d church" have shamefully insult-

nsider the objections which the *at*-nade. His argument against the de-rochial authority without *a custom* de-tion. He says in all corporations, ist by force of the common law, a ration is presumed; *by custom* he ad-e a delegation of the parochial autho-sage being presumptive evidence that gate was granted by the charter. If right in his law the consequence is delegation of the parochial authority brethren's hands as Vestrymen and annot be maintained without shewing poration or proving a *custom* to justify t.

ence we venture to argue a point of *ey general*: it is with reluctance we overty with Mr. *Jennings*: we still en-for that gentleman notwithstanding t to add his weight to the atrocious ge which has been brought against torney been attached to Mr. Boucher connexion, or had he been consult-nce in point of property, the assistance would have been a laudable exercise but when he was apprized of the na-versy: when he saw the vengeance of pon us: our integrity wantonly ar-characters publickly stabbed; and opinion of our conduct, the judg-heart was in fault, under such cir-d a helping hand against us was un-

Mr. Attorney's argument. We con-nastily adopted the expressions in the entively considering all the modes of We assert in contradiction to his con-v, that the political capacity of a pa-d by *prescription charter* or *act of par-being* propagated by *operation of law* pon the principles of publick utility. eed say a corporation can be erected by prescription charter or act of par-s is to be understood of corporations d not of such, whose political exis-upon *operation of law*.

ical capacity of a parish is not derived n charter or act of parliament, the are expressly in point: 1 Hob. 211. 8 mod. 351.

grounds Churchwardens are a corpo-eligible by the parishioners by the common right: which excludes the ol.tical constitution by prescription parliament. To this purpose Carth. 2 Salk. 547. Viner's ab. ch. ward. 126. Vid. Brook. Corporation: pl. xpress that Churchwardens are incor-tion of law.

herefore of the attorney general is laid and cannot extend to corporations *by* When indeed a body politic is crea-such *instrumentality* of creation limits e extent of their authority, and every er which is proved *time immemorial* is w. from some enabling clause in such erefore if in fact parishes were incor-*r* and a *custom* existed beyond memory to exercise the parochial authority, would be that such charter authoriz-n of it to them.

s the case with respect to the political rish by *operation of law*? Permit us to stion upon the principles of reason and common law. A deputy cannot ex-ty given him, nor a body politic cre-its granted powers: a deputy, there-egate his authority without leave of r a body politic by charter their au-: some enabling clause. But what ontrol the political capacity of a pa-reated by *operation of law*? Or what shall prevent a delegation of their au-e hands of *temporary* Vestrymen and ? Churchwardens indeed cannot trans-ity, because they are the deputies of in the department they act, and con-he bounds prescribed to them: upon le members of parliament cannot com-nto the hands of others; but the corpo-parish is composed of the people them-e, no principal or charter to impower delegation of the parochial authority

such things as perpetual vestries: we uted the notion, that the parishioners by *prescription charter* or *act of parlia-*en was the origin of *perpetual vestries*? oubtless of the parochial authority by y itself. If then the parishioners by from the common law could originally y commit their whole authority into *perpetual vestry*, surely and *a fortiori* nt *temporary* Vestrymen and invest them ial authority. The body politic of a y *operation of law* is in fact nothing iety or assemblage of people collected government of themselves and there-can do by themselves they may do by

y takes up our argument in another and contends that independently of the here can be no Vestrymen and Church-argument is this: without a parish, church: without a church, no in-out an incumbent, no Vestrymen and. He urges there can be no church in *g* without an *establishment* for the in-cannot comprehend this and should

have thanked him for his authorities. If a parish is established by act of assembly and a church established by act of assembly and such act of assembly be a law, in our judgment such a parish in *legal understanding* is a parish, and such a church *in legal understanding* is a church, whether the incumbent, in imitation of the apostles, preaches upon charity and donations or preaches upon *established pay*. But let us advert to the reason advanced by Mr. Attorney in support of his doctrine—"Parishes and churches were "instituted for the administration of *spiritual comfort* "*and instruction*." This we admit but deny the efficacy of his reason to support his position. We cannot conceive how an *established salary* for the incumbent is essential to the administration of *spiritual comfort and instruction*. The apostles preached *upon charity* and with success: the ministers of the church of England preach in some other colonies with general satisfaction to their respective congregations and yet they preach upon *voluntary contributions*: the Quakers preach *without any pay* and yet those of their profession flatter themselves they are sufficiently spiritualized with such an administration of spiritual comfort: the Presbyterians preach upon *subscriptions*, and that sect is distinguished for their piety and religious attachments. We can find no reason, why the people of the church of England should so widely differ from every other denomination, as to be dead to all impressions of religion, till they are awakened from their lethargy by a plundering ministry with sheriffs and officers at their backs to strip them of their property or drag them to jail. Is it possible that mankind can conceive a more exalted idea of *a proud pampered priest* than of a *meek humble paul!* It is enough for us to know that *we the clergy of the established church* are called up from their *natural and respectable* stations by *a spirit* to teach the christian religion: they solemnly avow their belief of it in the hour of ordination: and when they quit England and come amongst us *sweating* under the heavy load *of parchment rolls, certificates, credentials*, and *testimonials*, we cannot presume they adopt a fresh connexion, immediately cultivate an acquaintance with the *forty per poll* and bid adieu to that *miraculous spirit*, which called them to take holy orders, wafted them across the seas, and conducted them in safety to *a fat parish* in Maryland.

