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THE CASE

OF

ELIZABETH ROGERS

VERSUS

JOSHUA WADDINGTON,

DETERMINED IN THE

MAYOR'S COURT,

IN THE CITY OF NEW YORK,

AUGUST 7, 1786.

WITH AN HISTORICAL INTRODUCTION

BY HERMAN BARTHOLOMEW



1866.

ONE HUNDRED COPIES OCTAVO, AND TWENTY-FIVE COPIES
QUARTO, NUMBERED AND SIGNED.

No. 58.

For the Editor

BRADSTREET PRESS.

TO

OF THE CITY OF NEW YORK,

In recognition of his worth, both as a Lawyer and a Man,

THIS VOLUME IS INSCRIBED BY

HIS FRIEND,

Morrisania, N. Y., April 30th, 1866.



INTRODUCTION.

Darlington bind.
IN the summer of 1776, there stood on the northern side of Maiden Lane, near where Gold Street now enters it, a large Brewery, with its attendant dwelling, malt-house, sheds, storehouses, etc. The premises extended from Smith, now William, Street, on the west, to Queen, now Pearl, Street, on the east; and from Maiden Lane, on the south, to the present line of John Street, on the north; and it was one of the most notable features in that part of the city.

Ch. 34759
The greater portion of this property had formed, in the earlier days of the Colony, a part of the homestead of DIRCK JANSEN VAN DER CLYFF, and a considerable portion of it, on Smith's Vly, now Pearl Street, had passed from his widow, GEESIE HENDRICKS,* to THOMAS PARCELL, of Barn, now Ward's, Island, by deed dated July 13, 1696.†

* The *Register of Marriages* in the Collegiate Reformed Dutch Church, shows that they were married on the 3d of April, 1667.

† Records in the Register's Office, New-York, Liber 30, Folios 22, 23.

PARCELL, after conveying two separate portions to his two sons-in-law, WILLIAM DOBBS and JEREMIAH REDING, and repurchasing them, had conveyed the whole to HARMANUS RUTGERS, JUNIOR, by deeds dated November 13, 1708,* and February 19, 1713.† Other portions of the premises had been conveyed to the same gentleman, from time to time, by ABRAHAM SANTVOORDT,‡ ANDREW HARDENBROOK,§ CATARINA RUTGERS,|| his mother, JOHANNIS DE GRAAF,¶ CLEMENT and GEORGE ELSWORTH,** GRIETIE VAN DER WATER,†† PATRICK MACKNIGHT,‡‡ the heirs of JOOST CARELSE,§§ GEORGE ELSWORTH,||| and RICHARD PARCELL;¶¶ and they had been occupied by him and his descendants, as a Homestead and Brewery, for more than sixty years.* *

* Records in the Register's Office, New-York, Liber 30, Folio 26.

† Ibid., Liber 30, Folio 29.

‡ Ibid., Liber 30, Folios 32 and 52.

§ Ibid., Liber 30, Folio 34.

|| Ibid., Liber 30, Folio 38.

¶ Ibid., Liber 30, Folio 43.

** Ibid., Liber 30, Folio 46.

†† Ibid., Liber 30, Folio 48.

‡‡ Ibid., Liber 30, Folio 51.

§§ Ibid., Liber 30, Folio 58.

||| Ibid., Liber 30, Folio 142.

¶¶ Ibid., Liber 30, Folios 243, 245.

* * HARMANUS RUTGERS, JUNIOR, removed from his mother's house, in Broad Street, between Marketfield and Stone Streets, to his own house, then newly built, on Maiden Lane, in 1711; and it is also a matter of record, among the

The particular family of RUTGERS, of which this HARMANUS, JUNIOR, was a member, descended from RYCKERT RUTGERSEN, who, on the 1st of October, 1636, sailed for New-Netherland, in the good ship *Rensselaerfwyck*. He was probably a farmer; and he settled in Rensselaerfwyck, under a contract for six years' service, at a hundred and twenty guilders per annum. In 1648, he took a six years' lease of Bethlehem, now Ryersen's, Island, at a rental of three hundred guilders per annum, beside the tenths; but, four years after, he surrendered it to JAN RYERSEN, whose name the property has since borne.*

It has not been clearly established when, nor by what member of the family, the name of RUTGERS first appeared on the list of residents of the city of New-Amsterdam; but there appears to have been one, JAN RUTGERSEN, a Drayman,† a Small Burgher, of the date of the 11th of April, 1657,‡ and, in 1658, a resident of the east side of the Heere Graft, now Broad Street;§ and another, PETER RUTGERS, lived on the Prince's Graft, now Beaver Street, in

family papers, that the first beer was brewed in his Brewery, on the latter street, on the 24th of December, in that year.

* O'CALLAGHAN's *New Netherland*, i., 437.

† PAULDING's *New Netherland*, 111.

‡ O'CALLAGHAN's *Register*, 175.

§ Conveyance of land to him, by ABRAHAM RYCKE, June 7, 1658, cited by MR. VALENTINE, in *The Corporation Manual for 1861*, First edition, 599.

1665.* On the 11th of March, 1666, MARIA RUTGERS, of *Amersfoort*, was married to JORIS JANSEN, in the Collegiate Reformed Dutch Church, in New-York; on the 8th of October, 1670, the widow GEESTJE RUTGERS was married to GERRIT HUYGENS DE CLEYN, by whom, on the 15th of the following October, she had a daughter, RUTH; on the 14th of January, 1672, MAGDALEENTJE RUTGERS, of *New-York*, was married to JORIS WALGRAEF, of London; on the 11th of October, 1673, SARA RUTGERS, of *Nesop*, was married to DAVID WALDRON; and on the 21st of October, 1685, MARYHEN, widow of ROBERT RUTGERS, was married to JAN BARENTZ, by whom she had, at least, two children, who were "christened" in the Collegiate Church.†

It is very probable, however, that these belonged to some other family than that which is the subject of this inquiry, since there is evidence among the family papers of the latter, that a son of the tenant of Bethlehem Island, HARMANUS by name, was a prominent Brewer at Albany;‡ that the difficulty

* Assessment list, April 19, 1665.

† The particulars relating to the above-mentioned Marriages and Births are recorded in the *Registers* of the Collegiate Reformed Dutch Church, New-York.

‡ *The Deacon's Account Book*, in the archives of the old Dutch Church at Albany, shows that, in December, 1667, HARMAN RUTGERS was paid 17g. 10st. for beer furnished to HANS DE NOORMAN; and that, in February, 1695, he was

encountered by him in protecting his barley-fields from the Indians, induced him to remove to New-York, in the latter part of the seventeenth century, when he established himself in Broad Street, between Marketfield and Stone Streets; and that his two sons, ANTHONY and HARMANUS, JUNIOR, subsequently became noted Brewers in the latter city—his only daughter, ELSJE, the wife of DAVID SCHUYLER, of Albany, having been left in that city.*

HARMANUS, JUNIOR, the youngest of these—a grandson of the original lessee of Bethlehem Island,—by whom the premises in question were purchased and occupied, as before stated, was married to CATHARINA MEYER, † on Christmas day, 1706; and the following children were the fruits of that union: I. HARMANUS, 3D, born on the 30th of April,

paid 15g. for a half vat of beer, delivered to JOHANNES BENSING, for the burial of EGBERT NORSEN.—MUNSELL'S *Collections of the History of Albany*, i., 28, 50.

* HARMANUS RUTGERS'S *Will, Records of the Surrogate's Office*, Liber 8, Folios 32–35; MUNSELL'S *Annals of Albany*, iii., 76, 86, 99.

† This lady died suddenly, on the 28th of February, 1736. The following notice of that event appears in *The New-York Gazette*, Numb. 591, From *Tuesday, March 1, to March 8, 1736*:

“N. York, February 28, 6 o'Clock P. M. Just now we received the melancholy account, That this Morning the Wife of Capt. *Harmanus Rutgers* of this City, being in perfect Health, eat her Breakfast as usual, and about nine or ten o'Clock was taken with a Fit, and dyed about Four in the Afternoon, without speaking a word, to the great Surprize of her sorrowful Husband, Family and Friends.”

1708; married to ELIZABETH BENSON, on the 7th of June, 1728; and died during the lifetime of his father; leaving HARMANUS, 4TH, ANTHONY, ROBERT, CORNELIA, CATHARINA, and MARY. II. ELSJE, born on the 27th of January, 1710; married to JOHN MARSHALL, on her birth-day, 1731; and had EDWARD, JOHN, and ANNA MARIA. III. HENDRICK, born on the 20th of February, 1712; married CATHARINE DE PEYSTER, on the 9th of January, 1732; and had CATHARINE, married to WILLIAM BEDLOE; JOHN; ANNA, married to WILLIAM BANCKER; HARMANUS; ELIZABETH, married to GERARD DE PEYSTER; HARMANUS; HENDRICK—subsequently known to every New-Yorker of his time, as Colonel HENRY;—MARIA, married to Doctor McCREA, brother of the noted Miss JANE McCREA; and HARMANUS, who was killed in the Battle of Long Island. IV. CATHARINA, born on the 13th of February, 1714; married to ABRAHAM VAN HORNE, JUNIOR, on the 27th of December, 1729; and had CATHARINA, married to CORNELIUS BEEKMAN, ABRAHAM, MARGARET, ELIZABETH, JAMES, and EVA. V. MARY, born on the 10th of April, 1716; and died on the 14th of October, 1723. VI. ANTHONY, born on the 7th of June, 1718; and died on the 17th of the following September. VII. EVA, born on the 29th of August, 1719; married to JOHN PROVOST; and had JOHN.

VIII. JOHN, born on the 9th of February, 1722; and died on the 4th of August, in the same year.*

Mr. RUTGERS died on Thursday, the 9th of August, 1753,† and his Will, dated the 26th of June, 1750, was proved on the 28th of August, 1753.

By that Will he made various bequests to his several children; but to the widow of his eldest son, HARMANUS, (ELIZABETH BENSON,) he left the property in Maiden Lane, including the dwelling, brewery, and malt-house, during her widowhood, with remainder to her then eldest son, ROBERT,‡ who, on the 23d of September, 1755, was married to ELIZABETH, the daughter of WILLIAM BEEKMAN;§ and, in September, 1776, when General HOWE occupied the city, with the Royal army, the premises were held under that bequest, by the aged widow of

* The *Births* of the different members of this family were recorded in the family Bible of Mr. RUTGERS; and I am indebted to the Rev. HOWARD CROSBY, D. D., for the opportunity to correct and perfect this sketch from that authoritative record. The *Marriages* have been found recorded in the *Registers* of the Collegiate Reformed Dutch Church, in New-York. The *Deaths* have been noticed on information derived exclusively from Doctor CROSBY.

† The following notice of that event appeared in *The New-York Gazette: or, the Weekly Post-boy*, Numb. 550, August 13, 1753:

“ N E W - Y O R K , August 13.

* * * * *

“ Thursday last departed this Life, in an advanced Age, Mr. HARMANUS RUTGERS, a very eminent Brewer of this City, and a worthy honest Man: His Remains were decently interred the next Evening.”

‡ Record of Wills, in Surrogate's Office, Liber 18, Folios 347-356.

§ *Register of Marriages*, in the Collegiate Reformed Dutch Church.

HARMANUS, by whom they had been let to her son ROBERT, who carried on the hereditary business of a Brewer.

As the family belonged to the popular party, both ROBERT and his aged mother fled from the city when the enemy entered; and the premises in question were occupied by the Royal forces, for public purposes,* until the 10th of June, 1778, when the Commissary-General of the army gave his license for their use to BENJAMIN WADDINGTON and EVELYN PIERREPONT, Merchants, by whom or by whose tenants they were occupied, without interruption, until the 1st day of May, 1780, when Sir HENRY CLINTON's license to occupy them, at an annual rent of One hundred pounds, payable quarterly, was obtained by the same persons.† Under the latter au-

* It appears from *The Jones Manuscript* that three large breweries were occupied by the Royal troops, and there is little doubt that this was one of them.

† It will be proper, in this place, to notice the policy adopted by the Royal Commanders-in-Chief, relative to the abandoned property of the refugee inhabitants of New-York.

In the absence of any fund from which the Poor of the city could be provided for, on the 27th of December, 1777, General ROBERTSON, the commandant in the City of New-York, issued an Order authorizing nineteen of the principal inhabitants to form a "Vestry," for the purpose of soliciting donations from the charitable, and of disposing of it among the needy.

This measure, although temporarily successful, was not of such a character as would make it permanently useful; and, soon after, Sir HENRY CLINTON added to the "Vestry," the Mayor of the City and the Overseer of the Poor; gave to it the custody of the out-door Poor, the Almshouse, the city pumps, the cleaning of the streets and slips, the care of the public buildings, ferries, lamps, fire

thority, the premises were occupied from the 1st of May, 1780, until the 17th of March, 1783, when they appear to have been surrendered by the tenants; and when the Royal army embarked for England, they were restored to those to whom they legally belonged.

In the meantime, the Legislature of the State of New York had taken measures to protect the interests of her subjects who were in exile; and, for that purpose, on the 8th of February, 1783, Mr. EBENEZER PURDY, of Westchester County, had introduced a bill into the Assembly, entitled "A BILL for granting speedy Relief in Cases of certain Trespasses."

apparatus, arms of the militia, etc.; and authorized it to demand and collect rents, for the half-year which would terminate on the 1st day of May, 1778, from all persons who had entered and occupied the property of those friends of the popular cause who had left the city and remained outside the lines, for the liquidation of its expenses.

