only, according to the known maxim, "*ad queſtionem juris reſpondent judices, ad queſtionem facti reſpondent juratores.*" How is it poſſible then that the Judges ſhould try, without jury, and they are directed as well as authorized ſo to do, "the ſaid Court ſhall proceed," and at the ſame time according to the laws of the land, when thoſe laws direct "that no man, of what eſtate and condition ſoever, ſhall be moleſted, without being, for it, brought to anſwer by due courſe of law, nor paſſed upon nor condemned, but by the lawful judgment of his peers?" Can contraries exiſt, and be executed at the ſame time?—This act therefore is impoſſible to be executed.

HERE is a new office indeed!—And were your Honours to ſuffer the ſpecial juriſdictions to attempt to carry the act into effect, what inconceivable miſchiefs would enſue?—Is there a member

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of the Adminiſtration, or any other, that will ſell his beef, his pork, his corn, or his cheeſe, ſo as to enable the retailers and huxters to ſell thoſe articles again for paper, at the ſame rate they could be afforded for ſilver or gold? There is not. What's the conſequence?—Every evil-minded perſon in the State is invited by law to turn informer (a moſt deſpicable office) and more than five hundred proſecutions would take place in the courſe of a week!—Horrid reflection!—The idle, the profligate, the abandoned of every character, would appear in the group of proſecutors or witneſſes, urged and puſhed on by petty Conventions and deſigning Juntos, till perjury would run down our ſtreets like a ſtream, and violence like a mighty river!—The Judges themſelves might be tempted, by the perquiſites of office, to encourage informations, until every man of induſtry, of buſineſs, and of property, muſt quit the State, retire from buſineſs, give up his property, or join in an oppoſition of force!—The temptation is great, and ſeriouſly alarming! For to ſecure the Judges individually, and their perſonal influence, the very emitting act directs that they ſhall receive all monies tendered and refuſed for paſt contracts, and at the expiration of three months depoſite them in the General-Treaſury. What room for ſpeculation, what inducement to corruption, what incentives to depreciate the currency!

Oh! it is an abominable act! Yet ſome there are, and, to our ſhame be it ſpoken, too many, who tend it, who nurſe it, who hug it to their boſom as a darling child. But let me tell them it is a ſpurious offspring, conceived by an unlawful Convention, and brought forth by —— at an unguarded hour! 'Tis a monſter! and, as the immortal Pope expreſſes it upon another occaſion,

> "*It is a monſter of ſo frightful mein,*
> *As to be hated, needs but to be ſeen;*
> *Yet ſeen too oft, familiar with her face,*
> *We firſt endure, then pity, then embrace!*"

Let us ſee it therefore but once! Let us conſign it, O ye Judges, to its fate! Death is in its conſtitution, and die it muſt!——

But

BUT to return, for I muſt confeſs the digreſſion is not particularly directed to the point more immediately in queſtion:

WE again read in Bacon's Abridgment, that * "the power of conſtruing a ſtatute is in the Judges; for they have authority over all laws, more eſpecially over ſtatutes, to mould them according to reaſon and convenience to the beſt and trueſt uſe."

HERE the author refers to Hobart, Plowden, and Lord Coke, who fully juſtify the doctrine he advances. They are upon the table, and will be produced, if your Honours require it; but we preſume it would be only treſpaſſing upon your patience, too much exhauſted already, by a tedious diſcuſſion.

THE ſatisfaction you are pleaſed to expreſs upon this head, enables us to purſue the ſubject in another point of view. Perhaps there is not a civilized country on earth, where ſo ſmall a portion of natural liberty is given into the ſtock of political ſociety, as by the people of this State. There is a certain period in every year when the powers of government ſeem to expire; for the authority of the old officers ceaſes with the appointment of the new, and theſe cannot act until they are commiſſioned and ſworn. The Legiſlative of one Houſe being compoſed of new members, or members newly elected twice in the year, feels and carries into effect the ſentiments of the people, founded upon the extremes of liberty. The electors in the reſpective towns have generally ſome point to obtain; or, which is more unfriendly to public liberty, they are divided by parties, and ſo the members elected become the advocates of local, intereſted meaſures, without comparing them with the more extenſive objects of the community. The ſeſſions ſeldom exceed the limits of a week: New laws are propoſed, acted upon and adopted, according to the firſt or the preconcerted impreſſions of paſſion, without time for deliberation or reflection. The Upper Houſe, it is true, hath a negative upon the Houſe of Deputies; but they never perſiſt in exerciſing it without endangering their next election. The appointment of the Judges, Juſtices of the Peace, and

