the trial by Ordeal,* &c. have long since been laid

HAM tells us (Summa Magna, cap. 3.) that no Attorney could be admitted to the Court-baron, without a precept from the King; whereas, according to this author (who was a judge in the reign of Edw. I.) Attornies were admitted in the County-courts, both in civil and criminal actions.

From such tribunals as these, did Mr. LOCKE borrow his crude notions of a judiciary establishment for Carolina; and these were the models, which, in the present age of improvements, particularly in the sciences of government and jurisprudence, certain American Legislators have been copying!---[But, see more of this in a subsequent note.]

* These absurd modes of Trial, which grew out of the superstition of the earlier ages, very naturally fell,—in consequence of the spread of knowledge. The Ordeal was first prohibited by the canon law—and afterwards totally abolished by parliament, in the time of Henry VII. Trial by Battle stands repealed by canons only; and though our modern practice of DUELLING is derived from that source, this is expresly contrary to law: But anciently, in Writs of Right (instituting a particular species of civil action,) and in Appeals touching life,—Trials might be by Battle, or by Jury, at the option of the defendant; yet with this difference—that in the former, the combat was to be by champions (who, it was requisite, should be freeholders,)—whereas in the latter, it could only be between the parties themselves. The Grand Assise, giving this alternative to the tenant, was introduced by Henry II. with the consent of parliament: and this is what GLANVILLE (who wrote in that reign) refers to, as REGALE QUODDAM BENEFICIUM, CLEMENTIA PRINCIPIS, DE CONSILIO PROCERUM, POPULIS INDULTUM; QUO VITÆ" &c.—[Vide l. 2. c. 7.]—But after the institution of the justices in eyre (or circuit judges) by Hen. II. and the subsequent establishment of the court of common pleas,—which was erected in 1215,—real actions and other matters of importance were rarely tried in the county-courts: and we perceive by the reference to HENGHAM in another note, that soon after the institution of those judicatories, both demandant and tenant in the Grand Assise might avail themselves of the benefits of Trial by Jury,---by transferring the cause to one of the King's courts.---

aside, as irrational ; and that by *Jury*,* alone, retained and cherished,—as the best possible means of investigating truth, on the evidence of facts.

In the reign of King John, the Trial by Jury—as it was established by the laws of Edward the confessor, and continued by William the conqueror---was solemnly confirmed† by the Great Charter:‡ And

Yet Mr. Hume remarks, that there was an inſtance of the Trial by Battle, ſo late as the reign of Elizabeth.

But although the trial by Ordeal (which was meant to decide criminal cauſes) was not totally aboliſhed in England, 'till the time of Hen. VII. it was proſcribed throughout the Chriſtian world, by an eccleſiastical decree of the 4th council of Lateran---which was in the reign of Hen. III. and this, Mr. Hume notices, as a faint mark of improvement, in that age. Hence it would appear, that in the intermediate period of more than 200 years, this ſuperſtitious practice had in ſome degree prevailed. The trial by Battle, however, obtained throughout Europe, in thoſe early days.

* Trial in the Civil Law, is by Witneſſes : Whereas the Common Law, as FORTESCUE obſerves, " never determineth a controverſy by Witneſſes only, that may be determined by a Jury of twelve men ; foraſmuch as this way is much more available and effectual for the trial of the truth, than is the form of any other laws of the world, and further from the danger of corruption and ſubornation."---See Fortes. de Laud. &c. cap. 32.

† MAGNA CHARTA, together with CHARTA DE FORESTA, obtained a new confirmation in the ſucceeding reign of Henry III.

‡ Mr. DE LOLME notices the relaxation made by Hen. I. in favor of the people, of ſome of the rigid laws of the Conqueror : After which he remarks, that---" Under Henry II. Liberty took a further ſtride ; and the ancient Trial by Jury---a mode of procedure which is

from that period—nearly six hundred years past—it has been the established, constitutional mode, of trying both *civil* and *criminal* causes, under the English law.

But, independently of the use of this trial in England, traces are perceived of the ancient use of Juries in France, Germany and Italy; all of whom had a judicial tribunal, composed of *twelve good men and true:* And in Sweden, where the regal power was formerly very limited, the trial by Jury was in established use, till the middle of the seventeenth century. Sir *William Temple* remarks, that vestiges are not wanting of this trial, from the very institutions of Odin or Woden—the first leader of the Scythians, Asiatic Goths, or Goeta, into Europe; and founder of that mighty Kingdom round the Baltic sea, from whence all the Gothic governments in the north-western parts of Europe were derived. Hence it is known to have been as ancient in Sweden, as any records or traditions of that kingdom:—Nor is it improbable that the ancient Swedes, and the founders of other northern nations in Europe among whom jury-trial obtained, may have borrowed the institution from the Roman polity. The Normans, long accustomed to Jury-trial, are supposed to have

at preſent one of the moſt valuable parts of the Engliſh law—made again, though imperfectly, its appearance." [See his work on the Conſtitution of England, ch. 2.]—Henry II. reigned 35 years—and he died 26 years before the date of MAGNA CHARTA: yet we perceive, that the ancient Trial by Jury was revived, in ſome degree, at that early period.

brought it into England, with them, together with other juridical institutions of their own country; although it had been used among the Saxon-English, long before the conquest. About the same period, too, the institution of juries is recognized as an established usage, in Germany, by the laws of the emperor Conrad II.—He decreed, that none of his subjects should be deprived of their Benefice,* unless ac-

* The word BENEFICIUM (rendered BENEFICE, in our language,) was in uſe before the word FEUDUM, which we term fief, fee, or feud. FEUDUM, according to the hiſtorian ROBERTSON, was ſubſtituted in place of BENEFICIUM, and firſt occurs in a charter of King Robert of France, A. D. 1008.

Sir MARTIN WRIGHT informs us, that fiefs had anciently ſeveral denominations: While they were PRECARIOUS, they were called MUNERA; afterwards, when they became temporary AND FOR LIFE, they acquired the name of BENEFICIA; and they were firſt denominated FEUDA (or FEODA,) when they began to be granted IN PERPETUITY---and not before. Conrad II. who began his reign in the year 1024, was the firſt emperor (as Doct. Robertſon tells us) who made fiefs HEREDITARY.

The word "benefice" (BENEFICIUM,) as uſed in this place, we may then underſtand to mean, a FREEHOLD eſtate in lands---FOR LIFE, AT LEAST. And the HOLDERS of theſe eſtates were FREE-MEN,---LIBERI HOMINES; which Sir Martin Wright renders---"owners of land:" yet theſe BENEFICES (though they were conſidered as honors---HONORES,) were not ALLODIAL property, but holden of the immediate lord of the fee. For although, AT FIRST, thoſe were entitled LIBERI HOMINES who had lands of their OWN, independent of any feudal ſuperiority or dominion; yet upon the introduction of TENURES, thoſe whoſe eſtates came neareſt to the condition of the ALLODIAL, were called LIBERI HOMINES,---and judge Wright expreſsly tells us (in the work above cited) that the FREEHOLDERS even of PRIVATE LORDS were thus denominated. See Robertſon's Hiſt. of Charles V. note 8th in the proofs and illuſtrations; and Wright's Introduction to the law of Tenures.

cording to the custom of their ancestors, and by *the judgment of their peers.*

Such, then, is the origin of Jury-trial, as it obtained among *our ancestors.* From them, *we* derived the Right: And judge *Patterson* has emphatically styled it—"*a fundamental law, made sacred by the Constitution*"—a law, which "*cannot be legislated away.*"

Mr. *Hume* remarks, that "those who cast their eye on the general revolutions of society, will find, that, as almost all improvements of the human mind had reached nearly to their state of perfection about the age of Augustus, there was a sensible decline from that point or period; and men, thenceforth, relapsed gradually into ignorance and barbarism."

"The irruption of the barbarous nations"—and this followed only four centuries after—"overwhelmed all human knowledge;* which was already far on

* It is juſtly obſerved by a writer of our own country, "that as ſoon as Learning droops, or feels the Tyrant's hand, its votaries ſink back again into their original ignorance and rudeneſs. If we caſt our eyes, ſays he, towards ancient Greece,—to what a pitch of glory and reputation did ſhe raiſe herſelf, by carrying the Sciences to perfection! And Rome, once miſtreſs of the world, was not leſs renowned for her victories, than her extenſive Learning and Knowledge:—But, no ſooner was ſhe deprived of theſe, than ſhe ſhrunk back into a poor, petty ſtate!"

The effect produced by the irruption of the GOTHS, VANDALS, and other BARBARIANS, upon the Roman Empire, is ſententiouſly noticed by the poet in theſe beautiful lines.

"LEARNING and ROME, ALIKE, in Empire grew,
"And ARTS ſtill flouriſhed, where HER Eagles flew:
"From the SAME FOES, at laſt, BOTH felt their doom,
"And the SAME AGE ſaw LEARNING fall, AND ROME."

Pope's Eſs. on Crit.

its decline: and men sunk every age deeper into ignorance, stupidity and superstition; till the light of ancient science and history had very nearly suffered a total extinction, in all the European nations."

"But," continues Hume, "there is a point of depression, as well as of exaltation, from which human affairs naturally return in a contrary direction, and beyond which they seldom pass, either in their advancement or decline. The period in which the people of Christendom were the lowest sunk in *ignorance*, and *consequcntly* in *disorders of every kind*, may justly be fixed at the eleventh century; about the age of William the conqueror: and from that era, the sun of science beginning to re-ascend, threw out many gleams of light, which preceded the full morning when letters were revived in the fifteenth century."—"Perhaps there was no event which tended further to the improvements of the age, than one which has not been much remarked,—the accidental finding of a copy of Justinian's *Pandects** about the year 1130, in the town of Amalfi in Italy."

"The sensible utility of the Roman law, both to public and private interest, recommended the study of it.—What bestowed an additional merit on the civil law, was the extreme imperfection of that jurisprudence which preceded it, among all the European nations, especially among the Saxons or ancient

* The Pandects are a compilation of the principles and maxims of the Roman or Civil Law, deduced from numerous decisions; and to which an authoritative sanction was given by the emperor Justinian, by whose order this DIGEST was made.

English."--The historian then proceeds to notice these imperfections: "The absurdities," says he, "which prevailed at that time, in the administration of justice, may be conceived from authentic monuments, which remain, of the ancient Saxon laws; where a pecuniary commutation was received for every crime; where stated prices were fixed for men's lives and members; where private revenges were authorized for all injuries; where the use of the Ordeal, Corsnet, and afterwards of the Duel, was the received method of proof; and, where the *judges*† were rustic freeholders assembled of a sud-

† The right of referring the decision of controversies of a civil nature, to arbitrators (even to such "judges," as Hume here describes,) by the parties themselves, if they so chose to do, is not denied; in all cases where the matters in controversy regard their own personal interests: provided they do not affect, either directly or ultimately, the rights of others:---And such reference may be had at any time; as well after the commencement of a suit between the parties at variance, in a court of law, as before.

