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REPORT OF A CASE,

DECIDED ON

SATURDAY, the 16th of NOVEMBER, 1793,

IN THE

GENERAL COURT

OF

VIRGINIA;

WHEREIN

PETER KAMPER, was Plaintiff,

AGAINST

MARY HAWKINS, Defendant;

ON A QUESTION ADJOURNED FROM THE

DISTRICT COURT OF DUMFRIES,

FOR NOVELTY AND DIFFICULTY,

touching the

CONSTITUTIONALITY OF AN ACT OF ASSEMBLY;

Together with ARGUMENTS and OPINIONS of the respective

JUDGES at LARGE,

and the ORDER of COURT thereon.

PUBLISHED WITH THEIR PERMISSION.

BY A GENTLEMAN OF THE BAR.

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1794.

Entered according to the

LAWS of CONGRESS.

THE

CASE,

ARGUMENTS AND DECISION,

OF THE

COURT.

The adjournment *of this Caſe originated in* novelty *and* difficulty, *touching the* conſtitutionality, *or* judicial propriety *of the judges of the DISTRICT COURT, carrying the following clauſe of an act of the General Aſſembly into execution, which was conceived to be oppoſed to, or in direct violation of the Conſtitution of the Commonwealth of Virginia.*

The title and clauſe of the ſaid act are thus:

" An Act reducing into one, the ſeveral Acts concern-
" ing the Eſtabliſhment, Juriſdiction, and Powers of
" Diſtrict Courts."

(" Paſſed, December 12, 1792.")

" SECT. XI. Each of the ſaid Diſtrict Courts
" in term time, or any Judge thereof in vacation, ſhall,
" and may have and exerciſe the ſame power of granting
" injunctions to ſtay proceedings on any judgment obtain-
" ed in any of the ſaid Diſtrict Courts, as is now had and

" exerciſed by the Judge of the High Court of Chancery " in ſimilar caſes, and the ſaid Diſtrict Courts may pro- " ceed to the diſſolution or final hearing of all ſuits com- " mencing by injunction, under the ſame rules and re- " gulations as are now prescribed by law for conducting " ſimilar ſuits in the High Court of Chancery."

The RECORD, ARGUMENTS, and DECISION, here follow.

At a DISTRICT COURT, held at Dumfries, the twenty-third day of May, one thouſand ſeven hundred and ninety-three.

Preſent, the Honourable Spencer Roane, Eſq.

PETER KAMPER, *vs.* MARY HAWKINS, } Upon a motion for an injunction to ſtay the proceedings on a judgment obtained at the laſt term held for this diſtrict, by Mary Hawkins, againſt the ſaid Peter Kamper, under an Act of Aſſembly, entitled, " an Act reducing into one, the ſeveral acts con- " cerning the eſtabliſhment, juriſdiction, and power of " Diſtrict Courts."

The Court is of opinion, that the ſaid queſtion ſhould be adjourned to the General Court for *novelty* and *difficulty*, as to the *Conſtitutionality* of the ſaid Law in this behalf. Whereupon,

At a General Court held at the capitol in the city of Richmond, on Saturday the ninth day of November, in the year of our Lord, one thouſand ſeven hundred and ninety-three.

Preſent, Saint George Tucker.

And from thence continued by adjournments until Saturday, November 16, 1793.

Preſent, St. George Tucker, John Tyler, James Henry, Spencer Roane, and William Nelſon, jun. Eſquires, } Judges.

The Honourable, the Judges, delivered their reſpective opinions touching the caſe aforeſaid, in the following manner:

JUDGE NELSON.

THIS is a motion for an injunction, adjourned from the Diſtrict Court of Dumfries, on the conſtitutionality of the eleventh ſection of the Diſtrict-Court law*, which gives the Diſtrict-Court in term time, or a Judge thereof in vacation, the ſame power of granting injunctions to ſtay proceedings on any judgment obtained in a diſtrict-court, and of proceeding to the diſſolution or final hearing of ſuits commencing by injunction, under the ſame rules and regulations as are now preſcribed to the High Court of Chancery.

I ſhall conſider the queſtion under *two* points.

Firſt. Whether, if this clauſe be contrary to the conſtitution of this Commonwealth, it can be executed.

And, *Secondly.* Whether it be contrary to the conſtitution.

I. As to the firſt point, although it has been decided by the Judges of the court of Appeals, (whether judicially or not is another queſtion,) that a law contrary, to the conſtitution is *void*—I beg leave to make a few obſervations on general principles.

The difference between a free and an arbitrary government I take to be—that in the former limits are aſſigned

* *Paſſed in* 1792.

to thoſe to whom the adminiſtration is committed; but the latter depends on the will of the departments or ſome of them. Hence the utility of a written conſtitution.

* A *Conſtitution* is that by which the powers of government are limited.

It is to the *Governors*, or rather to the departments of *Government*, what a *law* is to individuals—nay it is not only a *rule* of *action* to the branches of government, but it is that from which their exiſtence flows, and by which the powers, (or portions of the right to govern) which may have been committed to them, are preſcribed—It is their commiſſion—nay it is their *Creator*.

The calling this inſtrument The *Conſtitution* or *form* of *Government*, ſhews that the framers intended it to have this effect, and I ſhall preſently endeavor to obviate the objection ariſing from the want of their appointment in form.

The preſent queſtion is whether an act of the legiſlature contrary to it, be valid?

*This is the paper by which the *delegates* and *repreſentatives* of the people, viewing with concern the deplorable ſituation to which this country muſt have been reduced unleſs ſome *regular adequate mode* of civil *polity*, had been ſpeedily adopted, did *ordain* and *declare* the *future form* of government to be as there ſet forth.

* *In the American edition of the Encyclopædia,* "Conſtitution *in* "*matters of policy, ſignifies the form of government eſtabliſhed in* "*any country or kingdom.*

"Conſtitution *alſo denotes an ordinance, deciſion, regulation, or* "*law made by authority, ſuperior eccleſiaſtical or civil.*"

That the word Conſtitution in the title of the inſtrument under conſideration, is not ſynonymous with ordinance or law, (as ſeems to be the opinion of the able author of "Notes on Virginia,) but is uſed in the former ſenſe is evident from its being called "the Conſtitution, or form of government, &c."

* *See ſecond Section of the Conſtitution.*

This is the paper which divides the government into three diſtinct departments, with one exception*.

This is the very paper under which there are two branches of legiſlature now aſſembled.

This is the very paper under which they are to meet once every year, or oftener.

This is the very paper which gives them their ſtyle—of the GENERAL ASSEMBLY OF VIRGINIA.

This is the very paper which calls one houſe the Houſe of Delegates, and the other the Senate.

This is the very paper which declares that the former ſhall conſiſt of two repreſentatives from each county, choſen by freeholders, &c.

This is the very paper which fixes the number of the Senate to twenty-four——which defines the number that ſhall compoſe a houſe of ſenate,—under which the ſtate is to be divided into twenty-four diſtricts.

Which declares that each county ſhall vote for a ſenator, who beſides other qualifications ſhall be twenty-five years of age—that a compariſon of polls ſhall be made by the ſheriffs, who are to return the perſon having the greateſt number of votes.

That a certain number are to be diſplaced by rotation.

That writs may iſſue from each houſe for ſupplying vacancies——And——

That all laws ſhall originate in the Houſe of delegates ſubject to amendment by the ſenate, except money bills.

I aſk then, whether the legiſlature do not ſit under the Conſtitution?

The anſwer in the affirmative to me is inevitable.

* *That Juſtices of the County Courts are eligible to either Houſe of Aſſembly.*

But it may be objected that, although the legiſlature would be bound by a fundamental regulation, made by a convention or other body delegated expreſsly for ſuch a purpoſe, the body who formed this, not having been thus ſpecially appointed,—this act poſſeſſes not ſufficient ſanctity; but is an act equal only to thoſe of a common legiſlature becauſe ſome acts paſſed in the ſame ſeſſion are confeſſedly ſo.

Here let it be remembered that the queſtion is not whether the *people* can change it; but whether the legiſlature can do ſo.

As to the powers of the Convention, this body ſeems to have been appointed, not only to ſee that the Commonwealth ſuſtained no injury, but alſo to conſult in general for the public good, and in ſuch a criſis as that at which our government was formed, thoſe who are delegated have authority more extenſive than a legiſlature appointed under a government, one object of which is to reſtrain that as well as the other departments,—whereas in the former caſe the people alone can decide whether theſe powers have been ſtrained too far.

As to ſome acts of the ſame ſeſſion being temporary and others revocable by the legiſlature.———

I anſwer, that the ſubject-matter of them will evince which are intended to be of this nature, and if any were deſigned to be permanent, they muſt be ſo until changed by the people, unleſs indeed calling theſe *ordinances* and the other a **Conſtitution*, ſufficiently manifeſt a deſign that *this* ſhould be of higher authority than *thoſe*.

It is confeſſedly the aſſent of the People which gives validity to a Conſtitution.

May not the people then, by a ſubſequent acquieſcence and aſſent give a Conſtitution, under which they have acted for ſeventeen years as much validity, at leaſt *ſo long as they*

* *See note, page 8.*

acquieſce in it, as if it had been previouſly expreſsly authorized?

The people have received this as a Conſtitution. The magiſtrates and officers down to a conſtable (for even the mode of *his* appointment is directed) have been appointed under it.

The people have felt its operation and acquieſced.

Who then can change it?

I anſwer, the *PEOPLE* alone.

But it has been ſuppoſed that the *legiſlature* can do this.

To decide this queſtion I have already ſtated that the legiſlature derive their *exiſtence* from the Conſtitution.

It may be anſwered that thoſe Members who paſſed the law under contemplation were elected under the act of 1785.

But who held the election? Who was to decide in caſe of an equality of votes? and, who certified the perſons elected?——The *ſheriff* under the law. Who appointed the ſheriff?——The executive.——By what authority?——Under the fifteenth article of this Conſtitution, which the legiſlature from their acts acknowledge to be inviolable.*

If then the legiſlature were elected at an election holden by, and were returned by a ſheriff, who derives his commiſſion from the Conſtitution, does not that body derive its exiſtence from the ſame ſource?

And can the legiſlature impugn that charter under which they claim, and to which by their acts they themſelves have acknowledged an obligation?——I apprehend not, nor can any argument againſt this poſition be drawn from an acquieſcence in ſome acts which may be unconſtitutional.

* *See the Appendix for reference to the particular laws.*

1ſt. Becauſe we may preſume, that if there be any ſuch, their unconſtitutionality has not yet been diſcovered by the legiſlature, which, if it had been done, (from the inſtance before recited, and ſome other inſtances) we have reaſon to think, would have produced a ſimilar declaration from that body.——And

2dly, Becauſe no individual may have yet felt the operation of them, and conſequently they have not been brought to inveſtigation.

But the greateſt objection ſtill remains, that the judiciary, by declaring an act of the legiſlature to be no law, aſſumes legiſlative authority, or claims a ſuperiority over the legiſlature.

In anſwer to this,—I do not conſider the judiciary as the champions of the people, or of the Conſtitution, bound to ſound the alarm, and to excite an oppoſition to the legiſlature.—But, when the caſes of individuals are brought before them judicially, they are bound to decide.

And, if one man claim under an act contrary to the Conſtitution, that is, under what is *no* law, if my former poſition, that the legiſlature cannot impugn the Conſtitution, and conſequently that an act againſt it is void—be juſt,) muſt not a court give judgment againſt him?*

* *There are but three lines of conduct, one of which muſt be purſued on ſuch an occaſion,—either*

1ſt, To refuſe to decide the queſtion at all, which would be a dereliction of duty, or

2dly, To wait for the legiſlature to decide whether the act be unconſtitutional, which would be contrary to that article in the Conſtitution, which declares, that "the legiſlative, executive, and "judiciary departments ſhall be ſeparate and diſtinct, ſo that neither exerciſe the powers properly belonging to the other."—ſince to decide whether the plaintiff or the defendant under the exiſting laws have a right, is a judicial act, and to decide whether the act

Nor is it a novelty for the judiciary to declare, whether an act of the legiſlature *be in force* or *not in force*, or in other words, whether it be a *law* or *not*.

In many instances one ſtatute is virtually repealed by another, and the judiciary muſt decide which is the law, or whether both can exiſt together.

The only difference is that in one inſtance that which was once in exiſtence is carried out of exiſtence, by a ſubſequent act virtually contrary to it, and in the other the prior *fundamental law* has prevented its *coming into exiſtence* as *a law*.

With reſpect to the idea that for the judiciary to declare an act of the legiſlature void,—is to claim a ſuperiority to the legiſlature,—if the legiſlative authority is derived from the Conſtitution, and ſuch a deciſion be a judicial act (as I have endeavoured to prove) this objection ſeems to be refuted.

For the reaſons which I have given, I am of opinion that the fundamental act of government controuls the legiſlature, who owe their exiſtence and powers to it——this concludes the firſt point——

That if the clauſe under conſideration be unconſtitutional, it is *void*.

II. The ſecond point—whether it be unconſtitutional is next to be conſidered.

By the fourteenth ſection of the Conſtitution, "the two houſes of Aſſembly ſhall, by joint ballot, appoint Judges of

be a void law as to a right veſted or in litigation, is in fact to decide which of the parties have the right.

There remains therefore when the queſtion occurs, but one thing to be done by the judiciary,—which is,

3dly, To decide that the act is void, and therefore that the claimant under it cannot ſucceed.

the Supreme Court of Appeals, and general court, *Judges* in Chancery, Judges of Admiralty, &c."

I was at firſt inclined to think that the inſertion of the word *Judges* between the *General Court* and *Chancery*, evinced an intention that the judges of the general court and thoſe in chancery ſhould be diſtinct perſons; but perhaps it would be unjuſtifiable to reſt ſuch an opinion on ſo critical a conſtruction.

However this opinion is ſupported by the ſixteenth and ſeventeenth ſections.

By the ſixteenth the governor and others offending againſt the ſtate, by mal-adminiſtration, corruption, &c. are impeachable before the general court. And——

By the ſeventeenth the judges of the general court are to be impeached before the court of appeals.——This might prove then that a judge of the general court could not according to the Conſtitution be a judge of the ſupreme court of appeals, becauſe all officers (except the judges of the general court,) are to be tried before the general court; but Judges of the general court are to be tried before the court of appeals——and the Conſtitution intended to prevent a man being tried in that court of which he is a member; becauſe in cauſes which might give riſe to an impeachment, the judges of a court might act jointly, and the influence of partiality or an *eſprit du Corps* was to be guarded againſt.

However to decide whether a judge of the general court could be a judge of the court of appeals, would be extrajudicial as that queſtion is not before the court, but this reſearch enables me to decide the queſtion that is before the court—that is, whether the ſame perſon can under the Conſtitution be a judge in chancery, and a judge of the general court?——I think that he cannot for theſe reaſons—

A judge in chancery is to be tried before the general court.——A judge of the general court cannot be a judge in chancery, becauſe a judge in chancery muſt be tried before the general court; but if a judge of the general court be a judge in chancery, then he (a judge of the general court) will be tried in the general court which is againſt the ſeventeenth article, which declares that a judge of the general court ſhall be impeached before the court of appeals.

My inference is that a judge in chancery and a judge of the general court were intended under the Conſtitution to be diſtinct individuals.

This is one reaſon againſt the law; but there are others alſo of force—Whoever is appointed a judge in chancery under the Conſtitution muſt be elected by joint ballot, and commiſſioned by the governor; neither of which requiſitions have been complied with.

On the whole, I am for certifying to the court below, That the motion for an injunction be over-ruled, the clauſe under which it is prayed being unconſtitutional.

JUDGE ROANE.

THIS great queſtion was adjourned by me from the diſtrict court of Dumfries. I thought it neceſſary to obtain the opinion of this court, for the government of the ſeveral diſtrict courts, who might otherwiſe have differed in their conſtruction of the clauſe in queſtion, and the adminiſtration of the law in this inſtance been conſequently partial.

My opinion then was upon a ſhort conſideration, that the diſtrict courts ought to execute this law; for I doubted

how far the judiciary were authorized to refuſe to execute a law, on the ground of its being againſt the ſpirit of the Conſtitution.

My opinion, on more mature conſideration, is changed in this reſpect, and I now think that the judiciary may and ought not only to refuſe to execute a law expreſsly repugnant to the Conſtitution; but alſo one which is by a plain and natural conſtruction, in oppoſition to the fundamental principles thereof.

I conſider the people of this country as the only ſovereign power.—I conſider the legiſlature as not ſovereign but ſubordinate, they are ſubordinate to the great conſtitutional charter, which the people have eſtabliſhed as a fundamental law, and which alone has given exiſtence and authority to the legiſlature. I conſider that at the time of the adoption of our preſent Conſtitution, the Britiſh government was at an end in Virginia: it was at an end, becauſe among many other weighty reaſons very emphatically expreſſed in the firſt ſection of our Conſtitution, "George the third "heretofore entruſted with the exerciſe of the kingly "office in this colony had abandoned the helm of go- "vernment, and declared us out of his allegiance and pro- "tection."

The people were therefore at that period, they were at the period of the election of the Convention, which form. ed the Conſtitution, abſolved from the former kingly government, and free, as in a ſtate of nature, to eſtabliſh a government for themſelves. But admitting for a moment that the old government was not then at an end, I aſſert that the people have a right by a convention, or otherwiſe, to change the exiſting government, whilſt ſuch exiſting government is in actual operation, for the ordinary purpoſes thereof. The example of all America in the adoption of the federal governmer and that of ſeveral of the ſtates in changing their ſtate conſtitutions in this temperate and

peaceable manner, undeniably proves my poſition. The people of Virginia, therefore, if the old government ſhould not be conſidered as then at an end, permitted it to proceed, and by a convention choſen by themſelves, with full powers, for they were not reſtrained, eſtabliſhed then a conſtitution.

