

known though the source is undiscovered. A great judge speaking of custom says "If there be any sufficient proof of record or writing to the contrary, albeit it exceed the memory or proper knowledge of any man living, yet is it within the memory of man; for memory or knowledge is twofold. First, by knowledge by proof, as by record or sufficient matter of writing, secondly, by his own proper knowledge. A record, or sufficient matter in writing are good memorials, for *littera scripta manet*. And therefore it is said, when we will by any record or writing commit the memory of any thing to posterity, it is said *tradere memoriae*." A late writer, on the same subject observes "that to make a particular custom good, 'tis requisite, that it has been used so long, that the memory of man runneth not to the contrary. So that, if any one can shew the beginning of it, it is no good custom." Many statutes are beyond the memory of man, if understood of persons *in being*, but the records of Parliament ascertain the time they were enacted, prevents their operation to establish a custom. If the Law of 1701-2, is not a legislative Act, it certainly points out the time when the present Vestry of St. Anne's parish was established, and is sufficient evidence that no such body existed prior to this period. The ancient usage therefore is, I think imaginary, and seems to have sprung from a chronological error, and a misconception of the term custom, by expounding it rather according to vulgar than legal acceptations; perhaps the expressions *time immemorial* and *beyond the memory of man*, which occur in the Law books may have occasioned the mistake, and as it was not thought probable that any person *now* in existence could remember the creation of Vestries, it may have been hastily concluded that their origin must also have been buried in oblivion, when the Laws of 1704 and 1729 were enacted.

The Acts of 1704 and 1729 relate to Vestries then established, and I think it is plain from what has been said, that they could only have existed under the Law of 1701-2. Statutes and Acts of Assembly are to be so expounded that the expressions may not be rendered nugatory, but receive force in construction, and that the intent of the legislature may be complied with: these rules cannot be observed unless the Vestries then in contemplation were those established under the Law of 1701-2, otherwise the legislature provided for the regulation of bodies *not in being*, and consequently all directions respecting the mode of taxation are senseless and impertinent, for the several clauses respecting this subject have no efficacy unless applied to such Vestries as were established under the precedent Act of 1701-2, and the rule of construction before suggested would be manifestly violated by a different application. That such was the intent of the legislature cannot be doubted; the Act of 1704 passed about three years after that for the establishment of religious worship &c. by which Vestries were constituted, and was *inter alia*, to aid a defect in the preceding Act, by vesting a power in the justices of the county to assess a tax on the application of the Vestry and Churchwardens, for repairing of churches &c. and the subsequent Act of 1729 was calculated to remove inconveniences which had been experienced under the Law of 1704, by rendering that a point of duty in the Magistrates which they had deemed a matter of discretion. If the Act of 1701-2 was not in force at the time of passing the above cited Laws, to what purpose was provision made for repairing churches, &c. for without this Act it don't appear to me there was any established church in the province, or that there could be any incumbent in the parishes, consequently the tax would be a burthen on the inhabitants and the appropriation of it useless. Indeed a late perusal of the Acts must I think satisfy the most incredulous that by Vestries were meant those deriving their authority under the Act of 1701-2, and that the Legislature never intended the powers they had conferred should be exercised only by such Vestries as might in future be formed by a creative fancy under the pretext of custom, and an application of the Law to this purpose will be evidently repugnant to the intentions of those who framed it.

That there can be a custom time immemorial in this province, is at least very problematical and many will think impossible; I mean a custom originating here, and not the adoption of a general custom of the mother country. The Government is created by charter, which on the principles premised is in legal idea *within* time of memory, but customs with us must necessarily be subsequent to the charter, the latter is not clearly immemorial, and it must appear extraordinary that a posterior Act should be deemed so, as it would be making recent usages more ancient than a prior establishment beyond which they cannot be derived.

The absurdity of setting up this ideal custom, is I think sufficiently obvious, it may not however be improper to consider the consequences which might result from an establishment of it in the latitude contended for, on the principles advanced for its support. Admitting therefore that when the Laws of 1704 and 1729 were enacted, Vestries had obtained authority, and a right of acting by the usage which had then prevailed independent of the Act of 1701-2, the like usage in other instances must be productive of similar consequences, and the conclusions deducible from the position advanced respecting the force of custom may be thought to establish the claims of the Clergy.

By the Act of 1701-2 the power of inducting ministers is vested in the Governor for the time being, and such ministers in virtue of that Act are entitled to 40 per poll in their respective parishes, but it is said the Law regulating these matters is a nullity, if so, the customs which have prevailed of inducting ministers by the Governor and their receipt of the 40 per poll, will be certainly thought of equal force with that which it seems empowers the Vestry to exercise their functions; the several authorities are co-existent, and the inference from custom appears equally forcible in either instance, for custom and usage cannot be deemed efficacious when applied in support of the rights of

Government and the Clergy, and of indubitable authority if they tend to the destruction of either.