But it is the very essence of an Arbitration, that the submission thereto be made with the mutual consent of the parties. If they wrong ther or wave any right of their own, by so doing---the act being their own, and done with their free consent, they only can be affected by any injurious consequences resulting from it; and consequently, no one else can have any just ground of complaint: For in such case, should the decision, as to the merits of the matter in controversy, prove ever so erroneous, the maxim of law applies---CONSENSUS TOLLIT ERROREM; consent abrogates error.

In all such cases. as at the time of establishing the constitution of the state, the citizens were entitled to the benefit of having trials by a Jury, in a court of law,---they cannot now, nor could they at any time subsequent to that period, be compelled to resort to any other mode of trial whatever. If either of the parties to a suit or action elect to have his

den, and deciding a cause from one debate or alter-cation of the parties.* Such a state of society was

cauſe tried by a Jury,--- he can no more be deprived of the Right of making that election, than could the two parties who ſhould voluntarily have agreed to ſubmit their controverſy to the award of Arbitrators, be obliged to have it decided by the verdict of a Jury. The parties themſelves, in theſe caſes, muſt be preſumed to be the beſt judges---and, indeed, the only competent ones---of what may be moſt conducive to their own particular intereſts, or conveniency: A diſcretion, in this reſpect, muſt neceſſarily be left with them---to be exerciſed free from controul; ſo as neither to violate the principles of natural juſtice, nor to infringe the conſtitutional rights of any individual.---The exerciſe of ſuch a diſcretion is, in fact, the inviolable right of every freeman.

* If there were no other circumſtance preſented to our view, upon which we might form an opinion of the rude and imperfect ſtate of the Engliſh Juriſprudence, at the period referred to by Mr. Hume---than their reſorting to ſuch tribunals as he has deſcribed, for the purpoſe of obtaining a diſpenſation of Law and Juſtice,---that alone would betray its monſtrous imperfections; or rather, the total incompetency of tribunals thus conſtituted, and legal controverſies ſo managed, to anſwer the purpoſes intended!--Well might he ſay---"ſuch a ſtate of ſociety was very little advanced beyond the rude ſtate of Nature!" In a Court (if it could claim that appellation) of this ſort—on the trial of a cauſe, involving perhaps, property of great value—no ſuch triers as a Jury, for effecting an impartial deciſion on the equity of the caſe, reſulting from a fair inveſtigation of its circumſtances; no ſuch agents as Counſel, for ſtating the facts in the caſe and its merits, to that Jury, and explaining to them THE LAW APPLICABLE THERETO, under the diſcretion and control of JUDGES OF LAW; were interpoſed between the rude unlettered perſons ſitting in the CAPACITY of Judges, and the ALTERCATING PARTIES. CHANCE might, indeed, in a tribunal of this nature, produce a deciſion of a cauſe according to Juſtice and Law: but, as Mr. Jefferſon has remarked (in his Notes on Virginia,) the rightful deciſion of it would be as much a matter of ACCIDENT, as if

very little advanced beyond the rude state of nature: *Violence* universally prevailed, instead of general and

it had been determined by CROSS & PILE,—which is a game of Chance.

Want of the aid of COUNSEL, in the trial of almoſt any cauſe, whatever, would effectually deſtroy that EQUILIBRIUM, or EQUALITY, which ought to ſubſiſt between the parties; as to their reſpective means and faculties of ſtating the FACTS, eluciduting the TESTIMONY, and applying the LAW under the immediate eye of JUDGES of Law,)—neceſſary to the attainment of a juſt and legal deciſion of the matter in controverſy. May not the occurrence of an infinite variety of poſſible, and even very probable caſes, be ſuppoſed, wherein the parties, in a cauſe under trial, would ſtand on extremely unequal ground, even before the moſt able Judges of Law, and the moſt upright and intelligent Jury—abſtractedly from every conſideration of the actual merits of their reſpective ſides,—without the advice and aſſiſtance of a profeſſional Advocate? A moment's reflexion will ſuggeſt an anſwer in the affirmative. The immenſe diſparity which we daily witneſs among men; in point of underſtanding and knowledge—as well as in reſpect to language or utterance, hearing, viſion, &c. plainly evinces the vaſt and undue advantage which ſome men would poſſeſs over others, in the trials of litigated caſes, were the parties to arrange, manage and advocate their own cauſes.—If ſuch were the courſe of proceeding in our judicial tribunals they would ſoon—inſtead of adminiſtering JUSTICE, ACCORDING TO THE LAWS OF THE LAND—become even with the beſt intentions, engines of INJUSTICE and OPPRESSION.

In the common concerns of individuals, they very frequently find it not only convenient, but neceſſary, to avail themſelves of the ſervices & talents of others, in the tranſacting of their buſineſs. Men CANNOT, in many inſtances, manage their own affairs, without employing Factors, Attornies in fact, or Agents of ſome kind. Theſe are the ſubſtitutes or repreſentatives of their principals: And in moſt caſes, which concern the private rights and intereſts of individuals, they poſſeſs a natural and indefeaſable Right, thus to delegate the ſuperintendence and conduct of them, to whom they pleaſe. It is a right founded in reaſon and the principles of common juſtice. If, then, a man enjoys this Right, in the management of his ordinary affairs,—does not common

equitable maxims : The *pretended Liberty* of the times was only *an incapacity of submitting to govern-*

ſenſe revolt at the idea of his being interdicted the exerciſe of the ſame Right, when either his PROPERTY, or other private concern, becomes the object of judicial controverſy or litigation ? Why ſhould he, in the name of reaſon and juſtice, be deprived, in this caſe, of the agency of ſuch perſon as HE MAY CHOOSE to employ and aſſiſt him ; when, as we have already ſeen, he probably MAY, and poſſibly MUST ſuffer Injuſtice and Wrong, from the WANT of ſuch aid ?---The truth is, that no Law can, in a free country, deprive the citizen of ſuch privilege ; and if it were attempted, the act would be wholly unjuſtifiable ; not only on the ground of its REPUGNANCE TO REASON, but becauſe IT COULD HAVE NO LEGAL OR CONSTITUTIONAL OPERATION : For the Conſtitution of our own State has declared it to be ONE of " the GENERAL, GREAT, and ESSENTIAL PRINCIPLES of LIBERTY and FREE GOVERNMENT"--- That all men are born equally free and independent, and have certain INHERENT and INDEFEASIBLE RIGHTS ; among which are thoſe of ENJOYING and DEFENDING LIFE and LIBERTY,---of acquiring, poſſeſſing, and PROTECTING PROPERTY and REPUTATION, and of purſuing their own Happineſs. But if a man, incapable of " protecting" his " PROPERTY," or his " REPUTATION," by the exerciſe of his own faculties, or otherwiſe prevented from doing ſo, in particular caſes--- (as many men are ;) if, under ſuch circumſtances, a man were debarred the privilege of taking to his aſſiſtance, as Counſel or Advocate, ſuch perſon as he might chooſe for that purpoſe ; he would be deprived of a CONSTITUTIONAL RIGHT, DECLARATORY of an ABSOLUTE one ; and contrary alſo to the ſpirit of the DECLARATION OF RIGHTS, prohibited from employing ſuch MEANS as he might deem neceſſary for ſecuring his own Intereſts. The PRIVATION of ſuch Right would, in numerous inſtances that may be readily conceived, be productive of the moſt injurious conſequences to the individual. It would be tyrannical and oppreſſive ; for, it is a maxim of Natural Law, that NO RIGHT CAN BE FOUNDED ON AN INJURY. " Man, (as is obſerved by a late Author) is a free Agent ; and, in the words of the Conſtitution of Pennſylvania, has an inherent and indefeaſible right of PURSUING HIS OWN HAPPINESS. His political liberty conſiſts in his NOT BEING OBSTRUCTED by

ment :* And men not protected by *Law*, in their *Lives* and *Properties*, sought shelter by their *person-*

any positive regulation of society, from prosecuting that object in such manner, and by such means, as he may think proper; provided they do not tend to infringe similar rights appertaining to others."---[See BARTON's Dissert. on Law of Nat^s.]

LEGISLATORS must therefore remember---as it also behoves the Constituent to do---that they are, themselves, but the PROXIES of the PEOPLE; who depute them to exercise those functions, as their Representatives and in their behalf, which they cannot perform in their proper persons: And that COUNSEL, in the judicial department of Government, are such Proxies, as individuals among the people may choose to employ in their private affairs, without compulsion or restraint; to aid, with their advice and service, those whom they represent; in cases which the principal or constituent either is, or conceives himself to be, INCOMPETENT to manage by HIMSELF---or where he is INCAPACITATED from attending IN PERSON, for that purpose. The POWERS of the Proxies in BOTH cases, are derivative, not original; BOTH result from the principle of expediency, as well as of Right; and in BOTH cases, likewise, the Proxies are COMPENSATED for their services, by those who depute and employ them.

* "It is without controversy," says Lord ST. ALBAN, "that Learning doth make the minds of men gentle, generous, manageable, & pliant to government; whereas Ignorance makes them churlish, thwarting and mutinous: and the evidence of time doth clear this assertion,---considering that the most barbarous, rude and unlearned times, have been most subject to tumults, seditions and changes."

Certain it is, that men of sense and good information do, universally yield the most ready obedience to the Laws,---provided such men are likewise virtuous; for, strictly speaking, no one can be said to possess a correct judgment, well improved,---or, in other words, to be a man of wisdom and knowlege,---without observing the precepts of morality: And it is equally true, that in a free country, the Laws alone must govern. In this sense, then, the foregoing observations of the celebrated BACON are well founded. Enlightened and good men are always good

al servitude and attachments, under some powerful chieftain, or by voluntary combinations."—Coming down to the dawn of civilization, he continues his observations thus:—"The gradual progress of improvement raised the Europeans somewhat above this uncultivated state; and affairs, in this island particularly (Great-Britain,) took early a turn, which was more favorable to Justice and to Liberty. Civil employments and occupations soon became honorable among the English: The situation of that people rendered not the perpetual attention to war, so necessary, as among their neighbors; and all regard was not confined to the military profession. The gentry, and even the nobility, began to deem an acquaintance with *the law*, a necessary part of education: They were less diverted, than afterwards, from studies of this kind, by other sciences; and in the age of Henry VI, as we are told by *Fortescue*, there were in the Inns of Court about two thousand students—who gave application to this branch of civil knowledge: a circumstance which proves, that considerable progress was already made in the *science of government*, and which prognosticated a still greater."

citizens: but, on the other hand, we never fail to find weak, uninformed and wicked men, among thoſe who act againſt the laws and the happineſs of ſociety; becauſe ſuch are more liable, either to be influenced by the artifices of others, or to be actuated by their own evil propenſities.

A ſentiment ſimilar to that of Lord St. Alban, on this point, is expreſſed in the following diſtich—which he has quoted in another place.