This Convention was not choſen under the ſanction of the former government; it was not limited in its powers by it, if indeed it exiſted, but may be conſidered as a ſpontaneous aſſemblage of the people of Virginia, under a recommendation of a former convention, to conſult for the good of themſelves, and their poſterity. They eſtabliſhed a bill of rights purporting to appertain to their poſterity, and a conſtitution evidently deſigned to be permanent. This conſtitution is ſanctioned by the conſent and acquieſence of the people for ſeventeen years; and it is admitted by the almoſt univerſal opinion of the people, by the repeated adjudications of the courts of this commonwealth, and by very many declarations of the legiſlature itſelf, to be of ſuperior authority to any oppoſing act of the legiſlature. The celebrated Vattel in a paſſage of his, which I will not fatigue this audience by quoting, denies to the ordinary legiſlature the power of changing the fundamental laws "for, ſays he, it is neceſſary that the Conſtitution of the ſtate be fixed."

But if the legiſlature may infringe this Conſtitution, it is no longer fixed; it is not this year what it was the laſt; and the liberties of the people are wholly at the mercy of the legiſlature.

A very important queſtion now occurs, viz. whoſe province it is to decide in ſuch caſes. It is the province of the judiciary to expound the laws, and to adjudge caſes which may be brought before them—the judiciary may clearly ſay that a ſubſequent ſtatute has not changed a former for want of ſufficient words, though it was perhaps intended it

ſhould do ſo. It may ſay too that an act of aſſembly has not changed the Conſtitution though its words are expreſs to that effect, becauſe a legiſlature muſt have both the power and the will (as evidenced by words) to change the law, and it is conceived for the reaſons above mentioned that the legiſlature have not power to change the fundamental laws. In expounding laws the judiciary conſiders *every* law which relates to the ſubject: would you have them to ſhut their eyes againſt that law which is of the higheſt authority of any, or againſt a part of that law, which either by its words or by its ſpirit, denies to any but the people the power to change it? In caſes where the controverſy before the court, does not involve the private intereſt or relate to the powers of the judiciary, they are not only the proper, but a perfectly diſintereſted tribunal; —e. g. if the Legiſlature ſhould deprive a man of the trial by jury—there the controverſy is between the legiſlature on one hand, and the whole people of Virginia (through the medium of an individual) on the other, which people have declared that the trial by jury ſhall be held ſacred.

In other caſes where the private intereſt of judges may be affected, or where their conſtitutional powers are encroached upon, their ſituation is indeed delicate, and let them be ever ſo virtuous they will be cenſured by the ill diſpoſed part of their fellow citizens: but in theſe caſes, as well as others, they are bound to decide, and they do actually decide on behalf of the people—for example, though a judges is intereſted privately in preſerving his independence, yet 'tis the right of the people which ſhould govern him, who in their ſovereign character have provided that the judges ſhould be independent; ſo that it is in fact a controverſy between the legiſlature and the people, though perhaps the judges may be privately intereſted. The only effect on the judges in ſuch caſe ſhould be, to diſtruſt their own

judgment if the matter is doubtful, or in other words to require clear evidence before they decide in cases where intereſt may poſſibly warp the judgment.

From the above premiſes I conclude that the judiciary may and ought to adjudge a law unconſtitutional and void if it be plainly repugnant to the letter of the Conſtitution, or the fundamental principles thereof. By fundamental principles I underſtand, thoſe great principles growing out of the Conſtitution, by the aid of which, in dubious caſes, the Conſtitution may be explained and preſerved inviolate; thoſe land-marks, which it may be neceſſary to reſort to, on account of the impoſſibility to foreſee or provide for, caſes within the ſpirit but without the letter of the Conſtitution.

To come now more immediately to the queſtion before the court; can thoſe who are appointed judges in chancery, by an act of aſſembly, without ballot, and without commiſſion during good behaviour, conſtitutionally exerciſe that office?—The fourteenth article of the Virginia Conſtitution recites "that the people have a right, to uni-" form government; and therefore, that no government " ſeparate from, or independent of, the government of " VIRGINIA, ought to be erected or eſtabliſhed within the " limits thereof." Here then is a general principle pervading all the courts mentioned in the Conſtitution—from which without an exception we ought not to depart—— If thoſe may be judges who are not appointed by joint ballot, but by an act of aſſembly, the ſenate have in that inſtance more power than the Conſtitution intended; for they control the other branch, by their negative upon the law, whereas if they mixed with that branch in a joint ballot, a plurality of votes of ſenators and delegates would decide.

If there can be judges in chancery who have no commiſſion during good behaviour, their tenure of office is ab-

ſolutely at the will of the legiſlature, and they conſequently are not independent. The people of Virginia intended that the judiciary ſhould be independent of the other departments: they are to judge where the legiſlature is a party, and therefore ſhould be independent of it, otherwiſe they might judge corruptly in order to pleaſe the legiſlature, and be conſequently continued in office. It is an acknowledged principle in all countries, that no man ſhall be judge in his own cauſe; but it is nearly the ſame thing, where the tribunal of juſtice is under the influence of a party. If the legiſlature can transfer from conſtitutional to legiſlative courts, all judicial powers, theſe dependent tribunals being the creatures of the legiſlature itſelf, will not dare to oppoſe an unconſtitutional law, and the principle I ſet out upon, viz. that ſuch laws ought to be oppoſed would become a dead letter, or in other words, this would pave the way to an uncontrolled power in the legiſlature. The conſtitution requires the concurrence of the legiſlature to appoint, and the executive to commiſſion a judge:—but an appointment by act of aſſembly, will inveſt with this high power one who has not the ſanction of the executive; and will throw a new office upon a man, without the liberty of declining ſuch appointment, if he thinks proper. For theſe reaſons, and others which it would be tedious to enumerate, I am of opinion, that the clauſe in queſtion, is repugnant to the fundamental principles of the Conſtitution in as much as the judges of the general court have not been ballotted for and commiſſioned as judges in chancery, purſuant to the fourteenth article of the Conſtitution.

Mr. ROANE then ſaid, "Although it is not in my opinion now neceſſary to decide, whether the offices of a judge in chancery and of the general court, may be united in the ſame perſon or not, ſuppoſing a conſtitutional appointment to have been made of the ſame perſon to each—yet in

as much as this queſtion is in ſome meaſure involved in the one juſt diſcuſſed, I will give my preſent impreſſions upon it, leaving myſelf free to decide hereafter the one way or the other, ſhould it come judicially before me.

The conſtitution has declared that the three departments of government ſhould be ſeparate and diſtinct.—There are great political evils which would ariſe from their union :— for example, if according to Monteſquieu, the members of the legiſlature were alſo members of the judiciary, the ſame man would as a legiſlator make a tyrannical law, and then as a judge would enforce it tyrannically.—This union it is evident would produce a complete deſpotiſm.

It is therefore a fundamental principle not only of our conſtitution, but acknowledged by all intelligent writers, to be eſſential to liberty, that ſuch an union ſhould not take place.

But is there any great political evil reſulting from the ſame perſons being a judge in chancery, and of the general court?

Is there any conſtitutional impediment?—It would be wiſe in the legiſlature to keep the offices ſeparate; for an union of ſeveral functions in one perſon, will put it out of his power to be perfect in either, and the commonwealth will be better ſerved by dividing than by accumulating the public duties.

But it has been ſaid, and I confeſs with great force, that in as much as the judges in chancery are to be tried, on impeachment, before the general court, if the judges of the general court are alſo judges in chancery, they in their latter character muſt be tried before themſelves in their former, and conſequently there will be a defect of an impartial tribunal. I can only anſwer this objection by ſaying, that the former court of appeals was compoſed of the judges of the general court, court in chancery, and admiralty.—The legiſlature might have ſo organized the

ſaid Courts as to have had nine-tenths of the court of appeals members of the general court.

The judges of the general court are by the conſtitution to be tried before the court of appeals, i. e. *under that organization*, before themſelves;—and the judges of appeals before the general court, which would produce the ſame dilemma.

This caſe then is preciſely ſimilar to the caſe before us.—And yet the judges of the court of appeals did in the remonſtrance of May, one thouſand ſeven hundred and eighty eight, declare "that the forming the court of appeals, ſo as to conſiſt of all the judges is *no violation* of the "conſtitution;" thereby over-ruling the objection which muſt have occurred in that caſe as well as in this.

Upon the whole I muſt ſay, that however inconvenient and unwiſe it might be to unite theſe diſtinct offices in the ſame perſon;—however in the caſe that has been ſuppoſed, there might be a defect of an impartial tribunal to try an offending chancellor upon an impeachment;—ſtill not ſeeing any expreſs proviſion in, or fundamental principle of, the conſtitution, reſtricting the power of the legiſlature in this reſpect; and grounding myſelf upon the above recited opinion of the former court of appeals as to the conſtitutionality of the union of offices which then exiſted in that body;———My preſent impreſſions are, that there is no conſtitutional impediment, plainly apparent, againſt uniting the two offices in the ſame perſon.

JUDGE HENRY.

THIS is an adjourned caſe from the Dumfries Diſtrict, and the queſtion *(new and difficult)* referred to this court is,——Ought the diſtrict judges to exerciſe that branch of

chancery juriſdiction committed to them by the laſt diſtrict law, of hearing and deciding all cauſes brought before them by injunction according to the rules preſcribed by law for conducting ſimilar ſuits in the high court of chancery.

The difficulty and novelty of this caſe is, that the law in queſtion requires of the common law judges, to exerciſe chancery juriſdiction, and that without a legal appointment, and without a commiſſion.

The diſcuſſion of this ſubject is no leſs delicate than it is important.—It is important as it brings in queſtion the rights of the legiſlature on one of the particular ſubjects committed to them by the plan of government: It is delicate, as the judges are compelled to examine their powers, their duties, and the regularity of their appointments, and therefore, they may be conſidered, in ſome ſenſe, as judges in their own cauſe.—But be the ſubject as delicate as can be ſuppoſed poſſible, and as important as any which can ever come before a court, it is now before us, and I embrace the opportunity, now offered me for the firſt time, of publicly declaring my opinion.

The importance of the ſubject requires a particular attention, and thorough examination. We will then have recourſe to the revolution and ſome of the hiſtory.

In the year 1776, the people of this country choſe deputies, to meet in general convention, to conſult of, and take care for, their moſt valuable intereſts. Theſe deputies ſeem to have been complete repreſentatives of the people, and veſted with the moſt unlimited authority. Accordingly, having taken a careful review of the ſtate of their country, they found a number of inſtances of miſrule in the then exiſting government, and that our prince by abandoning the helm of government, and declaring the people to be out of his allegiance and protection, had produced a total diſſolution of the ſocial band.

When this was found to be our unhappy ſituation, our deputies proceeded, (as of right they might), to prepare that form of government for us they judged beſt.

Accordingly, a plan of government was agreed upon, promulged, and accepted by the people, which has been uniformly acquieſced under from that day to this time.—But previous to the promulging the plan of government, theſe deputies declared that certain rights were inherent in the people, which the public ſervants who might be intruſted with the execution of this government, were never to be permitted to infringe—for example—the legiſlative branch were declared to be reſtrained from interfering, with the right of trial by jury in criminal caſes; from meddling with the rights of conſcience, in matters of religion, and each of the three branches into which the government was to be divided was declared incompetent to any of the duties of either of the other two.

The judiciary, from the nature of the office, and the mode of their appointment, could never be deſigned to determine upon the equity, neceſſity, or uſefulneſs of a law; that would amount to an expreſs interfering with the legiſlative branch, in the clauſe where it is expreſsly forbidden for any one branch to interfere with the duties of the other. The reaſon is obvious, not being choſen immediately by the people, nor being accountable to them, in the firſt inſtance, they do not, and ought not, to repreſent the people in framing or repealing any law.

There is a propoſition which I take to be univerſally true in our conſtitution, which to gentlemen whoſe ideas of parliament, and parliamentary powers were formed under the former government, may not be always obvious—'tis this—We were taught that *Parliament* was *omnipotent*, and their powers beyond control; now this propoſition, in our conſtitution, is limited, and certain rights are reſerved as before obſerved;—if this were always kept in mind, it

might free the mind from a good deal of embarraſſment in diſcuſſing ſeveral queſtions where the duty, and the power of the legiſlature is conſidered.

Our deputies, in this famous convention, after having reſerved many fundamental rights to the people, which were declared not to be ſubject to legiſlative control, did more;—they pointed out a certain and permanent mode of appointing the officers who were to be intruſted with the execution of the government.——Though the choice of the officers was intruſted to the wiſdom of the legiſlature, yet the manner of conducting this choice was fixed; hereby declaring in the moſt ſolemn manner, the public will and mind of the people to be, that the laws, when made, ſhould be executed by officers choſen and appointed, as therein is directed, and not otherwiſe, whereas under the former government, the legiſlature ſeemed to have had no bounds to their authority but the negative of the crown, and the public officers were appointed and diſplaced at the pleaſure of the governing powers which then were.

I come now to the particular caſe before the court. Kamper applied to the diſtrict court of Dumfries, for an injunction to a judgment obtained at law in that court by Hawkins, under the law which directs the diſtrict judges to hear and determine all ſuits commencing by injunction, under the ſame rules and regulations as are now preſcribed by law, for conducting ſimilar ſuits in the high court of chancery.

The permanent will of the people, expreſſed in the conſtitution, is that the legiſlature, by joint ballot of both houſes, ſhall appoint judges of the ſupreme court of appeals and general court, judges in chancery, &c. to be commiſſioned by the governor, and to hold their offices during good behavior.

'Tis alledged by ſome of my brethren, that the legiſlature are not warranted in appointing the ſame men to be

judges both at common law and in chancery. The words of the plan of government are, " they ſhall appoint judges " of the high court of appeals and general court, judges in chancery, &c."——Theſe words, *Judges in Chancery*, are ſuppoſed to deſign different perſons from the judges of the general court, and an argument to inforce this opinion is drawn from § 16 and 17, where it is provided, that any judge of the general court, offending againſt the ſtate, may be proſecuted in the high court of appeals; but a chancery judge offending muſt be proſecuted in the general court; therefore it is alledged, a common law judge cannot be a chancery, nor a chancery a common law judge in our government.

This queſtion has heretofore been alledged as one of the reaſons of the high court of appeals for declining to execute a very important law of the land;—without ſaying any thing about the propriety or impropriety of that buſineſs, it is ſufficient for my preſent purpoſe to obſerve, that the queſtion did not then come before the court in a judicial manner,——it was taken up as a general propoſition, and when publiſhed, contained an appeal to the people; this looked like a diſſolution of the government,—therefore I cannot view it as an adjudged caſe, to be conſidered as a binding precedent.

It is much to be wiſhed that the queſtion had been then decided, by calling a convention of the people.—But unfortunately the legiſlature neither yielded the point nor inſiſted, but adopted an expedient.—They new-modelled the courts.—The queſtion then went to ſleep, but the legiſlature preſerved the principle; they appointed judges of the high court of appeals, with unlimited juriſdiction, both in law and equity; they appointed judges of the general court, and a judge in chancery.

If the common law and chancery juriſdiction ought not to be united in the ſame perſons in the firſt inſtance, I do not ſee how it can be juſtified in the appellate juriſdiction.—If the form of government has provided that juſtice at common law ought to be adminiſtered by one ſet of men, and in chancery by another, it ſeems to me to follow as a neceſſary inference, that the appellate, as well as the original juriſdiction, ought to be ſeparate and diſtinct, and that thoſe gentlemen who now exerciſe the appellate juriſdiction have admitted the legiſlative conſtruction of the form of government formerly objected to.

But I do not reſt the queſtion on this ground. Where I am not bound by regular adjudications of the ſuperior court, I cannot reſt on other men's opinions. I muſt and will think for myſelf.

Our government is declared to be founded on the authority of the people. The people, in convention, have ordered that a legiſlature ſhall be choſen, a governor and council ſhall be choſen, judges ſhall be appointed.—All theſe different characters are ſervants of the people, have different duties, and are amenable to them. When the legiſlature were intruſted with the appointment of judges, I can find no particular characters, or any deſcription of men, declared to be ineligible, but thoſe holding legiſlative or executive authority, who are forbidden to interfere. To the diſcretion of the legiſlature is committed the choice of the judges, who ſhall fill all the ſuperior courts, and therefore, if they have choſen, or ſhall hereafter chuſe to appoint the ſame ſet of men to adminiſter juſtice to the people, both at common law and in chancery, I cannot find any thing in the form of government to reſtrain them.—They are to appoint judges in chancery at their diſcretion;—and for me to ſay I cannot act as a chancery judge in any caſe, becauſe if I ſhould offend, I am to be proſe-

cuted for ſuch offence before my brethren in the general court, ſeems to be a ſtrange reaſon for me to aſſign for declining the office.

I am therefore very clear and decided in my opinion, that the legiſlature were fully authoriſed by the form of government, to appoint the diſtrict judges to exerciſe a chancery juriſdiction in the caſe before us, and I do chearfully embrace this public opportunity of declaring my hearty approbation of the meaſure, and my willingneſs to act when the appointment is regularly made.

This brings me to the ſecond point in the caſe. Have the legiſlature made the appointment in the manner preſcribed by the form of government?——

I wiſh moſt ſeriouſly I could give an affirmative anſwer to this queſtion. 'Tis provided by the form of government, ſo often alluded to, that judges in chancery ſhall be choſen by joint ballot of both houſes, ſhall be commiſſioned by the governor, ſhall hold their office during good behaviour, and to ſecure their independence and remove them from all temptation to corruption, their ſalaries ſhall be adequate and fixed.—If a chancellor in any caſe muſt be choſen by ballot, be commiſſioned and hold his office during good behavior, ſurely it is proper, it is neceſſary in all caſes, that every judge ſhall be ſo choſen, ſhall be ſo commiſſioned, and hold his office ſo long as he behaves well.——The buſineſs of hearing cauſes originating in that court by injunction, is of a permanent nature.——To exerciſe this duty without the appointment and commiſſion preſcribed by the conſtitution, would be an exerciſe of a power according to the will of the legiſlature, who are ſervants of the people, not only without, but expreſsly againſt the will of the people.——This would be a ſoleciſm in government,—eſtabliſhing the will of the legiſlature, ſervants of the people, to control the

will of their maſters, if the word may be permitted.——'Till the appointment is made agreeable to the directions of the conſtitution, I cannot think myſelf duly authoriſed to take upon me the office.

Before I conclude, I wiſh to embrace the preſent opportunity of ſaying ſomething about what may be called inconſiſtency in my conduct.——'Tis well known I ſat in the former court of appeals, not being particularly balloted for and commiſſioned. I have latterly obeyed the commands of the legiſlature, by ſitting in the ſpecial court of appeals without any ſuch appointment or commiſſion.