For the more effective discharge of its duties, the "Vestry" appointed a Collector and Treasurer, JOHN SMYTHE, Esquire; and, as the authority was continued, by subsequent Orders, the papers of that period contained, regularly, his semi-annual notices to his tenants to make payment of their rents, while the occasional Reports of the "Vestry" itself, show the fidelity and success with which that body discharged its various duties, *without drawing a penny from the Royal Treasury, and without levying a single tax on the inhabitants of the city.*

Those who are curious enough to look further into this subject, will find the particulars, including the entire series of the Reports of the "Vestry" in a letter addressed to the Mayor of the City by HENRY B. DAWSON, May 1, 1862; by the former communicated to the Common Council, with a Special Message, May 15, 1862; and by the Board of Aldermen, on the same day, entered, *in extenso*, on its Minutes. *Minutes*, Stated Session, May 15, 1862—Vol. LXXXVI., pp. 208-227.

On the 10th, it was read a second time, and referred to the Committee of the Whole, by which, on the 24th, it was reported complete. The House agreed to the Report, on the same day, and ordered the Bill to be engrossed; and two days later (*February 26th*) it was passed.*

On the 14th of March, with amendments, it was passed by the Senate; on the same day, the amendments were agreed to by the Assembly; and on the 17th of the same month—the day on which the premises of the Plaintiff in this action were surrendered by the Defendants, who had occupied them—the Council of Revision returned the Act, with its approval,† and it became a law.

The Act referred to, was in these words:‡

“CHAP. XXXI.

“*An Act for granting a more effectual Relief in Cases
“of certain Trespasses. Passed 17th March, 1783.*

“**B**E it enacted by the People of the State of New-
“York, represented in Senate and Assembly, and
“it is hereby enacted by the Authority of the same,
“That it shall and may be lawful for any Person or
“Persons, who are, or were Inhabitants of this
“State, and who, by Reason of the Invasion of the
“Enemy, left his, her, or their Place or Places of

* Journal of the Assembly, Original edition, 109-132; 157, 158-161.

† Journal of the Senate, Original edition, 121-144; 147.

‡ Sessions Laws, 1783, Original edition, 283, 284.

“ Abode, and who have not voluntarily, put them-
 “ selves respectively, into the Power of the Enemy,
 “ since they respectively left their Places of Abode,
 “ his, her or their Heirs, Executors or Administra-
 “ tors, to bring an Action of Trespafs against any
 “ Person or Persons who may have occupied, in-
 “ jured, or destroyed his, her, or their Estate, either
 “ real or personal, within the Power of the Enemy,
 “ or against any Person or Persons who shall have
 “ purchased or received any such Goods or Effects,
 “ or against his, her or their Heirs, Executors or
 “ Administrators, in any Court of Record within
 “ this State, having Cognizance of the same; in
 “ which Action, if the same shall be brought against
 “ the Person or Persons who have occupied, injured
 “ or destroyed, or purchased, or received such real
 “ or personal Estate as aforesaid, the Defendant or
 “ Defendants shall be held to Bail; and if any
 “ such Action shall be brought in any Inferior
 “ Court within this State, the same shall be finally
 “ determined in such Court, and every such Action
 “ shall be considered as a transitory Action. That
 “ no Defendant or Defendants shall be admitted to
 “ plead, in Justification, any military Order or
 “ Command whatever, of the Enemy, for such Oc-
 “ cupancy, Injury, Destruction, Purchase or Re-
 “ ceipt, nor to give the same in Evidence on the
 “ general Issue.”

Under the provisions of this statute, numerous actions were instituted by the owners of property, against those by whom that property had been occupied during their absence; among whom were the venerable ELIZABETH RUTGERS, in the proceedings which are the subject of this work.

The latter appears to have been considered a test suit; and, consequently, the most distinguished Counsel of the times appear to have been retained on either side. The State of New York, also, appeared in Court, by her distinguished Attorney-General, to maintain her right, as a Sovereign State, to control the great principles at issue; and the relative rights and duties of the several States, and those of the Confederacy of which they were respectively members, as well as the rights which necessarily belong to a Commanding General, in an enemy's country, in a time of war, so far as they affected the inhabitants and subjects of New-York, were made dependent on this action, which had been brought in a Court from whose decision, under the provisions of the statute, there was no appeal. In view of these circumstances, as well as from the relative positions of the parties, the angry feelings which then prevailed throughout the State—the result of the recent war—and the great number of cases, covering claims to a large amount, which depended upon it, it excited a degree of interest

that no other case in this State has ever produced.

The action was brought in the Mayor's Court, in the City of New York; and each of the parties demurred to the plea of the other, the pleadings closing with joinders in demurrer, in the usual form.

The case came up for argument on these demurrers, on Tuesday, the 29th of February, 1784; and the most intense excitement seems to have prevailed throughout the city.

The bench was occupied by JAMES DUANE, Mayor, and RICHARD VARICK, Recorder, of the city; and Aldermen BLAGGE, GILBERT, NEILSON, RANDAL, and IVERS were associated with them, under the provisions of the Charter. Mrs. RUTGERS, the Plaintiff in the action, appeared by her Counsel, Messrs. JOHN LAWRENCE, WILLIAM WILCOX, Colonel ROBERT TROUPE, and EGBERT BENSON, the Attorney-General of the State, who was, also, Mrs. RUTGERS's nephew. Mr. WADDINGTON, the Defendant, appeared by his Counsel, ALEXANDER HAMILTON, BROCKHOLST LIVINGSTON, and MORGAN LEWIS; and the argument was listened to by a crowded and attentive auditory.

It is said that six of the Counsel were heard by the Court; and the following pages will show with what tact and ability the case was argued on either

side. Unfortunately, the files of the Court, in which were the pleadings and other papers in this action, were destroyed by fire, when the upper story of the City Hall was consumed, on the 1st of September, 1858; and there is no original evidence now in existence to show the particular parts in the argument which were taken by the several Counsel engaged.

The Defendant's Counsel did not deny that Mrs. RUTGERS had been an inhabitant of this city; nor that, by reason of the invasion of the enemy, she had left her place of abode; nor that she had not since voluntarily put herself into the power of the enemy; nor that the premises in question were her property; nor that the Defendant had occupied those premises, as charged in the Declaration; and Mrs. RUTGERS was thus admitted to be a complete Plaintiff, under the provisions of the statute. They denied, however, that the Defendant was such a "Person," against whom an action could lie as was described in the statute, because he was a *British* subject, a *merchant*, residing in an enemy's city, under the protection of the *British* army, by whom it had been *conquered*; and they evidently maintained that, for those reasons, he was not amenable to the State of New York, who was the *vanquished* party, when the cause of action accrued. This point was contested, of course, by the Plaintiff's Counsel;

and it is said that “great pains were taken on both sides to enforce the *rules* by which the statute ought to be expounded,”* the necessity of which must have been evident to both, since on this point the whole case depended.

The Defendant’s Counsel also insisted that the obtaining of the premises and their subsequent occupation, *related to the war* and were incidental to it. They insisted, also, that the use of the premises was vested in the *conqueror* by the Law of Nations; and they claimed that his license to the Defendant to use it continued the relation; but it was denied by the Plaintiff’s Counsel that a license from the enemy’s Commander-in-Chief to use those premises for *civil purposes related to the war*; while the unauthorized permission to occupy them for like *civil purposes*, which the enemy’s Commissary-General had given to the Defendant, it was maintained, was even less *related to the war* than the former.

The rights of the captors, under the Law of Nations, and those of the Defendant derived from the captors, were elaborately and learnedly discussed by Mr. WADDINGTON’s Counsel; but the Plaintiff’s Counsel denied that the Law of Nations afforded any rule of right, or ought to have any influence on *the Government of a People*, to which

* Decision, 14.

the statute especially related. Indeed, the latter objected, that these States are not bound by the customary and voluntary Law of Nations, any further than they had respectively adopted it, or engrafted it on their several codes.

The character of the recent war, and the relative rights of the opposing parties—“*parts of the same Nation*”—were also elaborately discussed; and the applicability of the Law of Nations thereto, especially in view of the common origin and common allegiance of *both parties*, were also carefully examined.

The Defendant’s Counsel denied the right of any particular State or Nation—“a particular society,” as the Court described it,—to so alter or annul any portion of the Law of Nations as to deprive a foreigner, when residing in that country, from appealing to it; and they considered and urged that the Federal compact had given additional force to that principle.

The Plaintiff’s Counsel insisted that the war was waged by Great Britain for *unjust* purposes; that the *unjust* party acquires no rights in such a war; that under the Law of Nations, no right can be derived from *an injury*; and that this principle was consonant to the Common Law. They maintained, also, that the Rights of War are only appropriated to “solemn” wars; and they denied that the War of the Revo-

lution, being a rebellion, was such a "solemn" war. On the other hand, the Counsel for Mr. WADDINGTON maintained that, by the Law of Nations, every "solemn" war is considered as a *just* war; that the War of the Revolution was a "solemn" war; and that, therefore, neither the justice or injustice of Great Britain was of any consequence for the purposes of that action.

Mrs. RUTGERS'S Counsel denied that the capture and occupation of the City of New York was such a conquest as vested the British Commander with the disposal of the rents and profits of *real* property; which they sustained by a reference to the Postliminium, and to the fact that no conquest is considered complete until conceded by the vanquished, or by a Treaty of Peace; and the Counsel for Mr. WADDINGTON made a spirited, but evidently an unsuccessful, effort to overcome that portion of the argument of their opponents.

Mr. WADDINGTON'S Counsel also argued that every Treaty of Peace implies an amnesty and oblivion of damages and injuries inflicted during the war; and the opposing Counsel admitted that, although a Treaty is only an agreement, and has no force beyond the express terms of its Articles, an amnesty on all subjects *relative to the war* is properly implied in every Treaty. They denied, however, that the occupation of Mrs. RUTGERS'S premises by

MR. WADDINGTON had been *relative to the war*; and they denied, therefore, that the amnesty included in the Treaty was properly applicable to his case.

The right of Congress to form a Treaty which, in its operations, should reach the *internal* police of a State was denied by Mrs. RUTGERS'S Counsel; but the legality of the Union, the constitutional authority of Congress to make Peace, the legal conclusion and ratification of the Treaty, and its binding effects on the several States, were ably and successfully urged, in opposition, by the Defendant's Counsel.

In short, the Defendant's Counsel relied, chiefly, on two points: FIRST, The rights of *captors*, under the Law of Nations; and, SECONDLY, The amnesty which the Treaty, by implication, at least, secured to their client; while the Counsel for Mrs. RUTGERS appear to have depended on the uncontrollable power of the Legislature, within the limits of the Constitution of the State, and the sanctity of the laws.

The Court took time to advise; and on Tuesday, the 27th of August, the Decision, which appears in the following pages, was delivered by the Mayor.

It is unnecessary to recapitulate the argument of the Court; but it may be remarked, without impropriety, that a careful examination of the Decision

has failed to furnish any evidence concerning some alleged features of it, of which much has been said by some of those who had never seen it.

The argument of Mr. WADDINGTON'S Counsel that he was not such a "person" as was referred to in the statute was disregarded (*pp.* 13-18); as were, also, their arguments on *the relations to the war*, of the Defendant's occupation of Mrs. RUTGERS'S premises (*pp.* 18-20); that the rights of *the conqueror* became vested in him, on the receipt of *the Commissary-General's* license (*pp.* 33-36); and that the Treaty had furnished an amnesty for that "act of usurpation" (*pp.* 36, 37). The Court also decided that there "was not a tittle in the Treaty to "which the statute was repugnant" (*p.* 44), while it decided, also, that the license from Sir HENRY CLINTON, under which the premises were occupied between the 1st of May, 1780, and the 17th of March, 1783, was legally issued and entitled to its respect

It was, in fact, a decision which, in some respects, at least, favored the views of each party; and it is not surprising that neither the one nor the other was particularly pleased with it.

On Thursday evening, the 2d of September, a jury of twelve citizens was summoned to meet at Simmon's Tavern, near the City Hall, to ascertain the sum due from Mr. WADDINGTON, the De-

pendant in the action, for the occupation of the premises in question; when the inquest gave a verdict of seven hundred and ninety-one pounds, thirteen shillings and four pence for Mrs. RUTGERS.* Mr. WADDINGTON, therefore, had reason to disapprove the Decision, whether considered theoretically or practically.

The "violent Whigs," as Chancellor LIVINGSTON called those who were of the CLINTON party, considered the decision as subversive of good order and the Sovereignty of the State; and, on the 13th of September, 1784, a meeting was called to consider the subject. It is not now known by what particular persons this meeting was called, nor where it was held, nor the character and extent of its action; but it is evident that a Committee was appointed to prepare and publish an Address to the People of the State, on the action of the Court; and that Messrs. MELANCTON SMITH, PETER RIKER, JONATHAN LAWRENCE, ANTHONY RUTGERS, PETER T. CURTENIUS, THOMAS TUCKER, DANIEL SHAW, ADAM GILCHRIST, JUNIOR, and JOHN WILEY were named for that purpose.†

That Committee duly performed the duty to which it had been assigned; and the following,

* *The New York Packet, and the American Advertiser*, Num. 417, Monday, September 6, 1784.

† DAVIS's *Memoirs of Aaron Burr*, ii., 45.

taken from one of the newspapers of the day,* is the Address which it issued :

“ TO THE PEOPLE OF THE STATE OF NEW-YORK :

“ FELLOW CITIZENS :

“ It is the happiness of people who live in a free
 “ Government, that they may upon every occasion,
 “ when they conceive their rights in danger, from
 “ whatever cause, meet, consult, and deliberate upon
 “ the proper mode of relief, and address their fellow-
 “ citizens, pointing out the dangers which they ap-
 “ prehend, and inviting them to concur in measures
 “ for their removal.

“ In the exercise of this privilege, a number of the
 “ free citizens of New York did assemble, and hav-
 “ ing appointed us their Committee, gave it in
 “ charge to us to address you on the subject of a
 “ late decision of the Mayor’s Court, in this City,
 “ on the law commonly called the Trespafs Law, in
 “ a case brought to issue in that Court, between
 “ RUTGERS and WADDINGTON.

