REMARKS

ON

"AN ACT TO ESTABLISH THE SUPERIOR COURT OF THE CITY OF BOSTON,"

PASSED BY

The General Court of Massachusetts,

AT ITS LAST SESSION.

BY A CITIZEN.

BOSTON:

PRINTED BY JOHN WILSON, 21, SCHOOL STREET.

1849.

REMARKS

ON

"AN ACT TO ESTABLISH THE SUPERIOR COURT OF

THE CITY OF BOSTON,"

PASSED BY

The General Court of Massachusetts,

AT ITS LAST SESSION.

BY A CITIZEN.

BOSTON:

PRINTED BY JOHN WILSON, 21, SCHOOL STREET.

1849.

REMARKS

ON

"AN ACT TO ESTABLISH THE SUPERIOR COURT OF THE CITY OF BOSTON."

THIS *Act* is a legislative phenomenon. It tears up by the roots and sweeps away a system of judicial proceedings, nicely balanced and adjusted between an established order of Courts, which has been amended from time to time, and adapted to existing circumstances, as our population increased, during a period of *fifty years.* But the magic of the movement consists in the *secrecy* and the speed — the *presto-pass* velocity — with which the thing has been done. We had seen, indeed, in the papers — casually noted amongst bills pending before the Legislature, to "incorporate manufacturing companies, and banks, and religious societies" — *an act to establish a Superior Court.* But, until the Bill had *actually passed*, not a word in any public paper ever gave the least hint or notion of the purport of the proposed enactment, and the tremendous change which it designs to make in all future proceedings, wherein our lives and liber-

ties, and rights of person and property, are to be adjudicated and determined.

Heretofore, when any important change in our laws, affecting extensively the interests of this city and county, has been contemplated, the people have been consulted or warned in some way, — if not formally called upon to express an opinion; yet such notice has been sent abroad, that those who might feel interested, and whose situation would make it proper and right, could be heard through the press or otherwise, and thus give the proper aid in perfecting the proposed action.

But, in this case, a *studied concealment and secrecy* have veiled the whole process, from beginning to end, from the people. We venture to affirm, that the purport of this law was not known to one hundred *legal voters* in the county, before it had actually passed both branches of our General Court. And, we repeat, this was not by *accident*, but by *design*. It was thought inconsistent with the safety of the *project* to make it known, except to a *few* who could be trusted.

Not only was this Act conceived and brought forth in most marvellous secrecy, but, now that it has indeed come to light, through the newspapers, amongst the Acts of the late session of our General Court, and we are permitted to inquire and seek to know something about it, there is still a mystery hanging over it. Where did the project of creating such a Court originate? Who drew the Bill? What individual, *what clique* or clan or cluster of men, concocted the plan and the Bill? It was reported by the Committee

on the Judiciary, in the House of Representatives; but no *explanatory report* accompanies the Bill, — a thing very unusual when *important* Bills are reported. But how came the Bill before that Committee? The original *draft* is not in the handwriting of any member of that Committee; and we venture a prediction, although we aver our utter ignorance of its real author and origin, that upon investigation it will be found, that it came to that Committee, like Minerva from the brain of Jupiter, a full-grown Bill, in legislative form; that it was drawn by a person or persons who were not members of either branch of the Legislature; and was thus brought before the Committee, without any previous instructions from them. This, we repeat, is merely our surmise: search, and see if it be not so. It is, then, a Bill having no real legislative *paternity;* a sort of *nullius filius, — a foundling*, discovered at the door of the Judiciary Committee; exposed, as it may be, to perish, like other unfortunate bantlings, whose parents are ashamed to own them.

After all, however, we freely and cheerfully admit, that to be born in obscurity, and even of unknown parentage, in this republican country, is no real disparagement to an *individual* or to an Act of Legislation. By its own *intrinsic merits*, each must stand or fall before the people. We shall proceed, therefore, to try the *Act* under consideration by this test.

In proceeding thus to examine the merits of the Act, the first *general* objection which occurs to us is, that it is *a Court created for, and confined to, the county of Suffolk.* We have already a *Police and Justices*

Courts for small matters, such as are usually disposed of by local magistrates. But this *Superior Court* is to have jurisdiction of the highest and weightiest matters, civil and criminal, — even of capital trials, — and yet it is but a *County Court.* The salaries of the Judges are to be fixed by our City Council, and paid out of our City Treasury; and they are never to hold any Court, except *within* and for this county. It results, as a matter of course, that the Judges must be taken from the Suffolk Bar, although appointed by the Governor. Now, it is well known, that we have able lawyers in Suffolk, and enough of them, to fill this new Bench; yet it is equally well known, that our *ablest lawyers* in this county will never occupy seats there. They can do better for themselves and their families, who have a right to their services, than to serve the public for the largest salary which, by this Act, the City Council will be allowed to award them. It has been difficult to find lawyers in this city, for years past, who were willing to receive an appointment even to the *Supreme Bench*, whose rank pointed them out as suitable; and those who have done so, it is well known, have accepted the appointment after considerable persuasion, and with reluctance. To that Bench, however, as our highest tribunal, the honor of a seat added some attraction. But, when we look at the Common Pleas Court, we see that it has seldom been possible to find our first lawyers in Suffolk willing to go upon that Bench. It is not so with lawyers in the interior of the State. There, the practice of the law is not so well rewarded, as it is in

Suffolk, amongst the ablest members of the Bar. It is well known that our Common Pleas Bench has been and is occupied by men of distinguished abilities, principally because they can be selected from all parts of the State; and that the same amount of legal talent and strength could not be procured, for the same amount of compensation, from our City Bar. In other words, the highest order of legal talent and attainments can be procured for a less compensation in money in the interior of the Commonwealth, than in Suffolk. This is a natural state of things, and by no means discreditable to the profession residing out of Boston. But the fact is too well understood to admit of question or argument; and it shows that any Court, short of the *highest*, must be a second-rate Court, if the Judges must, *ex necessitate rei*, be selected from our local Bar, instead of allowing the whole range of the State for the purpose. In plain terms, however high its jurisdiction and powers, its Bench must be occupied by *second* or *third-rate lawyers;* and the Court itself must take rank as a Town or County Court, just above, but next to, the Justices and Police Courts.