When I was appointed a judge of the court of admiralty there was a ſtanding law of the land, that every ſuch judge ſhould of courſe be a judge of the court of appeals, and an oath of office in both courts was preſcribed. When I was ballotted for, I conſidered myſelf as having a general appointment to both the courts, and acted accordingly: and had a commiſſion been applied for as a judge of the court of appeals, 'tis probable, it might have been granted. However, the legiſlature, on reviewing this ſubject, availing themſelves of what was then in their opinion judged to be an incomplete appointment, thought themſelves authoriſed to garble the commiſſion, and diſmiſs one half of the judges, without either giving them notice, or aſſigning any reaſon, aſſuming a right from their own omiſſion, if it was one, to diſmiſs their judges.——If the legiſlature were authoriſed to take this ſtep at that time, it ſurely furniſhes all ſucceeding judges, as they value their reputation and their independence, to ſee that their appointment be regular, before entering upon the duties of their office, in future.

This diſmiſſion was ſubmitted to, though, in a ſhort time afterwards, the legiſlature ſeem to have forgotten the principle on which they grounded the diſmiſſion of the judges; for when public convenience ſeemed to require a ſpecial court of appeals, in caſes where a majority of the judges of

that court ſhould be intereſted, they commanded the judges of the general court to attend in ſuch ſpecial court, without either an appointment or commiſſion, which command I have more than once obeyed: and I freely acknowledge, that I conſider this ſpecial court, with reſpect to me, who have been neither appointed nor commiſſioned ſince the paſſing of that law, as unconſtitutional; but it is temporary.—The caſe cannot often happen; 'tis exceedingly diſagreeable to be faulting the legiſlature; and, perhaps, one particular miſchief had better be ſubmitted to, than a public inconvenience.—Theſe were my reaſons for ſitting in this ſpecial court.

It is moſt devoutly to be wiſhed, that the preſent ſubject, now become the topic of public diſcuſſion, may be fully and generally underſtood, by the legiſlature, by the judiciary, and by the public at large, that there be no more of theſe unhappy differences of opinion between any of the different departments of government.

It remains only for me to add that where I have been appointed and commiſſioned, I obey with alacrity when a new appointment ſhall be made, and a commiſſion directed, authoriſing me to exerciſe the office of a judge in chancery, in any caſe whatever, I ſhall then have it in my power to exerciſe the right of every other free man,—to accept or refuſe,—though I have no difficulty in declaring, were the appointment perfect, that I might hold during good behaviour, I ſhould have no objection to enter upon the diſcharge of theſe new duties;—but until that is done, in juſtice to the public, whoſe rights are concerned, and to myſelf, as an individual, I muſt decline the duty preſcribed by the law in queſtion, not being as yet ſuch a judge in chancery as the people have ſaid ſhall exerciſe that kind of jurisdiction.

Of courſe, my opinion is that the diſtrict court of Dumfries be adviſed to over-rule the motion for an injunction in this cauſe.

JUDGE TYLER.

I am ſaved much trouble in the inveſtigation of this caſe by the gentlemen whoſe opinions have been already delivered with ſo much propriety and ſound reaſon, as it reſpects the queſtion of the validity of the Conſtitution.

It is truly painful to me to be under the neceſſity of ſaying any thing in ſupport of it at this day; but ſince I am reduced to this neceſſity, I muſt be indulged with a few obſervations on the ſubject.

I know it has been the opinion of ſome critical and ſpeculative gentlemen of conſiderable merit and abilities too, that our form of government was not authoriſed by the people, inaſmuch as no inſtructions were given by the people to the convention at the time the Conſtitution was eſtabliſhed.

To inveſtigate this ſubject rightly, we need but go back to that awful period of our country when we were declared out of the protection of the then mother country—and take a retroſpective view of our ſituation, and behold the bands of civil government cut aſunder, and deſtroyed—No ſocial compact, no ſyſtem of protection and common defence againſt an invading tyrant—In a ſtate of nature, without friends, allies, or reſources—In ſuch a caſe what was to be done?

Thoſe eminent characters to whom ſo much gratitude is, and for ever will be due; whoſe names are enrolled in the

annals of America, recommended a convention of delegates to be choſen for that purpoſe; who were to meet together for the expreſs deſign of completely protecting and defending the rights, both civil and religious, of our common country.—The delegates were ſo elected and convened.—What power had the people therefore that was not confided to their repreſentatives? All their rights, all their power, all their happineſs, all their hopes and proſpects of ſucceſs, were moſt indubitably entruſted to their care.—They were not betrayed.—The people did not ſay to their repreſentatives, So far ſhall ye go, and no farther.—Happy, indeed, for this country, that no ſuch reſtraint was laid on them.

In order to protect and defend the common cauſe then, a ſyſtem of ſocial duties were formed.—Without this what obedience could have been expected, and how could a regular defence have been made?

A great variety of departments were eſtabliſhed, and thoſe who were to execute them muſt have been made reſponſible to ſome regular power—And all this was to complete the great work of liberty.

Has not this policy been ſufficiently ratified by time and action? And if it were poſſible to doubt, under theſe circumſtances, has it not been ſealed with the blood of this wide extended empire? And ſhall its validity be now queſtioned? for what purpoſe? to revert back to our former inſignificancy? It cannot be.

Before I proceed to ſay any thing on the adjourned caſe now under contemplation, I will beg leave to make a few obſervations on the opinion that ſome gentlemen have taken up of the impropriety of the judiciary in deciding againſt a law which is in contradiction to the Conſtitution.

A little time and trouble beſtowed on this ſubject, I am ſure, would enable any perſon, endowed with common underſtanding, to ſee the fallacy of ſuch ſentiments.

What is the Conſtitution but the great contract of the people, every individual whereof having ſworn allegiance to it?—A ſyſtem of fundamental principles, the violation of which muſt be conſidered as a crime of the higheſt magnitude.——That this great and paramount law ſhould be faithfully and rightfully executed, it is divided into three departments, to wit; the legiſlative, the executive, and judiciary, with an expreſs reſtraint upon all, ſo that neither ſhall encroach on the rights of the other.—In the Bill of Rights many things are laid down, which are reſerved to the people—trial by jury, on life and death; liberty of conſcience, &c. Can the legiſlature rightfully paſs a law taking away theſe rights from the people? Can the judiciary paſs ſentence without a conviction of a citizen by twelve of his peers? Can the executive do any thing forbidden by this bill of rights, or the conſtitution? In ſhort, can one branch of the government call upon another to aid in the violation of this ſacred letter? The anſwer to theſe queſtions muſt be in the negative.

But who is to judge of this matter? the legiſlature only? I hope not.—The object of all governments is and ought to be the faithful adminiſtration of juſtice—It cannot, I hope, be leſs the object of our government, which has been founded on principles very different from any we read of in the world, as it has ingrafted in it a better knowledge of the rights of human nature, and the means of better ſecuring thoſe rights.—And were I inclined to borrow a ſentiment from any man, in ſupport of my opinion, (not as authority, but merely argumentative) I ſhould make uſe of the following one from the celebrated Hume, in his eſſay on our government—viz. "We are therefore to look up-
"on all the vaſt apparatus of our government, as having
"ultimately no other object, or purpoſe, but the diſtribu-
"tion of juſtice, or in other words the ſupport of the
"judges. Kings and parliaments, heads and armies, offi-

" cers of the court and revenue, ambaſſadors, miniſters, " and privy-counſellors, are all ſubordinate in their end " to this part of adminiſtration."——Hence it may reaſonably be inferred that if the commonwealth itſelf is ſubordinate to this department of government at times, ſo therefore will neceſſarily be the acts of the legiſlatnre, when they ſhall be found to violate firſt principles, notwithſtanding the ſuppoſed " *omnipotence of parliament*," which is an abominable inſult upon the honour and good ſenſe of our country, as nothing is omnipotent as it relates to us, either religious or political, but the *God of Heaven* and our conſtitution!

I will not in an extra-judicial manner aſſume the right to negative a law, for this would be as dangerous as the example before us; but if by any legal means I have juriſdiction of a cauſe, in which it is made a queſtion how far the law be a violation of the conſtitution, and therefore of no obligation, I ſhall not ſhrink from a compariſon of the two, and pronounce ſentence as my mind may receive conviction.—To be made an agent, therefore, for the purpoſe of violating the conſtitution, I cannot conſent to.—As a citizen I ſhould complain of it; as a public ſervant, filling an office in one of the great departments of government, I ſhould be a traitor to my country to do it. But the violation muſt be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might be productive of much public good. Theſe premiſes being admitted, as I think they muſt, I will now draw a compariſon of the law before us with the conſtitution. The conſtitution declares there ſhall be judges in chancery, judges of the general court, &c. &c. and the firſt queſtion that occurs is this—Can the office of a judge in chancery and common law be rightfully veſted in the ſame perſons, provided the appointment be regular?—To which I anſwer, I ſee no incompati-

bility, in the exerciſe of theſe offices, by the ſame perſons —for although they be diſtinct offices, poſſeſſing diſtinct powers, they do not neceſſarily blend and run together, becauſe they are placed in the ſame hands. The judge who knows the powers and duties of both, will well know how to keep them apart—like the rays of the ſun, they radiate from one common centre, and may run parallel for ever, without an interference.—But to this, an ingenius and ſubtile argument is offered, and taken from the 17th article of the conſtitution, wherein it is directed, that when the judges of the general court are impeached, the court of appeals ſhall ſet in judgment—but all other officers of government, ſhall be impeached before the general court. Therefore, the conſtitution meant to keep the offices diſtinct, in diſtinct hands, becauſe it is poſſible that they may try one another, and perhaps form a combination, in favour of the fraternity. This is too nice a deduction, and is a better argument in favour of an amendment of the conſtitution, than of the queſtion under conſideration. We cannot ſupply defects; nor can we reconcile abſurdities, if any there be; this muſt be done by the people; and were we about the buſineſs of amendments duly authoriſed, it might be well to conſider this point.—But I cannot ſee why a judge in chancery, if he be a judge alſo of the general court, may not be tried by the court of appeals; for if he be convicted of ſuch a crime, as he ought to be diſplaced office in either capacity, he would hardly be allowed to hold the other—nor do I ſee why the judges of the general court, cannot try their brothers in chancery.

The Legiſlature having a knowledge of this caſe, choſe to truſt the powers in our hands, as in the caſe of the high court of appeals who poſſeſs both chancery and common law powers, and are yet impeachable before the general court, who ought not to have a ſtronger ſympathy or fellow-feel-

ing for each other than for all the judges. In this caſe we find the ſame poſſible inconvenience, but it is barely poſſible to ſuppoſe that juſtice and the law will not be the object of a court's deciſion let who will be the culprit, or object of trial—we find the county courts poſſeſs theſe powers, and I do ſuppoſe, if the doctrine contended for, on this point, was ſound, they would not have been ſuffered to have reſted from the beginning of the revolution to this day, in thoſe courts, and without arrogating much to ourſelves we may be allowed to hope the truſt would be at leaſt as well executed, in our hands.—I have nothing to ſay with reſpect to the policy of the meaſure, that will ſpeak for itſelf; and moreover, it belongs to the legiſlature to decide.

The next inquiry we are to make, brings us pointedly to the compariſon of the law now under contemplation, and the conſtitution, and how does it ſtand? the conſtitution ſays that judges in chancery ſhall be appointed by joint ballot of both houſes of aſſembly, and commiſſioned by the governor during good behaviour—and for the moſt valuable purpoſes; to ſecure the independence of the judiciary.—Contrary to this expreſs direction, which admits of no doubt, implication or nice conſtruction, that bane to political freedom, the legiſlature has made the appointment by an act mandatory, to the judges, leaving them not at liberty to accept or refuſe the office conferred, which is a right every citizen enjoys, in every other caſe—a right too ſacred to be yielded to any power on earth—but, were I willing to do it as it relates to myſelf, as a judge I ought not; becauſe it would fruſtrate that moſt important object beforementioned—intended by the conſtitution to be kept ſacred, for the wiſeſt and beſt of purpoſes—to wit, that juſtice and the law be done to all manner of perſons without fear or reward.—

For how would the rights of individuals ſtand when brought in conteſt with the public or even an influential character, if the judges may be removed from office by the ſame power who appointed them, to wit, by a ſtatute appointment as in this caſe, and by a ſtatute diſappointment as was the caſe in the court of appeals—might not danger be apprehended from this ſource when future times ſhall be more corrupt? and yet, thank Heaven, the time has not arrived, when any judge has thus degraded his office, or dignity as a man, by a deciſion governed by fear or any other baſe motive, and I hope a long time will yet elapſe before this will be the caſe—but our conſtitution was made, not only for the preſent day, but for ages to come, ſubject only to ſuch alterations as the people may pleaſe to make. Let me now compare the law and the conſtitution in the other point; that of the want of a commiſſion during good behaviour, and the reaſons will fully or forcibly apply—when I receive the commiſſion, I ſee the ground on which I ſtand. I ſee that my own integrity is that ground, and no opinions, but ſuch as are derived from baſe motives, can be ſufficient to remove me from office—in which caſe whenſoever an appeal is made to me by an injured citizen, I will do him juſtice, as far as my mental powers will enable me, to diſcover it without any apprehenſions of an unjuſt attack—that if the proudeſt ſovereign on earth was in conteſt with the loweſt peaſant, that creeps through this vale of ſorrow yet ſhould the arm of juſtice be extended to him alſo.

To conclude, I do declare that I will not hold an office, which I believe to be unconſtitutional, that I will not be made a ſit agent, to aſſiſt the legiſlature in a violation of this ſacred letter, that I form this opinion from the conviction I feel that I am free to think, ſpeak, and act, as other men do upon ſo great a queſtion, that as I never did ſacri-

ſice my own opinions for the ſake of popularity, in the various departments I have had the honour to fill, however deſirable popular favour may be, when obtained upon honorable principles; ſo now that I am grown old, I cannot depart from thoſe motives which I have both in public and private life made my ſtandard—I concur therefore moſt heartily with my brothers, who have gone before me in the laſt two points, that the law is unconſtitutional and ought not to be executed, the injunction therefore muſt be overruled—and this opinion I form not from a view of the memorials, nor from writers who knew not the bleſſings of free government, but as they were ſeen and felt through the proſpect of future times, but from honeſt reaſon, common ſenſe, and the great letter of a *Free Conſtitution!*

JUDGE TUCKER.

THIS queſtion was an adjourned caſe from the diſtrict court of Dumfries, and aroſe upon the act of 1792, for reducing into one the ſeveral acts concerning the eſtabliſhment, juriſdiction, and powers of the diſtrict courts.

Sect. 3. of that act declares it to be the duty of two of the judges of the *general court* to attend each diſtrict court at their reſpective terms; and the ſaid two judges ſhall conſtitute a court for ſuch diſtrict, &c.

Sect. 11. provides "that each of the ſaid diſtrict courts, "in term-time, or *any judge thereof*, in vacation, ſhall, and "may have, and exerciſe the *ſame power* of granting injunctions, to ſtay proceedings on any judgment, obtained "in any of the ſaid diſtrict courts, as is now had, and exerciſed by the *judge* of the *high court of chancery*, in ſimilar "caſes, and the ſaid diſtrict courts, may proceed to the diſſolution, or final hearing of all ſuits, commencing by in-

"junction, under the ſame rules, and regulations, as are "now preſcribed by law for conducting ſimilar ſuits in the "high court of chancery."

Upon this clauſe, a motion was made in Dumfries diſtrict court, May 23, 1791, for an injunction to ſtay proceedings on a judgment obtained in that court, and was adjourned hither for novelty and difficulty.

The queſtion which it is now incumbent on this court to decide, ſeems to me to be ſhortly this—whether a *judge of the general court* of this commonwealth, can conſtitutionally exerciſe the functions of a *judge in chancery?* this calls upon us for a recurrence to fundamental principles, a duty which our bill of rights * expreſsly impoſes upon all the ſervants of the commonwealth. And this renders it neceſſary not only to inveſtigate the *principles* upon which our government is founded, but the *authority* by which it was eſtabliſhed; inaſmuch as there are doubts in the breaſts of many, whether our *conſtitution* itſelf is any more than an act of the ordinary legiſlature, revocable, or ſubject to alteration by them, in any manner, and at any time.

In conſidering this queſtion, I ſhall firſt ſtate my own impreſſions, ariſing from the text of the conſtitution, and the ſpirit of our government, only unſupported by any former judicial opinions on the ſubject—and, ſecondly, as founded on the authority and deciſion of the court of appeals.

I. In ſtating my own impreſſions, I ſhall conſider:

1ſt. Whether the conſtitution, or form of government of this commonwealth, be an act of the ordinary legiſlature, and, conſequently revocable, or ſubject to alteration by the ſame authority; or ſomething paramount thereto?

* *Bill of Rights, Art.* 15.

2dly. Whether, according to that conſtitution, the functions of a *judge of the general court*, and a *judge in chancery*, were intended to be diſtinct; or might be blended in the ſame perſon?

1ſt. Whether the conſtitution be an act of the ordinary legiſlature; or ſomething paramount thereto?

It will be remembered, by all thoſe who are converſant with the hiſtory of the riſe and progreſs of the late glorious revolution, that the meaſures which led to the final conſummation of that important event, although they originated, in moſt inſtances, with the legal and conſtitutional aſſemblies of the different colonies, made but a ſmall progreſs in that channel, particularly in this ſtate. The diſſolution of the conſtitutional Aſſemblies, by the governors appointed by the crown, obliged the people to reſort to other methods of deliberating for the common good.—Hence the firſt introduction of conventions: bodies neither authorized by, or known to the then conſtitutional government; bodies, on the contrary, which the conſtitutional officers of the then exiſting governments conſidered as illegal, and treated as ſuch. Nevertheleſs, they met, deliberated, and reſolved for the *common good*. They were the *people*, aſſembled by their deputies; not a *legal*, or *conſtitutional aſſembly*, or *part* of the *government* as then organized.—Hence they were not, nor could be deemed the ordinary legiſlature; that body being compoſed of the governor, council, and burgeſſes: who ſat in *ſeveral diſtinct chambers*, and *characters*: while the other was compoſed of a *ſingle* body, having neither the character of governor, council, or legiſlimate repreſentative among them: they were, in effect, *the people themſelves*, aſſembled by their delegates, to whom the care of the commonwealth was eſpecially, as well as unboundedly confided.

