THE CASE

OF

ELIZABETH RUTGERS

VERSUS

JOSHUA WADDINGTON,

DETERMINED IN THE

MAYOR'S COURT,

IN THE CITY OF NEW YORK,

AUGUST 7, 1786.

WITH AN HISTORICAL INTRODUCTION

BY HENRY B. DAWSON.

MORRISANIA, N. Y.

1866.

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

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Henry B. Dawson

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TO

CHARLES P. KIRKLAND, LL. D.,

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,

THE EDITOR

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

INTRODUCTION.

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.

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.**

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* 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 *Renſſelaerſwyck*. He was probably a farmer; and he ſettled in Renſſelaerſwyck, 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

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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 Amersfoordt*, 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 Nosop*, 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 17*g.* 10*st.* 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,

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paid 15*g*. 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:

"*NEW-YORK, 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.*"

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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.

"BE *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 Treſpaſs 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
"Adminiſtators, 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 provifions of this ftatute, numerous actions were inftituted by the owners of property, againft thofe by whom that property had been occupied during their abfence; among whom were the venerable ELIZABETH RUTGERS, in the proceedings which are the fubject of this work.

The latter appears to have been confidered a teft fuit; and, confequently, the moft diftinguifhed Counfel of the times appear to have been retained on either fide. The State of New York, alfo, appeared in Court, by her diftinguifhed Attorney-General, to maintain her right, as a Sovereign State, to control the great principles at iffue; and the relative rights and duties of the feveral States, and thofe of the Confederacy of which they were refpectively members, as well as the rights which neceffarily belong to a Commanding General, in an enemy's country, in a time of war, fo far as they affected the inhabitants and fubjects of New-York, were made dependent on this action, which had been brought in a Court from whofe decifion, under the provifions of the ftatute, there was no appeal. In view of thefe circumftances, as well as from the relative pofitions of the parties, the angry feelings which then prevailed throughout the State—the refult of the recent war—and the great number of cafes, covering claims to a large amount, which depended upon it, it excited a degree of intereft

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-

fendant 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 Treſpaſs 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- "paſs 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-

" penſation, &c., whatſoever, for or by reaſon of any " injury or damage, whether to the public or individ- " uals, which either of the ſaid contracting parties, " and the ſubjects or citizens of either, might have " done, or cauſed to be done to the other, in con- " ſequence of, or in any wiſe relating to, the war " between them, from the commencement to the " determination thereof, were mutually and recip- " rocally, virtually and effectually relinquiſhed, " renounced and releaſed to each other; and further " averred that the Defendant was, from the time of " his birth, and at all times ſince hath been, a Britiſh " ſubject.

" The Plaintiff, to the firſt plea of the Defendant, " namely, that the premiſes were held by virtue of " authority and permiſſion from the Commander-in- " chief of the Britiſh army, replied, that ſhe ought " not to be barred of her action by reaſon of that " plea; becauſe the law under which ſhe brought her " ſuit did expreſſly declare, that no Defendant or De- " fendants ſhould be admitted to plead any military " order or command whatſoever for the occupancy.

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

" The cauſe, as above ſtated, was argued on the " 29th of June paſt, before the Mayor's Court, and " on the 27th of Auguſt 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 ſages 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 treſpaſs againſt, &c., and "declare that no military authority whatſoever of "the enemy ſhall be plead, or evidenced in juſtifica- "tion of the treſpaſs.

"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 aforegoing 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 magiſ-

"trates. It is a knowledge that is abſolutely neceſ-
"ſary 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 ad-
"ditional 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 con-
"ſider the deciſion in the caſe of RUTGERS and WAD-
"DINGTON 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 unconſtitu-
"tional; nor do we mean to uſe them ourſelves.
"The mode of redreſs which our excellent Conſti-
"tution 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 diſ-
"appointed, 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 diſmiſſion 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 acquiſi- "tion 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 perſever- "ance 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 perſeverence 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 WADDING-"TON, 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 com-"mand whatſoever for ſuch occupancy in any action "brought in purſuance of the Act aforeſaid, was in-"compatible 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 nine- teen, 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 rejected by the House, by a vote of twenty to seventeen;† 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 following 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 resumed the consideration of the subject. The Preamble 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 cafe 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 com-"menced 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 juſtifica-"tion any military order or command whatever "of the enemy, for any occupancy, injury, deſtruc-"tion, 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 directy 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

OF THE

MAYOR'S COURT

OF THE CITY OF

NEW-YORK,

IN A CAUSE

BETWEEN

ELIZABETH RUTGERS

AND

JOSHUA WADDINGTON.

NEW-YORK:

PRINTED BY SAMUEL LOUDON.

M,DCC,LXXXIV.