How long the people of this county will be satisfied, and feel safe, to trust their highest interests touching life, liberty, and property, to such a tribunal, the experiment will show, and discerning and practical men may surmise and predict.

It ought to be added, also, that the Judges of our higher Courts, the Common Pleas and Supreme, — going, as they do, through the whole State, — acquire

much intellectual strength, become liberalized, and keep up with the age, by contact with men of all shades of character and opinion, and all degrees of progress. This is the course of things in England also, where the Judges traverse the kingdom, and where, it must be admitted, the Bar and the Bench do not discredit the age and nation where their labors are bestowed, remarkable as that age and nation are for intellectual progress. Need we ask, What must be the effect upon a Bench of Judges, to be hemmed in by the boundaries of a county not so large in territory as a Western farm, — bound down to a judicial treadmill, not large enough for air and exercise? It is unavoidable, that men thus limited in their sphere of action should fail to realize that intellectual growth, that ever-expanding grasp of mind and views, so essential in the administration of justice, where the analogies of the law are to be adapted to the ever-varying phases of society and social affairs.

The next general objection which occurs to us is the fact, that this Superior Court is not to be a *Court of law, but a mere Court of trials.* The Court is to consist of three Judges; but these Judges are neither directed nor authorized to reserve questions of law, to be argued before the full Bench, and decided by that Bench in the same Court. All questions of law, arising in trials, must be decided by the single Judge who presides at the trial; and, if his decisions are excepted to, the questions thus decided must be carried to the Supreme Court for their final adjudication. The Judge, called upon to rule a matter of law, and

doubting perhaps the correctness of his own opinion, necessarily formed and announced at the moment of the trial, has no power to reserve the question to be argued before his associates in full Bench. This is a *fatal and decisive defect* in this newly created Court. It puts it by the side of the little local Courts, holden by a single Justice of a Police or Justices Court.

It may be said, that our present Court of Common Pleas has the same defective organization. This is true; but it is not the less a defect on that account. No Court, however high its name and jurisdiction, can ever take rank at all *as a Court of law*, which is merely authorized to use a Jury for the ascertainment of the facts of a case, but cannot hear solemn argument upon the questions of law arising in the proceedings before it, and have the questions thus argued decided by a full Bench. No such Court exists in that country from which we borrow our forms and models of judicial proceedings. The Common Pleas, the King's Bench, the Exchequer, are all Courts of law, in the proper sense of that term, meeting *in banco* to hear and determine all questions of law arising in proceedings before any member of the Court. Without this power, a Court must lack all judicial dignity, and take, in fact, the rank and character of a Sheriff's Court, or a Coroner's inquest.

Having thus disposed of these objections, somewhat preliminary in their nature, we must proceed to a more searching analysis of this Act, and the Court created by it.

The first question, naturally asked by all who think upon the subject, must be, What occasion, what necessity, what call, was there for this breaking up of our established order of Courts? Why this interposition of a new tribunal, of mongrel visage and unwonted shape, — "*monstrum horrendum, informe, ingens*," — between the Court of Common Pleas and the Supreme Court? In other words, What is the real object of the law? and what does it propose to accomplish?

In answering this inquiry, we can get no aid from any Report by the Committee who presided over its birth. The Act was literally *still-born.* Nor are we aware, that any written or spoken exposition or explanation of the Act or its objects does anywhere exist. We shall, however, venture to assume, that the advocates of this law, if it should ever find any, will say that the "*law's delay*," that Gorgon dire, of classic memory, but not fabulous, is the evil which has evoked this anomalous enactment, and is to be cured by it. Let us examine, then, with all meekness, the real operation of this proposed *specific.*

In order to judge, with any degree of correctness, of the efficacy and value of the proposed remedy, we must understand with some precision *the disease* to be cured. That there is *delay*, most tedious, expensive, and injurious, in our judicial proceedings, as at present conducted, is, indeed, too true. But that *delay* is not, to any considerable degree, in relation to *jury trials.* As a general thing, it may be said, that, where a trial by jury is sought by the parties, it comes as

soon after the commencement of the action, as the real good of the parties, and a full and fair investigation of the case, require or will admit. It would hardly be desired, that such cases should be reached sooner than they now generally are. This is true even in the Supreme Court, where an opportunity to try by jury is offered but once or twice a year. Still, the cases carried to that Court are generally so important, and the preparation for trial is a work of so much time and labor, that they are generally called for trial before the parties are prepared for it. At the last Nisi Prius term of that Court in this county, the presiding Judge remarked, more than once, that he had heard complaints of delays in our judicial proceedings; but that, in fact, it was difficult to find the parties ready and willing to try. Indeed, the Court adjourned from day to day, at various times, because no case could be found ready for trial. This has been so, as we have witnessed, for many years. So great an evil has this become, — the delay of parties to be ready, not the delay of the Court, — that the Judges of our Supreme Court have been obliged to adopt a rule, that cases shall not be continued, even where both parties desire and request it, without good cause shown for it. The Court wish to dispose of the cases; and, if parties come there, the Judges insist that they shall proceed, and bring their causes to issue. We would not be understood as saying, that our Supreme Court is well arranged or conveniently organized in respect to jury trials. We think otherwise. It is clear that there ought to be more jury terms, — *four*,

