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AND

North-Carolina State Gazette.

Ours are the plans of fair delightful peace,
Unwarp'd by party rage, to live like brothers

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DEBATE
on the
NEW JUDICIARY
in the
SENATE of N CAROLINA.

The Bill for the more uniform and convenient administration of Justice, being read a second time, and open for amendment:

Mr. LITTLE proposed to strike out the whole of the bill, except the words "a bill," and insert in its place a substitute, providing for a division of the State into fifteen districts.

The Yeas and Nays being called,

Mr. WELBORN said he should vote against this amendment, because he did not like the manner in which it was introduced, though he liked the principle contained in it better than the bill. And if it had been brought in as a distinct bill and not merely with a view of frustrating the measure before the house, he would have given it his support.

The Yeas and Nays were taken on the proposed amendment as follow:

YEAS . Messrs. Alston, Ash, Arrington, Bryan, Brownrigg, Binford, Blount, Blackman, Foster, Fisher, Franklin, Gray, Huggins, Little, M'Koy, M'Carne, M'Kinne, Person, Ray, Rogers, Stevelie, Smaw, Slade —23

NAYS . Messrs Beard, Croom, Clements, Deberry, Davis, Davenport, Ferebee, French, Graves, Graham, Horton, Holmes, Harris, Harrison, Hooker, Hatch, Hinton, Knight, G. Lea, B. Lea, Marshal, Montgomery, Outlaw, Old, Pinckham, Rhodes, B. Smith, Stedman, Smith, Shuford, Scales, Selby, Williams, Welborn —34.

Mr. FRANKLIN moved to strike out the provision in the bill which allows jurors to be called out twice or four times a year in the county courts. If this part of the bill was expunged, the county courts would continue to be held as at present.

Mr. WELBORN wished this provision retained. If it were unnecessary to call out jurors four times a year he thought it would be wrong to put counties to the trouble & expence of doing so. And if it should be found in progress of time, that it would be best to have all the trials in the superior courts the juries in the quarterly courts might be dispensed with altogether.

Mr. FRANKLIN said, if this provision was retained, it would produce much confusion in the State. Some counties will call out jurors twice a year and some four times, and persons having business in the courts will no know when to attend. There ought to an uniformity in the courts throughout the state; they ought all to be held quarterly, or all half yearly

Mr. B. SMITH said, the bill was intended to render the administration of justice more convenient to the people. He thought the provision a proper one. In large counties, where there is considerable business, a jury might be summoned quarterly; but in counties where there was little to be done, it would be a hardship to call out jurors more than twice in the year.

Motion negatived.

Mr. FRANKLIN moved to strike out the last section of the bill, which limited its operation to three years.—If the system was a good one, it would then go on; and if not it could at any time be repealed. He saw no propriety in the limitation.

Mr. R. WILLIAMS hoped this section would be expunged, as it would remove a constitutional objection which had been made to the appointment of the Judges under it. The constitution directs that Judges shall be appointed "during good behaviour," whereas if the bill passes with this provision in it, they would be appointed for three years only.

The amenment passed without a division.

The question "shall this bill pass its second reading," being put,

Mr. FRANKLIN did not think it right that a bill of so much importance should pass without discussion. He acknowledged himself to be one of those who did not approve of the proposed change in our Judiciary system. He thought the change too great. It was giving up a system which had hitherto secured our rights and privileges; and although some complaints were made against it, yet they were not of that radical kind which call for its destruction. And if the old system be defective, so is the one proposed to replace it. For his part, he considered the present bill merely as an entering wedge to a plan which does not yet fully appear. This bill will be followed by others. Indeed another must pass at this session, or the Judiciary cannot go on, as there is no provision in the present bill for clerks and masters in equity.