It may be objected that notwithstanding there was no provincial custom for the establishment of Vestries when the Laws of 1704 and 1729 were enacted, yet they existed in England under the Common Law, which will support their proceedings here.—Vestries depend on particular local customs, and the authority of these parochial assemblies is more or less extensive in different places, according to the prevalence of the several customs by which they are regulated; in some parishes they have no existence, nor is the usage of one county in this respect any regulation for the conduct of others; how therefore such particular customs (which are no part of the Common Law but rather deviations from it) can bind the inhabitants here will be difficult to prove, nor is it more easy to ascertain what parish or county shall be preferred and held forth as an example for imitation, as the customs of all cannot be adopted. The Common Law of England is general to the kingdom, Judges are bound to observe its rules in their judicial determinations, but parochial customs for the regulation of Vestries must be specially alleged or courts of judicature will pay no regard to them in their decisions.

But if the customs in England respecting Vestries are part of the Common Law, and therefore to be regarded here, the obvious consequence of this concession is, that all other customs equally extensive must have the same obligatory effects. By the general custom in England and of common right, tithes are due to the Clergy for their support and maintenance; if they are not entitled to the 40 per poll under the Act of 1701-2, the Common Law in this respect remains in force untrammelled by any positive Act of the Legislature, and consequently this claim (upon legal principles) will stand unimpeached. That such an establishment would be thought unreasonable, I admit, and this might be an argument against the right, if it depended on particular custom; but "the common Law operates until suspended or abrogated by Statute." The doctrine of collateral warranty was fraught with injustice and rigour, but a legislative interposition was necessary to remedy the grievance, the Judges justly observing that their province was *ius dicere* and not *ius dare*. A bill in Equity for tithes may be supported as well for relief as discovery, authorities justify the assertion, and the nature of the demand and multiplicity of persons interested suggest the reason.

Should it be contended that these conclusions from the establishment of the supposed custom are ill grounded, and that the Clergy are neither entitled to 40 per poll, or tithes from the parishioners, it eventually follows that they have no legal provision whatever, and therefore the consequence of such position is considerable. Without a parish church there cannot be a parish, the latter is thus defined by several writers, "A parish is a place or district wherein the people live that do belong to some certain church." "A parish is a *cure of souls* limited to persons and place within a certain district or precinct." "Every precinct which belongs to the same parish church is one parish." "If a place has not a church, churchwardens and sacramentals, it is not properly a parish." "Parochia est locus in quo degit populus alicujus ecclesie." "A parish is that circuit of ground in which the souls under the care of one parson or vicar do inhabit." As there can be no parish without a church, neither can there be a church in legal understanding, without an establishment for the incumbent. Parishes were first instituted to remove the inconveniences which had been experienced from an itinerant Clergy, but this could not be effected without a permanent provision for their support and maintenance in that district to which the exercise of their religious duties was particularly confined.

If there is no parish church, there cannot be either Vestrymen or Churchwardens; the first are so called, "the business of the parish being transacted in the vestry, a place adjoining to the church, where the vestments of the priest are generally deposited and kept." The latter derive their appellation from "being the guardians or keepers of the church." These definitions presuppose a parochial church and established ministry, the offices of Vestrymen and Churchwardens are dependent thereon, and if the existence of the former is disproved the authority of the latter is annihilated. That the parishioners should be compellable to contribute for the reparation of a church without an officiating minister is contrary to reason and justice: we have it upon legal authority, "that the cause that every parishioner is charged to the reparations of the church, and to provide convenient ornaments in it for the greater convenience and honour of divine service, is first for the spiritual comfort which he hath in hearing of the Word of God there for his instruction in the true way to Heaven in celebration of the sacraments, and in presenting to God their prayers, not only privately, but with the great congregation to be thankful to God for all his benefits, and to desire of him all things necessary, &c. in respect of which inestimable benefits, he is chargeable to repair his proper church in which he receiveth them." But how are the parishioners to receive this spiritual comfort and instruction, if there is no incumbent to perform the sacred functions? a tax therefore for the reparation of an edifice from which they can receive no benefit, appears to me illegal.

As the avowed principle of the Vestry's authority is "ancient usage and custom of the parish beyond the memory of man," it is immaterial to consider if their power can be supported on other grounds; it is admitted that when St. Anne's parish was erected, the government of it devolved on the parishioners in a corporate capacity, and 'tis an incident tacitly annexed of course to every corporation—that it shall have perpetual succession, consequently the authority of the collective body cannot of common right be delegated to individuals; it may be done in some instances by particular custom, the ancient usage being presumptive evidence that this power was granted by the charter of incorporation, such in Ar-

ment of creation being always presumed even in corporations which exist by force of the Common Law.