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* 4 vol. 643.

other officers of government, being made by the members of both Houſes in a Grand Committee, is very often the reſult of political arrangements; and more attention is paid to the carrying of certain points, than to the qualification of the candidates; ſo that the people feel no great reſtraint from this quarter.

What is there then, in the nature of our government, to prevent anarchy and confuſion on the one hand, or tyranny and oppreſſion on the other?—Before the revolution, the King, as Supreme Executive, formed the balance; but ſince, the Executive Power hath become blended with the Legiſlative, and we have not, like the other States in the union, adopted any ſubſtitute for this defect.

The moment therefore that this Court feels itſelf dependent upon the Legiſlature, in the exerciſe of its judiciary powers, there will be an end of political liberty: For there is not an individual of mankind but wiſhes, if poſſible, to be exempt from the compacts that bind others. And there may be conjunctures in which the love of natural liberty will bid defiance to the reſtraints of law, if the Legiſlature are blindly guided by the general impulſe. Or ſhould theſe attachments be more ſtrongly fixed to the intereſts of a few deſigning men than to the public wiſh, tyranny would ſpring out of anarchy. In either caſe, the interpoſition of the Judiciary may ſave the conſtitution, at leaſt for a time; and, by averting the immediate evil, will give ſcope for reflection, and ſo prevent a diſſolution of government.

It is extremely to be regretted, that this Court is not as independent in the tenure by which the Judges hold their commiſſions, as they are in the exerciſe of their judicial proceedings. The frequent changes that ariſe from annual appointments may have an influence upon legal deciſions, and ſo deſtroy that uniformity which is eſſentially requiſite to the ſecurity of individuals. But from theſe conſiderations we have nothing to fear upon the preſent occaſion: For the knowledge, the integrity, the firmneſs of the Bench, will riſe ſuperior to every obſtacle; and

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the dignity of their determinations will diſplay a luſtre awful even to tyranny itſelf!

To this Honourable Court the warmeſt thanks of the defendant, of this aſſembly, of every citizen, are due, for their ſolicitous attention to their unalienable rights! Their expectations, their joyous hopes, await your determination; and we all pray to heaven, that before to-morrow's ſun ſhall deck the weſtern ſky, our hopes may wanton in complete enjoyment!

Then ev'ry gen'rous breaſt ſhall glow with pureſt flame
Of gratitude; and fathers, anxious for the public good,
Relate the glorious deed to their attentive ſons,
Who'll venerate the names of thoſe immortal Five,
Who nobly dar'd to ſave our dying laws!

May it pleaſe your Honours,

I CANNOT further purſue the ſubject, but muſt come to a concluſion.

WE have attempted to ſhew, that the act, upon which the information is founded, hath expired:—That by the act ſpecial juriſdictions are erected, incontroulable by the Supreme Judiciary Court of the State:—And that, by the act, this Court is not authorized or empowered to impanne a jury to try the facts contained in the information:—That the trial by jury is a fundamental, a conſtitutional right—ever claimed as ſuch—ever ratified as ſuch—ever held moſt dear and ſacred:—That the Legiſlative derives all its authority from the conſtitution—hath no power of making laws but in ſubordination to it—cannot infringe or violate it:—That therefore the act is unconſtitutional and void:—That this Court hath power to judge and determine what acts of the General Aſſembly are agreeable to the conſtitution; and, on the contrary, that this Court is under the moſt ſolemn obligations to execute the laws of the land, and therefore cannot, will not, conſider this act as a law of the land.

