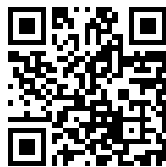


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John C. Manning  
1844

THE  
RIGHTS  
OF AN  
AMERICAN CITIZEN;  
WITH A  
COMMENTARY ON  
STATE RIGHTS,  
AND ON THE  
CONSTITUTION AND POLICY  
OF THE  
UNITED STATES.

BY BENJAMIN L. OLIVER,  
COUNSELLOR AT LAW.

BOSTON:  
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## PREFACE.

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THE importance of the subjects discussed in the following pages, to every citizen of the United States, at all times, must be very apparent. But, at the present moment, they have a peculiar interest. For, as the American people profess to act from principle; and, as a misapprehension of their rights, in their various complicated relations, at this critical and alarming conjuncture, may lead them into measures of great responsibility, the consequences of which may be irreparable and attended with never ceasing regret, it is presumed, that an attempt to define those rights, though it should be only partially successful, will not incur their censure.

The expectation, however, of receiving the approbation of all, is by no means entertained. For, as the public sentiment is divided on many of the subjects comprised in the present work, such an expectation could have no other ground, than one to which the author disclaims all pretensions; that of an ability to convince those persons who have formed different opinions. All that he asks of his readers, therefore, is, with relation to political subjects, that they



will do his work, as well as their own understandings, the justice to weigh his reasons, before deciding against the doctrines, in support of which they are adduced. For, he will not anticipate the possibility, that any of them, however opposed to him in sentiment, instead of refuting his arguments by open and manly demonstration, will resort to the disingenuous and illiberal substitute, of impugning his motives. But, if otherwise ; he must avow, that, he acts under his own impulse only, and has no understanding or connexion with any party whatever ; and, being under oath to support the constitution, he has done so, in the only way in his power, to the best of his small ability. For the rest, he begs leave to adopt from Grotius, as translated by Barbeyrac,—‘ Si j’ai avancé quelque chose de contraire a la piété, aux bonnes mœurs, a l’écriture sainte, aux sentimens reçûs de toute l’église chretienne, ou en un mot a quelque verité que ce soit, je le désavoue, et je veux qu’il soit tenu pour non dit.’

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# PART I.

## OF GENERAL RIGHTS.

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### CHAPTER I.

*Of the rights of Man, as derived from his nature and condition.*

**DIVISION I.** Of natural rights in general. Sec. I. Of the right of self-preservation.—Sec. II. Of liberty, or freedom of action.—Sec. III. Of natural equality.—Sec. IV. Of freedom of opinion and the rights of conscience.—Sec. V. Of the right of property.—Sec. VI. Of the right of self-defence.—Sec. VII. Of the right of protecting property.—Sec. VIII. Of the right to redress or reparation for wrongs and injuries.—Sec. IX. Of the pretended right of war.—Sec. X. Of the right to form associations and organize society.

**DIVISION II.** Of those natural rights which are usually retained in organized society. Sec. I. Of self-defence in cases of extreme urgency.—Sec. II. Of qualified liberty, *under which is considered*, 1, the right of expatriation; 2, the rights of conscience and freedom of inquiry; 3, the right of property; 4, the right of equality; 5, the right of freely discussing public measures; 6, the right of petition and remonstrance; 7, the right to reform the Government.

THOUGH man is a being evidently designed for society, and the greater part both of his various rights as well as duties, depends upon the relations which he contracts through the medium of social intercourse; yet, it will facilitate a distinct understanding of those rights and duties, to examine what rights he must necessarily be considered as having in relation to the rest of mankind, without any reference to those which result from organized society.

The only sure foundation of all right, is the will of the great Creator. Independently of this, men could have no ground to complain of wrong or oppression in any case, because their relation to each other would be that of brute animals, among

which the strong and ferocious devour the timid and weak, without pity or remorse. It would be the same with men ; because, having no other aim than self-gratification, and knowing no other restraint upon their actions than the want of power, whatever each individual found himself able to do, he would do without regard to any other consideration, than his own advantage. And thus the world would be filled with antediluvian violence. Such is the direct tendency of Atheism ; and it is on account of this tendency, as well as its impiety, that, it is held in the utmost detestation among reflecting men. Those persons, therefore, who having no settled or distinct notions on religious subjects, affect Atheism, in order to give themselves importance with the rest of mankind, by a pretended disbelief of the evidence of their own senses, if they were capable of understanding it, as well as of other evidence, which they have never examined sufficiently, err greatly to their own prejudice. For, they expect to excite admiration for the strength of their understandings, which, as simple people believe, sets them above vulgar prejudices, and frees them from the bugbears and restraints of what they term priestcraft, bigotry and superstition. But, the real consequences are, that, if sincere, they are pitied for the imbecility of their minds ; but, if insincere, they are despised for their hypocrisy. If they boast of such opinions, their vanity is laughed at ; if they attempt to make proselytes of simple persons, the ignorant, and novices, they are abhorred by people of principle. What, perhaps, is of much greater consequence in their own opinion, their oath is rejected as unworthy of belief in a court of justice, and they are trusted by nobody. Not by a prudent man, because honor is a base currency not by any means *at par* with religious principle ; not by each other ; because they know each other too well. Since there is nothing to deter them from anything which they think for their interest, but the fear of detection, exposure and loss of character.

The following particulars, derived from the sacred scriptures, which contain satisfactory evidence of divine revelation, constitute, as it is believed, a sufficient foundation for all the rights and duties of mankind, whether towards the great Crea-

tor, or towards each other. 1. That man was created a rational and accountable being, and that the dominion over the earth and all things in it, was given him. 2. That the whole human race are derived from the same first parents, and consequently, however various in stature, complexion, intellect, morals or civilization, they are all brethren of the same family. 3. That the Creator has given men a conscience to distinguish between good and evil ; as also, certain moral and religious precepts for the regulation of their conduct, as well with regard to themselves as towards each other ; the substance of all which is, to do justice to all men ; to walk humbly before God ; to be holy, and avoid every species of impurity and excess.

From this concise statement of so much of revelation as immediately relates to the subject of the present chapter, it is apparent, that all the rights, which men may justly claim to exercise or enjoy, and all the duties which they are bound to perform in relation to each other, are derived from the will of their Creator, either as necessarily to be inferred from the nature which he has bestowed upon them, and the condition in which he has placed them ; or, as manifested in those express declarations of his will, which are contained in the revelation or dispensation, to which reference is made.

Some of the more important *natural* rights, *i. e.* such as a man may claim in relation to the rest of mankind, but independently of organized society, or any of its positive regulations, may be found in the following enumeration.

SEC. I. *The right of self-preservation.* As men have their existence from their Creator, as his gift, it follows that he alone has a right to deprive them of it. Consequently no man or body of men, whether organized into a society, or living in a state of nature, without any regular government, has any right to deprive any individual of his life, unless in obedience to the will of the Deity ; whether it consist in some particular express command, like that given to Joshua, by virtue of which the different nations of Canaan were destroyed by him ; or, in some general direction given to men, requiring them to punish



certain crimes with death as often as they occur. Except in these two cases, therefore, every individual of mankind, has a *natural* right, to defend his life against all who may attack it; and in his own defence, it seems, may use any means whatever, which may be necessary for that purpose, even to the destruction of the lives of his *assailants*, if he can save his own life in no other way. But, it will be difficult to make out any pretence of right in any person, even for the preservation of his life, to inflict any injury, however small, upon an innocent individual. For, necessity has no dispensation to commit injustice. The proverb, 'necessity knows no law,' seems therefore to be misapplied, when it is used to justify whatever a man may do for the preservation of his life, though accompanied with the greatest injury to a third person. The true doctrine on the subject, is believed to be, that such extremity, though it may be urged in palliation of the wrong, can never be considered as a complete justification where the necessity is merely *moral*. Where the necessity is *physical*, it is admitted, that there can be no guilt or accountability, either in ethics or at law, in the immediate agent; but the person imposing the necessity is alone answerable. What a man does for the preservation of his life, is done under a *moral* necessity. This can be no excuse therefore for any injury done to a third person. Still, if such injury is inconsiderable, and admits of compensation, the person under such moral necessity, may so far presume upon the benevolence of others, as to suppose that they will be willing the act should be done for the preservation of human life. But this is true, only where there is no opportunity of asking permission; for the act cannot be justified if expressly forbidden. For, though self-preservation is the first instinct or dictate of nature, it must always remain in subjection to the will of its great author. The true construction of the expression, 'necessity knows no law,' seems to be, that, where a man's life is in danger, the fear of immediate destruction takes possession of his imagination so entirely, that all distinctions of right and wrong, are wholly forgotten; and whatever the instinct of self-preservation prompts him to do, he performs, regardless of every thing else. In any other sense, the expression is only

true in part. The true distinction would then be, that with regard to things, which in their own nature are *indifferent*, but which the laws of organized society have prohibited, from motives of mere policy or expediency, a man may do them, if it is necessary for the preservation of his life. But, with regard to those things which are *wrong* in their own nature, whether prohibited by the laws of society or not, this proverb affords no just criterion; because no necessity which is merely *moral*, can justify their commission.

SEC. II. *Of liberty or freedom of action.* As man is endowed with certain powers and faculties, by his Creator, who has also laid certain express or implied restrictions upon their use and exercise, it may reasonably be inferred, that, *subject to these restrictions*, a man has a right to do agreeably to natural law, whatever he has a power to do. But, as the meaning of this brief expression may be mistaken, to guard against any misapprehension that might arise on this subject, it may be stated more precisely, that, in a state of nature, a man may rightfully do whatever he has it in his power to do, provided that it is not inconsistent with the dictates of religion or morality, i. e. incompatible with his duty to God, or to any of the human race.

With relation to the rest of mankind, a man has therefore a natural right to the free and unmolested use of all his powers and faculties, so far as they may be exercised without infringing the equal rights of others. But, where no individual can set up a peculiar right to a thing, exclusive of that, which others may equally claim, he will have no right to do any thing, by which the exercise of their rights may be taken away without their consent. In any such case, mutual forbearance is the single alternative of mutual concession.

Of this natural liberty or freedom of action, subject to the limitations just suggested, no man, while living in a state of nature, can justly be deprived by any other man or body of men whatever. For, that cannot properly be called a right, of which a person may be deprived by others, without his consent. Besides, no man can have any right to control another, unless it is given by nature; as, in the case of a parent and

child, where a parent has a right to control the child until it is old enough to provide for and protect itself, at which time it seems to be set free by nature ; or, unless the submission to the control of another, is voluntary in the first instance, as, in the case of a female, who by marriage puts herself in subjection to her husband, and under his protection. This natural liberty arises necessarily from—

SEC. III. *The natural equality of men as to their rights.* All men are by nature equal as to their rights. For, they are all of the same family ; and, though they differ in their natural qualities and endowments ; yet, there is no evidence that it is the will of the Creator that one should rule over another, unless the mere happening of a thing can be used as an argument to justify it, which would equally justify every species of acknowledged wrong. It will be difficult, therefore, to make out any natural right, by which the strong, the beautiful, the fair complexioned, or even the wise, may justly compel the subjection of the weak, the ugly and deformed, the dark colored, or the ignorant and foolish. For, among men, right always depends upon justice, equity and equality ; and never upon force, fraud or cunning, or wisdom perverted to a selfish purpose. If no superiority of natural endowments can confer a right to subject others to its control, no casual concurrence of circumstances can afford the slightest pretence for any such right. It is not intended, however, to deny that a man, for such consideration as he thinks proper, may voluntarily relinquish to another individual, or to any body of men, whether formed into an organized society or not, any portion of his natural freedom, and consequently may abandon his natural right to equality with them in this respect. For, there appears no sufficient reason to doubt, that, in a state of nature, a man may bind himself to serve another, either for a certain length of time, or even during his life, and in this way come under an obligation to obey all his master's commands in all things within the agreement for service, unless they involve the performance of some act of injustice. And, in general, though possibly there may be some few exceptions, the slave will be justified in doing, by his master's orders, whatever the master would have a right to do in person.

For similar reasons, by the law of nature, a father may justly bind his son to service to a third person, if he makes proper stipulations for the son's support and education, and the son will be bound to serve such person, as long as he would have been bound to submit to and obey his father; *i. e.* until he is old enough to provide for and protect himself, at which time the father's natural right to control his son ceases, and the son is set free; and at that time being old enough to have a family of his own to provide for, he is no longer bound by the law of nature to submit to his father or to any body else. But, from the duties of gratitude, respect and reverence to his parents, the child is not released by any lapse of time.

#### SEC. IV. *Rights of conscience and freedom of opinion.*

From the natural equality of men as to their rights, it follows, that no man, or body of men, has any right to control another's belief or opinion in religious matters, or to forbid the most perfect freedom of inquiry in relation to them, by force or threats, or by any other motives than arguments or persuasion. Suppose, for instance, a missionary were to be so absurd as to attempt to compel a conversion to the Christian faith by establishing an inquisition among a heathen people, and punishing with death all those who refused to make a profession of faith; this would be no less an infringement of the natural rights of the natives, than it would be disgraceful to the great and most praiseworthy cause of heathen conversion. For, nature has given no man a commission to inquire into and control another's belief in this respect; and the divine revelation authorizes the use of no other measures to bring the unconverted to a right belief, than those of instruction and persuasion.

Yet, in a state of nature, a man might justly expel from his household, any person who entertained a different opinion from himself on religious or any other subjects, on the supposition that he was under no other obligation to retain him in his family than the imperfect duty of hospitality. Is there any christian, that would consider himself as doing wrong, if he excluded from his family, an Atheist, a Mahometan, or an open scoffer at

revealed religion, though such person to all appearance possessed a fair character and irreproachable morals? Certainly **not**. For, to wait and see if the guest attempted to spread his **own** false doctrine, or corrupt or undermine the principles of his host's family, would be merely gratuitous, and the guest could have no just cause of complaint, if such an opportunity were withheld. Since the attempt might be successful in the first instance, and after the contagion were once spread the mischief might be irreparable. For a similar reason, in a state of nature, every man has a perfect right, however illiberal the exercise of it may be, to choose to employ such individuals only as entertain opinions on any subject in accordance with his own. And any individual, who may be rejected from such employment on account of his opinions, will have no just cause of complaint; because the other is under no obligation to employ him at any rate, unless he has agreed to do so. But, it is obvious that no agreement can justly be *dissolved for any such cause*, unless it forms part of the agreement itself.

What *natural* right, then, it may be asked, does a heathen prince infringe, who refuses to permit a Christian missionary to reside within his territory, because he ignorantly supposes that the diffusion of the Christian religion may be injurious to his people? Certainly none. The guilt he incurs is that of rejecting the gospel, for which he is answerable to its great author from whom it proceeds, but to no earthly tribunal. But the missionary, *personally*, has no just cause of complaint, if compelled to leave the country, without other ill usage, because it is presumed, he is not on his own errand, but, in a qualified sense, is a messenger of his divine master.

SEC. V. *Right of appropriation, and property.* The foundation and true origin of the right of property seem to be, that the usufruct of the earth, and its various products and contents, was originally given to mankind *in general*; but, with the exception of certain grants made to one or two particular nations or tribes of men, which are mentioned in the Old Testament, no particular territory appears to have been assigned

by the great Creator, to any particular individual or nation. It seems to follow, that every individual as well as nation, has by nature, a right to appropriate to his or their use, so much land or territory, wherever it may be found not appropriated by others, as the individual or nation has occasion for, and can actually occupy, without any other right or title, than what arises from the mere act of appropriation, by taking possession and keeping it in actual occupation. For, if any person could have any right to turn out of possession a prior occupant, it would infer some natural superiority of right in such person over the occupant; but this would obviously be an unfounded pretention, unsupported by any evidence whatever. But, if, by taking possession, an individual excludes the rest of mankind, so long as he retains it; then, it is evident, that if he should always retain the possession, he will always be entitled to the usufruct of the land exclusive of others; which limited property seems to be all that ever was intended by nature. And therefore if he should abandon the possession of the land, it would be again reduced to a state of nature, and consequently would, in like manner, again become the property of the next occupant in succession, and the former occupant would lose all right to resume the possession. This however would hold good in those cases only, where the first occupant intentionally abandoned the possession, or voluntarily relinquished it to another.

The manner in which property would be transferred to a purchaser, or transmitted to a descendant or other kinsman, so as to make him an heir, may easily be deduced from this view of the subject. For, in a sale of land, the occupant or owner would merely deliver to the purchaser, that possession, upon which alone his right of property depended, and the purchaser from that time, would have a right to retain the possession against all the rest of mankind. If the owner of land was desirous, that his son should inherit it after his death, he would take care that his son should be the first occupant after that event took place; for, otherwise the son could have no natural right to what had been in his father's possession when he was alive. The obvious reason is, that the son could have no greater right than his father had, whose right would have ceas-

ed when his occupation ceased. Consequently when the father died, if the possession were then vacant, it would go to the next occupant; or, if the father had put the son in possession previously to his own decease, the son as occupant and owner would have a right to retain it.

It has been supposed by some, that, while living in a state of nature, an individual, having occasion to make use of any natural product, not previously appropriated by any other person, could not rightfully appropriate it to his own use, without the express or tacit consent of the rest of mankind. For, they consider the earth and all its products and contents, as intended by nature, as a joint stock for the general sustenance or other benefit of the whole human race. But, this opinion, it is believed, is erroneous, and such as if traced through its necessary consequences, would lead to great absurdity. For, if this opinion were well founded, then every person born, or to be born, would have a right to claim a portion or proportional part of all property on the face of the earth, on the ground that by nature, he had a rightful interest or share in it, which he had never relinquished. A further consequence would be, that no one could justly claim an exclusive property in any thing; and thus men would derive little or no benefit from the bounty of their Creator. But, in fact, there never was any *such* general community of property among all mankind. The true views of the subject, it is believed, may be illustrated, by considering the natural products of the earth, as well as the surface of the earth itself, in the same situation in this respect, as the waters of a river, which, though intended by the bounty of the Creator, as a joint provision for the necessities of all mankind, indeed of all creatures, living near enough to have access to it; yet, is by no means to be considered as a joint stock; because no individual that does not make use of its waters can have any interest in it. But, it would be quite otherwise, if it were a joint stock. And therefore, in a state of nature, where a man goes to the bank of a river with a vessel to draw water, and takes out such a quantity as he has occasion for, as soon as he has separated it from the rest of the water in the river, it becomes his, by this simple act of appropriation. For this purpose, it is not necessary, that he should

ask the consent or permission of any individual, or of the rest of mankind. Because though every one has a right to take what he wants ; no one has a right to forbid others to do the same. Consequently, in any such case, no one has a right to interfere and deprive another of what he has thus appropriated to himself, without some better ground than because the appropriation was made without the consent of the rest. For, the only ground for the right of property in relation to things furnished by the bounty of nature, is the mere act of taking and keeping possession, taken in connexion with the circumstance, that no one else has a better right, and consequently can have no right to defeat that possession. For, the mere act of one man cannot deprive another of any right that he has. To illustrate ; when A dips his vessel in the river, B has no right to prevent him from drawing up water ; because, though B has an equal right, he has no exclusive right to the water of the river. A therefore interferes with no right of B, because B when he pleases, may do the same. Yet A has no right to any particular portion of the water, before he appropriates it by filling his vessel ; for, if he had, then B would have no right to take that particular portion, supposing it possible to distinguish it beforehand, though A did not. But, each having an equal right, and neither an exclusive right, he who first fills his vessel with it, obtains a right of property in it. But this right has no other foundation, than the want of right in any other person, to deprive him of what he had thus appropriated.

It would be a false deduction from these principles however, to infer that an individual has a right to appropriate to himself by the mere act of taking possession, the *whole* of what was intended by nature for the common use of mankind, or of so many as might from nearness of situation, derive an advantage from it. For, in any such case, no man has a right to appropriate any more than he has occasion for. It is true, as long as the supply is abundant for all, no one would have a right to complain, that another engrossed or consumed more than his occasions required. But, as soon as there was a deficiency, any one having occasion for a supply, would have just cause to consider himself injured, if the supply should be pre-



vented by such wrongful appropriation. To illustrate ; by the law of nature, any one would have a right to take from the river whatever quantity of water his occasions required ; but he would have no right to divert the channel, because, in this way, he would do a general wrong to all those who were thus deprived of the use of its waters. And in general, where a thing is intended by nature for the general use of mankind, the attempt or claim of an individual to appropriate the whole of it to his own use, is wholly unjustifiable, and if he compels others to submit to it by force, will be an act of mere usurpation. For, in any such case, by the law of nature, every individual, previous to the organization of society, who has occasion for a supply, will have a right to disregard this act of appropriation, and take to himself, out of what is thus so unjustly engrossed, so much as he has occasion for, but no more.

This view of the subject wholly sets aside the right of necessity, which is supposed by some to supersede the right of property. For this right of necessity rests, as it is pretended, on the principle that no man can appropriate any thing, without the consent, express or tacit, of all mankind ; and that, as no man would have given such *express* consent, if he should thereby reduce himself to a state of extreme necessity, there can be no ground to infer a *tacit* consent in any such case. The case of extreme necessity must therefore always be excepted, it is pretended, in all cases, where an individual seems to acquiesce in silence in any such appropriation by others. The necessary consequence of such doctrine, however, would be, that in any case of such extreme necessity, a person would have a right to demand, that those things which have thus been appropriated by others, and which are necessary to relieve his necessities, should be thrown into a state of nature again ; or, agreeably a phrase of proverbial use in the law, should be brought into *hotchpot*, so that he may have a share, or, at least, so much as may be absolutely necessary to preserve his life.

But as a person, subject to the restriction before suggested, that he does not engross the whole of any thing of a general nature, may appropriate to himself, without any one's consent,

any thing not previously appropriated, this foundation for the pretended right of necessity, wholly fails; and, it is believed, a single case cannot be put, in a state of nature, where a man has a right to *demand* a portion of another's property, on the mere ground of extreme necessity in himself. A little consideration will plainly show that no such right can exist. For, if when a man falls into want, he would by the law of nature, have a right to appropriate to himself the goods of others, so far as his wants should require, without asking permission, the essential nature of property would be entirely destroyed. For, property consists in exclusive appropriation. But there can be no such appropriation, if the things appropriated are always liable to be taken away by the claims of the necessitous, not as matters of charity, but as yielding to a superior or paramount claim, which cannot be resisted or denied without injustice, and which the necessitous may make with propriety, and without shame or modesty. If this were so, the virtues of benevolence and charity would wholly cease; and there would remain no room for the exercise of any other virtues in this respect, than justice and equity, which, consisting in the exact fulfilment of all duties of perfect obligation, are rather strict duties than virtues.

In a moral point of view, it obviously can make no difference, whether the necessitous individual has sufficient power to enforce his claim or not. For, if it is his right, the person having a superabundance will be *morally* bound, to furnish the necessitous person with a sufficient supply, as a *debt*, and not as an act of benevolence or humanity, though he may have sufficient power to resist such demand.

The following imaginary cases may serve for the further illustration of what is believed to be the true doctrine in relation to this subject.

1. When Abraham separated himself from Lot, suppose that he had travelled with his flocks and herds to an extensive valley, one tenth part of which he could not actually occupy, with all his shepherds and herdsmen, and his and their possessions; now, if any other individual had found it for his interest to remove into the same valley, it cannot be doubted, that he would have had a perfect right to appropriate to him-

self any land not previously appropriated, notwithstanding any claim that the patriarch might set up to the whole of it, unless he had some higher title to it, than such as he might derive from his mere act, or rather attempt, of taking possession of the whole. Because, as has been already suggested, no individual has a right to appropriate to himself the whole of what was designed by nature for the use of mankind in general, unless he has a real occasion for the whole.

2. Suppose a person to be in a state of extreme want, and without any fault of his own, is unable to earn or beg sufficient food for his sustenance; can it be believed for a moment, that these circumstances throw all property into common stock, so far that he has by the law of nature, a right to take sufficient from any one however superabundant his store, to supply his necessities, without permission, and though it is expressly denied? If distress has a right to relieve itself in this manner, whenever relief is denied by others, the request to be relieved becomes a mere ceremony, and where then is the virtue which is supposed to be shown in granting relief? Indeed, in such case why is necessity to be considered an object of pity at all, since it must be merely voluntary, if an individual may relieve himself from it, when he pleases, at the expense of others? It follows, that, even in the case of a man famishing with hunger, he has no *absolute* right, to appropriate the food of others against their will; whatever mitigation of criminality, extreme distress may furnish.

3. Suppose the inhabitants of some island to be suffering with famine, and a ship arrives with a cargo of flour. In such a case, the rulers of the island will be perfectly justified in taking the cargo into their possession, giving a proper profit to the owner, and leaving with him a proper supply for his own occasions. This right however they will derive from their general power and duty, to provide for the public welfare on all occasions, which this extreme emergency will warrant them to exercise in this way. For, no wrong is done to the inhabitants, because it is presumed the government have authority from them to take all necessary steps for their relief in times of distress. No injury is done to the owner of the flour, both because all property as well as persons coming to another

country, are presumed to subject themselves voluntarily to all the laws and regulations of that country, and because, it is taken for granted, that such owner is paid a proper price for his flour. He will have no right to complain, if the government will not permit him, by a detestable monopoly, to extort enormous prices from the suffering inhabitants. For, this would be as unreasonable and unjust, as it would be, if the ship had touched at the island in distress for want of water, and the islanders should refuse to furnish a supply, unless upon a delivery of the whole cargo in payment for it.

SEC. VI. *The right of self-defence.* The right of self-defence against unjust aggression, may be considered as one subdivision of the general head of self-preservation, and has already been slightly touched upon as such, under SEC. I. A view of it somewhat more extensive, will here be taken. Whenever one person unlawfully assaults another, in a state of nature, for the purpose of taking his life, depriving him of his limbs, or maiming, mutilating or disfiguring him, or doing him any injury, from its nature, wholly irreparable, it seems to be generally agreed, that, by the law of nature the person thus assaulted may defend himself to the last extremity, and for this purpose, may resort to any measures of defence, which he may believe to be necessary to defeat the assailant's purpose even to the destruction of his life. Nor is the person assaulted bound to know the precise extent of the injury, which the assailant really intends. It is sufficient for his justification, *by the law of nature*, that he believes himself to be in danger of irreparable injury, and that the assailant puts him in apparent jeopardy, and that he has no other known resource by which he can protect himself or escape from the assailant, but by taking his life. For, wrong being infinite in its own nature, until its extent is ascertained by its actual commission, it may not be possible for the imagination of the party assailed, to set limits to the extent of injury, intended by the assailant. And, therefore, if A should draw a sword on B, and make an offer or attempt to kill him, and B cannot escape by flight, or any other obvious expedient, it seems by the law of nature, B will be excusable, if he takes the life of A. And it will not

vary the case, in this respect, if in fact A was merely in jest, and only intended to terrify B, if B believed him to be in earnest, and killed him under the mistaken supposition, that he had no other way to save his own life. The reason is, is, that B could not know what limits A had set to his unlawful design. In case of such disastrous consequences, therefore, it would seem, that B must be excused; and A's blood must rest on his own head for his folly.

For a similar reason, if A should make any such dangerous assault on B's family, or one of the persons, whom by the law of nature he is bound to protect, B, by that law will have a right to make use of any force, which may be necessary for the defence or protection of such person; and if A is slain in the conflict, and the assault could no otherwise be repelled, and the perpetration of his intended crime could, in no other way be prevented, it would seem by the law of nature, B must be excused. The reason is, that nature does nothing imperfectly; and therefore no other limits can be set to this right and duty of protection, but those which are set by the exigency of the case. For, those persons whom nature has set under the protection of others, she has given them a right to protect *effectually*; and, if the right to protect, ceases before coming to such extremity, then it would cease at the time when the assailant was most desperate, and consequently when protection would be most needed. But this is obviously absurd. And therefore, by the law of nature, a person may protect to the last extremity, those whom nature has placed under his or her protection.

SEC. VII. *The defence of property.* A similar train of reasoning will lead to the conclusion, that, in a state of nature, before the organization of civilized society, every individual will have a right to protect his property; and, for this purpose may proceed to any extremities, that such protection may require. It is true, that the loss of property is not an injury, in its own nature, irreparable, but, as there is no tribunal of justice, in a state of nature, to which an injured party may apply for redress, it must follow of course, that he has a right to prevent the commission of the wrong, by any measures, which

are necessary for that purpose, provided always that he does no wrong to an innocent third person. But, because a party injured will have a right to reparation after the injury is committed, which however he will be unable to compel without the use of force, to infer, that he has not a right to use the same force, to prevent the injury, would be unreasonable, especially as there is no certainty, that he will be able to obtain reparation by any means whatever, if he patiently suffers it to be committed. If therefore, one person should attempt to rob another, it cannot be doubted, that, by the law of nature, the party assaulted may resist, and repel force by force, to any extremity that may be necessary to defend his property. And, for the same reason, that a man may repel an assault upon his person, made for the purpose of committing a robbery, he may also, by natural right, make use of any force, that may be *necessary*, to prevent another from destroying his house or carrying off his cattle by open and direct violence. For, *in a state of nature*, he has no tribunal to apply to, either for protection or reparation, and must therefore either protect himself, or remain unprotected, and be liable to be plundered without any chance of redress. But, it seems, he would have no right to proceed to such extremities with an unresisting thief, whom he detected in the act of theft.

SEC. VIII. *The right to redress or reparation.* Where a person has suffered an injury from the wrongful act of another, which is completely terminated, the injured party, by the law of nature is entitled to reparation for the injury, which he has thus sustained. If this is withheld by the wrong doer, he may resort to force to obtain it, doing no injury which is unnecessary for that purpose, and which has no tendency to repair the loss. Thus, in a state of nature, suppose A attempts to take away B's horse by force, and convert it to his own use, it is obvious that, by natural right, B may justly resist the unlawful act of A, even to the last extremity of taking his life, if he can in no other way repel A and prevent the robbery. But, after A has forcibly taken away the horse, B has no right to take the life of A, because the act is already committed; and taking A's life, has no tendency to repair the injury or loss,

which B has sustained. But B will have a right by the law of nature, to retake the horse from A's possession, whenever he finds it, and, for this purpose, may proceed to the last extremity, if A should resist, while both are living in a state of nature. The reason is, that the horse still remains the property of B, notwithstanding A's robbery. For, it is obvious, that A can gain no property in the horse, by his own mere wrongful act. A's possession of the horse being wrongful, B, who has the right of property, may deprive him of it, and may use any measures which may be proper for that purpose, and which A's obstinacy may render necessary, since A's wrongful possession can neither confer on A any new right to the property thus obtained; nor take away any former right from B. But, if B cannot find his horse, he will have a right to take A's horse, or any other property of A, to hold as a species of distress, until A restores the horse, or makes other satisfaction for the wrong, to B's acceptance. If B can find no property of A, which he can take, he has a right, by the law of nature, to restrain A's person, until he makes compensation, if A has it in his power to do so. But, if he has not, then B may justly compel A, if he can without taking his life, to labor for him, until compensation is made. But, though A should absolutely refuse to labor for B, or otherwise make such satisfaction as he has in his power, B has no right by the law of nature to deprive A of life, or mutilate his limbs, or do him any irreparable injury, because this has not the slightest tendency to repair the injury which B has sustained. But B has a right to restrain his person, until he is willing to make full satisfaction, or, at least, all the reparation which he has in his power. Again;—

Where A has done an injury to B, irreparable in its nature, B has the same right of enforcing all the reparation, which A is able to make; but, under no circumstances whatever, has B a right to deprive A of life, or mutilate his limbs, for the reason before assigned, that no such act has the slightest tendency to repair the injury which B has sustained. Again; so long as B is merely enforcing satisfaction, A has no right to resist, until he has voluntarily made, or until B has compelled him to make reparation or satisfaction, either complete, or to B's

content, or all that the circumstances of the case admit. But, after either of these has been obtained, B has no right to proceed to further extremities, and if he should, A's right to resist will commence, precisely where B's right to compel or coerce, terminates or ceases.

From these considerations, it is apparent, that where a person has been wronged or injured, whether the injury be capable or incapable of reparation, in its own nature ; or whether, from a concurrence of circumstances, he is able or unable to obtain redress, he has no right whatever to inflict any injury on the wrong-doer, either by way of avenging his own wrong, or punishing *him* ; and whether it be done to deter the offender, from a repetition of the offence, or as a warning to others. These various positions will be examined separately. And first, in relation to the right of avenging injuries, and the *lex talionis* or right to retaliate, it may be remarked, that, by the law of nature, a party injured has no right to demand any higher redress, than complete reparation, which consists in being put in the same condition he was in, before the injury took place. To do a similar injury to the wrong-doer, has not the slightest tendency to this object ; and instead of doing himself right, which, in a state of nature, the party wronged is permitted to do, merely because there is no earthly tribunal to which he can apply for justice, he merely commits another wrong himself. The particular direction in Leviticus 'breach for breach, eye for eye, tooth for tooth,' it is believed, is not to be considered as a part of natural law, or, as declaring a natural right in the injured party, to retaliate an injury, but is rather to be considered as a direction for the legislator of the Jews, as to the punishments to be prescribed in their laws for certain crimes ; or, as a law to be enforced by the judges of that nation, on the offences comprised within the intent of such command or direction. For, in this way, the offender could never complain of the injustice or inequality of his punishment, when the judgment pronounced against him was, that he should suffer the same evil which he had caused to another. There is therefore no such right at all as that of revenge or retaliation ; and to attempt it, seems to be a presumptuous



infringement of that prerogative, which the great Creator has reserved to himself, when he says, 'Vengeance is mine.'

2. With regard to the supposed right of an injured party to punish his wrong-doer, a similar train of reflections will show that no such right exists. For, all that the party injured can claim in a state of nature, and by natural right, is reparation, which, as has been just suggested, he may compel by force, subject to certain restrictions. The reason is, that all men are by nature equal; but the right to punish, implies superiority on the part of the party punishing; for, otherwise, he could have no jurisdiction over the offence. And though nature, from the necessity of the case, constitutes an injured party the judge of the extent of the injury, for the purpose of obtaining redress, so far as the satisfaction of his own conscience is concerned; yet, the wrong-doer is not bound by his decision even here; and certainly far less when the question of punishment is brought up. As the injured party, therefore, has no power or rightful authority to determine the extent of punishment to be inflicted on the offender, he can have no right to punish at all. The power and authority to punish, must belong to some tribunal, having jurisdiction, which it is very clear can never result to an injured party, from the injury itself alone; since the right to enforce reparation, or to obtain redress, is totally distinct from an authority to inflict punishment.

Whence then, it may be asked, can society derive its right to inflict punishments for crimes? To many persons, it will be a sufficient answer, that all regular, established governments, however liable to commit occasional errors and mistakes, are God's vicegerents on earth, and therefore have sufficient authority to punish crimes. Others may be reminded, that government is grounded on an express or tacit compact, made by the constituent members of the society or nation, to obey the laws made by it, and to submit to such sentences, as the courts of the government may award agreeably to the laws, as a penalty for the violation of them. But, here it may be replied, that this answer is not satisfactory, where the sentences involve the sacrifice of human life; because, if, agreeably to the opinion of the greater number of pious and

religious men, no person has a right to take away his own life, it follows, that he cannot confer any such right upon society, by any compact which he may form for that purpose. For this excepted case, therefore, as society can derive no authority from consent expressly or tacitly given in the formation of government, a different source of lawful power must be sought. This, however, will readily be found in the natural right of self-preservation, or self-defence. This right each individual has from nature ; and however it may be modified in the organization of society, by the compact of its members, or by the various laws made by virtue of that compact, is by no means either given up or abandoned. The various individuals of society, therefore, by constituting their rulers their defenders and protectors, may, and without doubt do, confer on them the right to use any means necessary for their protection, which the several individuals possess themselves. The right, which society has, to punish with death, a murder committed within its territory, seems to follow. Because, though no single individual of the society would have any such right to punish, while in a state of nature ; nor, even after the formation of the society, could have any such right, unless it were conferred on him by the rulers ; yet, the society itself, and their rulers, as their delegates, would have such lawful power, because the society itself could not subsist, if they had not authority to deprive of life an offender, whose crime showed that he was an enemy of mankind, a disorganizer not to be restrained by law ; and one who would destroy the life of every individual who was obnoxious to his malice, as often as the case occurred, if he could do it with impunity. As therefore nature has formed man for society, for mutual protection and benefit, and as it is impossible that society can subsist in security without an authority to deprive of life, those offenders, whose crimes strike at its foundation, it seems to follow, that society possesses this right over such capital offenders, as necessary to its self-preservation.

SEC. IX. *Of the pretended right to make war.* Under the law of nature, it will be difficult to point out an instance, where an individual has a right to make war on another, if it

is to be considered, as affording a justification for offering violence to him, in any other circumstances than those already suggested under the heads of 'the right of self-preservation,' 'the right of self-defence,' &c. &c. For, a war for the purpose of retaliation, of punishing a wrong-doer, of setting an example, or giving a warning to others, it is believed, is wholly unauthorized by natural right. Suppose, in a state of nature, that A has slain the son of B, yet, by the law of nature, B has no right to deprive A of life, because A's crime is finished and can no longer be prevented, since B's son cannot be restored to life. B can derive no authority or right from the pretence, that he means to protect the rest of mankind, because it does not appear, that they are in any immediate or unavoidable danger, nor that he has any authority to act as their ruler or protector. Neither has he any authority, as judge, to punish a crime, when he has no lawful jurisdiction to determine on the merits of the case. For, it is possible that B's son may have been slain on a justifiable occasion. The reader may be referred to the case narrated in the Bible, where Abner slew Asahel in self-defence, yet was treacherously murdered for it by Asahel's brother Joab. In the case supposed, the principal injury is done to the person slain. This injury the father has no natural right to avenge, because this authority belongs to the Supreme Being alone. If, therefore, the father arrogates to himself this office, the assumption seems obnoxious to the charge of impiety, because, it seems to imply, a disbelief in the existence of a God, or a distrust in his justice. Yet, if the father should sustain any peculiar loss or damage from the death of his son, it cannot be doubted, that, by the law of nature, he will have a right to enforce reparation, in the same manner, as, if the damage arose from any other wrongful act. But, in a state of nature, the punishment of the principal crime must be left to the Ruler of the Universe. Why then, it may be asked, may not the punishment of murder be left to him, if committed in organized society? The answer is, that God has given an express command to punish wilful murder with death. This command, it is supposed, is addressed to the rulers of every organized society, who, in this respect, must consequently be considered

as invested by him with the necessary authority to try and punish the crime. For, it is much more reasonable to suppose, that this power is confided to an impartial tribunal, than to consider it as left to be exercised by the partiality and violence of private feeling. In the former case, guilt must be proved before it is punished; in the latter, innocence itself, might not always be able to obtain even a hearing.

SEC. X. *Of the right to form associations, and organize society.* The true doctrine on this subject, it is believed, will be best illustrated by the following imaginary case. Let it be supposed, then, that five thousand families are living peaceably, though in a state of nature, on a territory of sufficient extent, each family residing on its separate district. Let it be supposed, further, that some few of them, who are scattered among the rest, are desirous of forming a society, for their mutual protection, but that the greater number, disliking the restraints of society, and preferring their natural liberty and independence, refuse to join in this project. Here, it cannot be doubted, that the smaller number have a perfect right to form such a society, notwithstanding the refusal of the others to unite in it. Because man is formed for society, and has a natural right to provide for his security and happiness, in any way that he has a physical power to do, so that he violates no duty of religion, and infringes no right of the rest of mankind. It follows, therefore, that the dissenting families have no right to prevent the formation of the society. For, though they may be apprehensive of ill-consequences from the neighborhood of such a society, they have no right on that account to interfere with the freedom of action of its members; because their fears may be ill-grounded. The dissentients, consequently, will have no right to molest the society or any of its members, until some injury has actually been offered by them. When this happens, the individual injured by the society will retain his natural right to demand and enforce reparation in the manner already suggested in a preceding section. On the other hand, it is clear that, the society would have no right to compel any of the dissentients to come under its regulations or obey its laws; because, in relation

to them, the constituent members of the society gain no new rights or powers by forming their association and agreeing upon a government. Their laws therefore will not bind those who refuse to enter into the society, as respects whom, the members of the society will retain the same rights which they had before its formation, though the power and authority to enforce those rights will probably be entrusted to the rulers of the society, and not be enforced by the members individually. This, however, will depend on the terms of the association, or the constitution of the society. It is thus apparent, that the smaller number of families, derive no right to control the majority, from the mere act of forming a society. Let us consider, then, whether if the society had been formed by the greater number, they would have a right to control the smaller number, and compel them to join in it, or submit to its laws and regulations. To determine this question, it will be sufficient to suppose the society to be formed by the precise number of 499 families, and that there are 501 dissentients. Now, it is obvious, that if two of the dissentients alter their opinions and join the society, the dissentients will then become the smaller number. But, can it be supposed for a moment, that, by the law of nature, where there is no previous agreement to that effect, the change of opinion in two persons, shall take away the right of refusing to join the society, which 499 independent families previously had? This would be absurd; for, where there is no previous agreement in restraint of a natural right, it never can be taken away by the mere act of a third person. If it could, it would be improperly called a right, since its existence would depend on such person's discretion. It is thus evident, that there is no natural right, in the major number of the inhabitants of a territory, while living in a state of nature without any government, to control the smaller number, either by compelling them to join in the formation of a government, or by making laws for the regulation of their conduct. Each individual therefore, in strictness, has a right to refuse to join in the original formation of the society, and yet retains all his natural rights entirely unimpaired.