at least, every year. Why should we not have as many opportunities to go to a jury in Suffolk, as there are even in the mammoth city of London? There, even the King's Bench has a jury for trials every quarter. But we have said thus much merely to show, that the real point where our judicial system labors is not in relation to jury trials, even in the Supreme Court, much less in the Common Pleas; although it is true, that, in the Common Pleas, a case is not always reached the first term of the Court, as surely it ought to be. But, if the Court would sit during the whole space between the terms, every action would be tried in which the parties are ready for trial; and this could be done, with some time to spare. And why is not this done? It is said, there are not Judges enough to give us this accommodation. Then the plain and obvious remedy is, to give us more Judges, until we have enough for this purpose. And if business should so increase, with our increasing population, that one Court sitting through the whole year cannot dispose of the business in the Common Pleas, then let two branches of the Court be holden simultaneously by two Judges, one to each branch. This is the easy, natural, and straightforward remedy for such a disease; and it is difficult to imagine how any man, not bewildered by a mental *strabismus*, could ever have sought to cure it by the *awkward, misshapen monstrosity, clumsily contrived and put together* in this legislative enactment.

The *Act* under consideration transfers to the Superior Court the jurisdiction of all criminal cases where

a jury is required within the county of Suffolk in our State Courts; and original exclusive jurisdiction in all civil actions, wherein the plaintiff shall swear, that the matter sought to be recovered is of more value than three hundred dollars. No liberty or power is given to the defendant to carry the case to the Supreme Court, as he can do in the Common Pleas, by making affidavit that he believes he has a good defence. The Municipal Court is, of course, abolished, as all its business is transferred to the Superior Court. The new Court is divided into two branches, a criminal and a civil branch, and is to hold a term, or session, in each branch every month; and the civil branch, if needed, may have two Judges, each holding a Court at the same time. The business of the county, as at present disposed of, requires the Municipal Court to sit about six months, with a jury, in every year; and the Common Pleas does, in fact, sit about eight months every year. Three months more, annually, would dispose of all its business with ease.

It will be said, therefore, that this new Court makes ample provision for a speedy trial of all cases where a jury is to intervene, if the plaintiff chooses to go to this Court, and his case is large enough to permit him to do so. And this is true. Three Judges can certainly do the work, which does not now require two to do it, especially if part of that work still goes to the Common Pleas, as it can, and undoubtedly will continue to do.

But our answer is, and we think it will be conclusive in the mind of every sober man who looks to the

public good and nothing else, that all this could be done in a much more easy, natural, and simple manner. If our present number of Judges in the Common Pleas could not conveniently do it, give us one more, or even two more, until we have enough for the purpose. There is no occasion for a *new Court* of any sort, much less of *such a Court.* Unless it was thought that Judges, with so low salaries as those of our Common Pleas, ought not to be trusted with our important cases, — and we admit their salaries are too low, — why disturb the existing order of our Courts, and break up their harmoniously arranged jurisdictions, which are now so well understood and settled by the adjudications of our highest tribunal?

It may be said, however, and will be said, to those who may not understand such matters, that there are delays incident to our present system of Courts, even if they were competent to do all the work promptly as it comes along. If a citizen has a debt to be collected, concerning which there is no dispute, and so no jury will be required, — nevertheless, as our Common Pleas holds a term but once in three months, the creditor cannot have his action entered until the next Court, which may be three months ahead; and, if the action be entered, and the debtor do not appear to make defence, still, by our existing law, no judgment can be obtained against the debtor thus defaulted and able to pay, until the end of the jury sittings of the term of the Court at which the action is entered. This is precisely so; and *this*, in truth, is the law's delay so much complained of by our merchants, and

which ought long ago to have been remedied. There was no need of a new Court, and such a one as the legal world never saw before, — we say nothing of what prophets may have seen in dreamy visions, — to abolish this delay. A statute of THREE LINES, providing that our Common Pleas Court should hold a term every month, and give judgment upon all defaulted actions after twenty days' default, would have done the business completely. Any human being, not so sharp set for *new Judges* as the concocter of this Act seems to have been, might have hit upon this simple mode of cure, as it would seem to our unsophisticated minds.

Thus we have shown, that the delays in our judicial proceedings, as our Courts are now constituted, so far as they relate to *trials by jury*, are inconsiderable and unimportant; and, such as they are, they are remediable by a very simple process, — increasing the number of terms of our *present Courts*, and increasing the number of Judges if need be. This would avoid, as we have said, a violent disruption of a system, well adjusted and contrived, which has gradually been brought into perfect shape by the labors of half a century; beginning with the organization of our Municipal Court, where our *criminal* jurisprudence was, for the first time, separated from the *civil* in this county.

But there is a delay of justice, in our present system, which is too grievous to be borne, and which cries aloud for remedy. That delay is in the *final adjudication and determination of questions of law*

arising in judicial proceedings. It is because the Act under consideration does not remove this enormous mischief, that it is utterly unworthy to be thought of, for a moment, as even a step towards the desired relief. The *Supreme Judicial Court* must hear and determine, in the last resort, all questions of law. They must hear argument, deliberate, and decide, by a *full Bench;* that is, a majority of the Judges composing the Court. This is a slow process, and unavoidably consumes a great portion of the time of the Judges of that Court. The consequence is, that a case carried to that Court, where questions of law arise, sleeps a long sleep, — the sleep of death sometimes. It often happens, that the original parties and their Counsel die out, before the case is finally disposed of. It has been the common experience in that Court, that the questions of law reserved at the November term, and carried to the next March for argument, that being the only law term in the year, are not reached at that term, — not one of them; and that the whole list stands continued a year, and sometimes two years, before the whole Court can hear them argued. And, after argument, they not unfrequently are with the Judges another whole year, before they can find time to decide them. Such is the abominable state of things in that Court, as at present organized. It is no new grievance in kind, but it has accumulated in intensity. It results from no fault of the Judges, but from a want of time by any possibility to accomplish the work. The Judges of that Court can do no more work than they, in fact, do. It is impos-

sible. More Judges, one or two, would accomplish the desired object fully and entirely. The addition of one Judge, a year ago, has done much good, and added some speed, to the judicial locomotive. Now, if *he* or *they* — we know them not — who contrived this proposed new judicial machine, the Superior Court, had discerned that new Judges on the Supreme Bench would relieve us from an immense evil, and had diligently applied himself or themselves to accomplish the appointment of them, a good work might have been consummated. *Perhaps*, a *Judgeship* on that Bench was not within the scope of his thoughts or ambition.