To prove this diſtinction ſtill farther. The power of convening the *legal* aſſemblies, or the ordinary conſtitutional legiſlature, reſided ſolely in the executive: they could neither be choſen without writs iſſued by it's authority, nor aſſemble when choſen, but under the ſame authority. The conventions, on the contrary, were choſen, and aſſembled, either in purſuance of recommendations from Congreſs, or from their own bodies, or by the diſcretion, and common conſent of the people. They were held, even whilſt a legal aſſembly exiſted. Witneſs the convention, held in Richmond in March, 1775: after which period, the legal, or conſtitutional aſſembly was convened in Williamſburgh by the governor, lord Dunmore; and continued ſitting until finally diſſolved by him in June or July 1775.—No other legal aſſembly was ever choſen, or convened under the Britiſh government.

The convention then was not the ordinary legiſlature of Virginia. It was the body of the people, impelled to aſſemble from a ſenſe of common danger, conſulting for the common good, and acting in all things for the common ſafety. It could not be the legitimate legiſlature, under the then eſtabliſhed government, ſince that body could only be choſen under the permiſſion, and aſſembled under the authority of the crown of Great Britain.

But although the exerciſe of the authority of the executive government under the crown of Great Britain ceaſed altogether with the diſſolution of that aſſembly in June 1775, yet a conſtitutional dependence on the Britiſh government, was never denied, until the ſucceeding May, nor diſſolved until the moment of adopting the preſent conſtitution, or form of government; an event, which took effect by the *unanimous voice*

* *Ord. of Conv. July* 1775, c. 4. *Rev. Co.* 30.

of the convention, (elected after the final diſſolution of the general aſſembly, as above-mentioned, and aſſembled in Williamſburgh,) on the 29th of June 1776, after ſix weeks deliberation thereon *, and eight days before the declaration of independence, by the Congreſs of the United States. This was not then the act of the ordinary legiſlature that diſſolved the bands of union between us. It was the voice of the people themſelves, proclaiming to the world their reſolution to be free; to be governed only by their own laws; and to inſtitute ſuch a government, as, in their own opinion, was moſt likely to produce peace, happineſs, and ſafety to the individual, as well as to the community.

It ſeems to me an obſervation of great importance, that the *declaration of independence by this ſtate*, was *firſt made* in that inſtrument which *eſtabliſhes our conſtitution*. The inſtant that the declaration of independence took effect, had the convention proceeded no further, the government, as formerly exerciſed by the crown of Great Britain, being thereby totally diſſolved, there would neither have been an ordinary legiſlature, nor any other organized body, or authority in Virginia. Every man would have been utterly abſolved from every ſocial tie, and remitted to a perfect ſtate of nature. But a power to demoliſh the exiſting fabric of government, which no one will, I preſume, at this day, deny to that convention, without authority to erect a new one, could never be preſumed. A new organization

* *The convention came to a reſolution to inſtruct their delegates in Congreſs to move that body to declare America independent on the 15th of May, 1776, and the ſame day appointed a committee to prepare the draught of the new conſtitution, or form of government. See the journals of the convention aſſembled in Williamſburgh, May 1776.*

of the fabric, and a new arrangement of the powers of government, muſt inſtantly take place, to prevent thoſe evils which the abſence of government muſt infallibly produce in any caſe; but more eſpecially under circumſtances ſo awful, and proſpects ſo threatening, as thoſe which ſurrounded the people of America, at that alarming period. It would therefore have been abſurdity in the extreme, in the people of Virginia, to authorize the convention to abſolve them from the bonds of one government, without the power to unite them under any other, at a time when the utmoſt exertions of government were required to preſerve both their liberties and their lives: but ſince they are *both* in *form*, and *effect* only *different clauſes of the ſame act*, and neceſſary conſequences of each other, to queſtion the validity of the one, is to deny the effect of the other. The *declaration of independence*, and the *conſtitution*, as the ACTS OF THE PEOPLE, muſt therefore ſtand, or fall together.

Here let me cite the opinion of an eminent lawyer on the one hand, and of an enlightened politician on the other, on the ſubject of two national revolutions, the moſt familiar to us of any, except our own.

"The revolution of 1688, ſays judge Blackſtone, 1 Com. "211, was not a defeazance of the ſucceſſion, and a new "limitation of the crown by the king, and both houſes of "parliament; it was the act of the nation alone, upon the "conviction that there was no king in being."

"The national aſſembly of France, ſays the ingenious "M'Kintoſh, p. 60. was aſſembled as an ordinary legiſla-"ture under exiſting laws. They were transformed by "events into a national convention, and veſted with powers "to organize a new government. It is in vain that their "adverſaries conteſt this aſſertion by appealing to the defi-"ciency of forms. It is in vain to demand the legal in-"ſtrument that changed their conſtitution, and extended

" their powers. Accurate forms in the conveyance of " power are preſcribed by the wiſdom of the law, in the " regular adminiſtration of ſtates. But great revolutions " are too immenſe for technical formality. All the ſanc- " tion that can be hoped from ſuch events is the voice of " the people, however informally and irregularly expreſ- " ſed." (Def. of Fr. Revo. 60.)

Our caſe was much ſtronger than either of thoſe. There was at leaſt the ſhadow of legal, conſtitutional authority in the convention parliament of England in 1688, as the ordinary legiſlature, and the national aſſembly of France, was conſtitutionally aſſembled under the authority of the government it ſubverted. The convention of Virginia had not the ſhadow of a legal, or conſtitutional form about it. It derived it's exiſtence and authority from a higher ſource; a power which can ſuperſede all law, and annul the conſtitution itſelf—namely, the *people*, in their *ſovereign, unlimited*, and *unlimitable* authority and capacity.

From what I have ſaid, I am inclined to hope, that it will appear that our conſtitution was not the act of the ordinary legiſlature: a few words concerning it's operation, authority, and effect, as the act of the people, may not be improper.

" A conſtitution, ſays the celebrated Paine, is not a thing " in name only, but in fact. It has not an ideal, but a " real exiſtence; and wherever it cannot be produced in " a viſible form, there is none. A conſtitution is a thing " antecedent to government, and a government is only " the creature of a conſtitution. It is not the act of the " government, but of the people conſtituting a government. " It is the body of elements to which you can refer, " and quote article by article, and which contains the prin- " ciples on which the government ſhall be eſtabliſhed, the

" manner in which it ſhall be organized, the powers it " ſhall have, &c. See Rights of Man, part I. p. 30.

Vattel, in treating of the fundamental laws of a ſtate, obſerves, " that a nation may entruſt the exerciſe of the " legiſlative power to the prince, or to an aſſembly, or to " that aſſembly and the prince, jointly; who have then a " right of making new, and of abrogating old laws. It " is here demanded, whether if their power extends as far " as the fundamental laws, they may change the conſtitu- " tion of the ſtate? to this he anſwers, we may decide " 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 " *expreſs terms given them 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 truſt- " ed certain perſons, with the legiſlative powers, the fun- " damental laws are excepted from their commiſſion. In " ſhort, theſe legiſlators derive their power from the con- " ſtitution: how then can they change it, without deſtroy- " ing the foundation of their authority?" Vattel, p. 31.

That the legiſlature of this commonwealth have regard- ed our conſtitution in this light, will appear from more than one authority. I ſhall ſelect the preamble of an act paſſed in May ſeſſion, 1783. c. 32. Rev. Co. 204. entitled an act to amend an act, entitled an act concerning the appoint- ment of ſheriffs, which recites " that the former act was " contrary to the conſtitution, or form of government," for which reaſon it was repealed.—A ſecond inſtance may be found in the acts of 1787, c. 23. which recites " that a " former act, entitled an act to extend the powers of the " governor and council, Rev. Co. 81. appears to the pre- " ſent general aſſembly to be contrary to the true ſpirit of

" the conſtitution :" wherefore it was repealed.—Two other inſtances may be found, the firſt in the repeal * of the act of 1787, c. 39. for eſtabliſhing diſtrict courts, whereby the *judges of the court of appeals* were required to act as *judges of the diſtrict courts*: the ſecond, in an act of the laſt ſeſſion, 1792, ch. 28. providing for the republication of the laws of this commonwealth, which directs " that the bill of " rights, and conſtitution, or form of government, ſhall " be preſixed to the code of laws."—Other inſtances doubtleſs may be found in our laws where the legiſlature have either expreſsly, or tacitly, recognized the conſtitution as paramount to their own legiſlative acts; ſo that reaſoning, in this inſtance, is confirmed by precedent.

But here an objection will no doubt be drawn from the authority of thoſe writers who affirm, that the conſtitution of a ſtate is a rule to the *legiſlature only*, and not to the *judiciary*, or the *executive*: the legiſlature being bound not to tranſgreſs it; but that neither the executive nor judiciary can reſort to it to enquire whether they do tranſgreſs it, or not.

This ſophiſm could never have obtained a moment's credit with the world, had ſuch a thing as a written conſtitution exiſted before the American revolution. " All the " governments that now exiſt in the world, ſays a late " writer,† except the United States of America, have been " fortuitouſly formed. They are the produce of chance, " not the work of art. They have been altered, impaired, " improved, and deſtroyed, by accidental circumſtances, " beyond the foreſight or control of wiſdom; their parts " thrown up againſt preſent emergencies, formed no ſyſte- " matic whole." What the *conſtitution* of any country *was*, or rather *was ſuppoſed to be*, could only be collected from what the *government had at any time done*; what had

* 1788, *ch.* 67. † *M'Kintoſh on the Fr. Rev.* 115.

been *acquieſced* in by the people, or other component parts of the government; or what had been *reſiſted* by either of them. Whatever the government, or any branch of it had *once done*, it was inferred they had a *right* to do *again*. The union of the legiſlative and executive powers in the ſame men, or body of men, enſured the ſucceſs of their uſurpations; and the judiciary, having no *written conſtitution* to refer to, were obliged to *receive* whatever *expoſition* of it the legiſlature might think proper to make.—But, with us, the conſtitution is not an "ideal thing, but a real "exiſtence: it can be produced in a viſible form:" its principles can be aſcertained from the living letter, not from obſcure reaſoning or deductions only. The government, therefore, and all its branches muſt be governed by the conſtitution. Hence it becomes the firſt law of the land, and as ſuch muſt be reſorted to on every occaſion, where it becomes neceſſary to expound *what the law is*. This expoſition it is the duty and office of the judiciary to make; our conſtitution expreſsly declaring that the legiſlative, executive, and judiciary, ſhall be ſeparate and diſtinct, ſo that neither exerciſe the powers properly belonging to the other.—Now ſince it is the province of the legiſlature to make, and of the executive to enforce obedience to the laws, the duty of expounding muſt be excluſively veſted in the judiciary.—But how can any juſt expoſition be made, *if that which is the ſupreme law of the land be withheld from their view?* Suppoſe a queſtion had ariſen on either of the acts before cited, which the legiſlature have diſcovered to be unconſtitutional, would the judiciary have been bound by the act, or by the conſtitution?

But that the conſtitution is a rule to all the departments of the government, to the judiciary as well as to the legiſlature, may, I think, be proved by reference to a few parts of it.

The bill of rights, art. 8. provides, that in all capital and criminal profecutions, the party accuſed ſhall be tried by a *jury of the vicinage*, and cannot be found guilty without their *unanimous* conſent.

Suppoſe any future act of the legiſlature ſhould abridge either of theſe privileges, what would be ſaid of a court that ſhould act in conformity to ſuch an act?

Again; art. 9. declares that exceſſive bail ought not to be required. The act * concerning bail, I apprehend, extends not to the ſuperior courts; perhaps not even to the county courts. Is this injunction a mere dead letter, becauſe the legiſlature have not yet paſſed a law equally extenſive in its obligation?

Art. 10. declares that general warrants are illegal and oppreſſive, and ought not to be granted. Is this too a dead letter, becauſe we have no act of the legiſlature to enforce the obligation?

Art. 16. ſecures the free exerciſe of our religious duties, according to the dictates of every man's own conſcience. Should the legiſlature, at any future period, eſtabliſh any particular mode of worſhip, and enact penal laws to ſupport it, will the courts of this commonwealth be bound to enforce thoſe penalties?

Art. 15. of the conſtitution, declares that the clerks of courts ſhall hold their offices during good behaviour, to be judged of and determined in the general court. Can any legiſlative act give any other court cognizance of ſuch a caſe?—Or can any impeachment be tried in any court of this commonwealth, except this court, and the court of appeals, even ſhould an act of the legiſlature (as was once contemplated) erect a court for that eſpecial purpoſe?

From all theſe inſtances it appears to me that this deduction clearly follows, viz. that the *judiciary* are *bound* to take notice of the conſtitution, *as the firſt law of the land;* and

* 1785, *ch.* 80.

that whatſoever is contradictory thereto, is *not* the law of the land.

And here I ſhall avail myſelf of the reaſoning of one of the ableſt political writers that has appeared in America.*

"Some perplexity reſpecting the right of the courts to "pronounce legiſlative acts void, becauſe contrary to the "conſtitution, has ariſen, he obſerves, from an imagination "that the doctrine would imply a ſuperiority of the judi- "ciary over the legiſlative power. It is urged that the "power which can declare the acts of another void, muſt "neceſſarily be ſuperior to the one whoſe acts may be de- "clared void.

"But there is no poſition which depends on clearer prin- "ciples, than that every act of a delegated authority, con- "trary to the tenor of the commiſſion under which it is ex- "erciſed, is void. No legiſlative act therefore, contrary "to the conſtitution, can be valid. To deny this would be "to affirm, that the deputy is greater than the principal; "that the ſervant is above his maſter; that the repreſenta- "tives of the people are ſuperior to the people themſelves.

"If it be ſaid that the legiſlative body are themſelves "the conſtitutional judges of their own powers, and that "the conſtruction they put upon them is concluſive upon "the other departments, it may be anſwered that this can- "not be the natural preſumption, where it is not to be col- "lected from any particular proviſions in the conſtitution. "It is not otherwiſe to be ſuppoſed that the conſtitution "could intend to enable the repreſentatives of the people "to ſubſtitute their will to that of their conſtituents. It "is far more rational to ſuppoſe that the courts were de- "ſigned to be an intermediate body between the people and "the legiſlature, in order, among other things, to keep

* *Pub. v. 2. p. 293.*

" the latter within the limits aſſigned to their authority. " The interpretation of the laws is the proper and particu- " lar province of the courts. A conſtitution is in fact, and " muſt be regarded by the judges, as a fundamental law. " It therefore belongs to them to aſcertain its meaning, as " well as the meaning of any particular act proceeding from " the legiſlative body. If there be an irreconcileable va- " riance between the two, that which has the ſuperior ob- " ligation and validity ought of courſe to be preferred; or, " in other words, the conſtitution ought to be preferred to " the ſtatutes; the intention of the people to the intention " of their agents.

" Nor does this concluſion by any means ſuppoſe a ſupe- " riority of the judiciary to the legiſlative power. It only " ſuppoſes that the power of the people is ſuperior to both; " and that where the will of the legiſlature, declared in its " ſtatutes, ſtands in oppoſition to that of the people, declar- " ed in the conſtitution, the judges ought to be governed " by the latter, rather than the former. They ought to " regulate their deciſions by the fundamental laws, rather " than thoſe which are not fundamental.

" * It can be of no weight to ſay that the courts, on the " pretence of a repugnancy, may ſubſtitute their own plea- " ſure to the conſtitutional intentions of the legiſlature. " This might as well happen in the caſe of two contradic- " tory ſtatutes; or it might as well happen in every adju- " dication upon any ſingle ſtatute. The courts muſt de- " clare the ſenſe of the law. The obſervation, if it proved " any thing, would prove that there ought to be no judges " diſtinct from the legiſlative body."

Such is the reaſoning of one of the moſt profound politi- cians in America. It is ſo full, ſo appoſite, and ſo conclu- ſive, that I think it unneceſſary to add any thing farther on

* *Publius* 295.

the ſubject, and ſhall now proceed to the ſecond point, viz.

2. Whether, according to the conſtitution of this commonwealth, a judge of the general court can exerciſe the functions of a judge in chancery?

There again I muſt recur to one of the fundamental principles of our government, a principle eſſentially and indiſpenſably neceſſary to its exiſtence as a free government, exerciſed by the immediate authority of the people, delegated to the ſervants of their own choice, viz. the ſeparation of the legiſlative, executive, and judiciary departments.

Theſe departments, as I have before obſerved, our conſtitution declares ſhall be for ever ſeparate and diſtinct. To be ſo, they muſt be independent one of another, ſo that neither can control, or annihilate the other.

The independence of the judiciary reſults from the tenure of their office, which the conſtitution declares ſhall be *during good behaviour*. The offices which they are to fill muſt therefore in their nature be permanent as the conſtitution itſelf, and not liable to be diſcontinued or annihilated by any other branch of the government. Hence the conſtitution has provided that the judiciary department ſhould be arranged in ſuch a manner as not to be ſubject to legiſlative control. The court of appeals, court of chancery, and general court, are tribunals expreſsly required by it; and in theſe courts the judiciary power is either immediately, or ultimately veſted.

Theſe courts can neither be annihilated or diſcontinued by any legiſlative act; nor can the judges of them be removed from their offices for any cauſe, except a breach of their good behaviour.

But if the legiſlature might at any time diſcontinue or annihilate either of theſe courts, it is plain that their tenure

of office might be changed, ſince a judge, without any breach of good behaviour, might in effect be removed from office, by annihilating or diſcontinuing the office itſelf.

This has been proved in the caſe of the former court of appeals.* The moment that it was diſcovered that that court was not conſtituted according to the directions of the conſtitution, the legiſlature, without any charge of a breach of good behaviour by any one of that court, *removed a majority* of the judges from their office, as judges of that court, *by new-moddelling the court altogether.*

I am far from conſidering this act of the legiſlature as unconſtitutional, for reaſons that I ſhall hereafter mention.

But it proves that the judiciary can never be independent, ſo long as the exiſtence of the office depends upon the will of the ordinary legiſlature, and not upon a conſtitutional foundation.