OH! ye Judges, what a godlike pleaſure muſt you now feel in having the power, the legal power, of ſtopping the torrent of

lawleſs ſway, and ſecuring to the people their ineſtimable rights!——Reſt, ye venerable ſhades of our pious anceſtors! our inheritance is yet ſecure!——Be at peace, ye bleſſed ſpirits of our valiant countrymen, whoſe blood hath juſt ſtreamed at our ſides, to ſave a ſinking land!——

When the tear is ſcarcely wiped from the virgin's eye, lamenting an affectionate father, a beloved brother, or a more tender friend!——While the matron ſtill mourns, and the widow bewails her only hope!——While the fathers of their country, ſuperior to the ills of ſlaughter, are completing the mighty fabric of our freedom and independence, ſhall the deciſion of a moment rob us of our birthright, and blaſt forever our nobleſt proſpects?——Forbid it, thou Great Legislator of the Universe!——No:

"The ſtars ſhall fade away,
The ſun himſelf grow dim with age;
And nature ſink in years;
But thou (fair liberty) thou ſhalt flouriſh in immortal youth,
Unhurt amidſt the war of elements,
The wreck of matter, and the cruſh of worlds!" *

* Addiſon.

The

The CASE of the JUDGES.

THE conſequences of the foregoing determination were immediately felt. The ſhops and ſtores were generally opened, and buſineſs aſſumed a chearful aſpect. Few were the exceptions to a general congratulation, and laviſh indeed were the praiſes beſtowed upon the Court. The dread and the idea of informations were baniſhed together, while a moſt perfect confidence was placed in judicial ſecurity. The paper currency obtained a more extenſive circulation, as every one found himſelf at liberty to receive or refuſe it. The markets, which had been illy ſupplied, were now amply furniſhed, and the ſpirit of induſtry was generally diffuſed. Every proſpect teemed with returning happineſs, and nothing appeared wanting to reſtore union and harmony among the contending parties.

THE demon however of diſcord was not entirely ſubdued; for upon the next ſucceeding week a ſummons was iſſued from both Houſes of Aſſembly, requiring an immediate attendance of the Judges, "to render their reaſons for adjudging an act of the General Aſſembly unconſtitutional, and ſo void." Three of the Judges attended, the other two being unwell. This circumſtance induced the Aſſembly to diſmiſs them at that time, but they were directed to appear at the October ſeſſion next following.

ACCORDINGLY three of the Judges attended, and gave notice in writing to both Houſes, "that they waited their pleaſure." They were informed that the Aſſembly was ready to hear them, and would proceed immediately upon the buſineſs for which they were in attendance.

CERTAIN

CERTAIN ceremonies being adjuſted, and the records of the Court produced, the Honourable Mr. Howell, the youngeſt Juſtice, addreſſed himſelf to the Aſſembly in a very learned, ſenſible and elaborate diſcourſe, in which he was upwards of ſix hours upon the floor.

HE obſerved, that the order by which the Judges were before the Houſe might be conſidered as calling upon them to aſſiſt in matters of legiſlation, or to render the reaſons of their judicial determinatian, as being accountable to the Legiſlature for their judgment.

THAT in the former point of view, the Court was ever ready, as conſtituting the legal counſellors of the State, to render every kind of aſſiſtance to the Legiſlative, in framing new, or repealing former laws: But that for the reaſons of their judgment upon any queſtion judicially before them, they were accountable only to God, and their own conſciences.

UNDER the firſt head, the honourable gentleman pointed out the objectionable parts of the act upon which the information was founded, and moſt clearly demonſtrated, by a variety of concluſive arguments, that it was unconſtitutional, had not the force of a law, and could not be executed. His arguments were enforced by many authorities of the firſt eminence, in addition to thoſe produced upon the trial. But as this part of the ſubject hath in a great meaſure been anticipated, we ſhall not enter into a further detail, concluding that the legal defence of the Court, in ſhewing " that they were not accountable to the Legiſlature for the reaſons of their judgment," will be more intereſting to the public.