But, in our judgment, the changes proposed by the *Act* under consideration do not give any substantial relief in regard to the *enormous delays* in the final decision of questions of law in the Supreme Court: indeed, we are not sure that they will not make the evil worse. It is true, by this Act, all capital cases are to be tried by a jury in the Superior Court; and thus the Supreme Court are relieved from this labor. But is it not plain, as all questions of law arising in such cases are reserved for the Supreme Court, nothing will be gained by this change? Where life is concerned, and the trial is before an *inferior tribunal*, although called SUPERIOR, counsel will be ingenious and fruitful in reserving questions of law for the Supreme Court, and every case of that kind will go up upon such questions; and the argument, consultation, and determination of them will occupy the Judges of the Supreme Court more time than the same cases

would have occupied, if originally tried in that Court. As capital cases are now tried before a full Bench in the Supreme Court, it seldom happens that any law is reserved for after-consideration.

It is also true, that this Act does not permit any action originally commenced in the Superior Court to be removed by the defendant to the Supreme Court, for trial by jury, which can be done in the Court of Common Pleas. Undoubtedly, it was supposed that this provision would give great relief to the Supreme Court, and thus give speed to their motions in other matters. But it is easy to show, that such a supposition is delusive. In the first place, cases can still be carried to the Supreme Court, upon affidavit by the defendant, from the Court of Common Pleas, for trial by jury. The Supreme Court must still try cases by jury, therefore, as they now do. They cannot dispense with a traverse jury entirely. All questions of law arising in trials before the Superior Court, however trifling, are to be carried to the Supreme Court for argument and adjudication. The consequence will be, that the Supreme Court law docket will be crowded with such questions. And all such questions, small or great, must go through the same solemn form, — an argument before a full Court, and deliberation by a full Court, and a determination, and public announcement in open Court of the adjudication of the whole Bench. It is clear, that the little saving of the time of one Judge of the Supreme Court who would try the case by a jury is unimportant, and is perhaps counterbalanced by the considera-

tion, that the decisions of a single Judge of the Supreme Court, made at the trial, would often be acquiesced in; while the same rulings in a lower Court would be the foundation of *exceptions*, which would be carried to the Supreme Court, there to be heard and decided by the whole Bench. So that, on the whole, in all important cases, it is not certain but that as much is lost as gained to the Supreme Court, by the provisions of this Act, in this portion of it.

It will, however, be insisted, that the provisions in this Act — by which all appeals from the Probate Court are taken to the Superior Court, and which give to the Superior Court *exclusive original jurisdiction* of all proceedings in Equity — will save much time and labor to the Supreme Court. This is the most delusive and puerile part of this Act. True, all Bills in Equity must go first to the Superior Court, — and all appeals from the Court of Probate must do the same, — but an appeal from the final decree in Equity to the Supreme Court is reserved to both parties; and all matters of law, in Probate appeals, may be carried there also. What practising lawyer can fail to perceive, that this makes the Superior Court a mere sieve or hopper, through which all cases must pass, but where nothing will stop? The final decree in a Bill in Equity involves all the law and all the facts in the case. The same is true in Probate appeals. The facts, in both classes of cases, occupy but little time of the Court, as they are now managed; and, when the cases, having passed through the Superior, arrive at

the Supreme Court, they will occupy as much time in the latter, as if they had come there in the first instance. It may be said, that all preliminary and interlocutory matters, preparatory to the hearing, in Equity cases, will be disposed of in the Superior Court; this is true: but such matters now are disposed of at the Rules, and occupy little or no time of the Court. Besides, upon an appeal from the final decree, all these matters will be open to examination and revision in the Supreme Court. The result, therefore, will be, that the proceedings in all such cases will be mere matters of form, in the Superior Court: the parties, knowing their right to appeal, will not even argue their cases in the Superior Court, but take an appeal, as a matter of course. It would be a foolish waste of time to have a hearing below, when the losing party can, and of course will, take an appeal, and thus nullify all the proceedings in that Court. This will be so, not only in Equity cases, but in Probate appeals. As to both these classes of cases, it is certain, little or nothing will be saved of labor or time to the Supreme Court by this new tribunal.

From what we have above stated, it would seem incontrovertibly manifest, that the Act under consideration is wholly unworthy of adoption, as a *remedial measure*. It gives added speed in *trials by jury*, where no more speed is needed, — and, if needed, it can be had by more simple means, and in the present order of Courts; while it utterly neglects the real and substantial evil which besets us, — *delays in the final adjudication of questions of law in the Supreme Court.*