Two important consequences follow from the doctrine just

stated. 1. As each individual has a right to refuse to join the society, he may stipulate for what terms he pleases, as the conditions on which he is willing to join in forming the association. And, if those terms are agreed to, and he accordingly joins the society, those terms must be kept, for, if they are violated, he will have a right to return to his state of independence. Suppose, for example, that the smaller number should stipulate, that it should be part of the social compact, that no law should be enacted, unless by the voice of two thirds of the members; this would be binding upon the whole society, and could never be altered, without the consent of all. If this stipulation were infringed, the constitution would be violated, the compact would be broken, and consequently would cease to be binding, and the society would be dissolved so far as concerned the dissenting members. This is sufficient to show, that the right of the majority to govern, however fair and equal, has no other foundation, than the agreement of the original members of the social compact, not being at all grounded on any natural right; this subject however will be examined more at large in another place.

2. As no individual, in a state of nature, can justly be compelled to join in the formation of society; so the society, or, those who propose the formation of one, have an absolute right to refuse admission to its rights and privileges, to all those persons whom they dislike, for whatever cause. It follows, that they may justly stipulate for whatever qualifications they think best, of character, abilities, or property; and no person, not possessing such qualifications, will have any just cause of complaint, at being excluded from the society, for the want of them.

But, after these qualifications have been once agreed upon, *unanimously*, (for the majority have no natural right, in this respect to bind any but themselves,) these qualifications cannot rightfully be altered, so as to disqualify any of the members, without the consent of every one, including even the party thus to be disqualified. If this were not so, it is obvious, that a great fraud might be practised. For, if they agreed unanimously on certain qualifications at first, and then the majority had a right to alter them, and accordingly did so, it

is evident, that all those, who would not have joined the society on the terms contained in the alteration, would be defrauded of their natural right, if they are compelled in this indirect way to submit to the will of the majority. In any such case, their natural right to recede will revive, and, if they should continue to dwell in the territory of the society, they will become merely resident aliens, owing allegiance to the society no longer than while they abide within its boundaries.

Having considered some of the principal rights, which men have in a state of nature, previously to the formation and organization of society, and having established as an axiom that no individual can justly be deprived of the exercise of them, unless in consequence of his own assent, expressly or tacitly given, for, otherwise they can hardly be viewed as rights at all, it may not be amiss in this place, to touch very briefly upon the origin of society and the principal objects and inducements, which men probably had in view in both. These inducements and objects will more readily appear, if we consider the inconveniences, which must unavoidably attend any considerable number of families, living in the neighborhood of each other in a state of nature. One of the first inconveniences which would be felt, would be the want of a common tribunal of justice, to determine questions of conflicting claims or rights. For, on the supposition, that all these families at first were living on friendly terms with each other in general, it is impossible that disputes and controversies should not, sooner or later, arise among some of them. The consequence would then be, that, for want of such a tribunal, every individual who considered his rights infringed by another, would immediately make use of all his exertions to obtain reparation; while, on the other hand, the wrong doer, if he were so, would maintain his wrong, if possible, from the same motives which first led him to commit it; and, if he considered himself in the right, would, with still better reason, defend himself to the last extremity, from what he would then consider unlawful aggression. The two parties, in all probability, would soon commence hostilities, each uniting to himself all the other families, whom he could induce to take a part in his cause. The more effective party would prevail in the conflict, and, according to

the barbarous practice of early ages, the conquered party would either be slain in battle, massacred after the defeat, or compelled to serve their conquerors as slaves. The leader of the conquering party, who very possibly might be the individual who had induced them to take up arms in the first instance, would very naturally obtain great influence over all his followers and adherents, either by distributing among them the spoils of the vanquished, or by reason of the good opinion which they would entertain of his military skill or personal prowess, as displayed in this petty warfare. The advantages, which they had derived from acting in concert, and from the organization of their forces, which however imperfect, would be sufficient to enable them to perceive the superiority of a regular force, over a confused and disorderly multitude, would naturally prompt them to continue in society with each other, and their recent success would fix their choice upon their leader. Without descending into minute particulars and details, all of which would vary with circumstances, it is very apparent that the leader would gradually enlarge his powers by usurpation, and in this way would soon render his office, which, in the first instance, being bestowed from merely personal considerations, would unquestionably be elective, hereditary in his own family. The subjects, after they had several times experienced the evils which naturally attend a war for the succession between two or more competitors, would gladly submit to any such arrangement as would permit them to have the benefit of government, without the necessity of involving themselves in a murderous contest, in order to decide who should be the ruler.

This account of the origin of monarchy, it is believed, has often been verified by the experience of nations, and if the history of early times may be trusted, more than one may be traced to beginnings not materially variant from it, in principle.

It may be remarked here, transiently, that though there are three simple forms of government ; viz : 1. a Monarchy, where the power of the government in the last resort, is settled in an individual, who has a power to nominate his successor to the throne ; 2. an Aristocracy, where the same power is exercis-



ed by a certain limited number of individuals, who have the power of keeping their body full, without any interference of the people ; 3. a Democracy, where the whole body of the people make the laws and decide on all public measures, and form collectively the fountain of all political power ; to which may be added various combinations of these simple forms, such as limited or elective monarchies ; republics, &c. &c. Yet, it is believed, that monarchy alone, naturally succeeds to anarchy, where men live in a state of hostility and violence, without any regular government. Yet, however unlikely, it is very possible that either a democracy or an aristocracy may be established, in the first instance, as a form of government. Thus ; to continue the detail of the consequences of the former supposition, let it be supposed further, that, after the establishment of the organized society under the control of a military leader, and which comprised part only of the whole number of families, the neutral party, or those who took no part in the contest, seeing the slaughter or subjugation of those who had been defeated, should entertain a wish to secure themselves, as far as possible, from the chance of a similar catastrophe, (which suggests the other principal inconveniences of a state of nature, viz. insecurity of life, liberty and property). For this purpose, they might form themselves into a society, more or less organized according to circumstances ; and, if there were no particular individual among them, conspicuous over the rest, for superior wisdom, military prowess, the number of his family or hired attendants, or great wealth, it is not unlikely that they might agree to be governed by the direction of some small number of warriors or sages, constituting a council or senate, and who appeared to be most able to guide them by their wisdom and experience, and protect them by their military skill and valor. Here, in the mere act of agreeing to submit to the control of these worthies, the heads of the families, who constitute the elements of society, would act as members of a democracy. But, as soon as the agreement was once made, the government agreed upon would be an aristocracy.

But, if, instead of adopting either of these steps, the heads of families should assemble together, and make an agreement

with each other, to pursue such measures, and obey such laws and regulations, as they should agree upon, either unanimously, or by a majority of two thirds, or by a simple majority, and should afterwards choose a certain number of officers, either for a certain time, or removable at pleasure, or during good behavior, to enforce obedience to those laws, and distribute justice, they would then constitute a pure democracy. It is not intended in this place to discuss the respective advantages of these various forms of government. But, where there is a large extent of country, containing within it many various nations under distinct governments, none appears to be more safe than an hereditary monarchy. The consequence of being governed by an elective monarchy is seen in the fate of Poland. A simple democracy would immediately fall a prey to a neighboring monarchy. The delay and dissensions of their councils would be such, that without taking into the account the very probable chances of corruption, the monarchy would overrun the democracy, before the members of the latter could agree upon any measures for the general defence. If any one should object here the long continuance of the Roman Republic, surrounded by the most warlike nations, many of whom were governed by kings of great military skill, it may be replied, that Rome was rather an aristocracy, than a democracy from the time of the expulsion of the Tarquins, to that of Julius Cæsar; notwithstanding occasional and partial changes in the government. Yet Rome was saved more than once during that period, by the decisive measure of appointing a dictator, an officer who possessed absolute power for the term of six months, and who could not be called to account for any measures however arbitrary and tyrannical, which he chose to adopt during that time. An aristocracy is a far more effective form of government than a democracy. This is very apparent from the history of Venice. But the inequality of rank would be an insurmountable objection to the adoption of such a form of government, among freemen who acknowledge no natural superiority of right in one man over another. It is greatly to be apprehended, therefore, if hereafter, the Union of the American States should be dissolved, that those States, which attempt to preserve the republican form of government,

will easily be overrun by those who adopt a more energetic form.

The principal inducements, which men, living in a state of nature, would have, to form an organized society, would seem to be, 1. To have a tribunal, to which they might apply for the redress of any infringement of their natural rights, and thus prevent dissensions among those who were desirous of living together on friendly terms, from maturing into broils, outrages, and murderous conflicts, which dissensions, for want of such a tribunal, would necessarily arise from conflicting claims and pretensions; 2. To secure their persons and property from molestation by external enemies.

There are no doubt many other benefits arising from the organization of society, which, if they had been foreseen, might very probably have offered, of themselves, sufficient inducements to adopt that measure; as, for instance, the invention or at least a great improvement in trade or barter, as well as in manufactures, a rapid advancement in art and science in general, as well as every species of practical or speculative knowledge, necessarily accompanied with an increased degree of humanity, civilization, and refined social intercourse. Without mentioning other advantages, which might be enumerated, or wasting time in an unprofitable descant upon these, it should be observed, that these benefits are not to be obtained without a partial relinquishment of some of those natural rights which pertain to men individually before the organization of society. Among the rights which are thus relinquished in a greater or less degree, the most usual are, 1. the right, which in a state of nature, each individual has of redressing his own wrongs, personally; 2. the right of acting as he pleases, and consulting his own happiness alone, provided that he infringes no duty of piety and religion towards his Maker, and neglects or violates no obligation of justice, charity and humanity towards mankind. With regard to the first of these rights, there appears to be an almost total relinquishment of it to the government, in the first formation of the society. There certainly is with regard to all those wrongs, which come within the jurisdiction of any of the tribunals or courts established by the government. But, with relation to those wrongs, the redress of which is not thus provided for, it would

seem most expedient for the welfare of society, to consider, that the members of the community in forming a government, for the purpose of enacting laws and establishing tribunals of justice, had agreed to submit to the legislature, or to the Judges of the courts to determine, whether any grievance or injury complained of is of such a nature, or of sufficient importance to demand the aid of the court, and if it be not in their opinion, had agreed to pass it over in silence, until the legislature should alter such opinion, and see fit to interpose and provide a remedy.

2. In relation to natural liberty or freedom of action, it may be remarked, that it is with a view to this right, that governments are usually esteemed to be more or less free, precisely as this freedom is more or less trenched upon by the laws of such governments respectively. On entering into a social compact, the members might very naturally stipulate for the reservation of certain particular liberties or exemptions, which reservation ought to be strictly observed and complied with by the rulers or constituted authorities. If they are slighted or trampled upon, the power of the rulers will so far be usurped, and their government tyrannical.

But, with the exception of those reserved rights, the members of the society would be considered as agreeing to relinquish to the government so much of their natural freedom of action as should become necessary, from time to time, to obey and observe such laws and regulations, as the rulers, within their constitution or social compact, should think expedient to enact and promulgate for the general good. It would not be, therefore, so much the rights themselves, of liberty and freedom of action, which they relinquish for the good of society; as it would be a power to limit, restrain or wholly take away the exercise of those rights, which they would confer on the rulers, with a stipulation express or tacit, that such power should never be exercised except for the general and equal good of all. For the true idea of government seems to be, that it is established by the people, for the preservation of their natural rights *in general*, by a partial sacrifice of a few particular ones.

But, it is not merely the freedom of action, which each

individual relinquishes in a greater or less degree to the control of government; but he agrees also *to do* whatever the rulers shall judge expedient for the general good of the whole, with a stipulation, express or tacit, that legislation shall be general, and comprehend *all* the individuals of the society to whose circumstances it may be equally applicable.

As men, in relation to their rights, are by nature equal, no man can justly be subjected to the control of another, or any number of others, without his consent; or, unless he has committed some crime, or has come under some obligation. As, therefore, it cannot be supposed that any individual would originally have agreed to join with others in organizing a society, where he would not stand on equal ground with the rest, any law which would tend to degrade him below the rest, must be inequitable and in violation of an implied understanding. For, in strictness, no law can be binding, if inconsistent with the restrictions contained in the social compact or constitution of the society, and beyond the powers intended to be granted in it.

*Having stated in very general terms, though with as much distinctness as the necessary limits of this chapter, and the nature of the case, would conveniently permit, the rights which men have in a state of nature previously to the organization of society, and touched slightly upon the inconveniencies of a state of nature, and the consequent inducements which men had to unite and form a government; having also briefly considered some of the natural rights, which it is necessary, that men should relinquish in a greater or less degree, according to circumstances, to the government of the society, in order to obtain the objects of its organization, this chapter will conclude with a few remarks upon those natural rights, more or less of which are usually retained by the members of society, notwithstanding their entering into such an organized union.*

## DIVISION. 2. *Of those rights which are usually retained in organized society.*

SEC. I. *Self-defence in cases of extreme urgency.* The first and most important of these rights, is that of self-defence. This right is reserved to every individual, in all cases, where

there is not time sufficient to apply to the government for protection. So that, if a man is assaulted, and his life is in extreme danger, and he has no opportunity to apply to the police, because his case will admit of no delay, he will be excused by the law of society as well as by the law of nature, if he takes the life of his assailant, *supposing always that he has no other way to save his own*. For, in any such case as this, society cannot afford him that protection, which was one of the principal motives, which led him to unite with others in the formation of it. His natural right to protect himself in any such extremity, is therefore always reserved to him. But, where the aggression is threatened previously to its being actually made, no individual has a right to make preparations for his own defence, personally, if such preparations constitute a disturbance of the public peace. In any such case, the individual threatened ought to apply to the proper officers of the society for that protection, which it is their duty to afford him.

SEC. II. *Of qualified liberty of action ; freedom from unnecessary restraints, requisitions and exactions, &c.* Where the people form a social compact, contained in a written constitution, the extent of the powers granted to the government, may be defined with precision. But, where there is no written constitution, the extent of such powers is ascertained by usages and precedents, that is to say, by the practice of the rulers, sanctioned by the silent acquiescence of the people, *in peaceable and quiet times*. In different societies and under different governments, the powers of the rulers, and the consequent restraint on the natural liberty of the subjects, vary greatly.

Civil liberty consists in not being restrained from acting, and not being constrained to act, by any law which does not conduce to the general welfare. But, it may be asked, how shall it be ascertained whether a law conduces to the general welfare or not? The answer is, this is submitted to the wisdom and discretion of the rulers. But, it may be asked again, is there no restraint upon the exercise of this discretion? The answer is, that they are restrained from enacting laws, or

adopting any public measures which are inconsistent with the constitution, whether ascertained by usage or contained in a written document or compact. But, it may be asked again, who shall determine whether a law is or is not agreeable to the constitution or social compact? The answer must be, the tribunal (if any) provided in the constitution, for the determination of such questions, must decide. But, if none is provided, then that person or persons in whom the power is vested in the last resort, by the frame of government, whether a monarchy, an aristocracy, or a democracy, will have the constitutional right to determine. But, where the act in violation of the constitution, is committed by the very person or persons, to whom the supreme power of the government is given by the constitution; there is no peaceable remedy, if the illegal laws or measures are persisted in, after petition and remonstrance by the subjects; for the truth is, the frame of government is defective, and the conduct of the rulers or ruler is so far oppressive and tyrannical.

As the degree of restraint upon natural liberty or freedom, may vary under different constitutions or forms of government, it is obvious, that it may also vary greatly under the same constitution at different times, owing to the various interpretations and constructions put upon it, by persons of greater or less integrity and intelligence.

The definition of the freedom, which men have in a state of nature, of consulting their own happiness in all they do, so as they offend against neither religion nor morality, that is, provided they transgress no divine law, and do no injury to the rest of mankind, is sufficiently intelligible and plain. But, in a state of society, this single right branches out into a great variety of rights, each of which has received a distinct appellation. The first division of this natural liberty or freedom, is into a freedom from restraint, and a freedom from exactions or requirements. By relinquishing the first, we become liable to be restrained by the laws of society, from doing many things which, in a state of nature, we are at perfect liberty to do, without committing any wrong or injustice. By relinquishing the second, we become liable to be bound to do, by virtue of our social compact, and the laws made under it, many things,

which, in a state of nature, we were under no such obligation to do, and which, from the general maxim of the natural equality of all mankind as to their rights, no man or body of men could have any right to compel us to do, without some previous consent or other act of our own.

Under the former of these branches of natural liberty, viz : freedom from restraint upon the right of action, may be comprehended, 1. *The right of expatriation.* That a citizen of any community, in ordinary cases, has a right to leave its territory at pleasure, and reside in some other country, and cast off his native allegiance to his own, seems to follow of course, from the preceding view of the natural rights of mankind, and the origin of governments. It is true, that this right has been absolutely denied by some, who hold that a man can never shake off the allegiance which may be claimed by his native country. This, however, seems something like setting up an idol, and is entirely contrary to the principles acknowledged in the constitution of the United States. For, if a foreigner cannot become an American citizen, without committing a crime, or at least doing a manifest injustice to the country of his birth, why is the naturalization of aliens permitted among us? Why is it thought worth while to inquire into the character of an individual, who, by the very act of applying for naturalization, which renders such inquiry necessary, shows that he is not fit to be a citizen of any other country, since he must first throw off his allegiance to his native land? But, though this may furnish an excellent theme for declamation, which will be omitted here, such opinion seems not to be sufficiently well grounded to stand the test of a close examination. For, what is a man's country? Is it the place of his birth or residence? This would be a very unreasonable supposition, unless taken in connexion with its inhabitants, its frame of government, and its laws and institutions. For, a man cannot owe allegiance to inanimate nature, as mountains, rivers, and groves, whatever poets may imagine. Neither can it consist in the government, laws, and institutions; for, if so, then to change them in a material point, would deprive a man of his country. It must then consist in the inhabitants forming a society, the identity of which is preserved,



like that of a river, by perpetual succession under the government to which he has either expressly or tacitly agreed, on the territory subject to that government, and belonging to its citizens.

If a man owes allegiance to any of these, let it be first supposed that it is to the government. But if it is owed to the government, independently of the inhabitants, then it must be due to the persons of the rulers for the time being. For the government in any other sense, is a mere abstraction. In monarchies, it is admitted, allegiance is due to the king, as the feudal head of the nation, and who is acknowledged to be the lawful *political* master and lord of his subjects. But such allegiance can be claimed only in monarchies and aristocracies. In our republic, to whom is allegiance due? The answer must be, that no such allegiance is due to any one. But, with regard to the state of which he is a citizen, each one's allegiance is limited by the terms of the constitution made by the citizens of that state, and to which he has either expressly or tacitly assented. The same remark applies to the constitution of the United States, to which we must resort, if we would know precisely the kind of allegiance which is to be considered as due from the citizens of the Union.

As nothing is said in restraint of this natural right of going where he pleases, or expatriation, in either of those compacts, it follows that a man may rightfully expatriate himself, and throw off his supposed natural allegiance to his own country, whenever he pleases, provided he was not *personally* a party to the original compact, and has never taken any oath of allegiance, either to the state of which he is a citizen, or to the United States. For, obligations like these, whatever the common practice may be, are not to be assumed and cast off again at pleasure.

But, perhaps it will be urged, that a man's country consists properly in the succession of inhabitants in the territory and under the government of which he is a resident native citizen; and that, it is to these inhabitants in a body and in their political capacity as a nation, that allegiance is properly due. But, it may be replied, if he is under an obligation of this kind to them, every other citizen is also under a reciprocal obligation to him, as well as a similar obligation to each other. This

supposition would gratuitously and unnecessarily impose reciprocal obligations upon every one of the citizens of a country, to remain in it subject to its allegiance, however adverse it might be to his interest or happiness ; when, on the contrary, it would be much more agreeable to natural freedom, to consider every individual as having a right to expatriate himself, and form new connexions at discretion. Whether an American citizen can throw off his allegiance or not, without an act of Congress to authorise him, seems not to be judicially settled. 7 Wheat. 283.

Further, if a man is under obligations to any one, it must be to his parents ; yet nature sets him free from all ties but those of gratitude, affection and reverence, as soon as he arrives at maturity. If then he becomes free from them, there is certainly but little reason, why he should be under any higher obligations, in the ordinary course of events, to his countrymen, unless he has entered into some express, voluntary engagements to them.

It is not intended, however, to palliate or excuse, the conduct of any individual, who should see fit to exercise this right at a time when his country is in a state of peril or distress from hostile aggression, and has need of his assistance in its defence. The gratitude, which would be due to it, from him, on account of the protection it has afforded him during his youth, and the advantages which he has derived from its various laws and institutions, and the civilities and kindnesses which he has received from his fellow-citizens, would render his conduct deserving of the same reprehension as that of a son, who should refuse to relieve the necessities of his parents, on the ground, that gratitude is a duty of imperfect obligation, and that he had a natural right to do as he pleased in relation to the subject.

Neither is it intended to deny the perfect right of the government of the country, to adopt such measures, as may be necessary to protect itself against any of its citizens, who, not satisfied with renouncing their allegiance, should take up arms against their country, and abuse their knowledge of the weak points in its defences, to insure its overthrow.

2. *The rights of conscience, and freedom of inquiry.* In a

state of nature, these rights, as well as others of a similar kind, are derived from the natural freedom from the control of others, to which all men are entitled ; while again this natural freedom results from the natural equality of all men as to their rights. If these rights are relinquished on the formation of society, it must be by virtue of the constitution or social compact of the society or government. But, if not so relinquished, either expressly or by tacit acquiescence, they remain unimpaired to the members of the society or body politic, and the rulers have no right to do any thing to infringe them.

It is not necessary, however, in order to authorize the government of a country to legislate on these subjects, that a power for that purpose should be expressly given in the constitution. It will be sufficient, if the constitution imposes no restraint on the government, to prevent the exercise of such authority, and that a particular emergency has arisen, requiring such legislative interposition. For, unless expressly prohibited, their general authority to provide for the public welfare, would be amply sufficient for this purpose. These remarks, however, can apply only to open acts, opinions promulgated, and doctrines openly taught and inculcated. For, under a general power to provide for the general welfare, to institute a scrutiny into private opinions, and to require men to avow or disavow them, whether in relation to religious, moral or political subjects, would be an act of mere usurpation, and grossly tyrannical. Yet, a government, it is obvious, may be authorized by the citizens who frame and adopt it, to exclude from the rights of citizenship, or naturalization, all foreigners, who refuse to disclose their sentiments, whether religious or political. And, for the same reason, may be authorized by their citizens, to impose a test whether religious or political, on the citizens themselves, the refusal to take which, should be considered as a disqualification for office, whenever the public good requires such a measure. But, in most cases, the adoption of any such course would be highly odious. For the same reason, if it were part of the constitution, that no individual, though born within the country, should have the rights of citizenship, if he should profess any other religion than that of the state, such person would be a mere resident alien.

And if the legislature, being authorized for that purpose by the constitution, should deem it expedient to exclude from its territory, all persons, who were not of the same religion with that of the government, there would seem to be no absolute violation of natural right in this, though it would seem to be an act of gross intolerance, not to be justified but by circumstances of great urgency. To express this doctrine in a few words ;—as every man, in a state of nature, has a right to exclude from his household and family, every individual of bad character, notorious for bad principles or corrupt practices, it cannot be doubted, that, in organizing a society, the constituent members may confer a similar power on their government by using express terms for that purpose. A general authority to take care of the public welfare, would also be sufficient for that purpose, unless the exercise of this general power were expressly restrained in this particular instance.

Under any such authority, whether express or implied, the government would have a right to banish from its territory, any individual who should undertake to teach or disseminate opinions dangerous to the peace or welfare of society. And on this subject, the rulers or constituted authorities alone, would be the proper judges. It will make no difference, in this respect, of what nature such opinions or principles may be, or whether they relate to religion, morals or politics, if they lead, or, by the constituted authorities are thought to lead, to injurious consequences. For, erroneous opinions on the subjects of religion and politics, are found by experience to be a fruitful source of public troubles and disturbances, with their bloody concomitants, tortures, rapine, murder, massacre and civil war : while erroneous opinions in relation to morals, may soon sap the foundation of innocence and virtue, and raise on their ruins, a temple dedicated to vice, corruption, abomination, Dagon and Moloch. Can it be doubted then, that the open teaching, promulgation and inculcation of false and dangerous opinions, should immediately be stopped? The government, supposing them to have full authority from the people on this subject, should exercise a sound discretion in relation to it. If they merely punish crimes and immorality when they occur, they perform only half of their duty ; since they

ought to stop the sources of corrupt practices at the fountain head, in vicious principles.

Yet, on the other hand, the most perfect freedom of inquiry should be allowed, for the sake of informing the conscience. For, it cannot be supposed, that any individual, by coming under the obligations of society, intended to surrender his liberty of conscience, or his natural right of worshipping God according to the dictates of his own reason, to the mere opinions of other men as fallible as himself. Still, no christian government can be under any obligation to tolerate any grossly immoral or indecent practices, under the pretence of indulging religious freedom. For, such practices constitute a disturbance of the public peace, and are an offence or nuisance to all the orderly citizens. For similar reasons, the public teaching of a false religion, or the open inculcation of doctrines, professedly aiming at the subversion of all religion, should be silenced by public authority. For, the government acting on the behalf of the people, have a perfect right to adopt such measures as they may judge necessary for this purpose, provided they do not interfere with the right of free inquiry for the private satisfaction of each individual's own conscience.

It may be objected here, if these observations apply equally to all forms of government, where is the freedom, which is so much boasted of under democratic or republican forms of government? The answer is, that as, under a monarchy, it was never intended, to deprive the people of the power of doing good; so under a republic or a democracy, it was never intended that the people should be *free* to do evil; and, if there is less power and opportunity of doing good under a monarchy, and greater liberty as well as temptation to do ill under a republic or democracy, it is no part of the design of the framers of such governments; but such consequences naturally attend the greater or less degree of freedom enjoyed under each, respectively. To restrain the introduction of dangerous opinions among the people, is no infringement of their liberties; on the contrary, it is the most effectual method of preserving what the people have in view, in the exercise of their liberties, viz: their tranquillity and happiness.

Here it may be objected again, if this doctrine is true, then the rulers for the time being, will be the sole judges of the truth as well as the tendency of all avowed opinions, and open practices. Consequently if they chance to be in an error, the truth will be kept from the people. The answer is, it is no part of the duty of the government to regulate the consciences of individuals; but every person should be left at perfect liberty to form his opinions as he pleases, provided he does not disturb others with them. But, where the people and the government are agreed in the general grounds of their religious faith, it would be very extraordinary, if they had not a perfect right to exclude from their territory, any persons, who should disturb the public peace by attempting to introduce a new one.

These remarks, however, so far as they respect opinions on religious subjects, are not intended to apply to any organized society or government, where, on account of the great number of religious opinions, universal toleration is one of the fundamental articles of the constitution or social compact. Nor will they apply to persons, who profess to come as divine ambassadors, provided only they are furnished with those divine credentials, which furnish the only safe criterion, by which uninspired persons, can, in every case, distinguish between enthusiasm, fanaticism, or imposture, and true inspiration. But if, having no other evidence or assistance than other men, they undertake to disturb and revolutionize society, with the visions of their own imaginations or the mere deductions of their own understandings, without any other sanction or authority than enthusiastic reveries, or supported alone by the self-blandishing but fallacious supposition of their own intellectual superiority, and the ignorance and delusion of others, the government, having sufficient authority from the people for that purpose, will do no more than their duty in gently sending them out of the country without further molestation.

Neither are these remarks designed to apply in the slightest degree to missionaries, as if it were intended to deter them from what they consider their duty, in attempting to spread the divine revelation among the heathen. On the contrary,

this most benevolent intention, this attempt to comply with or fulfil the divine command, 'Go preach the gospel to all nations,' cannot in the fallible view of our narrow understandings, be too much applauded. Still, they should be careful not to disseminate as divine truths, any mere opinions or inventions of men. If unfortunately they should propagate error, what thanks can they deserve? Certainly nothing more than the praise of good intentions, accompanied with the discouraging abatement, of having done harm instead of good. In this case, it is obvious, there is ample room for an apparent conflict of rights and duties. For, the missionary may possibly mistake the peculiar tenets of the sect to which he belongs, for the only essential part of divine revelation, and esteem it his duty to spread them even at the risk of his life. On the other hand, the government of the country may consider those peculiar tenets, as nothing more than pernicious errors, and consider it their duty to put a stop to the dissemination of them.

Where a christian missionary goes among the heathen, thus exposing himself to toil, danger, hardships, and privation in the service of the great Master of our religion, there can be but one opinion, as to his merit and his reward. On the other hand, can there remain a doubt, that an enlightened christian community may adopt decisive measures, to prevent the propagation of delusion, fanaticism, or any doctrines of sufficient plausibility and having a tendency to disturb the public tranquillity, by subverting the true religion in the minds of the weak and defenceless, and introducing in its place, principles productive of confusion and numberless disorders?

Suppose, again, an enthusiast should be so zealous as to go to Rome for the purpose of converting the Pope, a case which history informs us has actually happened; what better treatment could he have a right to expect, than was given in the instance alluded to, viz. to be sent to a mad-house? Might not the Pope very properly answer his exhortation, by saying, 'Friend, it appears, that you have come hither, for the purpose of converting me to what you believe to be the true doctrine of the christian religion. Your design, though in

some measure vainglorious, is filled with benevolence; and if you have any new revelation, of the authenticity of which you can furnish satisfactory proof, I am ready to listen to it with the deepest veneration and humility. But, if you have not, what vanity can actuate you to suppose that I shall substitute your infallibility in the place of that, which is commonly ascribed to my office.

‘If I am sincere in the profession of the Catholic doctrine, can you be so simple as to expect to convert me to your opinions without the advantage of any other revelation, than I have myself, by the superiority of your intellectual powers alone? Or, if I am not sincere, what occasion is there for your kind offices? Would you take up arms against a shadow?’

3. *The right of property.* As society is organized for the security of property as well as life, this right remains in full force, and cannot be invaded without the grossest tyranny and oppression.

This right however is not infringed by equal taxes for public purposes, imposed by adequate legitimate authority. A misapplication or misappropriation of funds in the public treasury, however, must be considered as a violation of this right, though it is also a great breach of public trust. Any regulations introduced by law, for the transmission of property by descent, or directing the mode of transferring property on a sale, will be free from exception on this account; provided that no estate actually vested under a law, is divested by the operation of a law afterwards enacted. In any case, where an individual fails to receive what he had stipulated for, or what otherwise he would have a just right to expect, from an omission to comply with the laws of society, it must be ascribed to his own imprudence or negligence.

4. *Right of equality.* As men are naturally equal in their rights, there can be no doubt, as has been already remarked, that no individual would be willing to join in organizing a society, unless he were put on an equal footing with others, as to all the rights secured to him in the social compact, or constitution of the society. It would obviously be no violation of this principle, if, in the constitution itself, it had been



stipulated and agreed, that certain classes of persons, *which classes should be accessible to all*, should have greater powers, or should be exempted from certain public burthens. There is nothing unfair or unequal in this, in reality.

Neither would it be a violation of this principle, if a law should be passed, making men liable to certain common burthens for the benefit of society, as soon as they arrive at a certain age, and to exempt them from such burthens, as soon as they arrived at a certain other age, as in the case of military service. Because the law is general in its application, and the difference of condition occasioned by it, is merely temporary. Since every man, however aged, has once been young; and the young, if they live, will certainly arrive at an age, at which they too will in like manner be exempted. But, it would be a violation of this principle, if the legislature should attempt to alter by law, the requirements of individuals made in the constitution in order to qualify them for the exercise of certain civil rights, either by adding to or taking from them; or, by imposing new conditions, or removing old ones. And therefore a disqualification of individuals *by law*, grounded on distinctions not recognized in the constitution, is a violation of this principle.

For the same reason, a sacrifice of the interests of particular individuals, or inhabitants of particular districts, either in favor of other individuals or classes, or, even in favor of the public at large, is a violation of this right. But the government is generally considered as having authority to apply private property to public uses, if an adequate compensation is made to the proprietor, especially in cases of great emergency.

Where the operation of a law is, to prefer one class of citizens over another, the question, whether the law is to be considered as a violation of the natural right of equality, will depend upon the previous question, whether this effect is one of the principal inducements to pass the law; in which case it is tyrannical, as emanating from an usurped power; or, whether, without having such inducement, the principal operation or effect of the law, is to give such a preference; in which case, it is unjust because unequal in its operation, and if con-

tinued after notice of its effects, is also arbitrary and oppressive ; or whether this unequal effect was wholly overlooked by the legislature, and is a necessary attendant upon some great public advantage, the obtaining of which, was the sole object which the legislature had in view in the passing of the law ; in which case, it will be no violation of private right. But, as one class of citizens ought not to be sacrificed for the benefit of another, or, even of the public, the latter, out of the great advantage which they derive from the law, ought to make satisfactory compensation to those persons, who are sufferers by its enactment ; the loss to be ascertained by impartial appraisers or assessors. If the public are not willing to make this compensation, the wrong to the property of the suffering class or individuals, is neither more nor less than a robbery under pretence of law. But, if the public cannot afford, out of the benefit which they derive from the passage of such law, to make such compensation, it is conclusive proof, that the law is inexpedient as well as unjust ; since it will occasion more disadvantage than benefit. Where the principal operation of a law is to give a preference to one class of citizens over another, this is not a case for compensation ; but is a direct violation of the right of equality, to be waived by the injured class alone. As soon as this effect is ascertained, therefore, the law should be immediately repealed.

5. *The right of freely discussing public measures, &c.* Another right, which, it must necessarily be presumed, the people mean to reserve to themselves in every free elective government, is that of discussing the qualifications and characters of all candidates for public offices, *who consent to stand for them*, as well as the character, conduct, and general measures of all public officers. This subject will be considered more at large in Part II. Chapters 1 and 2.

But in governments so framed, that misconduct in the chief ruler or magistrate, does not by their constitutions, involve his disqualification for office, or his removal from it, whether it be elective or hereditary, it would be of no advantage to the people, for each citizen to have a right to comment harshly upon him, for the purpose of bringing him into hatred

or contempt with the people; since it could have but little tendency to correct public grievances, but might lead to public disorders and disturbances, and thus, instead of removing evils, might aggravate some and occasion others. For, it would be impossible to prevent the right of animadversion on the conduct of a bad prince, from being perverted to an unjust vituperation of the character and conduct of an excellent one. On the contrary, is it not very possible, that under a good prince, there might be thousands of factious demagogues, who, under the pretence of patriotism, the public good, and freedom and the rights of man, and other topics of popular declamation, might asperse and vilify their rulers; while under a cruel and merciless tyrant, whose public life was a disgrace to human nature, and whose administration of public affairs, was impolitic, unjust and ruinous, those same pretended patriots, from fear would have remained in perfect silence and perhaps have been most conspicuous for abject sycophancy and fawning servility?<sup>1</sup> Under all arbitrary governments, therefore, seditious speeches and writings are considered but little short of treason, to which they directly tend.

6. *The right of petition and remonstrance.* Another right retained by the people in all free governments, and which it is believed, is seldom denied under the most arbitrary and tyrannical, is that of representing to the government any particular

<sup>1</sup> Such conduct is perfectly natural, when it is considered, that demagogues and false patriots are actuated by the same motives, as the courtiers and flatterers of kings. For, it is to *power*, wherever placed, that each class equally bows. In monarchies, they are induced to pay court to the opinions and wishes of the king, if they would rise to employment in the state. With the same object in view, in democracies, they suffer neither honor, conscience, truth, justice, decency, nor religion, to stand in competition with popular notions, prejudices, or selfish interests. With such, the voice of the people, right or wrong, is the voice of God; and whatever is unpopular, is unpardonable. If they have sagacity enough to foresee in what direction the majority of the people will incline, it is there such persons will always be found, justifying or recommending in advance, measures which the people would blush to commit *individually*, as private citizens; and, instead of using the information which a superior education has given them, in endeavoring to remove popular errors, mistakes and prejudices, and settling the public opinion on true principles of religion, justice and morality, prostituting their superior advantages and influence, in confirming such errors, opinions and prejudices, rather than incur the risk of the displeasure of the people, by attempting to set them right.

evil or grievance, which the petitioner suffers from any law or other public measures, and requesting its removal, or that suitable compensation be made him for the damage, which he sustains in consequence of it. It should not be considered any infringement of this right, that the petition should be made in decent and respectful terms, however contrary it may seem to the opinions of those persons, who from a mistaken idea of the true principles of democracy, think there can be no freedom, where the private citizens may not affront and insult with impunity their superiors in office.

7. *The right to reform the government.* On this critical and dangerous subject, it seems difficult to establish any certain principles of general application, which will not be liable to be abused and misapplied, and which consequently may not involve in their operation, if injudiciously carried into practice, the most lamentable and disastrous results. A profound historian indulging in some reflections upon the American Revolution, makes the following observations. 'To overset an established government, unhinges many of those principles which bind individuals to each other. A long time and much prudence, will be necessary to reproduce a spirit of freedom, without which, society is a rope of sand. The right of the people to resist their rulers, when invading their liberties, forms the corner stone of American Republics. This principle, though just in itself, is not favorable to the tranquillity of present establishments. The maxims and measures, which in the years 1774 and 1775, were successfully inculcated and adopted by American patriots, for oversetting the established government, will answer a similar purpose, when recurrence is had to them by factious demagogues for disturbing the freest governments that were ever devised.'

It should not be overlooked, though it may seem to imply a contradiction in terms, that the strict enforcement or assertion of our most perfect rights, under peculiar circumstances may sometimes constitute a crying sin, as being a violation of some duty, which though of the strongest obligation in a religious and moral point of view, is usually called or defined a *duty of imperfect obligation*, because those persons who are the objects of it, have no right themselves to compel its per-

formance. This is true in relation to our rights in a state of nature, and towards individuals ; and is equally so in relation to our civil and political rights in a state of society, and towards the public. But, in the latter case, the consequences may be infinitely more disastrous, and wholly remediless. The following remarks are to be taken, subject to this qualification.

No government can have any legitimate foundation but in the good of the people ; for, the people were not made to be governed for the interest or pleasure of the rulers ; but rulers were set up and established to protect the people, and direct them by salutary laws and regulations, in the pursuit of their welfare and true interests. Where the people have good sense, and the virtues of self-denial, and the love of justice, as a nation, so as to know how to redress their wrongs on other nations, if any should be offered, and so as to be contented to do without, what they cannot gain without wrong to others, they have no need of arbitrary rulers, whose powers, in a political point of view, originate with themselves. But, if they have not this good sense and these virtues, they will soon fall a prey to usurpation, as a punishment for their folly and injustice. What nations have, and what nations have not, this intelligence and these virtues to a sufficient extent, may be conjectured, but can only be certainly determined by experience. To think so, and to be able to do it, are different things. To overthrow a monarchy is one thing ; to establish a permanent, free, popular government is another. The characteristic qualities of a people, which may lead them to the former, are not of themselves sufficient to enable them to effect the latter. The form of general government established by American sages, though most admirable, is not perfect ; and will stand no longer than while a portion of the same wisdom, patriotism and disinterestedness, which actuated them, shall continue to animate the public councils.

Governments were established at first, in days of ignorance violence and injustice. In most cases the strong, crafty and bold, reduced the weak, timorous, simple and defenceless to a state of subjection. The latter, in this way, became slaves to the former, in the first instance ; and afterwards, by a grad-

ual melioration of their condition became subjects, while the companions of the leader or conqueror, became nobles. This however was not always the case. For, in some instances, it is probable, where the weak were not immediately overrun in the first invasion, they were able by uniting and forming themselves into an organized society, adopting an exact military discipline, and inventing armour as well as improved weapons of offence, as shields, darts and swords, to prevail over those, who, relying merely on their gigantic stature and resistless bodily strength, had never felt the necessity, and consequently had never thought of any such expedients, but at best, had never made use of any weapons more effective than the stone, the stake, or the war club. It is most probable, that it was in this way, that Chedorlaomer, the first conqueror on record, subdued the various tribes of giants, enumerated in the holy scriptures. For, he had no divine assistance, and no mention is made of the superior stature of his soldiers or subjects. But they dwelt in cities, and must therefore have made some considerable advances in civilization and the necessary arts. But the nations or tribes whom he conquered, it is apparent, lived in a savage state ; and were most of them conspicuous for their lofty stature ; viz. the Emims, who are compared to the sons of Anak, of whom it was said, ' Who can stand before the Anakims,' the Rephaims, or giants, of whom it is said in the scriptures Og, the King of Bashan, was the last survivor, and whose stature, according to the scripture account, could not have been far from fifteen English feet ; the Horims, who dwelt in caves and holes in the ground on Mount Seir, and who, in this respect, were literally *Troglodytes*. These giants were in a great measure destroyed by Chedorlaomer, and it is most probable without any miraculous aid, by superior weapons, and military skill alone. But, when other nations of gigantic men succeeded, such as the Anakims and the Amorites, who were acquainted with warlike implements and defensive armour, and subject to military discipline, it was impossible for the Israelites to conquer them without divine assistance, and the three sons of Anak, who struck terror into the hearts of the Israelitish spies, with the exception of Caleb and Joshua, it is probable from the same ac-

count, were not cut off, until they were upwards of fourscore years of age ; there being no evidence that, under the divine economy, the ordinary course of nature is ever disturbed by a miracle without necessity.

In later times, governments are chiefly grounded in the first instance on conquest or usurpation. For we see in history, Kings are dethroned and are succeeded for the most part by tyrants ; Republics are conquered through delay or dissension, or corruption, and are annexed to the empire of the conqueror ; monarchies are subverted and succeeded by anarchy and confusion, until the turbulent authors are cut off, one chief being left to trample on the people's liberties and reduce them to a more abject state than they suffered before. In a few instances, the people have rescued themselves from oppression, and have established a mild and free government.