The diſtrict courts conſidered as independent of the *general court*, and not a modification of it, are merely *legiſlative* courts, and conſequently may be diſcontinued, or annihilated, whenever the legiſlature may think proper to aboliſh them.—And if the judges of thoſe courts held their offices only as judges of the diſtrict courts, they might be virtually, and in fact, removed from office, as the judges of the former court of appeals were, by a legiſlative act, diſcontinuing the courts, and transferring their juriſdiction to other tribunals, *without any breach of good behaviour.*

Hence ariſes a moſt important diſtinction between *conſtitutional* and *legiſlative* courts. The judges of the former hold an office co-exiſtent with the government itſelf, and which they can only forfeit by a breach of good behaviour. The judges of the latter, although their commiſſions ſhould import upon the face of them, to be during good behaviour,

* *Virg. Acts* vi. 1788, *ch.* 62.

may be at any time diſcontinued from their office, by aboliſhing the courts.—In other words, conſtitutional judges may be an independent branch of the government, legiſlative judges muſt ever be dependant on that body at whoſe will their offices exiſt.

If the principles of our government have eſtabliſhed the judiciary as a barrier againſt the poſſible uſurpation, or abuſe of power in the other departments, how eaſily may that principle be evaded by converting our courts into legiſlative, inſtead of Conſtitutional tribunals?

To preſerve this principle in it's full vigour, it is neceſſary that the conſtitutional courts ſhould all be reſtrained within thoſe limits which the conſtitution itſelf ſeems to have aſſigned to them reſpectively.

What thoſe limits are, may be collected from the 14th article, * which provides for the appointment of "*judges* of "the ſupreme court of *appeals*, and *general court*, *judges* "in *chancery*, *judges* of *admiralty*," &c. This ſpecification of judges of *ſeveral tribunals*, would lead us of itſelf to conclude, that the tribunals themſelves were meant to be ſeparate and diſtinct †. This concluſion ſeems to be warranted by two circumſtances, the one extrinſic, the other ariſing out of the conſtitution itſelf. Thoſe who recollect the ſituation of our juriſprudence, at the time of the revolution, will remember that the union of civil and criminal, common law, and equity juriſdiction, all in the general

* *Conſt. Virg.* ar. 14.

† *Since every word in that inſtrument, the conſtitution of the commonwealth, ſhould be conſtrued to have its effect; a rule applied to all written inſtruments whatſoever, and more peculiarly applicable, I ſhould preſume, to that which expreſſes the collective, and ſovereign will, and intention of the people.*

court, was one of the moſt obvious defects of that ſyſtem. In truth, nothing can be more dangerous to the citizen, than the union of criminal courts, and courts of equity. On the European continent, whereſoever the civil law has been adopted, criminal and civil proceedings have been conducted upon the like principles: the defendant in *civil* caſes might be examined upon oath by interrogatories, to which if he gave not ſatisfactory anſwers he might be committed until he did: this principle being extended to *criminal* caſes, was denominated by the moderate term of putting the perſon accuſed to the *queſtion*: but inaſmuch as the forcing a criminal to accuſe himſelf on *oath*, might prove a *ſnare to his conſcience*, the obligation to anſwer to the queſtion, *was inforced by torture*. To ſeparate forever, courts, whoſe principles and proceedings are ſo diametrically oppoſite, as thoſe of the common and civil law, was, I ſhould preſume, one of the fundamental principles which the framers of our conſtitution had an eye to. They, therefore, diſtributed the powers of the *then exiſting general court* into three diſtinct branches, viz. the court of appeals, the court of chancery, and the court of general juriſdiction, at common law. The repetition of the term, judges, ſhews that it was in contemplation that both the tribunals, and the judges ſhould be diſtinct and ſeparate. This is farther confirmed by art. 16 and 17:* the former of which provides that impeachments in general ſhall be proſecuted in *this* court, the latter that impeachments againſt the judges of *this court*, ſhall be proſecuted in the *court of appeals*. Nothing, then, can be clearer than that the conſtitution intended they ſhould be diſtinct judges of diſtinct courts. And hence I am ſatisfied, that the former court of appeals was unconſtitutionally or-

* *Conſt. Virg. arts. 16. and 17.*

ganized. This reaſoning, I apprehend will apply no leſs forcibly to the ſeparation of the general court from the court of chancery. A judge of the general court, if impeached, can be proſecuted in the *court of appeals only*; a judge in chancery *only* in the *general court*: if theſe offices be united in the ſame perſon, it muſt be by ſeparate commiſſions; a judgment on impeachment in the general court, cannot vacate the commiſſion of a judge of that court, becauſe the conſtitution has aſſigned another tribunal, where a judge of that court ſhall be tried; a judgment in the court of appeals cannot vacate the commiſſion of a judge in chancery, becauſe he muſt be tried, *as ſuch*, in the general court. Hence it ſeems to me we are driven to conclude that the conſtitution meant that the two offices ſhall be ſeparate and diſtinct. This conſtruction removes every difficulty, the contrary, I apprehend, creates a multitude, and thoſe inſurmountable *. In purſuance of this direction, contained in the conſtitution, the legiſlature, when it ſet about organizing the courts, diſtributed them as above-mentioned. The criminal and common law court, was ſeparated from the court of equity; and both from the court of appeals, in form, though not in reality, until the legiſlature, by the act of 1788, c. 68. corrected it's former error. And

* *A curious queſtion might here be propounded. Suppoſe a judge of the general court, holding alſo a commiſſion as a judge in chancery, and ſitting as a judge of a diſtrict court, where his functions were united, ſhould receive a bribe from one of the parties to a ſuit depending there before him: that on the trial at law he ſhall endeavour to influence the jury, and ſhall after grant an injunction to the party from whom he received the bribe: Muſt there be two impeachments and two trials, in different courts in this caſe, or could one trial, and one judgment vacate both commiſſions?*

thus diſtinct have they remained, until the act of the laſt ſeſſion, which hath not indeed united the conſtitutional courts, but hath blended them in effect, by aſſigning the functions of a judge in chancery to the judges of this court; and if carried into effect may lead to the total annihilation of all the courts which the conſtitution had in contemplation to eſtabliſh.

I have ſaid before (pa. 52,) that the diſtrict courts conſidered as independent of the general court, and not a modification of it, are mere legiſlative, and not conſtitutional courts. If they are a modification only of the general court, it flows from what I have already ſaid, that the conſtitution prohibits the exerciſe of chancery juriſdiction therein. If they be mere legiſlative courts, it cannot be the duty of any judge of a conſtitutional court, *merely as ſuch*, to exerciſe the functions of a judge of theſe courts: and it is, I conceive, expreſsly contrary to the duty of a conſtitutional judge of one court, to exerciſe the functions of a conſtitutional judge of another diſtinct conſtitutional court.

It appears then immaterial, whether, on the preſent queſtion, the diſtrict courts are to be conſidered as branches of the general court, or not: yet it would be eaſy to ſhew, that as they are at preſent modified and organized, they are nothing more than branches of that court; and not diſtinct, independent, legiſlative courts; unleſs the operation of the act in queſtion ſhould be conſtrued to affect and change their whole ſyſtem, and conſtitution.

But, if they are mere legiſlative courts, they may, at any time, be organized at the will of the legiſlature: legiſlative judges may be appointed, the tenor of whoſe commiſſion may import that their office ſhall be during good behaviour, and yet that office be diſcontinued whenever the legiſlature may think fit. If the juriſdiction of the court of chancery can be conſtitutionally transferred to them, ſo

may that of the general court, and of the court of appeals. In fine theſe legiſlative courts may abſorb all the juriſdictions, powers and functions of the conſtitutional courts. Theſe laſt then muſt either be ſuppreſſed, as uſeleſs, which the conſtitution forbids * ; or the judges of them will hold *ſinecures* inſtead of *offices*, which is expreſsly contrary to the bill of rights, art. 4. Add to this that ſuch an arrangement muſt ever render the judiciary the mere creature of the legiſlative department, which both the conſtitution†, and the bill of rights ‡ moſt pointedly appear to have guarded againſt.

2. I ſhall now proceed to take a ſhort view of the ſubject, as founded upon a ſolemn deciſion of the court of appeals, on a ſimilar occaſion.

It will not, I preſume, be denied that the deciſions of the ſupreme court of appeals in this commonwealth, upon any queſtion, whether ariſing upon the general principles of law, the operation or conſtruction of any ſtatute or act of aſſembly, or of the conſtitution of this commonwealth, are to be reſorted to by all other courts, as expounding, in their trueſt ſenſe, the laws of the land; and where any deciſion of that court applies to a caſe depending before any other tribunal, that tribunal is bound to regulate its deciſions conformably to thoſe of the court of appeals. This poſtulatum I conceive to be too obviouſly founded upon the principles of our government to require an attempt to demonſtrate it. Proceeding upon this ground, I ſhall take up

* *Art.* 14.

† *Conſt. U. art.* 3.

‡ *Bill of Rights, art.* 5.

the queſtion upon the authority of a previous deciſion of that court, on a ſimilar queſtion.

In the year 1787, the firſt act eſtabliſhing diſtrict courts was paſſed. This act "declared it to be the duty of the "judges of the high court of appeals to attend the ſaid "courts, allotting among themſelves the diſtricts they "ſhould reſpectively attend; three judges to be allotted to "each diſtrict; any two of whom ſhould conſtitute a "court." ch. 39. § 3.

It ſhould be remembered, that at that time the court of appeals was compoſed of the judges of the high court of chancery; judges of the general court; and judges of the court of admiralty. The office of the judge of the court of appeals was, at that time, as it were, incidentally annexed to their appointment to a ſeat on either of the other tribunals.

A part of the duty aſſigned to the court of appeals by that act was the appointment of clerks to the diſtrict courts, which the act required ſhould be done at the next ſucceeding ſeſſion of the court of appeals. Ib. § 2.

On the 12th of May following, the court made the following entry upon their records. "On conſideration of a "late act of aſſembly, entitled an act eſtabliſhing diſtrict "courts, after ſeveral conferences, and upon mature deli- "beration, the court do *adjudge* that clerks of the ſaid "courts ought not now to be appointed, for reaſons con- "tained in a remonſtrance to the general aſſembly:"— which remonſtrance is likewiſe entered on record, and contains, among other things, the following important paſſages.

"1. That in diſcuſſing the act eſtabliſhing diſtrict courts, "the court found it unavoidable to conſider, whether the "principles of that act do not violate thoſe of the conſtitu-

" tion, or form of government, which the people, in 1776,
" when the former bands of their ſociety were diſſolved,
" eſtabliſhed as the foundation of that government which
" they judged neceſſary for the preſervation of their per-
" ſons and property; and if ſuch violation were apparent,
" whether they had power, and it was their duty to de-
" clare that the act muſt yield to the conſtitution?

" 2. That they found themſelves obliged to decide, what-
" ever temporary inconveniencies might ariſe, and in that
" deciſion to declare, that the conſtitution and the act were
" in oppoſition, and could not exiſt together, and that the
" former muſt control the latter.

" 3. That the propriety and neceſſity of the indepen-
" dence of the judges is evident in reaſon, and the nature
" of their office, ſince they are to decide between govern-
" ment and the people, as well as between contending citi-
" zens; and if they be dependent on either, corrupt influ-
" ence may be apprehended.

" 4. That this applies more forcibly to exclude a depen-
" dence on the legiſlature, a branch of whom, in caſes of
" impeachment, is itſelf a party.

" 5. To obviate a poſſible objection that the court, while
they are maintaining the independence of the judiciary, are
" countenancing encroachments of that branch upon the
" departments of others, and aſſuming a right to control
" the legiſlature, it may be obſerved, that when they de-
" cide between an act of the people, and an act of the legiſ-
" lature, they are within the line of their duty, declaring
" what the law is, and not making a new law.

" 6. That although the duties of their office were not aſ-
" certained at the time of eſtabliſhing the conſtitution, yet
" in reſpect thereto, the conſtitution gives a principle, name-
" ly, that " no future regulation ſhould blend the duties
" of the judges of the general court, court of chancery,

" and court of admiralty, which the conſtitution ſeems to " require to be exerciſed by diſtinct perſons."

" 7. That the aſſigning to the judges of chancery and ad- " miralty juriſdiction in common law caſes, may be conſi- " dered as a new office."

Theſe declarations, according to my weak apprehenſions, comprehend the preſent queſtion in the fulleſt extent. I ſhould therefore be of opinion, upon the ground of this authority, as well as upon the conviction of my own mind, independent thereof, which, unleſs ſo fortified, I might have miſtruſted, that we ought to certify to the diſtrict court of Dumfries " That in the opinion of this court, a judge of the " general court cannot conſtitutionally exerciſe the func- " tions of a judge in chancery." But the judges who have already delivered their opinions, although ſome of them appear to diſſent from me upon this point, having unanimouſly concurred in another, viz. That the functions of a judge in chancery can only be exerciſed by thoſe who may be conſtituted judges in chancery, in the manner preſcribed by the conſtitution; I ſhall concur in their unanimous judgment, without offering any reaſons on a ſubject which has been ſo fully and ſatisfactorily diſcuſſed by them.

When the court unanimouſly agreed, and the certificate was in theſe words:

" Ordered, that it be certified to the ſaid diſtrict court (Dumfries,) as the opinion of this court, " that the motion " of the plaintiff, praying an injunction, to ſtay the pro- " ceedings on a judgment obtained againſt him in the ſaid " diſtrict court by the defendant, ought to be over ruled, " becauſe the powers and duties aſſigned to be performed by " the eleventh ſection of the act of the laſt ſeſſion of aſſem- " bly, entitled 'an act reducing into one the ſeveral acts " concerning the eſtabliſhment, juriſdiction, and powers of " the diſtrict courts,' can only be executed by thoſe who " may be conſtituted judges in chancery, in the manner pre- " ſcribed by the conſtitution of this commonwealth,"

THE

DECLARATION

OF

RIGHTS AND CONSTITUTION.

At a GENERAL CONVENTION of Delegates and Repreſentatives, from the ſeveral counties and corporations of Virginia, held at the capitol in the city of Williamſburgh, on Monday, the 6th of May, 1776.

DECLARATION OF RIGHTS.

A declaration of rights, made by the repreſentatives of the good people of Virginia, aſſembled in full and free convention; which rights do pertain to them, and their poſterity, as the baſis and foundation of government.

1. THAT all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a ſtate of ſociety, they cannot, by any com[illegible] deprive or

diveſt their poſterity; namely, the enjoyment of life and liberty, with the means of acquiring and poſſeſſing property, and purſuing and obtaining happineſs and ſafety.

2. That all power is veſted in, and conſequently derived from the people; that magiſtrates are their truſtees and ſervants, and at all times amenable to them.

3. That government is, or ought to be inſtituted for the common benefit, protection, and ſecurity of the people, nation, or community; of all the various modes and forms of government, that is beſt, which is capable of producing the greateſt degree of happineſs and ſafety, and is moſt effectually ſecured againſt the danger of mal-adminiſtration; and that when any government ſhall be found inadequate or contrary to theſe purpoſes, a majority of the community hath an indubitable, unalienable, and indefeaſible right, to reform, alter, or aboliſh it, in ſuch manner as ſhall be judged moſt conducive to the public weal.

4. That no man, or ſet of men, are intitled to excluſive or ſeparate emoluments or privileges from the community, but in conſideration of public ſervices, which not being deſcendible, neither ought the offices of magiſtrate, legiſlator, or judge to be hereditary.

5. That the legiſlative, and executive powers of the ſtate ſhould be ſeparate and diſtinct from the judiciary; and that the members of the two firſt may be reſtrained from oppreſſion, by feeling and participating the burthens of the people, they ſhould, at fixed periods, be reduced to a private ſtation, return into that body from which they were originally taken, and the vacancies be ſupplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws ſhall direct.

6. That elections of members to ſerve as repreſentatives of the people, in aſſembly, ought to be free; and that all

men, having ſufficient evidence of permanent common intereſt with, and attachment to the community, have the right of ſuffrage, and cannot be taxed or deprived of their property for public uſes, without their own conſent, or that of their repreſentatives ſo elected, nor bound by any law to which they have not, in like manner, aſſented, for the public good.

7. That all power of ſuſpending laws, or the execution of laws, by any authority without conſent of the repreſentatives of the people, is injurious to their rights and ought not to be exerciſed.

8. That in all capital or criminal proſecutions, a man hath a right to demand the cauſe and nature of his accuſation, to be confronted with the accuſers and witneſſes, to call for evidence in his favour, and to a ſpeedy trial by an impartial jury of his vicinage, without whoſe unanimous conſent he cannot be found guilty, nor can he be compelled to give evidence againſt himſelf; that no man be deprived of his liberty, except by the law of the land, or the judgment of his peers.

9. That exceſſive bail ought not to be required, nor exceſſive fines impoſed, nor cruel and unuſual puniſhments inflicted.

10. That general warrants, whereby an officer or meſſenger may be commanded to ſearch ſuſpected places, without evidence of a fact committed, or to ſeize any perſon or perſons not named, or whoſe offence is not particularly deſcribed and ſupported by evidence, are grievous and oppreſſive, and ought not to be granted.

11. That in controverſies reſpecting property, and in ſuits between man and man, the ancient trial by jury is preferable to any other, and ought to be held ſacred.

12. That the freedom of the preſs is one of the great bulwarks of liberty, and can never be reſtrained, but by deſpotic governments.

13. That a well regulated militia, compoſed of the body of the people, trained to arms, is the proper, natural and ſafe defence of a free ſtate; that ſtanding armies, in the time of peace, ſhould be avoided, as dangerous to liberty; and that in all caſes, the military ſhould be under a ſtrict ſubordination to, and governed by the civil power.

14. That the people have a right to uniform government, and therefore, that no government ſeparate from, or independent of the government of Virginia, ought to be erected or eſtabliſhed within the limits thereof.

15. That no free government, or the bleſſing of liberty, can be preſerved to any people but by a firm adherence to juſtice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.

16. That religion, or the duty which we owe to our Creator, and the manner of diſcharging it, can be directed only by reaſon and conviction, not by force or violence, and therefore all men are equally entitled to the free exerciſe of religion, according to the dictates of conſcience; and that it is the mutual duty of all to practice Chriſtian forbearance, love, and charity towards each other.

THE CONSTITUTION.

The Conſtitution, or Form of Government, agreed to and reſolved upon by the Delegates and Repreſentatives of the ſeveral Counties and Corporations of Virginia.