Mr. Attorney seems to have been misled by the manner of stating your question to him, and has run into some intemperance of expression in exposing our ideas of *legal customs*; he must have strangely misconceived our intention to charge us with a design of adopting the *local customs in England* and extending them here. A proposition containing the negative of your question, "that the vestry of St. Anne's parish "in Anne Arundel county have no right to act in "virtue of any custom in that parish independent of "the Law of 1701-2" may be true; and the affirmative of our precise answer "that we act as Vestrymen "by the authority of the parishioners founded upon "custom, law and common right who chose nominated and elected us Vestrymen of St. Anne's parish ac-"cording to the usage and custom of the parish be-"yond the memory of man" may be equally true; the two propositions stand consistent.

But Mr. Attorney is of opinion, we can draw no aid to our argument from any *custom originating in this province*—he grounds himself upon the *legal idea* of a custom in England, which cannot exist, as such, when the origin of it or memorial of its creation can be traced and pointed out. We thank him for the apology he has made for our supposed misconception of this *legal idea* of a custom, though indeed we should not deserve his compliment of "*distinguished abilities* "*and genius*," if we had in fact betrayed such palpable ignorance. We knew that *customs* prevailed in this province, and that their origin could be investigated and traced; the *legal idea* therefore of a custom in England could not be applied to a *custom* here. We took the expressions *beyond the memory of man* in a vulgar acceptation: because under such acceptation alone could the *customs* exist, which have hitherto prevailed as such in this province.

Mr. Attorney is pleased to say that *customs* in this province are ideal and absurd "the government is "created by charter, which on the principles premised "is in legal idea within time of memory," and of consequence every act posterior to the establishment of the government must be also *within memory* and cannot be taken as law upon the ground of *custom*.

Let us consider the consequences of Mr. Attorney's position. We have in this province *such a thing* as a middle branch of the legislature distinguished by the dignifying appellation of *The Honourable the Upper House of Assembly*. *How* and *when* was this *thing* propagated and brought forth? We affirm not by the Charter; but long after the settlement of this province our ancestors *in an unguarded hour* passed an Act of Assembly for the creation of it: this Act of Assembly was *temporary* and expired with *that Assembly*. In what element then does this *thing* draw its vital breath? It exists only by *custom*, which in vulgar acceptation has prevailed *beyond the memory of man*: but if the *legal idea* of those expressions is to take place and a *custom* fails, when the origin or memorial of its creation can be ascertained, the consequence is obvious, that this *celebrated thing* is fairly kicked out of its atmosphere.

It is a contested point, whether the duty upon tonnage belongs to the publick, or the lord proprietary: this duty was created by the act of 1661 and made payable in powder and shot or the value. When a question was made before the King and Council with respect to his Lordship's claim of it, the *attorney general*, in his state of the case, observed that the payment in powder and shot had been converted by *usage* into money, and settled at fourteen pence per ton. The judgment of the King and Council was not, that his Lordship should receive *powder and shot*, but *the fourteen pence per ton*. This fourteen pence per ton has been received by his Lordship in the vulgar acceptation of the expressions *beyond the memory of man*: but in Mr. Attorney's judgment no *custom* here can prevail, when the origin of it can be proved. Captains of vessels, then, may pay this duty in *powder and shot*: let them do it: this good consequence will result from it: we shall have plenty in case of an invasion; the lord proprietary, when the payment is in money, may appropriate it to his private use in England, but when the payment is in *powder and shot*, he must lock up this revenue in some warehouse here, as 'tis probable no body would buy; exigences may require an application of it to publick purposes and thus the original intention of the act may be effected and carried into execution.