HERE it was obſerved, that the Legiſlature had aſſumed a fact, in their ſummons to the Judges, which was not juſtified or warranted by the records. The plea of the defendant, in a matter of mere ſurpluſſage, mentions the act of the General Aſſembly as " unconſtitutional, and ſo void;" but the judgment of the Court ſimply is, " that the information is not cognizable before them."

them." Hence it appears that the plea hath been miſtaken for the judgment.

WHATEVER might have been the opinion of the Judges, they ſpoke by their records, which admitted of no addition or diminution. They might have been influenced reſpectively by different reaſons, as the whole act was judicially before them, of which, it being general, they could judge by inſpection, without confining themſelves to the particular points ſtated in the plea. It would be out of the power, therefore, of the General Aſſembly to determine upon the propriety of the Court's judgment, without a particular explanation. If this could be required in one inſtance, it might in all; and ſo the Legiſlative would become the Supreme Judiciary. A perverſion of power totally ſubverſive of civil liberty!

IF it be conceded, that the equal diſtribution of juſtice is as requiſite to anſwer the purpoſes of government as the enacting of ſalutary laws, it is evident that the Judiciary Power ſhould be as independent as the Legiſlative. And conſequently the Judges cannot be anſwerable for their opinion, unleſs charged with criminality.

THE nature of their office obliges them to decide upon every queſtion that can ariſe in legal proceſs. If they are not directed by their own underſtanding, uninfluenced by the opinion of others, how can they be ſaid to judge at all?—The very act of judging, ſuppoſes an aſſent of the mind to the truth or falſhood of a propoſition. And if a deciſion is given contrary to this aſſent, the Judge is guilty of perjury, and ought to be rendered infamous.

EVERY man is excuſable for errors of the head, provided ſufficient attention hath been paid to the means of information: But no man is excuſable for pravity or corruption of the heart.

THE Judges may err: For error is the lot of humanity. Perfection cannot be required of imperfect beings. But the very idea of being accountable to the Legiſlature, in matters of opi-

nion,

nion, ſuppoſes the Legiſlature to poſſeſs the ſtandard of perfection. A thought highly derogatory to the attributes of Deity !

THE Judge referred to ſeveral authorities, among which are the following :

BARON Monteſquieu, in his Spirit of Laws, obſerves, " * There is no liberty, if the Judiciary Power be not ſeparated from the Legiſlative and Executive. Were it joined with the Legiſlative, the life and liberty of the ſubject would be expoſed to arbitrary controul ; for the Judge would then be the Legiſlator. Were it joined to the Executive Power, the Judge might behave with violence and oppreſſion.

" THERE would be an end to every thing, were the ſame man, or the ſame body, whether of the nobles or of the people, to exerciſe thoſe three powers, that of enacting laws, that of executing the public reſolutions, and of trying the cauſes of individuals."

JUDGE Blackſtone in his Commentaries hath adopted the ſame ideas.—Serjeant Hawkins is preciſe and concluſive, † " that no ſuch Judge is in any way puniſhable for a mere error of judgment."

‡ " AND as the law has exempted jurors from the danger of incurring any puniſhment in reſpect of their verdict in criminal cauſes, it hath alſo freed the Judges of all Courts of Record from all proſecutions whatſoever, except in the Parliament, for any thing done by them openly in ſuch Courts as Judges : For the authority of a government cannot be maintained, unleſs the greateſt credit be given to thoſe who are ſo highly intruſted with the adminiſtration of public juſtice : And it would be impoſſible for them to keep up in the people that veneration of their perſons, and ſubmiſſion to their judgments, without which it is impoſſible to execute the laws with vigour and ſucceſs, if they ſhould be continually expoſed to the proſecutions of thoſe whoſe partiality to their

* Vol. 1, p. 222. † 2 H.P.C. c. 1, ſect. 17. ‡ 1 H.P.C. c. 72, ſect. 6.

their own cauſes would induce them to think themſelves injured. Yet if a Judge will ſo far forget the dignity and honour of his poſt, as to turn ſolicitor in a cauſe which he is to judge, and privately and extrajudicially tamper with witneſſes, or labour jurors, he hath no reaſon to complain, if he be dealt with according to the ſame capacity to which he ſo baſely degrades himſelf."——

COMPARING theſe paſſages together, the intention of the author is apparent, that, in the firſt place, the Judges are not anſwerable at all for mere error of judgment; and in the ſecond, they are triable only in Parliament for matters of a criminal nature.