1. WHEREAS George the third, king of Great Britain and Ireland, and elector of Hanover, heretofore entruſted with the exerciſe of the kingly office in this government, hath endeavoured to pervert the ſame into a deteſtable and inſupportable tyranny, by putting his negative on laws the moſt wholeſome and neceſſary for the public good: By denying his governors permiſſion to paſs laws of immediate and preſſing importance, unleſs ſuſpended in their operation for his aſſent, and when ſo ſuſpended, neglecting to attend to them for many years: By refuſing to paſs certain other laws, unleſs the perſons to be benefited by them would relinquiſh the ineſtimable right of repreſentation in the legiſlature: By diſſolving legiſlative aſſemblies repeatedly and continually, for oppoſing, with manly firmneſs, his invaſions of the rights of the people: When diſſolved, by refuſing to call others for a long ſpace of time, thereby leaving the political ſyſtem without any legiſlative head: By endeavouring to prevent the population of our country, and, for that purpoſe, obſtructing the laws for the naturalization of foreigners: By keeping among us, in the time of peace, ſtanding armies and ſhips of war: By affecting to render the military independent of, and ſuperior to the civil power: By combining

with others to ſubject us to foreign juriſdiction, giving his aſſent to their pretended acts of legiſlation: For quartering large bodies of armed troops among us: For cutting off our trade with all parts of the world: For impoſing taxes on us without our conſent: For depriving us of the benefits of trial by jury: For tranſporting us beyond ſeas, to be tried for pretended offences: For ſuſpending our own legiſlatures, and declaring themſelves invested with power to legiſlate for us in all caſes whatſoever: By plundering our ſeas, ravaging our coaſts, burning our towns, and deſtroying the lives of our people: By inciting inſurrections of our fellow ſubjects, with the allurements of forfeiture and confiſcation: By prompting our negroes to riſe in arms among us, thoſe very negroes whom, by an inhuman uſe of his negative, he hath refuſed us permiſſion to exclude by law: By endeavouring to bring on the inhabitants of our frontiers, the mercileſs Indian ſavages, whoſe known rule of warfare is an undiſtinguiſhed deſtruction of all ages, ſexes, and conditions of exiſtence: By tranſporting, at this time, a large army of foreign mercenaries, to complete the works of death, deſolation, and tyranny, already begun with circumſtances of cruelty and perfidy, unworthy the head of a civilized nation: By anſwering our repeated petitions for redreſs with a repetition of injuries: And finally, by abandoning the helm of government, and declaring us out of his allegiance and protection. By which ſeveral acts of miſrule the government of this country, as formerly exerciſed under the crown of Great Britain, is totally diſſolved.

2. We, therefore, the delegates and repreſentatives of the good people of Virginia, having maturely conſidered the premiſes, and viewing with great concern the deplorable condition to which this once happy country muſt be reduced, unleſs ſome regular adequate mode of civil polity is ſpeedily adopted, and in compliance with a recommendation

of the General Congreſs, do ordain and declare the future form of government of Virginia to be as followeth:

3. The legiſlative, executive, and judiciary departments, ſhall be ſeparate and diſtinct, ſo that neither exerciſe the powers properly belonging to the other; nor ſhall any perſon exerciſe the powers of more than one of them at the ſame time, except that the juſtices of the county courts ſhall be eligible to either houſe of aſſembly.

4. The legiſlative ſhall be formed of two diſtinct branches, who, together, ſhall be a complete legiſlature. They ſhall meet once or oftner every year, and ſhall be called the General Aſſembly of Virginia.

5. One of theſe ſhall be called the Houſe of Delegates, and conſiſt of two repreſentatives to be choſen for each county, and for the diſtrict of Weſt-Auguſta, annually, of ſuch men as actually reſide in, and are freeholders of the ſame, or duly qualified according to law; and alſo one delegate or repreſentative to be choſen annually for the city of Williamſburg, and one for the borough of Norfolk, and a repreſentative for each of ſuch other cities and boroughs as may hereafter be allowed particular repreſentation by the legiſlature; but when any city or borough ſhall ſo decreaſe as that the number of perſons having right of ſuffrage therein ſhall have been for the ſpace of ſeven years ſucceſſively leſs than half the number of voters in ſome one county in *Virginia*, ſuch city or borough thenceforward ſhall ceaſe to ſend a delegate or repreſentative to the aſſembly.

6. The other ſhall be called the Senate, and conſiſt of twenty-four members, of whom thirteen ſhall conſtitute a houſe, to proceed on buſineſs, for whoſe election the different counties ſhall be divided into twenty-four diſtrict, and each county of the reſpective diſtrict, at the time of the election of its delegates, ſhall vote for one ſenator, who is actually a reſident and freeholder within the diſtrict, or du-

ly qualified according to law, and is upwards of twenty-five years of age; and the ſheriffs of each county, within five days at fartheſt after the laſt county election in the diſtrict, ſhall meet at ſome convenient place, and from the poll ſo taken in their reſpective counties, return as a ſenator the man who ſhall have the greateſt number of votes in the whole diſtrict. To keep up this aſſembly by rotation, the diſtrict ſhall be equally divided into four claſſes, and numbered by lot. At the end of one year after the general election, the ſix members elected by the firſt diviſion ſhall be diſplaced, and the vacancies thereby occaſioned, ſupplied from ſuch claſs or diviſion, by new election, in the manner aforeſaid. This rotation ſhall be applied to each diviſion, according to its number, and continued in due order, annually.

7. That the right of ſuffrage in the election of members, of both houſes, ſhall remain as exerciſed at preſent, and each houſe ſhall chooſe its own ſpeaker, appoint its own officers, ſet its own rules of proceeding, and direct writs of election for ſupplying intermediate vacancies.

8. All laws ſhall originate in the houſe of delegates, to be approved or rejected by the ſenate, or to be amended with the conſent of the houſe of delegates; except money bills, which in no inſtance ſhall be altered by the ſenate, but wholly approved or rejected.

9. A governor, or chief magiſtrate, ſhall be choſen annually, by joint ballot of both houſes, to be taken in each houſe reſpectively, depoſited in the conference room, the boxes examined jointly by a committee of each houſe, and the numbers ſeverally reported to them, that the appointments may be entered (which ſhall be the mode of taking the joint ballot of both houſes in all caſes) who ſhall not continue in that office longer than three years ſucceſſively, nor be eligible until the expiration of four years after he

ſhall have been out of that office. A [illegible]quate, but moderate ſalary, ſhall be ſettled on him during his continuance in office; and he ſhall, with the advice of a council of ſtate, exerciſe the executive powers of government, according to the laws of this commonwealth; and ſhall not, under any pretence, exerciſe any power or prerogative, by virtue of any law, ſtatute, or cuſtom of England: But he ſhall, with the advice of the council of ſtate, have the power of granting reprieves or pardons, where the proſecution ſhall have been carried on by the houſe of delegates, or the law ſhall otherwiſe particularly direct; in which caſes, no reprieve or pardon ſhall be granted, but by reſolve of the houſe of delegates.

10. Either houſe of the general aſſembly may adjourn themſelves reſpectively. The governor ſhall not prorogue or adjourn the aſſembly during their ſitting, nor diſſolve them at any time; but he ſhall, if neceſſary, either by the advice of the council of ſtate, or on application of a majority of the houſe of delegates, call them before the time to which they ſhall ſtand prorogued or adjourned.

11. A privy council, or council of ſtate, conſiſting of eight members, ſhall be choſen by joint ballot of both houſes of aſſembly, either from their own members or the people at large, to aſſiſt the adminiſtration of government. They ſhall annually chooſe out of their own members a preſident, who, in caſe of the death, inability, or neceſſary abſence of the governor from the government, ſhall act as lieutenant-governor. Four members ſhall be ſufficient to act, and their advice and proceedings ſhall be entered on record, and ſigned by the members preſent (to any part whereof any member may enter his diſſent) to be laid before the general aſſembly, when called for by them. This council may appoint their own clerk, who ſhall have a ſalary ſettled by law, and take an oath of ſecrecy in ſuch matters as

he ſhall be directed by the board to conceal. A ſum of money appropriated to that purpoſe ſhall be divided annually among the members, in proportion to their attendance; and they ſhall be incapable, during their continuance in office, of ſitting in either houſe of aſſembly. Two members ſhall be removed by joint ballot of both houſes of aſſembly at the end of every three years, and be ineligible for the three next years. Theſe vacancies, as well as thoſe occaſioned by death or incapacity, ſhall be ſupplied by new elections, in the ſame manner.

12. The delegates for Virginia to the Continental Congreſs ſhall be choſen annually, or ſuperſeded in the mean time by joint ballot of both houſes of aſſembly.

13. The preſent militia officers ſhall be continued, and vacancies ſupplied by appointment of the governor, with the advice of the privy council, or recommendations from the reſpective county courts; but the governor and council ſhall have a power of ſuſpending any officer, and ordering a court-martial on complaint of miſbehaviour or inability, or to ſupply vacancies of officers happening when in actual ſervice. The governor may embody the militia, with the advice of the privy council, and when embodied, ſhall alone have the direction of the militia under the laws of the country.

14. The two houſes of aſſembly ſhall, by joint ballot, appoint judges of the ſupreme court of appeals, and general court, judges in chancery, judges of admiralty, ſecretary, and the attorney general, to be commiſſioned by the governor, and continue in office during good behaviour: In caſe of death, incapacity, or reſignation, the governor, with the advice of the privy council, ſhall appoint perſons to ſucceed in office, to be approved or diſplaced by both houſes. Theſe officers ſhall have fixed and adequate ſalaries, and, together with all other holding lucrative offices,

and all miniſters of the goſpel of every denomination, be incapable of being elected members of either houſe of aſſembly, or the privy council.

15. The governor, with the advice of the privy council, ſhall appoint juſtices of the peace for the counties; and in caſe of vacancies, or a neceſſity of increaſing the number hereafter, ſuch appointments to be made upon the recommendation of the reſpective county courts. The preſent acting ſecretary in Virginia, and clerks of all the county courts, ſhall continue in office, in caſe of vacancies, either by death, incapacity, or reſignation, a ſecretary ſhall be appointed as before directed, and the clerks by their reſpective courts. The preſent and future clerks ſhall hold their offices during good behaviour, to be judged of and determined in the general court. The ſheriffs and coroners ſhall be nominated by the reſpective courts, approved by the governor, with the advice of the privy council, and commiſſioned by the governor. The juſtices ſhall appoint conſtables, and all fees of the aforeſaid officers be regulated by law.

16. The governor, when he is out of office, and others offending againſt the ſtate, either by mal-adminiſtration, corruption, or other means by which the ſafety of the ſtate may be endangered, ſhall be impeachable by the houſe of delegates. Such impeachment to be proſecuted by the attorney-general, or ſuch other perſon or perſons as the houſe may appoint in the general court, according to the laws of the land. If found guilty, he or they ſhall be either for ever diſabled to hold any office under government, or removed from ſuch office pro tempore, or ſubjected to ſuch pains or penalties as the law ſhall direct.

17. If all, or any of the judges of the general court ſhall, on good grounds (to be judged of by the houſe of delegates) be accuſed of any of the crimes or offences before mention-

ed, ſuch houſe of delegates may, in like manner, impeach the judge or judges ſo accuſed, to be proſecuted in the court of appeals; and he or they, if found guilty, ſhall be puniſhed in the manner as is preſcribed in the preceding clauſe.

18. Commiſſions and grants ſhall run in the name of the *Commonwealth of Virginia*, and bear teſt by the governor, with the ſeal of the commonwealth annexed. Writs ſhall run in the ſame manner, and bear teſt by the clerks of the ſeveral courts. Indictments ſhall conclude, againſt the peace and dignity of the commonwealth.

19. A treaſurer ſhall be appointed annually, by joint ballot of both houſes.

20. All eſcheats, penalties, and forfeitures, heretofore going to the king, ſhall go to the commonwealth, ſave only ſuch as the legiſlature may aboliſh or otherwiſe provide for.

21. The territories contained within the charters erecting the colonies of Maryland, Pennſylvania, North and South-Carolina, are hereby ceded, releaſed, and for ever confirmed to the people of thoſe colonies reſpectively, with all the rights of property, juriſdiction and government, and all the rights whatſoever which might at any time heretofore have been claimed by Virginia, except the free navigation, and uſe of the rivers Potowmack and Pokomoke, with the property of the Virginia ſhores or ſtands bordering on either of the ſaid rivers, and all improvements which have been or ſhall be thereon. The weſtern and northern extent of Virginia ſhall in all other reſpects ſtand as fixed, by the charter of king James the firſt, in the year one thouſand ſix hundred and nine, and by the public treaty of peace between the courts of Great Britain and France in the year one thouſand ſeven hundred and ſixty three; unleſs, by act of legiſlature, one or more territories ſhall hereafter be laid

off, and governments eſtabliſhed weſtward of the Allegheny mountains. And no purchaſe of lands ſhall be made of the Indian natives but on behalf of the public, by authority of the general aſſembly.

22. In order to introduce this government, the repreſentatives of the people met in convention, ſhall chooſe a governor and privy council, alſo ſuch other officers elected to be choſen by both houſes as may be judged neceſſary to be immediately appointed. The ſenate to be firſt choſen by the people, to continue until the laſt day of March next, and the other officers until the end of the ſucceeding ſeſſion of aſſembly. In caſe of vacancies, the ſpeaker of either houſe ſhall iſſue writs for new elections.

(The End of the Conſtitution.)

COURT OF APPEALS.

Court of appeals firſt opened at Williamſburgh, 30th Auguſt, 1779.

Williamſburgh, to wit.

AT the capital in the ſaid city on Monday the 30th of Auguſt, one thouſand ſeven hundred and ſeventy nine: In virtue of an act paſſed at the laſt ſeſſion of general aſſembly intituled "an act conſtituting the court of appeals,"—then and there convened, Edmund Pendleton and George Wythe eſquires, two of the judges of the high court of chancery; John Blair eſquire, one of the judges of the general court and Benjamin Waller, Richard Cary, and William Roſcow, Wilſon Curle eſquires, judges of the court of admiralty.

And thereupon the oath of fidelity preſcribed by an act intituled "an act preſcribing the oath of fidelity," and the oath of certain public officers "together with the oath of office preſcribed by the ſaid act, conſtituting the court of appeals, to be taken by every judge of the ſaid court, being firſt adminiſtered by the ſaid George Wythe and John Blair eſquires, to the ſaid Edmund Pendleton, and then by the ſaid Edmund Pendleton eſquire to the reſt of the judges; the court proceeded to the buſineſs before them, and then adjourned till the 16th day of December next."—

[Signed,]

"EDMUND PENDLETON."

REMONSTRANCE,

Of the court of appeals, to the general aſſembly.

AT a court of appeals, held at the court houſe, in the city of Richmond, on Tueſday, the twenty ninth day of April, one thouſand ſeven hundred and eighty eight, and thence continued, by adjournments, until Monday, the twelfth day of May next following, then and there preſent:

Edmund Pendleton,
George Wythe,
John Blair,
Paul Carrington,
Peter Lyons,
William Fleming,
Henry Tazwell,
Richard Cary,
James Henry,
and John Tyler,
Eſquires, Judges.

On conſideration of a late act of aſſembly intituled "an act eſtabliſhing diſtrict courts," after ſeveral conferences, and upon mature deliberation, the court do adjudge that clerks of the ſaid courts, ought not now to be appointed, for reaſons contained in a remonſtrance to the general aſſembly, in the words following, to wit:

To the honourable the ſpeakers and other members of the ſenate and houſe of delegates of the commonwealth of Virginia in general aſſembly.

THE

RESPECTFUL REMONSTRANCE

OF THE

COURT OF APPEALS.

THE remonſtrants finding themſelves called upon by a late act of the general aſſembly, intituled, "an act eſtabliſhing diſtrict courts," to proceed at this ſeſſion to the appointment of clerks to the ſaid courts, that whole act was neceſſarily brought into their view; in conſidering which they encountered many difficulties, of an ordinary nature, ſuch as whether their power of appointing now, though directed by the 2nd ſection, was not controled by the 116th, declaring that the act ſhould take effect, and be in force, from and after the firſt day of July, in the year 1788, and not before, whether the diſtrict courts have juriſdiction of any ſuits now depending in the general court, of above thirty pounds value; whether any, and what, proviſion was made

for the trial of criminals who might remain in the public jail after the ſeſſion of the general court in June next, or who might be examined and committed prior to the ſaid firſt day of July; and whether for want of preciſion in ſeveral other parts of the law, it was, in the reſpective caſes to operate from the time of paſſing, or from the firſt day of July.

(In other inſtances, particularly in the conſtruction of the late execution law, regularly brought before the court this term, they have to lament the laſt difficulty, which they found ſo great that nothing but the repoſe of the community, and the neceſſity of having one uniform ſyſtem in that reſpect could have induced the court to decide upon it at laſt without further conſideration.)

But in the progreſs of their diſcuſſion, they found it unavoidable to conſider more important queſtions, viz: whether the principles of this act do not violate thoſe of the conſtitution or form of government, which the people in 1776, when the former bands of their ſociety were diſſolved, eſtabliſhed as the foundation of that government which they judged neceſſary for the preſervation of their perſons and property; and if ſuch violation were apparent, whether they had power, and it was their duty, to declare that act muſt yield to the conſtitution.

And here they have again to lament, that there ſhould be occaſion to decide thoſe important queſtions in any caſe, eſpecially at a time when the minds of the citizens are agitated upon other queſtions of great and national concern, more ſo that the neceſſity ſhould occur in a caſe wherein their individual intereſts are involved, and ſtill more that a deciſion one way might ſuſpend, though for a ſhort time, the beneficial effects of a law tending to promote the ſpeedy and eaſy adminiſtration of juſtice.

