(LVIIth YEAR.) THE (No. 2893.)

MARYLAND GAZETTE.

THURSDAY, JUNE 24, 1802.

GENERAL COURT—EASTERN SHORE.

WM. WHITTINGTON vs. WILLIAM POLK. } *Assize of novel disseisin.*

OPINION OF THE COURT.

IN the discussion of this case the following points were raised and contended for by the counsel of the plaintiff. 1st. That an act of assembly repugnant to the constitution is void. 2d. That the court have a right to determine an act of assembly void which is repugnant to the constitution. 3d. That the act of assembly passed in 1801, C. 74, entitled, "An act relative to the administration of justice in this state, &c." so far as respects the plaintiff is unconstitutional and void. 4th. That the assize of novel disseisin is the proper remedy to recover the office of chief justice of the fourth district. The two first points were conceded by the counsel for the defendant; indeed they have not been controverted in any of the cases which have been brought before this court. Notwithstanding these concessions the court deem it necessary to communicate the reasons and grounds of their opinion on those points.

The bill of rights and form of government compose the constitution of Maryland and is a compact made by the people of Maryland among themselves through the agency of a convention selected and appointed for that important purpose. This compact is founded on the principle that the people being the source of power all government of right originated from them.

In this compact the people have distributed the powers of government in such manner as they thought would best conduce to the promotion of the general happiness, and for the attainment of that all important object, have among other provisions judiciously deposited the legislative, judicial and executive, in separate and distinct hands, subjecting the functionaries of these powers to such limitations and restrictions as they thought fit to prescribe.

The legislature being the creature of the constitution and acting within a circumscribed sphere, is not omnipotent and cannot rightfully exercise any power but that which is derived from that instrument. The constitution having set certain limits or land marks to the power of the legislature, whenever they exceed them, they act without authority, and such acts are mere nullities; not being done in pursuance of power delegated to them. Hence the necessity of some power under the constitution to restrict the acts of the legislature within the limits defined by the constitution. The power of determining finally on the validity of the acts of the legislature cannot reside with the legislature, because such power would defeat and render nugatory all the limitations and restrictions on the authority of the legislature contained in the bill of rights, and form of government, and they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the constitution which declares that the power of making, judging and executing the laws shall be separate and distinct from each other.

This power cannot be exercised by the people at large, or in their collective capacity, because they cannot interfere according to their own compact, unless by elections and in such manner as the constitution has prescribed, and because there is no other mode ascertained by which they can express their will. It is true the people may assume the powers of government whenever the ends of it are perverted, public liberty is manifestly endangered, and all other means of redress are ineffectual; but surely every act of the legislature repugnant to, or in violation of, the constitution cannot be held a sufficient cause for the interposition of the people in a way which subverts the government and reduces the people to a state of nature, and therefore cannot be the proper mode of redress to remedy the evils resulting from an act passed in violation of the constitution. The interference of the people by elections cannot be considered as the proper and only check and a suitable remedy, because in the interval of time between the elections of the members who compose the different legislatures the law may have had its full operation, and the evil arising from it become irremediable; nor is it probable that the elections will be made with the view to afford redress in such particular case, and if they were and the law should be repealed, it could not be an adequate remedy. The senate of Maryland, one of the component parts of the legislature, is elected for five years, and vacancies in that body occasioned by death, resignation, or removal out of the state, are filled up by their own appointment. The present senate was elected in the month of September, in the year eighteen hundred and one, and the law under which the plaintiff claims the office of chief justice of the fourth district is a temporary law, and would have expired before the termination of the five years for which the present senate is elected, which shews in this instance that the interference of the people in their elections is not the proper mode of redress for an injury sustained by an act passed in violation of the constitution. It is the office and province of the court to decide all questions of law which are judicially brought before them according to the established mode of proceeding, and to determine whether an act of the legislature which assumes the appearance of a law and is cloathed with the garb of authority is made pursuant to the power vested by the constitution in the legislature; for if it is not the result or emanation of authority derived from the constitution, it is not law, and cannot influence the judgment of the court in the decision of the question before them. The oath of a judge is "That he will do equal right and justice according to the law of this state in every case in which he shall act as judge." To do right and justice according to law, the judge must determine what the law is, which necessarily involves in it the right of examining the constitution, (which is the supreme or paramount law and under which the legislature derive the only authority they are invested with making of laws,) and considering whether the act passed is made pursuant to the constitution and that trust and authority which is delegated thereby to the legislative body.

The three great powers or departments of government are independent of each other, and the legislature as such can claim no superiority or pre-eminence over the other two. The legislature are the trustees of the people, and as such can only move within those lines which the constitution has defined as the boundaries of their authority, and if they should incautiously or unadvisedly transcend those limits, the constitution has placed the judiciary as the barrier or safeguard to resist the oppression and redress the injuries which might accrue from such inadvertent or unintentional infringements of the constitution.

This power is properly vested in the judiciary, because to secure their uprightness and independency the constitution declares they shall hold their commissions during good behaviour, and shall receive liberal salaries as a compensation for their services, and because they are appointed by the executive, who, it is to be presumed, will appoint those persons judges, who are most distinguished for their integrity, experience and reputation for legal knowledge; such men from the nature of their studies and avocations in life may be presumed without disparagement to the talents and legal acquirements of others, better qualified and more competent than the rest of the community to the decision of legal and constitutional questions.