Our Jury System, (said Mr. F. which is, perhaps, the best in the world, is about to be destroyed, and to be replaced by one upon a new principld, which will be dangerous in its operation. Our present jurors are drawn from a plurality of counties; and no man could tamper with a Jury thus chosen. The Justices at the county courts are now to appoint the Jurors. Where are your influential men when this is done? No about these Justices; but they will have emissaries there. These Jurors are appointed three months before the trial, and known by the man to be tried. Will not this afford an opportunity for tampering with them. Or if this cannot be done, the party may get his cause removed to another county, which will be productive of delay and expence, if it does not finally defeat the ends of Justice.

But gentlemen say, that this system will bring Justice to every man's door, and that it will be as fairly administered as at present. He did not believe this. We have, said he hitherto had juries, which served as a shield for the poor man against the rich; but we are now about to adopt a Jury system, which would prove dangerous to our country.

Mr. F. begged gentlemen to consider how far this bill goes. If this bill passes, said he, your Judiciary System is gone; your county courts are gone; indeed the whole artillery of the bill is levelled at our present county courts—to put them out of the way, and establish superior courts in their place; and gentlemen might as well come forward & avow this to be their intention, and if they are nuisance let them at once be put down

Where, (asked Mr. F.) is your equity business to be tried? If in the county superior courts, he supposed the same causes would prevent their being attended to, that had hitherto had that effect. He supposed our supreme court would be our court of chancery, at any rate, he wished to see the wood machinery of the business, before he passed the present bill. He was for dividing the law from the equity business, if any eligible plan could be devised for the purpose.

He thought some of the provisions of this bill too strong, and others too weak. It was too weak with respect to criminals. Great offenders would be committed for trial. Will your county jails hold them? At some of the county court-houses there are not more than three or four inhabitants. Would the friends of a man in this situation suffer him to remain in an insecure prison, when his life might pay the forfeit, on conviction? They would not, and in order to secure such an one, guards must be resorted to. On looking over the files of the committee of claims, the expence on this head will be found already sufficiently large; but what will it be, when he courts are increased from eight to sixty? This he considered as amongst the weak parts of the system, the part through which great offenders would escape punishment.

He would state in what light he considered the system too strong.—It would create 110 new officers, viz. 2 Judges, 4 Solicitors and 104 clerks and clerks and masters in equity.—These men, finding themselves in office, when they go to an election, will enquire, Is the candidate a man who will meddle with our offices? Such considerations, he had no doubt would have their effect.

Let us, said he, look at the construction of our government. The power of the Executive is very limited. Take away the power of pardoning, and there is scarcely any thing left. He has nothing to do with the other two branches. He could not resist a system like this. Then the contest for power will be between the Legislature and Judiciary, and if this bill passes, you make the latter too strong for the former. The legislature cannot displace these officers, and they will influence your elections, and bid you defiance.

Mr. B. SMITH considered the subject before the house as one of the greatest magnitude. After giving it the most mature deliberation, the principle of the proposed change in the judiciary system of the State met his warm approbation.

Last year a bill of similar import was proposed, and being before the Senate near the end of the session, when his mind and body were too much debilitated to admit of continued investigation; he used his endeavours to postpone a determination to the present meeting of the Legislature and succeeded. Thence he thought it his peculiar duty to seek information, and had amongst other enquiries, made one by writing to a gentleman, whose very respectable standing and long experience in administering justice from the bench of the superior courts in South-Carolina, made his opinion eminently desirable. The answer was so extremely favourable to a system which carried the superior courts into the counties, that it disposed him to give his support to a similar arrangement for this State

Mr S. said he had heard a number of arguments against the bill proposed, but notwithstanding the high respect which might be entertained for the learning and abilities of the gentlemen who used them, he was so far from being convinced by their reasonings against adopting the measure, that a full examination of them had more strongly confirmed him in favour of it.

He believed the principal objections to the bill might be comprised under the following heads: 1st, the untruth of the preamble—2d, the unconstitutionality of the bill from being opposed to the district principle—3d, the great danger attending innovations, particularly on the work of the Heroes and Statesmen of the Revolution, the Patriots & Sages of '76, & 4th, the inexpediency of the measure.