SCILICET INGENUAS DIDICISSE, FIDELITER, ARTES,
EMOLLIT MORES, NEC SINIT ESSE FEROS.

Such were the meliorating effects upon the great interests of civil society, in England, produced by the introduction—or rather restoration—of the *liberal* principles of the Common-law Maxims of that kingdom, into its general system of national jurisprudence. The *clergy*—in whose hands the administration of justice principally resided, in those early times, by reason of their superiority in learning to the laity—had introduced into the juridical polity of the country, many of the Civil-law institutions; both in principles and practice: And *their* early attachment to that system, chiefly on account of its connection with the Roman pontifical state, occasioned the adoption of it in the ecclesiastical courts; as well as in those cases, generally, of which ecclesiastics claimed cognizance, and wherein they exercised jurisdiction: Hence the Civil-law Maxims and proceedings still prevail in the ecclesiastical courts; also in the Admiralty, which exercises a kind of *extra-territorial* jurisdiction;—and in some degree, likewise, in the Chancery.*

But the general diffusion of knowledge and letters, which took place in the fifteenth century, rapidly divested *the ancient law of the land* of those preposterous *appendages* to it, which grew out of the ignorance and superstition of earlier times. The excellence of its fundamental principles, and the aptitude of its main structure—when stripped of its hetero-

* The Civil Law is followed, in England, in the Eccleſiaſtical courts, in the Admiralty, and in the courts of the two Univerſities; but it is nothing more, in theſe, than LEX SUB GRAVIORI LEGE.

geneous excrescences,—to subserve the administration of Justice, among a manly and free people, naturally attached the natives of the country to their ancient Common Law; thus improved and improving, by the growing wisdom of the community.

Amidst all the turbulence of the times, in the ruder ages of the English history, the people of that nation had pretty uniformly manifested a strong attachment to political liberty, and a high sense of their personal and individual rights. In proportion as they became *more enlightened*, they became *more free*. The popular institutions which obtained in the various departments of their government—instead of bowing implicit obedience to the mandates of an hereditary sovereign, however arbitrary and unjust frequently asserted, with energy and success, the rights of *themselves*, in their *public* relations to the community; and of *those* who had *invested* them with authority, for the promotion of the *general weal*.

But among all the *popular** institutions of the English polity, there is none to which the *People* of Eng-

* The Trial by Jury owed its origin to that jealouſy, which very naturally aroſe in the minds of a free people, leſt injuries might reſult to the Rights, Privileges and Intereſts of Individuals, from an abuſe of Power by Judges independent of the People, and Standing Magiſtrates or Tribunals of any kind. The inſtitution of Juries was therefore deviſed, as a co-ordinate Tribunal; for the Trial of ſuch cauſes as ſhould involve the Lives, Liberties, Reputation and Eſtates, of the individual citizens: And thus, this popular Tribunal conſtitutes an eſſential Branch of the Judicial Power, and is a decided Check on the Judges of Law (though theſe are not excluſively ſuch,) who form the other Branch.

land have adhered with greater firmness,—none, which they have guarded with more rigid jealousy,

The COUNCIL OF CENSORS---which exiſted under the late Conſtitution of Pennſylvania---have very truly obſerved, that "Jury-trial is the only inſtance of Judicial Power, which the People have reſerved to themſelves."

The ſame Council alſo quotes the 11th ſect. of the BILL of RIGHTS prefixed to that Conſtitution, which is in theſe words---"That in all controverſies reſpecting PROPERTY, and in ſuits between man and man, the parties have a Right to Trial by Jury, which ought to be held ſacred." And to this they ſubjoin the following comment and cenſure, on a particular legiſlative Act; viz.

"In the 3d ſect. of the preſent Aſſembly (1784,) a Law has been paſſed to veſt in Iſaac Auſtin a real eſtate in the city of Philadelphia, claimed and poſſeſſed by George A. Baker, as his freehold. This extraordinary Act of Aſſembly, moreover, commands the ſheriff to put Mr. Auſtin in poſſeſſion. It is remarkable, that the bill depending on this occaſion was paſſed, after it had been ſhewn to the Houſe, that an action of Ejectment, concerning part of the premiſes, was depending in the Court of Common Pleas of Philadelphia County, an Attorney at Law having appeared to the action for the defendant Iſaac Auſtin. So flagrant an Infringement of the ſacred Rights of a citizen to Trial by Jury, and ſo manifeſt, and withall ſo wanton, a violation of the Conſtitution of this Commonwealth,---calls for the ſevereſt cenſure of the People, and of this Council. To their reſpective Conſtituents it belongs to enquire---how their ſervants in Aſſembly, individually voted on this occaſion: From the JOURNALS of the Houſe, they will derive full ſatisfaction on the ſubject."

Here we have an expreſs avowal, in the Conſtitution of 1776, of the RIGHT of Jury-trial in CIVIL caſes,---and a ſtrenuous vindication of that Right, by the Council of Cenſors, in 1784. It is likewiſe worthy of remark, that the Right of Jury-trial in CRIMINAL caſes, was ALSO declared in the ſame BILL of RIGHTS. And yet, in the Plan or Frame of Government, preſcribed by the ſame Conſtitution, it is ſaid---"Trials by Jury ſhall be as heretofore:"---thereby evidently intending, to guard againſt any encroachment on the Right itſelf, or change in the mode of reſorting to it---both in CIVIL and CRIMINAL caſes.

from the machinations of arbitrary power, as well as from the spirit of encroachment constantly manifested by the *Civilians*,*—than the Trial by Jury. Their

It is indeed a duty, moſt impreſſively incumbent on us all, to be vigilantly attentive to every ATTEMPT at ſuch encroachment.—Dr. Towers, in his little tract on Libels, ſays—"As the inhabitants of the United States of America, in conſequence of having obtained their Independence, have a power of making their own Laws, it may be hoped—— "THAT THEY WILL PRESERVE, UNVIOLATED, AND IN THEIR FULL EXTENT, THE RIGHTS OF JURIES." In another place, this ſtrenuous aſſerter of public liberty obſerves, that "the right of trial by jury is of infinite importance to the liberty of the ſubject. It cannot, ſays he, be guarded with too much vigilance, nor defended with too much ardor. NO PART OF THE POWER OF JURIES SHOULD BE GIVEN UP TO THE CLAIMS, OR USURPATIONS, OF ANY BODY OF MEN WHATEVER."

But, in order that we may have a reaſonable ground of HOPING as Doct. Towers does, let us not put it in the power of weak or deſigning men, to attempt a ſubverſion of the TRIAL BY JURY,—or an infringement, in the minuteſt degree, of the RIGHTS of Juries: For, we may reſt aſſured, that if the MEASURE OF JURISDICTION as to CIVIL actions, now conſtitutionally veſted in COURTS and JURIES, were, by any undue aſſumption of power, to be diminiſhed—and any ſuch cauſes, as are rightfully cognizable by them, tranſferred to any petty tribunal whatever,—and this, too, without the intervention of a Jury, and the free exerciſe of every other Right appertaining to that mode of trial; —the Rights of PROPERTY would be held by a moſt precarious tenure!—There would ceaſe to be any eſtabliſhed STANDARD of Right, or uniform known Rule of Juſtice, in ſuch caſes; every thing concerning them, would be involved in darkneſs, perplexity and error; and the earnings of the laborious poor, equally with the honeſt acquiſitions of their more opulent fellow-citizens, would become the ſport of reſentment, or favoritiſm—ignorance or caprice.

* In the reign of Henry VI. John Holland, duke of Exeter, and Wm. de la Pole, duke of Suffolk, renewed attempts that had been be-

writers on government and law abound with encomiums on this admirable mode of trial; and the experience of ages has fully evinced its excellence and utility.* The learned Judge *Blackstone*, one of the fore made, to introduce the Civil Law into England; and as a begining, or by way of a SPECIMEN, they exhibited THE TORTURE—an engine of that law, not calculated to prepossess the English in its favor.

* JURYMEN being summoned to the particular court, or term, in which they are to serve, deprives suitors in that court of an opportunity of TAMPERING with them; as they might do, if the jurors were PREVIOUSLY KNOWN TO THE PARTIES: And out of the whole number returned by the sheriff, and attending, the jury who are to try each cause, are ascertained by ballot; liable, however, to legal objections to any of them, when offered by either of the parties.

If there be a rule for a SPECIAL jury in a cause, the prothonotary furnishes a list of forty-eight names, from the Freeholders' Book: From this list, each party strikes out 12; and the first 12 of the remaining 24, who appear, when called, are sworn on the jury. By this means, also, all partiality, undue influence, or bias of any kind is prevented: And a jury may, besides, be thus obtained, particularly suited to the nature and circumstances of the case to be tried;—as, for instance, if the cause be a mercantile one, a struck-jury of merchants may be had.

In the Roman republic, the Consuls had the right of trying civil causes, before the creation of the PRÆTORS. "Every year," says MONTESQUIEU in his Spirit of Laws, "the PRÆTOR made a list of Judges during his magistracy. A sufficient number was pitched upon, for each cause; a custom very nearly the same as that now practised in England. And what was extremely favorable to Liberty, was the PRÆTOR's fixing the Judges with the consent of the parties. The great number of Exceptions that can be made in England, amounts pretty nearly to this very custom." Further, continues MONTESQUIEU:—"The Judges decided only the questions relating to matter of fact; for example, whether a sum of money had been paid or not,—whether an act had been committed, or not."

Here it is evident, that, among the ROMANS, the JUDICES (which

warmest eulogists of Jury-trial, has justly styled it "*the best perservative of Liberty*;" and considered "every new tribunal erected for the decision of *facts*, *without the intervention of a Jury*, (whether composed of *Justices of the peace*--or any other standing magistrates,) as a step towards establishing an *Aristocracy*,--the most oppressive of all absolute governments."

It is observed by Lord Chief Justice *Hale*, in his History of the Common Law, that, "As the Jury assists the Judge, in determining matters of fact; so the Judge assists the Jury in determining points of law."--But generally, in the United States, Juries are the *supreme judges* in all courts and in all causes,

we tranſlate "JUDGES") anſwered to the JURY, under OUR Law. The province of both was the ſame; being, EXCLUSIVELY, the triers and judges of matters of Fact. There was a diſtinct ſet of JUDICES fixed and agreed upon, for the trial of each particular cauſe: And it appears to have been the office of the PRÆTOR, in THIS particular, as it is of our ſheriff, to return at ſtated times liſts of perſons; from amongſt whom, thoſe, compoſing the ſeveral Juries, are taken. But a new liſt of Jurors being, with us, returnable to every court, by the ſheriff--independently of the Special-jury liſts made out, when required, by the prothonotary--is a circumſtance that gives our TRIAL BY JURY a vaſt advantage over that mode of trial, which the Romans poſſeſſed by means of their JUDICES: It cuts off all chance of colluſion between either of the parties and the TRIERS of their cauſe--the rich man has no opportunity of bribing them, if he were ſo diſpoſed; the artful and deſigning knave--none, of getting his cauſe prejudged; nor has any one the means of exerciſing any undue influence, whatever, over their minds. The poor, unlettered, HONEST man, is ſure of obtaining Juſtice from this Tribunal; equally with EVERY OTHER HONEST man,--however rich, powerful or learned. In ſhort, no other Tribunal, ever deviſed, could poſſeſs ſo many guards againſt corruption and injuſtice.

in which the life, the property, or the reputation* of any man is concerned.