THE ſame point is fully aſſerted in Bacon: *" But though they are to judge according to the ſettled and eſtabliſhed rules and ancient cuſtoms of the nation, approved for many ſucceſſions of ages, yet are they freed from all proſecutions for any thing done by them in Court, which appears to have been an error of their judgment."

So tender and delicate is the law in this reſpect, that even Juſtices of the Peace are ſacredly guarded from every kind of proſecution upon account of their opinion.

UPON the 10th of May, 1757, a motion was made in the King's Bench †" for an information againſt two Juſtices of the Peace, for arbitrarily, obſtinately and unreaſonably refuſing to grant a licence to one Henry Day, to keep an inn at Everſley; where it was alledged and ſworn to be fit and proper; and even neceſſary, that there ſhould be an additional one (there being one there already) and for which occupation of keeping an inn this man was (as thoſe two Juſtices themſelves had allowed on a former occaſion) a proper perſon, they having before licenced him to do ſo at another place.

‖" LORD Mansfield, and Mr. Juſtice Deniſon, held, that notwithſtanding this was a matter left in a great meaſure to the diſcretion of the Juſtices, yet if it appeared to the Court, from ſufficient

* 1 Bacon's Abr. 556. † Burrow's, 556. ‖ 556.

ficient circumſtances laid before them, that their conduct was influenced by partial, corrupt or arbitrary views, inſtead of exerciſing a fair and candid diſcretion, the Court might call upon them to ſhew the reaſons whereby they guided their diſcretion."

* "THE Juſtices thus intruſted have a right to judge for themſelves: No man can judge for another. And this power is truſted to them by the conſtitution, by the Legiſlature."

† "IT may be very dangerous to them to be obliged to give their reaſons publicly: Though they may have very ſufficient ones to ſatisfy their own minds, and to direct their own judgments."

‡ "AND if they are thus intruſted, why are they liable to be called to an account by any other juriſdiction, unleſs they act faultily and wilfully wrong? Indeed, if they do wilfully wrong, let them be puniſhed: But where they act quite conſcientiouſly, they are not accountable to any body."

‖ "BUT if it clearly appear that the Juſtices have been partially, maliciouſly or corruptly influenced in the exerciſe of this diſcretion, and have (conſequently) abuſed the truſt repoſed in them, they are liable to proſecution by indictment or information, or even, poſſibly, by action, if the malice be very groſs and injurious."

¶ "IF their judgment is wrong, yet their heart and intention pure, God forbid that they ſhould be puniſhed! And he declared that he ſhould always lean towards favouring them, unleſs partiality, corruption or malice, ſhould clearly appear."

JUDGE Tillinghaſt obſerved, that nothing could have induced the gentlemen of the Court to accept the office to which they were appointed, but a regard to the public good: That their perquiſites were trifling, and their ſalaries not worth mentioning. The only recompence they expected, or could receive, was a conſciouſneſs of

* Burrows, 556. † 559. ‡ 559. ‖ 562. ¶ 562.

of rectitude, which had ſupported them, and he was confident would ſupport them, through every change of circumſtances: That melancholy indeed would be the condition of the citizens, if the Supreme Judiciary of the State was liable to reprehenſion, whenever the caprice or the reſentment of a few leading men ſhould direct a public enquiry !——

THAT, as one member of the Court, he felt himſelf perfectly independent, while moving in the circle of his duty:—And however he might be affected for the honour of the State, he was wholly indifferent about any conſequences that might poſſibly reſpect himſelf.

THAT the opinion he had given reſulted from mature reflection, and the cleareſt conviction:—That his conſcience teſtified to the purity of his intentions, and he was happy in the perſuaſion, that his conduct met the approbation of his God!