Legitimate governments may be of any form whatever, whether a monarchy, an aristocracy, a democracy, or a combination of these. Where they are not established by divine appointment, they must be grounded, according to natural right, in the will of the people, express or tacit. A people, therefore, it is evident, without any government, when organizing a political society and forming a nation, may adopt any form of government which they think expedient, whether monarchy, aristocracy, democracy, or a republic. Whatever form they adopt, is a legitimate government, and no individuals in any succeeding generation, have a shadow of right to attempt to subvert it, or to excite the people to do so. Yet individuals who are dissatisfied, have a right to consult their happiness and leave the country ; but so long as they reside within it, they are bound to obey the laws. But, if the rulers should abuse their legitimate authority, and oppress the people by acts of tyranny and cruelty, the people, after petitioning for redress of grievances in vain, *if unanimous*, (otherwise not,) will have a natural right to remove their rulers, choose others in their room and reform the government, and adopt a new constitution if they see fit. A bare majority of the people, however, has no such right.

This extreme right, on account of the terrible consequences usually attending its exercise, notwithstanding the most tyran-

nical and unjustifiable conduct in the rulers, in most cases it would be very wrong, indeed a great sin, to put in force. For, the benefits resulting from revolutions, seldom compensate for the horrors which almost invariably attend them. The risk of violating many duties, which, though of imperfect obligation, cannot be disregarded without incurring a degree of guilt and responsibility, proportional to the calamitous consequences which must necessarily follow, must therefore make every reasonable and conscientious person pause and deliberate long, before he arms himself against his rulers; and it is very probable, that it is in part for such reasons, that we christians are commanded 'to submit to the powers that be.' But, in fact, the people are seldom or never unanimous for a change of their government, even when it is of the most arbitrary form, and their rulers are tyrants. Where they appear to be so, (and especially if the administration is mild, and the people do not stand in awe of it,) it is owing to the dread and fear which the orderly citizens entertain of the threats, outrages and massacres of revolutionists and anarchists, which are greater than the respect or regard, which they entertain for a government, in their opinion no longer capable of protecting either them or itself. Many of these citizens, therefore, in such cases, through mere apprehension, side with the unprincipled and disorderly, in order to escape their violence, (though being suspected, on account of the previous respectability of their characters, their hypocrisy is not always successful in this respect,) when they would prefer to submit to the measured oppressions of any regular government, rather than be exposed to the capricious and illimitable envy and malignity of ignoble and unprincipled disorganizers. There is seldom, therefore, an occasion where such right can be said to exist at all; and it would be a rare case indeed, that would render the exercise of it perfectly justifiable.

In the original formation of a government established by the people, it is their consent which renders it legitimate. But, though the government should commence unjustly, as by conquest or usurpation, yet, if the people afterwards acquiesce in it, no succeeding generation has any greater right to alter it, than if it had been established by the free consent of



the people in the first instance. For, the generation which *acquiesces*, have the same right to *adopt* the government under which they live, that a people without a government, have to form and establish one. The voluntary *acquiescence* of the former, is equal in its effects to the free choice of the latter. The contrary supposition would be attended with many inconveniences, if not absurdities. For, suppose a democracy is established by the free choice of the people, what sanction has this government, after the generation has passed away, which first established it? Certainly none but the tacit acquiescence of the people which succeed. In any such case, can we suppose that a political leader has a right to endeavor to persuade the people that their rulers oppress them, and, in this way, induce them to resist, throw off, or dissolve the government? For, without dwelling upon the probable consequences, mobs, riots, insurrections, rebellions, civil war, massacres, and other outrages, with which the overthrow of a settled government is invariably attended; and the anarchy and confusion, and suspension of the distribution of justice, which immediately follow; and the establishment of a military despotism, which would in all probability be the termination, and the only effectual one, of these horrors; whence could a demagogue derive this right? Can such a pretence owe its origin to any other source, than an abuse of the great liberty which is permitted in a democracy; but which in a stronger government, would well be considered as a crime of the greatest magnitude and atrocity, and which would immediately be punished as it deserved; or rather would rarely show itself, having no hopes of escaping punishment in case of a failure in the attempt. For, the confident expectation of escaping with impunity, is the chief origin of the fervid and inflammatory declamation against imaginary political evils and abuses, in the pretended patriot and lover of the people, as well as of the lawless violence of an ignorant and debased rabble, under the influence of intoxicating liquors, and in the exercise of, what they affect to believe, some of the rights of man.

When in the first formation of a constitution, a mode of amending the frame of government is pointed out in that instrument or political compact, all amendments and reforms made

in the mode prescribed, though not unanimously agreed on, are doubtless as valid and binding, as if they constituted a part of the original compact, to which all the people had unanimously assented in the first instance. And here it will make no difference, whether agreeably to such mode of amendment, the alterations in the constitution are to be made by the rulers themselves, or by the people convened in their primary assemblies. But, as the majority have no natural right to frame a government in the first instance, which shall bind the minority who dissent, though the minority may silently ratify it by their peaceable acquiescence, if they see fit ; it follows that a mere majority have no right to alter the constitution, unless it is expressly agreed that they may do so in the mode prescribed for that purpose in the constitution itself. It seems to follow, therefore, that though the people, if unanimous, have a right to change their form of government, even where there is no provision for any such alteration in their constitution ; yet, the rulers may justly enact laws to punish with exemplary severity, any persons who should attempt to excite the people to make radical changes in the government, or to remove, in an irregular and disorderly manner, those who preside over the administration of public affairs. This authority naturally results to the rulers, from the general power which is bestowed on them, either expressly or by implication, to provide for the public safety and welfare ; and the exercise of it is justified, not only by the bad motives which usually actuate innovators, such as disappointed avarice, or ambition, envy, vanity, and a desire of self-aggrandizement ; but, because of the infinite evils which attend an attempt to overthrow the government, where the people are divided into parties or factions, as they invariably are on such occasions.

Farther ; if it were permitted to individuals to excite the people to overthrow their government, or change it in an irregular manner under the plausible pretext of reform, then nothing could ever remain sacred or established among mankind. It can make no essential difference, what the *form* of government may be, which it is desired to overthrow. Yet, it is certain, that where the form and administration of the government, is most arbitrary and despotic, and consequently

where there will be the most just ground of complaint, there will be less of it made, through fear. On the contrary, where the government is most free, and there is consequently less danger of punishment for seditious or treasonable practices, unprincipled demagogues, from a desire of becoming popular, will pretend public abuses where none exist, and exaggerate those which do. Not but that there are tyrannical abuses of authority in democracies and republics, as well as in monarchies; but for the most part, they excite less apprehension and alarm in popular governments; because in them the power, however it may be abused, is supposed to be limited, and the evil consequences of such abuse, are definite and circumscribed. But in monarchies, where the political power exercised by the ruler is either arbitrary, or, at least very great, the abuse of it excites alarm; because the extent of the abuse, or of the evils that may be occasioned by it, cannot be either distinctly perceived or foreseen, or precisely ascertained. It is for this reason, that, under the government of an arbitrary tyrant, there is no one but must entertain apprehensions for his own personal safety. Yet, for the most part, timid and conscientious persons, are desirous of a strong, though not of an arbitrary government. Because, from its very structure, a strong government is most likely to be permanent, and they consequently feel a greater confidence that they shall be protected from the innovations, abuses, and violence of the turbulent and disorderly. On the other hand, the unprincipled, dissolute and flagitious, always desire a weak government, in order that they may be at liberty to practise wickedness with the greater hope of impunity.

Where the form of government is strong and effective, the just and peaceable therefore, enjoy the highest degree of that rational liberty which consists in the security of their persons and property, and the quiet and undisturbed exercise of all their civil and political rights, free from the molestation of the turbulent and licentious. On the other hand, where the form of government is weak and tottering, and the rulers, from a desire of popularity, neglect a discharge of their duty, and are consequently timeserving and inefficient, the turbulent and unjust enjoy the highest degree of freedom and impunity in

their insolent practices of fraud, violence and imposition upon those, who have not the power to protect themselves, and, whom, the rulers through an apprehension of a loss of popularity, are base enough to leave unprotected. For, flagitious and disorderly persons dislike wholesome laws, because they find their freedom to commit wrongs with impunity, is restrained by them. They therefore make an outcry for liberty, and for a repeal of such laws. But laws to prevent wrong and injustice do not deprive well disposed persons of any freedom; because they would do no wrong and commit no crime, if there were no law against them. They therefore are in favor of such laws, to protect society and themselves against the lovers of such liberty. And as the good, who alone may safely be entrusted with such freedom, i. e. a state of exemption from such laws, never complain for want of it; so, those who do complain, are the very persons in whom such confidence cannot be placed.

Lastly; though it cannot be doubted, that where all the people are *unanimous*, they have a natural right to alter their government, whether any provision for such alteration is made in their constitution or not, because the government is intended for their benefit, and, if they had not such right, the most horrible tyranny, cruelty and oppression might be continued from generation to generation, unless there were some miraculous interposition of providence; still the wise and prudent will be very cautious how they engage in any such enterprises; some of which, seem to have been signally marked with the divine displeasure. The reader will readily recollect that the same nation, which dethroned and beheaded Charles I, a legitimate monarch, under pretence that he had made use of an unwarrantable stretch of his regal authority, which however was not well defined, was compelled to submit to a bloody usurper and ruthless tyrant, *who died peaceably in his bed*. And here the sturdy republicans of parliament, who had deprived the nobles of their constitutional authority, and who made it almost a matter of conscience to withhold due reverence and respect from their lawful sovereign, were compelled by Cromwell, both a republican and a fanatic, and as bloody and ferocious as themselves, but far superior to them in ability and decision of

character, to bow their necks before him with servile fear ; yet, after all, were thrust out of parliament by him with the utmost scorn and contempt.

What massacres followed the decapitation of the mild and benevolent Louis XVI? What a succession of demons afterwards controlled the public affairs of France, who, deluding the infatuated people with the ceaseless, false and senseless outcry and jargon of liberty, equality, the rights of man, tyranny, priestcraft, aristocrat, democrat, citizen and patriot, never hesitated to violate every precept of religion, every moral duty, and every feeling of humanity, and carried their extravagance to the height of the most blasphemous impiety. Were the horrors, which thus succeeded to the overthrow of this established government, a judgment from heaven, or were they merely the natural consequences, which may always be expected to flow from the prevalence of anarchy, atheism, and unbounded licentiousness? Certainly, no tyranny can occasion such evils, as an intoxication of the intellect, arising from an influx of false principles on the subject of religion, morals and philosophy.

Well-disposed men therefore will hesitate long, before they join in any attempt to overthrow or revolutionize their government, under any pretext whatever. It is true the people may be unanimous in subverting their government, and yet afterwards, they may not be able to agree in forming a new one, and, if so, they will be in a much worse condition, than they were in, under that which they have rejected; because, to destroy is not the same as to reform. Will it not be worse than living under any regular government, to remain in a state of anarchy and confusion, until the different parties and factions, are reduced by battles, massacres and assassinations, under one; and another government is established by force or fraud, ten times more arbitrary and despotic than that which they have been induced to overturn? For, in many cases, revolutions do not result so much from a sense of intolerable oppression, as from a fondness for an idol—a golden calf—a false god—an imaginary degree of liberty, which, if it were real, the frailty, perverseness and folly of mankind, to say nothing of their wickedness, injustice and depravity, wholly disqualify them from enjoying.

## CHAPTER II.

*Of the Social Compact of the Citizens of the different States in the American Union, in the formation of the General Constitution, taken in connexion with the real or supposed compact of the citizens of each State, in the formation of its own Constitution or State Government.*

In order to form distinct ideas on the subject of the present chapter, it will be necessary to consider the situation of the thirteen states which first adopted the general constitution, immediately previous to that important transaction. From the year A. D. 1776, when Congress declared the colonies free and independent states, the war with Great Britain was carried on under articles of confederation, the powers conferred on the Provincial Congress, by which, may be considered as constituting the first general government of these territories or provinces. The project of a union, however, seems first to have been suggested some twenty or thirty years previous, by commissioners appointed by the colonies, at the call of the crown. These commissioners met at Albany, in July, 1754, and as among them, were found such discordant materials, as Governor Hutchinson, Governor Pownall, and Dr Franklin, entertaining political opinions so very different,—it might be a matter of curiosity to examine thoroughly a plan of government which is principally ascribed to Dr Franklin, and to which, it appears, the others agreed. It must suffice however, to observe, that the general government was to unite the colonies of Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina and South Carolina, and be administered by a President General, to be appointed by the crown; and a grand council, to be chosen by the representatives of the people of the several colonies, met in their respective assemblies. The assent of the President, who constituted the

executive, was requisite to all acts of the grand council ; the members of which were to be chosen every three years. The general government was to have power to make treaties with the Indians, &c. ; raise and pay soldiers, and equip vessels, &c. ; to make laws, to lay and levy general duties, imposts and taxes. Each colony was to retain its own constitution, *except so far as it might be altered by the act of parliament, which should establish the general constitution* ; that is, so far as they were inconsistent with the general constitution. Any colony however, was to be at liberty to defend itself on sudden emergencies. This project, though agreed to by Pownall and Hutchinson, was rejected in England.

To return ; the government established by the articles of confederation, though it carried the country through the arduous conflict with so powerful a country as Great Britain, yet would hardly have been sufficient to do so, if the sense of common danger, as well as an enthusiastic ardor in pursuit of what they esteemed their natural rights and liberties, had not sustained the people. These powerful motives supplied what was wanting through the inefficiency of this system, and without their aid, the struggle for independence would have been weak and unsuccessful. But the hurry of arms, and the uncertainty of the final result of the conflict, rendered it impossible, while the suspense lasted, to remedy the evils and defects of this system of confederation, though they were most sensibly felt ; since Congress were not able to bring into the field, or to sustain while there, so much of the strength of the country, as its extreme exigencies frequently required. The desperate struggle might not have been of so long continuance, if the provincial congress had been able to enforce its requisitions, instead of being obliged to rely on the provinces or states, for that purpose.

After the termination of the war, which was brought to a successful close in 1783, by a treaty with Great Britain, acknowledging the independence of the United States, and the bond which connected them with that country was severed, the states were left in a state of nature, and consequently were at liberty to assume whatever relations towards each other, they thought expedient, or could agree upon. It is

true, they were at that time associated or allied together by the articles of confederation, and whatever duties or obligations they had assumed upon themselves by virtue of those articles, were still binding. Yet, as those articles were generally admitted to be insufficient for the purposes for which they were adopted, and it was proposed, if practicable, to frame a government less liable to this objection, the articles of confederation may be wholly overlooked, so far as the subject of this chapter is concerned.

The relation which the several states had to each other at that time, being thus settled, it remains to consider, what relation the citizens of each state had to their own state governments and towards each other, when the federal constitution was adopted. This is sufficiently evident. Because, as soon as the connexion of the provinces or states, with the British government was completely dissolved, by the treaty of 1783, acknowledging their independence, the authority of the several state governments, over their respective citizens, was either the result of an *express* compact by the people of each state for the formation of a state government ; or, without any such express compact, derived its sanction, in part, from long previous usage under the colonial or provincial government ; and, as to the rest, though in some few instances it might seem to be founded on a temporary assumption of power, arising from the extreme urgency of the case, yet was immediately ratified by the approbation of the people, or sanctioned by their peaceable and ready acquiescence. ¶ For, the state constitutions were adopted by the people of the respective states at different periods of time. Some, while the revolution was going on ; some after the termination of the war ; and some but lately. Some of these, therefore, must be considered as being governed, from the time of the declaration of independence to the formation and adoption of constitutions by the conventions of their respective states, by rulers chosen under a temporary government, grounded merely on a supposed or implied compact, to conform to the usages adopted while under the colonial government, as far as was consistent with the change of condition and circumstances ; because the colonial government was dissolved, and yet no other had been expressly agreed



upon ; and the colonial government being abolished, there remained no authority for any other, except such as must be inferred from the acquiescence of the people.

If, at this critical time, therefore, any acts should appear to be done by the rulers, beyond their express authority, in order to insure the public safety merely ; yet the urgency of the occasion, the danger of delay in order to obtain the express concurrence of the people, and the fair intentions of the rulers, seem to furnish a sufficient excuse. For, it cannot be doubted, that in cases of extremity, where there is not time to wait for express instructions, the rulers having it in their power to do certain acts, which they think necessary to preserve the citizens, though such acts are not strictly within the scope of any powers expressly delegated to them, will do well to assume this responsibility. And though such acts, if performed by the rulers from motives of personal aggrandizement, or other considerations merely selfish, would have deserved the severest censure and animadversion, as consisting in a tyrannical usurpation of power ; yet, when actuated by a regard for the general welfare alone, the rulers have resorted to them from a want of any other safe resource, they become highly praiseworthy. It is true, if such acts are thought inexpedient by the people, and as so, are rejected by them, they will not be binding upon any one ; yet, until so rejected, they may be considered as sanctioned by the tacit acquiescence of the citizens ; and if they are adopted or expressly approved of by the people, they become as effectual as if authorized by them in the first instance.

By a reference to the state constitutions, it will immediately appear, that though the powers delegated in them by the people of each state, vary in extent and duration ; yet they are all republican in their form, consisting of a legislative body, variously divided, an executive or chief magistrate, and a judiciary. These for the most part are independent of each other ; and, with the exception of the judiciary, depend on popular suffrage for their offices. In some states, however, the judges also are elected by the people.

It does not, however, come within the limits of this work to enter into any particular detail, as to the forms of the various

state governments. For full information in relation to them, reference must be made to the collections of the laws of each state, and to its history from the time of the commencement of hostilities in the American revolution, down to the time when such constitutions were respectively adopted. 4

From the view of the subject that has just been taken, however concisely and imperfectly, it sufficiently appears, that at the time of the formation of the federal constitution, the people of the several states were living under legitimate state governments, independent of each other, and having no further connexion with each other, than by means of the articles of confederation; and, consequently, that if those articles had been abolished, without the substitution of the present constitution or some other, the states would have been as entirely free from all dependence upon each other, as the kingdoms of France and England are at this moment. When the constitution therefore, was submitted to the different states for their consideration, to be adopted by them if they thought expedient, each state, being thus wholly independent of the rest, considered itself, and was considered by all the others, and without doubt very justly, at perfect liberty either to accept or to reject it at discretion, and this without any obligation to take into view any thing beyond its own interests. The circumstance that a majority of the states were in favor of its adoption, had no operation whatever to bind the others, though a minority; for, each state had then a natural right to act for itself, without being justly subject to the control of any other state or nation. If the two states of the thirteen, North Carolina and Rhode Island, had thought best not to join the Union, they would have remained in a state of nature in relation to the others, *that is*, with all the rights and liberties of an independent tribe or distinct people, and would neither have been bound by its laws, nor could justly have been compelled to submit to its power. 4

During the war, the articles of confederation, as has been suggested already, were found defective in many respects; especially, because under them, the congress could neither raise men nor money of themselves; they could not adopt any general measures for the public safety, unless the states were

unanimous ; and could do but little more than recommend measures to the different states, which their legislatures adopted, enforced, rejected, or neglected, as they saw fit.

After the termination of the war, the confederation had no power whatever to provide for the payment of the national debt ; foreign nations hesitated to enter into treaties with the states, because under the articles of confederation, Congress had no power to enforce a compliance with it by the several states. Another defect was that thirteen distinct judiciaries had a constitutional right to decide on the same subject. And generally, as observed by a distinguished historian and biographer, it was found impossible for a government to answer the purposes for which it was established, while the enforcement of its decrees or acts, depended on the discretion of other parties.

Further ; the unsettled state of public affairs after the treaty of 1783 ; the want of subordination of the people to their respective state governments ; the want of good faith in some of the state governments ; and the consequent want of some sufficient tribunal to compel its observance ; and the little regard paid by some of the state governments, to the most earnest recommendations of Congress ; rendered it absolutely necessary to adopt some form of government more energetic than that established by the articles of confederation. On account of these defects, as well as many others, it was thought advisable to amend these articles, so as to remove as far as possible, all the evils arising from them. A motion was made accordingly by Mr Madison, the late president, for a proposition to all the other states to meet in convention, and digest a form of government adequate to the exigencies of the Union. It was not intended however, at this time by Congress, to introduce an entirely new system, but merely to amend that of the confederation. For the delegates to the convention were appointed, 'for the sole and express purpose of revising the articles of confederation and reporting to Congress alterations therein.' The defects of that system however were considered incurable, and the convention, though perhaps in strictness it did not come within the terms of their commission, made a draught of the present constitution, with the exception of the

amendments which have since been made, and recommended it to the citizens of the United States for adoption: This constitution being afterwards ratified and adopted by all the states, all objections on account of the previous informality just alluded to, are wholly removed by the voice and sanction of the people. It was at first adopted by eleven of the states only out of thirteen, and North Carolina and Rhode Island afterwards acceded to it.

The present constitution of the United States is therefore a social compact made by the inhabitants of certain territories, which, previously to its adoption, had local governments established within them, organized with powers, which acknowledged no superior, as long as they did not overstep the limits set to them either expressly or tacitly in the respective state constitutions. But, in the adoption of the general constitution, the supremacy of the state governments, as well as the independence of the states was limited in the same degree precisely, as they became bound by their own voluntary act, to obey all laws made by virtue of the general constitution. For, the supreme power, within the limits prescribed in it by the people of the United States being taken from the state governments, if it had ever been conferred on them, was bestowed on the general government; or if otherwise, was directly granted by the people to the general government. This is apparent, because the general constitution was made or agreed to, by the people of the thirteen states, the people of each state then constituting a distinct independent tribe or nation, and each tribe or nation acting in its original capacity, as one of the *elements* of this compact, and exercising those natural rights which belonged to each as an independent tribe or nation, before this general compact was made in the constitution of the United States. It would seem to be a great mistake, to suppose that this general constitution was made by the *state governments*, on behalf of the independent nations under their government; for, they had no authority from the people of their respective states to do any such act: On the contrary, special delegates were chosen by the people of each state respectively, for the express purpose of deliberating upon, and, if they thought fit, of adopting the constitution proposed. The ordinary repre-

representatives of the people elected to serve in the state governments, were not intrusted with the management of this important transaction, but recourse in each state was had to the highest known abilities and integrity, which it was supposed might be drawn forth on this occasion, however averse to aim at making a figure in legislative assemblies.

It may be objected, that agreeably to the preamble to the constitution of the United States, the constitution is to be considered as adopted by the people of all the states, acting as the elements of a single nation, without any reference to the state governments, or to the fact that they were members of independent organized societies already existing. But the preamble, on the supposition that this is its true construction, merely shows the light in which the people *agreed* to be viewed in the adoption of the constitution. Their agreement however cannot alter the fact, and that the other construction is the true one, seems to result from the following considerations. 1. If the people of the United States had intended to adopt a constitution, in their collective capacity as one great nation, without any reference to territorial or state governments, or to the independence of each individual state, there should have been no calling of separate state conventions for the adoption of the constitution, but delegates should have been chosen from all the states to one general convention, for the purpose of deliberating upon and adopting and ratifying it. But, in fact, after the constitution was approved of by the convention, whose whole authority in strictness was confined to revising the articles of confederation and proposing alterations in them, the ratification of the constitution was given by delegates chosen by the several states for the purpose of deliberating upon, and, if they saw fit, of adopting and ratifying it. The constitution therefore was adopted by the citizens of the several states, acting as distinct nations, the ratification being given by the respective delegates of each, meeting in state conventions.

2. If the constitution were instantaneously abolished, the union would be resolved, not into *one* nation in a state of anarchy as to national supremacy, but into the several nations inhabiting the territory of the respective states, and under in-

dependent and supreme heads ; for, all those powers which are taken from the state governments *expressly* by the constitution, or tacitly by the mere act of adopting it, if the constitution should be abolished, will, without any further act immediately revive to the state governments respectively.

3. The compact made in the general constitution, may be rescinded by the people in the same manner which was adopted in the making and ratification of it, *i. e.* the same majority of all the states acting as nations, may rescind it. The states or nations, acting politically, are therefore the elements of the general compact, and not the individuals of all the states, acting as the elements of one great nation.

4. Though the state legislatures have no right at all to rescind the constitution, even if every state legislature in the United States were unanimously in favor of rejecting it, yet, it is only because the people of the respective states have never entrusted them with any such power. Yet, it is apparent, if the people in each of the states should give the power to decide on this momentous subject, to delegates chosen by them to meet in their respective state conventions, those delegates might dissolve the union.

5. If the constitution was framed and adopted by the people of all the states, acting as members of one great nation, then this absurdity would follow, that if there had been a majority in any individual state against adopting the constitution, still that state must have come in, because the majority of the people of the United States were in favor of adopting it. This shows conclusively that, however the people were willing to have the constitution viewed after its adoption, they in fact acted as independent nations in adopting it.

*This subject will be further commented on under Chapters IV, V, and VI.*

## CHAPTER III.

*Of the powers delegated to the General Government in the Federal Constitution. Containing in DIVISION I. The Constitution of the United States; DIVISION II. On the powers of Congress; DIVISION III. On the power and duty of the President; DIVISION IV. On the constitutional jurisdiction of the Supreme Court of the United States.*

Before considering the very general and comprehensive subject of this chapter, it may repay the reader's attention to examine, in a cursory manner, the constitution itself, in which all these powers are contained. For this reason, as well as because it may frequently be convenient to such as are desirous of consulting it, to know its precise phraseology, it was thought best to introduce it in this place, without abridgement or any other alteration, either of its language or arrangement.

DIVISION I. *Constitution of the United States.*

WE, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

## ARTICLE I.

SECTION I. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SEC. II. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the

qualifications requisite for electors of the most numerous branch of the State Legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and, until such enumeration shall be made, the State of *New Hampshire* shall be entitled to choose three, *Massachusetts* eight, *Rhode Island* and *Providence Plantations* one, *Connecticut* five, *New York* six, *New Jersey* four, *Pennsylvania* eight, *Delaware* one, *Maryland* six, *Virginia* ten, *North Carolina* five, *South Carolina* five, and *Georgia* three.

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill up such vacancies.

The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment.

SEC. III. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the



third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in case of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SEC. IV. The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SEC. V. Each House shall be the judge of the elections, returns, and qualifications of its own members; and a majori-

ty of each shall constitute a quorum to do business ; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy ; and the yeas and nays of the members of either House, on any question, shall, at the desire of one fifth of those present, be entered on the journal.

Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SEC. VI. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to or returning from the same ; and for any speech or debate in either House, they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time ; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SEC. VII. All bills for raising revenue shall originate in the House of Representatives ; but the Senate may propose or concur with amendments, as on other bills.

Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States ; if he approve, he shall sign it ; but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter

the objection at large on their journal, and proceed to reconsider it. If, after such reconsideration, two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases, the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary, (except on a question of adjournment,) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

**SEC. VIII.** The Congress shall have power—

To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States.

To borrow money on the credit of the United States.

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

To provide for the punishment of counterfeiting the securities and current coin of the United States.

To establish post offices and post roads.

To promote the progress of science and useful arts, by se-

curing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

To constitute tribunals inferior to the supreme court.

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

To declare war ; grant letters of marque and reprisal ; and make rules concerning captures on land and water.

To raise and support armies. But no appropriation of money to that use shall be for a longer term than two years.

To provide and maintain a navy.

To make rules for the government and regulation of the land and naval forces.

To provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions.

To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States ; reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States ; and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings : and

To make all laws, which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SEC. IX. The migration or importation of such persons, as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress, prior to the year one thousand eight hundred and eight ; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be sus-

pended, unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder, or ex post facto law, shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any State. No preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another : nor shall vessels, bound to or from one State, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law : and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States. And no person, holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SEC. x. No State shall enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal ; coin money ; emit bills of credit ; make any thing but gold and silver coin a tender in payment of debts ; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States ; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

## ARTICLE II.

SEC. 1. The Executive Power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows :

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives, to which the State may be entitled in the Congress. But no Senator, or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each ; which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed ; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President ; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President. But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote : a quorum for this purpose shall consist of a member or members from two thirds of the States ; and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors, shall be the Vice-President. But if there should remain two or more,

who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.] *See amendment XII.*

The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes ; which day shall be the same throughout the United States.

No person, except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President. Neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President ; and the Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President ; and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished, during the period for which he shall have been elected ; and he shall not receive, within that period, any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation :

‘ I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States ; and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.’

SEC. II. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices : and he shall have power to grant reprieves and pardons, for offences against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur : and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they shall think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen, during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

SEC. III. He shall, from time to time, give to the Congress information of the state of the Union ; and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both Houses, or either of them, and, in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive Ambassadors and other public Ministers. He shall take care that the laws be faithfully executed ; and shall commission all the officers of the United States.

SEC. IV. The President, Vice President, and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

#### ARTICLE III.

SEC. I. The Judicial Power of the United States shall be vested in one Supreme Court, and in such Inferior Courts as the Congress may, from time to time, ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior ; and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SEC. II. The Judicial Power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the



United States, and treaties made, or which shall be made, under their authority ; to all cases affecting Ambassadors, other public Ministers, and Consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party ; to controversies between two or more States, *between a State and citizens of another State*, between citizens of different States, between citizens of the same State, claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects. *See amendment XI.*

In all cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury : and such trial shall be held in the State where the said crimes shall have been committed ; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SEC. III. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason : but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

#### ARTICLE IV.

SEC. I. Full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

SEC. II. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person, held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor ; but shall be delivered up on claim of the party to whom such service or labor may be due.

SEC. III. New States may be admitted by the Congress into this Union ; but no new State shall be formed or erected within the jurisdiction of any other State—nor any State be formed by the junction of two or more States, or parts of States—without the consent of the Legislatures of the States concerned, as well as of the Congress.

The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States : and nothing in this Constitution shall be so construed, as to prejudice any claims of the United States, or of any particular State.

SEC. IV. The United States shall guarantee to every State in this Union a republican form of government ; and shall protect each of them against invasion, and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

#### ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two thirds of the several States, shall call a Convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress ; provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect

the first and fourth clauses in the ninth section of the first article ; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

#### ARTICLE VI.

All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States, under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land : and the Judges in every State shall be bound thereby ; any thing in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all Executive and Judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution ; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

#### ARTICLE VII.

The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

#### ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press ; or the right of the

people peaceably to assemble, and to petition the government for a redress of grievances.

II. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

III. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner ; nor in time of war, but in a manner to be prescribed by law.

IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ; and no warrants shall issue, but upon probable cause, supported by oath or affirmation—and particularly describing the place to be searched, and the persons or things to be seized.

V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger : nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb ; nor shall be compelled in any criminal case, to be a witness against himself ; nor be deprived of life, liberty, or property, without due process of law : nor shall private property be taken for public use without just compensation.

VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district wherein the crime shall have been committed ; which district shall have been previously ascertained by law ; and to be informed of the nature and cause of the accusation ; to be confronted with the witnesses against him ; to have compulsory process for obtaining witnesses in his favor ; and to have the assistance of counsel for his defence.

VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved : and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

VIII. Excessive bail shall not be required ; nor excessive fines imposed ; nor cruel and unusual punishments inflicted.

IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others, retained by the people.

X. The powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

XI. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

XII. 1. The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate: the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted: the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the Representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.

2. The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors appointed ; and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President : a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of President, shall be eligible to that of Vice President of the United States.

XIII. If any citizen of the United States shall accept, claim, receive, or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office, or emolument of any kind whatever, from any Emperor, King, Prince, or Foreign Power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.

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In giving a construction to the constitution, it should be remembered,

1. That the constitution is a compact made by the people of the United States, and not a compact made by the legislatures of the different states.

2. That the government of the United States can claim no powers which are not granted to it by the constitution, either expressly or by necessary implication.

3. That the words of the constitution are to be taken in their natural sense, without restriction or enlargement.

4. That, where the constitution contemplates and authorizes a certain object to be effected, all proper means, not expressly prohibited by the constitution, may be adopted to effect that object.

5. That, though the powers delegated by the constitution are limited in extent, yet they are supreme within their limits, in the exercise of them. That, consequently,

6. The constitution is the paramount law of the land, and

cannot be altered by congress, or by any other political power, except in the mode pointed out in itself. See 2 Dal. 304.

## DIVISION II. *On the powers of Congress.*

~ Congress derives its existence and all its powers from the constitution. An act of congress, therefore, made contrary to any express restriction of the constitution, is absolutely void. 3 Dal. 399.

And, for the same reason, an act of congress, in enacting which there is an attempt to exercise powers, which are not given in the constitution, will be void. See 1 Cranch. 176.

Because the constitution is the only authority which they have, and beyond which they ought not to go. To prevent all doubts which might otherwise arise on this subject, it is declared in article tenth of the amendments to the constitution, that, 'the powers, not delegated to the United States, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' But a law may be void in part, so far as it is unconstitutional, and valid in other respects. See 3 Wash. 313.

Yet it is not considered necessary, that a power should be given in express terms, if it can be made out by necessary implication from an authority which is *expressly* granted. See 1 Wheat. 304, 330. 4 Wheat. 316.

And this is in conformity with what is familiarly called the sweeping clause in the constitution, viz. : Art. 1, sec. 8, by which congress are empowered 'to make all laws, which shall be necessary and proper for carrying into execution the foregoing powers, (*that is, the powers previously enumerated in the constitution*) and all powers vested by this constitution in the government of the United States, or in any department or office thereof.'

With respect to the incidental or implied powers of congress, therefore, it seems, that where certain means are appropriate to carry into effect a certain power, and there is no prohibition to use them, and no particular means are pointed out by which it may be effected, congress have authority to use such as are appropriate. So, where a certain duty is im-

posed on the government to do a certain act, and there is no restraint on any means in the constitution, they have authority to select the means at discretion. And for the same reason, where the end is within the intent of the constitution, all means which are plainly adapted to that end, and are not prohibited, may constitutionally be employed to that effect. See 4 Wheat. 316.

In any such case, if the means are appropriate, how far they are necessary for that purpose, under the 'sweeping clause,' is a question for the decision of congress, and not for the supreme court of the United States. *Ibid.*

It was therefore decided, that congress has power to incorporate a bank. *Ibid.*

Further ; in construing the extent of the powers created by the constitution, it is held, that there is no other rule, than to consider its language in relation to the powers which it confers, in connexion with the purposes for which they were conferred. See 9 Wheat. 188. The reason assigned is, that the framers of the constitution must be understood to have employed words in their natural sense, and to have intended what they have said.

By article VI. of the constitution, treaties made agreeably to it, are also the supreme law of the land. It is obvious, however, that a treaty made contrary to the constitution will be void ; because it would be absurd, if the treaty making power, which derives all its authority from the constitution, could contravene the constitution itself. For the same reason, if a treaty were made, containing stipulations, or concessions, which the president and senate under the constitution, have no authority to make, it would be void ; for instance, if they should attempt to cede part of the acknowledged territory of a state, without the consent of the people of that state in regular convention, it must be void, as not authorized by the constitution. And, it is believed, that the consent of the legislature of such state would not avail in any such case, unless specially authorized by the people to act on their behalf, in relation to this subject ; because no such authority is conferred by their state constitution.

A treaty made subsequently to an act of congress, and in-



compatible with any of its provisions, would so far operate as a repeal of the act. The reason is, that the treaty making power is established by the constitution, and is supreme within its department ; provided, only that it is not inconsistent with the constitution, nor requires the exercise of any power not granted in it. On the other hand, if an act of congress were enacted after a treaty, and inconsistent with it, though in any other respect not inconsistent with the constitution, though the inconsistency amounted to an intentional violation of the treaty ; yet there does not appear to be any sufficient foundation for an exception to the validity of the law on this account. It is true, such a violation of the treaty might lead to a war ; but it should be recollected, that congress has the power of declaring war, which is a far more decisive measure than infringing an article in a treaty. It is probable the courts would be governed in their construction of the law, in any such case, by the apparent intention of congress, whether the object was avowedly to infringe a treaty or not.

It is not within the limits of this work to examine minutely the precise extent of power probably intended to be bestowed on congress, in the enumeration of powers contained in section 8, of Article 1 of the constitution, some of which would singly require a volume for that purpose. It is the less necessary, because the concise expressions made use of in the constitution, to define these powers, are sufficiently clear for ordinary occasions, and professional gentlemen will be obliged of course to resort to the different series of original reports, the index alone to each of which, makes a larger book than the present work. A few remarks on some of them must suffice.

Under section 8 of the constitution, congress is authorized to lay and collect taxes, &c. ; but they must be uniform throughout the United States. A restriction is laid upon this general power, in section 6, that no capitation or direct tax shall be laid, unless in proportion to the census, &c. It seems, agreeably to the construction, that has been given to this clause in section 9, that the only taxes which it is necessary to apportion among the states, whenever congress shall see fit to lay them, are the land tax and the poll tax, no others being considered as direct taxes, within the intent of the

constitution ; and, consequently, all other taxes which congress may impose, agreeably to the constitution, must be laid uniformly. *See* 3 Dal. 171.

This power to tax is co-extensive with the territory of the United States, and congress has no power to exempt any state from its due share of the burthen of taxation. *See* 5 Wheat. 317.

However, it is held, that congress is not bound to extend a direct tax to the District of Columbia, or to the territories, though they may do so at discretion. *See* *ibid*.

A question may here be raised, whether, under the first clause of section 8, just referred to, congress has any right to impose taxes, except for the purpose of raising a revenue. The whole clause reads thus : 'The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defence and general welfare of the United States : but all duties, imposts, and excises, shall be uniform throughout the United States.' In order to discover the true interpretation of this clause, it may afford some assistance, so far as the present question is concerned, to take it in connexion with the two next, which authorize congress 'to borrow money on the credit of the United States,' and 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'

In the construction of the first clause alone, a question may be raised, whether that part of the clause 'to pay the debts, and provide for the common defence and general welfare,' is to be taken as a distinct authority from that of laying taxes, or, whether it is to be taken as expressing the purposes for which alone congress have the power of taxation. If the former construction were the true one, then congress would have an unlimited discretionary power of taxation. This power, however, it is believed, the states in adopting the constitution, never intended to confer on congress. It will be recollected, that, at the close of the war of the revolution, which was a long and severe struggle, and during which, the country had suffered much from the inefficiency of the articles of confederation, the states were oppressed with a heavy public debt, which congress, under the confederation, was wholly incapa-

ble of discharging. That, consequently, a regard for the safety of the states, in case of another war; the wish to pay the public debt, and thus redeem the suffering credit of the states; and, in general, to provide for the public welfare, by a closer union of the states; were some of the principal motives for adopting the present constitution. It will be remembered, that the power of taxation created one of the greatest obstacles to the adoption of the present constitution; and, it is probable that some of the states would never have ratified it, if they had considered the constitution as bestowing on congress an unlimited power of taxation. What then are to be the limits to this power? The answer must be that congress has no constitutional power to impose taxes, except in three cases, viz. : 1, to pay the public debt; 2, to provide for the common defence; 3, to provide for the general welfare.

With regard to the exercise of this power in the two first cases, there can but little doubt arise; since here the national honor, as well as the national safety, is concerned. But, with regard to the third, it may be asked, who shall determine, in any case, when the public welfare or interest may be advanced by the expenditure of money; and consequently, though neither the public debt nor the public safety is concerned, it will be expedient for the public to raise money by taxation. Certainly there can be but one answer to this question, viz. : that congress has the right to determine at discretion, whether it will advance the public interest to raise money in this way. For, this power of raising money is merely ancillary to an appropriation of it. Since, if congress think that the appropriation of a sum of money will contribute to the general welfare, they may use their discretion to raise it accordingly. And why should there be a distinction between such a power, and all others, in this respect? Must not the persons entrusted with the power, be considered as having the exercise of it left to their discretion? It is certainly left to their discretion, *not* to impose any taxes, unless they think it expedient; then, why is not the power, to impose taxes when they think it expedient for the general welfare, also left at their discretion?

If it should be asked, what is meant in the constitution by the words 'general welfare,' it may be answered, that, what-

ever contributes to advance the true interests of the country, may be considered as conducing to its welfare, and so far will come within the meaning of the words in the constitution. But here, the word 'general' is the emphatic word, and not 'welfare.' For, when the constitution was first adopted, it cannot reasonably be supposed, that the states adopting it, would have been willing that monies should be raised among them by a *general* tax, to be appropriated and expended to obtain any benefit merely *partial*; that is, for the advantage of some one or more particular states, while the others, though they paid their proportions of the taxes, derived no advantage from the expenditures. On this account, the states stipulate in the constitution or national compact, that congress shall have power to impose taxes, &c. to provide for the *general* welfare, and for the same reason very naturally require, that all duties, &c. shall be *uniform* throughout the United States.

As it would be unconstitutional, therefore, to lay an unequal tax, as well as an act of oppression to those who were compelled to pay the larger proportion of it; so it would also be unconstitutional to expend the money collected by it, with a view to give some peculiar advantage to some one or more of the states, only, as well as oppressive to those who bore their share of the burthen, while others reaped all the benefit. It is not to be supposed, however, that it is practicable to preserve a perfect equality, or a precise proportion in any such case, between the burthens and benefits which fall to the share of the states, respectively. But, as a principle or standard of right, this equality or just proportion should never be lost sight of for a moment, in any public measures whatever.