It is alledged by some writers, that the nature, intent, and proceedings of the *Dikasterion*,† among the ancient *Grecks*, were the same with those of the present *Jury*; namely, the protection of the less opulent part of the people from the power and undue control of the great, by administering *equal Law and Justice* to all descriptions of persons in the community.—The duty of the *Judices*, among the *Romans*, is also said to have consisted in their being impannelled (as we term it,) challenged, and sworn, to try uprightly the case submitted to their decision; and, when they had agreed upon their opinion or verdict, to deliver it to the *President*, who was to pronounce

* In cases of IMPEACHMENT, indeed, the "Reputation" of the party is implicated; and even his "Property" may be indirectly affected--that is, so far as a Removal from an Office of Profit, on conviction, may be considered as affecting his Property. This mode of procedure seems, however, to be unavoidable, in cases of great offences committed against the public interest and welfare, by civil officers employed in the public service: and even in these--the PRESENTMENT, as it were, is made by the immediate Representatives of the People; who are considered as being, in this particular, the Grand Inquest of the Nation in a Criminal Prosecution.

† The Trial by a JURY OF TWELVE is said to have been first known in GREECE. [See Trials per Pais, vol. I. pa. 39.]--And the Law of the ancient ROMANS had its foundation in the Grecian republics; receiving continual improvements in the Roman state for more than a thousand years.--The 12 tables of the Decemvirs, it is notorious, were extracted from the Laws of the Grecians: From this source, most probably, the Romans derived the institution of the JUDICES; a tribunal similar, in its great outline, to that of our JURIES.

it. The same writers say, this kind of judicial process was first introduced into the Athenian policy, by *Solon*, and thence copied into the Roman republic, —" as probable means of procuring just judgment, and protecting the lower people from the oppression or arbitrary proceedings of their superiors.."

Thus, neither the Grecian tribunal denominated *Dikasterion* (composed of the *dikastrai*)—the Roman *Judices*—nor the English (and, consequently, *American*) *Juries*—come within the description of "*standing Magistrates*;"—which, if erected into a tribunal for the decision of *Facts*, become, as judge *Blackstone* has truly observed, an *Aristocratical Tribunal.*

An eminent English writer on Jurisprudence remarks, that, " after the three powers (of government) were divided, and vested in different hands, inconveniencies were still felt; which, while the concerns of mankind lay in a narrow compass, were seldom experienced or attended to, and were consequently not provided for."—After this observation, he proceeds thus—" The judicial power being entrusted with the exposition of the Law; and, as it depended on their judgment, whether the case or fact, *sub lite*, was or was not within the description of the Law;—here was evidently a great latitude still left, for the exercise of partiality or oppression. Men of the most consummate knowledge and unbiassed probity are still men. Be their judgments ever so acute, their hearts ever so uncorrupt; yet even too exquisite a sensibility of nature may, in some

cases, misguide the one and pervert the other.—*Affection* and *Prejudice* operate imperceptibly on men of lively sensations, and make them often unjust in those very instances, wherein they flatter themselves that they are only generous. Thus the Judges might, by too liberal a construction, sometimes involve cases within their jurisdiction, contrary to the meaning of the legislature: at other times, they might counteract the legislative intention, and, in consequence of too limited an interpretation exclude cases clearly within the spirit of the Law. These abuses would quickly be perceived, and men would apply their ingenuity to obviate their ill consequences. The *Remedy*, "continues the same author," which has been devised in this country (England,) I mean the invention of JURIES,* is such as

* "If we consider the great advantages to public Liberty, which result from the institution of the TRIAL BY JURY, and from the LIBERTY OF THE PRESS, we shall find England to be a much more democratical state than any other we are acquainted with. The JUDICIAL power, and the CENSORIAL power, are vested in the PEOPLE."---[DE LOLME, on the Engl. Constit. ch. 17. IN NOTA.]—it will be recollected, that Mr. de Lolme wrote before the establishment of the American Republics. Nevertheless, the RIGHT of Trial by Jury, in England, is strictly a democratical, or popular ingredient, in the constitution of that country:—And, with respect to the LIBERTY OF THE PRESS---that important Right stands on a much firmer basis there, since the passage of Mr. Fox's Libel-bill, than it did when de Lolme wrote: the legitimate power of Juries, to decide the LAW as well as the fact, in cases of Libels, is, by that Act of Parliament, restored in England.

These two GREAT RIGHTS---which, in THIS country, are amply guarantied by our Constitutions of Government---and are, therefore, fundamental Laws, beyond the power of the Legislature to impair,---

does honor to human policy; it being perhaps *the most effectual means for the preservation of* LIBERTY, *and the security of* PROPERTY, *which human wisdom is capable of contriving.*"

The commendation bestowed by this writer on the institution of Juries, is expressed in similar terms by Mr. *Hume.* This celebrated historian denominates the Trial by Jury--" an institution admirable in itself,--and *the best calculated for the preservation of* LIBERTY, *and the administration of* JUSTICE, *that ever was devised by the wit of man:*" And this eulogium has the greater weight, inasmuch as its author was a native of Scotland--a portion of the British Isle, in which the *English Common-law*, *Trial* by Jury is not in use.

The Trial by Jury was the Birth-right of our American ancestors; and is secured, as a *Constitutional Right*,* to every citizen of the United States. On

may juſtly be conſidered as two of the MAIN PILLARS, upon which the noble ſtructure of our federal and ſtate governments reſts for its ſupport. Remove them; and preſently the other props of the Republic will be borne down---the ſuperſtructure will tumble to pieces---and all our popular Rights, together with public Liberty, be overwhelmed in the ruins. The obſervation, which de Lolme applies to the ENGLISH conſtitution, with reſpect to theſe rights, is therefore more ſtrictly applicable to OURSELVES---" If at any time," ſays he, " any DANGEROUS CHANGES were to take place in the Engliſh CONSTITUTION, the pernicious tendency of which the PEOPLE were not able at firſt to diſcover,---reſtrictions on the Liberty of the Preſs, and on the Power of Juries, will give them the firſt information." [See ch. 18. IN NOTA.]

* ....." If the Legiſlature (of Pennſylvania) had paſſed an Act, declaring---that, in future, there ſhould be no Trial by Jury; would it

the 26th of October, 1774, Congress asserted the claim of the American colonists to *Jury-trial*, as "A GREAT RIGHT." And, on the 14th of the same month, they had introduced into the DECLARATION OF RIGHTS an unanimous Resolution—"That the respective colonies are entitled to the *Common Law of England*; and, more especially to the GREAT AND INESTIMABLE PRIVILEGE of being tried by their *Peers of the vicinage*, according to the course of *that* Law"—"*This* (say the same Congress) provides, that neither *Life*, *Liberty*, nor PROPERTY, can be taken from the possessor, until *twelve** of his *unexceptionable Countrymen and Peers*,† of his Vicinhave been obligatory?---No: It would have been VOID, for want of jurisdiction or constitutional extent of power. THE RIGHT of TRIAL BY JURY is a fundamental Law, made sacred by the Constitution, and cannot be legislated away." [See Judge PATTERSON's Charge to the Jury, in the case of Vanhorne's lessee against Dorrance. [2. Dall. Rep. 304.]

* "It is the UNANIMITY of the jury that secures the rights of mankind." So says Mr. ADAMS, in the 55th letter of his first volume. The legal requisite, that the verdict shall be UNANIMOUS, is certainly ONE of the great excellencies of Jury-trial: and it will appear that two public characters of most respectable station in the administration of the federal government---Mr. SMILIE, a member of the house of representatives, and Mr. GALLATIN, secretary of the treasury—gave evidence, on a solemn occasion, of this being also THEIR opinion. The excellence of the provision is, indeed, fully testified by EXPERIENCE; independently of the decided support which the principle has received from the ablest statesmen and juris consults.

† As the PRIVILEGE of Jury-trial is a very exalted one, so the OFFICE of a Juror is equally dignified and important. JURYMEN are coordinate JUDGES with those seated on the bench, in a court of Law as

age,* (who, from that neighborhood, may reasonably be supposed to be acquainted with his character and the character of the witnesses,) upon a fair trial and full enquiry, face to face, in open court, before as many of the people as choose to attend,—shall pass well as Fact (wherever they chooſe to exerciſe a judgment on both,) in all caſes tried by them. Their truſt is a great one:—They have been ſtyled, in England---the nation's "EPHORI and TRIBUNI---the boundaries of prerogative---and the living bulwark of the Laws"---Such is the DIGNITY which the law attaches to the Office of a Juror, that when Sir GILES MOMPESSON---a member of the Engliſh parliament in the reign of James I---was convicted before the houſe of lords, on an impeachment for certain high crimes and miſdemeanors; it was adjudged, that---beſides paying an enormous fine, ſuffering impriſonment, &c: he ſhould be degraded of the order of KNIGHTHOOD,---never be of any INQUISITION or JURY,---and ever be held to be an INFAMOUS perſon.--- Both GLANVILLE and BRACTON tell us, that in ancient times the JURY, as well in the common pleas as in pleas of the CROWN, were twelve KNIGHTS.

* By the policy of the ancient law, the jury were to come from the VICINAGE---or vicinity---of the place, where the cauſe of action was laid in the declaration: and therefore it was thought neceſſary, that SOME of the jury ſhould be returned from the very HUNDRED (a diviſion of an Engliſh county, ſimilar to our townſhips,) in which the cauſe of action was laid. But it was diſcovered from experience, that jurors thus coming from the IMMEDIATE neighbourhood, would be apt to intermingle their local and perſonal attachments, prejudices, and partialities, with their deliberations, when the ſelection of the jury was made from ſuch LITTLE, CONFINED DISTRICTS; and it was therefore found more conducive to impartial juſtice, to allow a greater range for their choice. Hence the Jury are now to come from the body of the county; this being conſidered, in law, as the VICINAGE for that purpoſe.

their sentence upon oath against him."* We find, also, that the attempts of the British parliament to deprive the American people, in many instances, of this mode of trial, was one of the *grievances* complained of, by that Congress: and a charge reiterated against the same government, nearly two years after, in the *Declaration of Independence.*†

Such, then, is the foundation upon which the Right of Trial by Jury stood in this country, at the commencement of our revolution, and until the establishment of our federal and state constitutions. It was our Inheritance; "a great and inestimable Privilege,"—and one which we therefore guarded with the most watchful jealousy.