“ This action was founded on a law of this State,
 “ entitled ‘ An Act for granting more effectual relief
 “ ‘ in cases of certain trespasses,’ passed in March,
 “ 1783, by which it is declared, that it shall and may
 “ be lawful for any person or persons who are or were

* *The New-York Packet, and the American Advertiser*, Num. 434, Thursday, November 4, 1784.

“inhabitants of this State, and who by reason of the
 “invasion of the enemy, left his, her, or their place
 “or places of abode, &c., to bring an action of tres-
 “pafs against any person or persons who may have
 “occupied, injured, or destroyed, his, her, or their
 “estate, either real or personal, within the power of
 “the enemy. And that no Defendant or Defendants
 “shall be admitted to plead in justification, any mili-
 “tary order or command whatsoever, for such oc-
 “cupancy.

“The Plaintiff charged the Defendant for the use
 “and occupancy of a certain brew-house and malt-
 “house, in the City of New-York, the property of
 “the Plaintiff.

“To this charge the Defendant plead, that the
 “premises in question were occupied part of the
 “time under the British army, who took possession
 “thereof by virtue of a permission from the Com-
 “mander-in-chief of said army, and the remainder
 “of the time by virtue of license and permission
 “granted by the said Commander-in-chief to a
 “certain person, under whom the Defendant held ;
 “which licenses and permissions the said Commander
 “had authority to give by the Law of Nations.

“The Defendant further plead, that by the Treaty
 “of Peace, all right, claim, &c., which either of the
 “contracting parties, and the subjects and citizens of
 “either of them, might otherwise have to any com-

“ penfation, &c., whatfoever, for or by reason of any
 “ injury or damage, whether to the public or individ-
 “ uals, which either of the faid contracting parties,
 “ and the fubjects or citizens of either, might have
 “ done, or caufed to be done to the other, in con-
 “ fequence of, or in any wife relating to, the war
 “ between them, from the commencement to the
 “ determination thereof, were mutually and recip-
 “ rocallly, virtually and effectually relinquifhed,
 “ renounced and releafed to each other; and further
 “ averred that the Defendant was, from the time of
 “ his birth, and at all times fince hath been, a British
 “ fubject.

“ The Plaintiff, to the firft plea of the Defendant,
 “ namely, that the premifes were held by virtue of
 “ authority and permiffion from the Commander-in-
 “ chief of the British army, replied, that fhe ought
 “ not to be barred of her action by reason of that
 “ plea; becaufe the law under which fhe brought her
 “ fuit did expreffly declare, that no Defendant or De-
 “ fendants fhould be admitted to plead any military
 “ order or command whatfoever for the occupancy.

“ As to the further plea of the Defendant, namely,
 “ the Treaty of Peace, the Plaintiff demurred, or
 “ denied its fufficiency in the law.

“ The caufe, as above ftated, was argued on the
 “ 29th of June paft, before the Mayor’s Court, and
 “ on the 27th of Auguft judgment was given.

“ The two points which presented for the Court’s
 “ determination upon, arising from the two pleas of
 “ the Defendant, were,

“ 1st. Whether permission and authority from the
 “ Commander-in-chief of the British army, agree-
 “ ably to the Law of Nations, was a sufficient justi-
 “ fication to the Defendant for the use and occu-
 “ pancy of the premises in question; notwithstanding
 “ the Act of the Legislature declares, ‘ that no De-
 “ fendant or Defendants shall be admitted to plead
 “ ‘ in justification any military order or command
 “ ‘ whatsoever.’

“ 2d. Whether the Treaty of Peace includes in it
 “ such an indemnity as to justify the Defendant for
 “ his use of the premises.

“ With respect to the first point, the Judgment of
 “ the Court was, that the plea of the Defendant was
 “ good for so much of the time as he held the premi-
 “ ses under the immediate authority of the British
 “ Commander-in-chief; or in other words, notwith-
 “ standing the law declares that no Defendant shall
 “ be allowed to plead in justification any military
 “ order or command whatsoever, yet the authority
 “ and permission of the British Commander-in-chief
 “ shall be deemed a sufficient justification; because in
 “ the opinion of the Court, a liberal construction of
 “ the Law of Nations would make it so, and because
 “ the Court could not believe that a repeal of, or

“interference with, the Law of Nations entered into
“the scheme of the Legislature.

“The second plea, namely, the Treaty of Peace,
“the Court declared insufficient.

“From this state of the case it appears that the
“Mayor’s Court have assumed and exercised a power
“to set aside an Act of the State. That it has per-
“mitted the *vague and doubtful* custom of Nations to
“be plead against and to render abortive, a *clear*
“*and positive* statute; and military authority of the
“enemy to be plead against the express prohibition
“of our Legislature.

“This proceeding, in the opinion of a great part
“of the citizens of this Metropolis, and in our
“opinion, is an assumption of power in that Court,
“which is inconsistent with the nature and genius of
“our Government, and threatening to the liberties
“of the People.

“We think the controversy, notwithstanding the
“immense learning and abilities which we are told
“have been displayed in it, lies within a narrow
“compass, and within the reach of every common
“understanding.

“It is reducible to the two following questions:
“Does the plain and obvious meaning of the statute
“prohibit the pleading of any military orders,
“commands, permission, and authority of the enemy,
“in justification of any trespass for which a suit can

“ be brought under it? Can a Court of Judicature,
 “ consistently with our Constitution and Laws, ad-
 “ judge contrary to the plain and obvious meaning
 “ of a statute?

“ If these questions are answered in the negative,
 “ authorities from GROTIUS, PUFFENDORF, WOLFIUS,
 “ BURLAMAQUI, VATTEL, or any other Civilians, are
 “ no more to the purpose than so many opinions
 “ drawn from the fages of the Six Nations.

“ If they are answered in the affirmative, then
 “ there can be no disputing against the opinion of
 “ the Court.

“ With regard to the meaning and intention of
 “ the Legislature, it may be inferred from the very
 “ enacting of the Law; for in doing that, they sup-
 “ pose that as laws before stood, actions could
 “ not lie in cases of this nature; to remedy this,
 “ they make it lawful for persons described in the
 “ Act, to bring actions of trespasss against, &c., and
 “ declare that no military authority whatsoever of
 “ the enemy shall be plead, or evidenced in justifica-
 “ tion of the trespasss.

“ No point of controversy can arise on the case,
 “ but must turn upon the propriety or impropriety
 “ of the law itself; not upon its construction. For
 “ the plain language of the law is this, that the
 “ military power of Great-Britain, by taking posses-
 “ sion of these estates and giving authority, per-

“ mission, order, or command to persons for occu-
 “ pying and improving them, should not excuse the
 “ occupier from being considered as a trespasser,
 “ and thereby not liable to pay damages to the
 “ owner. We can hardly conceive it possible for
 “ the Legislature to have chosen words that would
 “ make the intention of their law more clear.

“ If what we have stated be not the true meaning
 “ of the law, then we conceive that it has no mean-
 “ ing.

“ The time of passing the law, and the evident
 “ grounds of it, show the intention of the Legislature,
 “ and put it beyond a doubt that the spirit and literal
 “ construction of it are the same. To give a remedy
 “ to those citizens who had abandoned their estates
 “ on the approach of the enemy, and who had ad-
 “ hered to the fortunes of their country in all its
 “ vicissitudes; most of whom had suffered very great
 “ loss of personal property, and many of them re-
 “ duced from affluence to penury and want. The
 “ real estates which they owned in the Southern
 “ District, it was well known, had been greatly in-
 “ jured; most of them irreparably so.

“ We were then at the close of the war. The
 “ Legislature had certain accounts that the prelimi-
 “ nary Articles of Peace were signed. The time
 “ was considered as just at hand when the exiles, the
 “ greater part of whom had expended all their loose

“property, were to be put in possession of their real
 “estates, from which they had suffered voluntary
 “banishment for more than seven years. The bad
 “condition of their estates, and their incapacity to
 “improve them, made the case which the Legisla-
 “ture thought proper to afford relief in, by the
 “law.

“It is well known that most of these estates
 “were at that time held, or pretended to be held,
 “by virtue of authority from the British Com-
 “mander-in-chief. The Law of Nations was the
 “same then as at this time, and the immutable
 “principles of justice have not changed. Yet the
 “wisdom and supreme authority of the State did
 “declare that no military order or command of the
 “enemy should be plead or given in evidence.
 “The law being thus plain and explicit, it was
 “never apprehended that its operation would be
 “defeated by the plea of authority from the
 “enemy.

“Impressed with a belief of its complete and
 “entire operation, many of the persons themselves,
 “who held the estates of exiles under the British,
 “abandoned the place with them, to avoid paying
 “the damages which would accrue from it.

“The Gentlemen of the Law, we are confident,
 “almost universally considered it as expressed in
 “plain and unequivocal language, that could not

“ be misunderstood or explained away. In short,
 “ no doubt was entertained of the meaning of the
 “ law until the case of RUTGERS and WADDING-
 “ TON was agitated; and then there was no way
 “ left for the Defendant to justify himself but by
 “ inventing distinctions where there was no dif-
 “ ference, and introducing matter which the law
 “ prohibited.

“ From what has been said, we think that no one
 “ can doubt of the meaning of the law. It remains
 “ to enquire whether a Court of Judicature can
 “ consistently, with our Constitution and Laws,
 “ adjudge contrary to the plain and obvious mean-
 “ ing of a statute.

“ That the Mayor’s Court have done so in this
 “ case, we think is manifest from the foregoing re-
 “ marks.

“ That there should be a power vested in Courts
 “ of Judicature, whereby they might control the
 “ supreme Legislative power we think is absurd in
 “ itself. Such power in Courts would be destructive
 “ of liberty, and remove all security of property.
 “ The design of Courts of Justice, in our Govern-
 “ ment, from the very nature of their institution,
 “ is to *declare* laws, not to *alter* them.

“ Whenever they depart from this design of their
 “ institution, they confound Legislative and Judicial
 “ powers.

“The laws govern where a Government is free ;
 “and every citizen knows what remedy the laws
 “give him for every injury. But this cannot be
 “the case where Courts, if they deem a law to be
 “unreasonable, may set it aside.

“Here, however plainly the law may be in his
 “favor, he cannot be certain of redress, until he
 “has the opinion of the Court.

“It may be *expressed generally*, and only say, that
 “all persons in certain circumstances shall recover
 “in certain cases. But it may not by name bar
 “every objection that might possibly be argued
 “against it, where interest and inclination hold in-
 “vention on the rack.

“It may not particularly describe the man, say what
 “country he is to spring from, or what his occupa-
 “tion is to be ; and being thus *generally expressed*,
 “it cannot be, from the nature of things, but it will
 “admit of some exceptions ; and as it may admit
 “of some exceptions, it must receive a *reasonable*
 “and liberal interpretation from the Court, *how-*
 “*ever arduous the task may be.* Now the reasoning
 “of the Court and the reasoning of the Legislature
 “may lead them to very different conclusions, and
 “as the Court reasons last upon the case, it is utterly
 “impossible for any man to guess, when he brings
 “a suit, however exactly it may apply to the law,
 “until by a tedious and expensive process, he ob-

“tains the opinion of the Court whether he shall
 “recover or not.

“It is not our intention to enter into a particular
 “consideration of the evils which would result from
 “the exercise of such a power in our Courts; much
 “less to consider all the arguments used to vindicate
 “the decision in the case of RUTGERS and WADDING-
 “TON. We are addressing an enlightened people,
 “who are awake to everything that may affect their
 “dearly attained freedom; who know that the con-
 “sequences which would flow from the establishment
 “of such a power would be of the most serious and
 “pernicious kind; rendering abortive the first and
 “great privilege of freemen, the privilege of making
 “their own laws by their Representatives. For if
 “the power of abrogating or altering them may be
 “assumed by our Courts, and be submitted to by the
 “People, then, as far as liberty and the security of
 “property are concerned, they become as useless as
 “other opinions which are not precedents; and
 “from which Judges may vary.

“It is to be observed that the principal Judges
 “are, in most cases, appointed to act within the
 “limits of a certain age or during good behavior.
 “We do not wish to lessen their independency; for,
 “while they are content to move in their proper
 “sphere; while they speak the plain and obvious
 “meaning of the law, and do not presume to alter

“it or to explain it to mean anything or nothing ;
 “while in the duties of their real province, they
 “cannot be too independent ; nor ought they to
 “be liable to a remove but for misbehaviour. But
 “if they are to be invested with a power to over-
 “rule a plain law, though expressed in *general words*,
 “as all general laws are and must be : when they
 “may judge the law unreasonable, because not con-
 “sonant to the Law of Nations or to the opinions
 “of ancient or modern civilians and philosophers,
 “for whom they may have a greater veneration
 “than for the solid statutes and supreme Legislative
 “power of the State : we say, if they are to assume
 “and exercise such a power, the probable conse-
 “quences of their independence will be the most
 “deplorable and wretched dependency of the Peo-
 “ple. That the laws should be no longer absolute,
 “would be in itself a great evil ; but a far more
 “dreadful consequence arises, for that power is not
 “lost in the controversy, but transferred to Judges
 “who are independent of the People.

“These being our apprehensions, we have, in
 “compliance with the request of our fellow-citi-
 “zens, and from a conviction of its propriety,
 “briefly stated to you our ideas on this important
 “affair.

“In a free Government, people should be in-
 “formed of the conduct of their rulers and magif-

“trates. It is a knowledge that is absolutely necessary to the preserving of their freedom.

“Power presents so many charms to mankind, that there are very few indeed, even of the best of men, who have their avarice and ambition so perfectly under the correction of virtue and true wisdom, as not to feel an inclination to surmount the limits assigned them; especially when the additional temptation of ignorance or inattention on the side of the People prompts to it.