Judge Hazard.

MY brethren have ſo fully declared my ſentiments upon this occaſion, that I have nothing to add by way of argument. It gives me pain that the conduct of the Court ſeems to have met the diſpleaſure of the Adminiſtration. But their obligations were of too ſacred a nature for them to aim at pleaſing but in the line of their duty.—

IT is well known that my ſentiments have fully accorded with the general ſyſtem of the Legiſlature in emitting the paper currency: But I never did, I never will, depart from the character of an honeſt man, to ſupport any meaſures, however agreeable in themſelves.—If there could have been a prepoſſeſſion in my mind, it muſt have been in favour of the act of the General Aſſembly; but it was not poſſible to reſiſt the force of conviction. The opinion I gave upon the trial was dictated by the energy of truth: I thought it right—I ſtill think ſo. Be it as it may, we derived our underſtanding from the Almighty, and to him only are we accountable for our judgment.

To the obſervations of the Judges, ſucceeded a very ſerious and intereſting debate among the members, wherein many arguments and obſervations were adduced on both ſides. At length a queſtion was taken, " whether the Aſſembly was ſatisfied with the reaſons given by the Judges in ſupport of their judgment?"—It was determined in the negative.

A MOTION was then made, and ſeconded, " for diſmiſſing the Judges from their office."

THIS was coming to the point, for the obtaining of which the greateſt exertions had been made. Candidates were upon the ſpot ready to fill the ſeats thus to be made vacant, whom a confidence of ſucceſs had rendered very important.

UPON a queſtion of ſo unprecedented and ſo intereſting a nature, many of the leading gentlemen of the Adminiſtration ſeemed almoſt ready to yield the ground upon which they had contended.—Some were for diſplacing the Judges at all events; ſome were for ſaving appearances by drawing out a conceſſion on the part of the Court, and others were determined fully to juſtify them, when the following memorial was preſented, which gave a new turn to the deliberations.——

To his Excellency the Governor, and his Honour the Speaker of the Lower Houſe of Aſſembly: To be communicated to both Houſes.

THE underwritten, appointed Juſtices of the Superior Court, &c. at the annual election in May laſt, for the term of the current year, and cited to appear before the General Aſſembly at their preſent ſeſſion, by an order therefor, paſſed at their laſt ſeſſion, ſpecially convened in the city of Newport, " to render the reaſons of a certain judgment given by ſaid Court, at the laſt term thereof in the county of Newport," having appeared before both Houſes in a Grand Committee, and made full communication of all the proceedings of the Court, relative to the caſe in which ſaid judgment was rendered; and having entered into a full and free examination of the ſeveral parts and principles of the penal law

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in queſtion, and compared them with the conſtitution, or fundamental laws of the State, and all other laws operating thereon, which ſecure to the citizens thereof their rights and privileges; and having eſtabliſhed their obſervations thereon by many the moſt approved authorities in law, as well as by the conſtitution and doings of the fœderal union, and the members thereof, ſince the revolution in this country——

F O R the advice and aſſiſtance of the General Aſſembly in point of legiſlation——concluded, by utterly denying the power of the Legiſlature to call upon them.——

F O R the particular reaſons of their judgment in that, or any other caſe; and declining to render the ſame——alledging and maintaining, by arguments and authorities of law, that for the ſame they are "accountable only to God (under the ſolemnities of their oath of office) and to their own conſciences!"

And while, to remove miſapprehenſions, they diſclaim and totally diſavow any the leaſt power or authority, or the appearance thereof, to contravene or controul the conſtitutional laws of the State, or acts of the General Aſſembly—they conceive that the entire power of conſtruing and judging of the ſame, in the laſt reſort, is veſted ſolely in the Supreme Judiciary of the State.