In the formation and adoption of our national con-

* Mr. ADAMS points ont the monſtrous abſurdity that would attend the placing of the adminiſtration of juſtice in the hands of the legiſlative body of a ſtate.---"No man," ſays he, "would conſider his life, liberty, or property, ſafe in ſuch a tribunal. Theſe all depend upon the diſquiſitions of the counſel; the knowledge of the law, in the judges; the confrontation of parties and witneſſes; the forms of proceedings by which the facts and the law are fairly ſtated before the jury, for their deciſion; the rules of evidence, by which the attention of the jury is confined to proper points," &c.

† Mr DICKINSON was one of the deputies, from Pennſylvania, to the Congreſs held at New-York in the year 1765, which was 9 years before the firſt revolutionary Congreſs. In the firſt volume of his Political Writings, lately pub iſhed, is the rough draught of the Reſolves of that Congreſs. They are in the nature of a Dec aration of Rights, conſiſting of fifteen articles---The 9th article declares, "that TRIAL BY JURY is the inherent and invaluable Right of every Freeman in theſe (then) colonies."

stitution, with its subsequent amendments,* the preservation of this right was *carefully protected*,† by the most express and positive provisions. And the people of Pennsylvania, in framing and accepting the constitution of the state, seem to have used the most clear and precise language that could be devised, for securing the Right, as it existed at that mo-

* The Right of jury-trial, in CIVIL cases, had never been controverted, nor does the exercise of that right appear to have bece infringed, in our co onia governments: But, in some CRIMINAL cases, the co o-nists had been divested of the right, by acts of the British par iament. Hence, n framing the constitution of the United States, it was thought proper to guard against simi.ar infractions, by SECURING the trial by jury in CRIMINAL CASES.

Yet, the omission of an EXPRESS provision for securing it in CIVIL CASES ALSO, was the ground of much dissatisfaction among the peop'e. As one instance, among many, of the existence of such dissatisfaction, let us refer to a pamph et, pub.ished at Phi.ade'phia in the year 1787, entit'ed---"A View of the proposed Constitution of the United States," &c. This was intended to exhibit the supposed defects of that instrument; and, in a note, referring to the c.ause for securing the trial by jury in CRIMINAL cases, the writer says---"By this, the RIGHTS of the peop.e are preserved in all CRIMINAL causes. Would it not be well to SECURE IT, ALSO, in CIVIL causes? In the Dec.aration of Independence, one of the complaints against Great-Britain," was, "for depriving us in many cases, of the benefits of trial by jury"

In order, then, to al ay this jealousy, the peop.e did, E MAJORI CAUTELA, very ear.y engraft into the Amendments to the constitution, an artic.e EXPRESSLY securing the Right of trial by jury in CIVIL cases: And this c'ause likewise restricts the exercise of common-law jurisdictions, WITHOUT this tribunal, to due and reasonab.e limits.

† Even in those articles of the constitutions of the United States and of Pennsylvania, which provide for the trial of great and enormous offenders, on prosecutions by Impeachment, due caution has been observed, not to interfere with the RIGHT of Jury-trial, in cases which may

ment—*in its fullest extent*,* to themselves and their posterity.—" The *Trial by Jury*," say they, " shall

affect the LIFE, PROPERTY, or perſonal LIBERTY, of the implicated party. Thoſe conſtitutions ſeverally provide—that judgment, in caſes of Impeachment, ſhall not extend further than to removal from office, and diſqualification to hold any office of honor, truſt or profit, under their reſpective governments.

* The JUDGES, in our Courts of Law, have a general ſuperintending Authority;—and alſo poſſeſs a concurrent Authority, with the Jury, in conducting the Trial of cauſes depending before them. It is the duty of the Judges to expound and declare the Law to the Jury (JUS DICERE —NON JUS DARE;) and to exhibit and ſtate to them a clear ſummary of the Facts, ariſing from and complicated with the Merits of the particular caſe, SUB LITE—and eſtabliſhed by legal Teſtimony; after the Law, applicable to the caſe, ſhall have been cited or read, by the Counſel on each ſide; and ſuch Facts, as they ſhall have reſpectively deemed it neceſſary to adduce in Evidence, been inveſtigated, aſcertained and commented on, in preſence of both Court and Jury—Unleſs, indeed, where either or both of the Parties to the cauſe ſhall have choſen to diſpenſe with the aid of Counſel, and to manage their buſineſs, themſelves.

Here the JUDGES, as Sir Matthew Hale obſerves, ASSIST THE JURY, in determining POINTS OF LAW:—Yet we perceive, that in a Judicature thus conſtituted, the JURY are not only a component part of the tribunal—but, an eſſentially-important part—THEY try and decide the cauſe (determining upon both Law and Fact, if they ſo pleaſe;) it being the province of the Judge to pronounce JUDGMENT, upon THEIR VERDICT.

Hence the Jury, in rendering their Verdict, are independent of control by the Judges; as was determined in the well-known caſe of BUSHEL, (reported by Lord Chief-Juſtice Vaughan.) Meſſrs. Penn and Meade, two eminent Quakers, were indicted for holding religious meetings of that ſociety—(ſee State Trials;) and the Jury, of which Buſhel was foreman, would not find them guilty. The Judges, diſſatisfied with this, fined and committed the Jurors;—alledging, as the reaſon for ſo doing, that they had acquitted Penn and Meade, againſt the law of the realm—againſt full and manifeſt evidence—and againſt the direction

be *as heretofore*,*—and the *Right* thereof remain *inviolate*." From the plain import of these words, it

of the Coutt, in matter of Law, to them in Court openly given and declared. But it was afterwards folemnly adjudgetl, that the Commitment, Fining, &c. were unlawful. It was alſo reſolved in Parliament, in 1677, that the Precedents and Practice of Fining and Committing Juries, in ſuch caſes, were illegal.

Thus, it is---a fair Trial by diſintereſted and independent Jurymen, in open Court and before Judges of Law---Where the Evidence is orally given and openly exhibited, according to maxims of Reaſon and Natural Juſtice, ſanctioned by long experience and the nature of things---And where the Facts, thus inveſtigated, are brought into view, ſtated, and commented upon---and the Law, pertinent to the caſe, applied thereto,---in preſence of the Court, the Jury, the Parties, the Witneſſes, and the People,---by Counſel of the reſpective Parties' own chooſing (if any they pleaſe to employ,)---and, finally, where the LAW ariſing in the caſe, after the TRUE STATE OF THE FACTS has been thus elicited, is laid down by the Judges, and the aſcertained Evidence ſummed up by them, for the information of the Jury: it is THIS "TRIAL BY JURY"---with all theſe CONCOMITANTS in the MODE OF CONDUCTING IT, and other ancient RIGHTS APPERTAINING TO IT---to which we have been "HERETOFORE" ENTITLED. And, therefore, "THE RIGHT thereof," which the Conſtitution declares "ſhall REMAIN INVIOLATE," neceſſarily comprehends ALL THE RIGHTS ATTENDANT ON THIS ANCIENT FORM OF TRIAL, IN THE MANNER OF CONDUCTING IT---AS FULLY AS THEY WERE ENJOYED IN PENNSYLVANIA, WHEN THE CONSTITUTION WAS ESTABLISHED.

* When the 6th ſect. of the Bill of Rights was under conſideration, in a grand committee of the whole, of the convention which eſtabliſhed the ſtate conſtitution,---it was adopted WITHOUT ANY DISCUSSION OR DIVISION; as appears by the minutes of that committee, under date of Feb. 3, 1790.

It is worthy of remark, that, after the RIGHT of Trial by Jury, GENERALLY, as it had been THERETOFORE uſed and eſtabliſhed, was thus SECURED, by the adoption of the 6th ſect. of the Bill of Rights,

is obvious—that any *new tribunal*, whatever, "for the decision of *facts*, without the intervention of a *Jury*," which should be erected *subsequently* to the adoption of the constitution, would be a violation of the *Right* of Jury-trial: and, that every *extension of the jurisdiction* of the *then existing* judiciary tribunals, acting *without* the intervention of a *Jury*,—either as to the *measure* and *objects* of such jurisdiction —or, as impeding or obstructing the *discretion* which the citizens might *choose* to exercise, in respect to the *mode* of asserting or defending their rights, as well as in seeking redress for, or vindicating themselves against wrongs,—would be equally an infringement of the constitution.

The governor of Pennsylvania has very judicious-

the 9th sect. was introduced, for securing in EXPRESS terms the Trial by Jury in CRIMINAL PROSECUTIONS; it being evidently intended, thereby, to obviate any doubt which might afterwards arise, as to the construction of the 6th section: For, this sect having reference to the "Trial by Jury" in GENERAL terms, it was probably apprehended by some members of the convention, that it might be construed, at a future day, to relate to that mode of trial in CIVIL cases, only.

It was very obviously the meaning of the convention, that the Right of Trial by Jury shou'd be established, according to our own ancient usage and the course of the Common Law. And therefore, when it was moved by Mr. GALLATIN and seconded by Mr. SMILIE, in the grand committee, to insert after the words---"JURY OF THE VICINAGE"---in the night section, the following, viz. "WITHOUT THE UNANIMOUS CONSENT OF WHICH JURY, HE CANNOT BE FOUND GUILTY," there was a determination in the NEGATIVE, on the question: Because, an UNANIMOUS verdict being required in all our Trials by Jury, whether in CIVIL OR CRIMINAL cases, as the Right to that Trial was THERETOFORE established; the words, moved to be inserted, were considered as superfluous and wholly unnecessary.

ly noticed this construction of the constitutional provision for securing the trial by jury,—in l is reasons for returning, with his negative, what was commonly called *the hundred-dollar bill*, on the 9th of Dec. last. Under the third head of his objections to that bill, are comprehended the following—"Because the "jurisdiction, proposed by the bill to be assigned to "justices of the peace, tends to elude, if not di- "rectly violate, a constitutional provision. It is de- "clared; that "Trial by Jury shall be as heretofore:" "but that cannot be the case, if according to the "principle on which the bill is founded, the origin- "al jurisdiction of all suits shall be exclusively as- "signed to a single justice, and only an appellate ju- "risdiction be reserved for a jury. Again (conti- "nues the governor;) the right of trial by jury was "intended to be secured to the citizens, *in civil as* "*well as criminal cases*: but the right may be as ef- "fectually defeated by the *mode* prescribed for its "enjoyment, as by an absolute refusal to allow it."