“A private and individual case would not justify the measures which we have taken. But we consider the decision in the case of RUTGERS and WADDINGTON as an adjudication which may be drawn into precedent, and eventually affect every citizen of this State. It therefore merits the attention of us all.

“To prevent this mischief, we do not advise our fellow-citizens to measures which are unconstitutional; nor do we mean to use them ourselves. The mode of redress which our excellent Constitution points out, is,

“FIRST: By an appeal to the Supreme Court, where this cause will be carried by a Writ of Error. We feel a confidence from the characters of the gentlemen who preside in that Court, that the law will have its operation restored in its plain and obvious meaning. But if we should be disappointed, the cause is of too much consequence

“ to rest here. Its importance will grow with the
 “ difficulties and defeats it may meet with ; for each
 “ of these will make a new discovery of the strength
 “ of its opponents ; each defeat will create a new
 “ triumph over freedom, and give additional cour-
 “ age and importance to her adversaries, and all call
 “ upon us the more earnestly to support that cause,
 “ to defend that ground upon which the standard
 “ of liberty is erected, and which, if ever surren-
 “ dered, we should be prepared to surrender with
 “ it every less and consequent privilege, whereby we
 “ might be allowed better terms, from despotism,
 “ than we should by discovering our wretchedness
 “ and imbecility in a contest which the first defeat
 “ will have rendered vain and hopeless.

“ The next mode pointed out by the Constitution
 “ is an appeal to the Court of Errors, one part of
 “ which the Senate constitutes. Preparatory to such
 “ an event, we exhort you to be cautious in your
 “ future choice of members, that none be elected
 “ but those on whom, from long and certain ex-
 “ perience, you can rely, as men attached to the
 “ liberties of America, and firm friends to our Laws
 “ and Constitution : men who will spurn at any
 “ proposition that has a tendency to curtail the
 “ privileges of the People, and who at the same
 “ time that they protect us against Judicial Tyranny,
 “ have wisdom to see the propriety of supporting
 “ that necessary independency in Courts of Justice,

“ both of the Legislature and People, without which
 “ the fear of dismissal from office on the one hand,
 “ and of personal violence on the other, might steal
 “ into their decisions, and render them interested and
 “ corrupt.

“ Having confined ourselves to Constitutional
 “ measures, and now solemnly declaring our disap-
 “ probation of all others, and having solely for our
 “ object the support of our excellent Constitution
 “ and the absolute and entire operation of our Laws,
 “ we feel a freedom in sounding the alarm to our
 “ fellow-citizens.

“ If that independence and freedom, which we
 “ have obtained at a risk which makes the acqui-
 “ sition little less than miraculous, was worth con-
 “ tending for against a powerful and enraged Mon-
 “ arch, and at the expense of the best blood in
 “ America, surely its preservation is worth contend-
 “ ing for against those, among ourselves, who might
 “ impiously hope to build their greatness upon the
 “ ruins of that fabric which was so dearly estab-
 “ lished.

“ That the principle of the decision in the case of
 “ RUTGERS and WADDINGTON is dangerous to the
 “ freedom of our Government, and that a perse-
 “ verance in that principle would leave our Legislature
 “ nothing but a name, and render their sessions
 “ nothing more than an expensive form of Govern-
 “ ment, the preceding remarks must evidence.

“ Permit us, upon this occasion, earnestly to
 “ entreat you to join us in a watchfulness against
 “ every attempt that may be used, either violently
 “ and suddenly or gently and imperceptibly, to
 “ effect a revolution in the spirit and genius of our
 “ Government; and should there be, amongst us,
 “ characters to whom the simplicity of it is offen-
 “ sive, let our attention and perseverance be such as
 “ to preclude the hopes of a change. For even if
 “ our Government was less excellent than it is, it
 “ would be better for us to be reconciled to a few
 “ inconveniences than, by a hasty and ill-judged
 “ Revolution, to put to the hazard all that we now
 “ enjoy under the present.

“ Frequent changes or even alterations in Gov-
 “ ernment, where the People have so lately come
 “ to the exercise of one, may produce an instability
 “ in them that will be more disagreeable than trifling
 “ inconveniences in the one already established.

“ MELANCTON SMITH,

“ THOMAS TUCKER,

“ PETER RIKER,

“ DANIEL SHAW,

“ JONATHAN LAWRENCE,

“ ADAM GILCHRIST, JUN’R.,

“ ANTHONY RUTGERS,

“ JOHN WILEY,

“ PETER T. CURTENIUS.”

It is evident that an event of so much importance, concerning which so much excitement prevailed among the solid men of the State, would not be allowed to pass unnoticed in other and more authoritative bodies than primary assemblages of the People.

On the twelfth of October, 1784, the Legislature of the State assembled in the City of New York; and on the twenty-seventh of the same month, Mr. HARPER made a motion in the words following, to wit:

“Whereas at a late trial, had before the Mayor’s Court, in the City and County of New-York, in a suit commenced by RUTGERS against WADDINGTON, on the *Act for granting a more effectual relief in cases of certain trespasses*, in the judgment of the said Court, on the said trial, it was declared, that such part of the Act as specially provides that no Defendant or Defendants shall be admitted to plead in justification any military order or command whatsoever for such occupancy in any action brought in pursuance of the Act aforesaid, was incompatible with the Law of Nations; and that the Plaintiff ought not to recover in the suit for such part of the time of occupancy of a messuage as the Defendant occupied under the order of the British Commander-in-chief.”

“*Resolved*, That the adjudication aforesaid, is in

“its tendency, subversive of all law and good order,
 “and leads directly to anarchy and confusion,
 “because if a Court instituted for the benefit and
 “government of a Corporation, may take upon
 “them to dispense with, and act in a direct viola-
 “tion of a plain and known law of the State, all
 “other Courts, either superior or inferior, may do
 “the like; and therewith will end all our dear-
 “bought rights and privileges, and Legislatures
 “become useless.

“*Therefore resolved*, That it be recommended to
 “the Honorable the Council of Appointment, at
 “their next appointments, to appoint such persons
 “to be Mayor and Recorder of the City of New-
 “York, as will govern themselves by the known
 “laws of the land.”*

Debates arose on this motion; and, after some time spent thereon, the House ordered that the further consideration of the subject be postponed.†

In the afternoon session of the House, on Friday, the 29th of the same month, Mr. HARPER called the subject up; and, by a vote of twenty to nineteen, the House sustained the call.

The subject was again debated; and, “after some time spent thereon,” Mr. ADGATE, of Albany, moved that “Mr. SPEAKER ask Mr. RANDALL, a

* *Journal of the Assembly*, Original edition, 22.

† *Ibid.*, 23.

“ member of this House,* in his place, whether in
 “ a late trial had before the Mayor’s Court, held
 “ for the City and County of New-York, in a suit
 “ commenced by RUTGERS against WADDINGTON,
 “ on the Act for granting a more effectual relief in
 “ cases of certain trespasses, it was declared by the
 “ said Court, that the Plaintiff ought not to recover
 “ any damages for the time the Defendant occupied
 “ a messuage under the order of the British Com-
 “ mander-in-chief.”

After a spirited opposition, this motion was re-
 jected by the House, by a vote of twenty to seven-
 teen;† but, on motion of Mr. HARPER, after
 further debate, the Clerk of the Mayor’s Court was
 ordered to appear before the House, on the follow-
 ing Tuesday (*November 2*), with the records of the
 trial.‡

At the designated time, ROBERT BENSON, the
 Clerk of the Court, produced “ the records and
 “ papers in the said cause;” when the House re-
 sumed the consideration of the subject. The Pre-
 amble and Resolutions offered by Mr. HARPER,
 together with the Pleadings and the Judgment in
 the action, were first read for the information of the
 House; when Mr. PURDY, of Westchester County,

* Who had sat on the Bench when the case was argued and decided.

† *Journal of the Assembly*, Original edition, 29.

‡ *Ibid.*, 30.

the author of the Act under which the action was brought against Mr. WADDINGTON, offered a substitute for Mr. HARPER's proposed Preamble, which the House adopted. After further debate, and an ineffectual attempt by the minority to secure another postponement of the subject, the House adopted the amended Preamble and the first Resolution, by a vote of twenty-five to fifteen. The second Resolution offered by Mr. HARPER—requesting the Council of Appointment to appoint a Mayor and Recorder in New-York, who should “govern themselves by the known laws of the land”—was rejected by a vote of nine in favor against thirty-one opposed.*

The Preamble and Resolution thus adopted were in these words :

“Whereas in a late trial had before the Mayor's Court in the City of New-York, in a suit commenced by RUTGERS against WADDINGTON, on the *Act for granting a more effectual relief in cases of certain trespasses*, notwithstanding it is specially provided by the said Act, that no Defendant or Defendants shall be admitted to plead in justification any military order or command whatever of the enemy, for any occupancy, injury, destruction, purchase, or receipt, nor to give the same in

* *Journal of the Assembly*, Original edition, 32-34.

“evidence on the general issue, the said Court did
 “admit of a plea of the Defendant, wherein he did
 “plead that he occupied under the licence and per-
 “mission of the then British Commander-in-chief,
 “for a part of the time of occupancy charged against
 “him; and that therefore the Plaintiff ought not
 “to recover for the time of his so occupying; which
 “plea being admitted by the said Court, Judgment
 “was given accordingly.

“*Resolved*, That the Judgment aforesaid, is, in its
 “tendency, subversive of all law and good order,
 “and leads directly to anarchy and confusion; be-
 “cause if a Court instituted for the benefit and
 “government of a Corporation may take upon
 “them to dispense with and act in direct violation
 “of a plain and known law of the State, all other
 “Courts, either superior or inferior; may do the
 “like; and therewith will end all our dear-bought
 “rights and privileges, and Legislatures become
 “useless.”

It is said,* that Mr. WADDINTON, alarmed at these manifestations, and at the threatened Appeal and Writ of Error, soon after compromised with Mrs. Rutgers; and the entire subject became matter of History, and, soon after, was entirely forgotten by the great body of those who were most interested in the great political principles which had been involved

* DAVIS's *Memoirs of Aaron Burr*, ii, 47.

—even those who had been most active in condemning the action of the Court, appear to have thought no more of the subject.

H. B. D.

Morrisania, N. Y., June, 1866.

ARGUMENTS AND JUDGMENT

O F T H E

M A Y O R ' S C O U R T

O F T H E C I T Y O F

N E W - Y O R K ,

I N A C A U S E

B E T W E E N

E L I Z A B E T H R U T G E R S

A N D

J O S H U A W A D D I N G T O N .

N E W - Y O R K :

P R I N T E D B Y S A M U E L L O U D O N .

M , D C C , L X X X I V .

ADVERTISEMENT.

THE suit between ELIZABETH RUTGERS and JOSHUA WADDINGTON, having from its peculiar circumstances been a subject of much public expectation, it has been judged, that a publication of the principles on which the late determination in the Mayor's Court was founded, might answer some beneficial purposes ; and would at least serve to prevent misapprehension.

In compliance with the wishes and request of several citizens, the arguments and judgment of the Court are now given to the public.

ELIZABETH RUTGERS

A G A I N S T

JOSHUA WADINGTON.

THIS was an action of trespass brought against the Defendant, upon an act of the Legislature of this state, passed the seventeenth of March, one thousand seven hundred and eighty-three, for the occupation of a brew-house and malt-house of the Plaintiff, from the thirteenth day of August, one thousand seven hundred and seventy-eight, until the time of passing the act above-mentioned. The cause came on to be argued upon demurrer, before the Honorable James Duane, Esq. Mayor, Richard Varrick, Esq. Recorder, Benjamin Blagge, William W. Gilbert, William Neilson, Thomas Randal, and Thomas Ivers, Esquires, Aldermen, on Tuesday the twenty-ninth day of June past.

The Counsel for the Plaintiff, were Mr. Lawrence, assisted by the Attorney-General, Mr. Wilcox, and Mr. Troupe. Those for the Defendant
were

were Mr. Hamilton, assisted by Mr. B. Livingston, and Mr. Lewis.

Mr. Lawrence opened the pleadings and arguments on the part of the Plaintiff, and was followed by Mr. Wilcox. Mr. Livingston, Mr. Lewis, and Mr. Hamilton, were next successively heard, in behalf of the Defendant; and were replied to by Mr. Lawrence, Mr. Troupe, and the Attorney-General. The arguments on both sides were elaborate, and the authorities numerous.

The Court took time to advise, until Tuesday the twenty-seventh day of August, and then the Honorable the Mayor proceeded to deliver the judgment of the Court, as follows :

“ IN the case of Elizabeth Rutgers, versus Joshua Waddington, which we gave notice should be determined this day, the Court now proceed to judgment. It is represented to be a controversy of *high importance* ; from the *value* of the property, which in this and other actions depends on the same *principles* ; from involving in it questions, which must affect the *national character* :---Questions whose decision will record the spirit of our Courts to prosperity ! Questions which embrace the whole law of nations !

It were to be wished, that a cause of this magnitude was not to receive its first impression from a Court of such a limited jurisdiction, as that in which we preside ;---from *Magistrates actively* engaged in establishing the police of a disordered city, and in other duties, which cut them off from those studious researches, which great and intricate questions require. If we err in our opinion, it will be a consolation, that it has been intimated, “ to be probable

probable, whatever may be the determination that it will not end here."

The Counsel on both sides, who have managed this cause, and by whose diligence and abilities, so much learning, on an uncommon subject, hath been drawn into view, have spared us much labour.