And whereas in the citation aforeſaid no charge is contained againſt the underwritten, in their aforeſaid capacity, nor had they reaſon to apprehend any proceedings were to be grounded thereon, to affect their lives, liberties or property, or their eſtate in their office aforeſaid, or their good name and character, as officers of this State:——

And whereas, from appearances, there is reaſon to apprehend that a deſign is formed, and ripening for execution, by a ſummary vote of the Legiſlature, either to diſmiſs them from their aforeſaid office, or to ſuſpend them from the power of exerciſing the ſame:

Wherefore;

WHEREFORE, they pray that they may have a hearing by counſel before ſome proper and *legal tribunal*, and an opportunity to anſwer to *certain and ſpecific charges*, if any ſuch can be brought againſt them, before any ſentence or judgment be paſſed injurious to any of their aforeſaid rights and privileges.——And

THIS they claim and demand as freemen, and officers of this State; and, at the ſame time, with deference, utterly proteſt againſt the exerciſe of any power in the Legiſlature, by a ſummary vote, to deprive them of their right to exerciſe the functions of their aforeſaid office, without the aforeſaid due proceſs of law, or a commencement thereof (in which latter caſe a ſuſpenſion only from the duties of office can take place) before the full term for which they were appointed and engaged, under the conſtitution of the State, ſhall be completed: And more eſpecially *upon a mere ſuggeſtion of a mere error of judgment.*——

JOSEPH HAZARD,
THOMAS TILLINGHAST,
DAVID HOWELL.

State of Rhode-Iſland, &c. Providence, Nov. 4, 1786.

THIS memorial being received, the Judges informed the Aſſembly, that they had directed counſel to enforce its contents, and requeſted an hearing accordingly. Whereupon the author, having addreſſed the Houſe in the uſual manner, obſerved,

THAT the neceſſity of exhibiting the memorial upon the table, aroſe from the motion laſt made by one of their honourable members, for diſmiſſing the Judges from office, without any previous charge of criminality. A meaſure ſo novel as this motion tended to produce, could not have been foreſeen or expected; and therefore it would not be thought ſtrange if the counſel was not fully prepared to meet and oppoſe it.

WHAT do the Judges pray for?—That if they are to be paſſed upon for any thing reſpecting their duty, they may firſt know for what offence they are to be judged: That the particular charge or charges may be ſpecified: That they may have time for defence:

That

That they may be heard before a tribunal legally conſtituted; and that they be heard by counſel.—

Is there a gentleman in this Aſſembly ſo inattentive to the rights of his conſtituents, as to refuſe, upon this occaſion, what the loweſt peaſant, nay the vileſt criminal, is entitled to receive?—I preſume there is not. And notwithſtanding many of them may ſuppoſe that the honour of the Legiſlature is wounded by the deciſion of the Court, and ſo would wiſh to reſtore it, even by ſacrificing the Judges; yet I am confident they will not incur the imputation of real diſgrace, by removing the barriers to perſonal ſecurity, and the preſervation of property. For if they would preſerve in the minds of the citizens an attachment to their meaſures, and a veneration for their laws, they certainly will not openly violate the laws themſelves.

Be pleaſed to recollect a paragraph in our Declaration of Rights, our Magna Charta, wherein it is provided, "that no man, of what eſtate and condition ſoever, ſhall be put out of his lands and tenements, nor taken, nor impriſoned, nor diſinherited, nor baniſhed, nor any ways deſtroyed, nor moleſted, without being for it brought to anſwer *by due courſe of law.*"

Was it in the power of the General Aſſembly to nullify this part of our conſtitution (which we utterly deny) they have not done it. The right is ſtill guarded by all the ſolemnities of law, and therefore the honourable remonſtrants claim and demand its benefits. This they do, from your Honours, not as a Legiſlative, but as acting in a judicial capacity. For the paſſing of ſentence is the exerciſing a judiciary power, grounded upon a pre-exiſting law. You are bound then by that oath, to which you all ſubmitted as a neceſſary qualification, previouſly to your becoming members; and which is in theſe words: "And you do farther engage equal right and juſtice to do to all perſons that ſhall appeal unto you for your judgment in their reſpective caſes."

It is perfectly immaterial upon the preſent argument, whether the judgment of the Court was right or wrong; whether it was agreeably