These things being so, — and we do not fear that any practical lawyer will gainsay them, — it may be thought somewhat strange, that such a *Bill* should have passed through the various stages of legislative enactment, until it received the final executive sanction. To those who are even partially initiated into the mysteries of legislative proceedings and lobby influences, the matter is easily explained. After all the newspaper complaints of waste of time and windy speeches in our General Court, it is well known, that, while all private acts, gotten up for individual interest and purposes, and party measures, are discussed and smothered with words and wind, almost all public measures, in which the whole community are interested, are entirely neglected, — are very little debated, and are carried forward and taken care of, if at all, by a very few. An Act, like that creating a Superior Court for Boston, would attract the attention of nobody out of Boston; and, if one or two persons, amongst the Boston delegation, should seem to favor the measure, it would pass, as a matter of course. The Bill is read by its *title only*, — it is printed, — it goes into the hands of a Committee, and is reported without alteration. The country members, who look out with keen eyes for their own interests, would see no mischief threatened to them or their constituents, in a Bill whose operation is confined to Boston. Besides, in a measure like the one under consideration, most persons not being lawyers would candidly profess, that they could not and would not undertake to decide upon its merits; they would say, and doubt-

less they did say, in this case, "The responsibility is with the Boston delegation, upon this subject: if they are satisfied, they shall have it." And, as to our own delegation, — honest and good and faithful men as they are, — a very large proportion of them would say, and properly, "This matter is to be understood and explained by professional men: if they say it is right, we agree to it." It will thus be seen, that just such a measure as this, important and vital as it is to those upon whom it is to operate, would still pass through all the usual legislative stages unimpeded, because none would feel willing to assume the responsibility of opposing a measure, local in its operation, and apparently desired or asked for by a particnlar section of territory. The mere fact, therefore, that this Act has passed through the usual legislative formalities, raises no substantial presumption in its favor. Those who are called upon to decide its fate, in our City Council, should bear this fact in mind. All that the General Court have done, when fairly considered, is this: they have passed an Act which came before them, explicitly and distinctly declaring, *upon the face of it*, that *they*, the members of the General Court, did not and would not decide, whether it was a *suitable*, *wise*, and *proper* measure to promote the welfare of Boston or not. The decision of that momentous question, they expressly refer to the City Government.

It has occurred to us, that it may be stated, as an inducement to try the effect of this new Court, that a somewhat similar Court, called the "Superior Court of the City of New York," was created some years ago

in that city. Probably the idea of the erection of such a Court, as well as the name, was borrowed from that quarter. But that Superior Court was a *Court of law*, properly so called, and not a mere Court of trials. It reserved questions of law, heard them argued in full Bench, and decided them, in the same manner as our Supreme Court conducts similar matters. Besides, the city of New York was then three times as large as Boston now is; and there was no such easy and simple mode of relief for delays in judicial proceedings as we have at hand, if we choose to use them, without creating any new order of Courts. Moreover, in the case of the New York Superior Court, the Judges were selected from the State at large, and not from the city alone.

We have forborne to speak of the obvious defects of this law in its details and particulars, preferring to confine ourselves to the discussion of it as a system of jurisprudence, or a branch of such a system. Perhaps it is a feature rather calculated to give it popular favor, than otherwise, that this Court has no power to make attorneys and counsellors. Inasmuch, however, as all such careless omissions or mistakes could be cured by an additional Act at the next General Court, we have chosen to confine ourselves to those considerations which go against the whole project, as unnecessary, and worse than useless. We have also desired to abstain from all suggestions of unworthy or selfish motives, in any quarter, in the getting up and carrying forward of this measure. Much might be surmised and said; but we choose to leave this whole view of

the subject to the imagination of our readers, and of those who must give their vote upon the adoption of the law. "*If a man desire the office*" of a Judge, "he desires a good work;" and we should feel great reluctance to speak unkindly of those whose holy aspirations may lift their longing hearts in that direction.

In conclusion, we will briefly recapitulate our objections to the establishment of the proposed new Superior Court: —

1*st*, It is a *local*, *County Court*, whose action is confined to Suffolk; and its Judges must be selected within the county, and paid by the local authorities.

2*d*, No such Court is needed. All that it proposes to accomplish can be as well done by the Court of Common Pleas; and a legislative Act of a single paragraph could give all the necessary power for that purpose. Monthly terms by the Common Pleas, — two Courts sitting simultaneously, if needed, — judgments upon defaulted actions after twenty days' default, and taking away the right in the defendant to carry cases to the Supreme Court, would do the whole.

3*d*, The hearing of Bills in Equity and Probate appeals, in the Superior Court, is a futile provision; making some work for the Court below, but saving none to the Court above.

4*th*, This Act leaves untouched the enormous evil of delays in our Supreme Court. Unless this can be reached, let us remain as we are. In comparison with

this, no existing mischief in our judicial system deserves to be mentioned.

If any should be inclined to try the operation of this proposed new Court, we would remind them, that an *experiment*, in most particulars quite similar, has been already tried, and in this county. "The Boston Court of Common Pleas" was erected in 1814, with authority to hold terms every two months. At the end of one year, such frequent terms were found very inconvenient and unnecessary, and they were abolished; and the present order of quarterly Courts was established. And yet all lawyers will remember, that at that time a very large proportion of the actions brought were instituted merely to collect debts: of course, speedy action was desirable. Whereas, at the present day, very few actions for mere collection are commenced; the greater part being brought to determine contested rights. In a few years afterwards, in 1821, that Court was abolished, and the present Court of Common Pleas for the whole commonwealth was established. Up to that date, with the exception of three or four years during the extension of the Circuit Court of Common Pleas into Suffolk, from the foundation of the government, there had been only a County Court between the Common Justice Courts and the Supreme Court. But such a tribunal had never possessed the confidence of the people; and, at that time, almost all cases were carried, as a matter of course, to the Supreme Court; appeals being allowed in all cases. The present Act may deny the right of

appeal in matters of fact, as it indeed does; but no legislation can give confidence and respect to a tribunal so constituted, that it cannot deserve and command it.