We cannot but express the pleasure which we have received, in seeing young gentlemen, just called to the bar, from the active and honorable scenes of a military life, already so distinguished as public speakers, so much improved in an arduous science.*

That in a contest, (which we are told) is not considered without *temporary prepossession*, we may express our sentiments with more deliberation and correctness; and that nothing to be offered by us, may be misunderstood or misapplied, we have taken the trouble to preserve our remarks by committing them to paper.†

The action is grounded on a statute of this state, entitled, "an act for granting a more effectual relief "in cases of certain trespasses," passed the seventeenth day of March, one thousand seven hundred and eighty-three; and the declaration charges, 1st. The substance of the act, viz. "That it shall and may be lawful for any person or persons, who are, or were inhabitants of this state, and who, by reason of the invasion of the enemy, left his, her, or their place or places of abode, who have not voluntarily put themselves respectively into the power of the
the

* *Omnes not possunt, ne multi quidem, aut jurisperiti esse, aut disertis*, says Cicero, speaking of the science of the law in his day. The difficulty is since much enhanced by the progress of commerce, and the change of manners in different ages.

† *Omnis abfit in judicando precipitantia, adcoque extemporaneæ sententiæ temeritas cane pejus et angue fugiatur.*

the enemy, since they respectively left their places of abode, his, her, or their heirs, executors, or administrators, to bring an action of trespass against any person or persons, who may have occupied, injured, or destroyed his, her, or their estate, either real or personal, within the power of the enemy.”

2. Complains that the Defendant, on the thirtieth day of August, 1778, with force and arms, &c. occupied one brew-house, and one malt-house of the Plaintiff, situate in the east ward of the city of New-York, and within the jurisdiction of this Court, and his occupation thereof so continued, from the said 13th day of August, in the year 1778, until the 17th day of March, in the year 1783.

3. And also, that he the said Joshua, with force and arms, &c. afterwards, to wit, the same 13th day of August, 1778, and at divers days and times, between the said 13th day of August, 1778, and the 17th day of March, 1783, occupied one other brew-house, and one other malt-house, of her the said Elizabeth, within the city and ward, and within the jurisdiction, &c. et alia enormia, to the great damage, &c. against the peace, &c. And the said Elizabeth avers,----

1st. That there was open war between the king of Great-Britain, his vassals, &c. and the people of the state of New-York aforesaid, on the 10th day of September, 1776, to wit, at the east ward, &c. and within, &c. and that the said open war continued from the said day, until the time of passing the act aforesaid.

2d. That the King of Great-Britain, his vassals, &c. and the enemy mentioned and intended in the said act are one and the same and not different.

3d. That

3d. That she was an inhabitant of the state of New-York, and that the place of her abode was the city of New-York, in the state of New-York, on the tenth day of September, in the year last aforesaid, to wit, in the east ward, &c. and within the jurisdiction, &c.

4th. That by reason of the invasion of the enemy, she the said Elizabeth afterwards, to wit, the said tenth day of September, in the year aforesaid, left her said place of abode, to wit, in the ward aforesaid and within &c.

5th. That she did not, at any time after she left her said place of abode, as aforesaid, voluntarily put herself within the power of the enemy aforesaid.

6th. That the brew-house and malt-house aforesaid, were parcel of the real estate of the said Elizabeth, and at the days and times they were occupied by the said Joshua were in the power of the enemy, to wit, at the east ward, &c, and within &c.

Wherefore the said Elizabeth saith she is made worse, and hath sustained damage to eight thousand Pounds et inde, &c.

The Defendant to this charge, as to the force and arms and whatsoever is against the peace, and as to the whole of the trespass aforesaid, except as to the occupying the said brew-house and malt-house of the said Elizabeth, on the twenty-eighth day of September 1778, and continuing the occupation thereof until the seventeenth day of March 1783, he pleads not guilty and takes issue.

And as to the occupying the brew-house and malt-house, on the aforesaid twenty-eighth day of September, 1778, and continuing the occupation thereof until the last day of April 1780 inclusively, the said Defendant saith, that the said Elizabeth actionem non,

non, quia dicet, that long before the said twenty-seventh day of September 1778, to wit, on the fourth day of July 1776, in (substance) the declaration of independence by Congress, who did then and there declare, that the United Colonies were, and of right ought to be free and independent states; that they were absolved from all allegiance to the British crown, and that all political connection between them and the state of Great-Britain was, and ought to be totally dissolved, &c. That the said declaration was on the ninth of July, in the year aforesaid, approved of by the Convention of the state of New-York: And afterwards, on the 8th day of May 1777, the same was recognized and confirmed by the Legislature of this state.

That upon the 10th day of September 1776, and from that time until after the last day of April 1783, there being open war between &c. the army of the said king, on the 10th day of September, 1776, conquered the city of New-York, and continued in uninterrupted possession thereof, from that time until and after the last day of April 1778; and the said army so being in possession, the said brew-house and malt-house, by virtue of authority from the Commander in Chief of the said army, on the 10th day of June 1778, was taken possession of by the Commissary-General of the said army, for the use of the said army---as by the laws, &c. of nations in time of war he lawfully might do---and that the said Commissary on &c. at &c. gave his licence and permission to Benjamin Waddington and Evelyn Pierrepont, residing in the said city as British merchants, under the protection of the said British army, and having been from their birth and still being subjects of the King of Great-Britain, to enter into,

use and occupy the said malt-house and brew-house, from the said 28th day of September 1778 inclusively, to the last day of April 1780 inclusively: By virtue whereof they entered and occupied the premises, from the first of the two last mentioned days to the last inclusively; and the Defendant as their servant and at their command, from time to time, and at divers times from the first to the last of those days, entered into and occupied the said brew-house and malt-house, for the benefit of the said Benjamin and Evelyn: Quæ est eadem &c. whereof the Plaintiff complains, in the first count of her declaration.

And as to the occupying the said brew-house and malt-house, from the last day of April, 1780, to the 17th of March, 1783, he pleads over again the declaration of independence of these states; the approbation thereof by the Convention of the state; and the recognition and confirmation thereof by the Convention; the conquest of the city of New-York by the British: And that the brew-house and malt-house, being out of the possession of the Plaintiff, the Commander in Chief of the said army, on the last day of April, 1780, gave his license and permission (as by the laws of nations he might lawfully do) to the said Benjamin and Evelyn (describing them as in the other plea) to enter into and occupy the said brew-house and malt-house, from the last day of April, 1780, until the said license and permission should be revoked; paying therefore to such person as the Commander in Chief should authorize to receive the same, at the rate of one hundred and fifty pounds for each year, in quarterly payments, &c.

He then avers that they accordingly entered and occupied the said brew-house and malt-house, on the

1st day of May, 1780, and continued the occupation thereof until the 17th day of March, 1783, till when the said license remained in force; and then avers as before, that he as their servant, and at their command, from time to time and at divers times, between the two last mentioned days, did enter and occupy the said brew-house and malt-house, &c. quæ est eadem &c. concluding with an averment, that the said Benjamin and Evelyn did pay the said one hundred and fifty pounds a year to John Smith, appointed by the said Commander in Chief to receive the same.

For further plea to the whole of the trespasss, according to the form of the statute, the Defendant saith, that the Plaintiff actionem non &c. Because he saith, that after the passing the act of the Legislature of this state, in the declaration mentioned, to wit, on the 3d day of September, 1783, at &c. a certain definitive treaty of peace, between the king of Great-Britain and his subjects, and the United States and the subjects and citizens thereof and of each of them, was entered into, made and concluded by plenipotentiaries on the part of the said king and states respectively (naming them) in virtue of full powers &c. which definitive treaty, on the 14th day of January, 1784, at Annapolis, &c. by the United States of America in Congress, then and there assembled in due form, was ratified and confirmed; and afterwards on the same day, announced and published by proclamation under the seal of the United States, to all the good citizens of the said United States; enjoining all magistracies, legislatures, &c. to carry into effect the said definitive treaty &c. prout &c. In virtue of which said definitive treaty,
all

all right, claim, &c. which either of the said contracting parties, and the subjects and citizens of either of them might otherwise have had to any compensation, recompence, retribution, or indemnity whatsoever, for or by reason of any injury, or damage, whether to the public or individuals, which either of the said contracting parties, and the subjects and citizens of either might have done or caused to be done to the other, in consequence of, or in any wise relating to the war between them, from the time of the commencement to the determination thereof, were mutually and reciprocally, virtually and effectually, relinquished, renounced and released to each other &c. -- And he avers, as in his other plea, that from the time of his birth, and at all times since, he hath been and still is a subject of the king of Great-Britain: And between the times in his plea mentioned, as a subject of the said king, resided in the city of New-York, using the art, trade, &c. of a merchant, under the protection of the army of the said king, then waging war against the said state; *et hoc paratus est verificari*: Wherefore he prays judgment whether the said Plaintiff, her action against him ought to have or maintain; with this, that the said Joshua will verify that the whole of the trespasses by him supposed to be committed, is for certain acts &c. by him supposed to have been done while he was residing as a subject of the said king, and under the protection of the army of the said king, and in relation *to the war* aforesaid.

The Plaintiff replies as to the plea of the Defendant, as to the residue of the trespasses, by him done as aforesaid, by him above pleaded in bar, that she by reason thereof ought not to be barred from

from her said action; because she says, that by the act &c. for granting a more effectual relief in cases of certain trespasses, in her declaration in part recited, it is also among other things enacted, that no Defendant or Defendants, shall be admitted to plead in justification any military order, or command whatsoever of the enemy, for such occupancy: And avers, that the said Commissary-General and Commander in Chief were, at the time of giving the permission or license, subjects to the said king of Great-Britain, the enemy mentioned and intended by the act aforesaid, and in the military service of the said king: Wherefore seeing that the said Joshua hath acknowledged the trespass by him done as aforesaid, the said Elizabeth prays judgment and her damages, &c.

And as to the further plea of the said Joshua, to the whole of the trespass aforesaid by him pleaded in bar, the Plaintiff demurs.

And the Defendant on his part demurs to the plea of the Plaintiff last above pleaded.

The pleadings close with joinders in demurrer, in the usual forms.

From these pleadings, and the arguments which they have produced, three questions are presented for our consideration.----

Ist. Whether the Plaintiff's case is within the letter and intent of the statute on which this action is grounded?

IIdly. Whether the laws of nations give the captors, and Defendant under them, rights which controul the operation of the statute and bar the present suit?

IIIdly. Whether there is such an amnesty included or implied in the definitive treaty of peace, as virtually or effectually relinquishes or releases the Plaintiff's demand under the said statute?

Under

Under one or other of these heads, all the reasons and authorities which have been offered on both sides, may be properly applied:

I. Then we are to enquire, whether the Plaintiff's case is within the letter and intent of the statute, on which this action is grounded.

From the concessions which arise out of the pleadings, we find, that according to the letter of the statute, she was an inhabitant of this city, who by reason of the invasion of the enemy, left her place of abode; and that she hath not since voluntarily put herself into the power of the enemy; that the brew-house and malt-house in question, were part of her real estate; "that they were occupied by the Defendant as charged in the declaration, and at the time of such occupancy, were in the power of the enemy:" and nothing more is required to make Mrs. Rutgers a compleat Plaintiff, within the statute.

Instead of contesting this point, the Defendant's counsel endeavour to shew, that according to the intention of the Legislature, the statute cannot comprehend the Defendant. For this purpose, they strongly rely on his being a British subject, residing in this city as a merchant, under the protection of the British army, when the cause of action accrued.

Without embarrassing the question *at present* with the privileges claimed for the Defendant, either from the temporary *conquest* of the city, or the *definitive treaty*,---which will hereafter meet with due attention---it seems proper to consider simply, whether from the nature of the provision, and the circumstances of the Defendant, he was *intended* to be included in the statute, for if it doth not extend to
him

him there is an end of the suit---if it doth extend, there will be a fair opening to examine---whether the temporary conquest, or the treaty of peace, operate as an extinguishment, or release of the cause of action? And here it will be proper to enquire into the *occasion* and *nature* of the statute---the *remedy* it provides---and the *rules* by which it ought to be construed.

The statute was made at the eve of a war, when peace, and an evacuation of the southern district, were like to take place. The object of it, as the title expresses, was for granting a more effectual relief in cases of certain trespasses. The persons who are to be redressed are the exiles, who were compelled to retire from their estates, on the invasion of the southern district: The persons to be prosecuted, were those who had occupied, injured, or destroyed, the real or personal estates of those exiles, within the power of the enemy: and it is provided, that every Defendant who had occupied, injured or destroyed the property, shall be held to bail; and that no Defendant shall be admitted to plead in justification, any military order, or command of the enemy for such occupation, &c.

This then is clearly a *remedial law*. Great pains have been taken on both sides, to enforce the *rules* by which it ought to be expounded.

The counsel for the Defendant urge, that a sound legal discretion ought to be used in recurring to first principles; so as to make law a rule of right, and not a net to entangle justice. That *Ratio est anima legis: et qui hæret in litera hæret in cortice*; they point

Show, 405 to 10 mod. 20. out how far the common law is to be consulted, in the construction of statutes.---

Bacon, p. 648, 4 co. 71 a. That statutes against law and reason are void.---

Vin. Stat. 512. 4 co. p. 13.

1 Domat. p. 782 That many things are within the letter, which are not within the equity of a statute.---

Puff. b. 5 c. 12 p. 6.

Plow. 466, 7. That no statute can be construed so as to be inconvenient, or against reason.---

Bac. Stat. 649, to 651.

They exemplify these rules by a number of particular cases, to which if time does not fail us, proper attention shall be paid in another place.

They add, that this being an act of a *mere private nature*, may be the more easily *controuled*.

On the other hand it is urged,---That when a statute gives a remedy for a wrong, it is to be construed according to equity.---

Wood 10. That it ought to be construed in suppression of the mischief, and in advancement of the remedy.---

Wood 9 mod. 161. That it ought to be interpreted reasonably, and according to the meaning of the Legislature.---

Wood 10. That what is in the same mischief is in the same remedy, tho' out of the letter.---

8 mod. 65. That even in the construction of a penal statute the *intention* is to be regarded.---

Hob. 97. That a court ought so to construe a statute as not to suffer it to be eluded.---

In one point, both parties agree, that the advice of Plowden is most worthy of attention. “ In order, “ says he, to form a right judgment whether a case “ be within the equity of a statute, it is a good “ way to suppose the law maker present, and that “ you asked him the question---did you intend to “ comprehend this case? Then you must give your- “ self such answer as you imagine, he *being an upright “ and reasonable man*, would have given. If this be, “ that he did mean to comprehend it, you may safe- “ ly hold the case to be within the equity of the sta- “ tute; for while you do no more than he would “ have done, you do not act contrary to but in con- “ formity with the statute.”