In last September provincial term, a question was started, whether costs should be taxed in *tobacco* or *money*: no Act of Assembly existed to determine this question: our judges taxed the costs *in tobacco*. They proceeded upon the ground, that as far back as our constitution could be traced, costs had been taxed *in that manner*: we do not mean, to vindicate this judgment; but we quote it to shew that in the opinion of our judges, there may be such an *antient usage* as obtains the force of law.

The lord proprietary in 1728 assured the assembly he never would break in upon the laws, *customs* and acts of assembly of this province.

But what has been the idea of the legislature itself with respect to *customs originating here*? the *oath* of our judges is framed by an act of assembly: by this *oath* they are solemnly bound to regard the *customs* of the province: this is the oath—

"You shall swear &c. you shall do equal law and "right &c. according to the laws, CUSTOMS and di-"rections of the acts of assembly of this province &c. "and where they are silent, according to the laws, "statutes and reasonable customs of England as used "and practised within this province."

Mr. Attorney, after endeavouring to prove the absurdity of setting up an *ideal custom*, proceeds to tell us of the consequences, which he thinks may be deduced from our doctrine—"If vestries had obtained autho-"rity and a right of acting by the usage which had "then prevailed independently of the Act of 1701-2" then "the customs which have prevailed of inducting "ministers by the Governor and their receipt of the "forty per poll will be certainly thought of equal "force."

As to the point of *induction*, we throw that out of the case: Mr. Attorney has not been explicit, whether the authority to induct needs the aid of the act of 1701 2 or *custom*.

That a right to the forty per poll is deducible from our principles of a *custom*, we take the liberty to deny. It is not only essential to a *custom*, that it has prevailed *beyond the memory of man*, but it is an equal ingredient to constitute the validity of it, that there be *no interruption or suspension of it*. 1 Black. Comm. 77. "Any "interruption, says that learned judge, would cause a "*temporary ceasing*. the *revival* gives it a *new begin-*"*ning*, which will be in time of memory and there-"upon the *custom* will be void." How then stands the forty per poll upon the point of *custom*? This *custom* has been broke in upon and interrupted twenty-four years by divers successive acts of assembly. It is plain these acts or inspection laws occasioned a *temporary ceasing* of the forty per poll: When did they expire? Only two years ago: the *revival*, then, of such *custom* must be dated from that period and of consequence *within memory* "and thereupon the custom will be "void." Those acts of assembly were negative laws with respect to the *forty per poll*, and expressly enacted a *temporary* discontinuance of the *right* to it. The words of the several acts were, "During the continu-"ance of this act the county courts shall levy &c. NO "MORE than 30 pounds of tobacco per poll *instead* of "40 per poll." Is not this an express discontinuance of the *right* to *the forty per poll* pro tempore or during the act? If the *right* subsisted, the *right* might be exercised; but would not an exaction of the *forty per poll* have been a palpable breach of the act of assembly? If then the right was discontinued "though for a day," the same learned judge declares the custom annihilated and destroyed. An inheritance indeed derived from *prescription* or *custom* cannot determine by *matter in pais*, but our acts of assembly are certainly matters of *record*.

But Mr. Attorney endeavours to alarm us with *tithes*. "By the general custom of England and of "common right tithes are due to the clergy for their "support and maintenance: if they are not entitled "to the forty per poll under the act of 1701-2, the "common law in this respect remains in full force un-"restricted by any positive act of the legislature, and "consequently the claim upon legal principles stands "unimpeached." We cannot presume Mr. Attorney in earnest upon this point: our idea of his legal abilities forbids it; yet why should he endeavour to alarm the province with apprehensions he himself cannot feel?

Mr. Attorney, surely, is not of opinion, that tithes can be extended to this province on an admission that the act of 1701 2 is not in force, any more than they can under an admission that it is in force. To speak in general, the common law certainly extends here; it has an operative force till altered by our acts of assembly; the act of 1701 2 is in the affirmative only to assess forty per poll without any thing negative to exclude tithes; if the common law for tithes then extends, it is only the common case of two consistent laws, where the obligation to obey both remains.

When God ordained sacrifices for the atonement of sins and established a ministry to be exercised by *Moses* in the character of high priest and by the *levites* in an inferior subordinate capacity, he ascertained what offerings should be brought to the altar and appropriated a part for the priest and to the levites he gave tithes or tenths as a compensation for their care of the tabernacle. The *levites* seem to us to stand in the predicament of *churchwardens*.

Sacrifices were abolished by the Gospel dispensation and of consequence the different offices of *priest* and *levite*: the offices then being annihilated, the fees, offerings and tenths fell of course.