It is true this presumption, like many others, may fail in some instances; but that by no means proves the fallacy of the reasoning, or evinces the impropriety of lodging the power with the judiciary.

To secure an honest decision, and to prevent the mischiefs which would flow from partiality or corruption, the judges are liable to be removed from office on conviction of misbehaviour in a court of law.

It is also observable that the courts cannot take judicial cognizance of any act repugnant to the constitution, unless the question is judicially brought before them, and then it is fully discussed by counsel learned in the law, and the court decide on mature consideration.

Under these safeguards nothing can be wanting to inspire a well-grounded confidence in the people, that the judiciary will rightly and honestly determine all questions which are brought before them arising under the constitution and the laws of the state made pursuant thereto.

As to the third point, that the act of assembly passed in 1801, C. 74, entitled, "An act relative to the administration of justice in this state, and to repeal the acts of assembly therein mentioned," so far as respects the plaintiff is unconstitutional and void.

The court cannot help regreting that any occurrence should render it necessary to resort to the judiciary, to decide the question, whether an act of the general assembly is constitutional or not? But whenever it does become necessary and the case is judicially brought before this court, they trust they will not seek any evasion or shrink from the determination of it, but act with caution and circumspection, and give it that consideration which the importance of it and their duty demand.

The motives which may induce the legislature to pass a law, cannot be inquired into by the court in a question as to its constitutionality, nor can the policy or inexpediency of the law have any influence with them in deciding such question.

The only inquiry with the court is, whether the act passed is made pursuant to the power vested in the general assembly by the constitution.

Although in the opinion of the court the authority of the general assembly is limitted; yet as the powers of legislation are not particularly or specifically defined but conferred under a general grant, they are subject only to such restrictions and limitations as are prescribed by the bill of rights and form of government and the constitution of the United States.

The parts of the constitution most applicable to the question, and which have been very amply animadverted on by the counsel, are the following articles of the form of government.

The 40th. That the chancellor, all judges, the attorney-general, clerks of the general court, the clerks of the county courts, &c. shall hold their commissions during good behaviour.

The 49th. That all civil officers of the appointment of the governor and council, who do not hold commissions during good behaviour, shall be appointed annually in the third week of November.

The 47th. That the judges of the general court and justices of the county court may appoint the clerks of their respective courts.

The 50th. That the governor, every member of the council, every judge and justice, before they act as such, shall respectively take an oath, "That he will not, through favour, affection, or partiality, vote for any person to office," &c.

The 56th. That there be a court of appeals, &c.

The 44th. That a justice of the peace may be eligible as a senator, delegate, or member of the council, and may continue to act as a justice of the peace.

And the following articles of the bill of rights.

The 6th. That the legislative, executive and judicial powers of government, ought to be for ever separate and distinct from each other.

The 30th. That the independency and uprightness of judges are essential to the impartial administration of justice and a great security to the rights and liberties of the people: wherefore the chancellor and all judges ought to hold commissions during good behaviour.—In the report of the committee it stood, wherefore the chancellor, all judges *and justices*, &c. but it does not appear by the printed proceedings of the convention how the word *justices* came to be omitted.

The judiciary of Maryland, previous to the time when the constitution of Maryland was formed, consisted of county courts, a provincial, now general court, a court of appeals, chancery court, and court of admiralty.

The justices of the peace in their respective counties, were conservators of the peace, and individually or singly had a limitted jurisdiction conferred by acts of assembly, and in their respective counties they composed the county courts, but for holding court one of the quorum must have been present, i. e. one of certain justices named in the commission.

By an act of the general assembly which passed at the first session of assembly (in February 1777) which was held after the formation of the government, the forms of the commissions were prescribed, the judges of the court of appeals, general court and court of admiralty were to hold their commissions during good behaviour, the justices of the county courts until they should be duly discharged. The justices of the county courts have been annually appointed by the governor and council. This has been the uniform and uninterrupted practice ever since the constitution was established until the modification of the system in the year 1790.

By the 48th article of the form of government, the governor with the advice and consent of the council may *suspend or remove* any civil officer who has not a commission during good behaviour.

It appears to the court upon considering the several parts of the constitution which relate to the question, to be the plain and obvious meaning of that instrument that the justices of the county courts were not entitled to commissions during good behaviour. A plain distinction is kept up between the justices of the county courts and the judges of the other courts, and a studied uniformity of language has been observed throughout to preserve the distinction. So far as respects the justices of the county courts the principle in the bill of rights that the legislative, executive and judiciary shall for ever be kept separate and distinct is departed from, and they are made capable of being elected as members of the general assembly, or members of the council: which constitutes a very striking distinction between the justices of the county courts and the judges of the other courts, and manifests plainly that it was not the intention to place them on the same footing as to the durability of their commissions. The word *justices*, which was inserted in the report of the committee, being omitted in the bill of rights, is a circumstance which with the act of assembly directing the forms of the commissions operates forcibly on our minds to confirm our opini-