The result of all these rules is obviously this--- that *remedial laws* are so to be expounded as to have their *full force*---in *advancement* of the *remedy*---upon an equitable interpretation---according to the *intention* of the Legislature---to be sought after by a *sound, legal discretion*.

Under the impression of these maxims, it is asked whether the law *intended* to *exempt*, or to *include* a person under the circumstances or description of the Defendant.

Here then is a British merchant, who merely for the purpose of commerce resided in the city, while it was in the power of the British, for his own private accomodation: He was permitted by the *Commissary-General*, and afterwards by the Commander in Chief, to enjoy the Plaintiff's property for near six years: He has paid as a rent, one hundred and fifty pounds a year, for three years only of the term, to the order of the British Commander in Chief. He remains in the city, pursuing his business as a merchant, altho' those

those under whose protection he exercised his function, are long since withdrawn.

The temporary conquest and the definitive treaty out of the question, what can exempt him from the description of the statute? Can any or all the maxims laid down by his counsel for its construction? Before assent is yielded to such a proposition, let us take a nearer view of his case as connected with his principals under whom he justifies.

If they did not come to this country to join the military in its oppression, and to enrich themselves by its spoils---a suspicion too dishonorable to be entertained! If they resided here under the protection of the British army, to pursue their *private* affairs as merchants--as their pleas avow, and we are bound to believe.---If for their *private* purposes, without relation to or connection with the war, they occupied the Plaintiff's tenements, confessedly for a considerable part of the time without any consideration at all? why it is repeated should they be exempted from this statute?

How, as applied to them personally and independent of national considerations, can it be hard or contrary to reason or justice, that they should be compelled to pay an adequate rent for the accommodations which they have enjoyed? why should they even wish to be exempted at the expence of a widow, driven into exile by the dread of a *siege*, or the expectation of a *storm*? would not this be unreasonable, unjust? If, according to the advice of Plowden, we were to suppose ourselves conversing with the members of the Legislature; that the Defendant's case was fairly stated, as it in fact existed, at the moment of passing the statute; and that they

had been asked whether they meant to comprehend such a case, what would probably be their answer? there is no doubt in our minds but it would be in the *affirmative*. The spirit import general terms of the statute; its design and the circumstances which gave it birth, seem fully to justify this conclusion.

Besides that Legislature knew too well the practice of war, to suppose that the *Commissary-General* of a British army had competent authority to grant the license or permission in question: From the nature of his office the contrary would be presumed, especially when the pleas themselves aver expressly, “ that the said brew-house and malt-house, by *virtue* “ *of authority from the Commander in Chief* of the said “ army, were taken possession of by the said Com- “ *missary-General for the use of the said army.*” The license then from the Commissary to occupy those tenements for the private purposes of the Defendant’s employers was repugnant to the orders of his Commander in Chief; an encroachment on other departments, for which there was no colour of right; and it is consequently to be considered as a mere nullity. This had the facts been fully represented, the Legislature could not but have observed: To give it now its proper weight will be the duty of the court.

As a circumstance of much moment to the Defendant it is contended, that the *obtaining and the occupancy* of the tenements in question, related to the war.

In arguments, which display great skill, and an uncommon degree of zeal and industry, this interesting point is slightly touched.

The *relationship to the war* results from the capture of the city, say the gentlemen, by which the right to the use of the lands vested in the *conqueror*: His
authority

authority to the Defendant to use it continues the relation, and by way of illustration this case is stated ---“a prize ship is condemned and sold---the purchaser is a merchant: tho’ this is a *private speculation* on his part, yet the damage done was in relation to the war, and the sale and purchase good.”

But this is a remote argument indeed. The merchant here had no other agency than to purchase a prize lawfully condemned, in which, by the law of nations, the original owner no longer had any interest, the property being absolutely and effectually changed. Can it then be said with the least appearance of reason, that this purchase was an act which bore a relation to the war? it is true the original capture and the damage sustained by it were consequences of the war; but these circumstances could produce no relationship between the act done by the merchant---The purchase, which is the true point---and the war.

Let us suppose a case; a statute passes to criminate every man within the power of the enemy, who had voluntarily done any act on the side of the enemy, in relation to the war; could this Defendant on the facts stated in the pleadings, have been convicted? Take up that part of the case, which would have been most unfavourable to him---his contract with the British commander: He hired the tenements from him; but it was for the purpose of his own *private commerce*: The rent which he paid contributed to strengthen the hands of the enemy; but they had a right to raise contributions; they had a force to collect them, which could not be resisted. Here then is no evidence of hostility or enmity, of a concern in or relation to the war. The most zealous of our friends, within their power, could have been compelled to be related to the war in this way: They must either submit

submit to be accommodated on the terms of the conqueror, or to perish in the streets. Under the prosecution then which we have supposed, the Defendant must have been acquitted.

We must not be amused by high sounding words ---too much is attempted---if a construction of the license from the British commander to occupy the tenements for the three last years of the term, had depended *abstractedly* on the voice of reason, we must have found it difficult to conceive how even such a license bore a *relation to the war*.

Here however, other considerations, which it will be premature to explain in this place, must have their weight.

But when it is insisted that the remainder of the term for which the tenements were held under the bare unauthoritative permission of the Commissary-General, had *any relation to the war*, it is altogether without foundation.

We proceed now to the second general head, in which it is proposed :

Idly. To enquire---whether the law of nations gives the captors, and the Defendant under them, *rights* which *controul* the operation of the statute, and *bar* the present suit?

To maintain those rights and that controul, the Defendant's counsel have entered into a large display of the law of nations, its principles, divisions, obligations and effects, and have pointed out the sacredness of its authority, and the temerity and dishonour, in a national view, of countenancing any act repugnant to it.

On the other hand, one of the Plaintiff's counsel from a view of the contradictory opinions, which
were

were read, seemed to think that this law afforded no rule of right, and ought to have no influence on the government of a people.

The truth is, that the law of nations is a noble and most important institution: The rights of sovereigns, and the happiness of the human race, are promoted by its maxims and concerned for its vindication.

We hitherto have not been so loudly called upon to form and inculcate an extensive knowledge of this interesting science; but now since we are placed in a new situation, as one of the nations of the earth, it is become an indispensable obligation. We profess to revere the rights of human nature; at every hazard and expence we have vindicated, and successfully established them in our land! and we cannot but reverence a law which is their chief guardian---a law which inculcates as a first principle---that the *amiable precepts of the law of nature, are as obligatory on nations in their mutual intercourse, as they are on individuals in their conduct towards each other; and that every nation is bound to contribute all in its power to the happiness and perfection of others! What more eminently distinguishes the refined and polished nations of Europe, from the piratical states of Barbary, than a *respect* or a *contempt* for

* Principles of the Law of Nature, referred to.—That man was made for *society*—that society is absolutely necessary for *man*—that the *public good* ought always to be the supreme rule—that the spirit of *sociability* ought to be *universal*—that we ought to have the same disposition towards other men, as we desire they should have towards us—that we should behave in the same manner towards other men, as we would be willing they should behave towards us in the like circumstances—that we should preserve a benevolence even towards our *enemies*—that although the *exercise* of benevolence towards our enemies may from necessity be *suspended*, yet we are not allowed to *stifle* its principle; that revenge introducing, instead of benevolence, a sentiment of hatred and animosity is condemned; because such a sentiment is vicious in itself, and contrary to the public good.

for this law. Books therefore which treat of the law of nations have always been received with avidity and applause.

The principal authorities adduced in this cause, are from Grotius, Puffendorff, Wolfius, Burlamaqui and Vattel.

Grotius,* in his book *de jure belli et pacis*, professes to treat of but a small part of the law of nations--- marriage---the power of fathers---masters--and sovereigns--promises--contracts--oaths--treaties--ambassadors--burials--punishments--peace and war.

Commentators have observed, that tho' this celebrated work contains many excellent precepts, it is neither methodical nor comprehensive.

Puffendorff next composed his treatise, *de jure naturæ et gentium*, in which we find more order, and great erudition: But it has been observed, that this work is not free from error, and that the author has not shewn how the civil does not destroy *natural* society; and that the *latter* only serves to perfect the *former*.

We are informed, that to illustrate this was attempted by *Wolfius*;‡ and after him by *Burlamaqui*.|| This last work, says a writer, is evidently rather an *introduction* than a *system*; and it served only to excite a desire to see it continued with equal perspicuity and elegance. The honor of this task was reserved for the great Vattel, whose work is entitled to the highest admiration! He modestly takes *Wolfius* for his guide; but in numberless passages corrects, abridges and improves him. What *Wolfius* has diffused into fourteen volumes, our author has contracted into one; at the same time that his reasonings

* A professor of the law at Groningen. † The great Saxon philosopher, || Professor of civil and natural law at Geneva.

sonings are clear and satisfactory, and carry nothing of the dryness of an abridgment.

Thus we see, that the writers on the law of nations are distinguished philosophers, of different countries and ages; some educated in *republics*; some in *monarchies*; some at a time when *prejudice*, and an ignorance of the rights of mankind prevailed; and others when *philosophy* had refined the reason, and in some measure subdued the fiercer passions of the human mind.

Hence it can be no more an objection or reproach to the law of nations, than it is to any other science (for all partake of imperfection)---that a difference of sentiments and opinions should be discovered among different authors!---A further use intended by these observations, is to justify the preference, which we shall give to Mr. Vattel, in points where we shall find him at variance with other writers.

But to return from this digression, to the arguments before us: It has been objected by one of the Plaintiff's counsel, that these states are not bound by the *customary and voluntary law of nations*, any further than as either of them, has adopted or engrafted them.

But the objection has been fully answered: By our excellent constitution, the common law is declared to be part of the law of the land; and the *jus gentium* is a branch of the common law. *In re publica maxime conservandi sunt jura belli*, is an ancient adage.

Co L. p. 11, b.
Black. 4, p. 67,
Burr. 3 vol. p.

The authorities cited on this point for the Defendant are full and conclusive.

14 30.

Indeed if we should not recognise the law of nations,

tions, neither ought the benefit of that law to be extended to us : and it would follow that our *commerce*, and our *persons*, in foreign parts, would be unprotected by the great functions, which it has enjoined.---

After being thus explicit, it is almost unnecessary to touch a more limited question, of the same nature, which has been debated in the course of the arguments, viz.

Whether the common laws of war which apply to *two great nations*, apply to *two great parts* of the same nation ?

The manner in which Mr. Vattel treats this question, is highly satisfactory ; and humanity forbids, that his principles should be ever called in question !

When a nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is *dissolved* ; and the war betwixt the *two parties*, in every respect, is the same with that of a public war, *between two different nations*. Independent of each other, they can have no *judge* ; like two different nations, they appeal to the *ultima ratio regum*---they decide the quarrel by arms---were it not for the restraints imposed by the law of nations, such a civil war would be beyond expression cruel and destructive. Hasty punishments, in the moment of rage and animosity, would mark its progress with injustice, slaughter and desolation.

But alas ! have the restraints of that benevolent law protected our country in the late war, from the miseries we have described ? They have not !---Vengeance unrestrained, and undistinguished, hath been let loose upon us in all her horrors !

But

But it is peace !---Let our injuries and our resentments be buried forever in the definitive treaty !---

What *we* have suffered cannot alter the common laws of war : they are founded upon reason and humanity, and will prevail as long as reason and humanity are cultivated. As philosophy and the love of mankind extend themselves, these beneficial institutions will, we trust, be still further improved, to controul the human passions, and mitigate the asperities of war ; till in the end hostilities shall be banished from the world, as disgraceful to our nature.* But to return to the point.

The words which follow, are the decision of Vattel, speaking of the case before us---“ The obligation” says he, “ of observing the common laws of war, is therefore *absolute indispensable* to both parties ; and the same which the law of nature *obliges all nations* to observe between state and state.”

And here it is questioned, whether since the law of nations is obligatory, it may in any part be altered by a particular society, so as to deprive a foreigner, when residing in that country, of his appeal to them ?

The Defendant’s counsel deny, that in *theory*, a particular state hath such a right. They raise this distinction, that where there is merely an infringement of the *local law*, foreigners like all others, must

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* The ancients it is remarked, were impressed with but a very faint idea of the law of nations. Some are of opinion, that it had its origin in the reign of Charlemagne, about the middle of the eighth century, before which time the nations of Europe, but little civilized, observed few treaties : Others fix it at a much later period, affirming that all knowledge of the science before the reign of Maximilian 1st. (about the beginning of the sixteenth century) is rather matter of curiosity than instruction. However since this last period, its progress hath been gradual, and its influence more and more extensive.

be judged by that law: But where the transaction originally affects a man's conduct, as *a member of a foreign nation*, he may appeal to the law of nations, and by that law, which is part of the law of the land, the thing must be decided.

And they consider the fœderal compact as giving additional force to this restraint---

In support of this reasoning, a passage from the Elem. Jurisp. elements of jurisprudence, is cited to page 62. this effect:

“States like the individuals who compose them, are moral persons, they have a public will and understanding, are capable of natural and acquired rights, and susceptible of respective obligations. The *primary law* of nations therefore is no other than the *law of nature*, so far as it is applicable to them. Whatever, in this behalf, reason dictates is a duty of natural justice, from the necessary law of nations.”