We have thus endeavored, in the plainest possible manner, using no unnecessary professional phraseology, — desiring that all should understand and judge what we say, — to discharge what we have felt to be a DUTY. We have regretted, most sincerely, that such a duty has been imposed upon us. We have sometimes felt, as if we could wish we had not known that such a measure was in contemplation. Such a blissful ignorance would have saved us from the labor of this exposition of the proposed law, and from some other unpleasant contingencies, which we foresee may result from a collision with friends and associates, for whom we entertain great good-will and respect. But seeing, as we think we see, nothing but unmixed evil to result from the proposed measure, we have not felt at liberty to refrain from speaking, and thus to seek our individual ease and peace by skulking from duty. We will add, that we do not feel that we have any interest in the present question, except as we are component parts of the body politic, and desire the prosperity and happiness of that body. Indeed, personally and individually, we are not sure, that our mere worldly interests would not be benefited by the adoption of the law before us. *Unwise* and *inconsiderate* legislation, however injurious to the people at large, may possibly bring lucre and gain to some members and professions within that people. The troubles

and vexations incident to such legislation may compel those exercised thereby to seek aid and assistance from others, whose vocation it may be to come to the rescue in such cases, and whose services are to be paid and compensated. But we forbear to enlarge upon this topic.

Finally, the responsibility of adopting this law rests with our City Council. THERE LET IT REST. The supreme legislative authority have seen fit to place it there. They are free, unequivocally free, to adopt or reject. *Theirs shall be the praise and the blame. Be their action what it may, — be the consequences good or bad, — they cannot escape.*

APPENDIX.

APPENDIX.

COMMONWEALTH OF MASSACHUSETTS.

IN THE YEAR ONE THOUSAND EIGHT HUNDRED AND FORTY-NINE.

AN ACT TO ESTABLISH THE SUPERIOR COURT OF THE CITY OF BOSTON.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows: —

SECT. 1. — There shall be and hereby is established in the city of Boston, a Court to be called the Superior Court of the city of Boston; and there shall be appointed, commissioned, and qualified, in the manner prescribed by the Constitution, three meet persons, learned in the law, to be Justices of the said Court, one of whom shall be appointed and commissioned as Chief Justice of the said Court.

SECT. 2. — The Clerk of the Municipal Court of the city of Boston shall perform the duties of Clerk of the said Superior Court at the terms thereof held for the transaction of criminal business; and his duties, compensation, and tenure of office, as Clerk of the said Superior Court for criminal business, shall be the same as are now provided by law in respect to the Clerk of the said Municipal Court. And the said Superior Court shall have the same power to fill vacancies in the office of the Clerk of the said Court for criminal business, and to appoint and qualify a Clerk *pro tempore* for such criminal business as the said Municipal Court or Court of Common Pleas now have; and shall fix the compensation of such Clerk *pro tempore*, to be paid out of the fees

received by the said Clerk or Clerks under this Act; and the said Clerk or Clerks of the said Superior Court, for the criminal business thereof, shall be entitled to receive for their services the same fees which are now allowed by law to the Clerk of the said Municipal Court for similar services.

SECT. 3. — The Clerks for the time being of the Supreme Judicial Court, in the county of Suffolk, shall also be the Clerks of the said Superior Court, at the terms thereof held for the transaction of civil business; and shall perform all the duties of Clerk of the said Superior Court in relation to the civil business thereof; and shall be entitled to receive for their services the same fees which are now allowed by law to the Clerks of the Supreme Judicial Court and Court of Common Pleas for similar services, in the county of Suffolk. And the said Superior Court shall have power to appoint and qualify a Clerk *pro tempore*, for the civil business of the said Court, who shall act as Clerk of the said Superior Court in the absence or inability of both of the said Clerks of the Supreme Judicial Court, and shall also have power to fix the compensation of such Clerk *pro tempore*, which shall be paid out of the fees received by the said Clerks of the Supreme Judicial Court, and the Clerk of the criminal sessions under this Act.

SECT. 4. — The said Superior Court shall have power to appoint two criers of the said Court, one for the civil and one for the criminal side thereof, each of whom shall receive for his attendance and services the same fees as are now allowed by law to the crier of the Supreme Judicial Court in the county of Suffolk; and they shall also have power to appoint a messenger or messengers of the said Court; and the fees of such criers, and the compensation of such messenger or messengers, shall be paid by the city of Boston in the manner hereinafter provided.

SECT. 5. — The Mayor and Aldermen of the said city of Boston shall have power, and it shall be their duty, to provide, from time to time, for the payment by the said city of all expenses attending the sessions of the said Court, and the transaction of its business, not herein specially provided for.

SECT. 6. — The salaries established, and all expenses incurred in the administration of justice under this Act, shall be paid by the city of Boston: *Provided*, that the treasurer of the said city may be allowed to retain out of the fees, fines, forfeitures, or costs, accruing or incurred in the Court hereby established, or in the

Police or Justices Court of said city, an amount sufficient to pay the salaries established by this Act, and all expenses incurred in the administration of justice under this Act, and shall account to the Commonwealth for the balance which shall then remain in his hands.

SECT. 7. — It shall be the duty of the City Council of the said city of Boston to establish, by ordinance, the salaries of the Justices of the said Superior Court, within sixty days after the passage of this Act: *Provided*, that the salaries so established shall never exceed three thousand dollars a year for each Justice; but the same shall not commence until this Act shall take effect; and no salary shall be reduced during the continuance in office of any of the said Justices, to whom such salary shall be payable. And it shall also be the duty of the said City Council, thirty days at least before this Act shall take effect, to provide by ordinance for the payment, by the said city, of all other expenses attending the sessions of the said Court, or the transaction of its business, not herein otherwise provided for, so far as the same shall then have been ascertained: *Provided* this Act shall first have been accepted by the said city of Boston, in the manner hereinafter provided.