On this view of the ſubject, the following alternative preſented themſelves to the court; either to decide thoſe queſtions, or reſign their offices. The latter would have been their choice, if they could have conſidered the queſtions as affecting their individual intereſts only; but viewing them as relating to their office, and finding themſelves called by their country to ſuſtain an important poſt as one of the three pillars on which the great fabric of government was erected, they judged that a reſignation would ſubject them to the reproach of deſerting their ſtation, and betraying the ſacred intereſts of ſociety entruſted with them, and on that ground found themſelves obliged to decide, however their delicacy might be wounded, or whatever temporary inconveniencies might enſue, and in that deciſion to declare that the conſtitution and the act are in oppoſition and cannot exiſt together, and that the former muſt control the operation of the latter. If this opinion declaring the ſupremacy of the conſtitution needed any ſupport, it may be found in the opinion of the legiſlature themſelves, who have in ſeveral inſtances conſidered the conſtitution as preſcribing limits to their powers as well as to thoſe of the other departments of government.

In forming their judgment upon both queſtions they had recourſe to that article in the declaration of rights, that no free government, or the bleſſings of liberty can be preſerved to any people but (among other things) by frequent recurrence to fundamental principles; an article worthy to be written in letters of gold. The propriety and neceſſity of the independence of the judges is evident in reaſon, and the nature of their office, ſince they are to decide between government and the people as well as between contending citizens, and if they be dependent on either, corrupt influence may be apprehended, ſacrificing the innocent to popular prejudice; and ſubjecting the poor to oppreſſion and per-

ſecution by the rich, and this applies more forcibly to exclude a dependence on the legiſlature, a branch of whom in caſes of impeachment, is itſelf a party. This principle ſuppoſed, the court are led to conſider, whether the people have ſecured, or departed from it, in their conſtitution or form of government. In that ſolemn act they diſcover the people diſtributing the governmental powers, into three great branches, legiſlature, executive, and judiciary, in order to preſerve that equipoiſe which they judged neceſſary to ſecure their liberty, declaring that thoſe powers be kept ſeparate and diſtinct from each other, and that no perſon ſhall exerciſe at the ſame time an office in more than one of them. The independence of the two former could not be admitted, becauſe in them a long continuance in office might be dangerous to liberty, and therefore they provided for a change, by frequent elections at ſtated periods; but in the laſt from the influence of the principle before obſerved upon, they declared that the judges ſhould hold their offices during good behaviour. Their independence would have been rendered compleat, by fixing the quantum of their ſalaries, which perhaps would have been done, if the duties of office had been at that time aſcertained. But although it was not then done, yet in reſpect to this, the conſtitution gives a principle, not to be departed from, declaring that the ſalaries ſhall be adequate and fixed, leaving it to the legiſlature to judge what would be adequate when they ſhould appoint the duties. And when they had ſo done, they exerciſed their whole power over the ſubject, and the ſalary was thenceforth to be conſidered as fixed, while the duties ſhould continue the ſame. And when public utility ſhould require an increaſe or diminution of duty, there ſhould be an analogous alteration of ſalary, with this reſtriction however, that ſuch regulation ſhould not blend the duties of the judges of the general court, court of chancery,

and court of admiralty, which the conſtitution ſeems to require to be exerciſed by diſtinct perſons; and the legiſlature appear to have ſo conſidered it in the arrangement of thoſe courts.

The court of appeals of whomſoever conſtituted, muſt neceſſarily act upon the ſubjects referred to all the others, and therefore the forming it ſo as to conſiſt of all the judges is no violation of the conſtitution; and that mode, aſſimulated to adjournments of caſes before all the judges of England in the exchequer chamber, may have been dictated by neceſſity.

The court then proceeded to conſider what had been done by the legiſlature in conſequence of the conſtitution. In the October ſeſſion of 1777, they paſſed two acts, organizing the general court and court of chancery, giving to the former juriſdiction at common law, in civil caſes as well as criminal, and to the latter juriſdiction in all caſes in equity. The duties of each were diſtinctly pointed out, and a ſalary of five hundred pounds to each judge was thought by the legiſlature to be an adequate reward for thoſe duties, and this previous to the appointment of any judges. The election of the judges followed, when four of thoſe at preſent in office were of the number elected; who, thinking as they ſtill think the ſalary was adequate to the ſervices, declined other purſuits, and accepted their appointments, under a confidence that the conſtitution would [illegible]e them to that ſalary, ſo long as they ſhould perform the duty, in an upright manner.

The nominal ſum they conceived was to be paid them in ſpecie, or in ſomething equivalent thereto, and they have reaſon to believe the legiſlature ſo underſtood it, from laws in force at that period, making it penal to demand an allowance for the difference between ſpecie and paper money.

And though the other judges have been called into duty by ſubſequent appointments, they may be ſuppoſed to ſtand upon the ſame ground of original compact. The court of admiralty, indeed, was not permanently conſtituted 'till the year one thouſand ſeven hundred and ſeventy-nine, and the judges then appointed; yet by being made judges of the court of appeals, they have ever ſince been put upon the ſame footing with their brethren in point of ſalary. The various ſubſtitutions of paper money and tobacco for ſpecie, which was not to be had, the judges conſidered as temporary expedients, which, though operating greatly to the diminution of their ſalaries, were not deſigned to affect their independence; and therefore they acquieſced, content to ſhare in the public calamities, in hopes of a recurrence to the conſtitutional principle in better times. And they conſidered in the ſame light the act of one thouſand ſeven hundred and eighty-one, ſtating the ſalary at three hundred pounds, as dictated by neceſſity, and not proceeding from deſign, and therefore, did not conceive it to be their official duty to interpoſe.

But the act now under conſideration, preſenting a ſyſtem, which aſſigns to the judges of the chancery and admiralty juriſdiction in common law caſes, which ſo far may be conſidered as a new office, the labour of which would greatly exceed that of the former, without a correſpondent reward, and to the judges of the general court duties, which though not changed as to their ſubjects are yet more than doubled, without any increaſe of ſalary, appeared ſo evident an attack upon the independency of the judges that they thought it inconſiſtent with a conſcientious diſcharge of their duty to paſs it over. For vain would be the precaution of the founders of our government to ſecure liberty, if the legiſlature though reſtrained from changing the tenure of judicial offices, are at liberty to compel a reſignation by reducing

ſalaries to a copper, or by making it a part of the official duty to become hewers of wood and drawers of water, or if in caſe of a contrary diſpoſition, they can make ſalaries exhorbitant, or by leſſening the duties render offices almoſt ſinecures; the independency of the judiciary is in either caſe, equally annihilated. The court, however, willing to hope, that in the preſent inſtance the legiſlature had no ſuch deſign, but that inattention or ſome other circumſtances might occaſion the deviation, and that upon a reviſion of the ſubject, this law will be placed upon unexceptionable ground, had only to conſider what ought to be their conduct in the mean time. The reſult of which was that they ought not to do any thing officially in execution of an act which appeared to be contrary to the ſpirit of the conſtitution, and therefore they declined to appoint the clerks of the diſtrict courts under the ſaid act.

To obviate a poſſible objection, that the court, while they are maintaining the independency of the judiciary, are countenancing encroachments of that branch upon the departments of others, and aſſuming a right to control the legiſlature, it may be obſerved that when they decide between an act of the people and an act of the legiſlature, they are within the line of their duty, declaring what the law is, and not making a new law. And ever diſpoſed to maintain harmony with the other members of government, ſo neceſſary to promote the happine of ſociety, the court moſt ſincerely wiſh, that the preſent infraction of the conſtitution may be remedied by the legiſlature themſelves, and thereby all further uneaſineſs on the occaſion be prevented. But ſhould their wiſhes be diſappointed by the event, they ſee no other alternative for a deciſion between the legiſlature and judiciary than an appeal to the people, whoſe ſervants both are, and for whoſe ſakes both were created, and who may exerciſe their original and ſupreme

power whenſoever they think proper. To that tribunal, therefore, the court, in that caſe, commit themſelves, conſcious of perfect integrity in their intenſions, however they may have been miſtaken in their judgment."

It is ordered that the Preſident of the Court do deliver the ſaid remonſtrance to his Excellency the Governor, with a requeſt that he will be pleaſed to lay the ſame before the General Aſſembly at their firſt ſeſſion.

(Signed)

EDMUND PENDLETON.

Subſequent to this Remonſtrance, the whole of the Judges reſigned, and afterwards re-qualified, under an Act *for amending the Act, entitled,* "An Act conſtituting the Court of Appeals," *paſſed the 22d of December,* 1788.

ADVERTISEMENT.

ALTHOUGH this caſe is a conteſt between two individuals in its origin, yet, conſidering it as one which involves the deareſt rights and intereſts of the community, by its creating a ground of nice and critical enquiry between the legiſlature and judicial departments of the particular ſtate, and taking into view the extenſive field of *law learning* (into which the reſpective judges of the general court have advanced, with very ſound and able arguments), as one applying not only to the reſpective States, but to the co-relative departments of the federal government, the Editor has thought it proper to annex hereunto the Conſtitution of the UNITED STATES.

CONSTITUTION

OF THE

UNITED STATES.

The conſtitution framed for the United States of America, by a convention of deputies from the ſtates of New-Hampſhire, Maſſachuſetts, Connecticut, New-York, New-Jerſey, Pennſylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, at a ſeſſion begun May 25, and ended September 17, 1787.

WE, the people of the United States, in order to form a more perfect union, eſtabliſh juſtice, inſure domeſtic tranquillity, provide for the common defence, promote the general welfare, and ſecure the bleſſings of liberty to ourſelves and our poſterity, to ordain and eſtabliſh this conſtitution for the United States of America.

ARTICLE I.

SECTION I.

ALL legiſlative powers herein granted, ſhall be veſted in a Congreſs of the United States, which ſhall conſiſt of a ſenate and houſe of repreſentatives.

SECTION II.

1. The houſe of repreſentatives ſhall conſiſt of members choſen every ſecond year, by the people of the ſeveral ſtates; and the electors, in each ſtate, ſhall have the qualifications requiſite for electors of the moſt numerous branch of the ſtate legiſlature.

2. No perſon ſhall be a repreſentative, who ſhall not have attained to the age of twenty-five years, and been ſeven years a citizen of the United States; and who ſhall not, when elected, be an inhabitant of that ſtate in which he ſhall be choſen.

3. Repreſentatives, and direct taxes ſhall be apportioned among the ſeveral ſtates, which may be included in this union, according to their reſpective numbers, which ſhall be determined by adding to the whole number of free perſons, including thoſe bound to ſervice for a term of years, and excluding Indians not taxed, three-fifths of all other perſons. The actual enumeration ſhall be made within three years after the firſt meeting of the Congreſs of the United States; and within every ſubſequent term of ten years, in ſuch manner as they ſhall by law direct. The number of repreſentatives ſhall not exceed one for every thirty thouſand: but each ſtate ſhall have at leaſt one repreſentative: and, until ſuch enumeration ſhall be made, the ſtate of New-Hampſhire ſhall be entitled to chooſe three; Maſſachuſetts eight; Rhode-Iſland and Providence Plantations one; Connecticut five; New York ſix; New Jerſey four; Pennſylvania eight; Delaware one; Maryland ſix; Virginia ten; North Carolina five; South Carolina five; and Georgia three.

4. When vacancies happen in the repreſentation from any ſtate, the executive authority thereof ſhall iſſue writs of election to fill ſuch vacancies.

5. The houſe of repreſentatives ſhall chooſe their ſpeaker and other officers; and ſhall have the ſole power of impeachment.

SECTION III.

1. The ſenate of the United States ſhall be compoſed of two ſenators from each ſtate, choſen by the legiſlature thereof, for ſix years: and each ſenator ſhall have one vote.

2. Immediately after they ſhall be aſſembled, in conſequence of the firſt election, they ſhall be divided, as equally as may be, into three claſſes. The ſeats of the ſenators of the firſt claſs ſhall be vacated at the expiration of the ſecond year; of the ſecond claſs, at the expiration of the fourth year; and of the third claſs, at the expiration of the ſixth year; ſo that one third may be choſen every ſecond year. And if vacancies happen, by reſignation or otherwiſe, during the receſs of the legiſlature of any ſtate, the executive thereof may make temporary appointments until the next meeting of the legiſlature, which ſhall then fill ſuch vacancies.

3. No perſon ſhall be a ſenator, who ſhall not have attained to the age of thirty years, and been nine years a citizen of the United States; and who ſhall not, when elected, be an inhabitant of that ſtate for which he ſhall be choſen.

4. The Vice-Preſident of the United States ſhall be Preſident of the ſenate; but ſhall have no vote, unleſs they be equally divided.

5. The ſenate ſhall chooſe their other officers, and alſo a Preſident pro tempore, in the abſence of the Vice-Preſident, or when he ſhall exerciſe the office of Preſident, of the United States.

6. The ſenate ſhall have the ſole power to try all impeachments. When ſitting for that purpoſe, they ſhall be on oath or affirmation. When the Preſident of the United

States is tried, the chief juſtice ſhall preſide: and no perſon ſhall be convicted, without the concurrence of two-thirds of the members preſent.

7. Judgment, in caſes of impeachment, ſhall not extend further than to removal from office, and diſqualification to hold and enjoy any office of honour, truſt, or profit, under the United States. But the party convicted ſhall, nevertheleſs, be liable and ſubject to indictment, trial, judgment and puniſhment according to law.

SECTION IV.

1. The times, places, and manner of holding elections for ſenators and repreſentatives, ſhall be preſcribed in each ſtate by the legiſlature thereof: but the Congreſs may, at any time, by law, make or alter ſuch regulations, except as to the places of chooſing ſenators.

2. The Congreſs ſhall aſſemble at leaſt once in every year: and ſuch meeting ſhall be on the firſt Monday in December, unleſs they ſhall by law appoint a different day.

SECTION V.

1. Each houſe ſhall be the judge of the elections, returns and qualifications of its own members: and a majority of each ſhall conſtitute a quorum to do buſineſs: but a ſmaller number may adjourn from day to day, and may be authoriſed to compel the attendance of abſent members, in ſuch manner, and under ſuch penalties as each houſe may provide.

2. Each houſe may determine the rules of its proceedings; puniſh its members for diſorderly behavior; and, with the concurrence of two-thirds, expel a member.

3. Each houſe ſhall keep a journal of its proceedings; and, from time to time, publiſh the ſame, excepting ſuch parts as may in their judgment require ſecrecy; and the yeas and nays of the members of either houſe, on any queſ-

ſtion, ſhall, at the deſire of one-fifth of thoſe preſent, be entered on the journal.

4. Neither houſe, during the ſeſſion of Congreſs, ſhall, without the conſent of the other, adjourn for more than three days, nor to any other place than that in which the two houſes ſhall be ſitting.

SECTION VI.

1. The ſenators and repreſentatives ſhall receive a compenſation for their ſervices, to be aſcertained by law, and paid out of the treaſury of the United States. They ſhall, in all caſes, except treaſon, felony, and breach of the peace, be privileged from arreſt, during their attendance at the ſeſſion of their reſpective houſes, and in going to, and returning from the ſame: and for any ſpeech or debate in either houſe, they ſhall not be queſtioned in any other place.

2. No ſenator or repreſentative ſhall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which ſhall have been created, or the emoluments of which ſhall have been encreaſed, during ſuch time: and no perſon, holding any office under the United States, ſhall be a member of either houſe, during his continuance in office.

SECTION VII.

1. All bills, for raiſing revenue, ſhall originate in the houſe of repreſentatives; but the ſenate ſhall propoſe or concur with amendments, as on other bills.

2. Every bill, which ſhall have paſſed the houſe of repreſentatives and the ſenate, ſhall, before it become a law, be preſented to the Preſident of the United States. If he approve, he ſhall ſign it: but if not, he ſhall return it, with his objections, to that houſe, in which it ſhall have originated, who ſhall enter the objections at large on their journal, and proceed to conſider it. If, after ſuch recon-

ſideration, two-thirds of that houſe ſhall agree to paſs the bill, it ſhall be ſent, together with the objections, to the other houſe, by which it ſhall likewiſe be reconſidered: and, if approved by two-thirds of that houſe, it ſhall become a law. But, in all ſuch caſes, the votes of both houſes ſhall be determined by yeas and nays: and the names of the perſons voting for and againſt the bill, ſhall be entered on the journal of each houſe reſpectively. If any bill ſhall not be returned by the Preſident, within ten days (Sundays excepted) after it ſhall have been preſented to him, the ſame ſhall be a law, in like manner as if he had ſigned it, unleſs the Congreſs, by their adjournment, prevent its return; in which caſe it ſhall not be a law.

3. Every order, reſolution, or vote, to which the concurrence of the ſenate and houſe of repreſentatives may be neceſſary (except on a queſtion of adjournment) ſhall be preſented to the Preſident of the United States; and, before the ſame ſhall take effect, be approved by him; or, being diſapproved by him, ſhall be repaſſed by two-thirds of both houſes, according to the rules and limitations preſcribed in the caſe of a bill.

SECTION VIII.

The Congreſs ſhall have power,

1. To lay and collect taxes, duties, impoſts, and exciſes, to pay the debts, and provide for the common defence, and general welfare, of the United States; but all duties, impoſts, and exciſes, ſhall be uniform throughout the United States.

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations, and among the ſeveral States, and with the Indian tribes.

4. To eſtabliſh an uniform rule of naturalization, and uniform laws on the ſubject of bankruptcies, throughout the United States.

5. To coin money; regulate the value thereof, and of foreign coin; and fix the ſtandard of weights and meaſures.

6. To provide for the puniſhment of counterfeiting the ſecurities and current coin of the United States.

7. To eſtabliſh poſt-offices and poſt-roads.

8. To promote the progreſs of ſcience and uſeful arts, by ſecuring, for limited times, to authors and inventors, the excluſive right to their reſpective writings and diſcoveries.

9. To conſtitute tribunals inferior to the ſupreme court.

10. To define and puniſh piracies and felonies committed on the high ſeas, and offences againſt the law of nations.

11. To declare war; grant letters of marque and repriſal; and make rules concerning captures on land and water.

12. To raiſe and ſupport armies. But no appropriation of money for that uſe, ſhall be for a longer term than two years.

13. To provide and maintain a navy.

14. To make rules for the government and regulation of the land and naval forces.

15. To provide for calling forth the militia, to execute the laws of the union, ſuppreſs inſurrections, and repel invaſions.

16. To provide for organizing, arming, and diſciplining the militia, and for governing ſuch part of them as may be employed in the ſervice of the United States: reſerving to the States reſpectively the appointment of the officers, and the authority of training the militia according to the diſcipline preſcribed by Congreſs.

17. To exercise exclusive legislation, in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings: —and

18. To make all laws, which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

SECTION IX.