Thus far we could agree with the professor, that no state can by its separate ordinance, prejudice any part of such a law---nay, that all the states of the world united could not; because being of moral obligation, it is immutable. But when this doctrine is applied in general to all customs, which prevail *by tacit consent* as part of the law of nations; we do not find that he is warranted by authorities.

Hook. ec. pol. Hooker's ec. pol. not being at hand,
b. 1. g. 10. we have not examined him.

But Vattel treating of the *necessary law of nations*--which Grotius calls the *internal law of nations*, and several others the *natural law of nations*, uses these strong expressions.

“Since then the *necessary law of nations* consists in the application of the law of nature to states, and is
immutable

immutable, as being founded on the *nature of things*,-- and in particular on the nature of man : It follows, that the necessary law of nations is immutable, and whence, says he, as this law is immutable, the obligations that arise from it *necessary and indispensable*, nations can neither make any change in it, by their *conventions*, dispense with it *themselves*, nor *reciprocally* with respect to each other.

The restraint then of which the lecturer speaks is not perhaps so general, as he teaches ; for according to Mr. Vattel, it seems only to be applicable to Vattel, p. 2 3. *laws of moral obligation*.

Now we know, that there are usages of nations which are indifferent, and which, as Mr. Vattel observes, different states may agree to establish by treaty, or introduce by custom, at their pleasure.

With respect to such usages, it might perhaps have been considered that every nation by the law of nature, is free and independent of all foreign and external controul ; but if one nation must be subjected, at all events, to usages which she cannot approve, because others may have thought fit to adopt them, her liberty would no longer remain entire.

The usages of ransoming captures at sea, seems to have been dictated by a spirit of benevolence ; it favoured personal liberty ; it afforded some alleviations to the misfortune of the captive merchant and mariner, who, unconnected with the war, were interrupted in the pursuit of their private concerns ; it was an usage which, we believe, every polished nation adopted : Nevertheless, when Great-Britain conceived, that this usage did not correspond with her interest, her Parliament did not hesitate to abrogate it ; for by a statute passed so lately as 1782, it is made unlawful for any British subject to ransom his ship or effects when captured, “and all contracts

and agreements which shall be entered into, and all bills and other securities which shall be given to any person or persons, shall be absolutely void.”

It cannot be said, that this is a law operating only on the subjects of the British state. All commercial nations appear to be interested in the usage; it was a benefit to the *captor* as well as the *captive*; nor is any provision made for ransom bills, which might have taken effect before the law could be promulgated to the different parts of the world.

Doug. Kep.
P. 169.

This circumstance proves, at least, that the British nation did not consider itself bound by the broad principles laid down by the lecturer.

Time will not permit us to give this subject a fuller discussion.

We must acknowledge there appears to us very great force in the observation arising from the fœderal compact. By this compact these states are bound together as one great independent nation; and with respect to their common and national affairs, exercise a joint sovereignty, whose will can only be manifested by the acts of their delegates in Congress assembled. As a nation they must be governed by one common law of nations; for on any other principles how can they act with regard to foreign powers; and how shall foreign powers act towards them? It seems evident that *abroad* they can only be known in their fœderal capacity. What then must be the effect? What the confusion? if each separate state should arrogate to itself a right of changing at pleasure those laws, which are received as a rule of conduct, by the common consent of the greatest part of the civilized world.

We shall deduce only one inference from what hath

hath been here observed---that to abrogate or alter any one of the known laws or usages of nations, by the authority of a single state, must be contrary to the very nature of the confederacy, and the evident intention of the articles, by which it is established, as well as dangerous to the union itself.

We are next led by the arguments which have been offered, to examine---whether the *war* was of such a *nature*; and the capture such a *conquest* as absolutely to transfer, under the idea of an usufruct, the rents and issues of houses and lands to the British Commander, during his occupancy of the city?

On the part of the Plaintiff it is insisted, that the war which was waged against us by Great-Britain was *unjust*. As a matter of fact this cannot be denied---the honour of every American is concerned in its establishment. Every patriot knows and feels it. Upon account of the injustice of the war, he renounced his allegiance and committed his fortune and his life to uncertain hazard. Upon account of the injustice of the war, Lord Chatham exclaimed in the British House of Peers that he rejoiced America had resisted.---Against the injustice of the war Lord Camden and his compeers protested; and the great cities of England itself remonstrated: And finally, on account of the injustice of the war, even the British House of Commons, in spite of the influence of the court, resolved against its further prosecution.---And it is not too presumptuous to think that upon account of its injustice, all the astonishing efforts to subdue our country were blasted by the hand of Heaven!

Loft's Rep. 79.

2 Vatt. 77.

Grot. 698.

§ 11. n. 9.

Upon this ground then the Plaintiff's counsel enforce her demand; by an *unjust* war, they affirm, the *unjust* party acquires

quires no right ; all the acts of that party, however otherwise allowable, imbibing the taint of the first injustice.

¹ Ruth. 33. That it is a maxim of the law of nations, that no right can be derived from an injury.

Cro. El. 540. That this principle is consonant to the mo. 461.

Bull. 92. common law ; for that wherever there has been a disseizen, and a recovery is had against the disseizer, or even an innocent purchaser, the disseizee shall recover the mesne profits ; the first act being tortious no subsequent act could be otherwise.

³ Vat. 72. They subjoin another proposition, "that

[§] 183, 187. by the law of nations the rights of war

³ Gro. 167 8. are only appropriated to war of the *solemn kind* ;" and insist that the annunciation of hostilities in the late war, was not

[§] 3—4. attended with the solemnities which the law of nations requires.

² Ruth. 678. To these observations and authorities the Defendant's counsel reply---

² Vatt. 10. That the obligation to make restitution of that which is acquired in an *unjust war*, rests *in foro conscientia*, and is not

[§] 26 28. external---that in the language of the law of nations every solemn war is a just war.^a---That the late war

b. ² Ruth. 508. was a solemn war : And that no consequence can be drawn from the injustice^b

^{510. 564. 579.} of the quarrel on the part of Great-Britain---that the opinion of the antient

² Hutch. 357. Doctors, that the rights of war are only appropriated to war of the solemn kind, is exploded by some of the most respectable modern authors, who attribute the same effects to all public wars :

¹ H. P. C. 163 4. But that the war between us and Great-Britain was the most solemn that modern times have exhibited.

² Burl. P. 263. This

Cunn. Policies of Insuranc, 276.

This

This they infer from the act of the British Parliament putting us out of the protection of the law; and the declaration of the independence of the United States, which goes on the idea of an open war: and with respect to the formalities in the annunciation of war they show that they are arbitrary.

Burl. 271.
 § 21.

Without entering into a minute examination of the reasons and authorities, by which the parties have attempted to maintain opinions so opposite to each other; we shall consider the subject in a more enlarged view.

It is a maxim founded in reason and humanity, that the restoration of peace, whatever may be the cause of a war, ought always to be in contemplation. Every impediment then, which might retard this blessing, ought to be discountenanced---every facility which could promote it, encouraged; in proportion as the refinements of civilization enlightened mankind, it was to be expected that the law of nations, fostered and cherished by philosophers, should become more benevolent, and more suitable to the dignity and happiness of man. Hence the doctrine, that the solemnity and justice of a war were essential in ascertaining the rights acquired as the effects of war, came to be exploded; because experience had fully proved, that it was productive of mischief. The shedding of human blood, and the ruin of families and countries could be but poorly compensated by the most humiliating concessions; while such is the influence of pride and ambition, that two nations, equally convinced that it is their duty and their interest to embrace an accommodation, often suffer the calamities of war to rage only
 from

from the fear of being degraded, by making the first advances towards peace. They wait for some splendid victory, which may never happen, to have an opportunity of manifesting their superiority, and of opposing what is necessary to their affairs, as an act of *generosity*.

If then every treaty of peace was to be determined only by the precise rules of justice: If it must necessarily be acknowledged on one side, that the cause of the war was, on their part, unjust, or hostilities were commenced by them without those previous solemnities which have once been deemed essential; where is the nation which would confess their wantonness or injustice? or where the tribunal to whose arbitration they would submit their honour? It is therefore for the happiness of mankind; founded, in a manner, in necessity, that in a treaty of peace neither party should be condemned for, or be bound to acknowledge, precipitancy, or the want of solemnity, in certain formalities in the commencement of the war; and much less the injustice of their cause; and that the odium of all the blood which had been shed, was imputable to them. This would be to subscribe to an indelible disgrace, to which a sovereign power very seldom would consent, and never but in the last extremity. If then it is plain, that no acknowledgment of such a nature can be stipulated in a treaty, and there is no tribunal to judge between sovereign powers, all enquiry into the justice or solemnity of a war must cease, and those facts be incapable of serving the basis of a precept-- in short, that they can be no otherwise material, than *in foro conscientiae*.---These observations are justified by the authority of Mr. Vattel; they are corroborated
by

by the usage of nations; and in the particular question before us, govern our decision.---We conclude therefore, that if there had been a want of solemnity, or the usual formalities in the commencement of the war---which we do not think is the case---and altho' as a *matter of fact* this war, both in its principle and progress, hath been marked with unparalleled injustice and violence; none of these circumstances are of any avail in the present case.

The next point which has been raised, is, Whether the capture and occupancy of the city of New-York, is such a conquest as vested the British Commander with the disposal of the rents and profits of real property?

To maintain the negative of this question, the Plaintiff's counsel have recourse to the doctrine of Postliminium---which is that right, by virtue whereof, persons and things are restored to their former state; when coming again under the power of the nation to which they belong.

Vatt. 85. 112. They cite opinions, that the acquisition of a town taken in war is not complete till confirmed by a treaty of peace, or submission, till then there are hopes of recovery.

Gro. 616. That acquisitions of war are only of force against neutral persons; to give the conqueror a right, it must be by peace, otherwise the right is supposed to continue in the old proprietor.

What I have observed, says Grotius, of lands, takes place also in my opinion in regard to all rights annexed to those lands. *Upon this principle it must be said, that the profits of the land recovered are to be restored;* and he refers to a formal decision of the civilian Paulus, in the point.

They add, that no usurpation putteth the party out of possession.

On the other hand the Defendant's counsel argue:

That the Romans and other nations of antiquity, used upon any conquest to make an immediate distribution even of the lands among themselves: But that the refinements of more civilized ages have softened the rigour of this right, so far as to leave individuals who remain with their property, unmolested, further than in making contribution. But that the personal property of those who fly becomes a booty.

To these general authorities which they quote are added two in point, viz.

“To whom any thing is granted by the articles of peace, to him also are allowed all the profits from the time of the grant: *but not before.*”

Again, “The products restored on a peace are due from the instant fixed for the execution. If there is no fixed time, they are due from the moment of restitution of the things granted, but those which were collected before the conclusion of the peace are not to be delivered up: For the fruits belong to the proprietor of the stock; and here possession is accounted for lawful title.”

The two authorities quoted from Grotius, and on each side of the question, seem at the first view, to be repugnant; but on an attentive examination it will appear otherwise: In the first case he is speaking of profits of *lands to be restored.* He conceives, that
the

the profits of such lands ought to be recovered on account of the antecedent right of soil to which they were annexed.

But in the last case, he speaks of a *new right*, granted by the articles of peace, which had no prior existence, there he says the profits shall be allowed from the time of the grant, *and not before*. That this distinction is just will appear from a view of the whole of the last authority :

To whom any thing is granted by articles of peace, to him are also all the profits allowed from the time of the grant *but not before* ; then follows this passage which explains the sense of the author---“ As Augustus Cæsar well argued against Sextus Pompeius, who having Peleponnesus granted to him, would have also had all the tributes which *were in arrear* for some years past before the time of that grant.”

Thus Grotius is at unity with himself: But it is not in our power to reconcile him to Vattel. These authors differ in their opinions with respect to the restitution after peace, of the fruits collected by a captor during the war. Besides this, which is under consideration, there are several strong passages in Vattel, which corroborate the same doctrine; and it receives additional force from the authority of Burlamaqui and of Barbeyrac in his notes upon Grotius.

We are therefore of opinion, that restitution of the *fruit*, or in other words, the rents and issues of houses and lands, which have been *bona fide*, collected by or under the authority of the British Commander, while he held possession of the city, cannot, *according to the law of nations*, be required.

The usufruct seems to be placed on the footing
of

of any other contribution exacted by a conqueror in the course of a war; and the right of demanding contributions in such case, hath, we believe, never been questioned.---With respect to the products, which might be due on the conclusion of a peace, they must cease to be recoverable by the captor after the restoration of the town, unless the treaty should provide for it by an express stipulation.

But this doctrine in its fullest extent will prove no effectual relief to the Defendant. As we have before observed the rights of the British General as the effect of a temporary conquest, could only be communicated by his *immediate* authority; the agency of the Commissary General in disposing of those rights, was an act of usurpation; and it is not pretended that merely as British merchants and British subjects, either the Defendant or his employers had any claim or interest in the usufruct.

The Defendant therefore, upon the most liberal construction of the law of nations, remains chargeable to the Plaintiff in this action.

We proceed therefore to the third general head, to enquire---

Vatt. B. 4. c. 2.

P. 120 121 § 18 to 21

Grot. B. 3. c. 20.

P. 699 and

Barbeyrac's Note.

Burla. p. 253,

§ 7—1—3.

III Idly, Whether there is such an amnesty included or implied in the definitive treaty of peace, as virtually or effectually relinquishes or releases the Plaintiff's demand?

And here the Defendant's counsel insist, that every treaty of peace implies an amnesty and oblivion of damages and injuries in the war; and rely on the authority of Grotius, Barbeyrac, Barlemaqui and Vattel in support of the proposition.

A treaty of peace can be no more than an agreement

ment. The effect of it is to put an end to the war, and to abolish the subject of it : as it forbids the revival of the same war, by taking up arms for the cause which first enkindled it, it is in reality perpetual.