It had been asserted that the preamble contained a very unqualified censure of the Judges of the superior courts, and attempts were made to prove that it alledged facts which were untrue. He could not think that any censure was either expressed or intended against the Judges. The words are, that the delays and expences inseperable from the present *constitution* of the courts of this State do often amount to a denial of justice.—Here is not the shadow of complaint against the Judges. Had he considered it in that light he would not vote for a bill with such an unfounded charge. For when the three eldest of the Judges were elected, he had the honor of a seat in the Legislature, and the pleasure of voting for them. He had no reason to repent of the preference given to them, nor did he believe the friends of the bill meant to convey the smallest censure upon any of the Judges. Their complaints are plainly directed against the *constitution* of the courts, a change in which they think indispensible for the happiness and convenience of the people.

In attempting to prove the unconstitutionality of the bill submitted to consideration, there had been cited the 44th article of the constitution declaring the Bill of Rights a part of it, and then the 4th, 9th and 14th sections of the Bill of Rights upon the construction of these, much ingenuity had been displayed, but altho' the ear was gratified, he heard no argument which convinced the understanding. It is true the 4th section declares "that the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other." No one is disposed to deny the propriety of this declaration, nor has it been proved that the bill infringed that article. It is insinuated that this is done by increasing the duty of the Judges without raising their salaries. He was in favor of liberal salaries, and did not believe they could be better bestowed than upon good Judges;—but is not the salary the same now, since the duty has been diminished by separating the State into different ridings as it was when the whole State was but one riding? When the Legislature formed the eastern and western ridings and thereby lessened the laborious duty of the Judges, but continued their full salaries, who heard the smallest suggestion that the measure was unconstitutional? Did the Judges complain of the alteration? By conscientious, learned and upright officers, composing a great and most independent branch of government, bound by the most solemn oaths to support the constitution, would they not have refused to carry the law into effect if it had been contrary to that venerable instrument? We therefore, by their compliance with that law, have their legal knowledge and tried integrity in favor or acknowledgment of our right to alter their duties without changing the salary; and if we had a constitutional right to pass that law, which has not been controverted, we certainly have an equal right to perfect the bill before you into a law.

It is true, that in one of the greatest models of human wisdom and political excellence, the constitution of the United States, the sages who formed it, by the 1st section of the 3d article, took more care to guard the independence of the Judges than is shewn in our constitution, by forbidding a diminution of compensation during their continuance in office. Yet even this section jealous as it is of judicial rights, does not forbid an increase of duties without an increase of salary. Penetration far less keen than that of those great and wise men, must easily have foreseen that with the certain and rapid increase of population and commerce in our country, law-suits must multiply, which would inevitably add to the labours of the Judges.

The 4th section of our Bill of Rights urged against the measure proposed, he considered in favor of it—That declares "In all controversies of law respecting property, the *ancient* mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred & inviolable." An attempt was made to shew that a jury selected from the district was the ancient mode; but if he recollected rightly this sort of ancient mode was not pretended to have existed in this colony more than fifty years back. Certainly much more ancient modes well known to those who formed the constitution of North-Carolina could be shewn. These were trial by peers of good and lawful men, 1st, from the vicinage—2dly, from the body of the county.

The most celebrated authorities state, that by the policy of the ancient law the jury was to come *de vicin to* from the neighbourhood or vicinage of the *ville* or place where the cause of action was laid in the declaration, and therfore some of the jury were obliged to be returned from the hundred in which such *ville* lay, and if none were returned the array might be challenged for defect of hundredors. For living in the neighbourhood they were properly the very country or *pais* to which both parties had appealed, and were supposed to know before-hand the characters of the parties and witnesses, and *therefore* the better knew what credit to give to the facts alledged in the evidence. This practice was afterwards, by different statutes, gradually extended till by 24th Geo: 2d. ch. 18 the jury were to come *de corpore comitatûs* from the body of the county at large.