The Apostles preached the Gospel at the hazard of their lives, and yet their Lord and Master established *no pay* for their services: but when persecution and the natural fate of mankind had swept them away, in process of time doctors of divinity notwithstanding their declarations in the hour of ordination felt themselves as men—with every propensity and appetite for the good things of this world.

In times of old an opinion was generally adopted that it was in the power of the priest to *damn* or *save*: under this impression Offa, a King of part of England, in order to coax the priests to give him an absolution for the murder of King Ethelbert, made a law, by which he gave the tithes or tenths of the produce of all his lands to the churches in his kingdom.

When the several parts of what is now called England, through a variety of changes and mutations, had devolved upon King Ethelwulph, he by a grant *now extant upon record* enlarged and extended Offa's establishment of tithes over the whole realm and granted them to the churches.

Antiently all the lands of England were the property of the crown; and as a man may charge what is his own with such incumbrances as he pleases, the above Kings had a legal authority to burthen their lands or territories in the manner they did by their respective acts and deeds.

When lands, in process of time, were disposed of by the crown to the subject, they were purchased with the *precedent charge* of tenths or tithes; and all the statutes with respect to tithes consider them as the property and inheritance of the respective churches and officiating clergy in England, acquired by antient grants and donations, and as inseparably annexed to these churches as the gifts of a glebe: the statutes do not *create* tithes but merely inforce the *payment* of them.

When this province was in the hands of the crown and the King originally vested with absolute property in the soil, he might have exercised such a power of ownership, as to charge it with tithes or any other incumbrance: *but he never did*: his grant to the lord proprietary was free from all incumbrances and of consequence from tithes. When his lordship became entitled to the province, he too from that power, which he had over his own property, might have disposed of his lands under the reservation or incumbrance of tithes: *but he never did*. Our *American* ancestors also when they obtained grants from his lordship might upon the same principle have charged their respective property with such a burthen, *but they never did*: the people therefore of this province hold their lands free from tithes or tenths.

The lands, we have purchased, are our property; as such they cannot be burthened or charged *without our assent*; the common law shields us from such an evil: the eternal laws of nature and reason are invincible bars to it.

It is said in our law books, that tithes are due by common law to the churches in England: and our books are right: the common law with respect to tithes *there* has a legal foundation to operate upon, *the assent and grants of our English ancestors*, who had the lands in England and had of consequence the power to charge them with such a burthen: but the common law has no such capital ground *here* to work upon.

A question may be asked, why tithes are said to be due by common law and common right, when in fact they are founded upon donations and grants? The reason is this: by the statute of Westminster cap. 38. it is enacted, that whatever was done in the reigns antecedent to the time of Richard should be deemed and taken as *beyond the memory of man*: and therefore the statutes made before that period and general grants and donations cannot be plead as such but are adopted and received as common law and common right. Tithes were granted before the time of Richard and hence they are claimed by the churches in England as common law rights.

It is held that the common law which is the birthright of every subject extends to the British colonies. Salk. 411. 666. 2 p. Wms. 75. But says Mr. Blackstone the colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; and he further observes that the artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are inforced by penalties) *the mode of maintenance for the established clergy*, the jurisdiction of spiritual courts and a multitude of other provisions are neither necessary nor convenient for them (colonies) and therefore are not in office—1. Black. 106.—Mr. Blackstone is certainly right in his law, though as certainly mistaken in the fact, when he asserts that our American plantations are principally conquered countries.

We have now done with Mr. Attorney whose argument occasioned an unavoidable prolixity in our answer.

You urge a long string of questions and use a profusion of argument to prove our election and qualification as Vestrymen were under an idea of the existence of the Act of 1701-2; you seem to hope, contrary to any design we ever entertained, we should deny it; but as we do not, we shall be glad to know the inference you would draw? If we were elected and sworn as Vestrymen under an idea we then entertained, that the act had the force of a law, and we have been since clearly satisfied, that the act is void; and if we are, as we think, legal and constitutional Vestrymen *by the common law*, is it not our duty, and are we not impowered to act still in our office? Your aim in this could not be to convince the understanding; your own mind could not be influenced by your reasoning. But, Mr. Boucher, as it will be in your *professed element*, and we are but in our *noviciate*, we should be obliged to you to inform us, whether if you were in our circumstances and had taken the oath, we did, which admit was only voluntary, and thought with us, that you had still a rightful authority by the common law, would you have had no impressions, that you were under a moral obligation from your oath to exercise your office?

Notwithstanding a considerable majority of the *worthy* clergy in this government of Maryland are a-