An amnesty is a *perfect* oblivion of what is past, and the end of peace being to extinguish all subjects of discord, this should be the leading article of the treaty. This accordingly, says Vattel, at present is the constant rule.

But tho' the treaty, he adds, should be wholly silent on this head, the amnesty, by the *very nature of the peace*, is necessarily implied in it.

In another passage, he observes, that the effect of the amnesty, cannot be extended to *things of no relation to the war* concluded by the treaty.

These principles are well established by the law of nations; and they are even admitted by the counsel for the Plaintiff.

But it is objected, on their part, that the occupation of the tenements in question by the Defendant, *had no relation to the war*; and that therefore the amnesty cannot acquit him.

This objection has been fully considered; and we have given an opinion that the term for which the tenements were held by the permission of the Commissary General can, on no construction, *have a relation to the war* :

The amnesty implied in the treaty cannot therefore justify the Defendant; for all the authorities prove, that it can be only extended to *things done in relation to the war*.

The parties have indeed joined their issues upon other points, upon which, if the cause had entirely rested, judgment ought to have been given.

“ But

“ But it is a known rule, that if upon the whole
 “ record, matter in law appear why judgment should
 “ be given against one party, the court must judge
 “ so, for it is the office of the court to judge the law
 “ upon the whole record, and the consent of parties
 “ cannot prejudice their opinions, nor acquit them
 Hob. 56. “ of their office in that point.”

It has been further objected, that Congress could form no treaty of peace to reach our *internal* police.

There is a great distinction between the authority of the treaty; and its operation and effects.

The first we hold to be sacred and shall never, as far as we have power, suffer it to be violated or questioned.

It is the great charter of America---it has formally and forever released us from foreign domination---It has confirmed our sovereignty and independence; and ascertained our extensive limits.

Our union, as has been properly observed, is known and legalized in our constitution; and adopted as a fundamental law in the first act of our legislature. The federal compact hath vested Congress with full and exclusive powers to make peace and war. This treaty they have made and ratified, and rendered its obligation perpetual.

And we are clearly of opinion, that no state in this union can alter or abridge, in a single point, the federal articles or the treaty:

But the operation and effects of the treaty, within our own state, are fit subjects of enquiry and decision: According to its spirit and true meaning we must determine our judgment: Nor shall any man, by any act of ours, be deprived of the benefits which, on a fair and reasonable construction, he ought to derive from it.

On

On this occasion, we say with the sage--*fiat justitia ruat cælum.*

We cannot, it is urged by the Defendant's counsel, impose a sense upon the treaty different from that which it intrinsically bears. "The rules received among nations must interpret treaties."

This is an unnecessary observation: No dispute hath arisen respecting the intrinsic sense of the treaty: The Plaintiff's counsel repeatedly insisted that the article of the treaty which respected an indemnity related to *public offences*---the Defendant's counsel in answer frankly confessed, that though that article was mentioned by *one* of them, it was *not relied on*. That they rested on two things; one, the *right* which the law of *nations* gives the *captors*; the other the *amnesty* included essentially in every treaty, whether expressed or not, agreeably to the current of authorities, and the reason of the thing.

It is then an implied and not an *express* amnesty, on which the Defendant relies; an amnesty which necessarily results from every treaty of peace---And thus, the intrinsic sense of the treaty and the rules for its interpretation are out of the question.

We have in some measure anticipated another question, which was much debated at the hearing---

Whether the courts of justice ought to be governed by the *statute*, where it clearly militated against the law of nations.

Here it is material to observe that the *description of persons*, who are subject to be sued by this statute is *general*; extending to all who had occupied or injured the real or personal estate of the exiles, within the power of the enemy.

The counsel for the Defendant, by stating a number

ber of pointed cases, shewed clearly, from the nature of things, that the statute must admit of exceptions. Mr. Attorney-General, one of the counsel for the Plaintiff, who argued the cause very ably, admitted that many cases may be out of the statute, tho' the Plaintiff's is not of the number.

Thus then, it seems to be agreed, on both sides, that the provision in the statute, being general, cannot extend to all *cases*: and must therefore receive a *reasonable interpretation* according to the *intention*; and not according to the *latitude of expression* of the legislature: It follows as a necessary consequence, that the interpretation is the province of the court, and, however difficult the task, that we are bound to perform it.

Hob. 346
a. Plowd. 109. Show. 455.
Vin. Tit. statute,
P. 514. n. 27, 30, 31,
Ibid 524. n. 119 128.
Ibid 528. n. 154. n. 156
1 Stat. 506.
4 Bur. 250, 1.
Blac. Rep. 602.
10 Mod. 245.

The authorities which have been cited on the part of the Defendant, not only establish this general principle; but bring forward a number of judicial decisions, wherein the courts of justice have exercised that power.^a

b. 1. Inst. 36, 6.
Co. Lit. 24, 6, 290.
Vin. Vel. 19. P. 514.
n. 22, 24, 25.
4 Bac. 639. 12 Mod. 688.
4 Bac. 651, 3 Rep. 7.
4 Bac. 647, Plowd. 205.
Plowd. 205. 11 Rep. 73.
19 Vin. 519. n. 91 464
11 Mod. 161. 1 Black. 91.
4 Bac. 652. 10 Mod. 344.
19 Vin 520. Hob. 298.
Cart. 36. Vaugh. 179.

On the other side, the uncontrollable power of the legislature, and the sanctity of its laws, have been earnestly pressed by the counsel for the Plaintiff; and a great number of authorities have been quoted to establish an opinion, that the courts of justice, in no case ought to exercise a discretion in the construction of a statute.^b

However contradictory these authorities may appear to superficial observers; they are not only capable

pable of being reconciled; but the result of the whole will appear to be wise, suited to human imperfection and easily explained.

The supremacy of the Legislature need not be called into question; if they think fit *positively* to enact a law, there is no power which can controul them. When the main object of such a law is clearly expressed, and the intention manifest, the Judges are not at liberty, altho' it appears to them to be *unreasonable*, to reject it: for this were to set the *judicial* above the legislative, which would be subversive of all government.

But when a law is expressed in *general words*, and some *collateral matter*, which happens to arise from those general words is *unreasonable*, there the Judges are in decency to conclude, that the consequences were not foreseen by the Legislature; and therefore they are at liberty to expound the statute by *equity*, and only *quoad hoc* to disregard it.

When the judicial make these distinctions, they do not controul the Legislature; they endeavour to give their *intention* it's proper effect.

This is the substance of the authorities, on a comprehensive view of the subject; this is the language of Blackstone in his celebrated commentaries, and this is the practice of the courts of justice, from which we have copied our jurisprudence, as well as the models of our own internal judicatories. To apply these general remarks to the particular case under our consideration---The American prisoners of war, in the power of the enemy, were quartered in the houses of the exiles: they in fact occupied those houses by a *military order or command*, and are included within the general description of the statute,

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which

which according to the letter, extends to *all persons* without any exception, who have so occupied or injured such houses. But can we force ourselves to believe, that the Legislature could have been so unjust and oppressive, as to add to the sufferings of the patriot soldier, consigned after fighting the battles of his country, to a long captivity by making him pay for the fetters, which he had worn in the service of his country, or for want of means, to undergo a second loss of liberty ?

That the legislative, judicial and executive powers of government should be independent of each other, is essential to liberty.

This principle entered deeply into our excellent constitution, and was one of the inducements to the establishment of the Council of Revision, that the judicial and executive of whom it is composed, might have the means of guarding their respective rights, against the encroachments of the Legislature, whether by design, “or by haste or unadvisedness.” For this and other purposes, all bills, which have passed the Senate and Assembly, before they become laws, are to be presented to the Council for their revival and consideration; that if it should appear improper to them, that any bill should become a law, it may be returned with their objections for further consideration, and become subject to the approbation of two-thirds of the members of each house, before it can be a law.

From this passage of our constitution, Mr. Attorney seems to regard this determination of the Council of Revision on the law in question, in the light of a judicial decision; by which this court ought to be guided, for the sake of *uniformity* in the dispensation

tion of justice. But surely the respect, which we owe to this honorable Council, ought not to carry us such lengths; it is not to be supposed, that their assent or objection to a bill, can have the force of an adjudication: for what in such a case, would be the fate of a law, which prevailed against their sentiments? Besides in the hurry of a session, and especially *flagrante bello*, they have neither leisure nor means, to weigh the extent and consequences of a law, whose provisions are general, at least not with that accuracy and solemnity, which must be necessary to render their reasons incontrovertible, and their opinions absolute. The institution of this Council is sufficiently useful and salutary, without ascribing to their proceedings, effects so extraordinary; nor is it probable, that the high judicial powers themselves, would in the seat of judgment always be precluded, even by their *own* opinion given in the Council of Revision;---for instance, if they had consented to a bill, *general in its provision*, and in the administration of justice they discovered, that according to the letter, it comprehended cases, which rendered its operation *unseasonable, mischievous and contrary to the intention* of the Legislature, would they not give relief? surely it cannot be questioned.

Upon the whole, this being a statute is obligatory, and being general in its provisions, collateral matter arises out of the general words, which happens to be unseasonable. The Court is therefore bound to conclude, that such a consequence was not foreseen by the Legislature, to explain it by equity, and to disregard it in that point *only*, where it would operate thus unseasonably.

The questions then, whether this statute hath in
any

any respect revoked the law of nations, or is repealed by the definitive treaty of peace, or foreign to the circumstances of the case: neither will happen, nor ought to be apprehended.

There is not a tittle in the treaty, to which the statute is repugnant. The *amnesty* is constructive, and made out by reasoning from the law of nations to the treaty.

The repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the Legislature passed this statute; and we think ourselves bound to exempt that law from its operation: First, because there is no mention of the law of nations, nor the most remote allusion to it, throughout the whole statute: Secondly, because it is a subject of the highest national concern and of too much moment to have been *intended* to be struck at in *silence*; and to be controuled *implicatively* under the generality of the terms of the provision: Thirdly, because the provision itself is so indefinite, that without any controul, it would operate in other cases *unreasonably*, to the *oppression* of the *innocent*, and contrary to *humanity*; when it is a known maxim “that a statute ought to

¹ Inft. 360. “be so construed, that no man who is “*innocent* be punished or *endamaged*.” Fourthly, because the statute under our consideration, doth not contain even the common *non obstante clause*, tho’ it is so frequent in our statute book---“And it is an established maxim, where two laws are seemingly repugnant, and there be no clause of non obstante in the latter, they shall, if possible, have such construction, that the latter may not repeal the former by implication:” Fifthly, because altho’ it is a true rule, that

posteriores

posteriores leges prioribus derogant, to use the language of Sir Thomas Powis, in the Dutcheſs of Hamilton's caſe,---at the ſame time it muſt be remembered, that repeals by *implication* are diſfavoured by law, and never allowed of but where the *inconſiſtency* and *repugnancy* are plain, glaring and *unavoidable*: for theſe repeals carry along with them a tacit reflection upon the Legislature, that they ſhould ignorantly, and without knowing it, make one act repugnant to and inconſiſtent with another: and ſuch repeals have ever been interpreted ſo as to repeal as *little* of the precedent law as poſſible.

10 Mod. 118.
Dyer 348, at
the bottom.

The Plaintiff's counſel, who themſelves argued in favour of this laſt propoſition, adduced ſeveral authorities to ſupport it.

Whoever then is *clearly exempted* from the operation of this ſtatute by the law of nations, this Court muſt take it for granted, could never have been *intended* to be comprehended within it by the Legislature.

It is aſked by the Defendant's counſel, whether if a perſon within the power of the enemy, had been ordered by them *on pain of death*, to injure or deſtroy the property of an exile, he could have been ſued under this ſtatute, for obeying ſuch order? The anſwer is obvious---if he did the injury under coercion and for the preſervation of his life, the duress on every principle of law and reaſon, ought to work out his juſtification;---for no one can conceive that the ſtatute, comprehensive as it is in the proviſion, could have been intended to be applied to ſuch a caſe of extreme and fatal neceſſity.

Again it is aſked, whether veſſels condemned here in the Courts of Admiralty, can be recovered under this ſtatute.

statute. Whether the British Generals, Howe and Clinton can be prosecuted under it for damages which they have committed on the property of the exiles, in relation to the war? The principles, which we have lain down, clearly shew that such vessels cannot be recovered: That those Generals cannot be sued; because these are all acts done in *relation to the war*, which according to the law of nations, are virtually and effectual buried in oblivion by the definitive treaty: every such treaty in its very nature implying a general amnesty.

We have gone further perhaps into many important subjects, which have been brought into view by this controversy, than was strictly necessary; but it is time that the law of nations and the nature and effects of treaties should be understood: And in the infancy of our republic, every proper opportunity should be embraced to inculcate a sense of national obligation, and a reverence for institutions, on which the tranquility of mankind, considered as members of different states and communities so essentially depends.

Besides the maxim *interest reipublicæ ut sit finis litium*, never applied more forcibly, than it now doth to us in our present circumstances; and it is hoped by being thus explicit, we may ease the minds of a multitude of suitors, whose causes are depending here under this statute---at all events we shall relieve this Court from an unusual weight of judicial examination, which a want of time renders incompatible with our other public and indispensable duties.

Upon the whole, it is the opinion of this Court, that the plea of the Defendant as to the occupancy of the Plaintiff's brew-house and malt-house, between

tween the 28th day of September, 1778, and the last day of April, 1780; and the last plea of the Defendant as to the whole of the trespasss, charged in the Plaintiff's declaration are insufficient in the law; *and* that only the plea of the Defendant in justification of the occupancy between the last day of April 1780, and the 17th day of March 1783, is good and sufficient in the law.---

Let Judgment be entered accordingly.

E R R A T A.

- PAGE* 4, 23d line, for prosperity read posterity.
 9, 18th line, for Convention read constitution.
 32, 33d line, for observation read observations.

2014-11-13