In fine—As the *Right* to Trial by Jury, both in *civil* and *criminal* cases, is secured to the people of England,—not only by *Magna Charta*,* but by many

* MAGNA CHARTA, or the Great Charter of English liberties, was for the most part declaratory of the fundamental laws of England, and, in the 29th chapter of this charter it is expressly insisted on, that no freeman shall be hurt, EITHER IN HIS PERSON OR PROPERTY, unless by the Judgment of his Peers, or by the Law of the Land; (NISI PER LEGALE JUDICIUM PARIUM SUORUM, VEL PER LEGEM TERRÆ:) a privilege which, as Judge Blackstone notices, is expressed in a most the same words by the emperor CONRAD, 200 years before—"NEMO BENEFICIUM SUUM PERDAT, NISI SECUNDUM CONSUETUDINEM ANTECESSORUM NOSTRORUM, ET PER JUDICIUM PARIUM SUORUM."

other fundamental laws of that realm ; so it is guarantied, in the most positive and direct terms, to the people of Pennsylvania, by *our Great Charters*—the Constitutions of the United States and of this Commonwealth.

" Juries (says *Duncombe*, in his Trials per Pais,) are as it were incorporated with the English constitution, being the most vaiuable part of it : for," says he, " without them, no man's life can be impeached (unless it be by parliament,) and no one's liberty, *or property*, ought to be taken from him. And, to the same effect are the words of Mr. *Granville Sharp*. The Trial by a Jury of the vicinage (or county,) says this great assertor of political liberty, is the unalienable Right of Englishmen, " according to the ancient laws of the land :—nay," adds Mr. Sharp, " *this particular mode of trial* is *so inseparably annexed to the law of the land*, that it is sometimes expressed, and known by *that general* term, " *the law of the land*,"—*as if* there was *no other* law of the land, but this one : And consequently, this *principal* or *fundamental* law is so necessarily implied* and comprehended in that general term, " *the law of the land*;"

* Mr. HUME, in remarking on the Great Charter of the Engliſh, ſays—" Time gradually aſcertained the ſenſe of all the ambiguous expreſſions; and thoſe generous barons, who firſt extorted this confeſſion, ſtill held their ſwords in their hands, and could turn them againſt thoſe who dared on any pretence, to depart from the ORIGINAL SPIRIT AND MEANING of the grant. We may now, from the tenor of this charter, conjecture (continues the hiſtorian) what thoſe laws were, of king Edward, which the Engliſh nation during ſo many generations ſtill deſired, with ſuch an obſtinate perſeverance, to have recalled and eſtabliſhed."

—that the latter may be considered as intirely *subverted* and *overthrown*, whenever the former is either *changed* or *set aside*."

Notwithstanding the sacredness of this inestimable privilege, attempts have been made to violate and undermine it—not only in the country from which we derive the rich inheritence—but, in our own; as we have already seen:—and this, in some instances, through the suggestions of men intent on *benefiting themselves*, and promoting *particular interests*, by "*grinding the faces of the poor*," and the *unwary*; while they *profess* to be their friends and protectors!

Among us, *various* projects have been artfully devised by a few crafty individuals, eagerly seeking for power, to betray the worthy but unsespecting portion of the community, into the snares laid for them.—It is, then, a duty highly incumbent on us all, to be on our guard.—THE CONSTITUTION* is the rock of our political salvation. Upon *this*, let every true and virtuous American found his *Rights*: And let every man whoever he may be—that shall attempt to remove a single atom from this foundation of civil Liberty, this bulwark of our personal and private Rights, this fortress agsinst petty as well as public

* "A people who are so happy as to posseſs the ineſtimable bleſſing of a free and defined Conſtitution, cannot be too watchful againſt the introduction, nor too critical in tracing the conſequences of new principles and new conſtructions, that may remove the land-marks of power."
See the Letters of HELVIDIUS, written in reply to Pacificus, and generally attributed to Mr. MADDISON.

oppression; let every such man—however plausible may be his pretences, or what name soever he may assume—be marked as an *Anti-Republican*, and an *Enemy** to our free and happy *Government.*

"It is not almost credible," says lord chief-justice *Coke*, "to foresee—when any Maxim or Fundamental Law of the realm is *altered*†—what *dangerous*

* The Author of TRIALS PER PAIS, treating of the Trial by Jury, observes—that, "if the good of the subject be the good of the king, as most certainly it is, then, those are enemies to the good of the king and state, who attempt to alter or invade this fundamental principle in the Administration of Justice, in the realm; by which the king's prerogative has flourished, and the just Liberties of the People have been secured so many ages."

The observation is equally just, MUTATIS MUTANDIS, when applied to our own government and people.

† Mr. GRANVILLE SHARP, after commenting upon what he styles, "that wicked and unconstitutional act of parliament, in the reign of king Henry VII. by which the fundamental Right of Trial by Juries was violated"—justly remarks,—"that the most WICKED ordinances have sometimes been ushered into the world, under the most sanctified titles and specious pretences." [See his DISSERTATION ON THE PEOPLE'S RIGHT TO A SHARE IN THE LEGISLATURE.]

And Sir EDWARD COKE, treating of the same law (in his 2d. Instit.) says—"By colour of that Act, shaking this fundamehtal law (the TRIAL BY JURY,) it is not credible what horrible Oppressions and Exactions, to the undoing of infinite numbers of people, were committed by Sir Rich. Empson, knt. and Edmund Dudley," &c. In the next paragraph he adds—"And the fearful ends of these two oppressors should deter others from committing the like; and should admonish Parliaments, that, instead of this customary and precious Trial, PER LEGEM TERRÆ (by the Law of the land,) they bring not in absolute and partial Trials, by Discretion."

inconveniencies do follow; which," continues this great judge, "expressly appeareth by that most unjust and strange Act, the 11th of Henry VII: for *hereby*, not only *Empson* and *Dudley* themselves" (they were two corrupt *public* characters, in that reign,) "but such JUSTICES OF THE PEACE as they caused to be authorized, committed most grievous and heavy *oppressions*, and *exactions; grinding the faces of the poor subjects* by penal laws, by information only; without any presentment, or TRIAL BY JURY, being the ancient Birth-right of the subject; but to hear aud determine the same by *their Discretion*," &c.

Let us not, then, delude ourselves with a belief, that there are *no Empsons* and *Dudleys*, *no corrupt Justices of the Peace*, elsewhere, than in *England! Such* men, unfortunately for the honor of human nature and happiness of society, are to be found in other countries; indeed, in all. It is, therefore, a matter of very serious moment, that we place ourselves fully on our guard against the machinations of those *Innovators*,* who, under the *mask* of Repub-

* The antiquity of Usages and Customs in the affairs of civil government, which have been so long adopted and practised, with the voluntary consent of the people, as to acquire the force and character of Laws—affords, of itself, a strong presumption of their excellence; and especially, when such Usages and Customs are maintained and cherished by a people, in the freest and most enlightened periods of their history. The English Colonists, who established themselves in various parts of this continent, at different times, were induced to emigrate from their parent-country by a great variety of motives: They comprehended in fact, almost every denomination of Christians; and en-

licanism, are endeavoring to overthrow that most *Re*•

tertained various opinions, also, respecting some principles of Civil Government. Yet we find them conforming, in a great measure, to the fundamental principles of the government they had left; retaining, pretty generally, its most valuable institutions;--discarding such as arose from, and were connected with, hereditary orders in the state—an hierarchy—and religious establishments.

But mere speculative politicians—even of the greatest wisdom and soundness of judgment, in relation to the fundamental principles of government, abstractedly considered—are apt to rely too much on their own theories: And hence, by departing too widely from those forms and institutions, the utility and benefits of which have been demonstrated by the experience of ages,—their plans of civil polity, predicated on fine-spun theoretical systems, generally prove either impracticable or injurious.

A memorable instance of the truth of this observation occurs, in the following case.—About 140 years since, eight English gentlemen of distinction (five of them, peers—and three knights) obtained from Charles II. a chartered grant of that vast tract of country on this continent, comprehended between the 29th and 36th and an half degrees of North Latitude—and running from the Sea-coast, on the East, in parallel lines to the Pacific ocean. The grantees were constituted absolute lords and proprietors of this extensive region, which was denominated CAROLINA; the king saving to himself, his heirs and successors, the sovereign dominion of the country.

As the proprietors were desirous of establishing a Constitution or Frame of Government, for their new colony,—they applied to the celebrated JOHN LOCKE, for his aid on the occasion; he being known to possess an acute and penetrating judgment, and having distinguished himself by his knowledge of the elementary principles of political science. He accordingly drafted a plan of Government, (consisting of 120 articles) for the colony; which the Lords-Proprietors adopted, and endeavored to establish, as "THE FUNDAMENTAL CONSTITUTIONS" of their new dominion.

But, the model of government framed by this great man, and in the prime of his life (for he was then between 30 and 40 years of age,) contained such Innovations upon the long-established and beneficial

publican institution of our civil polity, the *constitution-*

Laws, and Civil Institutions, to which the People had been accustomed,—that it was found, in effect, useless and impracticable. "Several attempts were afterwards made (says the respectable author of an Historical account of the Rise and Progress of the Colonies of South-Carolina and Georgia) to amend these Fundamental Constitutions; but all to little purpose: the inhabitants, sensible of their impropriety, and how little they were applicable to their circumstances—neither by themselves, nor by their representatives in assembly, even gave their assent to them, as a body of Laws; and, therefore, they obtained not the force of fundamental and unalterable laws, in the colony."

This CONSTITUTION of Mr. Locke formed, indeed, a system of government highly Aristocratical. It established three classes of Nobility, styled Landgraves, Cassiques, and Barons;—those of the first title, to possess 48—the second, 24—and the third, 12000 acres of land; and their possessions were to be unalienable. The 9th article is in these words—"There shall be just as many Landgraves as there are counties, and twice as many Cassiques, and no more. These shall be the hereditary Nobility of the Province, and by right of their dignity be Members of Parliament," (for so their Legislative body were to be called.) "Each Landgrave shall have four baronies, and each Cassique two baronies, hereditarily and unalterably annexed to, and settled upon, the said dignity."—The 16th article runs thus: "In every signiory, barony and manor, the respective LORD shall have power, in his own name, to hold Court-leet there, for trying all causes both civil and criminal: but when it shall concern any person being no inhabitant, VASSAL, or leet-man of the said signiory, barony or manor, he, upon paying down 40 shillings to the Lords-Proprietors' use, shall have an APPEAL from the signiory or barony-court to the county-court, and from the manor-court to the precinct-court."—And, by the 110th article it is declared, that—"Every freeman of Carolina shall have absolute power and authority over his Negro-Slaves, of what opinion or religion soever."

SUCH are a few of the more prominent, among many, of the extravagant provisions of this most extraordinary instument! SUCH is a small specimen of the arrangements of a mere theoretical politician, for carrying his visionary system into effect; deviating, as this other-

al TRIAL BY JURY ; an institution which is our Inhe-

wise great man suffered himself to do, from the sanctioned results of Experiment!—It may, however, be presumed, that a person holding such political principles as Mr. Locke did, must have conformed, in this instance, rather to the wishes and views of the Lords-Proprietors who employed him, than to the suggestions of his own judgment: For, in the preamble to "the fundamental constitutions"—which are therein made to appear as being the act of the Lords-Proprietors—some of the reasons of their establishment are thus recited :—"that the government of this province may be made most agreeable to the Monarchy under which we live, and of which this province is a part; and that we may avoid erecting a numerous Democracy; We, the Lords-Proprietors of the said province, have agreed" &c.—Besides, it is certain that the Proprietors were devoted to these Constitutions (as it may be readily supposed they would be,) and expressed great zeal for their establishment.