1. The migration or importation of such persons, as any of the States now existing, shall think proper to admit, shall not be prohibited by the Congress, prior to the year one thousand eight hundred and eight: but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

3. No bill of attainder, or ex post facto law shall be passed.

4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

5. No tax or duty shall be laid on articles exported from any State. No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another: nor shall vessels, bound to or from, one State, be obliged to enter, clear, or pay duties in another.

6. No money ſhall be drawn from the treaſury, but in conſequence of appropriations made by law; and a regular ſtatement and account of the receipts and expenditures of all public money ſhall be publiſhed from time to time.

7. No title of nobility ſhall be granted by the United States: And no perſon, holding any office of profit or truſt under them, ſhall, without the conſent of Congreſs, except of any preſent, emolument, office, or title, of any kind whatever, from any king, prince, or foreign ſtate.

SECTION X.

1. No State ſhall enter into any treaty, alliance, or confederation; grant letters of marque and repriſal; coin money; emit bills of credit; make any thing but gold and ſilver coin a tender in payment of debts; paſs any bill of attainder, ex poſt facto law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No State ſhall, without the conſent of Congreſs, lay any impoſts or duties on imports or exports, except what may be abſolutely neceſſary for executing its inſpection laws; and the net produce of all duties and impoſts, laid by any State on imports or exports, ſhall be for the uſe of the treaſury of the United States; and all ſuch laws ſhall be ſubject to the reviſion and control of the Congreſs. No ſtate ſhall, without the conſent of Congreſs, lay any duty on tonnage, keep troops, or ſhips of war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unleſs actually invaded, or in ſuch eminent danger as will not admit of delay.

ARTICLE II.

SECTION I.

1. The executive power ſhall be veſted in a Preſident of the United States of America. He ſhall hold his office during the term of four years, and, together with the Vice-Preſident, choſen for the ſame term, be elected as follows:

2. Each State ſhall appoint, in ſuch manner as the legiſlature thereof may direct, a number of electors, equal to the whole number of ſenators and repreſentatives, to which the State may be entitled in the Congreſs. But no ſenator, or repreſentative, or perſon holding an office of truſt or profit, under the United States, ſhall be appointed an elector.

3. The electors ſhall meet in their reſpective States, and vote by ballot for two perſons, of whom one, at leaſt, ſhall not be an inhabitant of the ſame State with themſelves. And they ſhall make a liſt of all the perſons voted for, and of the number of votes for each; which liſt they ſhall ſign and certify, and tranſmit ſealed to the ſeat of the government of the United States, directed to the Preſident of the ſenate. The Preſident of the ſenate ſhall, in the preſence of the ſenate and houſe of repreſentatives, open all the certificates, and the votes ſhall then be counted. The perſon having the greateſt number of votes ſhall be the Preſident, if ſuch number be a majority of the whole number of electors appointed; and if there be more than one who have ſuch majority, and have an equal number of votes, then the houſe of repreſentatives ſhall immediately chooſe by ballot one of them for Preſident: and if no perſon have a majority, then, from the five higheſt on the liſt, the ſaid houſe ſhall in like manner chooſe the Preſident. But in chooſing the Preſident, the votes ſhall be taken by States, the repreſentation from each State having one vote: a quorum for this purpoſe ſhall conſiſt of a member or members from two-thirds of the States: and a majority of all the States ſhall be neceſſary to a choice. In every caſe, after the choice of the Preſident, the perſon having the greateſt number of votes of the electors, ſhall be the Vice-Preſident. But if there ſhould remain two or more, who

have equal votes, the ſenate ſhall chooſe from them, by ballot, the Vice-Preſident.

4. The Congreſs may determine the time of chooſing the electors, and the day on which they ſhall give their votes; which day ſhall be the ſame throughout the United States.

5. No perſon, except a natural born citizen, or a citizen of the United States, at the time of the adoption of this conſtitution, ſhall be eligible to the office of Preſident. Neither ſhall any perſon be eligible to that office, who ſhall not have attained, to the age of thirty-five years, and been fourteen years a reſident within the United States.

6. In caſe of the removal of the Preſident from office, or of his death, reſignation, or inability to diſcharge the powers and duties of the ſaid office, the ſame ſhall devolve on the Vice-Preſident; and the Congreſs may, by law, provide for the caſe of removal, death, reſignation, or inability, both of the Preſident and Vice-Preſident, declaring what officer ſhall then act as Preſident; and ſuch officer ſhall act accordingly, until the diſability be removed, or a Preſident ſhall be elected.

7. The Preſident ſhall, at ſtated times, receive for his ſervices, a compenſation, which ſhall neither be increaſed nor diminiſhed, during the period for which he ſhall have been elected: and he ſhall not receive, within that period, any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he ſhall take the following oath or affirmation:

"I do ſolemnly ſwear (or affirm) that I will faithfully "execute the office of Preſident of the United States; and "will, to the beſt of my ability, preſerve, protect, and "defend the conſtitution of the United States."

SECTION II.

1. The Preſident ſhall be commander in chief of the army and navy of the United States, and of the militia of the ſeveral States, when called into the actual ſervice of the United States. He may require the opinion, in writing, of the principal officers in each of the executive departments, upon any ſubject relating to the duties of their reſpective offices: and he ſhall have power to grant reprieves and pardons, for offences againſt the United States, except in caſes of impeachment.

2. He ſhall have power, by and with the advice and conſent of the ſenate, to make treaties, provided two-thirds of the ſenators preſent concur: and he ſhall nominate, and by and with the advice and conſent of the ſenate, ſhall appoint ambaſſadors, other public miniſters and conſuls, judges of the ſupreme court, and all other officers of the United States, whoſe appointments are not herein otherwiſe provided for, and which ſhall be eſtabliſhed by law. But the Congreſs may, by law, veſt the appointment of ſuch inferior officers, as they think proper, in the Preſident alone, in the courts of law, or in the heads of departments.

3. The Preſident ſhall have power to fill up all vacancies that may happen, during the receſs of the ſenate, by granting commiſſions, which ſhall expire at the end of their next ſeſſion.

SECTION III.

He ſhall, from time to time, give to the Congreſs information of the ſtate of the union; and recommend to their conſideration ſuch meaſures as he ſhall judge neceſſary and expedient. He may, on extraordinary occaſions, convene both houſes, or either of them: and, in caſe of diſagreement between them, with reſpect to the time of adjournment, he may adjourn them to ſuch time as he ſhall think proper. He ſhall receive ambaſſadors and other public miniſters.

He ſhall take care that the laws be faithfully executed; and ſhall commiſſion all the officers of the United States.

SECTION IV.

The Preſident, Vice-Preſident, and all civil officers of the United States, ſhall be removed from office, on impeachment for, and convicton of, treaſon, bribery, or other high crimes and miſdemeanor.

ARTICLE. III.

SECTION I.

The judicial power of the United States ſhall be veſted in one ſupreme court, and in ſuch inferior courts as the Congreſs may, from time to time, ordain and eſtabliſh. The judges, both of the ſupreme and inferior courts, ſhall hold their offices during good behaviour; and ſhall, at ſtated times, receive for their ſervices, a compenſation, which ſhall not be diminiſhed during their continuance in office.

SECTION II.

1. The judicial power ſhall extend to all caſes, in law and equity, ariſing under this conſtitution, the laws of the United States, and treaties made, or which ſhall be made, under their authority; to all caſes affecting ambaſſadors, other public miniſters, and conſuls; to all caſes of admiralty and maritime juriſdiction; to controverſies to which the United States ſhall be a party; to controverſies between two or more ſtates, between a ſtate and citizens of another ſtate, between citizens of different ſtates, between citizens of the ſame ſtate, claiming lands under grants of different ſtates, and between a ſtate, or the citizens thereof, and foreign ſtates, citizens or ſubjects.

2. In all caſes affecting ambaſſadors, other public miniſters and conſuls, and thoſe in which a ſtate ſhall be a party, the ſupreme court ſhall have original juriſdiction. In all the other caſes before mentioned, the ſupreme court ſhall have appellate juriſdiction, both as to law and fact,

with ſuch exceptions, and under ſuch regulations as the Congreſs ſhall make.

3. The trial of all crimes, except in caſes of impeachment, ſhall be by jury: and ſuch trial ſhall be held in the ſtate where the ſaid crimes ſhall have been committed; but when not committed within any ſtate, the trial ſhall be at ſuch place or places, as the Congreſs may by law have directed.

SECTION III.

1. Treaſon againſt the United States, ſhall conſiſt only in levying war againſt them, or in adhering to their enemies, giving them aid and comfort. No perſon ſhall be convicted of treaſon unleſs on the teſtimony of two witneſſes to the ſame overt act, or on confeſſion in open court.

2. The Congreſs ſhall have power to declare the puniſhment of treaſon: but no attainder of treaſon ſhall work corruption of blood, or forfeiture, except during the life of the perſon attainted.

ARTICLE IV.

SECTION I.

Full faith and credit ſhall be given in each ſtate, to the public acts, records, and judicial proceedings of every other ſtate. And the Congreſs may, by general laws, preſcribe the manner in which ſuch acts, records, and proceedings ſhall be proved, and the effect thereof.

SECTION II.

1. The citizens of each ſtate ſhall be entitled to all the privileges and immunities of citizens in the ſeveral ſtates.

2. A perſon charged in any ſtate with treaſon, felony, or other crime, who ſhall flee from juſtice, and be found in another ſtate, ſhall, on demand of the executive authority of the ſtate from which he fled, be delivered up, to be removed to the ſtate, having juriſdiction of the crime.

3. No perſon, held to ſervice or labour in one ſtate, under the laws thereof, eſcaping into another, ſhall in conſequence of any law or regulation therein, be diſcharged from ſuch ſervice or labor; but ſhall be delivered up on claim of the party to whom ſuch ſervice or labour may be due.

SECTION III.

1. New ſtates may be admitted by the Congreſs into this union; but no new ſtate ſhall be formed or erected within the juriſdiction of any other ſtate—nor any ſtate be formed by the junction of two or more ſtates, or parts of ſtates—without the conſent of the legiſlatures of the ſtates concerned, as well as of the Congreſs.

2. The Congreſs ſhall have power to diſpoſe of, and make all needful rules and regulations reſpecting, the territory or other property belonging to the United States: and nothing in this conſtitution ſhall be ſo conſtrued, as to prejudice any claims of the United States, or of any particular ſtate.

SECTION IV.

The United States ſhall guarantee to every ſtate in this union, a republican form of government; and ſhall protect each of them againſt invaſion, and on application of the legiſlature, or of the executive (when the legiſlature cannot be convened) againſt domeſtic violence.

ARTICLE V.

The Congreſs, whenever two-thirds of both houſes ſhall deem it neceſſary, ſholl propoſe amendments to this conſtitution, or, on the application, of the legiſlatures of two-thirds of the ſeveral ſtates, ſhall call a convention for propoſing amendments, which, in either caſe, ſhall be valid to all intents and purpoſes, as part of this conſtitution, when ratified by the legiſlatures of three-fourths of the ſeveral ſtates, or by conventions in three-fourths thereof, as the one

or the other mode of ratification may be propoſed by the Congreſs; provided, that no amendment, which may be made prior to the year one thouſand eight hundred and eight, ſhall in any manner affect the firſt and fourth clauſes in the ninth ſection of the firſt article; and that no ſtate, without its conſent, ſhall be deprived of its equal ſuffrage in the ſenate.

ARTICLE VI.

1. All debts contracted, and engagements entered into, before the adoption of this conſtitution, ſhall be as valid againſt the United States, under this conſtitution, as under the confederation.

2. This conſtitution, and the laws of the United States which ſhall be made in purſuance thereof, and all treaties made, or which ſhall be made, under the authority of the United States, ſhall be the ſupreme law of the land: and the judges, in every ſtate, ſhall be bound thereby, any thing in the conſtitution or laws of any ſtate to the contrary notwithſtanding.

3. The ſenators and repreſentatives before mentioned, and the members of the ſeveral ſtate legiſlatures, and all executive and judicial officers, both of the United States and of the ſeveral ſtates ſhall be bound, by oath or affirmation to ſupport this conſtitution; but no religious teſt ſhall ever be required as a qualification to any office or public truſt under the United States.

ARTICLE VII.

The ratification of the conventions of nine ſtates ſhall be ſufficient for the eſtabliſhment of this conſtitution between the ſtates ſo ratifying the ſame.

Done in convention, by the unanimous conſent of the ſtates preſent, the ſeventeenth day of September, in the year of our Lord one thouſand ſeven hundred and eighty-ſeven,

and of the independence of the United States of America the twelfth. In witneſs whereof we have hereunto ſubſcribed our names.

GEORGE WASHINGTON,
Preſident and Deputy from Virginia.

AMENDMENTS *to*

NEW-HAMPSHIRE,
John Langdon,
Nicholas Gilman.

MASSACHUSETTS,
Nathaniel Gorham,
Rufus King.

CONNECTICUT,
William Samuel Johnſon,
Roger Sherman.

NEW-YORK,
Alexander Hamilton.

NEW-JERSEY,
William Livingſton,
David Brearley,
William Patterſon,
Jonathan Dayton.

PENNSYLVANIA,
Benjamin Franklin,
Thomas Mifflin,
Robert Morris,
George Clymer,
Thomas Fitzſimons,
Jared Ingerſoll,
James Wilſon,
Gouverneur Morris,

DELAWARE,
George Reed,
Gunning Bedford, jun.
John Dickinſon,
Richard Baſſet,
Jacob Broom.

MARYLAND,
James M'Henry,
Daniel of St. Thomas Jenifer,
Daniel Carrol.

VIRGINIA,
John Blair,
James Madiſon, junior.

NORTH-CAROLINA,
William Blount,
Richard Dobbs Spaight,
Hugh Williamſon.

SOUTH-CAROLINA,
John Rutledge,
Charles C. Pinckney,
Charles Pinckney,
Pierce Butler.

GEORGIA,
William Few,
Abraham Baldwin.

Atteſt. WILLIAM JACKSON, ſecretary.

CONGRESS of the UNITED STATES,

Begun and held at the city of New-York, on Wednesday, the fourth of March, one thousand seven hundred and eighty-nine.

The conventions of a number of the states having, at the time of their adopting the constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added—and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution—

RESOLVED, by the senate and house of representatives of the United States of America, in Congress assembled, two-thirds of both houses concurring, that the following articles be proposed to the legislatures of the several states, as amendments to the constitution of the United States, all, or any of which articles, when ratified by three-fourths of the said legislatures, to be valid, to all intents and purposes as part of the said constitution, viz.

ARTICLES, in addition to, and amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original Constitution.

I. After the first enumeration, required by the first article of the Constitution, there shall be one representative for every thirty thousand, until the number shall amount to one hundred; after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred representatives—nor less than one representative for every forty thousand persons—until the number of representives shall amount to two hundred; after which, the proportion shall be so regulated by Congress, that there

ſhall not be leſs than two hundred repreſentatives, nor more than one repreſentative for every fifty thouſand perſons.

II. No law, varying the compenſation for the ſervices of the ſenators and repreſentatives ſhall take effect, until an election of repreſentatives ſhall have intervened.

III. Congreſs ſhall make no law reſpecting an eſtabliſhment of religion, or prohibiting the free exerciſe thereof, or abridging the freedom of ſpeech, or of the preſs; or the right of the people peaceably to aſſemble, and to petition the government for a redreſs of grievances.

IV. A well-regulated militia being neceſſary to the ſecurity of a free ſtate, the right of the people to keep and bear arms, ſhall not be infringed.

V. No ſoldier ſhall in time of peace, be quartered in any houſe, without the conſent of the owner; nor in time of war, but in a manner to be preſcribed by law.

VI. The right of the people to be ſecure in their perſons, houſes, papers, and effects, againſt unreaſonable ſearches and ſeizures, ſhall not be violated: and no warrants ſhall iſſue, but upon probable cauſe, ſupported by oath or affirmation—and particularly deſcribing the place to be ſearched, and the perſons or things to be ſeized.

VII. No perſon ſhall be held to anſwer for a capital or otherwiſe infamous crime, unleſs on a preſentment or indictment by a grand jury, except in caſes ariſing in the land or naval forces, or in the militia, when in actual ſervice, in time of war, or public danger: nor ſhall any perſon be ſubject for the ſame offence to be twice put in jeopardy of life or limb; nor ſhall be compelled in any criminal caſe, to be a witneſs againſt himſelf; nor be deprived of life, liberty, or property, without due proceſs of law: nor ſhall private property be taken for public uſe, without juſt compenſation.

VIII. In all criminal proſecutions, the accuſed ſhall en-

joy the right to a ſpeedy and public trial, by an impartial jury, of the State and diſtrict, wherein the crime ſhall have been committed; which diſtrict ſhall have been previouſly aſcertained by law; and to be informed of the nature and cauſe of the accuſation; to be confronted with the witneſſes againſt him; to have compulſory proceſs for obtaining witneſſes in his favour; and to have the aſſiſtance of counſel for his defence.

IX. In ſuits at common law, where the value in controverſy, ſhall exceed twenty dollars, the right of trial by jury ſhall be preſerved: and no fact tried by a jury, ſhall be otherwiſe re-examined in any court of the United States, than according to the rules of common law.

X. Exceſſive bail ſhall not be required; nor exceſſive fines impoſed; nor cruel and unuſual puniſhments inflicted.

XI. The enumeration, in the conſtitution, of certain rights, ſhall not be conſtrued to deny or diſparage others retained by the people.

XII. The powers, not delegated to the United States, by the conſtitution, nor prohibited by it to the States, are reſerved to the States reſpectively, or to the people.

FREDERICK AUGUSTUS MUHLENBERG,
Speaker of the Houſe of Repreſentatives.

JOHN ADAMS, Vice-Preſident of the United States,
and Preſident of the Senate.

Atteſt. JOHN BECKLEY, Clerk of the
Houſe of Repreſentatives.

SAMUEL A. OTIS, Secretary of the Senate.

N. B. By the returns made into the Secretary of State's office, it appears that the firſt article of the above amendments is agreed to by only ſeven States—the ſecond by only four—and therefore theſe are not obligatory. All the remainder, having been ratified by nine States, are of equal obligation with the conſtitution itſelf.

Auguſt 12, 1791.