ARGUMENT OF THE HON. WILLIAM SMITH, IN GIVING JUDGMENT ON THE CASE OF THE HON. MR. JUSTICE JOHNSON IN THE COURT OF EXCHEQUER, ON THE 7TH OF FEB. 1805

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Argument of the Hon. William Smith, in Giving Judgment on the Case of the Hon. Mr. Justice Johnson in the Court of Exchequer, on the 7th of Feb. 1805 by William Smith

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WILLIAM SMITH

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OF THE

HON. WILLIAM SMITH,

IN GIVING JUDGMENT

ON

THE CASE

OF THE

HON. MR. JUSTICE JOHNSON,

IN THE

COURT OF EXCHEQUER,

ON THE 7TH OF FEB. 1805.

N. B. BARON SMITH DISSENTED FROM THE REST OF THE COURT.

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1805.

TO THE

RIGHT HONOURABLE

SIR M. SMITH, BART. L. L. D.

MASTER OF THE ROLLS,

LORD COMMISSIONER OF THE GREAT SEAL,

AND ONE OF HIS MAJESTY'S

MOST HONOURABLE PRIVY COUNCIL

IN IRELAND.

THE following Note of his Son's Argument, on the Case of Mr. Justice Johnson, extracted (with the Baron's permission) from a general Report of the proceedings in the Court of Exchequer, is, with much Respect, inscribed

By his Lordship's

Obedient,

And very humble Servant,

THE EDITOR.

COURT OF EXCHEQUER, Feb. 7th, 1803.

ARGUMENT

OF THE

HON. WILLIAM SMITH.

IN this cafe the arreft appearing to me to have been illegal, I am confequently of opinion that the Prifoner fhould be difcharged.

Indeed, I conceive that fuch fhould be our rule, in a matter of lefs eafy folution than the prefent. For it is only in cafes of certainty, that the Court is to remand. In thofe of doubt, it is bound to bail, or to difcharge. And here, accordingly, we ought to liberate, in as much as we cannot bail.

In entertaining the fentiments which I have briefly thus avowed, I am aware that I encounter the authority of my Lord Chief Juftice;* whofe fallibility I am the more reluctant to admit, becaufe he would himfelf be the firft to make, and nobly act on, the admiffion. But, fallible he

* Downes.

he is; for he is human:—and it is ſuperfluous to ſtate, that in diſſenting from the opinion, I venerate the man.—He indeed is one, my deference for whoſe ſuperior intellect and knowledge gives way only to my reſpect for his more valuable qualities; and to the honeſt exultation which I feel, that merit ſo uncommon is placed at the head of our Crown law.—I muſt differ with ſome degree of qualm from him, who more elevated by worth and talent, than by age or ſtation, would bend a patient and docile ear to the arguments of the humbleſt man. Who, if theſe ſhould bring conviction to his candid and modeſt mind, would unaffectedly rejoice to have his errors thus corrected; without adverting to the lowlineſs of the inſtrument which removed them;—and whom this liberal ſentiment alone would have ſufficed to exalt, above the corrector to whom he yielded. A man, who may be proud; but is a ſtranger to that baſe pride, whoſe pert and diſguſting offspring are Obſtinacy and Preſumption.

I am aware that I alſo differ in opinion, from one with whom I have generally had the good fortune to agree; and from whom no man, who is as well acquainted with him as I am, can diſſent, without conſiderable ſcruple and heſitation. I mean my highly eſteemed and reſpected friend, *Judge Daly*.

But

But let it be recollected, that the peculiar ſituation of *Judge Oſborne* precluded him from giving, and perhaps prevented him from forming, any judgment on the preſent queſtion. It is poſſible that, had he not yielded to the circumſtances of a ſituation, which he conſidered ſo delicate as to enjoin ſilence as a duty, he might have delivered an opinion, in concurrence with that of the ſecond Judge of the Court; and in oppoſition to what a perſon, unacquainted with the manly integrity of his character, might ſuppoſe to be the more probable bias of his mind. In that event, the Court being equally divided, the Priſoner would have been remanded, not ſo much by a ſubſtantial deciſion on his claim, as by virtue of an etiquette and form of law.

There is then a poſſible caſe, in which the Court of King's Bench may be conſidered as having been divided. But, whether ſuch an hypotheſis be admitted or not, be it remembered, that my ſentiments coincide with thoſe of *Mr. Juſtice Day;* as independent a gentleman, and as intelligent and upright a magiſtrate, as, I believe, is to be found upon the bench of either country; and one eminently verſed and informed in Criminal law: a Judge, to whoſe hands an innocent man might commit his life; and whoſe late deciſion ſeems calculated to prove, that the liberties of the ſubject may be entruſted to his care.

Nor