Mr BOYD,

THE attention of the public has for some time been engaged with several writers on the subject of the commissions of Oyer and Terminer lately issued in this province. As I think it is a subject of the greatest consequence to our liberty and welfare, I shall take leave to review the different arguments which have been urged in support of them; and whatever pain it may cost me to condemn a measure which has proceeded to such fatal lengths, if truth and a reverential regard to our excellent constitution shall compel me to do so, I will not shrink from the patriotic, though disagreeable task. To save myself and the reader trouble, I will consider all the arguments used on this occasion together, without ascribing to each particular gentleman his particular merit---I begin my enquiry into the legality of this commission by consulting the first authority of the profession, from whose institutes I shall extract what appears applicable to this controvercy. The paragraphs in point are the following, 4 Ins. cap. 28.

"1st. That Oyers and Terminers shall not be [illegible] out "before the Justices of the one bench or the other, or the "Justices Errant, and that for great and horrible trespasses of "the king's especial grace &c."

"2dly, That commissions are like to the king's writs, such "are to be allowed which have warrant of law and continual "allowance in courts of justice--for all commissions of new "invention are against law untill they have allowance by "act of parliament. Commissions of novel inquiries are de-"clared to be void--so as a commission is a delegation by "warrant of an act of parliament, or, of the common law "whereby jurisdiction, power or authority is conferred "on others. In the reign of Edw. 3, the justices were so "careful that no innovation should creep in concerning com-"missions of Oyer and Terminer, that certain justices having "their authority by writ, where they ought to have had it by "commission, though it were of the form and words that the "legal commission ought to be. John Knivet chief justice "by the advice of all the judges resolved, that the said writ "was contra legem, and where divers judgments were before "then found against J. S. the same and all that was done by "the colour of that writ was damned," "I see nothing else "in my lord Coke's treatise on this subject that will serve to "elucidate my inquiry, I now desire to make a few remarks "upon these.

with respect to the first, and which is according to the statute of Edw. 3. cap. 2. I can conceive no words more strong to prove the necessity of such persons only as are there mentioned being appointed under these commissions. In the observations which I have recited and in all the rest which are in that chapter, there is no distinction made between general & special commissions, as to the rules for the direction of them,---I therefore can see no foundation for Mr Hawkins's opinion--all lawyers know that a single doubtful opinion of any man, even of my lord Coke himself, is not obligatory on our acceptance, much less an unsupported opinion of Mr Hawkins who never was considered as an authority, but a mere laborious compiler, and of no higher dignity in a lawyer's office than Giles Jacob --and the reason he gives in the opinion alluded to is certainly not well founded.

1st. Because my lord Coke is well known to be on all occasions rather more prolix than concise, and therefore it is not probable to suppose that he would have omitted mentioning so material a distinction, if such a one had in fact existed.

2dly. Because the words of my lord Coke are too express to admit of any such distinction.--He first gives a definition of general commissions and the form of one--He then mentions those that are particular, and cites five precedents where such were granted---and in the paragraph immediately succeeding he begins, "concerning commissions of Oyer and Terminer, Ten conclusions are to be observed &c."(and these ten are all that he makes in the whole chapter.) Any man who reads for instruction and is content to take his authors meaning as he finds it would necessarily suppose these general words including both, meant both, especially when the author goes immediately from that which is said TO BE the subject of this observation, to that which is said TO BE NOT so, and upon this last expresly speaks. Besides, if this particular clause relates only to special commissions, it may with as much propriety be said, all the rest do, and then the general commissions have no restraint at all.

3dly. If such a method of interpretation is admitted a precedent is formed for discovering the sense of any auther, however respectable, in the annotations of a critick, who has the sagacity to find he means the direct contrary of what he says---how we are to account for the words great or horrible trespasses, I apprehend is not an essential enquiry. At that time perhaps commissions of Oyer and Terminer did not issue so much of course as they now do: I cannot speak of this certainly from history, but it is much more easily reconcileable to my belief, than that my lord Coke, so remarkable for his particularity, should have omitted a distinction of such great importance, if there really had been such a one. However we have no right to destroy the real meaning of a whole context in any book, much less in one of unimpeached authority, to gratify our construction of one equivocal expression.