Further; whether it is necessary or not, to impose a certain tax in order to provide for the public welfare, belongs to congress alone to determine, and for two reasons; 1, Because this restriction is given in the constitution in order to furnish congress with a rule, by which to decide in what cases to impose taxes, according to the intention of the parties to that compact. This is a sacred trust confided to the presumed integrity and justice of congress, and which, it would seem, they could hardly violate without being conscious of it; 2, Because no other persons are entrusted by the constitution with the important

office of determining whether a tax is necessary for the general welfare or not. The supreme court of the United States has no jurisdiction to determine this question, which is one of political expediency alone. But, if it should once be made to appear, that such taxes are not conducive to the *general* welfare ; as if the purpose for which they are imposed, is expressly declared in the act which imposes them, and the appropriation as there made, it is self-evident, is to effect some object of a *partial* nature, perhaps it may be assumed that the supreme court might well decide, that the tax does not conduce to the *general* welfare, and therefore that congress has no authority under the constitution to impose it. To illustrate ; suppose congress should enact a law imposing a new tax, and should appropriate the money to be collected by it, to build a new state house in Connecticut, or any other state ; can any one doubt that this law would be unconstitutional, and that the supreme court of the United States would decide that it was void ? And yet, if no unconstitutional appropriation should appear on the face of the Act, the court could hardly have any jurisdiction of the subject, in this respect.

\* A similar restriction must be implied, upon the power which is given in the second clause 'to borrow money on the credit of the United States,' though there is no express qualification annexed to the exercise of this power. Because it cannot be supposed, that it was intended by the constitution to give congress a power to do that indirectly, which they have no constitutional power to do directly. For, if this restriction is not extended as well to the power of raising money by borrowing, as to that of raising it by imposing taxes, congress will have the power of borrowing money on the credit of the United States for whatever objects they choose ; and, having in this way created a public debt, may then exercise the power of taxation for the purpose of raising money to discharge it ; though the objects for which the debt was created at first, were such as the constitution never contemplated, as furnishing an occasion for raising money by taxation. But this is too irrational to be admitted, and therefore congress can have no power to borrow money on the credit of the United States,

for any other purposes than to pay the public debt, and provide for the common safety and general welfare of the United States.

It may be remarked here, transiently, that the right of expending the public money, must necessarily be limited to those objects, for which alone congress is authorized to raise it. For, if congress have no authority to raise money by the imposition of taxes, or by borrowing, except to answer the necessary purposes before mentioned, it must follow, that congress can appropriate the public money to no other purposes; unless we can suppose the absurdity, that though congress have the power to raise money for a constitutional purpose only, yet, as soon as it is collected, they may apply it to one for which they could not constitutionally have raised it.

It follows, that congress has no right, under the constitution, to appropriate money, except for *general* purposes, that is, purposes that conduce to the *general* benefit of all the states. Equality of benefit to all, should also be observed here, if practicable, though it is not of so much consequence as it is that the public burthens should be borne equally, or rather proportionally. For, as long as each state derives a benefit from a public measure, greater than the burthen, which it sustains by paying its proportion of the money expended to effect it, there will be no ground of complaint, though one state, owing to some natural or accidental advantages, should derive ten times as great a benefit from it as the rest. But, where one state bears a heavy burthen in consequence of some public measure, and derives no advantage from it sufficient to compensate for that burthen, while another state derives a very great advantage from it, but bears no greater burthen, perhaps a much lighter one, there is sufficient cause for complaint on account of the inequality, which; it is apparent, could never have been in the contemplation of the states when the constitution was adopted.

It follows from the same train of reasoning, that congress has no authority, under the constitution, to appropriate money to make internal improvements in any case, *where the advantage of them is to be derived by one or more particular states only*. For, such internal improvements, in the territory of any

particular states, should be made by the states themselves, at their own expense. The other states have nothing to do with them ; and, by the compact which they have made in the constitution, they never entrusted congress with any power to appropriate money in this way. If, however, an internal improvement in any particular state, will be of service also to the interests of the United States, there should be a comparative estimate made of the particular interest of the state, and of the general interest of the United States ; and the expense of making the improvement should be defrayed in just proportions out of the state treasury and that of the United States. If the state will not consent to such an arrangement, then congress will proceed no further than the *general* interests require.

A more convenient arrangement in this respect, it is believed, would be, for congress to make an annual appropriation of a certain sum of money, more or less, according to circumstances, to be paid over to the state treasuries, according to the ratio of the apportionment of direct taxes, or representatives to congress, and to be disposed of either in internal improvements in the states respectively, or to such uses as the state legislatures should direct. Either of these two modes of making internal improvements would be constitutional and equitable ; but, it is believed, that to expend money in internal improvements for the benefit of certain states only, to which they make no proportional contribution, is within none of the powers of congress, and is equally unconstitutional and inequitable.

But, it may be objected here, if this be so, whence does congress derive authority to expend money in the erection of fortifications on the sea-coast of the commercial states, when the benefit of them is principally derived by those states only. The answer is, that one of the principal motives which the states had for forming the union, was to insure the safety of all of them without distinction. It is the duty of the general government, and they have ample power in the constitution, to protect any state that happens to be in danger at any time, from foreign aggression, at any expense, however great to the union, and though the others may be perfectly safe. The ad-

vantage here is mutual, because it is altogether uncertain, which state may first need the assistance of the United States. In the early settlement of some of the inland states, since the adoption of the constitution, fortresses and blockhouses, and military posts and stations were erected and maintained by congress, in performance of their duty of defending the settlers, some of which are still kept up, though the task of maintaining them is daily growing less and less necessary. And, for the same reason, if a danger should hereafter arise to any of them from any new enemy, it will equally become the duty of congress to protect them out of the public treasury, at whatever cost. And, if by taking any particular measure of precaution or prevention, the danger may be avoided, or, if it should come, may be more easily repelled, it is within the constitutional discretion of congress to adopt such measures *in advance*. As therefore congress is bound to protect all the states equally, and as the commercial states on the sea-coast, will be secured or defended from attack much more effectually, by erecting fortifications along their shores and in their harbors, it will not only be a justifiable expenditure of the public money under the constitution, but perhaps the most economical mode of securing the safety of those states, that can be adopted.

The erection of light-houses and the building of ships of war, are justified on a different ground. The first is to secure the shipping from the dangers of the coast, and the latter to protect them from enemies; and, as it is well known that the commerce which is carried on by means of merchant vessels, is advantageous, not only to the exporting and importing states, but likewise to those who consume foreign commodities, and those who raise produce, or manufacture goods for exportation, the security and protection of it concern the general welfare.

The third clause above referred to, authorizes congress to regulate commerce, &c.; and it may be asked, Has congress any authority, under it, to impose duties on imports? To answer this question, the true meaning of the parties to the constitution should be considered, without resorting to any refined or artificial construction. For this purpose, it will be necessary to know what is meant by *regulating* trade, and whether it



is ever necessary for the mere *regulation* of trade, to lay a tax on imports, and if so, whether such a measure was at all in the contemplation of the states, when they authorized congress to regulate trade.

The doctrine on this subject is very fully examined in *Smith v. Ogden* ; and it seems that the power to regulate commerce, includes also the power to regulate navigation. It extends also to every species of commercial intercourse between the United States and foreign states, and among the several states of the union ; but does not comprehend the commerce between individuals in the same state. This power may be executed to its utmost extent, as far as it is granted by the constitution. It does not comprehend the power of laying duties or imposts, on exports or imports, which is one of the branches of the taxing power ; but it extends equally to every species of vessels, however propelled, or however employed. 9 Wheat. 209.

It will immediately occur to an attentive reader, that the constitution, in the first clause referred to, having given authority to congress to impose taxes and duties for certain specified purposes, requiring that they should be uniform ; and, in the second clause, having authorized congress to borrow money on the credit of the United States ; the subject of taxation, or raising money was wholly dismissed from their minds. It would seem probable, therefore, in framing the next clause, which gives power to congress to regulate commerce, the thought of doing it by means of imposts and duties never occurred to them. If, then, there are any other measures, which congress can naturally adopt for the regulation of trade, without resorting to imposts and duties, those measures probably are what the framers of the constitution had particularly in view in this clause.

It should be remarked here, that the whole clause authorizes congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. Now, it is expressly forbidden in the fifth clause of section ix. to lay any tax or duty on articles exported from any state, &c. ; it is clear, therefore, that, though congress has the power to regulate commerce, to do it by the imposition of duties or taxes,

is not what was intended by the constitution. But, it may be said here, that the imposition of duties is forbidden on exports ; it follows, that it was not intended by the constitution, to prevent the imposition of duties on imports. The answer to this objection, which is merely captious, is, that congress has the general power of laying taxes and duties by the first clause of section viii. above referred to, and which has just been examined ; and, by the fifth clause of section ix, an exception is made, that no tax or duty shall be laid on exports. The general power of taxation, it has been attempted to show, is restrained to the payment of the public debt, and providing for the common defence and general welfare. This does not authorize the laying of any tax or duty on imports *for the regulation of trade*. And a power to regulate trade does not imply any right to impose taxes or duties on imports, if trade is susceptible of regulation without it ; and as exportation, and the trade among the states can be regulated without it, there is obviously no necessity for implying a power to tax imports, which are introduced by foreign trade, from a power *to regulate trade*. Still, if it should be necessary to impose a duty on imports, for the advantageous regulation of trade, it cannot be denied that congress has the power to do it. But, then they will do it under the power to lay taxes and duties to provide for the *general* interest ; and it must be subject to the restrictions before mentioned, of not consulting local, sectional, or partial interests only.

Further ; as the protection and encouragement of trade and commerce, were subjects of the highest interest and importance to most if not all of the states which first joined in the adoption of the constitution, it cannot be supposed, that by giving congress a power to regulate trade, they meant any thing else than a power to adopt such measures, as they should think best calculated to advance and increase it. Can it be imagined then that, under such a power of *regulating trade*, congress has a constitutional authority to adopt measures injurious to it, for the purpose of advancing some other interest ? Certainly not. If so, then it is quite clear that congress, under the power of *regulating trade*, has no constitutional authority to lay a duty on imports, for the mere purpose of en-

couraging manufactures ; though, if it can be made to appear, that by the imposition of such taxes or duties, trade or commerce will be advanced, it cannot be doubted that congress has such power ; and this is a subject that the constitution submits to their discretion.

It remains then to consider, whether, if the general welfare of the states will be promoted by taxing imports, congress has not the power, under these clauses in the constitution, to lay such taxes, even though they may be unfavorable to the interests of trade.

It may be remarked here, that in giving a construction to the constitution, what the states really intended, should be the guide ; and the words used in the constitution should always be taken, not independently and by a strict construction, but with a reference to such intention. However advantageous, therefore, it may be for the interests of the United States, that a certain power should be given to congress, if such power does not appear to be given in the constitution, or, if it may possibly be considered as coming within the comprehensive range of a very general expression, in all probability could never have been in the contemplation of the states to bestow on congress, it cannot be sustained by, or implied from mere considerations of political expediency.

In adopting the constitution, each state must be considered as having acted on its own judgment with regard to the powers, which it was willing to join in confiding to congress. Though a certain power, therefore, may have been considered very proper to be granted to congress by one or more states, yet some particular state may have thought otherwise, and therefore may have refused to confer it. In any such case, to endeavor to make use of general words, in their most comprehensive sense, in order to prove that a certain power is given by them to congress, which such state never contemplated, would be a dishonorable attempt to make the constitution a catching bargain. But there never can be any necessity for resorting to so degrading an expedient. For, if it will be advantageous to the common interest of the United States, that congress should have a certain power, and it is doubtful whether it is granted to them by the constitution, it would be

far better to propose an amendment to the constitution, for the purpose of removing the doubt, and either grant or deny the power expressly, than by an artificial or subtle construction of the constitution, usurp a power not distinctly granted by it, to the great dissatisfaction of the dissentients. But, it may be objected perhaps, that by a fair interpretation, the power may be considered as given by implication, or, that it is given according to the literal sense of the words ; and, if it is submitted as an amendment to the constitution, it may be impracticable to convince a sufficient number of those who have the power to make amendments, to render it effectual as such. The answer is, if the grant of the power to congress is at all doubtful, and the expediency of it is so uncertain, that a sufficient majority cannot now be obtained to insert it as an amendment to the constitution, it will be better to consider it as not granted, than to exercise it against the opinion of so many dissentients, as to its constitutionality, as well as to its policy.

In answer then to the proposed inquiry, it may be observed, that congress undoubtedly has a power to impose taxes, imposts and duties, &c. on imports, in three cases, and in those only, viz. : 1, to pay the national debt ; 2, to provide for the common defence ; 3, to provide for the general welfare. But what was the intended operation of this power to impose duties, &c ? It seems clear, that it was to raise money, which was afterwards to be appropriated and expended in obtaining one or more of these objects. Because the duties are to be imposed, 1, to pay the public debt, which cannot be done without collecting and appropriating money ; 2, to provide for the common defence, which can only be done by appropriating the money collected from the duties, to the pay of the army or navy, which congress is authorized by the constitution to raise, or maintain, &c. &c. ; 3, to provide for the general welfare, viz. ; by the appropriation of the money collected from the duties, to defray the expense of any measures of *general* expediency.

The injury done to the trade of the country by laying heavy duties in order to pay the public debt, in the first case, or, in order to provide for the public safety, in the second, must be borne, if necessary, as a concession made to justice, or a sac-

rifice to necessity. But, if the tax or duty is imposed to provide for the general welfare, a distinction should be taken. For, if the sacrifice made in the loss of trade, is *general* to all the states, and the benefit derived from the sacrifice is likewise *general*, then the whole becomes a question of political expediency, for the decision of congress, whether trade shall thus be burthened with taxes, in order that the money raised by them should be expended in promoting such measures or not.

But, if one state alone is to suffer in its trade, yet derive little or no advantage from such measures, while the other states, without suffering any material disadvantage in their commerce, are to derive the whole advantage of such measures, this will be wholly contrary to the true intention of the parties to the constitution, as well as taking a very unfair and dishonorable advantage of the state thus oppressed.

There is nothing at all refined in this doctrine, since it is grounded on plain principles of justice and honesty, which every man of integrity would blush to transgress in the common transactions of private life, and which ought not to be disregarded or overstepped by statesmen and politicians, however high their stations and offices, and however great their popularity.

The application of this doctrine is easy. Congress has no constitutional power, under the three first clauses in Article 1, section viii. to impose taxes or duties of any kind, except for the purposes of revenue. Because, though such a power may seem, at first sight, to come within the very general words of the constitution, yet their sense must be restricted to what was the real intention of the states, at the time of its adoption.

It remains to consider the final question, whether any part of the constitution gives congress a power, either expressly or by necessary implication, to impose a duty on imports, for the acknowledged purpose alone, of encouraging domestic manufactures.

Any person consulting the constitution for the purpose of ascertaining whether such a power is given in it to congress, would very naturally turn to those places in it where taxes, duties, and the regulation of trade are mentioned; and, if he

could not find any such power granted to congress, either in express terms, or by necessary implication, he would be very apt to give over farther examination, and conclude that no such power is delegated by it. But, in all probability, the true reason why nothing can be found in the constitution in relation to such a power in express terms, is, because at that time, manufactures were so little advanced in this country, that the encouragement of them was not much considered, in comparison with the important objects particularly contemplated in its adoption. For, it was not until Hamilton drew up his report on manufactures, that the subject attracted the public attention in this country, which it deserved.

The country at that time being in debt, and it being necessary to raise money to pay it, *as well as for other purposes*, the constitutionality of which was never doubted; and the least burthensome way of raising the money being by the imposition of duties on imports, the sole question was, upon what articles it would be the best policy to lay duties. The present constitutional question, whether congress has a right to lay duties for the mere purpose of encouraging manufactures, was not much thought of; because, as the payment of the public debt was a sufficient constitutional ground for the imposition of duties, it was unnecessary to look for another. According to the policy recommended by that distinguished politician, but, which whether wise or unwise, has long prevailed in commercial and manufacturing countries, the duties ought to be laid on such articles of foreign growth or manufacture, as interfere in our own market with similar articles of home production. The reason is, because if this were not done, foreign growers and manufacturers, owing to the greater cheapness of labor in old countries, and greater capital, superior skill and experience, and perhaps other causes, which it is not material to consider here, would be able to undersell us in our own market, and the consequence of which would be, that our own countrymen would be discouraged from manufacturing, &c.; because the low price at which they would be compelled to sell, would prevent their receiving reasonable wages for their labor.

Where therefore congress have the constitutional power to

lay imposts, the money arising from them being necessary to pay the public debt, or for other constitutional purposes, such considerations of public policy, are properly allowed to designate the articles upon which the duties should be laid. But where there is no such foundation, the money not being wanted for any constitutional purpose, there is no room for the question of policy, until some other constitutional occasion, if there be any such, occurs for the exercise of this power. In relation to the present subject, therefore, no conclusive inference can be drawn from the recommendations of Hamilton, whatever weight may be due to his opinion. The following considerations may perhaps afford some assistance in determining this point.

The constitution was adopted to promote the general welfare of all the states. But, though this is self-evident, no power is given to congress in *express* terms, to provide for the general welfare, except in the single case of laying taxes, &c. 'to provide' 'for the general welfare.' Yet, this is either immediately or remotely the sole object of every power enumerated in Article I. section 8. But, as the states were apprehensive that congress might either usurp powers not granted to them, or misuse those that were, certain powers are expressly denied to congress, and the exercise of some of those which are granted, is restricted to certain cases.

Here then two different constructions may be given to the constitution. 1. As the sole object of the formation of the union, was to provide for the general welfare of the states, it may be considered that congress have the power to adopt any measures whatever for that purpose, which they may think expedient, with the exception of such as involve the exercise of powers, expressly forbidden either wholly, or in certain cases only which are specified. If this principle of construction should be adopted, it will follow, that the enumeration of the powers expressly conferred on congress in section 8, of Article I. will have no other operation than to state in express terms, what would have been understood without them, on a fair construction of a mere power to provide for the general welfare. It will be necessary then to suppose, that this enumeration was made merely for the purpose of preventing all

doubt, as to the most important of the powers, as far as the states could agree on the subject. It will be necessary, also, as these *express* powers alone are inadequate to the contemplated object, to imply or infer, not only all the powers which are necessary to carry the expressed powers into execution, for this the constitution grants in the sweeping clause, but also, all such powers as shall be necessary to promote the principal object of the union, viz. : the general welfare, with the exception of those powers and acts only, which are expressly prohibited in the constitution.

Under this construction, the principal question might be settled at once without difficulty. For, then, under this general power to promote the general welfare of the United States, if it were expedient to lay a duty on imports for the mere purpose of encouraging domestic manufactures, congress might constitutionally do it, because it is not forbidden in the constitution in *express* terms. In such case, the policy of the measure, the articles on which the duties should be imposed, the amount of the duties, and the duration of the act imposing them, would all be equally at the discretion of congress.

This construction, however, would be liable to the objection, that the constitution, after enumerating certain powers, provides that all powers not given in it to congress, are reserved to the states or the people. From this reservation, those powers are excepted which are necessary to the exercise of those which are *expressly* given. And therefore if this reservation has any operation at all, it must apply to all powers which are neither *expressly* granted in the constitution, nor necessary to the exercise of those which are so. It is true, certain powers are forbidden to congress; yet, as it was not supposed that the enumeration of denied powers was so complete, that congress might constitutionally exercise any powers not enumerated and forbidden, this reservation of powers not granted was made in express terms.

Now, it is apparent, if congress have the power to adopt measures of every kind whatever which they think expedient for the general welfare, with the exception of such only as are expressly forbidden, or depend upon the exercise of powers which are so, then the express general reservation of all pow-



ers not granted, becomes wholly inoperative. Since, notwithstanding this reservation, congress will have authority to exercise any powers and do any acts, not expressly forbidden, if they should consider them conducive to the general welfare.

The other construction is grounded on the supposition, that the states being jealous of their rights and interests, and consequently desirous of guarding against the possibility of any usurpation of powers by congress, having expressed the general objects of the union in the preamble to the constitution, as a limitation of the purposes for which the powers delegated in it are to be employed, have made an enumeration of all the powers which they were willing to entrust to congress, and after having expressly forbidden the exercise of some of those powers in certain cases, and also having *expressly* denied certain other powers in any case, in order that there might remain no doubt at all on the subject, have finally made an express reservation of all powers not granted to congress in the constitution. The effect of this last principle of construction will be, that congress, for the general purpose of providing for the general welfare, can exercise no other powers, than those which are granted in the constitution in express terms, and such others as are so *necessary* to the exercise of them, that the latter, the *express powers*, cannot effectually be exercised without the former, the *implied powers*. Under this latter construction, the power of imposing duties on imports, for the sole purpose of encouraging domestic manufactures, is not authorized by the constitution. But, perhaps the reader will come to the conclusion, that, with regard to some few particulars, the decision of which, at the time of adopting the constitution, was a matter of no immediate necessity, and which, if stated in *express terms*, would never have received the sanction of all the states, the constitution is not so much an exemplification of a compact, in which all those who adopted it, *actually* agreed, as it is a form of words, expressing clearly all that was agreed, but leaving matters which they could not agree upon, couched under a veil of general words, with a reservation as to their construction. But the whole subject is submitted to the discerning reader.

## DIVISION III.

*Of the Powers and Duties of the President.*

The executive power of the United States, by the constitution is vested in the President. It belongs to his department therefore to execute every law, which congress have authority to make under the constitution. 9 Wheat. 733. But, if the President should mistake the construction of an act of Congress, and in consequence of it, should give instructions not warranted by the act, any aggrieved party might recover damages against the officer acting under those instructions, which though given by the President, would furnish no justification or excuse. See 2 Cranch, 119.

For the same reason, the President cannot alter the effect or operation of a law by his proclamation. But, in general, it would seem, that where a particular duty devolves on the President, but, the means to be used in the discharge of it are not pointed out, he may adopt those which are most proper for that purpose, provided they are not repugnant to the constitution, and are not forbidden by any act of congress.

It is held accordingly, that, in time of war, the President has a right to use all the customary means to carry it into effect. 1 Gal. 563.

It may be remarked here transiently, that the President, in all cases, where his official authority and duty are not brought in question, is merely a private citizen, and is bound by all the ordinary duties and obligations of one. Accordingly, it has been held that, if his testimony is necessary in any case, for the purposes of justice, he may be subpoenaed into court as a witness, and may be required to produce papers, if regularly notified, in the same manner as any other individual. However, it is quite clear, that the President can generally be under no obligation to divulge or disclose any part of any documents or affairs, which the public interest requires should be concealed. See 1 Burr's Trial, 183.

Under the constitution. (article ii. section 2) the President has a power to nominate, and by and with the consent of the Senate, appoint certain officers of high standing and great re-

sponsibility. In the same section power is given to congress, to vest the appointment of such inferior officers, as they shall think proper, either in the President alone, the courts of law, or, in the heads of departments. Congress has exercised this authority by the creation of such offices as the public occasions require, the appointments to which have been distributed accordingly.

Under the power given by the constitution to nominate and by and with the consent of the Senate, &c. it is held, that the act of nomination is entirely discretionary with the President. He may therefore nominate whom he pleases. But, unless sanctioned by the consent of the Senate, the nomination will be wholly ineffectual. But if the Senate agrees to the nomination, the appointment becomes complete; and it becomes the duty of the president to give the officer a commission. This he cannot legally refuse to do, because the constitution requires the President to commission all officers of the United States. If so, it would seem, that if the President should make a nomination to the Senate, and they should concur, he will afterwards have no right to recall his nomination without their consent.

Where the President appoints an officer, who is not removable at his discretion, the officer may demand his commission, because the appointment confers legal rights upon him, which cannot be resumed. If therefore the commission has been made out and signed by the President, the officer will be entitled to a mandamus to the secretary of state, requiring him to deliver to the officer, his commission or a copy of it from the record, which is made by law of equal efficacy. See 1 Cranch, 137, 155.

Though the commission is conclusive evidence of the appointment, and it usually is impossible to show the appointment otherwise than by proving the existence of the commission: still, there are cases, where the appointment is plainly complete, before any commission is issued; for example, where the courts or heads of departments have authority to appoint officers, who must have their commissions from the President. 1 Cranch, 137, 155.

Where the President is intrusted by the constitution with

a discretionary power, his acts in the exercise of it are not subjected to the examination of the Supreme Court of the United States. But, if a specific duty is assigned to him by law, and the rights of individuals, depend on the performance of that duty, if the President should refuse to perform it, any individual injured by the refusal, has a right to resort to the laws of his country for a remedy. See 1 Cranch, 155.

The heads of departments for the same reason, where they act merely as the organs of the President's will, in the exercise of his legal or constitutional *discretion*, are, in like manner, exempt from the control of the judiciary. But, where either of them refuses to perform a particular duty assigned to him by law, and which the President has no right to forbid, (whether he actually forbids it or not) as to record a patent for land, or a commission, &c. the courts of the United States are bound to afford redress, precisely as if those duties were to be performed by any individual, who was not one of the heads of department.

It is the duty of the President to cause all constitutional laws to be enforced, and there does not appear to be any pretence of constitutional right on his part, to decline the performance of any duty assigned to him by an act of Congress, on the ground that such law is unconstitutional. The question of the constitutionality of a law, is no where submitted to him by the constitution. Such question belongs to the Supreme Court of the United States alone, and his single opinion would be a very insufficient counterpoise to the wisdom of the two houses of congress. It is true, the constitution gives him a qualified veto on all bills which have passed both houses of congress, so far as to require, in case of his disapprobation, a majority of two thirds of each house, &c. to constitute such bill a law. But, after a law is once constitutionally passed, with or without his approbation, if he may refuse to perform the duty of putting such law in execution, he will obviously have an absolute veto on all laws, which may call for his assistance to enforce them. This veto is not contemplated in the constitution. If therefore a law should be unconstitutional, he incurs no responsibility by putting it in force, until the Supreme Court decide it to be so. It is very desirable, however,

that any person, who considers a law to be unconstitutional, and who will suffer an injury by its being put in execution, and especially if such injury will be irreparable, should have a right to apply to some proper tribunal for process to suspend the execution of it, until the question of constitutionality can be finally settled.

And here it may not be amiss to consider what remedy is provided by the constitution, in case the President should be guilty of any official misconduct. By Article II. Sect. 4, the President, &c. &c. is made liable to impeachment for treason, bribery and other high crimes and misdemeanors. It will be unnecessary in this place to make any comments on treason and bribery and other high crimes, but in relation to misdemeanors in office, it may very properly be asked in what they can consist, as contradistinguished from the three former charges. To answer this question clearly, will be rendered more easy, by considering in what respects the President may violate his official duty. This, it is apparent, may take place in three ways, viz. ; 1. By refusing to execute the laws and treaties of the United States. 2. By usurping a power not confided to him by the constitution ; though in some cases, this may amount to treason. 3. By an arbitrary and corrupt use of an authority lawful in itself, but which was intended to be exercised with a single view to the public good, to answer the purposes of selfish intrigue. In England, the King is not constitutionally answerable for any of his official conduct ; but, as it is presumed, that he always acts by the advice of his ministers, they are held personally responsible for all political measures adopted during their administration. Some of them have suffered capitally for such alleged misconduct. It is on this account, in part, that ministers send in their resignation as soon as they find that the majority of parliament is against them. But, in the United States, the President is answerable for his own official conduct ; and is liable to impeachment for any default in the discharge of his duty.

But, though the constitution contemplates the possibility of the President's being impeached, yet from the adoption of the constitution to the present time, no such impeachment has ever been moved for ; and unless unfitness, or incapacity or a

neglect of duty, is to be considered as a ground for impeachment, perhaps never will be. For, the President's authority seems so distinctly marked out in the constitution, and he is so hemmed in by the barriers of superior as well as co-ordinate authorities, that there are but few cases, where he would be able to usurp authority without its being felt by some of the other branches of the government, which would hardly fail indignantly to repel the encroachment. If the President should be so indiscreet as to command an unconstitutional or illegal act to be done, it would be no excuse or justification to the officer who executed it.

It would hardly seem to afford sufficient foundation for an impeachment, if the President should make use of the discretion, which is intrusted to him by the constitution or the laws of the United States, imprudently and injudiciously. For, in any such case, the people must be content with the honest exercise of such ability, as they see fit to elevate to this high office. But, they have a right to expect integrity and fair purposes and intentions. And, therefore, if the President should pervert the powers, confided to him by the constitution, to be exercised for the promotion of the general welfare, to the purposes of favoritism, partial or local interests, political intrigue or the mere confirmation or advancement of his own authority, he would well deserve to be impeached. Because, in this way, he sacrifices the general interests of the nation, to the purpose of buying over and corrupting a party or faction.

From the imperfection of humanity, a mere error of judgment, a casual omission of duty, not persisted in against conviction, ought in no case whatever, however unfortunate the consequences, to be the subject of an impeachment ; but a deliberate refusal, either to execute a law, to observe or enforce the observance of a treaty, or to abide by and if officially called on, put in execution a decree of the Supreme Court of the United States, would perhaps be as gross a violation of the President's duty, as, considering the very limited extent of his power, can well be imagined. For, by refusing to execute a law, he usurps to himself the authority of putting an unqualified veto upon the acts of the national legislature. He also assumes a dispensing power as to the discharge of his own duty ;

as, if he had a discretion whether to perform it or not, and constitutes himself a *judicial* officer, to judge of the constitutionality of a law, when his office is merely *ministerial*, to execute it. For, by the constitution, whatever laws Congress see fit to enact, it is his duty to execute. To neglect it willfully, is an assumption of authority, a denial of the wisdom of the general legislature, and a contempt of their authority. And in all cases where his assistance is required to execute the laws, if he withholds it, the laws virtually become so far annulled, and Congress is deprived of the power of legislation. For, of what avail are laws which are not enforced?

The same remark applies to treaties. Under the constitution, the President has no discretion in relation to the observance and enforcement of them. The constitution requires, that he should execute the laws; it also makes treaties, &c. the supreme law of the land. Treaties consequently are laws, which he must execute, and this can be done in no other way, than enforcing their observance. The assumption of a dispensing power, in this case, may be attended with worse consequences than a refusal to execute a law of congress. For, a refusal to execute or observe a treaty, made with a powerful nation, may be the means of involving the country in a ruinous war, the consequence of which possibly might be the dissolution of the Union, by the dismemberment or the separation of the states.

If he should in like manner refuse to observe a treaty made with a nation or tribe of men, too inconsiderable to be able to redress its own wrongs, he may be the means of stamping on the national character a mark of dishonor, which, after the wrong is once done, and consequently has become irremediable, no lapse of time will ever be able to efface; but which will remain a source of regret and mortification to future generations, as a proof of the breach of faith of their ancestors. Further, would there not be just reason to apprehend, that, it might bring upon the whole nation, if they should sanction such an act in their ruler, the punishment of the oppressor, the curse of those who remove their neighbor's landmark, the judgment upon those who unrighteously 'slay and afterwards take possession?' See 1 Kings, chap xxi.

The wilful perversion of a legitimate authority, however difficult it might be to establish it by proof, would also be a misdemeanor. Let it be supposed, for example, that there is a vacancy in a public office, of which the appointment is vested in the President, provided it be done by and with the advice and consent of the senate, if in session. Suppose the President postpones the nomination until after the recess of the senate, in order to usurp to himself the unqualified power of appointment, is not this in direct violation of the constitution ; and, if it is done wilfully and not through mistake of his power, is it not an impeachable offence ? The case would undoubtedly be highly aggravated, if the President should appoint, during the recess of the senate, a person who had previously been nominated by him to the senate, and whose nomination had been expressly negatived by them.

The appointment of certain officers, which it would be superfluous to enumerate, is vested in the President alone, by the laws of the United States, made by virtue of an article in the constitution. Many, if not all such, are removable by the President at discretion. This provision, generally speaking, is conducive to the general interest, because, for many reasons besides malversation in office, a public officer may have lost the confidence of the President, or of the public, and may also cease to be qualified to discharge its duties. Besides, as the President is considered in some measure accountable for the neglect or failure of duty of those, whom he either appoints to office, or retains in it, it would seem no more than proper, that he should have the privilege of selecting those persons in whom he is to confide. Further, if the President were considered as having no right to remove a public officer, against whom no default could be proved, the tenure of the office would be changed. It would no longer be during the discretion of the President, but during good behavior. Great latitude of removal and appointment, therefore, should be permitted. Yet, it is obvious, very great abuses may be occasioned, if such an authority may be exercised arbitrarily and corruptly, without animadversion. Suppose, for example, the President should see fit to remove an officer, without assigning any reason ; here, it can never be a proper subject of inquiry,



whether the President had or had not a good and sufficient reason for such a measure ; because the President is under no obligation to assign reasons for the exercise of this discretion ; and, if any sufficient cause for the removal can be supposed, without impeaching the officer's character, which ought not to be done on mere surmise, such cause in fairness should be taken to be the true one. But, if the President should see fit to assign as a reason, any cause wholly unfounded in fact, and which he had no good reason to believe, or, which was perfectly consistent with a faithful discharge of the officer's duty, and especially, if it were any cause, which would have a tendency to reduce all officers, who are removeable at the President's discretion, to become his mere servile instruments, as to all acts, whatever, as well without, as within the sphere of their official duties, and whether such acts are right or wrong, such measure would deserve the severest reprehension. Because, it would be a tyrannical abuse of the discretion, intrusted to him by law for the public convenience, to the gratification of his ill will or arbitrary disposition. So, though the removal of one or more particular individuals from office, without assigning any reasons, might possibly be free from any invidious remark, however unexceptionable the characters of such persons might be ; yet, if any President should, as soon as conveniently could be done, after entering upon his office as President, dismiss from all offices holden during his pleasure, all the former incumbents, and replace them immediately with such persons as had been most active in procuring his election, this also should be a sufficient cause for an impeachment ; because it tends to produce, not only secret and indirect, but open and palpable bribery and corruption, in bargains and stipulations for offices, not in consideration of services done for the public, but for services rendered and to be rendered to advance the interests of a party or faction ; all of which is nothing less than selling the people, and pocketing the price. If such behavior in office is not liable to impeachment, of what avail is it, that it is regarded with disgust and contempt by every man of integrity.

Yet, it must be an extreme case, that would render it expedient to impeach the President of the United States. The

great delay and consequently expense, which must attend so important a trial before so numerous a tribunal as the senate, prosecuted by the still more numerous house of representatives ; the neglect or suspension of other public business during the trial, which would probably be the consequence, would hardly be compensated by the removal of the President from his office, the term of which is only four years, and more or less of which must be consumed in his administration previous to the impeachment, as well as afterwards during the trial. To these may be added the danger, that the course of justice may be impeded by strong collisions of opinion between political parties, which might lead to civil commotions and disturbances, the final issue of which, it might be impossible to foresee. In most cases, therefore, it would be best to trust to the discernment and influence of the more intelligent of the citizens, at the presidential elections, to take care that a person who had once been guilty of malversation in this important office, should not have a second opportunity ; and if his misdemeanor amounted to a high crime, as treason, or bribery, to make it the subject of an indictment, where the trial will be speedy, and on conviction, the court will award a suitable punishment. But if the default originates from mere incapacity, that is, a want of knowledge, experience, or natural abilities, let the people by their electors, at the regular expiration of his official term, select some other individual better qualified for the discharge of the duties of this high office, and peaceably restore the former incumbent to that station in private life, which is so graceful to honest intentions, when disqualified for those of more responsibility, by the possession of very limited abilities.

But nothing can be more unbecoming a worthy citizen, than to make any charges of this kind, against the principal executive officer of the United States, upon mere surmise or suspicion, having no other foundation, than, *that the President has exercised his discretion in certain cases, and that his motives are unknown.* For, in all governments, power must be confided somewhere ; when so confided, it is liable to abuse ; otherwise, there would be no confidence. If then the possi-

bility of an abuse, is a sufficient foundation to infer its actual existence, who can be secure from suspicion, from calumny, or even from conviction on an impeachment?

#### DIVISION IV. *Of the Judiciary.*

1. *General remarks.* 2. *Of the original jurisdiction of the Supreme Court of the United States.* 3. *Of its appellate jurisdiction.* 4. *Of the respect which ought to be paid to its decisions.* 5. *Passage from an opinion of Ch. Jus. Jay.*

1. *General remarks.* The judicial department of every government, is the rightful expositor of its laws, emphatically of its supreme law. 2 Pet. 524.

In every well constituted government, it has been observed, the judicial power should be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. See 2 Wheat. 397. 6 Wheat. 264.

Accordingly, under the constitution of the United States, the jurisdiction of the judiciary is coextensive with the constitution, laws and treaties of the United States, when the subject is submitted to it in the form prescribed by law. 9 Wheat. 738. See 5 Peters, 20. 6 Wheat. 264. For that power is capable of acting, only, when the subject is thus presented. Ibid. So, under the constitution, the courts of the Union have jurisdiction also of all controversies, between two or more states, between a state and citizens of another state, and between a state and foreign states, citizens or subjects. 6 Wheat. 264. In the former class of cases, the jurisdiction depends on the character of the cause; in the latter on the character of the parties. For, whatever may be the subject of the controversy, these parties have a constitutional right to come into the courts of the Union. 6 Wheat. 264.

Whenever, therefore, the correct decision of a case either in law or equity, depends on the construction either of the Constitution, or the laws of the United States, or of any treaty made under their authority, it falls within the jurisdiction of the national judiciary.

For it is held, where a right is protected by a treaty, it is sanctioned against all the laws and judicial opinions of the states, and whoever may have the right, it is protected. But, if the person's title is not affected by the treaty, and if he claims nothing under it, his title cannot be protected by it. 5 Cranch, 344.

By the constitution, the judicial power of the United States is vested in one Supreme Court, and such inferior courts, as congress may establish. It will be remarked, that under the constitution, *original* jurisdiction is given to the Supreme Court in certain specified cases, *absolutely*; in other cases, *appellate* jurisdiction only is given, 'with such exceptions, and under such regulations, as the congress shall make.' On this subject, it is held, that where jurisdiction is not given *originally*, it shall be exercised by appeal. Where it is given *expressly* by appeal, *original* jurisdiction is excluded. But where *original* jurisdiction is given, if another tribunal may also take cognizance, the power of appeal from that tribunal is not necessarily negatived. See 2 Wheat. 397.

As the *original* jurisdiction of the Supreme Court is pointed out by the constitution, it cannot be lessened or enlarged by an act of congress. For congress cannot transcend the authority confided to them by the constitution. See 1 Cranch, 137, 175.

But, in addition to the powers conferred on the Supreme Court in *express terms*, certain other incidental powers are also necessarily implied, as resulting to all courts from the nature of their institution. Thus, to fine for contempts; to imprison for contumacy; to enforce the observance of an order, &c. are powers which cannot be dispensed with in a court; because they are necessary to the exercise of all others. See 7 Cranch, 32.

Yet, it is held generally, that the judicial power granted in the constitution, can only be exercised in the cases and the modes prescribed by congress. See 3 Cranch, 170. 1 Cranch, 9. 3 Dal. 237, 6 Cranch, 312.

2. *Of the original jurisdiction of the Supreme Court.* In cases affecting ambassadors, other public ministers and consuls, the Supreme Court has *original* jurisdiction, by the constitution. Yet, it is held, that congress are not prevented from

vesting a concurrent jurisdiction in inferior courts as to consuls. See 2 Dal. 297.

The Supreme Court has also original jurisdiction in cases where a state is a party. On this subject, the following distinctions seem to be settled. A state may sue another state, or the citizens of another state, or the citizens of a foreign state. A state may be sued by another state or by a foreign state. But, by virtue of the eleventh amendment of the constitution, it is established that the judicial power of the United States shall not extend to a suit brought *against* a state, by the citizens of a state, or those of any foreign state. This amendment however excludes the jurisdiction of the federal courts, in suits only where the state is named defendant on record. 9 Wheat. 732. For although the claims of a state may be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction. 5 Cranch, 515.

And where a state obtains judgment against an individual, and the court rendering such judgment, overrules a defence set up under the constitution or laws of the United States, the transfer of the record into the Supreme Court, in order to inquire, whether the judgment violates the constitution or laws of the United States, does not constitute a suit commenced or prosecuted against a state within the eleventh amendment. See 6 Wheat. 264.

Under the construction, that has been given to the constitution, any *foreign* state may sue any of the United States, before the Supreme Court of the United States, and for this purpose, it has been held, in general, that the Supreme Court will consider as sovereign and independent states or nations, (and consequently foreign nations) those powers, that are recognized as such by the executive or legislative departments of the government. See 5 Peters; *cites* 4 Cranch, 241. 4 Wheat. 64. 3 Wheat. 64.

Yet, it seems, if a domestic, dependent nation (in which light the court viewed the Cherokee Indians in this case,) should be wronged, *as a nation*, the Supreme Court will not entertain jurisdiction of any suit brought by them against such

state. Because these Indians are not looked upon as a *foreign* nation, within the intent of the constitution, so as to enable them to sue the state before that tribunal. The supreme court in any such case, can neither redress past wrongs, nor redress future ones. Because to do this effectually, would require the exercise of *political* power, which is not intrusted to the court. See 5 Peters. 20.

But though the supreme court has *original* jurisdiction in certain cases under the constitution, it does not follow that congress may not also vest *concurrent* jurisdiction in some other national tribunal, as for instance, the circuit court; because the word *original* is not to be taken as *exclusive*. See 2 Dal. 417. 6 Wheat. 632.

3. *Of its appellate jurisdiction.* The appellate jurisdiction of the supreme court, may be exercised in all cases specified in the constitution, other than those, in which it has original jurisdiction; and their exercise of such jurisdiction over the state tribunals, is not restrained by the constitution. 6 Wheat. 254. The appellate jurisdiction of the supreme court, being given subject to such 'exceptions and under such regulations as congress shall make,' will depend on the construction given to the judiciary act and other acts of congress, taken in connexion with the constitution. Under these acts, it may be exercised, either by appeal from final decrees of the circuit courts or courts exercising the powers of circuit courts; or, by writs of error from final judgments of such courts; or, by a certificate from a circuit court, that the opinions of the judges are opposed on points stated; or, by writ of error from the final decrees or judgments of the highest court of law or equity in a state in certain cases; or, lastly by writs of mandamus, prohibition, habeas corpus, certiorari, procedendo.