SECT. 8. — The said Superior Court shall have exclusive original jurisdiction of all suits in equity to be commenced after this Act shall take effect, of which the Supreme Judicial Court and the Court of Common Pleas within the county of Suffolk, or either of them, now have original jurisdiction; but any party aggrieved by any final decree of the said Superior Court, in any suit or proceeding in equity, may appeal therefrom to the Supreme Judicial Court: *Provided*, that such appeal shall be claimed within fifteen days after the entering of such final decree, unless the said Superior Court shall, for cause shown, allow a further time therefor. And if, upon such appeal, the Supreme Judicial Court shall reverse the decree of the said Superior Court, the Supreme Judicial Court shall enter such decree as the Superior Court ought to have entered, unless further proceedings in the cause should be necessary; in which case the cause shall be remitted to the Superior Court for such further proceedings. And whenever the decree of the Superior Court shall be confirmed by the Supreme Judicial Court, the party appealing shall be decreed to pay to the appellee the costs and all the reasonable expenses occasioned by such appeal, to be

taxed by the Clerk, and revised by the Supreme Judicial Court, or some Justice thereof, if either party shall so require. And no appeal shall be allowed until the party appealing shall have recognized, with sufficient surety or sureties to prosecute such appeal with effect, and to pay the costs and such reasonable expenses as he may be decreed to pay by the Supreme Judicial Court.

SECT. 9. — The said Superior Court shall also have exclusive original jurisdiction of all real actions commenced after this Act shall take effect, and of all civil actions commenced after this Act shall take effect, of which any Court of this Commonwealth, in the county of Suffolk, now has jurisdiction, in which the debt or damages demanded, or the property claimed, shall exceed in amount or value the sum of three hundred dollars, and in which the plaintiff, or some one in his behalf, shall, before service of the writ, make oath or affirmation before some Justice of the Peace, that the matter sought to be recovered actually exceeds in amount or value the sum of three hundred dollars, a certificate of which oath or affirmation shall be endorsed on or annexed to the writ. And the said Superior Court shall also have exclusive jurisdiction of all appeals to be claimed after this Act shall take effect, from decrees of the Judge of Probate for the county of Suffolk, which are now by law cognizable by the Supreme Judicial Court, with the powers and authority now vested in the Supreme Judicial Court concerning such appeals. And they shall also have exclusive original jurisdiction of all petitions or complaints for damages caused by the laying out or discontinuance of highways in the city of Boston, which shall be instituted after this Act shall take effect, of which the Court of Common Pleas now has jurisdiction, with the powers and authority now vested in the Court of Common Pleas, concerning such petitions or complaints. And the said Superior Court shall also have power to grant writs of review of their own judgments, or of the judgments of the Court of Common Pleas within the county of Suffolk. The Supreme Judicial Court within the county of Suffolk shall retain exclusive jurisdiction of all libels for divorce, and shall have the sole and exclusive power to issue writs of certiorari, mandamus, prohibition, and quo warranto; but the said Superior Court, and the Justices thereof, shall have concurrent authority with the Supreme Judicial Court in the county of Suffolk, and the Justices thereof, to issue writs of habeas corpus, and to adopt all such measures in regard thereto as are provided in

the one hundred and eleventh chapter of the Revised Statutes, or are otherwise provided by law: *Provided, however*, that if any citizen of this Commonwealth, not living in the city of Boston, shall be the defendant in any action at law, returnable into the said Superior Court, he may, at the time when he shall enter his appearance, move the said Court in writing for an order of removal, and thereupon it shall be the duty of the said Court to enter an order that the said action be removed for trial to the Court of Common Pleas; and whenever such order shall be made, it shall be the duty of the plaintiff in such action to enter the same at the term of the Court of Common Pleas holden within and for the county of Suffolk, next after such order of removal shall be made. And the said Court of Common Pleas shall have power to try and determine such action in like manner as if the same had been originally commenced therein.

Sect. 10. — The said Superior Court shall also have exclusive original jurisdiction of all crimes, offences, and misdemeanors whatsoever, which are now cognizable by the Supreme Court within the county of Suffolk, or by the Municipal Court of the city of Boston; and they shall likewise have the same appellate jurisdiction which the Municipal Court of the city of Boston now has of all offences which shall be tried and determined before the Police Court of the city of Boston, or before any Justice of the Peace for the county of Suffolk; and the said Court shall possess and exercise all the powers now possessed and exercised by the said Municipal Court not inconsistent with the provisions of this Act.

Sect. 11. — Any party aggrieved by any opinion, direction, or judgment of the said Superior Court, in matter of law, in any civil action, suit, or proceeding whatever, not being a suit in equity, whether it be according to the course of common law or otherwise, shall have the same right to allege exceptions thereto, and to have the same allowed, as now exists in civil actions, suits, or proceedings in the Court of Common Pleas; and thereupon, such exceptions having been allowed, the case shall be removed to and entered in the Supreme Judicial Court in the same manner, and shall be disposed of by the same proceedings, as are now required or authorized by law in respect of cases carried by exceptions from the Court of Common Pleas to the Supreme Judicial Court, save in the case of Probate appeals, in which the Supreme Judicial Court shall either enter such decree as the Probate Court should

have entered, or remit the case either to the Probate Court or the said Superior Court, with such directions for further proceedings as the case may require. And any party aggrieved by the final judgment or decision of the said Superior Court, founded on matter of law apparent on the record, may appeal therefrom to the Supreme Judicial Court; which appeal shall be claimed and entered in like manner as similar appeals from judgments of the Court of Common Pleas are now required to be claimed and entered. And when any person convicted in the said Superior Court shall think himself aggrieved by any opinion, direction, or judgment of the Court in any matter of law, he may allege exceptions thereto, in the same manner that a person convicted in the Municipal Court of the city of Boston may now allege exceptions; and the case shall thereupon be removed to the Supreme Judicial Court, and be there disposed of as is now by law provided in regard to cases removed by exceptions from the said Municipal Court; and, if such matter of law be apparent on the record, the party aggrieved may appeal in like manner as is provided in this section respecting civil actions.

Sect. 12. — Final judgments in the said Superior Court, in civil actions and in all criminal cases, may be re-examined upon a writ of error, and reversed or affirmed in the Supreme Judicial Court for any error in law or in fact; and, when the judgment shall be reversed, the Supreme Judicial Court shall render such judgment as the said Superior Court ought to have rendered.