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

AGAINST

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 abovementioned. 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 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

* *Omnes non poſſunt, ne multi quidem, aut juriſperiti eſſe, aut diſerti,* 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 abſit in judicando precipitantia, adcoque extemporancæ ſententieæ temeritas cane pejus et angue fugiatur.* BARBEYRAC

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 an 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 treſpraſs, 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 treſpaſs 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 treſpaſs, 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

out

Show, 405 to 10 mod. 20. Bacon, p. 648, 4 co. 71 a. out how far the common law is to be conſulted, in the conſtruction of ſtatutes.---

Vin. Stat. 512. 4 co. p. 13. That ſtatutes againſt law and reaſon are void.---

1 Domat. p. 782 Puff. b. 5 c. 12 p. 6. Plow. 466, 7. That many things are within the letter, which are not within the equity of a ſtatute.---

Bac. Stat. 649, to 651. That no ſtatute can be conſtrued ſo as to be inconvenient, or againſt reaſon.---

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 conſtruſtion 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

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 pur- "chaſer is a merchant: tho' this is a *private ſpecula-* "*tion* on his part, yet the damage done was in rela- "tion 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 ofthe 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:

IIdly. 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 republica maxime conſervandi ſut jura belli*, is an ancient adage.

Co L. p. 11, b. Black. 4, p. 67, Burr. 3 vol. p. 1430. The authorities cited on this point for the Defendant are full and concluſive.

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 ſanctions, which it has enjoined.---

After being thus explicit, it is almoſt unneceſſary to touch a more limited queſtion, of the ſame nature, wh ch 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 obliga-
"tion" ſays he, "of obſerving the common laws
Vatt. b. 3, p. 111, laſt clauſe of § 3. "of war, is therefore *abſolute indiſpenſi-*
"*ble* 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

 be

* 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 Iſt. (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 elements of juriſprudence, is cited to this effect:

Elem. Juriſp. page 62.

" 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.

Hooker's ec. pol. not being at hand, we have not examined him.

Hook. ec. pol. b. 1. g. 10.

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 Cambden 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. mo. 461. Bull. 92. That this principle is consonant to the 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. § 183, 187. 3 Gro. 167 8. § 3—4. 2 Ruth. 678. 2 Vatt. 10. § 26 28. They subjoin another proposition, "that by the law of nations the rights of war are only appropriated to war of the *solemn kind*;" and insist that the annunciation of hostilities in the late war, was not attended with the solemnities which the law of nations requires.

a. 3 Vatt. P. 72. § 183. 187. 3 Gro. 167 8. § 3. 4. 2 Ruth. 678. 2 Vatt. 10. § 26. 28. To these observations and authorities the Defendant's counsel reply---That the obligation to make restitution of that which is acquired in an *unjust war*, rests *in foro conscientiæ*, and is not external---that in the language of the law of nations every solemn war is a just war.[a]---That the late war was a solemn war: And that no consequence can be drawn from the injustice[b] of the quarrel on the part of Great-Britain---that the opinion of the antient 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: But that the war between us and Great-Britain was the most solemn that modern times have exhibited.

b. 2 Ruth. 508. 510. 564. 579. 2 Hutch. 357. 1 H. P. C. 163 4. 2 Burl. P. 263. Cunn. Policies of Insurance, 276.

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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

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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 incapa ble of ſerving sthe baſis of a precept--. in ſhort, that they canbe no otherwiſe material, than *in foro conſcientiæ*.---Theſe obſervation are juſtified by theauthority 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 unparralleled injuſtice and violence; none of theſe cir-
3 Vatt. 110 cumſtances 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. 87. 197. 79. 214. They cite opinions, that the acquiſitions of a town taken in war is not compleat till confirmed by a treaty of peace, or ſubmiſſion, till then there are hopes of recovery.

Gro. 616. 701. n. 22. 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.

Vatt. B. 369. P. 62. § 165.

Gro. 6. 3. C. 9. P. 612. § 1. 2. Id. P. 622. §13.

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

Gro. 2. 3. c. 20. P. 721. § 22.

"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.*"

2 Hutch. 363. Vatt. b. 4. c. 3. Gro. b. 3. c. 20. P. 701. § 22.

When lands are encloſed by fortifications the effects of capture take place.

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."

3 Gro. C. 6. p. 583. § 4 Gro. 20 P. 699. n. 1. § 12. n. 2. Vatt. b. 4 c. 3. § 30. P. 123.

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 ofoting

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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 meerly 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.

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?

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 fœderal 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 fœderal 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.

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

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 *lattitude 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 uncontroulable 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,

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 reviſal 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 Inſt. 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. Hard. 344.

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 coertion 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 definitve 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 treſpaſs, 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, 23*d line, for* proſperity *read* poſterity.
9, 18*th line, for* Convention *read* conſtitution.
32, 33*d line, for* obſervation *read* obſervations.