But, no writ of error lies from the supreme court to the circuit court, in a criminal case. 3 Cranch, 159. 2 Dal. 197.

But, if the judges of the circuit court disagree in opinion in a criminal case, it may be carried up to the supreme court by certificate, as well as in a civil case. 7 Wheat. 42.

And no writ of error to the circuit court will lie, where the

matter in dispute is not of greater value than \$2000, exclusive of costs.

Under the judiciary act, the appellate jurisdiction of the supreme court extends to a final judgment or decree, in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a national treaty and the decision is against its validity. So, where a statute of the United States is drawn in question in the same manner, and the decision is against its validity. So, where an authority exercised under the United States is drawn in question, and the decision is against its validity. See 1 Wheat. 304. 6 Wheat. 264.

But, it is only, where the state court decides *against* the claim set up under the laws, &c. of the United States, that the supreme court has appellate jurisdiction. 6 Wheat. 598. It is not sufficient that the construction of the statute is drawn in question, and that the decision was against the party, it must appear, that *his title depended upon the statute*, 12 Wheat. 117. And generally, it seems, under Sect. 25th of the Judiciary act, 1789 ch. 20, the supreme court has no appellate jurisdiction, in a suit where the construction of a statute of the United States, or a commission under them, is drawn in question, unless some right, title, privilege or exemption is set up by the party, under such statute, and the decision is against it. 12 Wheat. 117.

So, where in any such case, the validity of a statute of any state is drawn in question, as being repugnant to the constitution of the United States and the decision is in favor of its validity, it must appear that the right of the party depended on its validity, otherwise the court will have no jurisdiction. On the other hand, if the validity of a statute of any of the states, is drawn in question, on the ground of being repugnant to the constitution, or to the treaties, or the laws of the United States, and the decision in the state court, is in favor of the validity of the law of the state, the supreme court has appellate jurisdiction. So, if the validity of an authority exercised under any state is drawn in question, in like manner, on constitutional ground, and the decision in the state court is in favor of its validity. 1 Wheat. 304. 6 Wheat. 264.

So, where two parties in a state court set up conflicting titles under the same act of congress, and there is a decision against the title of either, the supreme court has appellate jurisdiction. 4 Cranch, 382. 8 Wheat. 312.

But, the judgment in the state court, in any such case must be final. A judgment reversing that of an inferior state court and awarding a *venire facias de novo*, is not a final judgment. 3 Wheat. 433. 6 Wheat. 448. 12 Wheat. 135.

The appellate jurisdiction in cases brought from the state court, is not limited by value. 8 Wheat. 312.

So the supreme court has jurisdiction, where the parties claim under grants made by different states, though at the time of the first grant, one state was part of the other. 9 Cranch, 292. See 2 Wheat. 369.

But there must be something apparent on the record, to bring the case within the appellate jurisdiction of the supreme court, otherwise a writ of error will not lie to the highest court of law or equity of the state. 2 Wheat. 263.

It is no objection to the appellate jurisdiction of the supreme court, that one of the parties is a state, and the other a citizen of that state. 6 Wheat. 284. And here note, that citizenship in this case means nothing more than residence.

The supreme court has no authority on a writ of error, to declare a law of a state void, on account of its collision with the constitution of that state. 3 Peters. R. 288.

Under the judiciary act all the courts of the United States have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, *which may be necessary for the exercise of their respective jurisdictions*, &c. The qualification seems to be essential; for it is held that the power of the circuit courts to issue a writ of *mandamus* is confined exclusively to those cases, in which it may be necessary to the exercise of their jurisdiction. 7 Cranch, 304.

The same act authorizes the issuing writs of *mandamus*, &c. to any courts appointed, or *persons holding office under the authority of the United States*. But, this latter authority is held not to be warranted by the constitution. 1 Cranch, 137, 169.



Where a district court refuses to proceed to judgment, a mandamus lies to compel it. 1 Paine, 453.

If a state court refuses to transfer a cause, under the act of congress, the circuit court may issue a mandamus. 1 Cooke, 160. So, if a collector of a port refuses to grant a clearance, a mandamus lies from the circuit court to compel him. 1 Hall L. Journal, 429.

In general, it seems, the person applying for a mandamus must be without any other remedy, and the officer to whom it is directed, must be one to whom such direction may be legally made. 1 Cranch, 137.

The supreme court has authority to issue a habeas corpus, where a person is imprisoned under the warrant or order of any other court of the United States. 7 Wheat. 38. But, it seems, in general, is restricted to cases, where the prisoner is confined under or by color of authority of the United States; or, is committed for trial by some court of the United States; or, where it is necessary to bring him in to testify. 1 Wash. C. C. Reports, 232.

If a district court should proceed in an admiralty suit, where it had no jurisdiction, a *prohibition* would lie from the supreme court. 3 Dal. 121.

An injunction may be issued to restrain an officer of a state, from performing an official act, enjoined by an unconstitutional statute of the state. 9 Wheat. 733.

A circuit court cannot enjoin proceedings of a state court, nor *vice versa*. 4 Cranch, 179. 7 Cranch, 278.

It is no objection to the granting of an injunction, that a party has a sufficient remedy at law. 9 Wheat. 733.

4. *Of the respect which ought to be paid to the decisions of the Supreme Court of the United States.* If, in a case depending before any court, a legislative act shall conflict with the constitution, it is admitted that the court must exercise its judgment on both, and that the construction must control the act. The court must determine whether a repugnancy does or does not exist, and in making this determination must construe both instruments. 2 Pet. 524.

*Mr Justice Johnson in 1 Pet. 614, asks, 'What is the course*

of prudence and duty, where cases of difficult distribution as to power and right, present themselves?' *and answers*, 'It is to yield, rather than encroach. The duty is reciprocal, and will no doubt be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur, in which the maintenance of principle, and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our courts must do their duty,' &c.

In the establishment of this court, it is evident that the states intended to provide a supreme tribunal, not only for the decision of all cases, arising in the ordinary course, under the laws and constitution of the United States, but those also, where the rights or claims of any of the states, might seem to clash with those of others, or with the laws, constitution, rights, or authority of the general government. In these cases, the jurisdiction of the court is final and conclusive; and, from their decrees, there is no earthly tribunal to which an appeal can be made. And, though it cannot be doubted, but, that from the imperfection of human reason, they must sometimes err in judgment; yet, however important the interests may be, which are affected; however high and powerful the parties in any such case; the decision of this court must be submitted to and obeyed, even though it should be unjust. This consequence necessarily results from the theory of the government, established by the constitution. For, the decrees of all tribunals of final jurisdiction, are equally liable to the objection, that they may sometimes err. But, as erroneous decisions must be of rare occurrence; and, as it is better that an erroneous decision should sometimes occur, than that parties should have no tribunal to apply to in case of conflicting pretensions, which they are unable to settle by negotiation, the consequence of which would be an appeal to force, the supreme court may be considered as the standing arbitrator, agreed upon by the states in the federal constitution, in all the cases alluded to. The decisions of this court must therefore always be regarded as made agreeably to truth and justice; and, though a state may consider a decision wrong, and

its interests in consequence of it injuriously affected, still such state has no right to disregard and disobey, and far less to resist the decision of the court. For, they can have no better ground to resist, than the opinion which they entertain of the justice of their case. But, unless they are to be judges in their own cause, this amounts to nothing, because the other party may have an equally good opinion of his side of the question; and, to prevent the evil, which usually arises from such conflicting claims or pretensions, is the very object sought for in establishing a common tribunal. There is no mutuality in a general submission to arbitration, where one party considers it binding in all cases submitted, whether the decision is for or against him; and the other considers it binding only when the decision is in his own favor.

Still the decisions of the supreme court are not to be considered as conclusive evidence of absolute right, politically speaking. For, there is nothing to prevent any state, which considers itself injured by a decision of the supreme court, from urging the injustice of the decision, as a ground, either for amending the constitution, or, for repealing a law of the United States, so far as either of them may have furnished occasion for an unjust decree.

It may be observed here, that though the question, whether a certain law or other public measure, be constitutional or not, in a government of laws, would appear to be very properly submitted to the highest court in the nation; yet it does not seem quite reasonable or proper, that the decision of so important a question, should in any case depend upon the opinion of a bare majority of the judges. Since, where a law has been enacted, or other public measure adopted, with the joint sanction of the wisdom of both houses of congress, and has also received the President's approbation, to suffer it to depend on the opinion of a bare majority of the judges, to decide whether it is constitutional or not, is to leave it *in such case*, in the power of the single individual, whose opinion turns the scale, to control the collective voice and wisdom of the whole government. For, it is possible that a law may be enacted unanimously by congress, and be approved of by the President, and, on a question in relation to its constitutionality be-

fore the supreme court, may be decided to be unconstitutional, by the turning voice of the least able of all the judges on the bench. It would seem more proper in every case, to presume so far on the prudence and wisdom of congress and the President, as to trust in the first instance, that they would not transcend their authority by enacting an unconstitutional law ; and therefore to consider every law as constitutional, until it had been decided to be unconstitutional, by the opinions of two thirds of the judges of the supreme court, notwithstanding the opinions of a majority of their number should be against it. The constitutionality of a law of any of the states, however, has no claim whatever to be treated with the same respect. For, the majority of congress can seldom or never have any *particular or partial* interest to serve, in the passage of any unconstitutional law, which in its own nature must be of general application. But each state has its own private interest to consult, distinct from that of the rest, and this interest there is good reason to apprehend, may sometimes tempt the state governments to make unconstitutional attempts to enact and enforce laws, by which the rights of others may be injuriously affected. The presumption in favor of the constitutionality of a state law, consequently, must naturally be much weaker, than that of an act of congress. It would seem therefore a very reasonable distinction, to consider every state law, in relation to the federal constitution, as constitutional, so far as it affected persons and property within the state, until it had been decided to be unconstitutional by a majority of the judges of the supreme court of the United States ; while a law of the United States should be considered as constitutional, until decided not to be so, by a majority of two thirds of the judges of the same tribunal.

The increase of the States in population and wealth, and consequently in political power, is so rapid, that, in all probability before many years will have elapsed, it will be found necessary to adopt some new measures, in order to give the supreme court more weight and strength, in proportion not only to its respectability, as the highest tribunal of justice in the United States, but as the best and firmest barrier, against any usurpation, or tyrannical abuse of political power. It will

be found expedient to enable this court to enforce its righteous decrees *instantly*, in cases of oppression, arising from an abuse of power in violation of the constitution. The life, liberty and property of every citizen of the United States should be placed within the protection of this court so effectually, against oppression by an unjust exercise of political power, that after a decree in his favor, neither of them should continue in jeopardy a day longer than may be necessary to give notice of the judgment of the court. In the theory, the beau ideal of the federal government, no doubt this was intended ; and, by the laws of the union it would seem, that an insurrection or levying of troops with or without a pretence of political power, for the purpose of resisting the execution of a decree of the supreme court of the United States, must be treasonable. Yet, where there is no other resistance to the decree of this court, than what is implied in a simple act of disobedience to it, the penalty of the clause of *non omittas*, should be of a severity proportioned to the importance of the case. For, what can be a greater disgrace to the government of the Union, than to have the decrees of its highest tribunal openly contemned and disregarded ?

To relieve the judges of this tribunal, of part of the great responsibility, which is placed upon them ; to preserve this court as incorruptible, impartial and independent, as it always has been ; to protect it from the obloquy, which upright decisions always occasion in the unjust and unprincipled ; some such measures as the two following would seem to be advisable to be adopted before many years. 1. To increase the number of judges as high as twelve, at least. 2. To establish a seniority among the states, so that, as vacancies hereafter arise on the bench, each state in its turn may have the appointment of one of the judges of the supreme court. The appointment might be entrusted to the Governor by and with the consent of the senate of each state. It would be found expedient, also that the Union should be classed under four divisions of six states each ; and it would be sound policy for the prevention of jealousies, to take care that two judges should never be taken from the same division in succession. This would prevent any predominance in the supreme court, of

the North over the South, or of the East over the West, and *vice versa*.

In general the policy of having one department of the general government, depend upon another co-ordinate department, for the appointment of its officers, seems liable to exception, if it is intended to be, as it ought to be, perfectly independent. For the same reason, they ought not to be liable to be removed by an address of both houses. For, while they are exposed to this danger, if any political question should be brought before them, in which the dominant political party in congress for the time being, has any strong interest or bias, the judges will be liable to lose their offices, if their views of justice do not coincide with the feelings of a majority of congress. For the same reasons, they ought not to be under any obligations to the President for their nomination. All such relations are supposed to have a tendency to diminish the independence of a judge, and consequently his impartiality, in cases where the President's views, feelings or interests are concerned in any case brought before the court; and though such suspicions, it is believed, are almost invariably groundless, yet a judge ought not to be placed in a situation, where he may feel an inducement ungratefully to decide against one to whom he is under obligations and whom he believes to be in the *right*, or otherwise be exposed to the calumny and obloquy of the illiberal, as if he had sacrificed justice to partiality.

The supreme court of the United States is the firmest stay and support of the Union. Being the least swayed by party considerations, it is the most upright, and consequently, in a literal as well as figurative sense, it is the most firm and stable. Having its foundation in principle, and not in faction, ambition, love of popular applause or selfish interests, it is the most to be relied on of all the departments of government. Every thing possible therefore should be done to support its dignity and independence. For, while this department of the general government is kept spotless and incorruptible, and while it has power to enforce its decrees; though intrigue and corruption should taint every other part of the government, the union of the states, and the constitutional or political rights of each individual citizen, will still remain unviolable.

5. *This Chapter it is believed cannot be better terminated, than by the quotation of the following passages in the opinion of Ch. Jus. Jay, in the case of Chisholm v. Georgia.*

‘Prior to the date of the constitution, the people had not any national tribunal, to which they could resort for justice. The distribution of justice was then confined to state judicatories, in whose institution and organization the people of the other states had no participation, and over whom they had not the least control. There was then no general court of appellate jurisdiction, by whom the errors of state courts, affecting either the nation at large, or the citizens of any other state, could be revised and corrected. Each state was obliged to acquiesce in the measure of justice, which another state might yield to her, or to her citizens, and that even in cases, where state considerations were not always favorable to the most exact measure. There was danger, that from this source animosities would in time result ; and as the transition from animosities to hostilities was frequent in the history of independent states, a common tribunal for the termination of controversies became desirable, from motives both of justice and policy.

Prior also to that period, the United states had, by taking a place among the nations of the earth, become amenable to the laws of nations, and it was their interest, as well as their duty to provide, that those laws should be respected and obeyed. In their national character and capacity, the United States were responsible to foreign nations for the conduct of each state relative to the laws of nations, and the performance of treaties, and there the inexpediency of referring all such questions to state Courts, and particularly to the courts of delinquent states, became apparent. While *all* the states were bound to protect *each*, and the citizens of *each*, it was highly proper and reasonable, that they should be in a capacity, not only to cause justice to be done *to* each, and the citizens of each ; but also to cause justice to be done *by* each, and the citizens of each ; and that, not by violence and force, but, in a stable, sedate, and regular course of judicial procedure.

These were among the evils against which it was proper for the nation, that is the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation.

Let us now turn to the constitution. The people therein declare that their design in establishing it, comprehended *six* objects. First, To form a more perfect union. Second, To establish justice. Third, To insure domestic tranquillity. Fourth, To provide for the common defence. Fifth, To promote the general welfare. Sixth, To secure the blessings of liberty to themselves and their posterity.' \*\*\*

It may be asked, what is the precise sense and latitude, in which the words '*to establish justice*,' as here used, are to be understood? The answer to this question will result from the provisions made in the constitution, on this head. They are specified in the second section of the third article, where it is ordained, that the judicial power of the United States shall extend to ten descriptions of cases, viz. First, To all cases arising under this constitution; *because the meaning, construction, and operation of a compact, ought always to be ascertained by all the parties, or by authority derived only from one of them.* Second, To all cases arising under the laws of the United States; *because, as such laws constitutionally made, are obligatory on each state, the measure of obligation and obedience ought not to be decided and fixed by the party, from whom they are due, but by a tribunal deriving authority from both the parties.* Third, To all cases arising under treaties made by their authority; *because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation.* Fourth, To all cases affecting ambassadors, or other public ministers and consuls; *because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority.* Fifth, To all cases of admiralty and maritime jurisdiction, *because as the seas are the joint property of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction.* Sixth, To controversies to which the United States shall be a party; *because, in cases in which the whole people are interested, it would not be equal or wise, to let any one state decide and measure out the justice due to others.* Seventh, To con-



troversies between two or more states ; *because, domestic tranquillity requires, that the contentions of states should be peaceably terminated by a common judicatory ; and, because, in a free country, justice ought not to depend on the WILL of either of the litigants.* Eighth, To controversies between a state and citizens of another state ; *because in case a state, that is all the citizens of it, has demands against some citizens of another state, it is better that she should prosecute their demands in a national court, than in a court of the state to which those citizens belong ; the danger of irritation and criminations arising from apprehensions and suspicions of partiality being thereby obviated. Because, in cases where some citizens of one state, have demands against all the citizens of another state, the cause of liberty and the rights of men forbid, that the latter should be the sole judges of the justice due to the latter ; and true republican government requires, that free and equal citizens should have free, fair, and equal justice.\** Ninth, To controversies between citizens of the same state, claiming lands under grants of different states ; *because, as the rights of the two states to grant the land, are drawn into question, neither of the two states ought to decide the controversy.* Tenth, To controversies between a state, or the citizens thereof ; and foreign states, citizens or subjects ; *because, as every nation is responsible for the conduct of its citizens towards other nations ; all questions touching the justice due to foreign nations, or people, ought to be ascertained by, and depend on national authority.'\*\*\**

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\* This last clause refers to the ground of the particular point decided in the case, *Chisholm v. Georgia*, viz., that under the constitution a state might be sued by a citizen of another state. In consequence of this decision the eleventh amendment to the constitution was made.

## CHAPTER IV.

*Of the Powers delegated to the State Governments, by the people of each State respectively.*

As the people of the several states have formed a political union by the federal constitution, for the purpose of providing for the general welfare of all ; and, for the more effectual attainment of this object, have agreed upon a frame of government for the United States, thus constituting themselves to a certain extent a consolidated empire or government ; in the same manner, the people of each of the states in the union, have formed a social compact with each other, and have agreed to adopt a state government, for the purpose of providing for the safety and happiness of each and of all the inhabitants, residing within their respective territories. The general government has the care and control of all the external relations of all the states *collectively*, as one great nation ; the state governments have the regulation of the internal affairs of their respective states, and it is their duty to provide for the domestic safety and tranquillity of each citizen. The former protects the whole nation, and every state or constituent part, from the hostile aggression of foreign enemies, and all other political dangers, arising either from external or internal causes ; the latter regulates the social intercourse of private individuals with each other in all the various relations of society, and furnishes as far as is practicable, a protection against private violence, fraud or other injustice. As the former depends upon the will or assent of the whole people of all the states in the Union ; so each of the latter depends upon the will or assent of all the people of each state, *collectively*. As the national compact of the United States is contained in the federal constitution ; so the social compact of the people of each state, is contained in their state constitution, respectively. For the more clear illustration of this doctrine, an example may be taken, viz : The people of the state of Massachusetts have made a social compact with each other, in their state constitution, for the

purpose, among others, of securing their natural rights, as far as they think consistent with the necessary restraints of organized society; in this case they act as individuals; they have also, *collectively* made a compact with the inhabitants of each of the other states *collectively*, for their mutual safety and defence against foreign enemies, the terms of which compact are contained in the federal constitution; in this case, the inhabitants *collectively* of each state, act as a distinct tribe and independent nation. In this manner and to this extent, the whole people of the United States, by the adoption of the federal constitution have become one great nation, with this qualification, however, that, if the union should be dissolved, the whole nation will not be resolved into its primary elements, i. e. the people in a state of anarchy, or, in a state of nature, but merely into those elements of a second order, viz. into the tribes or nations, which now reside on the territories of the states respectively, and which are now, and would then still continue to be, in subjection to the respective state governments.

The people of the United States have agreed, that the federal constitutions shall be paramount in power and obligation to the constitution of the respective states, so that, if there should be discovered any incompatibility between the former and any of the latter of these, it is the latter which must yield. And as some of the state constitutions were adopted previous to the federal constitution, and some afterwards, it follows, that if any of the powers previously bestowed by the people of any of the states, on their respective state governments, in their state constitutions, should be found inconsistent with any powers afterwards conferred by them on the federal government in the federal constitution, the exercise of those powers by the state governments would be so far taken away, or more properly suspended. On the other hand, if the people of any state, since the adoption of the federal constitution, have granted any powers in the state constitution, to their respective state governments, and those powers should be found incompatible with any power previously granted to the federal government, in the federal constitution, the grant of power in the state constitution will be considered as so far void. In the former case, it is presumed that the people of the states, by their adoption of the federal constitution have agreed to waive the

provisions of the state constitution, so far as the inconsistency extends. In the latter, it is considered not to be within the power of any state, to curtail the powers granted in the federal constitution, without the consent of the other states.

From these general propositions as a basis, it follows, that any article or provision in a state constitution, which may interfere with the provisions of any national treaty whether made before or afterwards, if agreeable to the constitution of the United States, will be so far void. And for the same reason, if any article in a state constitution should be found to interfere with an act of congress, whether enacted before or afterwards, agreeably to the constitution of the United States, will also be so far void. Because, either an act of congress, or a treaty, made agreeably to the constitution of the United States, is entitled to the same respect as the constitution itself, since each must be made by virtue of powers granted by it. But, where a certain power is granted to congress in the federal constitution, which without any inconsistency or inconvenience may also be exercised by the states; the grant to congress, does not *necessarily* imply a prohibition to the states to exercise the same power. But, where the exercise of the same powers by both the federal government and the respective state governments, is incompatible, if both should legislate on the same subject, the act of congress must prevail and will suspend not only all laws made by the states concerning that subject, but of course the power itself in the state constitution. For example, congress have the constitutional power to pass a general bankrupt law ; but, until they exercise this power, the states may enact a bankrupt law within their respective territories. If congress afterwards enact a general bankrupt law, this annuls the state bankrupt law, and suspends the authority of the state legislatures to act on the same subject. If congress then repeals the general bankrupt law, the power of the state to legislate on that subject, again revives. See 4 Wheat. 122.

It may be remarked here incidentally, that, as the states cannot *directly* impede or hinder the exercise or operation of any of the constitutional powers of congress, or of any department of the general government, for the same reason any law of a state, which *indirectly* tends to the same purpose, will be so far void. See 4 Wheat. 316.

It will be observed on consulting some of the state constitutions, that they contain words expressive of a grant of powers, which though limited, are sovereign within the limits. These, it is obvious, must be suspended or annulled, so far as they are irreconcilable with the constitution of the United States, or any treaty or act of congress, made by virtue of it. But, if it should ever happen, that the Union should be dissolved, without any fault on the part of the state governments, it cannot be doubted but that all such sovereign powers *expressly granted* in the state constitutions, will immediately revive and be in force, until altered or resumed by the people of those states respectively.

Subject to these few restrictions and rules of construction, the powers delegated to each state government by the people of the state, may be readily ascertained by consulting the state constitution. And here it will be observed, that some of these social compacts, have a declaration of the natural rights of the citizens prefixed, with an intimation how many of them, and to what extent, they are submitted to, or exempted from the control of the state government erected by the state constitution ; or, from the powers granted by it to the state rulers.

If any contradiction should seem to exist between the bill of rights and the constitution of any state, in any particular respect, it would seem reasonable to consider the constitution as the compact, in which the powers of the state governments are delegated, and the bill of rights as merely the basis or substratum, on which such delegation is predicated. The constitution therefore, in any such case, where the intent of it is clearly expressed, ought not to be restrained by the bill of rights. But where the intent of the constitution is not precisely ascertainable of itself, it would be very proper to consider the bill of rights, as furnishing the best means of ascertaining the true meaning of those who framed the constitution, and giving a just construction to it. Where the bill of rights is clear, declaring explicitly what rights the people are entitled to enjoy in relation to a particular subject, if the constitution is silent in relation to it, all laws or regulations of the legislature made *not to preserve*, but to contravene, limit, or infringe such rights, are void ; because they will have been enacted, *without any*

authority from the people. But, if any such law or regulation is made contrary to any provisions of the constitution of the state, it will be void, because, enacted *against* the *express* will of the people.

As it would not be practicable, within a reasonable compass, to give a detailed account of each of the state constitutions, a few general remarks only upon the powers delegated in them, by the people of the respective states to their state rulers, will be submitted to the reader.

The state constitutions contain, in the first place, the frame of government, which the people of the states have seen fit to adopt for the regulation of their respective territories; secondly, those powers which the people have delegated to their rulers; and lastly the restrictions upon those powers.

1. The frame of government of each of the states, is very similar in principle, to that of all the rest. Each of them has a governor or chief executive officer, with or without a council; a legislature, consisting of an upper and a lower house, or a senate and house of representatives; and a judiciary, which is either expressly established in the constitution, or erected by the legislature by virtue of powers conferred on them for that purpose, in that compact. The governors are chosen for one or more years; but no one holds his office either for life, or, during good behavior. The democratic principle, which runs through all the state governments, as well as the government of the United States, is most discoverable in the legislature, consisting of a senate or upper house, a body of men, presumed to be distinguished for their gravity, dignity of character, experience and wisdom; and, a lower house, or house of representatives or delegates, supposed to consist of men arrived at mature age, but retaining their full strength and capacity for active business. These characteristic qualifications however are sometimes lost sight of, and are frequently found interchanged in the two houses. It is not very unusual to see youthful sages in the senate; it is not uncommon to behold in the lower house, ardent temperaments, whose desire to render themselves conspicuous by their eloquence, the frosts of age have been unable to chill.

Many of the states have taken care, that the lower house

shall not become so numerous, as to be liable by possibility, to assume the appearance of an irregular or primary assembly of the people. Some however still continue oppressed as with an *incubus*, by a house of representatives excessively numerous, which the people have frequently, but in vain, expressed a wish to have diminished.

The disadvantages, which might naturally be expected to result from too numerous a house of representatives, are, 1. *Unstable legislation* ; many new members are desirous of rendering themselves conspicuous by the introduction of some fancied reform, and this, without being well acquainted with the state of the laws then in force. The disadvantage of frequent changes in the laws, is, that the people never know when they are safe ; for, they hardly can have time to learn what the laws are before they are repealed, and new ones enacted. 2. *A great increase of unimportant business in the legislature* : this, in all probability, would arise, in part, from the zeal of the members to seem active in the service of the people ; and partly, because the proximity of a member of the house, would frequently suggest to his neighbors a variety of applications to the legislature, which might hardly be thought of under other circumstances. The time consumed by the legislature, in the consideration of private applications respecting affairs of little or no moment to the public, may frequently be of more value in a pecuniary point of view, than the grant or denial of the application ; yet, as every member in the house has a right to be heard on every subject, the time consumed in any debate, may obviously depend upon the number of speakers who choose to avail themselves of this right ; this naturally suggests, 3. *Prolonged debates, and almost interminable speeches*. The propensity to indulge in popular declamation, which excites ambitious persons to deliver long harangues before numerous assemblies, loses much of its force, when they find themselves in the presence of a smaller body of individuals, each of whom the orator perceives to be a man of experience and discernment, and consequently not likely to be agreeably affected, or at all influenced by common place appeals to popular prejudices or predilections, the flourishes and sallies of debating clubs, or the rhetoric of the academies.

4. *A vast expense to the state, not only directly, in money actually expended, but indirectly, in the waste of time, which might be more profitably employed.* This is a subject of frequent remark, but the amount of the loss arising to the state in this way, is not estimated as it ought to be, from not being considered with sufficient attention, and submitted to calculation. Let it be supposed then that the senate contains forty members, and the house of representatives double that number, which, if the difference in years and experience, and consequently in weight of character, is considered, will be a reasonable or proportional estimate. Suppose the pay of the representatives to be two dollars a day, apiece; and the travel fees of each member, one with another, to amount on an average to five dollars for both coming and returning, and the session of the legislature to continue ninety days. Then the whole charge on the state for a single session of the house of representatives, will be composed, so far as the present subject is concerned, of the following particulars. The attendance of eighty members, at two dollars a day for ninety days, will amount to \$14,400; to which adding the travel fees of eighty members at five dollars apiece, viz. four hundred dollars, the whole amount will be \$14,800. On the other hand, let it be supposed, that the house of representatives contains five hundred members. Then, at the same rate, it will be seen, that their pay, being two dollars a day, for five hundred representatives, for ninety days, will amount to \$90,000, and their travel fees will be \$2,500; the whole amount of both will be \$92,500. Here, it is apparent, without any nicety of calculation, that there would be an annual saving to the state of \$77,700 in money. If it is further considered, that, in all probability, the session of the legislature would be shortened, at least one third, by the reduction of the numbers of the representatives, in consequence of the subtraction of unimportant business, the suspension of unprofitable debate, and the infrequent recurrence of questions of order and formality, there would be a further saving of \$4,800, with about half as much for the senate, viz. \$2,400; amounting together to \$7,200 to be added to the former saving of \$77,700. The whole saving to the state, in money alone, in con-



sequence of thus reducing the number of representatives, it thus appears, would probably be \$84,900. This however would not be all, as appears from the following considerations: It would be a degrading estimate of the value of the service of those individuals, who are elected representatives in the state legislature, where their services are wanted at all, to suppose that their private business, which they are obliged to neglect while they are attending in the house of representatives, would not bring them in, as much as the pay which they receive for their public duties. On the supposition, then, that the public good would be as well provided for in a less numerous house of representatives; and that the attendance of all beyond the proposed number of eighty representatives, is wholly useless; and that each of those members, on an average, would, in his private capacity, or, in his regular calling, perform services, or earn, to the amount of two dollars a day; it will appear, that the public lose by having five hundred representatives, the amount which four hundred and twenty of them might earn in ninety days, at two dollars a day, deducting however every seventh day. This loss will readily be found to amount to \$75,600. And though it is not a pecuniary loss, like the abstraction of money directly from the treasury of the commonwealth; yet, it ought by no means to be wholly neglected by those, who wish to form a correct judgment of the expediency or in expediency of public measures.

Under these views of this subject, can any one doubt, that it would greatly advance the public interest, in any such case, to reduce the representation in this manner and to this extent? Or, if eighty members of the house were selected, can any one doubt, that they would be a far more wise and efficient body than the whole number of five hundred, though including the same eighty? Would not the public service be better consulted and sooner performed? Would not the commonwealth in that case, be better able to *afford* to attend to minute business, at the same time that less of it would be brought before the legislature? Would not there be fewer laws passed, and would they not be more likely to survive the session of the legislature, at which they were enacted? If these advan-

rages would result, would it not be better for the other four hundred and twenty representatives to remain at home ?

But, perhaps it will be objected, that, it will be impracticable to apportion this reduced number of eighty, properly or equally. But, in fact, there needs be but little difficulty on the subject. Let the apportionment be, that each county send one, and then let the rest of the eighty representatives, be apportioned among those counties whose population entitles them to more than one representative, in proportion to the number of inhabitants, or the rateable polls, or the qualified voters for representatives, as may be judged best.

If it should be objected, in any such case, that the mode of electing representatives, will, in this way, become too much assimilated to that of electing senators ; the answer is, that, let the representatives be chosen in what way they may, still they must be chosen by the people of the same state, who elect the senators. To district the state in a different manner for one class than for the other, is merely a piece of political pedantry, and would be attended with no benefit whatever. Its only recommendation is a show of wisdom. But, perhaps it will be objected, that the representatives are in the nature of agents for the towns by which they are chosen ; and, if this mode of apportionment should be adopted, the towns would lose their agents. The answer is, that this would be a general benefit and not a disadvantage. Because, it would be much better that, the representatives should consider themselves, as the representatives of the people of the state, and owing a duty to the whole state, than consider themselves as the mere agents or instruments of the towns which send them, and accountable to them alone for their behaviour in office. If they consider themselves in the former light, they will feel bound to consult the general good of the whole state, though it should happen to be inconsistent with some inconsiderable local interest. But, if they consider themselves as the agents of the towns, they will be tempted to sacrifice the good of the state, to that of the little clan which elects them, whenever those interests come into competition, from an apprehension that otherwise, they shall not be again returned to the legislature.

If the representatives are chosen in the way suggested, and their number is limited to double that of the senate, they will become at the same time more independent, and more respected. Petty intrigue and compromise will be more likely to cease. There will be less fluctuation in the laws, and there will be a greater probability that the weak point in a democratic government, may become equally its ornament and strong hold.

The future historian will probably smile at the simplicity of the citizens of any state thus situated, who should confide the task of reforming its representation in this particular, to the representatives themselves, whose numbers are to be reduced by the amendment. Is it to be expected that the representative of an inconsiderable village, will so far consult its interests, as to vote himself out of the house of representatives, even though he should relieve the village of a large proportion of its state tax ; a consequence, which it has been shown, will certainly follow from the reduction of the number of the representatives ? That they ought to be reduced, few will risk their reputation for political sagacity, so far, as to deny ; but, the object of a denial of its expediency may just as well be obtained, by refusing under one pretext or other, to concur in any amendment which can be proposed, and making it a theme for never ending debate. If the people wish to have this measure adopted, they should take care to give their representatives explicit instructions to that effect ; for, it is an evil, which yearly increases with the growth of the country, and will never remedy itself.

2. With regard to the powers delegated to the state governments by the people of the respective states, in their state constitutions, it may be remarked, that, all these powers may be reduced to the general heads of regulating the election or appointment of all public officers ; making provision for the administration of justice ; providing for the support of the government of the state, and adopting such measures, and enacting such laws from time to time as shall be found expedient for the safety, welfare, growth and general prosperity of the state ; always however in subjection to the powers delegated to the general government in the constitution of the United States.

For the purpose of obtaining these general objects, particular powers are given in the state constitutions, more or less extensive and subject to various restrictions. Beyond these *express* powers, and such others as must necessarily be implied, in order to render the exercise of those which are expressed, effectual, neither the legislature nor any other branch of the state government, can constitutionally proceed. If they should attempt to do so, it would be an attempt to usurp power; and their laws or other acts, would be void and without obligation. The following short report of a case, the insertion of which, it is hoped the reader will excuse, may serve to illustrate the doctrine on this subject. It is the more worthy of notice, because it shows the necessity of having some check to prevent the usurpations and encroachments of the legislative departments of the freest governments on earth.

MASSACHUSETTS. Supreme Judicial Court. February Term, 1789. *E. Goddard and alt. v. G. Goddard*. The case was, G. Goddard sued out a writ of ejectment of lands in Roxbury against E. Goddard, returnable to the court of common pleas in Suffolk, July term, 1786, at which term E. Goddard was defaulted, and G. Goddard had judgment for seisin and possession, which judgment was executed by a writ of *Hab. fac. possessionem*. Afterwards, November 5th, 1787, the general court, on the petition of Jona. Metcalfe and *uxor*, RESOLVED, for reasons set forth in the petition, that the prayer thereof be granted, and that the said Jonathan and Hannah, his wife be empowered to re-enter the said action, and to become parties to the said suit at the common pleas in Suffolk, in January term in 1788, and the court are hereby authorized and directed to proceed thereon, according to law and the rules of the said court, in the same manner as if the said action had been regularly continued in the said court; the said Jonathan and Hannah, serving the said G. Goddard with an attested copy of the resolve, fourteen days at least before the sitting of the said court. Afterwards, at January term aforesaid, the action was re-entered, and the said Jonathan and Hannah were admitted by the court of common pleas, parties to the suit, and at the same term the action was dismissed, the said Jonathan being dead. Afterwards, on the petition of Fisher Ames, Esq.

on the behalf of the said Hannah, the general court **RESOLVED**, that the said judgment recovered by the said G. Goddard, be annulled and reversed, and that the said writ of *Hab. fac. possessionem*, and all proceedings in pursuance thereof, be rendered null and void ; and the clerk of the court of common pleas was directed to carry forward the action to July term, 1788, as if it had been regularly continued and not dismissed ; and that the said Hannah should be admitted a joint defendant with the said E. Goddard ; and the court of common pleas, and the supreme judicial court (if the same should be carried there) should have cognizance thereof in like manner, as if it had not been defaulted and dismissed, and the said Hannah had been an original defendant with the said E. Goddard ; and if the said G. Goddard shall not prosecute his action, or shall not proceed therein, the said courts are required and directed to render judgment for the defendants, for their possession and costs, and to award a writ of *Hab. fac. possessionem*, in like manner as if the said Hannah and E. Goddard had demanded the same by the writ aforesaid. Accordingly at July term, 1788, the action was brought forward, and the said Hannah admitted a joint defendant, with E. Goddard, by order of court, and G. Goddard appears, and the pleadings are filed as follows ; G. Goddard objects to the resolve as unconstitutional and against law ; and the opposite party agrees to carry the cause or action up, ' for the judgment of the supreme judicial court, and that, when under the consideration of that court, the said G. Goddard shall have and be entitled to all and every advantage in the cause, whatever, as well respecting the said resolve, as the parties, and the action itself, which he now has or can have before the court of common pleas ; and no injury or disadvantage shall accrue to the said G. Goddard, by reason of his thus appearing in this court in this manner, if the law would subject him otherwise to any.' On which agreement the action was carried by a demurrer to a bad plea, to the supreme judicial court. August term, 1788 ; at which term the parties appeared. After argument upon the force and effect of the resolution of the general court, the cause was continued for advisement to February term, 1789, when the court ordered the following special judgment to be

entered, viz. ; ‘ This cause appears to have been entered at a court of common pleas, held at Boston on the first Tuesday of July, 1788, in pursuance of a resolve of the general court, to which resolve the said G. Goddard objects and demurs, because he says, that by the thirtieth article of the declaration of rights it is declared, that in this government, the legislative department shall never exercise the executive and judicial powers, or either of them ; that the legislature of this commonwealth cannot by act or resolve nullify and reverse a judgment of court, and the consequent proceedings thereon, without exercising the judicial power ; that it plainly appears from the resolve of the general court, copies of which are among the papers of the case, that this suit is now pending there on the mere power and authority of the same resolve, which expressly declares the judgment of the court of common pleas upon the original process, annulled and reversed, and the writ of *Hab. fac. possessionem*, which issued thereon and all proceedings in pursuance thereof, null and void, and expressly directs other parties, not named in the original process, to be parties therein. That the said Hannah, if she had the right she claims, had and still has her remedy in the regular and common course of law,—the parties being fully heard thereon, *It is therefore, upon mature consideration and advisement, considered by the court here, that they will take no further cognizance of this action in consequence of said resolves.*’ **PER CURIAM.**

The acts of a state legislature may therefore be void, either because they are contrary to the constitution of the United States, or to some treaty or act of congress, made under its authority. See 5 Cranch, 344. 7 Cranch, 164. 4 Wheaton, 316. As, if a state should attempt to regulate foreign commerce, or, to lay a tax on imports or exports. See 9 Wheat. 201, 209. 12 Wheat. 419. So, if an act of a state legislature, should tend to hinder, or burthen, or control the operation of any constitutional law enacted by congress.

So, if a state legislature should enact a law, without having any authority under the state constitution, and especially if contrary to any prohibition contained either in it, or in the bill

of rights. *The restrictions upon the Powers of the States will be further considered under Chapter VI.*

And here a question may arise of great importance and deep interest to the United States, as well as to each of the several states. As the constitution of the United States is a compact, by which the citizens of the United States have delegated to their rulers certain limited powers, and have made an express reservation, either to the states or to the people, of all powers not delegated in it; suppose one of the states, or a private individual should be of opinion, that congress had transcended its legitimate authority, and enacted an unconstitutional law; what remedy can be had?

It has been seen before, that an unconstitutional law, whether enacted by congress or by a state legislature, is equally void, because it is an infringement of the national compact. If the officers of the federal government or of the state government, should attempt to enforce it, any private individual injured by it, might bring his action and have the question of the constitutionality of the law settled in the last resort, before the supreme court of the United States. If the law were decided to be constitutional, there would be an end of the question, so far as concerns any private individual. But, if the law of congress had a particular bearing on the interest or policy of one or more of the states, which considered the law as not authorized by any powers, *really intended* to be granted to congress by the federal constitution, however it might seem to be included within them by the generality of the terms made use of to express those powers, any such state or states, without being driven to the necessity of impugning the correctness of the decision, and without having recourse to the rash and treasonable attempt of forcibly opposing the law, or the decree of the supreme court grounded on it, might justifiably adopt the following course of measures, if thought expedient; viz.