There are, moreover, two or three features in this high-toned, aristocratical, yet visionary and impracticable scheme of Mr. Locke, which deserve to be particularly attended to: It attempted to alter the Right of Trial by Jury, in an all-important particular; and to interdict professional Counsel from advocating or defending Causes, in Courts of Law. When we take these into view, and connect them with the arrangement which was proposed by the 16th article before quoted,—do we not perceive a striking resemblance in them, to some of the lately projected measures of our legislating innovators?—Is there not a great similitude between Mr Locke's little Court-leet, which every lord was to hold in each barony &c. for trying all causes;—and the petty tribunals, for similar purposes,—which were proposed by what was called the Adjustment-Bill, to be erected in little districts all over this State, under the direction and auspices of our Justices of the Peace? Indeed the likeness is so strong, that one can scarcely refrain from believing some of our modern Law-givers have been studying "The Fundamental Constitutions of Carolina," which Mr. Locke set on foot a century and an half ago; but which the PEOPLE of that country had sense and spirit enough speedily to reject, as useless, impracticable, and inapplicable to the condition of Freemen.

The People of Pennsylvania possess, undoubtedly, as much Spirit

ritance, our Right, and the most effectual skilled against Injustice and Oppression.

and as high a sense of their just Rights, at least,—as the Carolinians did at that period; and therefore will never submit to any invasion of them, which may lead to the establishment of such Orders of men in the State, as LANDGRAVES, CASSIQUES or BARONS—or any other petty lordlings, by whatever names or titles they may be designated, who may be invested with discretionary powers and aristocratical influence over their fellow-citizens, in their respective neighborhoods. They certainly wish to see no VASSALS in Pennsylvania! If the Innovators, who appear to have been captivated by Mr. Locke's aristocratical Constitution, not content with their own, had examined one which was framed in the year 1783, by a practical politician of our own country, for his native State,—they would have found a system of Judicature, predicated on principles more sound and rational—more consonant to the genius of our Government and the security of our Rights. This is the Draught of a Fundamental Constitution for Virginia, prepared by Mr. Jefferson; with a design of being proposed in a convention, which it was expected would have been called at that time, for the establishment of a Constitution for the Commonwealth.

By this draught, the Judiciary powers of the government were to be exercised by County Courts, and such other inferior Courts as the Legislature should think proper to erect; by three Superior Courts, to wit: a Court of Admiralty, a General Court of Common Law, and a High Court of Chancery; and by one Supreme Court, to be called the Court of Appeals;—Besides which, provision was made for the erection of a tribunal for the Trial of persons impeached for Misbehavior in Office.

But it was specially provided, that the Judgment of no Inferior Court should be final, in any civil case, of greater value than 50 bushels of Wheat; the rate of which was to be previously ascertained from time to time, for such purposes, by a mode prescribed. And one clause of the then proposed Constitution is in these words—"In all causes depending before any Court, other than those of impeachment, of appeals, and military courts, Facts put in issue shall be tried BY JURY; and in all Courts, whatever, Witnesses shall give their Testimony, VIVA VOCE, in open Court, wherever their attendance can be procured: And all Parties shall be allowed COUNSEL, and compulsory process

Let us notice on this occasion, the emphatical observations, which the patriotic *Dickinson** applied,

for their Witnesses."—By the next clause it was provided, that even "Fines, Amercements, and Terms of Imprisonment, left indefinite by the Law—other than for Contempts—shall be fixed by the JURY, Triers of the Offence."—[See Appendix to Mr. Jefferson's Notes on Virginia.]

Although great Innovations in Law and Government generally produce most serious consequences to the community,—the caution which, in the year 1789, was applied to the authors of such dangerous projects, by Sir JAMES MARRIOTT (Judge of the English High Court of Admiralty,) is so apt to the present occasion; that, notwithstanding the laconic pleasantry of the terms in which it was conveyed, its application to the Arbitration-Mongers ought not to be witheld.—Sir James advises such folks, "TO BEWARE OF THE VERTIGO OF GIDDY-HEADED EXPERIMENTS!"

* In the two first Congresses,--which commenced their several sessions, at Philadelphia, on the 5th of September, 1774, and the 10th of May, 1775—as well as in that held at New-York. in the year 1765—we find the name of JOHN DICKINSON, as a deputy from PENNSYLVANIA. In those dignified and ever-memorable assemblies, this gentleman was a distinguished compatriot of FRANKLIN, WASHINGTON, and the other great men of that illustrious band of PATRIOTS, whose worth sheds a lustre on the American Character. Mr. Dickinson's talents as a LAWYER and a STATESMAN, together with his ERUDITION, and acquaintance with the BELLES LETTRES, early and deservedly procured him a high reputation among his countrymen. His locks have long since been "SILVER'D O'ER," in his country's service; and the important aid he has afforded her cause, cannot fail to be remembered with gratitude by the AMERICAN PEOPLE, as long as the PRINCIPLES, on which the Revolution of 1776 was founded, continue to be venerated. After very many years of a life well spent, he has retired from the active scenes of public station: Possessing an opulent fortune, and the respect of his country, he may truly be said to enjoy OTIUM CUM DIGNITATE. The opinions of such a character as this, added to the testimony of numerous and great authorities, concerning the subject before us, must be IRRESISTABLE, in the minds of all reasonable and good men.

in the year 1788, to such as made *unreasonable* objections to the present federal constitution. "It seems highly probable," says Mr. Dickinson, "that those who would reject this labor of public love, would also have rejected the *heaven-taught institution* of TRIAL BY JURY, had they been consulted upon its establishment." After putting into the mouth of an *enemy* to Jury-trial, the most *plausible* objections which he supposes might be conjured up against the institution, he proceeds thus; "Happily for *us*, our *ancestors* thought otherwise: They were not so over-nice and curious, as to refuse Blessings, because they might *possibly* be *abused*: they perceived that the *uses* included were *great* and *manifest*. Perhaps they did not foresee, that from this *acorn*, as it were, of their planting, would be produced a perpetual vegetation of political energies, that would *secure the just liberties of the nation*, and elevate it to the distinguished rank it has for several centuries held. As to *abuses*, they trusted to their own spirit, for preventing or correcting them: and worthy it is of deep consideration, by every friend of freedom, that abuses which seem to be but "trifles,"* may be attended by fatal consequences. What can be *trifling* that diminishes or detracts from *the only safe defence, that was ever found*, against "*open attacks* and *secret machinations?*"† This establishment originates from a knowledge of human nature. With a superior

* Blackstone's Commentaries, Vol. IV. 350.

† Bl. Comm. III. 381.

force, wisdom, and benevolence united, it rives the difficulties concerning the administration of justice, that have distressed or destroyed the rest of mankind. It reconciles contradictions, vastness of power, with safety of private station. It is ever new, and always the same." Concluding in the words of Sir *William Blackstone*, he thus coincides in sentiment with that learned commentator, on this subject; and the salutary caution this quotation contains cannot be too often repeated: "It is the duty which every man owes to his Country, his Posterity, and Himself, to maintain to the utmost of his power this valuable *Palladium*, in all its Rights; to restore it to its ancient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to amend it, wherever it is defective; and, above all, to guard with the most jealous circumspection against the *new** and *arbitrary* modes of trial, which, under a variety of plausible pretences, may imperceptibly undermine this best preserva-

* It may not be improper to notice, in this place, the case of COOPER v. COATES; reported in 1 Dall. 248.—On a rule to shew cause, why AUDITORS shou'd not be appointed, under the act of assembly (passed the 3d of April, 1781,) the defendant's deposition was read, stating, that no question of Depreciation could arise in the cause. The Court seemed to censure the comprehensive terms of that act—They observed, that the WORDS are so very general and comprehensive, that if the spirit and intention of the law, expressed in the preamble and other sections, were not to be considered, they would include every case arising between the periods mentioned in the act.—"But (say the court) it is INCONSISTENT WITH THE CONSTITUTION, and with JUSTICE, that THE TRIAL BY JURY shou'd be TAKEN AWAY IN THIS MANNER;

tive of Liberty." To this excellent admonition and advice, Mr. Dickinson subjoins this forcible, and almost prophetic, remark: "*Trial by Jury* is our *birthright*; and *tempted to his own ruin by some seducing spirit, must be the man, who in opposition to the genious of* UNITED AMERICA, *shall dare to attempt its subversion.*"

Should, then, any man appear among us, who should thus "*dare*," however covertly, in order to accomplish his own purposes—to seduce us out of our most invaluable *Rights*, and thus *violate the Constitutions of the Land;* such man ought to be marked as our worst enemy.—Let the man with those views also beware!—Let him not, by schemes of avaricious selfishness and personal ambition, attempt to impose on a worthy, free, and magnanimous People!—If he should, unfortunately, have intrigued himself into the confidence of any portion of his honest, unsuspecting countrymen—and found his way into the councils of the nation, by his hypocrisy, his avarice, or his ambition; let him remember, that *the Constitution* of his country—THE SUPREME LAW OF THE LAND—has interposed *Barriers*,* against his projects *for sapping the Rights of the People.* But if *he*

and, therefore, the courts of justice have always determined, that AUDITRATORS shall be appointed, ONLY, where there is a DISPUTE about the Depreciation."—and the Rule was accordingly discharged.

Yet, even under SUCH construction of that act, it has an unconstitutional aspect.

* "THE CONSTITUTION is the origin and measure of legislative authority. It says to legislators—THUS FAR ye shall go, AND NO FUR-

should fail to bear this in remembrance,—he may be assured that an enlightened *People*, jealous of their Privileges and the Liberties of their country, will *not forget* it. They will readily ascertain the nature and extent of those boundaries, which limit the power and authority of all public functionaries,—by the answer which will suggest itself to the question—What is *a Constitution?* It will be found to be, in the emphatic words of judge *Patterson*—"The *Form of Government*, delineated by the mighty hand of the People; in which certain *first principles*, or *fundamental laws*, are established. The Constitution is *certain* and *fixed:* it contains the *permanent Will* of the *People*, and is the *supreme Law of the Land*; and can be revoked or altered, only, by the authority that made it."

And, if it be asked—What are *Legislatures?*—the answer occurs, in the words of the same very respectable judge:—"*Creatures of the Constitution*,

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THER. Not a particle of it ſhould be ſhaken; not a pebble of it ſhoudl be removed. INNOVATION IS DANGEROUS—One Encroachment leads to another; Precedent gives birth to Precedent; what has been done may be done again;—THUS, RADICAL PRINCIPLES ARE GRADUALLY BROKEN IN UPON—and THE CONSTITUTION EVENTUALLY DESTROYED."—See Judge Patterſon's charge to the jury—in the caſe of Vanhorne's leſſee v. Dorrance.