Sect. 13. — A majority of the Justices of the said Superior Court may, at any time before judgment in any civil action, set aside the verdict, and order a new trial, for any cause for which by law a new trial may and ought to be granted; and they may also, at any time within one year after judgment in any criminal prosecution, grant a new trial for any cause for which by law a new trial may or ought to be granted, in the manner provided in the one hundred and thirty-eighth chapter of the Revised Statutes.

Sect. 14. — The Justices of the said Superior Court shall establish a seal for the said Court; and all writs and processes, issuing from the said Superior Court, shall be under the seal of the Court, and signed by the Clerk thereof, and may run into any county, and shall be obeyed and executed throughout the Commonwealth.

Sect. 15. — The said Court shall issue all writs and processes that may be necessary or proper to carry into effect the powers

granted to them; and, when no form for any such writ or process is prescribed by statute, the Court shall frame one, in conformity with the principles of law and the usual course of proceedings in the Courts of this Commonwealth.

SECT. 16. — The said Superior Court shall be holden by one or more of the Justices thereof, on the first Monday of every month, except the months of August and September, for the disposition of suits at law and in equity; and, on the third Monday of each month, the said Court shall be holden by one or more of the Justices thereof, for the disposition of criminal business; but, upon the trial of any indictment for a capital offence, the said Court shall be holden by all the Justices thereof.

SECT. 17. — The civil business of the said Court shall be transacted exclusively at the terms thereof appointed for the disposition of civil business, and the criminal business of the said Court shall be transacted exclusively at the terms appointed for the disposition of criminal business.

SECT. 18. — Each term of the said Court, for the transaction of civil business, may be continued and held until and including the last Saturday of the month in which the same shall commence; and each term of the said Court, for the transaction of criminal business, may be continued and held until and including the Saturday preceding the first day of the next term: *Provided, however*, that if any case should be on trial at the end of any term, such trial may be continued and finished during the next succeeding term.

SECT. 19. — Once in every four months, grand jurors shall be selected and required to attend the said Superior Court, at the terms thereof, for the transaction of criminal business, in the manner prescribed in the one hundred and thirty-sixth chapter of the Revised Statutes; and they shall be held to serve in the said Superior Court at each term holden for the transaction of criminal business, until another grand jury shall be empanelled in their stead.

SECT. 20. — Traverse jurors shall also be selected and required to attend the said Superior Court, at the respective terms thereof, in the same manner in which traverse jurors are now by law selected and required to attend the terms of the Supreme Judicial Court in the county of Suffolk, and of the Municipal Court of the city of Boston.

SECT. 21. — The Judges of said Superior Court shall have

power, from time to time, to make any rules, not contrary to any statutes of this Commonwealth, regulating the pleadings, practice, and business of the said Court, both at law and in equity; and more especially they shall have power, and it shall be their duty, from time to time, to frame such rules as shall avoid all useless technicalities, and at the same time cause the points really in issue between the parties to be distinctly and fully presented on the part of the defendant, as well as on the part of the plaintiff, so that surprise, loss of time, and useless expense may be avoided, and trials shortened, and the just decision of causes expedited as much as is practicable; and also such rules as shall cause the progress of all suits and proceedings in equity to a just final decree, to be as speedy as possible.

SECT. 22. — At any term of the said Superior Court, for the transaction of civil business, whenever the public convenience shall require it, two sessions of the said Court may be held in different places, each by one of the Justices thereof; and such division may be made of the business of the Court at any time as may conduce to the more speedy and convenient disposal of the same.

SECT. 23. — When no Justice of the said Superior Court shall be present at the time and place appointed for holding a Court, whether at the beginning of a term, or at any adjournment thereof, the sheriff of the county of Suffolk, or either of his deputies, may adjourn the Court from day to day, or from time to time, as the circumstances may require, or as may be ordered by any of the said Justices; and he shall give notice of such adjournment by making public proclamation in the Court House, and by a notification thereof posted on the door of the Court House, or published in some newspaper.

SECT. 24. — All indictments, complaints, informations, appeals, and all other matters which may be pending in the Municipal Court of the city of Boston, and all writs, warrants, recognizances, precepts, and processes, returnable to the said Municipal Court, and which would have had day therein, if this Act had not been passed, shall, after this Act shall take effect, be returnable to, and have day in, and be fully acted upon by the said Superior Court at the first term thereof to be held for the transaction of criminal business, next after this Act shall take effect. And all parties, jurors, witnesses, and others who would have been held to appear at the said Municipal Court then next to be held in the city of Boston,

and after this Act shall take effect, shall be held to appear at the said first term of the said Superior Court for the transaction of criminal business; and on the first day of the term last aforesaid of the said Superior Court, the said Municipal Court of the city of Boston shall be, and the same hereby is, abolished.

SECT. 25. — This Act shall be void, unless it shall be accepted by the said city of Boston, by the concurrent vote of the City Council of the said city of Boston, within sixty days after its passage; and it shall be the duty of the Mayor of the said city, within ten days after such acceptance, to certify the same to the Secretary of the Commonwealth.

SECT. 26. — This Act, if accepted by the city of Boston, shall take effect from and after the first day of October next; but the Governor, by and with the advice and consent of the Council, may appoint the Justices of the said Superior Court, at any time after the acceptance of this Act, in the manner provided in the preceding section.

House of Representatives, May 2, 1849.

Passed to be enacted.

FRANCIS B. CROWNSHIELD, *Speaker.*

In Senate, May 2, 1849.

Passed to be enacted.

JOSEPH BELL, *President.*

May 2, 1849.

Approved.

GEO. N. BRIGGS.

SECRETARY'S OFFICE.

Boston, May 22, 1849.

I certify the foregoing to be a true copy of the original Act.

Witness the Seal of the Commonwealth:

WILLIAM TUFTS,

Deputy Secretary of the Commonwealth.