1. They might send a remonstrance to congress, alluding to the decision of the supreme court, and stating, that though the question of the constitutionality of the law, might be considered as so far settled in the affirmative, in a technical sense, that it must be considered as the law of the land and obeyed as such, until repealed; yet, they did not consider such law, as

coming, in fact, within the real intention of the parties to the constitution. They might then state their objections to it, and show the inequality of its operation, or in what manner it tended to sacrifice the interests of the states complaining, either to that of the United States, or, in favor of some one or more particular states, or, in general point out in what respect it was unconstitutional. They might conclude with requesting a repeal of the law, or a modification of it in those offensive particulars. If the offensive law were not repealed or modified ;—

2. They might appeal to the states ; *i. e.* either to the respective states, or to the respective state governments, both or either, as might be thought expedient, stating the whole case, and all the public proceedings, which had taken place in relation to it. They might also state the injury or injustice, which they and their interests suffered in consequence of the operation of the law. They might then request the citizens, to instruct their representatives in congress, by a declaration in convention, to endeavor to procure a repeal of the law. They might also call on the state legislatures, to declare, what in their opinion the true construction of the constitution of the United States, in relation to the offensive law, ought to be. If the law were not repealed, or, if an opinion favorable to its constitutionality were expressed ;—

3. They might send a second remonstrance directed to congress, another similar one directed to the legislatures of the several states, and a third of the same import, addressed to the citizens of each of the states collectively, as members or constituent parts of the Union. This remonstrance might contain in substance, that, though under a strict construction of the constitution, it might perhaps be considered, that congress had a power to pass the law complained of ; yet, in fact, it never was in the contemplation of the states remonstrating, to grant congress any such power ; that the exercise of it was injurious to them, and that they therefore requested the constitution might be so amended, as to restrain the exercise of such power for the time to come. If this application also failed of obtaining the desired object ;—

Lastly : They might send a remonstrance addressed to the respective states, as well as to the citizens of the United



States, as forming collectively one great nation. In this remonstrance they might state, that, when the constitution of the United States was adopted, the states remonstrating did not intend to enter into such a compact, as that national agreement had been construed to contain; that, under this instrument laws had been enacted, which were subversive of their interests, and unauthorized by any power which they had intended to grant by that compact; that they had made application for redress, in every mode which could reasonably be expected of them, but in vain; that the union, therefore, had not been attended with all the advantages, which they had contemplated in adopting it; and, on the contrary, some evils had resulted to them from it, which more than counterbalanced all the benefit which they had derived from it, or could expect from a continuance of their connexion with the union; and that therefore, they requested the consent of their brethren, associates, and fellow citizens, that they, the remonstrants, might peaceably withdraw themselves from the union. Further than this, it is not thought worth while to carry the supposition, because it is hoped, that such extraordinary folly will never be found either in the people of the United States, or, in the people of any state; or, in those delegates or representatives, to whom the people of either government may intrust the decision of this momentous question, as to dissolve the union on any such account. \* \* \* \*

Having skipped the crimson page, which might naturally be expected here, since, let the attempt at separation be commenced how it may, there is but little hope, that it will ever be effected without bloodshed; suppose the union to be dissolved, and that the calm of peace has at length succeeded, what will become of the fame and renown of those distinguished statesmen, who framed, and persuaded the people of the United States to adopt, the present admirable system of general government? certainly, if this attempt to induce men to govern themselves by laws grounded on the dictates of reason, religion and virtue, should prove unsuccessful, the foundation upon which the reputation of those politicians for wisdom, is grounded, will be swept away by torrents of vice and corruption; and the names of most of those who have been flattered

by holiday orators, that their glory would be imperishable, will be effaced from the columns of time, before this century has passed away. But, what is this in comparison with the degraded and imbecile state, to which this now great and flourishing republic will infallibly be reduced ?

Two other questions naturally suggest themselves here.

1. If a law should be passed by congress, or any other public measure be adopted by the federal government, injurious to the interests of a particular state, and which should be decided by the supreme court of the United States to be constitutional, does the right, which the state has of adopting the course of remonstrance, just considered, belong to the *government* of the state or to the people of the state ;—to the rulers, or, to the citizens ?

The answer obviously must be, that, since, agreeably to the constitution of the United States, all rights, not delegated in it, are reserved to the states, or to the people, the determination of this question will depend upon the respective state constitutions. For, if the people of any state have given this superintending power to their state rulers in their constitution, those rulers will have the right to interpose, in the cases and in the manner before suggested and to that extent, but no further, between the general government and the people of their state. For, that such a power may be delegated by the citizens of each state, to their state rulers in general, or to the legislative, or the executive, or the judicial department singly, cannot be doubted. But, unless this power is thus expressly delegated, it must remain in the citizens ; and, in that case, the interference of the state government itself, in its political capacity, will be a mere usurpation of illegal authority. It will not be denied, however, that, if the legislature of any state, should feel convinced that a law injurious to the interests of the state, and not warranted by the federal constitution, or the real intention of those who adopted it, had been enacted by congress, they would be bound to make it known to the people of the state, so that all proper measures might be adopted to procure its repeal. But, further than this, the state governments cannot constitutionally proceed, without authority

from their citizens. For, within the powers delegated in the federal constitution, the government of the United states is the government, not only of all the states taken *collectively*, as one great nation; but, also is the government of each state taken separately; in the same manner, that within the powers delegated in the state constitutions, the state governments have the sovereign control of the affairs of the respective states, provided they do no act inconsistent with the federal constitution. But, neither the federal government, nor any of the state governments can justly transcend their assigned limits.

On examination of the state constitutions, however, it is believed, that no such power will be found to be given to the state governments, either expressly or by necessary implication, to interpose between the federal government and the citizens of any of the states; indeed, there would seem to be a manifest impropriety in intrusting any such power to them, if it is considered in what manner the state governments are organized. For, as the governor, as well as the members of the state legislatures, are chosen for short periods only, there could be but little dependance placed upon the permanence of any measures which, in an emergency of this nature, they might see fit to adopt; since however wise, firm and consistent the characters of the rulers may be, the administration of public affairs in popular governments, will always fluctuate, more or less according to the frequency of elections, with the changes of popular opinions. Because, a change in the public sentiment will immediately remove from office, all those individuals, whose offices are elective, and who are not pliant enough to accommodate their professions to the doctrines of the times; and will put in their place, persons entertaining different opinions, and who consequently will adopt a different course of public measures. Besides, though the individuals usually selected for the public service, may be esteemed by the people, well qualified to answer the ordinary occasions of the public, by enacting the necessary laws for the regulation of the internal affairs of the state, and in the exercise of the powers conferred on the state governments in the state constitutions; yet, it is not at all unlikely, that, for the more important occasions of altering the state constitution itself,—for the

momentous crisis of assuming a new attitude with regard to the federal government, as well as an unexpected relation to the other states, the citizens of a state would think it expedient to call upon the highest abilities within their reach, for assistance : because nothing less would be thought adequate to direct them in any so dangerous a conjuncture.

Further ; though aspiring men, even in the highest offices of the state administration, if restricted to the exercise of the powers conferred on them by the state constitution, would have but little opportunity of disturbing the tranquillity of society, in the common course of affairs ; yet, if any power were conferred on such persons by the people, or, if they were permitted to usurp a power, to interfere in the manner before suggested, or, in any other manner between the government of the United States and the citizens of their own state, the most dangerous consequences might ensue. Because the strong desire, which such persons always have, to distinguish themselves in the eyes of the citizens of their own state, might prompt them to seize upon every pretence to rail against the general government ; and, as far as inflammatory harangues, seditious and turbulent resolves, messages and addresses would go, to set it at defiance ; and, in the improbable yet possible case of an actual encroachment upon some of the rights of the state, instead of adopting the wise and magnanimous course of friendly expostulation and remonstrance, thus giving the general government an opportunity of retracing its steps and redressing the grievance, if there were one, would gladly avail themselves of any such occasion, and from motives of selfish aggrandizement would be tempted to raise the standard of hostility, in the rash and unprincipled attempt to dissolve the union by force. Yet, what could they hope to gain by any such attempt ? Certainly, the most probable consequence would be, that, though they might bring upon their own state the illimitable horrors of intestine war, they would ultimately be compelled to submit to reasonable terms of compromise, and observe the national compact to which all have agreed.

It would be desirable, without doubt, that the power, now under consideration, should be confided to the governor and the members of both houses of the legislature of the respective

states, if their term of office were longer, so that there would be less reason to distrust the consistency as well as permanence of their public measures ; because, they then would become the guardians and protectors of the rights of the states against the encroachments, not of the general government, for of this there is hardly a possibility, but of the legislative department of it. If then, congress should enact a law, which the authorities of a state considered to be unconstitutional and injurious to the interests of the state, those state rulers would immediately take care to have the question of its constitutionality determined by the supreme court of the United States ; and, if aggrieved by their decision, would adopt the regular course before suggested, so far as was just and expedient, without the necessity of convening primary assemblies of the people, a measure seldom desirable, or in any manner disturbing the tranquillity of the public mind. The supposition indeed is possible, though perhaps it would be better to consider it impossible, that there might be a final difference of opinion as to interests, which are believed to be of sufficient consequence, to demand for their preservation, the dissolution or dismemberment of the union. But, as it seems *really* impossible, that a necessity for adopting a measure so fatal to the strength and prosperity of this *now* great and flourishing nation, should ever arise from any other cause than the selfish or angry passions of the leaders and partizans of the various parties or factions, which already distract the country ; if the people of the United States, or those of either of the several states, ever have recourse to this miserable alternative, they will have nothing to which to ascribe the loss of the happiness, which, if they choose, they may enjoy under their complicated but admirable system of government, and the total decline of their rank among the nations of the earth, but their infatuation, their ignorance of their true interests, their misplaced confidence in superficial orators and selfish statesmen, and their weak concessions to rude importunity and senseless clamor.

2. It may be asked ; are there really no limits to the jurisdiction of the supreme court of the United States, with regard to what are generally considered as constitutional questions ?

The answer must be, that, in one respect, there are limits, but in another, there are none. It would seem, that congress must always be bound by a decision of the supreme court of the United States; but the states are not *always* bound. If the supreme court should decide, that a law is unconstitutional, congress must always be bound by the decision, because the authority of that court to decide upon the constitutionality of all laws enacted by congress, proceeds from the same source from which congress derives all its authority to enact laws. They therefore cannot deny the authority of the court, in this respect, without removing the foundation of their own powers. But with regard to the states, the case is different. For, the states have delegated to the government of the United States certain limited powers only, and, for the purpose of providing a check upon the rulers to prevent their overstepping the limits prescribed to them, have erected the supreme court to decide, in the last resort, whether they exceed their powers or not. If therefore the supreme court should decide that any measure of the government of the United States is unconstitutional, it would be considered from that moment illegal and void, and the general government would be bound by the decision. But, if the supreme court should decide that the measure is constitutional, a further question may arise, which is, whether the point decided, comes within the jurisdiction of that court as limited in the constitution of the United States; for, if it does not, the decision of the court will not bind the states. In order that the supreme court should have jurisdiction in relation to a particular subject, it must either be conferred in the constitution in express terms, or it must be necessary to the exercise of some authority expressly delegated in the constitution. In either case, there would seem to be but little question as to the jurisdiction of the court. But, the supreme court must have jurisdiction conferred on them in the constitution, *over the subject matter involved in their decision*. If they have not, their decision, though obligatory on the national government, when given against them, because this court always has authority to decide that a measure, purporting to be adopted under the authority of the constitution, is in fact unconstitutional; yet, if given in favor of the general

government and against the states, will not be binding. It is true, within the jurisdiction conferred by the constitution, every decision of the supreme court, must be submitted to by the states, since, by adopting the federal constitution they have agreed to do so; and, on the improbable supposition, that the court should make an incorrect decision, in fact, still it must be considered as correct, and obeyed as such, there being no higher court of appeal provided by the constitution. But, how can the states be bound by the decisions of the supreme court, on the supposition that they should usurp jurisdiction over matters not submitted to them by the states, in the federal constitution? If it is asked;—how can it be ascertained, whether such jurisdiction is granted in the constitution, or not, otherwise than by the construction given to it by the supreme court, and which they alone are authorized to decide in the last resort; the answer must be, that the question, whether a certain jurisdiction is conferred in the constitution, or not, must be determined by a reference to the constitution itself. This subject is not left to the mere discretion of the court. For, as this court can neither extend its jurisdiction beyond the express limits prescribed to it; so neither can it assume jurisdiction in cases where the constitution is silent. It can never depend upon mere construction. For, where the constitution is entirely silent in relation to a particular subject, and where the powers delegated to the supreme court can be exercised without giving authority or jurisdiction in relation to that subject, it must be self-evident, that the supreme court can have no constitutional jurisdiction. It is no small argument of the excellence and wisdom of the provisions in the constitution, that, in order to find cases not provided for in it, recourse must be had so frequently to absurd or at least very improbable suppositions. Let it be supposed then for a moment, that the supreme court should assume jurisdiction of a suit, commenced by a citizen of a state against another state, and that the court should decree against the state sued, can it be imagined, that the state would be bound to submit to the decree? Certainly not; because one of the amendments to the constitution of the United States, expressly provides, that the judicial power of the federal government shall not extend

to such a case. Suppose again, that this court should entertain jurisdiction on a prosecution for a crime, committed within a state and against the laws of the state alone, would not any judgment which this court might pronounce in this case, be wholly void? No one can be so unreasonable as to believe, that the extent of delegated powers, can depend upon the construction of the delegate alone. No one can be so absurd as to imagine, that the limited jurisdiction of any court, however high, can be extended by the mere construction of the court itself. *This subject will be farther examined in a different connexion, in the next chapter.*



## CHAPTER V.

*Of the Independence of the States and the Sovereignty of the Union considered together, and how far the latter is consistent with the former.*

To form just and adequate ideas on the subject of the present chapter, it may not be amiss to consider shortly, what would be the condition of the several states, if the Union among them were peaceably dissolved, and, with that single exception, every thing else were left in the same situation that it now is. The people of each state, it is apparent, would then find themselves in possession of a distinct territory, with a separate regularly organized government, fully authorized by the people for the regulation of its concerns; and though perhaps not invested with any power to wage a foreign or offensive war; yet having full authority to resist invasions from without, and to suppress tumults and insurrections within; and generally to provide for the public peace and the domestic tranquillity of its citizens, and the support and maintenance of the government. Under such circumstances as these, and acknowledging no earthly superior in any other government or tribunal whatever, it is impossible not to perceive, that each state would be completely sovereign and independent. It was in this condition, that those states of the American Union claimed to be, which agreed to the articles of confederation; and, with the exception of that compact, this was the situation those states were in, which first agreed to adopt the federal constitution.

It is thus apparent, that the constitution of the United States is the only restraint, which the several states have imposed upon their own independence. It is also the only bond that unites them under one government. A proper regard for their own interests, it is true, would tend to keep them at peace with each other, and might also induce them to form alliances for mutual protection against external aggression. But such conse-

quences would greatly fall short of the advantages, to be derived from a union, under a constitution like that of the United States. For, the general government, being invested by it with all the powers of peace and war, and with the control also of the whole resources of all the states, without being under any necessity of consulting the local authorities, in these respects has all the consistency and strength of a great empire, with no other restraint upon the exercise of the vast powers thus bestowed in the constitution, than requiring, that they shall be employed for the *general* good of all the states, and not to advance any partial, local, or sectional interests.

The independence of the several states, is therefore confined to the relation existing among them, as individual states. But, no state is independent of the union, that is, of the states, taken collectively as forming one nation under the federal constitution. Their absolute independence is limited, just so far as they have seen fit to limit it themselves, in that national compact ; but no further.

What then is the construction, that ought to be given to this compact, in this respect? Two principles of construction are laid down in express terms, in the amendments to the constitution, and which consequently have become part of the constitution on itself. 1. 'That the enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' 2. 'The powers, not delegated to the United States, by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'

It is believed, that the former of these principles is not wholly free from obscurity. The intent of it, however, probably was, that the enumeration of certain rights *expressly retained by the people*, shall not be construed in denial of others belonging to them, not elsewhere given up in the constitution, and not contained in such enumeration.

Among the powers most characteristic of sovereignty, given to congress in the constitution, are, 1. The power of laying taxes, duties, imposts and excises, for the purpose of paying the national debts, and providing for the common defence and general welfare, &c. 2. The power to regulate commerce with foreign nations, and among the several states, &c.

3. The power to establish a rule of naturalization. By the present rule established by the exercise of this power, an alien may become a citizen of the United States, without being a citizen of any of the states. For, though by naturalization he becomes entitled to the privileges of a citizen of the United States, and consequently to the privileges of a citizen of that state to which he belongs, or wherein he may see fit to reside ; yet, if the union should be dissolved, he would become again a mere alien, unless the state, in which he abode, saw fit to adopt him.

4. The powers to coin money ; to establish post roads ; to raise and support armies ; to provide a navy, &c.

The restrictions upon the authority of *congress*, are merely such restraints and limitations, as the people of the United States have seen fit to impose on their government, and are not the exceptions merely of powers, reserved to the state governments.

The restriction upon the authority of the *states*, relate to the exercise of such sovereign powers, as the citizens of the states, if they had thought expedient, might have entrusted to their respective state governments ; but, having confided some of these powers to congress, and having expressly restricted congress from the exercise of the rest, there would be an apparent inconsistency and impropriety, in permitting the states to exercise them.

No state, therefore, can enter into any treaty, alliance or confederation, whatever. This applies as well to treaties, alliances and confederacies, &c. between two or more states, as to treaties, alliances, &c. between one or more of the states, and a foreign nation. But, though certain powers are denied or forbidden to the state governments, in the federal constitution, which the people of the respective states might otherwise have delegated to their respective state governments ; it by no means follows, that other powers not mentioned among those which are thus forbidden or denied, may, of course, be lawfully exercised by the states. For, this must depend upon the language of the state constitutions themselves, respectively.

The general superintending power, intended to be bestowed on congress, by the federal constitution, is also apparent from the provision, that the United States shall guarantee to

every state in the union, a republican form of government. This expression admits of considerable latitude of interpretation. It is probable, however, that any form of government, where the rulers were not hereditary, and depended for their appointment upon the choice of the people, would be considered a republic, within the true intent of the constitution. If the people of any state, therefore, saw fit to adopt a state constitution, in which the governor and senate were chosen for life, or during good behaviour, and to vest in them the *discretionary* exercise of all the powers, which the state governments may now properly exercise, under the federal constitution, the government would still be a republic, within the meaning of the constitution; and, if those state rulers did not abuse their powers, in an attempt to overstep the limits prescribed by it, the general government would have no right to interfere.

The supreme political power of the government of the United States, is further apparent, from the clause in the constitution, in which the people of each of the states agree, 'that the constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.' Perhaps there is not a clause in the whole federal constitution, the strict observance or enforcement of which, is more essential to the dignity of the general government, than the one now under consideration. For, if the judges of the state court were not bound to conform to the constitution of the United States, in their decisions, nor to obey the laws of the union, then one of the principal objects in view in the formation of the union, would not be obtained; and in fact there would be no union. But, as laws, which are enacted by congress under pretence of a power, which in fact is not granted by the federal constitution, are not binding, it may be asked, how shall it be determined, whether such power is granted or not, when a case, involving the rights of individuals under a law of the United States, comes before one of the state courts, and an objection is made to the constitutionality of the law? The answer which

naturally suggests itself, is, that congress should generally be presumed to have acted within their constitutional authority, unless the contrary is clearly demonstrated. The state judge ought therefore to decide accordingly. But if he is convinced, that the law is enacted without such constitutional authority, he ought to decide so. If any authority is given at all to a state judge to decide in any such case, he must have authority to decide *correctly*, that is, according to the impartial dictates of his own judgment. A judge has no right in conscience, to decide contrary to what he believes to be the justice of the case, on the supposition, that the case will be carried to the constitutional tribunal in the last resort; for this may not take place. Any party, however, aggrieved at the decision of a state court in any such case, may always have a hearing before the supreme court of the United States; and when the question has been once settled there, the decision will furnish a rule for the state courts in all such cases from that time, by which they will be bound to govern themselves, whatever their own private opinions may be.

In order to strengthen the arm of the general government, the federal constitution has wisely given authority to congress to pass all laws, which may be necessary for the exercise of the powers, granted in the constitution. This clause is one of the greatest importance, because, though this auxiliary power might have been considered, as necessarily implied from the grant of the principal powers themselves; yet the omission would probably have given rise to innumerable objections and cavils. Under this clause, congress has a sufficient authority to apply an adequate remedy for every difficulty, that may arise in the execution of the powers granted in the federal constitution, and consequently, in putting in force all laws made by virtue of those powers. In pursuance of this general authority, given in the sweeping clause of the federal constitution, congress has taken care, by the creation of proper officers, with prescribed duties and ample powers, wholly distinct from the officers of the several states, to render the execution of the laws of the United States entirely independent of any act of any particular states, or of any of their officers, and without the necessity of requesting the consent or co-operation of

the executive, legislative or judicial departments of the states, where such laws of congress are to be put in force. But, if it had been necessary, in any such case, to have the previous consent of the states, the execution of the law might have been greatly delayed, perhaps wholly frustrated ; or, if the officers of the states were employed in the execution of the laws of the United States, as there would be no obligation upon them to perform such services, unless perhaps the several states enacted laws for the purpose of rendering it so, it would remain optional with such officers, whether to execute them or not. For, it has been found by experience, that the idol popularity, has sometimes induced even an officer of the United States, to resign his office, rather than offend the citizens of the state where he resided, by discharging his official duties. But, in general, the officers of the United States, not depending upon the states either for their appointments or for their continuance in office, supposing them to have a proper regard for their official oaths, can have nothing to hinder or delay them in the discharge of their duties. For, on the extreme supposition, that a law of the United States is unconstitutional, as well as impolitic and injurious to the interests of a particular state ; still, unless it is decided to be unconstitutional by the supreme court of the United States, the officers of the general government are bound to enforce it. Nor is it clear, upon what ground, except a regard for the dictates of prudence, forbearance and temporary expediency, they would be bound to regard a decision of the state courts to the contrary, if they should assume to themselves a power to determine upon the subject. Where the courts of a state express their opinion of the construction, which ought to be given to a law of the United States, and ground their decision in the cause before them, upon the unconstitutionality of the law, the person aggrieved by the decision, if a private individual, may have his remedy at the regular constitutional tribunal, but will have no pretext whatever to resist the decision of the state court. But, on the extreme supposition, that a law of the United States requires one of the officers of the national government to perform a certain duty, and one of the state courts decides the law to be unconstitutional, is or is not the officer of the United

States, however high and responsible his situation, bound at his peril to await the decision of the supreme court of the United States on the subject, before he undertakes to enforce the law contrary to the decision of the state court? Whatever the prevailing opinion may be on this subject, as to the *legal* duties, there can be none as to the moral obligation. Certainly, the utmost delicacy, moderation and forbearance ought to be used in all cases, where by possibility there may be a clashing of jurisdictions. The aim of each party should be, not so much to assert his *strict right* in the first instance, as, by mild and prudent measures, to put his adversary in the wrong, in the hope that the supreme court of the United States, whenever the case is regularly brought before them, will award ample redress to the party injured. And here, it is worthy of remark, that the principal cases, where there is reason to apprehend that public disturbances may arise between the general government and the states respectively, must result from a disagreement in opinion between the courts of the United States and those of the states. This is a singular proof of the prudence and foresight of the framers of the constitution. For, *in general*, such is the love of regularity and order, and the prudence and moderation of those persons who preside over the tribunals of justice, a fact which has been verified by experience both with regard to those of the United States and those of the several states in the union, that the framers of the federal constitution were well warranted in supposing, that they had avoided, as far as possible, every occasion, which might give rise to internal disorders and civil commotions, on account of the undefined and undefinable powers and rights of the general and state governments respectively, when they had taken care, that no such unfortunate circumstances could ever happen, where one party or the other would not be manifestly and grossly in the wrong; the case of conflicting jurisdictions between the courts of the United States, and those of the state courts, being a solitary exception. And, it is believed, until some late unfortunate occurrences, to which it seems unnecessary to make further allusion, most reflecting persons would have come to the conclusion, that if there were no other sources of public troubles and dissensions between

the United States and the several states, than such as arise from the collisions of their respective judiciaries, and the execution of their conflicting sentences and decrees, the country might enjoy a state of uninterrupted tranquillity and repose forever.

But, if the legislature or the executive of a state, having come to the conclusion that a law of the United States was unconstitutional, notwithstanding a decision of the supreme court to the contrary, should array an armed force to resist the execution of the law, such conduct would undoubtedly be treasonable. See 2 Dall. 346. 4 Cranch, 75. 1 Paine, 265.

So, if they should attempt by the use of similar violent means, to enforce a law of the state, which had been decided to be unconstitutional, by the same court :

And, for the same reason, if they should resist in the same manner, the execution of a decree of the supreme court of the United States.

Neither would it be a crime of small magnitude with regard to the state itself, if the governor or legislature of a state, should venture to adopt any such rash measures in opposition to the general government. The state constitutions confer on the state governments no power of opposing the measures of the general government, under any circumstances. If any such power is ever exercised by the state authorities, it will be an act of dangerous usurpation, for which they will be answerable to their constituents, perhaps on an impeachment, perhaps on an indictment for a treasonable conspiracy. For, whence can the governor or legislature of a state derive authority or jurisdiction, to decide whether a law of congress, or a decision of the supreme court of the United States, is unconstitutional? If the citizens of the states had ever intended to bestow such power on the state rulers, the adoption of the constitution of the United States by those citizens, would have abolished such intention. For, a clause in it declares that it shall be the supreme law of the land ; but, this is altogether inconsistent with a power in the governor or the legislature of any state, to oppose any measures, adopted by the general government by virtue of powers delegated in it. The same constitution has also provided a supreme tribunal for the decision of constitutional



questions ; consequently, the state authorities have no jurisdiction of any such question. On the extreme supposition, that the supreme court should usurp jurisdiction of questions not submitted to them by the constitution, the right to remonstrate belongs to the states, that is, to the citizens of the respective states ; and not to the state rulers ; for the plain reason already suggested, that the citizens have not delegated this power to the state rulers, either expressly or by necessary implication, in their state constitutions.

The constitution of the United States is the solemn compact of all the states, adopted from motives of the greatest expediency, or rather necessity. But, of what utility can it be, if the execution of laws or decisions made under its authority, may be resisted, whenever the governor or legislature of a particular state, under whatever pretence, believe or affect to believe such laws or decisions to be unconstitutional ? Such an act of opposition may at first sight, appear to be aimed at the administration of the general government for the time being ; for the government being of the nature of a company or association, is a mere abstraction, and consequently impassible ; but the wrong is evidently offered to the other states, that compose the federal union. For, it is they, with whom the compact was formed ; and, it is they, who are injured as well as condemned, when the compact is violated.

It might be supposed, at first view, that in ordinary cases, there would be but little reason to apprehend, that the rulers or government of any state, would ever array themselves in opposition to any measures of the general government. Because, if a state legislature should enact a law for any such purpose, it would be merely void, and the citizens of the state itself would not be bound by it, and would be protected by the constitutional tribunals of the union, in their disregard or disobedience of such law. Besides, if they obeyed such law, any further than they were actually compelled to do so by the state rulers, it would not be sufficient before the national tribunals, to excuse an inconsiderable assault and battery, and far less to afford a justification for murder, treason, insurrection or rebellion. The same rule would apply to the courts of the state. For, if they had not adopted the same views or opin-

ions as the governor and legislature of the state, they also, would decide that such opposition to the general government was illegal, and that all laws of the state, &c. enacted by the legislature for such purpose, were void ; and, in any such decision, they would be sustained by the supreme court of the United States, and ought to be protected by the power of the union.

But, if the highest courts of a state should undertake to decide, that a decree of the supreme court of the United States was unconstitutional, and refuse to obey it, or suffer it to be obeyed, or to be enforced by the civil officers of the United States ; and the governor and legislature of the state should raise an armed force to resist the power of the national government, and should make an actual opposition to it ; this, it cannot be doubted, would be treason in all persons in the state, whether rulers or citizens, who voluntarily took an active part in it. But, it would not necessarily amount to a dissolution of the union, unless the citizens of the state sanctioned the violence of their rulers, with their express approbation, given in their primary assemblies called together for that purpose. It would amount to nothing more than a rebellion, and should be treated as such. The quiet and sober-minded citizens of such state should be protected against the violence of the insurgents, and the latter should be reduced, as soon as possible, to a state of civil subordination to the federal government.

But, according to the theory of the whole system of state governments, taken in connexion with the federal government, if the people of such state should sanction such measures of the state government in their primary assemblies, such state, in effect, would already have separated itself, violently and irregularly, from the federal union. The relations afterwards subsisting between that state and the other states in the union, which would not necessarily be dissolved by the secession of one or more particular states, would depend upon the moderation and forbearance of the administration for the time being. For, the federal government, without perhaps having a strict right to compel any state to continue its adherence, contrary to the express unanimous wish of all the citizens or legal voters of such state, would unquestionably have a right to claim of it a full satisfaction of all just demands, as well as an indem-

nity for all injury arising to the union, or to any other of the states, or to any citizen of the United States, though a citizen also of such seceding state, if he did not consent to such secession. The federal government, also, notwithstanding a state should see fit to withdraw itself in this irregular manner from the union, would have a perfect right to compel it to observe and comply with the terms and conditions of all treaties, regularly made by virtue of powers delegated to the federal government in the constitution of the United States. For, why take the pains to frame and adopt a constitution, if the parties did not expect to be bound by it? And how can the parties be bound by it, if each has a right to refuse compliance with it, at discretion? But, however this may be, if at the time of calling a state convention, for the purpose of ascertaining the wishes of the people of the state, on the subject of a secession from the union, there were a considerable number of voters, though a minority of the whole, given in favor of adhering to it, it would be a mere question of policy, for the other states to decide, whether such state should be permitted to withdraw from the union or not. For, the obligations of a national compact of general union, purporting to be formed as well for posterity, as for the generation of men then in existence, and which, therefore, it was intended, should last as long as the whole people of all the states should have an independent existence, are not to be assumed and cast off again, according to the caprice of an ignorant and misguided multitude, under the influence of selfish interests or turbulent and ungoverned passions. The excitement, which men of superficial but popular talents sometimes occasion among the less informed and more combustible class of citizens, by exaggerating public grievances, some of which from the imperfection of all human institutions, are unavoidable, and consequently cannot be prevented by the wisest and best organized administration, can furnish no rational ground for dissolving a compact of this nature. The federal constitution was formed after long deliberation by men of distinguished abilities, and, after a critical examination and thorough scrutiny by assemblies in each state, of men selected for their great knowledge, experience and political discernment, was recommended to

the citizens of the several states. In consequence of this recommendation, the constitution of the United States was adopted by the people of the thirteen states, which first constituted the federal union, and who in their primary assemblies ratified it and bound themselves, and their posterity being citizens of some of the states, to comply with and obey it. Whether any after generation of citizens of any single state, even though unanimous, have any absolute right of dissolving their connexion with the United States, is not satisfactorily made out in the affirmative. For, it has never been demonstrated, to the satisfaction of any but political smatterers without knowledge or principle, that every body of men have a right to abolish the lawful government of the territory under which they have been born and educated, whenever they fancy they can govern themselves better ; at any rate, it is not yet settled, that the rest of the nation are under any obligation to submit to such an arrangement. But, if the citizens of such state are not unanimous ; if there is a respectable minority among them, against secession ; the federal government has an undoubted right to compel the state to submit to its authority. Such an exercise of power, it is not improbable, would eventually receive the approbation of the very persons, who under the influence of some popular speaker, may have raised the loudest shouts in favor of separation and disunion. For, the inconsiderate resolutions or actions of any body of men, acting under the transient excitement occasioned by the declamation of some *improvisatori*, who from practice has acquired a graceful and fluent manner of speaking on all subjects, without any other advantage than a very superficial view of their tendency and consequences, are certainly not to be compared with the deliberations of Jay, Madison, Hamilton, Pendleton, Governor Randolph, and other distinguished statesmen. When the excitement is over, therefore, the people will view with regret, perhaps with shame and disgust, any excesses or disorders, which they may have committed during their infatuation ; or, if they have been arrested in their career of madness and folly, will feel grateful to those who have performed for them so kind an office.

To suppress any such internal commotion, however, it is

hoped, that it will never become necessary, even under the most threatening appearances, to resort to any harsher measures than persuasion or remonstrance. If the majority of the citizens of a state should be in favor of adhesion, there would probably be but little occasion for the general government to interpose for the preservation of tranquillity and order. And, if the majority were in favor of separation, the proximity of a small national force without the limits of the state, would be a sufficient protection for the minority, who adhered to the federal government, if they should be threatened with violence, and who should be cautioned against the use of any force but in repelling aggression. By this moderate course of measures, the temporary excitement would soon subside. When the fit of intoxication was over, which would soon be the case if not imprudently exasperated, intemperate resolves would give place to a spirit of prudence and moderation. A total change would take place in the public sentiment, and consequently in the state administration. As the people of the state resumed the exercise of their reason, they would supplant in office, folly and rashness, by good sense and a spirit of conciliation. If unfortunately there should be an attempt to array an armed force in opposition to the general government, it would probably be suppressed in a moment. The most turbulent and violent of the leaders, and consequently idolized by the credulity of the abused people, as an illustrious patriot and hero—who perhaps fancied himself a state Washington—being arrested, would see his partizans abandon him to his fate. Being then tried and convicted of treason, he would be surprised to find himself regarded by the multitude whom he had attempted to mislead, neither as a patriot, nor a renowned hero, not even as a martyr of liberty, but merely as an unsuccessful political incendiary ; while the citizens of the state, having learned a useful lesson respecting the arts and fate of demagogues, and having put in office men of sound judgment and deliberate consideration, would be surprised to find that they can live in happiness and prosperity all their days, notwithstanding the fancied oppressions of the general government.

To return ; from the preceding observations and reflections,

it cannot be difficult to determine how far the United States constitute a single consolidated empire ; and, in what respects, they are merely a confederacy of independent nations. And it is evident, that there is not the slightest inconsistency either theoretical or practical, in relation to the subject, if rightly considered. For, within the powers delegated to the legislative, judicial and executive departments of the general government, the United States form one grand consolidated empire, and *within the prescribed limits of these delegated powers*, no other difference can be discerned between this government, and the most absolute monarchy on earth, while, in the actual exercise of no greater powers than these, except in the single circumstance, that the monarchy restrains itself ; but the general government is restrained by the federal constitution. So far therefore as the exercise of the powers delegated requires, the states cease to be independent, and consequently, sovereign and independent. The state governments however, it must be repeated, have nothing to do with this subject. It concerns merely the citizens of each state, taken collectively as forming a distinct tribe or nation ; the general government, formed by the constitutional compact between all these states ; and the citizens of all the states taken in their new relation to each other under this national compact, as fellow citizens of the American republic. It is true, that a citizen of each state has, in certain respects, the freedom of all the other states ; but should the union be dissolved, it will be found, that he derives this advantage from the federal constitution alone ; and whether he is afterwards to be considered as an alien, or as a denizen of any other state, will depend upon the laws of that state alone.

That it was not intended by the federal constitution, to consolidate the states, any further, than is necessarily implied in the exercise of the powers delegated in it, is evident from the express provision of the constitution, that, no ‘ new state shall be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.’

Further, the states, in many respects, seem wholly independent of the union. The government of the United States

cannot appropriate an acre of land belonging to any state, or assume exclusive jurisdiction over it, without the assent or grant of the state.

If an officer of the United States commits a crime against the laws of any state, he is amenable to the state court where the crime is committed, and the judgment of the state court will be final. If the officer should set up a defence under the laws and constitution of the United States, for the purpose of bringing the case before the supreme court of the United States, that court will examine no farther into the merits of the case, than to ascertain whether the laws or constitution of the United States are at all brought in question; and if not, the judgment of the state court will be permitted to take its course.

The states are perfectly independent of each other, and their dependence on the general government is just so much as they voluntarily agreed to, in giving the government of the United States a supremacy in certain defined respects, by the adoption of the federal constitution. They are sovereign within their own territory, therefore, in all other cases; and if congress should violate this sovereignty by enacting unconstitutional laws, the state wronged may have the subject examined before the supreme court of the United States, the tribunal of last resort for constitutional questions, and if the law should be decided to be unconstitutional, it will lose its validity. But, it may be objected here, and the objection deserves consideration, If the supreme court is the tribunal of ultimate resort for all questions arising under the constitution of the United States, of what avail is the express limitation of the powers granted by it to the federal government? For, if congress should pass an unconstitutional law, and the supreme court should declare it to be constitutional, to what remedy can any state or individual injured by it resort? Certainly to none that is not paramount or collateral to the constitution itself, as, for instance, a convention of the states, in order to amend it by declaring its intention so clearly as to prevent the possibility of misinterpretation. This subject has been partially discussed *ante* p. 152. A few remarks, in further illustration of the view there submitted to the discerning reader, but in a

different connexion, it is hoped will be excused here. Suppose congress to enact an unconstitutional law, and the supreme court of the United States, making the same mistake with the members of congress, should decide it to be constitutional, must a state submit to have its rights sacrificed? To answer this question correctly, it would seem necessary to establish a distinction analogous to that suggested in the place just referred to, to wit : that, as the constitution is a compact of the several states in the federal union, conferring certain powers on the federal government, and reserving others to the states ; where laws are made, the subject matter of which is within the powers granted to the general government, the supreme court is the proper tribunal to decide whether they are constitutional or not. But, if the subject matter of the law, is not within the powers delegated to the general government, no state can justly be bound by such law, even on the absurd supposition, that the supreme court should decide it to be constitutional. Here it may be objected again, if this court has no conclusive jurisdiction, except where the subject matter of the law is within the powers delegated to congress, it follows, that this court will have no authority to decide a law to be constitutional, except in cases where there is no need of any such decision, viz, where the law comes within *the express words* of the constitution, made use of in defining the powers of congress. But, the answer is, that the subject matter of a law may be clearly within the powers granted to the general government, and yet the law may be unconstitutional. In any such case the court will have jurisdiction to decide ; and though they should decide wrong, the decision will be binding on the states. To illustrate : The power of taxation is delegated to congress ; yet, if congress should impose an unequal tax, the law would be unconstitutional and consequently void ; but, as the subject matter of the law is within the power delegated to congress, the supreme court has a power to decide finally in relation to it. On the other hand, as the constitution confers no power on the general government to interfere in the municipal concerns or internal organization of a state, if congress should enact a law to control either in any respect, it would seem, that it would be void, and though the



supreme court should decide it to be constitutional, the decision would not bind the states, because the subject matter of any such law, does not come within the powers delegated to the general government. In cases like these, it can hardly be supposed that the several states, in the formation of the federal constitution, intended entirely to resign to the supreme court, the right not merely of construing that compact, for this is not doubted, but of extending it by construction to matters not contemplated by it.

How far these remarks may apply by way of analogy to the case of enforcing the decision of an arbitrator, appointed by the United States and a foreign government, in relation to disputed boundaries between the foreign government and one of the states; and how far this point ought to depend upon the inquiry, whether the state whose territory is concerned, *had previously consented to such arbitration or not*; or how far these remarks may be considered applicable to the case of a state, which has forcibly taken possession of a territory, which, agreeably to a decision of the supreme court, is protected by treaties made with the United States, is submitted to the discerning reader.

Let it be supposed, further, that congress should require the justices of the peace holding commissions under the several states, to perform certain acts when requested, under a certain penalty, there can be no doubt, that though such law might be a sufficient authority to the justice to perform the act, so far as the United States is concerned, yet it would be wholly void as to the penalty; because the subject matter of the law, so far as requiring a *state* officer to perform any act under a penalty, does not fall within any provision of the federal constitution. It is true, the state officer may lawfully do the act for the sake of the fee, which he may be entitled to claim for it under the act of congress; but in any other respect his services will be merely gratuitous. Who then, it may be asked, is to decide whether a certain power is granted to congress in the federal constitution or not? It seems, that the supreme court has conclusive and unquestionable jurisdiction to decide, that a certain power is not granted; that the court has also conclusive jurisdiction to decide that a certain power is incidental, that is to say, absolutely necessary to the exercise of some

other power *expressly* granted in the constitution, and consequently that such incidental power is also granted. But, unless they determine such power, not being an express one, to be thus incidental, they cannot bind the state by a decision, that the law made by virtue of it, is constitutional. So, the supreme court cannot bind the states by a decision, that a certain power is incident to a certain other power, where such supposed incident power is expressly prohibited in the constitution. But, if the constitution does not *expressly* prohibit the exercise of the power, decided by the court to be incidental, the decision of the court will conclude the states, even on the supposition that it is erroneous in fact. Because, where the supreme court has jurisdiction at all, as no other tribunal is provided for the correction of errors, its decision must be taken for as near an approximation to absolute right, as the fallibility of human nature permits; and consequently should be submitted to by the states, who have so far constituted that court their final arbitrator.

The express words of the constitution of the United States are, that "the constitution and the laws of the United States *which shall be made in pursuance thereof*, and all treaties made or which shall be made &c. It is plain then, that it is only those laws which are made in pursuance of the constitution, that will bind the state courts, even although sustained by a decision of the supreme court, unless that court has constitutionally a jurisdiction over the subject matter. In the case however of the most manifest usurpation of power on the part of congress, it would be highly unjust as well as inexpedient, for any state to array itself against the United States. For, an unconstitutional act can never with propriety be ascribed to the people of the union, who have *expressly* refused to congress the power to pass any unconstitutional law. Until the people have received notice of it, and have had a full opportunity of learning the true state of the case, and of electing another set of public officers, any such unconstitutional act should be ascribed to the *general administration* only. Till that time, any state which considers itself aggrieved, will best consult its interests, by restricting the exercise of its powers to endeavors to enlighten the public mind, and, in this way, induce them to elect wiser legislators.

## CHAPTER VI.

*Of the rights reserved to the people of the United States ; not being granted either to the general government, or to the state governments.*

IN the formation of the federal constitution, it was judged best, on the whole, though there was considerable difference of opinion in relation to the subject, not to introduce into it any bill of rights. The reason for excluding it, was principally, because, it was thought, that if no bill of rights was inserted, all rights and liberties not relinquished to the general government, in the constitution, either in express terms, or by necessary implication, would be considered as retained by the people ; while, on the other hand, if a bill of rights were introduced in the constitution, and any right or liberty chanced to be omitted in the enumeration, such right or liberty so omitted, would be considered as relinquished to the general government, by implication. Some of the members of the state conventions, however, and particularly of the Virginia convention, where this subject was thoroughly discussed, were strongly in favor of a bill of rights, and some of the amendments, which were afterwards made to the constitution in consequence of the strenuous efforts of those members, contain in express terms a reservation to the people, of certain rights and liberties, which it would be difficult to show congress had any right to interfere with, independently of such reservation. These rights, however, were very properly reserved to the people in express terms, for the purpose of avoiding, as much as practicable, all doubts in relation to the subject. For the same reason, two clauses were inserted among these amendments, declaring in substance, that powers not delegated by the constitution are retained ; and, that a partial enumeration of rights should not be construed to deny or disparage rights not contained in it.