In Magna Charta, that famous instrument acknowledging and ascertaining the rights of the gallant people from whom we are descended, it is more than once insisted on as the principal bulwark of their liberties, but especially by ch. 29—"That no free man shall be hurt in either his person or property,"—"*nisi per legale judicium parium suorum vel per legem terræ*," and it was esteemed a privilege of the highest and most beneficial nature.—Moreover when an issue is joined between the parties in a suit by these words, "And this the said A. prays may be enquired of by the country," or, "and of this he puts himself upon the country, and the said B. does the like" the court awards a writ of *venire facias* upon the roll or record commanding the sheriff "that he cause to come here, on such a day, twelve free and lawful men, (*liberos et legales homines*) of the body of his county, and by whom the truth of the matter may be better known, & who are neither of kin to the aforesaid A. nor the aforesaid B. to recognize the truth of the issue between the said parties," and such writ is accordingly issued to the sheriff. But when the usage began to bring actions of any trifling nature in the courts of Westminster Hall, it was found to be an intolerable burthen to compel the parties, witnesses and jurors to come from Westmoreland perhaps, or Cornwall, to try an action of assault at Westminster. A practice therefore very early obtained of continuing the cause from term to term in the court above, provided the justices in Eyre did not previously come into the county where the cause of action arose, and if it appeared that they arrived there in that interval then the cause was removed from the jurisdiction of the justices of Westminster to that of the justices in Eyre. Thus we wish to remove the causes from our district towns to the counties where the causes of action arise, and to relieve our constituents from the intolerable burthen of being compelled, as parties, witnesses and jurors, to go from their own counties to the distant ones where the superior courts are held at present. To conclude the authorities respecting the ancient mode of trial by jury—we find by 2d Hale, P. C. 264, and 2d Hawk. P. C. ch. 40, that when a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon his country, which country the jury are, the sheriff of the county must return a panel of jurors, freeholders without just exception, and of the neighbourhood, that is of the *county* where the fact is commited. Thus we find abundant cases in favour of trials by juries of the counties. Not one of real ancient date respecting juries from a district composed of several counties The article however most relied on to prove the unconstitualty of the present bill, is the 9th section of the bill of Rights, which declares, "That no free man shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used."—The word *heretofore* does not appear to apply in the strict sense contended for by any opposer of the bill. If it did, the jurors ought to be taken exactly from the same districts that they were heretofore, that is, previous to the forming of the constitution. Admitting this doctrine, the State could not have been divided into more districts than existed previous to '76, which we know has been done without any constitutional objection being raised. If such a strained construction were correct, a criminal of Morgan district (formerly a part of Salisbury district) upon being convicted might vitiate the trial and arrest judgment by urging "You have tried me by jurors of Morgan district, whereas, I ought to have been tried by those of Salisbury district as that was the mode heretofore used." Would any Judge admit such an argument to be good? And shall we be alarmed at one so easily answered? No, the true meaning of the word heretofore, is explained by the clause itself, "the unanimous verdict of good and lawful men in open court." If the word means more it is that juries shall be summoned agreeably to the ancient mode which has been fully shewn to be from the vicinage or county, and this reasoning is particularly supported by the 14th section of the Bill of Rights.

Former legislatures of the State as the increase of population and convenience of the people required, have extended the number of districts since the formation of the constitution by creating Morgan & Fayetteville districts, and in 1785, actually established a superior court of law and equity in the *county* of Davidson—Was any objection raised against these laws upon the ground now taken? No one can have a doubt of our power or rights being equal to those of any former Legislature. Why then should we be deterred from establishing as many superior courts as we think beneficial to the PEOPLE, without believing in the new discovery, that it is unconstitutional.

(To be continued.)