My observation on the second extract is, that if our situation will not admit of a strict adherence to the rules which direct the exercise of any prerogative in England, that prerogative cannot be exercised here, for so far as parliament or the common law directs, the idea of discretion is absurd upon the principles of our constitution, which instruct every novice that the legislative authority can in all instances controul the executive; consequently wherever the parliament interferes with the exercise of any prerogative whatever, so far as that interference reaches, the rule is absolute and cannot be departed from; and the common law being the only source from which the king's prerogative is derived, the restrictions it imposes are a part of it. If we are intitled to the benefit of acts of parliament previous to the charter, it must be all or none: It never must be left to the interpretation of judges to say what shall and shall not be in force; for it is contrary to the true policy of all well regulated states to have the legislative and the executive power in the same hands and particularly odious to the generous sentiments of a free people. with respect to the observation made that English subjects carry with them into a new country the laws of the parent state to be used in its infancy as circumstances will admit, I answer that this is only applicable to those who settle an uninhabited country; though could it be applied to us, we certainly never should allow a vague discretion of that nature which is scarcely tolerable in a state of the most severe necessity to be exercisable here at any time the caprice of one branch of the legislature may provide a seeming occasion for it--I therefore maintain my position, that if any part of our situation makes it necessary in order to introduce courts of Over and Terminer here that the legal restrictions of their appointment should be at all dispensed with, it is ILLEGAL to appoint such. I quote in confirmation of this general reasoning the the case above cited by Coke, wherein all the judges determined that where they were appointed by writ instead of commission, though it were of the form and words of the legal commission. Yet the difference, nominal as it was, was fatal, because the said writ was contra legem, so strictly were these commissions considered----------much more must appointments of that kind be contra legem which destroy the very essence of them---I pay no attention to any private opinion against an express judicial authority, which must govern our belief and practice unless contravened by some later, and in order to constitute a legal authority in a point of law. There must be a judicial opinion after a solemn argument on that point only.---If such a one can be produced let it be, together with such statutes as may have altered the constitution of these courts since the time from which I have now extracted the doctrine of them.

Were I inclined to take an advantage of any man, Selden has given me one good opportunity to do so, but truth obliges me to confess, that justices of Oyer & Terminer are not mentioned in the act of 27 Hen. 8, to which he refers, and from which he so elaborately, though so weakly argues---How he could make a mistake so unfortunate for his purpose (one not authorized by the quotation which he cites) I cannot possibly conceive but by supposing he had a mind to display the great ingenuity with which he could argue in the most different cases; of which however in the present case he has given a very unsuceesful proof---for what can be more weak than to suppose the Assembly, by providing against trivial objections to form, meant to change the very essence of an important power?---Or can there be a more irrational conclusion than to intend this from the clause cited? Had it related to substance instead of form it would not even then have served his purpose, because in general words the king is never included, and no part of the prerogative can be affected by implication. At the same time, though it is not necessary, I must doubt the authority of the Queen's peace act as it is generally believed to be obsolete. In Sir Matthew Hales pleas of the crown fol. 23 I find as follows, that the justices of Oyer and Terminer in criminal causes cannot be by writ but must be by commission under the Great Seal; otherwise their proceedings are void. 42 Assis. 12, as also in fol. 31. by the statute of 9 Edw. 2. cap. 5, Justices of Oyer and Terminer, Jail Delivery and Assize are to send their records and processes determined & put in execution to the Exchequer at Michaelmas once every year under their Seal, to be kept by the treasurer and chamberlains, but are to take out their estreats first.

I would by no means attempt to impose upon the public by referring to books of no authority. This is a circumstance I leave for a Selden a Regulus & the Gentleman without a name in the North-Carolina Gazette to do. My quotations are therefore in a great constitutional point from that able crown lawyer, Sir Matthew Hale, one of the first characters in the law England ever produced. I therefore now offer to the good people of this country the matter of law above cited; wherein the reader will observe in the first place that no commission of Oyer & Terminer can issue but under the GREAT SEAL, by which no person I presume will have ingenuity enough to discover is meant the Great Seal of North-Carolina.