In a state of nature, the rights of an individual might be

summed up in a single expression, viz, that he had a right to do whatever he had a power given him by nature to do, provided he violated no precept of religion, and was guilty of no wrong to others. But, in the innumerable relations of organized society, though all a man's rights may be summed up in a manner almost as brief, viz, that he is restrained by no law or duty from doing anything which does not violate any rule of religion or morality, and which does not infringe any of the positive laws or institutions of society ; yet, it will be best in order to furnish a more distinct and clear idea of these rights, to take a review of the more important of them separately. For this purpose, since no particular order is observed in the constitution, none needs be observed here.

1. *Religious Freedom.* Under the first amendment of the constitution, congress is prohibited from 'making any law respecting an establishment of religion, or prohibiting the free exercise thereof.' The reason of this prohibition may be traced in part, to the general spirit of toleration, which prevails throughout the United States. It is not a necessary conclusion however, that all the various sects are thus tolerant ; but, as the population is divided into a great number of different sects, no single one of which constitutes a majority of the whole, it would be vain for any particular sect, to encourage thoughts of being established as the religion of the whole union. As therefore, there is no probability that any particular sect will ever be able to gain an ascendancy in this country by means of political power ; and as unprofitable contests for that object, would create rancorous disputes among those sects, and tend to bring the general cause of Christianity into disesteem with the feeble minded, and 'give an occasion to the adversary,' it has been thought best to provide for a general toleration of religion. The power to make regulations in regard to religion, therefore, must remain in the people of the United States ; and though at first sight it might seem, that the citizens of each state might authorize their state rulers to impose religious restraints, yet, as this would interfere with Art. IV, Sect. 2, of the Federal Constitution, it seems that it cannot constitutionally be done.

2. *Freedom of speech and of the press.* By the same amendment congress is prohibited from passing any law, abridging

the freedom of speech or of the press. These two rights are not further noticed here, being made the subject of chapter II, in part II.

3. *The right of the citizens to bear arms.* The second amendment to the constitution, declares, that 'the right of the people to keep and bear arms, shall not be infringed.' The reason assigned in the amendment for this restriction on the power of congress, is sufficient to show its true construction. This reason is, 'because a well regulated militia is necessary to the security of a free state.' Certainly, it is impossible to provide any other mode of defence which shall be at the same time so safe so cheap, and so effectual as that of a well organized militia. For, every able bodied man, with the exception of those who are exempted because they are engaged in the discharge of other public duties, is bound to assist in the public defence; and consequently, with the exception of the small number referred to, the number of the whole militia of the United States, is limited only by that of its effective citizens.

The chief excellence of the militia system, is that every citizen at a moment's warning becomes a soldier; and when the exigency is over, at a moment's warning retires again to the calm and usual pursuits and occupations of peace. To repel a sudden invasion of a foreign enemy; to put down a domestic insurrection at its first commencement; to protect the country from any attempt to usurp power by persons not confided with it, are occasions, in which the policy of the militia system is very apparent. Another advantage, which however is not quite so obvious, is the assistance which it is always ready to lend the civil arm of the government; in preserving domestic peace and tranquillity; in the execution of the process of the law; and in suppressing the tumults and riots and other disorders of the less informed citizens, when under the influence of their own unruly passions, whether excited by some unfortunate occasion, or exasperated by the false reasonings or representations of designing and unprincipled leaders or declaimers. The influence of the militia system in these last cases, is less perceived by the orderly citizens, because it is so much felt by those whose irregularity of conduct can only be restrained by the consciousness of a superior controlling power, which

they cannot withstand, and therefore will not attempt to provoke.

Their inefficiency in the field against a regular army, arises from, and is consequently in direct proportion with the following circumstances; viz; want of military skill and experience, in the officers; want of respect for their superiors, and of a spirit of subordination, in the private soldiers. The officers are unable to teach; the privates will not learn. The officers neither know how to command, nor how to enforce obedience. The privates will neither submit nor obey. The whole results in a total disregard of discipline, a want of confidence in their officers, and a distrust of themselves and of each other. These defects however may be remedied by drilling and exercising under officers, who have had an opportunity of seeing service.

There is but little danger that the militia will betray their country. There may be traitors among them; but having their own interests to protect, and being in reality the country itself, it would be absurd to suppose that they would ever betray themselves. It is true, that they may ruin themselves by acting under erroneous views of their own interests. But this is incident to human nature.

The provision of the constitution, declaring the right of the people to keep and bear arms, &c. was probably intended to apply to the right of the people to bear arms for such purposes only, and not to prevent congress or the legislatures of the different states from enacting laws to prevent the citizens from always going armed. A different construction however has been given to it.

It is a common practice in some parts of the United States, for individuals to carry concealed about their persons, some deadly weapon, and such as is not much used, as a regular weapon of attack or defence, in the army, as, a dirk or a loaded pistol. This cowardly and disgraceful practice, if it is really unconstitutional to restrain it by law, ought to be discountenanced by all persons who are actuated by proper feelings of humanity or a just regard for the dictates of religion. For, what does this practice in a civilized community imply? In what light does the wearer expect to be viewed? Is he under the influ-

ence of unmanly timidity ? Has he not sufficient courage to declare his sentiments, unless supported by the consciousness that he has a deadly weapon at hand, to which he can appeal, in case of any difficulty or quarrel ? Or, is it vanity ? If so, then he must frequently display his pistol or dirk. But the weapon of a soldier, worn by one who is not so, becomes the badge of a fop or coxcomb. Or, does he mean to act the part of an assassin, and gratify his temper or malignity by stabbing or shooting the first person who happens to offend him, or who is unwilling to assent to his opinions ? The alarming frequency of bloody affrays attended with fatal results, in those parts of the country where this low bred practice is most prevalent, would seem to demand the interposition of the legislature, if it might constitutionally be had. However, the courts and juries may do much, if they will set their faces against it. This they may do with perfect propriety and without either violating the constitution, or overstepping any legal principle. To constitute the crime of murder, it is not necessary, that the act should arise from malice against any particular individual, it is sufficient, if it results from an unprincipled disregard of the lives of other people in general ; as, if a man maliciously or wantonly rides a horse used to kick, into a crowd of people, or turns loose in the street a furious wild beast, and any one loses his life in consequence of it, it will be murder. And, there appears to be no reason, why a man, who arms himself with a deadly weapon, with an intent to use it upon the first person who offends him, and afterwards uses it upon some provocation which does not constitute a legal excuse, and kills his antagonist, should be regarded, in any other light than a murderer. There are without doubt circumstances, which may justify a man for going armed ; as, if he has valuable property in his custody ; or, if he is travelling in a dangerous part of the country ; or, if his life has been threatened. But under other circumstances, it ought not to be tolerated or countenanced ; because the presence of such weapons has frequently turned a quarrel into a bloody affray, which otherwise would have terminated in angry words, or at most an inconsiderable breach of the peace.

While on this subject, it may not be amiss to suggest, that

if the state legislatures would pass a law, providing that if any man should by writing, or by advised speaking, either in a person's presence or absence, charge him with any failure of truth or honesty, for the mere purpose of reproach, and not for the purpose of demanding *legal* reparation; or, should apply to such person the contumelious epithets, usually resorted to for the purpose of insult, he should be liable to a certain heavy pecuniary fine, or to imprisonment for a certain number of days, to be remitted at any time upon asking pardon of the injured party in open court, either verbally or in writing, according to the manner of the offence, it would probably tend to put a stop to duelling. The public sentiment too, ought to be corrected with regard to acts of personal violence. When an assault and battery has been committed, the jury seldom assess sufficient damages; the judges too frequently impose such inconsiderable fines, that an injured party is frequently discouraged from attempting to obtain redress by law, and unless he is a conscientious man, prefers to resort to modes of redress which the law forbids.

4. *The quartering of soldiers.* It is provided in the third amendment of the constitution, that 'no soldier shall in time of peace be quartered in any house, without the consent of the owner; nor, in time of war but in a manner to be prescribed by law.' This provision is important to the comfort of the citizens. When soldiers are quartered on the inhabitants of a place without their consent, it gives rise to many abuses and impositions on the part of the soldiers, and a great deal of ill will on the part of the citizens. To live at free quarters, is little else than making booty and pillage of every thing, at discretion. In a state of war, the exigencies of military service may frequently require that soldiers may be quartered on the inhabitants. To leave the regulation of this matter to the discretion of the commander in chief of an army, would be to subject the persons and property of the citizens to the risk of outrage, insult and violence, without any other means of redress than such as depend on his arbitrary will. The citizens have prudently guarded themselves as far as practicable, by requiring that this subject shall be regulated by law.

5. Under the 4th amendment, the persons, houses, papers



and effects of the people are secured from unreasonable arrests, seizures and searches. No warrants therefore shall issue but upon probable cause supported by oath, &c. By these provisions all *general* warrants, for searching or seizing persons, property, or papers, without particularly describing the object of such process, are made unconstitutional. The propriety of securing the liberties of the citizens in these respects, is manifest from the arbitrary and tyrannical use of *general* warrants which has frequently been resorted to in Great Britain.

6. The 5th amendment declares, that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, &c. &c. One of the principal objects of this provision, was to exempt persons who belong neither to the army or navy of the United States from trials by a court martial, or other tribunals not known to the common law, which might be erected by the legislature. It furnishes an important barrier or safeguard, on the part of the people, against any acts of violence, imposition or oppression which may be practised upon them in war or peace, by military commanders, either by direct outrage, or by subjecting them to summary trials and convictions before officers under their command, and consequently more or less under their influence, by the most odious and least to be depended upon of all trials, that by court martial. This however will prove inadequate to protect individuals, whenever the people become so infatuated as to connive at acts of arbitrary power in popular leaders. For, such leaders, depending on the weakness or sottishness of the multitude to overlook, perhaps to applaud, all acts of tyranny or oppression committed on individuals, so long as a pretence is held out, that they are done for the public good, without considering that no individual can be oppressed without at the same time threatening the liberty and safety of all, will be very much inclined to trample on any obstacles which may stand in the way of their ambition, however the rights of others may be sacrificed in consequence. But, if the people have the good sense to consider, that the greater the power of the offender, the more necessity there must always be to bring him to justice; and that no public services whatever are a sufficient

warrant for the violation of the laws of the country and the rights and liberties of the citizens, and sustain the decisions of the tribunals of justice in assertion of those rights by an open avowal of such sentiments, there will never be any danger of a loss of freedom from any such usurpation of unconstitutional power.

7. The same amendment provides, that no man shall be compelled to give evidence against himself. This provision forbids the enactment of laws, which shall authorize the infliction of torture, imprisonment, or any other means of coercion, in order to compel an accused person to confess his guilt, and is in perfect accordance with the principles of the common law, which excludes, as incompetent, all evidence of confessions, extorted either by threats or promises of favor made by persons acting judicially, or officially.

8. The same amendment provides, that 'no person shall be deprived of life, liberty or property without due process of law, &c. &c. This clause seems not to be aimed so much at the tyrannical conduct of persons in power, acting under an usurped authority, as to prevent congress or the legislatures of the states from intrusting a power over the lives or the liberties of the citizens to public officers in command, and from confiscating the estates of individuals without the formality of trial, by mere unprincipled acts of legislation. Bills of attainder are prohibited in the constitution, in Section ix, Article 1. Even this prohibition, it seems, is not wholly superfluous. Before the adoption of the constitution, a man by the name of Phillips was attainted by a bill of the legislature of Virginia, and was executed under it.

9. Under amendment sixth, the accused shall enjoy the right to a speedy and public trial, &c. &c. These just and humane provisions, are made to prevent the possibility of unfairness or oppression, from being practised upon the humblest or most obnoxious individual in society. An accused person cannot now be detained in prison, as otherwise he might be, from year to year, at the discretion of the court or the public prosecutor, but has a right to demand a trial at the regular time, and cannot justly or constitutionally be deprived of it, or delayed without sufficient cause. If there is no substantial reason for de-

lay, he must either be tried or discharged without trial. If any other rule were adopted, he might be kept in perpetual imprisonment, under one pretence or other. The absence of material witnesses on the part of the prosecutor, is not of itself a sufficient cause for putting off the trial, unless it appears also, that the public prosecutor has made every reasonable exertion to procure their attendance, and that he will probably be able to do so at the next regular term. Neither will it be a sufficient cause for delay even then, if the prisoner is willing to admit that the absent witness will testify in the manner the prosecutor states in his affidavit he expects him to testify ; or, if the person accused can produce the record of the conviction of such absent person, of any crime that renders his testimony inadmissible in a court of justice. Neither ought the indisposition of the public prosecutor, to be considered as a sufficient reason for putting off a trial, where the accused party is suffering imprisonment in the mean time. The liberty of the citizen ought not to depend one moment on the health of the public prosecutor. If any of the jurymen are not impartial, *i. e.*, if they have any personal interest in the result of the trial ; if they have expressed a decided opinion as to the guilt or innocence of the prisoner, they ought to be taken from the jury either on the challenge of the prisoner, or that of the public prosecutor, or, on the challenge of the juror himself ; in order that justice may be done to the public as well as to the accused party.

The prisoner must also be tried in the district where the crime is charged to have been committed. This is provided, in order that he may not be liable to be oppressed by being taken away among strangers, who, not being acquainted with his previous character, would derive their first impressions with regard to it, from the nature of the accusation itself.

It may not be amiss here, to suggest, that an innocent person accused of a crime, should be very cautious in the voluntary relinquishment of any formality, which the law require to be complied with in criminal trials. All those formalities are directed for the purpose of protecting innocence from the possibility of an unjust conviction. They are all grounded on some sufficient reason, though that reason may not always appear, or may not be applicable to every case. They ought

not to be so numerous or so hard to be complied with, as to prevent the conviction of guilt itself, it is true, but they cannot be liable to this exception, since notwithstanding the strict observance of them, the innocent sometimes are convicted.

The case is easily conceivable, that a person perfectly innocent, may, from the force of concurring circumstances publicly known, be generally believed to be guilty of the crime of which he is accused ; and the court as well as the jury and the witnesses, may be so satisfied of it, and of the plenary proof which it is expected to adduce against him, that the unfortunate individual may be considered as virtually condemned in the minds of all, even before the trial is commenced. It is here that the wisdom and humanity of these requirements and technical formalities are most manifest. For, if they are strictly observed, the court and jury, however strong their prepossessions may possibly be against the prisoner, if they pay ordinary attention to the proceedings, will not fail to perceive whether there is or is not *sufficient legal evidence* of the prisoner's guilt, and then if he is really innocent, he can never be convicted except from one of those errors or mistakes, which it is incident to the imperfection of human nature sometimes to commit.

The prisoner must be acquainted with the precise nature of the accusation, so that he may know what to defend. This notice must be given him seasonably, so that he may have a reasonable time to prepare for his defence, and procure the attendance of his witnesses. This he is entitled to process, to compel, and of this right congress cannot constitutionally deprive a prisoner. He is also entitled to the assistance of counsel in all criminal cases. In capital ones, if the prisoner is unable to retain counsel at his own charge, it is the humane and invariable practice of the court to assign him such as he requests, and to the honor of the legal profession, it is due to remark, that the task is seldom if ever declined without sufficient reason, and when undertaken is discharged with a disinterested zeal and ardor, which always secures to the prisoner a fair trial ; though it has sometimes overshot the mark and defeated the purposes of justice, by procuring the acquittal of undoubted guilt, contrary to both law and testimony.

10. The eighth amendment provides, that excessive bail shall not be required. This is supposed to be intended to prevent the requiring of excessive or unreasonable bail, in cases of bailable *criminal* charges only. There is however no reason, why it may not extend to cases, where the defendant in a civil action, is held to bail for an unreasonable amount for the purpose of oppression. It seems however to be a direction for magistrates, and not either for the legislature or for sheriffs, &c. Where a prisoner charged with a bailable offence, is brought before a court or magistrate having authority to hold him to bail, or to let him go upon his giving bail, by what rule is he to be guided in settling the amount to be required, agreeably to the spirit of the constitution? The design of bail is either to relieve a prisoner in custody for a bailable offence, from imprisonment, upon his giving sufficient caution or security for his appearance at court, at the proper time to take his trial; or, it is to compel a person at large to give such security, under the alternative of being committed to prison till his trial comes on. To relieve from imprisonment and to secure the appearance of the accused, are therefore the two objects, which the magistrate is to have in view; but, where both cannot be obtained, the former must yield to the latter. The magistrate here has a right to use a proper discretion. It is obvious, if the person accused, being released on bail, sees fit to abscond, his recognizance will be forfeited, and his bail be held responsible for the amount. If therefore, previously to his going off, he should deposit a sum of money with his bail, sufficient to indemnify them against the forfeiture of the recognizance or bail bond, the purpose of justice will be eluded, so long as he keeps himself out of the jurisdiction of the court, and yet the bail will be held harmless. Where the crime charged therefore is of an odious or infamous nature, and the evidence strong, and the person accused is rich, or has opulent parents or influential friends, the highest bonds should always be required. So, if he is a transient person, high bail should be required; otherwise he may deposit a sufficient sum of money with some one to induce him to procure bail for him, and then abscond. But, where the crime is not of an infamous nature, where the evidence is slight, and yet not suffi-

ciently so to warrant the discharge of the person accused; if he is poor, &c. &c. the lightest bonds should be required.

The eighth amendment also prohibits excessive fines. This is a direction to the legislatures as well as to the courts and to magistrates. If therefore a law should be passed, imposing a ruinous fine upon an inconsiderable offence, or otherwise wholly disproportioned to the magnitude of it, it would be inconsistent with the spirit of this amendment. So, where a crime is punishable by fine and imprisonment, at the discretion of the judge, this discretion is a reasonable discretion, *i. e.* the best exercise of his honest judgment, and must not be confounded either with whim, caprice, or vindictive feelings. A man's farm or stock in trade, ought never to be made a sacrifice, to the ruin of himself and the distress of his family, but, if necessary to make an example, he should rather be imprisoned for a longer period, and a more moderate fine be imposed. For similar reasons, if a law should be passed, requiring a specified and very heavy fine to be imposed in all cases of crimes of any particular class, and allowing the judge no discretion, though the offence in some cases might be very slight, it cannot be doubted that such a law would be contrary to the spirit of the constitution.

No express restriction is laid in the constitution, upon the power of imprisoning for crimes. But, as it is forbidden to demand unreasonable bail, which merely exposes the individual concerned, to imprisonment in case he cannot procure it; as it is forbidden to impose unreasonable fines, on account of the difficulty the person fined would have of paying them, the default of which would be punished by imprisonment only, it would seem, that imprisonment for an unreasonable length of time, is also contrary to the spirit of the constitution. Thus in cases where the courts have a discretionary power to fine and imprison, shall it be supposed, that the power to fine is restrained, but the power to imprison is wholly unrestricted by it? In the absence of all express regulations on the subject, it would surely be absurd to imprison an individual for a term of years, for some inconsiderable offence, and consequently it would seem, that a law imposing so severe a punishment

must be contrary to the intention of the framers of the constitution.

Under the same amendment the infliction of cruel and unusual punishments, is also prohibited. The various barbarous and cruel punishments inflicted under the laws of some other countries, and which profess not to be behind the most enlightened nations on earth in civilization and refinement, furnish sufficient reasons for this express prohibition. Breaking on the wheel, flaying alive, rending asunder with horses, various species of horrible tortures inflicted in the inquisition, maiming, mutilating and scourging to death, are wholly alien to the spirit of our humane general constitution. Yet the statute books of some of the states, are disgraced by laws justly chargeable with barbarity. Is not whipping a punishment sufficiently severe of itself, when required to be inflicted on the naked back, without the savage direction that, the stripes should be 'well laid on?' Is not the punishment of death sufficient? Must the atrocious spirit of revenge be gratified, by having the culprit burned alive?

11. In the fifth amendment will be found a prohibition to take private property for public use, without just compensation. It would seem no more than justice in any such case, to estimate the property taken, at its fair value at that time, with the usual rate of interest on that amount, until the time of paying for it; this being the nearest approximation that can be made, to the actual detriment which the owner has sustained. Where the legislature do any act of this kind, it cannot of itself constitutionally determine the amount of compensation. *See 2 Dal. 304.*

There are some other rights, which are reserved to the people, though not mentioned in the general constitution. Among these is the right of self-defence, in cases where the danger is so imminent, that the person in jeopardy, may suffer irreparable injury, if he waits for the protection of the laws. It is true, if he survives, the justice of society will afford him such separation as its own power permits; but he is not bound to submit to this alternative; and as the compact between him and society is mutual, if society is unable to protect him, his natural right revives to protect himself. *See ante, p. 40.*

Another right, reserved to the people though not mentioned in the constitution, is that of expatriation. Every citizen who has not entered into an express compact with the government by swearing allegiance, may leave the country and dissolve all ties with it but those of gratitude and affection, at pleasure. This right is acknowledged indirectly by the constitution; for otherwise, it would not have established a rule of naturalization, by which aliens who desert their native country, may become citizens and patriots here. *See ante*, p. 43.

The people also according to the democratic theory, have a right to alter their constitution and frame of government, as they please, *if unanimous*. This right is inalienable; no express stipulation can deprive them of it. It is true, that a mode of amending the constitution is pointed out in it: but, as this mode of amendment is only agreed upon by the people of the United States, as a safe and convenient one; the same authority, if *substantially* unanimous, may abolish the whole constitution and the mode of amendment, and adopt whatever form of government they see fit. This however is the right of revolutionizing, which however it may be viewed in the abstract, if taken in connexion with its concomitant circumstances and attendant consequences, viz. the unsettled state of all laws and institutions; the base and profligate practices of ambitious men to mislead the people; the insecurity of property—of life itself, and the extreme improbability, that a people who have been so foolish as to abolish a tolerable government, on account of some theoretical defects, will have sufficient wisdom to adopt a better, should cause a case, where such right may be exercised with propriety, to be regarded as *potentia remotissima*, an incredible supposition. *See ante*, p. 55.

An important right, and one which is expressly reserved to the people, in the constitution, is that of assembling peaceably.

This is one of the strongest safeguards, against any usurpation or tyrannical abuse of power, so long as the people collectively have sufficient discernment to perceive what is best for the public interest, and *individually* have independence enough, to express an opinion in opposition to a popular but designing leader. But, if they are ignorant or misinformed in this respect, the exercise of this right will be pernicious, if



their rulers are governed by any expression of the sentiments of such of them as see fit to exercise it ; and will be useless, if they are not at all influenced by it.

This right includes not only a right to assemble in order to petition for a removal of grievances, but also a right to assemble for the purpose of deliberating upon public measures. For, it cannot be supposed that they have a right to assemble for the purpose of petitioning only, when a short consultation may perhaps be sufficient to convince them, either that their is no grievance at all ; or, that it is unavoidable ; or, that it will remedy itself ; &c. &c. any of which will be sufficient to satisfy the people, that an application to congress on the subject, would be superfluous or useless.

The proper occasion for the exercise of this right would seem to be, where a law has a different operation from what congress intends, and is oppressive in any respect, either to the people in general ; or, to any particular class of them ; or, to the inhabitants of any particular state, district, territory, or section of the country. In any such case, those persons who suffer the inconvenience or grievance, may well send a petition or remonstrance to congress on the subject. But then it should be subscribed by those only who belong to the suffering class or district. For, the object of it must be to show to congress the true state of the case, and in this way to let congress perceive the impolicy of the law and the necessity of its repeal. But, if signed by petitioners or remonstrants, who have no interest in it, and who know nothing about its consequences from personal experience, it will be a mere attempt to impose upon congress. For, it is not the mere *opinions* of those who suffer no grievance, which are wanted, nor theories, however ingenious, but the results of experience.

For the same reason, when different classes of citizens suffer different grievances from a particular public measure, each class should remonstrate separately, and state only the real grievances which it suffers, itself, without noticing those which it supposes other classes to suffer. For, of these, those other classes are the best judges, who can petition for themselves if they think it expedient. Nether should their petitions or remonstrances be filled with lectures or disquisitions on specula-

tive points in political economy ; for, though such disquisitions may serve the purposes of making an ostentatious display of the talents or eloquence of the persons employed by the remonstrants to frame their representation or petition ; in any other view, they are useless and impertinent, as it is to be presumed, that the greater number of the members of congress are acquainted with the elements of that science, and are capable of applying those elements for themselves. If remonstrances or petitions were draughted subject to these restrictions, and contained those grievances only which the petitioners really felt, it cannot be doubted that they might be of service to the public interest ; because they would then give congress information which might be depended on, as to the operation of their laws, and congress might thus know the result of experience in regard to public measures, which they might previously have adopted with no better light, than such as they had borrowed from theory or analogy.

But such petitions or remonstrances should be carefully distinguished from one, which owes its origin to individuals, whose interests are concerned to procure the enactment or repeal of some particular law. For, these persons, if they happen to possess any considerable standing among the people, may very easily create a faction, by keeping their own private interests out of sight, and, at the same time calling assemblies and making great pretences of regard for the public interest, which they affect to consider to be deeply concerned. Such an occasion is greedily seized by aspiring young men to bring themselves into notice, and, if none are invited to attend the meeting as is frequently the case, but those who are '*favorable*' to the object of it, it is very probable that every '*patriotic*' and '*spirited*' resolution will be adopted '*unanimously* ;' and that many thoughtless spectators, who attend the meeting for the mere purpose of entertainment, from hearing a descant on one side of the subject only, will be brought to believe, almost any thing which the orators and leaders see fit to assert. In this way, a few selfish individuals, if possessing, singly, only a small share of influence in society, by uniting together, and then drawing in others, who are so simple as to believe, that they have no other aim than the public good,

may set on foot a faction, which may endanger the tranquillity of the whole Union.

A petition or remonstrance, deriving its origin from such a source, it is obvious, can be of no service to congress while legislating for the *general* interest of the community ; but, on the contrary, is a gross abuse.

Again : Suppose a law to be already enacted, which certain persons think will be detrimental to their interests ; still, if no detriment has already followed, the time to remonstrate has not arrived. Because, they ought to take for granted, that congress has weighed the matter and its consequences deliberately, before passing the law.

When a grievance has actually taken place, it would be very proper for the persons injured, to send a remonstrance, or petition, *stating facts*, to congress, with a request that they might have an opportunity to verify them *by testimony*. Such an opportunity, it would be very proper to afford the remonstrants ; but all argumentative matter should be regarded as superfluous. For, it is the business of the representatives and senators, to argue the question of general expediency, especially those, who come from the neighborhood where the remonstrants reside, or who are elected by them. But, if such senators or representatives dissent from them, and express themselves accordingly in the senate or house, the remonstrants have the regular course of redress, of choosing others. If however they cannot succeed in the attempt on account of the preponderance of another class of interests, congress will perceive at last, that the remonstrance is nothing more than the expression of a wish on the part of a minority, that their interests should supersede those of the majority ; it being presumed, however, that congress is acting constitutionally.

When grievances, which are stated in a remonstrance, are verified by testimony, it is to be presumed, that congress will provide a remedy for them, if it can be done without making a sacrifice of interests, which are of more importance.

Where a grievance affects a particular class of men only, it is absurd for those to subscribe the petition or remonstrance, who do not belong to the class ; or, if they do, are not sufferers by it. For example, if the grievance affects booksellers

alone, it is absurd for blacksmiths, tailors, shoemakers, &c. &c. to subscribe the petition ; because they must know that their interests are not affected, and if they subscribe it, it will be an attempt to practise a species of imposition on congress. It is on this account, that every one who subscribes a petition to congress, ought to add his trade or occupation, and if he does not, the name should be struck off.

In this way, the greater the number of remonstrants, the greater also would be the weight of the remonstrance, because it would then appear that each of them personally, felt a share of the grievance, which it was the object of the remonstrance to remove.

But, if the remonstrance is merely filled with abstractions, and plausible speculations, and 'eloquent,' 'spirited' and 'patriotic,' declamation, and subscribed by persons who do not mention their particular occupations, &c. it is odds that there is no real *public* grievance ; but the whole probably is a scheme to overawe congress, concerted by a few influential persons, who have some private ends in view, and have drawn in the simple and unwary to subscribe what they know nothing about, and have no interest in, unless in fact it is one adverse to the remonstrance.

An attempt of this kind, however, would seldom be attended with much success, if both houses of congress always had the necessary firmness and steadiness. But, in popular governments, where men are elected to office because they are popular, the principles of those of them, whose popularity has little better foundation than watching the vane of public opinion, will seldom hold out long against a turbulent and insolent expression of the will of those, who are supposed to be the people, but, who, in fact, are merely the restless, dissatisfied, ambitious and grasping part of them.

Where any public measure is adopted by congress, which any class of citizens, or portion or district of the country considers oppressive, the first question to be settled is, whether it is constitutional or not. This the supreme court of the United States is the only constitutional tribunal, having jurisdiction to determine. The mere opinions of the majority of any convention of individuals, assembled by their own authori-

ty only, are entitled to no weight or consideration in congress. For, they are not the constitutional advisers of congress. They are not recognized as acting in any official capacity, nor have they any jurisdiction as a court. It will be sufficient therefore, for such assemblies to deliver their *opinions* to congress, when asked. But, if congress give them any weight, they wrong those quiet citizens, who stay at home and confine their ingenuity to the management of their own affairs, confiding, that no other class of citizens will have any greater share of public influence than themselves ; but who, if they find that there is any advantage to be gained by forming conventions, and sending remonstrances to congress, will soon learn the lesson.

The next question is whether such measure is expedient ? This congress is exclusively to decide. Here too, the opinions of any conventions not legally called under the authority of the United States, or of any of the states, are entitled to no weight. For, if congress is to be governed by any such *opinions*, the convention with which they originate, in effect becomes *the congress*, and congress is thus deprived of the exercise of its own power and discretion. But in fact, a remonstrance so indecorous as to express opinions to congress, and point out the path in which it ought to tread, should be lightly regarded. Further ; if it comes from a majority of the people who belong to a class or district, whose interests are supposed to be peculiarly concerned, but who are in the minority in congress, it reflects great disgrace upon their representatives, as if they were unable to manage the affairs intrusted to them. Would it not be better then to send abler ones ? On the other hand, if such representatives have faithfully discharged their duty to their constituents in this respect, and still are unable to convince congress, is it not apparent that the weight of reason in the minds of a majority of the members, is unfavorable to their view of the subject ?

The choosing of delegates from different states in the union, to form a convention, with a view to induce congress to adopt any public measure, is a still greater abuse of the right of assembling, reserved to the people in the constitution. The organization of any such body of men, by choosing a president and

secretary, &c. and any high-toned resolves, &c. which they might adopt, would tend to excite mistrust, suspicion and alarm. What would they have? For, either they are the majority, in which case their conduct is absurd; because, they may remove from office those representatives who do not act agreeably to their wishes; or, they are the minority, in which case by organizing themselves, they expect to gain some advantage of influence, which will turn the scale in their favor against the will of a majority of the people. But how is this to be done? Do they mean to extort from congress the adoption of any public measure, which to the minds of the members does not seem expedient? Do they mean to overawe by their boldness, the representatives of the people whom they are unable to convince by their arguments, when urged by their constitutional representatives in congress? But, if the members of congress, under the influence of some undefinable apprehension, should comply with the wishes of such convention, and adopt any measure not approved of by the majority of the people, they would at once violate their own consciences, and commit a breach of trust against their constituents.

If such convention should send an address to congress, containing argumentative matter to induce congress to come into their views, it would be equally impertinent and improperly directed. Such addresses ought to be made to the people. Let the people be once set right in their opinions, and there is no fear but that proper legislation will soon follow.

It is matter of regret, that individuals of respectability should ever be forward to take an active part in proceedings of this kind, which if coolly considered are certainly unwarrantable and inexpedient, because they tend to lessen the confidence of the people in their constitutional rulers. Is not the government democratic enough already? But must its deliberations be annoyed by addresses or lucubrations from conventions, originating in any thing but what they profess to originate in; perhaps the disappointed ambition of an unsuccessful candidate for office, who has no other way to attract notice, or to gain political influence and importance; perhaps in sordid interest acting through the medium of patriotism and under pretence of a disinterested regard for the welfare and prosperi-

ty of the country. Certainly such abilities might be more profitably employed in flashing imaginary powder in the daily journals, or garnishing the dull prosings of a periodical review.

It is true, there is no reason to apprehend, that men of respectability, will personally do any thing wrong. But they seem not to consider, that many rash and inconsiderate persons, seeing how far men of character are willing to venture, and having a desire to attract observation by proceeding to extremities, will not hesitate to attempt measures, that never would have been contemplated by men of sense and principle, and which these rash men would never have thought of themselves, but for the encouragement which they had received from the previous countenance and co-operation of their betters. For, it is a common misfortune, to which intelligent, influential, and *wise* men are exposed, who associate in any enterprise, with the rash, ignorant, or profligate, if wisdom were not excluded by the very fact, that they are always held responsible for, and usually considered the authors of every act and measure adopted by such attendants, followers or companions, however outrageous and absurd in its intentions and consequences, and although such acts or measures may have been adopted not only without the concurrence, but against the express will of such men of intelligence. Why do not these latter ask themselves then, whether it is right to call conventions of the people, and declare to them, that the execution of unconstitutional measures may be resisted by force; and then express to them an opinion, that some particular public measure is unconstitutional, when the constitution has provided a regular and unexceptionable tribunal for the final decision of all such questions, and the jurisdiction of that tribunal has been formally and expressly acknowledged by all the states, by the act of adopting the constitution? For, what can naturally be expected to follow next, but the raising of armies, the secession of one or more of the states from the union, and the other consequences which usually attend insurrections and revolutions; viz. civil war and foreign alliances, and the subjugation of part of the country, either to the rest, or to strangers? Is it possible, that men of discernment and fair intentions, can be willing to haz-

ard such consequences on matters of speculation, or where the question of right and expediency is uncertain at best, on an opinion which the *majority of the people* think erroneous, and which opinion is therefore so far to be presumed correct? What judgment must then be formed of those men of influence in society, who, under whatever pretext of patriotism,—under whatever show of disinterestedness, have caused an exasperation and excitement in the minds of the people, which possibly may only terminate in the dissolution of the union, and the deluging of their country with the blood of its citizens?

In some cases; however, the exercise of the right of assembling to discuss public measures, is of advantage to the people, if there are no extensive combinations formed among them for the purpose of effecting some particular object, regardless whether the measures are right or wrong. Because they have an opportunity, which is sometimes improved, of receiving useful information, from the oral communications of men of learning and experience. But, for the most part when such assemblies are called on the most unexceptionable business, they serve chiefly as occasions for haranguing the people, and exciting their passions by loud and florid declamation, delivered with the regulated and precise gesture of the academy, and with all the generous and glowing ardor of holiday patriotism. This however is a great improvement on the affrays, tumults, riots and public disturbances, which in many countries invariably attend numerous and irregular assemblies of the people. For, in this country, it is generally found, that on such occasions, the people who are assembled, instead of disgracing themselves by tearing down gaols, or other public buildings, and forming turbulent mobs, having been gratified by prolix and complimentary addresses, on their patriotism, intelligence, morality, &c. &c. become comparatively mild and good humored, and vent their spleen or independence, in patriotic, spirited and vain-glorious resolves. The meeting is then dissolved; the citizens retire filled with self-applause, and glory, and deafened and wearied; the orators are complimented in the next newspaper, in which the respectability and number of those who attended the meeting, are greatly exaggerated, and the whole subsides in an unruffled calm.



In connexion with this subject, it may not be amiss to make a few observations upon the restrictions, which the constitution of the United States imposes upon the powers of the states. These restrictions may be found in Article I, Sec. 10. It has been mentioned already, *ante* p. 158, that no state, under the constitution, has any right 'to enter into any treaty, alliance or confederation,' &c. This prohibition extends as well to an alliance, &c. with another of the United States, as to one with a foreign state. If alliances were formed between two or more states to which the rest were not parties, it would not only lead to jealousies and animosities between the confederate and preferred states, but would be wholly inconsistent with that clause in the constitution, which declares, 'that the citizens of each state, shall be entitled to all privileges and immunities of citizens in the several states.' On the other hand, if the several states were at liberty to form alliances, &c. with foreign powers, it would introduce foreign influence into the Union, and would supplant the predominant interest which each state is supposed to take in the general welfare of the United States, by a greater interest in the affairs of some ally, by which it might be protected at any time, if it saw fit to oppose itself to the measures of the United States.

By the same section, 'no state shall grant letters of marque and reprisal.' The reason of this prohibition is, that this grant is an exercise of sovereign power, which the states do not possess. Congress alone has the power of declaring war. But if any state might grant letters of marque and reprisal, it would have the power of involving the country in a foreign war at any moment.

The States are also prohibited from coining money. This also is a sovereign power, and confided to congress alone, by the constitution of the United States. If each state had the power of coining money, it would be impossible to keep the specie currency of the Union, of the same standard, which would be a great embarrassment to commercial intercourse, and a source of various frauds. It is, without doubt, a great disadvantage to all fair dealers, in domestic manufactures, that there is not a national standard for gold and silver plate, established by law in this country, as it is in others.

No state can constitutionally emit bills of credit, or make any thing but gold and silver a lawful tender in payment of debts. There is no legal process by which a state can be compelled to redeem its bills; there is great danger, therefore, if any were issued, that they would soon depreciate; this, as is usual in such cases, would give rise to many frauds and inconveniencies upon the unfortunate holders.

No state can constitutionally pass any bill of attainder. No country can be considered free, and consequently no citizen can ever be safe, where the legislature is permitted to exercise the iniquitous power of declaring a man guilty of a crime, and putting him to death without a lawful trial. The same reason will extend in a proportionate degree to the enactment of *ex post facto* laws generally, which the states are prohibited from passing by the constitution. This prohibition, however, extends to penal statutes only. See 3 Dal. 386.

And therefore every law which makes an action done before the framing of the law, and which was innocent when done, criminal, and punishes such action, is an *ex post facto* law, and consequently unconstitutional. So, if it aggravates a crime, or makes it greater than it was when committed. So, if it changes the punishment, and inflicts a greater punishment than the law annexed to the crime when it was committed. So, if it alters the legal rules of evidence, and receives any testimony less than, or different from, what the law required when the offence was committed. See *ibid*.

No state can constitutionally pass a law, which impairs the obligation of contracts. Any law will be considered as impairing the obligation of a contract, which substitutes a mode of performance different in any respect, from what was agreed upon between the parties. As, if it authorized the discharge of the contract by a smaller sum than the contract contains; or, if it substitutes a different time when it is to be paid, or, introduces any new conditions, or dispenses with any. It is apparent, that any such substitution is virtually a cancelling of the original contract which the parties have made, and making another for them. This can never be done without their consent. See 8 Wheat. 1. 3 Wash. 313. See 1 Gal. 338. 12 Wheat. 370. See 4 Wheat. 518, 122. See also the case of the Yazoo lands, 6 Cranch. 87.



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The states are also forbidden to keep on foot any armed force in time of peace, without the consent of congress. This also is a sovereign power, which expediency requires should be exercised by the United States alone. For, if one state keeps a standing army of disciplined troops, the other state will sooner or later be compelled to do the same, the ultimate tendency of which, it is not difficult to perceive. The intention of the framers of the constitution, without doubt, was to avoid all occasions, not only of actual collision between the states, but also of jealousies and distrusts. Nor did it escape their observation, that a state prepared with a standing army, would be much less likely to yield a ready obedience to the laws of the United States, than one having nothing to rely upon, in case of resistance, but the transient and undisciplined ardor of citizen soldiers.

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**PART II.**

**OF SOME PARTICULAR RIGHTS.**

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## PART II.

### OF SOME PARTICULAR RIGHTS.

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#### CHAPTER I.

##### *Of the right of suffrage and of elections.*

IN governments, where the power is retained in the hands of the people, and is exercised in their name by such delegates as they see fit to appoint from time to time for that purpose, the right to take a part in such appointment or delegation, belongs to every constituent member of the social compact, upon which the government is grounded. This right, in whatever manner it may be exercised, is the right of suffrage. It also comprehends within it, the right which each member has of voting upon all subjects, in relation to which the people see fit to exercise their political power personally, and not through the medium of representatives or delegates.

The simplest form of a popular government, is that of a pure democracy, where the people meet together in primary assemblies and make such laws and regulations for the conduct of the members of the society, as they see fit. In the formation of any such government, a difficulty would meet them at the outset. For, as soon as any measure was proposed, it would immediately be found that some would be in favor of it, while others would be equally opposed to it. In this case, one party or the other must recede, or the society would be dissolved. Because each individual would think himself justified in saying that he did not intend, by joining the society, to have his feelings or interests made a sacrifice to those of others; that



therefore nothing should be done without his concurrence, or he would secede. This, it is obvious, he would have a perfect right to do, until some regulation on this subject had been *unanimously* agreed upon by all the members. It would soon appear, therefore, since perfect unanimity could seldom be found among them, that the society would gradually melt away by the withdrawing of discontented individuals, unless some substitute for it were agreed upon by the society. They would therefore very naturally adopt the principle of mutual concession, and agree that the will of the greater number should bind the whole society, in the same manner as if they had all been unanimous. Not that this is always to be considered as conclusive proof, that the measure approved of by the majority, is really the most wise and expedient; for, perfect unanimity itself would afford no such proof. But as, according to the democratic theory, all the associates or members of society are equal in wisdom and virtue, as well as in their rights, the probability that a measure is wise and expedient, is in direct proportion to the numbers who vote in favor of it, and *vice versa*. It is true, only a few out of the whole number, really possess wisdom, but those few are perhaps more likely to be found in the majority of the whole, than in the minority. But, however this may be, experience teaches us, that every man supposes himself to have his share, and whether he have or have not, at all events he has a will, and this he will never yield to the control of another spontaneously, unless he finds it for his interest to do so.