Upon the whole, whatever opinion may be entertained respecting the above consequence resulting from an establishment of the supposed custom, I think it must be admitted that the custom itself (whether the term is considered in its legal or vulgar acceptation) cannot be supported, and that unless the Vestry of St. Anne's parish have a power to act in virtue of the Law of 1701-2, they have no authority whatever.

I would further remark that the question propounded being of an interesting nature, and two Gentlemen of distinguished abilities having declared their opinions on the subject, I deliver my sentiments with deference and respect; regard is due to important stations, tenderness to reputation, and veneration to genius and learning; but as candour cannot require an implicit assent to unsatisfactory reasoning, neither can it be offended with a dissimilarity of judgment on points of difficulty and importance. To prevent misconception, let it be observed that I do not mean by a diversity of opinion, to take part in the public controversy, or arraign the conduct of those who imposed the tax and applied for its assessment; mistakes are incident to humanity, and I doubt not but the Gentlemen who prosecuted the measure which has been since thought a ground for censure, were fully convinced of its legality and justice.

Annapolis, Jan. 18, 1773.

T. J. S.

### TO THE FIRST CITIZEN.

SIR,  
WE thank you for the sentiments, which you have spoken with an *bona fide* freedom. We had for a long time impatiently waited for a man of abilities to step forth, and tell our DARING MINISTERS, in a nervous style, the evils they have brought upon the community, and what they may dread from an injured people, by a repetition of despotic measures. While we admire your intrepidity in the attack, permit us to applaud that calm and steady temper, which so peculiarly marks and distinguishes your excellent performance.

Personal invective, Sir, you must now expect to encounter: this is the weapon which modern policy has invented, to cut down such characters, as thwart the pernicious schemes of arbitrary Ministers: every man, who has hitherto presumed to espouse his Country's interest, has been vilified with a brutal violence; but when a Gentleman quits the field of manly argument, and descends to illiberal reflections, as he betrays a pitiful ignorance, nothing can be apprehended from such an affected censellation.

We have pained ourselves with the perusal of that pompous lucubration and *articular acquisition*, uttered forth to the publick under the signature of *The Editor of the Dialogue*, and celebrated by critics, for brilliant expression, grammatical propriety, and dignity of sentiment. What a monument of SELF-IMPORTANCE! while the eye is dazzled with the splendour of the pile, the idea of the frog in the stable steals upon the mind. Blush Cambridge! blush!—If such be the fruits of the FAM'D NURSERY, our boys shall never cross the Atlantic.

Go on, Sir, and assert the RIGHTS of your country: every friend to liberty will be a friend to you; malice may rage, and RAW HEAD and BLOODY BONES clatter and rattle; but the *bonest heart*, bold in the cause of FREEDOM, feels no alarm.

"AN HONEST MAN, like the true religion, appeals to the understanding, or modestly confides in the internal evidence of his conscience. The TOR employs force instead of argument, imposes silence where he cannot convince, and propagates his character by the sword."—Junius.

We highly approve of your adopting the British maxim—the King can do no wrong: we honour, Sir, and respect our *supreme Magistrate*: but such is the frailty of nature, that no human exertion can, at all times, penetrate the latent purposes of designing men.—O EDEN! EDEN! had you relied upon your own manly judgment in every political case; had you been guided by your own benevolent feelings upon late important subjects: had you, in honourable imitation of the prudent and politic OGLE, rejected that impudent and yet often repeated project of DARING MINISTERS, in placing the GOVERNOR in the front as a screen to themselves, the moment they are scorched by the patriotic fire of the DELEGATES of the people,

"EDEN had been a little God below."

### INDEPENDENT WHIGS.

S—E—Y—D—E, July 30.

A Turkish vessel being taken by the small Russian Squadron, all the crew and passengers were put to death.

CONSTANTINOPLE, Sept. 3. Advice has been just received here, that a large fleet of Russians, some of the ships apparently of very great force, has been seen in the Black Sea off Trebizond: likewise that they had landed a great number of men between the above place and Amasia. This news has occasioned much consideration, as every person conjectures that it is designed against the capital; therefore every necessary preparation is taken to oppose their design. A body of 30,000 Janissaries and 8000 Spahis are ordered to march immediately into Natolia, to stop the march of the Russians before they reach Angora; orders are also given to reinforce the fleet, which is to proceed up the Black Sea with the utmost dispatch; and an express is sent up to the Bassa Kayseria, commanding him to take the field with all the troops under his direction.

Sept. 17. We had another dreadful fire here, in the night of the 5th Instant, which burnt down 200 houses. As combustible matter was found in different parts of

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