In another part of the ſame charge, the judge ſays—"The interpoſition of a JURY is, in ſuch caſe" (one involving the RIGHTS OF PROPERTY,) "a conſtitutional GUARD upon PROPERTY, and a neceſſary CHECK to LEGISLATIVE AUTHORITY."

—they owe *their* Existence *to* the Constitution—they derive *their* powers *from* the Constitution: *it* is *their Commission*; and therefore, *all their Acts* must be *conformable to it*,*—*or else* VOID. The *Constitution* is the work or will of the *People themselves*; in their original, sovereign, and unlimited capacity: *Law* is the will of the *Legislature*, in their *derivative* capacity."

It is remarked by a writer who has attentively viewed the subject, and weighed its importance,—"That he who *obliquely* endeavors to render JURIES *useless*, is no less criminal than he that would absolutely *abolish* them: That which doth no act *according to its institution*, is, as if it were not in being: And whoever doth without prejudice consider this matter, will see, that it is not less pernicious *to deny Juries the use of those methods of discovering Truth, which the Law hath appointed*, and so *by degrees* turn them into a *mere matter of form*; than *openly* and *avowedly* to *destroy* them. Surely," continues this writer, "such a *gradual* method of destroying our *native Right*, is the most dangerous in its consequences. The safety which our forefathers, for many hundreds of years, enjoyed under this part of the law especially, and have transmitted to us, is so

* The writer of the celebrated Letters under the signature of JUNIUS, makes a similar observation, in his dedication of them to the English nation. "The Power of the Legislature," says he, "is LIMITED—not only by the RULES OF NATURAL JUSTICE, and the WELFARE OF THE COMMUNITY,—but by the FORMS and PRINCIPLES of our particular CONSTITUTION."

apparent to the meanest capacity, that whoever shall go about *to take it away*, or *give it up*, is like to meet *the fate of* ISHMAEL—*to have every man's hand against him, because his is against every man.* Artifices of this kind will ruin us more silently, and so with less opposition; and yet as certainly, as more moved oppression: This only is the difference—that one way, we should be *Slaves immediately*, and the other insensibly: but with this further disadvantage, too, that our Slavery would be the more unavoidable, and the faster rivited upon us,—because it would be *under color of Law.*"

It cannot have escaped the observation of such, among us, as possess a common share of discernment, that those who have in the most unequivocal manner evinced their hostility to *Jury-Trial*, are the same sort of men that manifest an unjust and illiberal antipathy to the *Profession* of the *Law*. We have seen the *same* description of characters---so zealous for *abolishing* the *one*, equally desirous of *proscribing* the *other*.—Let us, however, take a transient view of the primary causes to which we may trace this preposterous dislike to persons of *knowledge* and *skill* in the *Laws*, which so incessantly haunts the imaginations of *some* people; and they will be found to have their origin—as Sir *Matthew Hale* has told us—in Ignorance, Jealousy and Envy.

Originally, the justices (or presiding *judges** of

* It is not easy to comprehend, precisely, the ancient construction of the English county-courts &c. and the measure of judicial powers al-

FOLLOWING PAGE(S) MUTILATED

the courts) in England, would not permit either the plaintiff or the demandant, the defendant or the tenant, to make an *Attorney*, in any action, suit or bill, in any of the numerous petty judicatories of the country—whether these were of record or otherwise; because the words of the writ commanded the *defendant* to appear, &c—and that this was always

lotted to the members, reſpectively, compoſing thoſe judicatories. In the County, Hundred, or Barony-Court (all having, apparently, the ſame meaſure of juriſdiction, within their reſpective diſtricts,) the Suitors were, in fact, the JUDGES; and, more eſpecially, after the Earl, the Biſhop, and the Baron, diſcontinued THEIR attendance. Thus the Suitors, who were the PARES (or peers) of the court, united in themſelves, excluſively, the characters of both JUDGES and JURY: for they exerciſed the functions of both; independently of any co-ordinate tribunal, holding the ſtation of JUDGES OF LAW. It does not however appear, that the number of theſe FREEHOLD-JUDGES was determinate, in ordinary caſes that came within their juriſdiction; which were, for the moſt part, of a very trivial nature: But, when a ſuit was brought before the county-court, by JUSTICIES,—it was then to be regularly tried by a JURY, compoſed of 12 good and lawful men.

Beſides thoſe minor tribunals, the SHERIFF'S TOURN and the COURT-LEET had, formerly, CRIMINAL juriſdiction within their ſeveral precincts or liberties;—thoſe who were bound to attend them, being obliged to preſent, by Jury, all crimes therein. But the buſineſs of both theſe courts has fallen into the QUARTER-SESSIONS.

The Freeholders of the county are in fact the JUDGES in the County-court, and the ſheriff is the Miniſterial-officer. But originally—eſpecially before the inſtitution of the Juſtices in Eyre and the eſtabliſhment of the Common Pleas—the County-court was a tribunal of great diginty; inaſmuch as the Biſhop and the Earl, with the principal men of the county, ſat and preſided therein, to adminiſter juſtice. When the Biſhop, however, was prohibited and the Earl ceaſed to attend it, its original importance greatly declined; Its judicial power becoming SOLELY veſt-

taken, by *them*, to be *in proper person*:*—But these inferior courts were afterwards deprived, by parliament, of the power which they exercised of prohibiting suitors, therein, substituting in their stead such

ed in the hands of ignorant judges; and its proceedings--as well as thoſe of the hundred-courts and courts-baron, being removable into the king's ſuperior courts,---occaſioned the diſuſe of bringing actions in any of them.

* Though it is ſaid that, by the common law---before the appointment of juſtices in eyre by Hen. II (and, conſequently, before the inſtitution of the court of common pleas,---the parties in a real action were obliged to appear PERSONALLY before the court; yet GLANVILLE tells us, that a FINE might at all times have been levied by ATTORNEY.

It is well known to perſons converſant in the law, that a FINE--by which is meant, in this place, a compoſition of a ſuit (whether actual or feigned) for eſtabliſhing the title to real property--became, about the middle of the twelfth century, the general mode of transferring Lands; ſo as to ſecure the POSSESSION and evince the TITLE of the purchaſer: and that this was ſubſtituted in lieu of a charter of feoffment accompanied by livery of ſeizin, which, by the ancient common law, had before been the uſual mode of conveying and aſſuring the title to lands. A FINE might ORIGINALLY have been levied in the court-baron, hundred, or county-court; as they were, beſides, in the courts at Weſtminiſter: But from the time of inſtituting the juſtices in eyre, Fines were uſually levied before them, in their circuits; by reaſon of the pre-eminence of their court over the county-courts. And this circumſtance became, very early, a principal cauſe of theſe inferior judicatories loſing one of the great objects, wherein they exerciſed a judicial authority---their juriſdiction to hold pleas of Land; [redacted]ing they were conſtrained---by a conſciouſneſs of their INCAPACITY to conduct, by themſelves, matters of any intricacy or conſiderable importance---to admit the aſſiſtance of ATTORNIES, in carrying on the proceſs of levying a FINE.

Attornies as they chose, for the management of their causes. The statute of Merton, ch. 10. made the 20th of Hen. III. (*A. D.* 1236) enacted—that every freeman who owed suit to the county, tithing, hundred or wapentake, or to a court-baron, might make an Attorney to do his suit for him. The stat. 6. Edw. I. ch. 8. enacted in 1278, also instituted Attornies in the county-courts:* And the stat. of Westminster 2. ch. 10. made the 13th of the same king (*A. D.* 1285) permitted any person to make a general Attorney, to sue in all pleas during the circuit of the justices in Eyre.

It should be noticed, however, that the "*justices*" —mentioned above—were not justices *of the peace*.

* The County-courts, in England, are very different in their conſtruction, powers, and juriſdiction, from the County-courts in this State. There, the County-court "is no court of record, but only a Court-baron"—[See Greenwood's CURIA COMITATUS REDIVIVA.] "Therefore," ſays the ſame book, "neither pleas holden in this court by PLAINT, nor pleas holden by writ of JUSTICIES, are taken as matters of record; for thoſe pleas are holden by reaſon of the court, which the ſheriff holdeth by virtue of his office:" And Dalton, in his office of ſheriffs, informs us—that this court was ordained for the ſheriff to hold plea there, (in his particular county,) for particular or private matters—under 40 ſhillings, between party and party.

But in Pennſylvania, we have County-courts, for the trial of civil cauſes, called Courts of COMMON PLEAS. Theſe tribunals are courts of record; unlimitted in their juriſdiction, as to the value in controverſy; and they reſemble, in their main conſtitution, the Engliſh court of the ſame denomination. This laſt is, however, one ſtationary court, eſtabliſhed in Weſtminiſter; in conſequence of the proviſion in the XIth chapter of the MAGNA CHARTA of king John—that Common Pleas ſhould not follow the royal court, but ſhould be held in ſome certain place.

These where not instituted till the year 1327; when the duty assigned to the office was *merely* that of *keeping the peace;* and chief-justice *Holt* observed, that he knew not whether they were any thing more, at first, than high-constables—They had no power as judges,* till the year 1361; and their jurisdiction is almost wholly confined, in England, to matters of a criminal nature. They have cognizance of disputes, in civil cases, where the value in controversy is very small indeed, and only of certain specified kinds: But

* When Justices of the Peace were first invested with certain judicial powers, it was provided--that one lord, and three or four of the most worthy men in the county, with some learned in the Law, should be made Justices in every county---This was by stat. 34 Edw. III. ch. 1. And 29 years afterwards, the stat. 13 Rich. II. ch. 7. directs, that they be of the most sufficient knights, esquires, and gentlemen, of the Law.

But nearly 150 years before the office of Justice of the peace was established in England, the people of that country were sensible of the impropriety of conferring offices in the law on men ignorant of the law: for, in the 53d chapter of king John's GREAT CHARTER, that prince thus engaged to his subjects--"We will not make any Justiciaries, Constables, Sheriffs or Bailiffs, but what are knowing in the law and are duly disposed to observe it."--All these possessed, in different modes and degrees, either judicial or executive powers, or both, in the Law. Even the "Constables," at that early period, were the Conservators or Wardens of the peace alluded to by lord Holt; and after the institution of the office of PETTY Constable, by the stat. of Winchester in 1285, the former Constables (who were, in fact, a SORT of Justices of the Peace, with certain powers in criminal matters,--until the institution of the office of Justices of the Peace under that denomination, in the reign of Edw. III.) were called HIGH Constables. The High Constable--or Conservator of the Peace for the HUNDRED--was an officer at common law, in aid of the Sheriff, who is Conservator of the Peace for the whole COUNTY; The Petty Constable was appointed to assist the High Constable in the Hundred.