It is very clear, therefore, that though it may be perfectly *natural*, in the familiar use of the term, that the members of a society should agree, at the first formation of it, that the express will or vote of the greater number, should always have the effect of perpetual unanimity, yet this effect has no other foundation whatever, in natural right. For, it is believed, a case can neither be put nor imagined, where, independently of a previous agreement, that the vote of the majority shall prevail, the greater number have any such right to control the whole society, that the smaller number, or minority, are under a moral obligation to submit to their decision. On the contrary, the right of self-preservation, as well in the smaller number as in the larger,

must always be paramount, in the absence of express agreement, to any such pretended right in others, whether more or less numerous. Each individual has a right to place his own safety on the exercise of his own judgment alone. The man at the helm has as much right to steer a ship on Scylla, if he thinks self-preservation demands it, as all the rest of the crew have to compel him, if they can, to turn towards Charybdis. If therefore necessity itself acknowledges no such paramount right in the majority, it is clear that it can have no other just foundation, than that of convention or agreement.

The prevalence of the democratic notion, that the majority have a natural right to decide and govern the whole, has probably prevented an examination of the question, whether a better rule might not be adopted in public assemblies than the usual one, that the vote of a mere majority shall decide in all cases. That there are many inconveniences resulting from the adoption of it, is very clear; and that these inconveniences may not be obviated by a modification or qualification of this rule, is not easily demonstrable.

The inconveniences which result from the adoption of the rule, that a majority, however small, and though consisting of a single individual, more than the number of the minority, shall be sufficient to determine the rejection or adoption of all public measures, however important, are the following, viz.

1. The casual absence of one or two members, may enable the minority to pass laws or adopt other public measures, entirely contrary to the will of the majority.

2. If there is merely the difference of one between the majority and the minority, any single individual has it in his power to control the whole legislative body of which he is a member, and may turn the scale in all cases when the whole number is thus divided, at his caprice or discretion. Here the individual, having the least reputation to preserve, the least regard for principle; and who is most susceptible of corrupt influences, will be most apt to gain the ascendancy. For, men of character and principle will stand firm, out of a regard to duty and consistency. But unprincipled men will sell them-

selves as well as their country, and so favorable a conjuncture will enable them to command the highest price.

3. But, upon the improbable supposition, that there is not a single unprincipled individual in the legislative assembly, it follows, that the person possessing the most feeble intellect, and who consequently is the most wavering and unsettled, will immediately become of the greatest influence and importance. All the rest may be firm from a settled conviction of the justness of their views of the subject. But, this individual having less knowledge and discernment, will act from motives of ostentation and vain glory.

4. But, if they are all men of sense and integrity, still it is found by experience, that a public measure of any considerable importance, which is adopted by the vote of a small majority, is of doubtful expediency, and seldom attended with a good result. The reason is, not only because the minority is so numerous, that it may be considered an equal question, whether in reality the adoption of the measure is wise or not; but, because the people immediately become divided into factions in relation to the subject. The question, though settled for that time, will be brought up again and again. The public mind is kept in a state of excitement and exasperation in respect to it. Intrigue and corruption are resorted to. The public policy in relation to the great interests of the country, continue uncertain and wavering, because laws are first enacted, then modified, then repealed, then re-enacted with qualifications, &c. &c. The parties prevail alternately, but never without great heat, strife and animosity, and if the question is ever finally settled, it is through the influence of any considerations, rather than those of justice, wisdom or public expediency.

Many of these inconveniences would be avoided by requiring the sanction of a larger proportion, than a mere majority of a quorum. Let a decisive majority consisting of two thirds of a quorum, always be necessary to authorize a change in the existing state of public affairs, by the adoption of new measures, and there would be an end to most of the evils just referred to. For, unless the expediency of a law or other public measure, were very apparent, there would be no probability,

that two thirds of the legislature would be in favor of its enactment or adoption ; and, if so, the opposition would have but little prospect of success in any attempts, which they might make to procure its repeal. Thus public policy would be less subject to change. For, as it would require the concurrence of two thirds to enact a law, it would also require the concurrence of two thirds to repeal it. This would produce a proper caution in the enactment of laws ; for, though a fraction over one third of the quorum, would be sufficient to prevent the enactment of a law, a majority of twice that number would be necessary to procure any modification of it. This rule is wisely adopted in relation to amendments of the constitution, where frequent changes would be absolutely intolerable ; and it is believed, great advantages would immediately be perceived, if it were extended to the acts of the federal and state legislatures.

In the election of rulers and other public officers, different considerations will necessarily vary the conclusion. Here, a mere majority of voices ought to be allowed to prevail ; because if two thirds were required, it would always be in the power of a numerous minority to prevent the choice of any other candidate than their own. A plurality of votes, where there are more candidates than two, ought not to be sufficient to constitute a choice ; because, in this way, there is a possibility that the individual most odious to a majority of the voters, may prevail in the election.

In a republic, or any form of government more complicated than a simple democracy, of which a town meeting for the making of by-laws may be considered a fair example, all the voice or influence, which the people have in the regulation of public affairs, is exercised through the medium of senators, delegates, or representatives, whom they choose to act for them in the various capacities established by their constitution, or frame of government. If they would make the most advantage of their right in this respect, it is obvious that they should take care to select men of integrity, and well qualified to discharge the duties of the offices which they are expected to fill. For, since the people have a right to vote for any candidates whatever, who have the necessary legal qualifications, the advantage of the right of suffrage, depends upon the op-

portunities, which it affords the citizens, of excluding all who are incapable or unworthy, from stations of responsibility, and placing in them those only whom they esteem most deserving of their respect and confidence. Yet, in practice, it is found, that these two great objects of a democratic form of government, are but partially obtained, owing to the manner in which the people usually exercise their rights in this respect. The reason, why the people so frequently fail of obtaining full success in relation to these objects, will be best exhibited in answers to the two questions, Why are not the best men always chosen ? and, Why are not unsuitable men always excluded ?

In answer to these questions, it might be thought captious, to remark, that the people are not qualified to determine who are the most suitable candidates for public offices ; for, though popular applause, or censure, is no decisive proof either of merit or of the want of it, yet there is usually some foundation for popular opinions. But, supposing the people to possess an unerring judgment of the merits of candidates, they must necessarily be deprived of the benefit of their superior discernment, by a certain course of measures, which frequently is adopted by influential persons, previous to the elections, and by which they attempt to secure the choice of the candidates whom they support.

Under a government of laws, it is true, that it is a matter of no great consequence, by whom the laws are executed, the sole object of government being to provide that they shall be properly enforced. Among these laws, however, must of course, be included every rule or regulation, adopted for the general defence and protection. Now to the great body of the people, being neither office seekers, nor office holders, and consequently having no other personal interest in the government, than what concerns their own safety, and the regular administration of the laws, it is a matter of no real consequence, whether the government is administered by A. or B., provided only that the public peace, as well as private tranquillity, is preserved, and the laws are enacted with wisdom, and executed with prudence. But, in choosing persons for public offices, the people, according to the true theory of a republican form of government, should be guided by the characters of the re-

spective candidates ; and should elect those whom they consider to possess the best abilities, and the most industry, fidelity, and integrity. For, in the *beau ideal* of a republic, there are no parties or factions. Each individual aims at the general good, though not to the total exclusion or neglect of his own private interests. And therefore, though he will not be disinterested enough to sacrifice his private property to the public good ; yet, if he is an office seeker or office holder, he will be so true a patriot, as immediately to relinquish his office in favor of some more able aspirant. Patriotism of a higher order than this, will be looked for in vain, in the present generation, any where but in eulogiums, theatrical exhibitions, obituary notices, or anniversary orations ; and such as is here described, it is to be feared, will seldom be found, except in Utopia, or the Island of Formosa.

Experience shows, that there are always two or more parties or factions in a community, the well disposed part of each of which, equally seek the best interests of the whole. But, in all such parties or factions, those who make a pretence of the public good to bring about their own private views and selfish purposes, are far more zealous and forward, than those who aim only at the general good. By a show of greater zeal, they expect to be regarded as having a more ardent patriotism ; and among superficial observers, the single-hearted, and the inexperienced, they commonly obtain their aim. And though true patriotism, such as existed among noble and disinterested men of former days, who desired no other reward than an approving conscience, and the applause of such as are able to distinguish and justly value true merit, is a stronger motive than the sordid considerations of profit, office, or station ; yet this quality is so infrequent, and office seekers so often assume the mask of it, while playing their parts before the public, that some hypocondriacs and misanthropes deny that there is any such thing as political integrity in any of those, who hold themselves up as candidates for public office. Yet it cannot be doubted, that there really exists such a virtue as disinterested patriotism, and that it may be distinguished from hypocrisy and imposture, by men of information and discernment.

Imagine a young man of good education, availing himself of every opportunity to bring himself before the public, by making speeches at conventions or assemblies of the people, and taking a conspicuous stand in relation to any of those subjects which are made use of by turbulent and ambitious men to keep the public mind in a state of ferment ; that, under a pretext of some crying grievance, whether real or imaginary, he proposes to insult or disturb congress, or the state legislature, by insolent and violent resolutions ; that, though he may have outgrown the puerile desire of displaying a talent for declamation, which perhaps has gained him an academical prize, yet has not acquired sense enough to be ashamed to take up two or three hours of the time of a public assembly, in rehearsing those superficial views, those crude speculations, which usually occur to young men at a certain age ; but which, for the most part, they have too much diffidence to express in public, until the same advance in years which gives them confidence, brings also juster views, and a more correct estimate of their own abilities ; suppose him to have acquired sufficient knowledge of mankind to perceive, that in popular assemblies, the good opinion of the wise, being few in number, is of but little consequence, provided only, that the more numerous body, however giddy, rash, and inconsiderate, is prepossessed in his favor ; since the vote of any of the latter has the same weight as that of any of the former ; suppose him to be in the constant practice of the arts, by which an ill-disposed multitude are usually governed ; that he leads them to such measures as suits his purpose, by exciting their animosity against their political opponents, and inspiring in them a confidence of their impunity, whatever they may do ; that he boldly affirms among them that every one, who dissents from him is an aristocrat, and an enemy to the people's rights ; that among the ignorant and profligate, he calls the restraints of justice, religion and good order, priestcraft, superstition, and fanaticism ; that he holds out to the selfish, necessitous, and sordid, that they will probably gain an office by joining in his measures ; and lastly sets at defiance those persons of integrity, who, he is conscious, discern his true character, and asperses their reputations beforehand, both to disable them from exposing his

artifices, and to deter others from opposing his schemes, &c. &c. &c. Can any one in his senses ascribe these arts to patriotism? Is there any one, however unprincipled, who will be so mere a simpleton as to support his measures without an expectation of the share of the public spoil; or to lend his influence in raising him to public office, without a hope, perhaps an express promise, of some inferior office in return?

But, how may that true patriotism, which is ready to sacrifice interests merely selfish, for the public good, be distinguished from the counterfeit, which, under pretence of seeking the public good, regards its own exclusively, and to them, however inconsiderably concerned, will sacrifice all other considerations,—the tranquillity, the honor, and the safety of the country.

True patriotism comes forward when real dangers threaten the country, takes the lead in personal sacrifices, and risks not only ease, but health and safety, to protect it and insure its welfare. The test of it is self denial, or a disregard of personal interests where the general welfare is concerned.

False patriotism is most conspicuous where there is no real danger. The false patriot magnifies every public grievance, in order that his assistance may be called for to furnish a remedy. In this way he expects to gain power and distinction by instilling a belief that a crisis is at hand, where his superior abilities may be required. Some of the characteristic traits of false patriotism are, speeches and harangues, never ending but to begin again; inflammatory resolutions proposed to the people for adoption; abuse of the privilege of speech and of the freedom of the press, and of the right which the people have to assemble, by convoking them without any necessity or useful occasion. Further; the false patriot makes magnificent pretences of doing, what the true patriot does without any pretence at all; and it is not unusual to find that the false pretences of the former, obtain a credit with the multitude which the actual performances of the latter do not always receive. The principal aims of the false patriot are office and emolument; when these are obtained it languishes until there is a danger of a change in the administration, when it revives and proclaims the danger to which the country is exposed.



There is a third class of persons, who make no pretensions to patriotism true or false, but who think it a comfortable way of living to secure a public office, the duties of which are easy, and will afford them greater profit than the same quantity of labor in an independent calling, and at the same time exempt them from that anxiety, which usually harasses all whose living depends on their own exertions. It is a characteristic of many of this class, that they may easily be brought over to join any party, which, there is a probability, will gain the ascendancy in political affairs, by any reasonable prospect of personal benefit. Such persons seem to be formed by nature, like parasitical plants, to depend and hang upon others, whom they flatter, and by whose course their own conduct is wholly guided. They are the flatterers of men of influence so long as they retain it; but when that influence appears to be on the decline, it is their apparently sincere change of opinion, which frequently gives the greater weight to the opposite scale of the political balance. It is one of the miseries attending popular governments where the people are divided into two parties or factions, that the preponderance of one or the other, should so often depend upon this third class.

That government alone can with propriety be styled free, where the political powers bestowed by it on their rulers, are limited to the necessary emergencies of society; i. e. to its safety and good order; and where the people have a right to select whom they please for their rulers, at periods recurring with sufficient frequency to enable them to remove all those public officers, whose duties are not performed in a satisfactory manner, and to elect others in their room. But though the powers of the rulers, as well as their term of office, are limited, and though the laws of the country may be the most mild and indulgent, still, if the people have not the uncontrolled exercise of their power and right of electing their own rulers, they can hardly be considered as living under a free government; since in that case they do not govern themselves, but are governed by that power, which virtually appoints their rulers by controlling their elections. For, if they cannot remove their rulers from office and elect others in their room, then the rulers will not be accountable to them. Thus, if the members of a state

legislature were appointed by a foreign power, however just and equal the laws might be, the people would not live under a free government ; because the rulers would be responsible, not to the people who had no hand in their appointment, but to the foreign power which placed them in office. Neither in strictness could the people be considered as free, if a foreign power had the right of nominating the rulers, and the people had merely the right to adopt or reject such nomination ; since they must be very much at the mercy of the nominating power. Nor does it make any material difference, whether the nomination is made by a superior foreign power, or, by a domestic superior power ; or, is exercised by a species of political legerdemain, by persons in whom no such superiority is acknowledged, in a manner so subtle as to escape observation, though practised in the presence and before the eyes of the people. For, if the people are deprived of the free exercise of their right of suffrage, the effect is still the same, whether it is done by force or by fraud, by superior power, or by mere juggle. Because, at best, they merely elect those who are nominated for them by others ; in which case they are no more free than those, who live under rulers whom others appoint without the ceremony of an election, which in any such case is as humiliating and mortifying, as it is unnecessary and tantalizing. An imaginary case may serve for illustration. Let it be supposed, that in a district where the people are divided into two parties, it has become necessary to elect a public officer ; that a preliminary meeting is thought necessary by the major party in order to select a candidate ; that in this party there is an individual of great political influence, who has usually acted as a leader, who is desirous that some friend or kinsman should be elected to the office ; that this individual is a man of fair character, and has an average stock of abilities and acquirements. Under such circumstances, if this influential person has intimated his wishes on the subject, it is next to impossible that they should not be gratified ; though there may be twenty individuals in his own party, who are better qualified for the office in every respect. For, this influential person will be consulted on all subjects of importance previous to the election ; and, by means of his satellites and dependants, will know precisely at

what time, and on what occasion, to bring forward the favored candidate to rehearse a speech before the public. A meeting being then called, agreeably to previous arrangement, and such persons being put upon the nominating committee, as are previously ascertained to be favorable to the candidate's pretensions, he will of course be nominated by them unanimously, and it is probable the nomination will be received with the apparent approbation of all present. No further step will then be necessary than to insert the doings of the meeting in the next newspaper, with a notice of the nomination, and an account of the promising talents of the candidate, which, however, experiment has shewn, the people think ought not be written by any friend nearer than a brother. His election to office will then follow of course, though each voter of the party to which he belongs, is perfectly satisfied in his own mind, that there are many individuals in every respect better qualified for the office. They will not oppose the election of this candidate, however, because in every stage of the process, from the first preliminary meeting to the day of election, they feel that they shall be in a minority, if they make any such attempt; besides, if they vote for any other candidate than the one, nominated for them by the leaders of the parties to which they belong, they will break up the party, and then their opponents will gain the election; or, at any rate, their votes for persons whom they believe to be better qualified, will be merely thrown away.

To persons, therefore, who belong to parties, there is no other freedom of election, than, either to vote for a candidate nominated for them by the influential men of the party, or, to vote for a candidate nominated by the opposite party, or, to cast their vote for third persons, or, not to vote at all.

To vote for persons nominated by the influential men of a party, in most cases, differs but little from giving those influential persons the power of appointment. The other alternatives need no comment. What then is to be done? The embarrassment lies here, that the people suffer certain influential persons to nominate candidates for them, without being perhaps conscious of it at the time, and suppose that those candidates are the choice of a majority of the party, when it may be, that, with the exception of the leaders of the party, and a few re-

tainers, every individual in the party may prefer other candidates. How does this happen? It happens because the people are deprived of their power of nomination, and suffer the nomination of the influential men, made through the medium of a nominating committee, to go forth to the public as the voice of the majority of the party. It is undoubtedly to considerations of this kind, in part, that the right of suffrage, as at present exercised, has become of little value or estimation among discerning men, who have no desire to lead others, and disdain to be led by them. This is apparent from the little interest, which seems to be taken in elections, demonstrated by the small number of votes given in, when compared with the whole number of qualified voters.

The single remedy for this evil, and which would immediately restore the right of suffrage to its proper value and estimation, is for every voter to throw off the badges of party, which are nothing more than the livery, by which the leaders of parties distinguish their followers from all others. They should also have the virtue and independence, to vote according to the dictates of their consciences, and with a view to the general interest, which is invariably sacrificed by a party to its own interest, whenever they come into competition. For, there is no one so simple as to imagine, that a party will not prefer the election of an individual pledged to support them, however incapable and however worthless, to the ablest and most honest man that can be found, who will give no such pledge. What is this but a sacrifice of the general good of the whole in order to further the interests of a part, or rather the private views of the leaders of a faction?

Let the people then throw off the trammels of party, and take care to secure to themselves *the exercise of the right of nominating the candidates for public offices*. To intrust it to a nominating committee, though apparently chosen by the people is in fact to throw it away; for, if the committee are to nominate the candidates to be voted for by the people, why not permit them to appoint the rulers at once, and thus save the formality and trouble of an election, when they amount to the same thing in substance?

This evil might be obviated in practice, if the people at a preliminary meeting, held at a convenient time before the days of election, would adopt some such course as the following:—

1. Let them choose a moderator. 2. Let them choose a committee to assort and count votes for that meeting. 3. Let them bring in their votes in writing for candidates for nomination, which being sorted and counted, the most popular candidates would presently appear. 4. If any candidate had more than one half of all the votes, it would be unnecessary to proceed further. But, if there were many candidates, and neither of them had a majority of the whole, let a second ballot take place, to decide between the two candidates having the highest number at the preceding ballot, and casting out all votes given in for any others. The candidate having the highest number at the second balloting, would thus be the candidate nominated by the people or by the party, according to circumstances, and each individual would act without being controlled by the indirect dictation of others. After the vote was declared, those speakers who thought themselves qualified to instruct the people, might profitably employ the rest of the time in useful discourses; but it would be a very useful regulation to consider all rhetorical declamation as out of order, until the regular business of the evening had been transacted; so that no one might feel obliged to remain to hear it.

This course of proceeding would generally be distasteful to the leaders of the party, because their control over the proceedings of the people would be very much lessened, and their influence would be reduced to just what it ought to be, that is, the influence of superior talents, information and integrity, so far as they possessed these qualities. But the influence of intrigue and secret corruption would be almost wholly abolished.

In answer to the second question, why are not unsuitable persons always excluded from office? It may be answered, in relation to those offices, which are filled by popular elections, that the people seldom, if ever, elect a man to an office for which they know him to be unfit: if therefore such an individual is chosen by the people, it must be the result of mistake or misinformation. Party prejudice, it is true, often turns the scale against superior merit, but the people will not, with their eyes open, disgrace themselves by choosing persons known to be dishonest or incapable. The bad policy of such a

choice is apparent ; because it would take away from the citizens one of the inducements to correct conduct, *i. e. the prospect of rising in the public estimation by a uniform course of good behaviour*, by showing, that the people attach no importance to the good or bad character of the candidates. But in fact, it is for the interest of the people, that all public officers should not only be capable of properly discharging their duties ; but should be men of such integrity, that no inducements which can be offered, will be able to induce them to betray the public confidence. For this purpose, it is absolutely necessary, that the officer's integrity should be grounded on religious principle, not religious profession merely, for this is a mere counterfeit ; nor upon honor, or pride, or reputation, or sense of character ; for, all of these last have been found to fail, when exposed to the ordeal of supposed secrecy, impunity, the hope of office, &c. &c., or, to personal danger or loss of office, &c. &c.

On the other hand, when unsuitable persons are appointed to offices by men in power, it may arise from a great variety of causes. It may be the result of erroneous impressions, made by recommendations given without proper caution or inquiry. It may also be, by way of grateful acknowledgment to the person so appointed, for services, of whatever nature, previously rendered by him to the person appointing. Where the tenure of the office depends upon the pleasure of the person making the appointment, and a man of unsuitable character is appointed, with a knowledge of his character, it may also be, because a person without reputation or principle, is much more obsequious to the commands of his superior, who can remove him at pleasure, and thus deprive him of his temporary standing with the people, and perhaps of his means of support, than a man of religious principles and respectable character, of whom any dishonorable compliance would be vainly required ; because, if he were removed, he would be sustained by conscious rectitude, as well as the certainty that his character would support him, whether in or out of office.

This last suggestion, it is believed, furnishes the true reason, why men, well known to be incapable of a proper discharge of duty, are sometimes appointed to office. It is because services are expected of them, of a very different nature from their reg-

ular official duties, which they can, and perhaps they alone are known to be willing to perform. . The insufficient discharge of their official duties is therefore winked at.

Notwithstanding the popular theory of a democracy or a republican form of government, therefore, it is quite apparent, that, under the right of electing whom they please for their public rulers, according to the common practice, there is no insurmountable obstacle to prevent men of bad principles and bad character, and very limited talents and acquirements from attaining to the highest public stations. It is equally clear, that the people are deprived of the services of every man of experience and integrity, whose principles will not permit him to unite with any of the parties or factions which, under pretence of zeal for the public good, are constantly disturbing the peace of society, by their contests for power, office and emolument. For, the objects of a party or faction, from its nature must be merely selfish. The first class of leaders seek the highest offices for themselves. The second class, or parasites, endeavor to procure the election of the first, in order that they, the parasites, may be appointed by them, to such offices as the laws place under their control. The rest of the party are merely retainers or followers. The public then lose the services of all honest men, who refuse to join any party. Because no party or faction, will ever elect to office any individual, whose refusal to act under them, is an indirect reflection upon their political conduct.

If, however, the people have the independence and good sense, to secure to themselves the exercise of the right of *nominating candidates*, in the manner already suggested, no persons, whatever their wealth, standing or office, will be able to exert any improper influence over the voters; the office of parasite will cease, becoming equally ineffectual and contemptible, and the people will become, in fact, what perhaps they now suppose themselves to be, the real constituents of public officers.

But unfortunately for the good of society, it too often happens, that, while the ignorant, incapable, selfish and dishonest unite in the support of a candidate possessing a similar character, from the influence of sympathy, as well as from the envy which they feel towards men of principle and integrity—the honest and well meaning voters, from a belief, that superior

merit will undoubtedly receive the preference at popular elections, do not feel the necessity of exerting themselves at all on such occasions. The consequence is, that the less deserving candidate frequently prevails; because in proportion to his want of merit, the more gross, shameless and unprincipled are the measures, which are resorted to, to secure his election.

In connexion with the present subject, it may not be amiss to make a few remarks in relation to the right, which is frequently claimed by the voters of districts, to give particular instructions to their representatives in the legislature.

It can hardly escape the observation of any reflecting person, that there are certain hackneyed propositions, which are continually made use of by public speakers and writers, by whom they are assumed as incontrovertible principles or axioms, behind which it is unnecessary to look, and yet which, on examination, are found to be wholly groundless and futile. These erroneous opinions are continued by the obsequious court which persons, who know better, frequently pay to popular prejudices, for the sake of ingratiating themselves with the people, or, from an apprehension of being denounced by demagogues, if they should attempt to set up any doctrine at variance with such opinions.

One of these is the pretended natural right, which, it is said, the majority in any society have to control the minority, which, when analysed, is found to be grounded on consent, agreement or arrangement, or otherwise has no better foundation, than the mere brutal right of the strongest. Another of these pretended rights, is that, which the voters in particular districts claim, of giving instructions to their respective representatives in the legislature, which has no rational foundation at all. This is easily demonstrable from the following considerations.

A representative, from whatever part of a state he may be chosen, is the representative of the state, and not the agent of the town or district from which he comes, though as a convenient mode of designating him, he is frequently called the representative from such or such a town or district. It follows, of course, that such town or district has no greater right to instruct him, than any other part of the state. For, the mode of



election by districts, is merely a mode of apportioning the representation.

It is not made the duty of a representative to obey any such instructions. It is true, he has a right to consult whom he pleases, and, for the same reason, any one may advise him, who thinks fit. But, as he is chosen on account of his own personal qualities, his talents and experience, it would be absurd to suppose, that he is not at liberty to follow the dictates of his own judgment. On the contrary, the whole community have a right to the exercise of his own understanding, unbiassed by the limited and perhaps selfish views of the comparatively small number of his immediate constituents. Further, the exercise of such rights by a majority of such constituents, seems wholly inconsistent with the rights of the minority; because it appears to be the meaning of the social compact, by which the citizens agree to be bound to obey such rulers, as the majority shall choose, that those rulers shall be left to the exercise of their own judgment. For the minority are bound by the compact to obey the rulers, and not to obey the majority; but, if the representatives are bound to obey the instructions of the majority, then the minority become servants to the caprice of the majority.

It is one of the advantages of a legislative assembly, that the members confer together, and, by a comparison of their respective sentiments, and, by an interchange of such intelligence as each possesses, they become better informed, and consequently better able to legislate on all subjects brought before them. But, if a representative is bound to follow the instructions of his immediate constituents, who are but a small body of men in comparison with the whole state, and who have not had the advantage of hearing the subject debated, the public will lose the benefit arising from the discussions of the legislature; indeed, all discussion becomes superfluous, if the representative is bound to act agreeably to the instructions of his constituents.

But, if the representative is bound to follow such instructions, there is an end of all responsibility on his part. He becomes a mere tool or instrument, in whom the possession of knowledge or abilities, is merely a superfluous ornament.

All that can be expected of him is, to have sense enough to understand what is required of him, and capacity enough to do it, and the responsibility must rest on those who made him their agent. All this is a violation of common sense.

But, on the supposition, that the representative is bound to obey such instructions of the majority of his constituents, how is this majority to be ascertained? There is no provision in any law, to hold meetings for any such purpose. What sanction or evidence, then, can any self-constituted assembly offer, to induce the representative to receive their resolutions, as the instructions of his constituents? Certainly none, that he is obliged to regard. Such irregular and informal assemblies generally afford conclusive evidence of the intrigue and management of a few influential individuals, and perhaps may be submitted to by an obsequious representative, who may be willing to compromise his personal dignity, rather than incur the risk of losing his office, through the influence which such leaders have over the rest of the constituents, who have less means of information. Such instructions however are always degrading to the representative personally, and consequently must tend to deprive the office both of respect and responsibility. A sure mode of preserving the independence of the representative, would be to lengthen his term of office, and render him ineligible a second time. The fear of losing his office, in that case, would never induce him to submit the exercise of his own judgment to the opinions of the leaders of the party which elected him; and, having no selfish interest to serve, he would be left wholly free from the influence of any other motive, than the conscientious discharge of his official duties according to the best of his ability.

## CHAPTER II.

*Of the Liberty of Speech and of the Press.*

It is a prevailing error among persons, who have not been properly educated, that the less restraint there is in the laws and constitution of a state, the greater is the share of civil liberty which the citizens enjoy. The reverse is much nearer the truth. The restraint of the violent, licentious and unjust, constitutes the only safe foundation for the liberty of the just, peaceable and well disposed. It is the sole object of civil government to protect the latter against the injustice and violence of the former. When an outcry is made for a greater degree of liberty, than is already enjoyed, an inquiry should always be made, what sort of persons they are who make the outcry, and what is the nature of the liberty for which they ask? Is it a freedom to practise wrong upon others with impunity, which they claim, or is it security from having it practised upon themselves? The former is as shameless and reprehensible, as the latter is reasonable and proper.

There is no government so bad among civilized nations, as to acknowledge as a principle, the right to compel the performance of wicked actions, or to hinder the performance of any actions, which are indispensable to the discharge of any duties of perfect or even of imperfect obligation. There is but little ground to apprehend an infringement of liberty in either of these respects. But, it is in relation to those actions, which, in a moral point of view, are indifferent, that a nation should be considered as enjoying a greater or less degree of civil liberty. Under tyrannical governments, indeed, it is common to say that one is more free than another, because of the greater or less liability to the violation of personal rights in one than in another; but, in fact, where either life or property may be taken from a citizen without law or trial, there is no liberty at all. A law, made to prevent the citizens from doing things, which if there were no such law, they might do without impropriety,

is a restraint upon those only who would do them, if there were no such law. If therefore the tendency of any such act, is found to be injurious to the welfare of the community, it may be prohibited out of regard to the public good, and this ought not to be considered as any infringement of the liberty of the citizens. For, as soon as the law is passed, the citizens have notice, that such acts are inconsistent with the public welfare. This notice alone would be sufficient to prevent a good citizen from doing them, if there were no law against it. The law therefore is passed for those citizens, who can be restrained in no other way, and though it is a restraint upon the bad, constitutes the only security of the good.

Where actions, which in a moral point of view are indifferent, and do not at all interfere with or interrupt the welfare or prosperity of society, are prohibited, it constitutes an infringement of liberty; and, if such prohibitions result from the caprice of the rulers, or, are imposed by them to subserve some selfish interests, it constitutes a direct invasion of civil liberty, and a nation is deprived of its freedom in proportion to the number of such unnecessary restraints. But prohibitions and restraints, however numerous, so long as they contribute to the happiness and prosperity of society, are no infringement of civil liberty. How excessive therefore is the simplicity of those peaceable and well disposed citizens, who join in the clamor, which factious and unprincipled men make for the repeal of laws, which impose salutary restraints! For, what is the true motive of the outcry, which such turbulent individuals raise on such occasions? Is it patriotism, and a regard for the liberties of the citizens, as they pretend? Or, is it because they are not unwilling to sacrifice the welfare of society to advance their own private interests, and wish to annul all laws, which prevent them? But, is it wisdom in the sheep, to desire the wolves to be let loose among them?

In applying these remarks to the subject of the present chapter, it may be observed, that every man has a natural right to express his honest sentiments on every subject that arises. But, he has no right to misrepresent facts; neither has he a right to tell even the truth with any malicious or ill intention. The limits of this right in a state of nature, are

therefore very apparent, and consist in benevolence as to intention, truth as to statements, and sincerity as to sentiments and professions. In civilized society, the right of freedom of speech, is further restrained by such regulations, as political expediency may have imposed with a view to the public welfare. But, as the laws of society impose restraints upon the natural right of freedom of speech, in certain cases from motives of policy, so, on the other hand, in certain cases, it suffers simple falsehood however naturally wrong, to escape with impunity. The first is punished, because a violation of express law ; the latter is passed over unnoticed by the law, in cases, where it is presumed, no ill consequences ensue.

To be more particular ; no language however false or malicious is considered *in law*, as a sufficient justification for personal aggression. So, also, no redress, can be had by applying to any tribunal of justice, for any language of mere insult or contumely, however false and malicious, unless it charges a man with having committed some crime ; or, impeaches his character, skill, capacity or integrity in his trade, profession or occupation ; unless some instances of particular damage sustained in consequence, can be established by evidence ; or, unless it charges him with some disgusting distemper, that renders him unacceptable among decent people.

But, *by the law of nature*, where a man has suffered injuries of the kind just referred to, whether they are such as he might obtain redress for, by the laws of civilized society or not, it would be difficult to show that he had not a right to use the same means to obtain reparation, which he has in case of other injuries offered to his person. Those injuries, for which no action can be maintained before the tribunals of justice established in an organized community, are supposed *by the law* to be too inconsiderable to be a subject of legal animadversion ; and as the exercise of the right of obtaining reparation personally, would lead to continual breaches of the peace, the policy of society forbids recourse to any such measures. In this way it happens, that no redress whatever can be had for words of mere contumely or insult. Yet, unfortunately, it seems that those very injuries, which consist in opprobrious language, considered by the law of too little consequence to maintain an

action, are among the most frequent causes of bloodshed by duels. For, men, who are not under the influence of christianity, if they find that they cannot obtain protection or reparation under the laws of society, which it was organized to furnish, are very apt to consider the law of nature as still so far subsisting; and therefore adopt the same measures to obtain redress for such wrongs, as if no society had ever been organized. This view of the subject points out at once, both the cause and the remedy of duelling. For, legislation against duelling will always remain unavailing, until either some adequate means of obtaining redress, for such injuries as commonly lead to duels, are provided by law; or, such heavy penalties are imposed, as will prevent such injuries from being offered. Such measures, it is true, would considerably abridge the freedom of speech among a certain class in society, but, it cannot be doubted, that an advantage would arise to the public in general, from such a restraint upon the licentious and ill bred.

In the first amendment to the constitution, congress is prohibited to pass any law, to abridge the freedom of speech or of the press. It has never been pretended, that congress has any power to enlarge the natural right, which men have of communicating their sentiments to each other, and consequently this amendment was made merely in order to prevent this natural right from being abridged. When, therefore, the limits of this natural right are once clearly ascertained, no law, though made by congress for the express purpose of punishing those, who overstep the limits of this natural right, will be unconstitutional on the mere ground that it abridges the freedom of speech. For, as it is the *natural* right which congress is forbidden to abridge, if congress merely punishes those acts which have no authority at all in natural right, the constitution will not be violated. This view of the subject is sufficient to show, that congress is not prohibited by this amendment to the constitution, to enact any laws which they may think proper, to punish libels upon those who are engaged in the administration of the general government. For, no man has any natural right to slander another, by inventing, circulating and publishing malicious falsehoods in relation to his character. Consequently, no natural right is infringed by a law enacted to punish such injuries.

In republican governments, however, as the election of the rulers is made by the people, it is necessary, in order to put it in their power to make a judicious selection, that they should have great freedom, both in discussing the tendency of all public measures of the administration, as well as the conduct of all public officers. They ought also to be permitted to express their conjectures or suspicions as to the motives by which those officers are actuated. They ought also to be allowed to communicate to each other, with the utmost freedom, what they know or have heard, as to the principles, religious, moral or political, of any candidate for any public office, who consents to stand, as likewise, as to his general private character or conduct. This freedom seems necessary to enable the people to give their votes with proper intelligence and discrimination. Because, a bad moral character is decisive proof, that a man is not properly actuated by religious principles, however he may profess them, and no man whose conduct is not thus actuated, is a safe depositary of any office of trust, public or private.

But, no man has a right, either legal or moral, to traduce the character of any candidate for public office, upon mere surmise. If therefore he undertakes to state any facts or circumstances, which are injurious to the character of a candidate for office, it ought not to be considered any abridgment of the freedom of speech, or of the press, that he should be held answerable for damages in a civil action, unless he can prove the truth of his statements; and, if such false statements are circulated through the medium of the press, there is no hardship upon the wrongdoer, in holding him answerable criminally, on an indictment for a libel.

With regard to the constitution of the United States, as well as the constitutions of the respective states, as also, the general and state administrations, it is essential to the liberty and welfare of the citizens, that great freedom of observation and discussion should be permitted. Because, if there is any thing defective in the Federal Constitution, or, in any of the state constitutions, the people ought to have an opportunity of having it pointed out, in order to avail themselves of the power of amendment, which is reserved to them. So, if any measures of the general

administration, should be thought to be inexpedient, unjust or dishonorable, the citizens ought to have a right to express their opinions to each other, in order that those rulers or other officers, who may have forfeited the confidence of the people and betrayed their own trust, may be removed from office. The same reasons apply to the state administrations. Great latitude of remark should be permitted here, because freedom of remark and discussion on these topics, tend to enlighten the people and enable them to remedy any particular evils which may be found either in the frame of government, or in the laws, or in the administration of public affairs in general.

But it would be a gross abuse of this right, which it would be no violation of the constitution to restrain by law, to make a pretext of it, in order to bring the whole frame of government into contempt with the people, with the detestable object of inducing them to throw off all government, and thus introduce a state of anarchy and confusion.

Most of the preceding remarks are applicable to the freedom of the press, as well as to the freedom of speech; and the salutary and reasonable restraint of both, by enacting laws for the punishment of slander, or libels, whether against individuals, or against decency and good manners, furnishes no juster cause of complaint, than all offenders have; who may complain with the same propriety against laws made to punish theft, robbery and murder, as being made in restraint of freedom of action.

But, in relation to the freedom of the press, it may be observed, that the press is said to be free, when it is not required by any law that writings, intended for publication, should be subjected to the inspection of commissioners, appointed for the purpose of examining literary works, and determining whether the publication of them will or will not have a bad effect upon the cause of religion or morality, and licensing or forbidding their publication accordingly. By our law no man can be restrained from publishing whatever he pleases, because he is not under any obligation to submit his works to the examination of any person or persons, previous to publication, and, until publication, no one can know what the work contains. But, the author and publisher are both held answerable, civ-



illy, for damages done to individuals, and criminally for the public offence if any is committed by such publication, in whatever it may consist, whether in its tendency to lead to a breach of the public peace, or to corrupt the public morals. The constitution also forbids congress to lay any such restraint on the press, as should require authors to submit their writings to the inspection of any one before publication ; so that, whatever expediency may dictate in relation to the subject, congress cannot impose any such restraint upon the freedom of the press without violating the constitution. Whatever the truth may be as to the soundness of this policy, it is the more popular doctrine, that it is a less evil to give every individual an opportunity of publishing his lucubrations, however offensive they possibly may be to decency and good morals, and even though they should be filled with blasphemy and licentiousness, than to require him, before publication, to submit them to the inspection of any individuals, though selected by the people for their wisdom, knowledge and virtues. But, it must be acknowledged, that some compositions have a most detestable tendency, and, that when once published, it is absolutely impossible to suppress them. In ordinary cases, it is most surely gross folly to lose an opportunity of preventing an evil, which, as soon as it exists, becomes incurable and remediless. But it will be objected, that in this case it cannot be done without infringing the liberty of the citizens. This is one of the pretences, which are always made use of, to keep good men in bondage or else in continual strife with the perverseness of the dissolute, as if there were any hardship in restraining bad men from doing what good men esteem it a crime to commit. It is not to be doubted, that much of the difficulty of obtaining the consent of the people to subject the press to salutary regulations, arises from the repugnance of authors to submit their works to an examination to decide upon their merits ; because such an inspection of their works seems to imply some superiority in the inspectors. But, if the examination is confined to the simple inquiries, whether the composition has any article in it, tending to sap the foundation of religion or morality, or to disturb the general tranquillity and welfare of society, no one will have any reason to complain but the advocates of Atheism,

Anarchy, and universal licentiousness. It may readily be shown, however, that any such restraint, after the character of a work is once ascertained, would not be contrary to the true spirit of the constitution ; because the constitution intended only to prevent congress from restraining the natural right of the citizens, to impart their sentiments freely to each other. But this right does not extend so far as to protect attempts to corrupt society and overthrow its institutions, by setting open a gate, through which blasphemy, impiety, indecency, irreligion, and bad principles may enter, and, having once taken possession, introduce their followers and attendants, vice, immorality and every species of corrupt practice. It is true, the admirers of such writers as Paine, Byron and Moore, if the most exceptionable writings, or passages in the works of each, had been suppressed or expunged, would have had reason to complain, that the principal beauties of those authors, according to their opinions, were strangled in their birth, yet, it is believed, that most persons of consideration and reflection are of opinion, that the preservation of the principles and morals of the young and inexperienced, is a more than sufficient counterbalance for the loss of all the brilliant or spicy passages in the writings of either of those authors, even though accompanied with the total suppression of the rest. But, as long as those who profess to aim only at the public good, are unwilling to submit to any such tribunal, though their works would not be affected by its decrees, it will be vain to expect such as have no way of effecting their base or selfish purposes, but by the perversion of the liberty of the press, to agree to such a restraint of this liberty, as would put an end to their schemes and defeat their intentions.

But, in a political point of view, in which it is probable the subject was principally considered by those, who framed the *first* amendment to the constitution, nothing could be more odious to a free people, than to have the press subjected to the control of the government, or to the administration for the time being. For, in this way, the liberty of the people would cease to be any thing more than a theme for public declamation, without any existence in reality. Because, the censors, being under bondage to those who appointed them, would permit noth-

ing to be published, however true, that might reflect disgrace upon the administration ; and, consequently the most odious and impolitic measures, the most tyrannical acts, and the most gross public injuries would alike escape without redress or even animadversion. Party bias and corruption, it is true, are found to take the place of restraint, in some measure, in producing similar effects, since if credit is to be given to what the editors of public journals say of each other, there is no public measure, however just and expedient, of any administration, which will not be decried and imputed to degrading motives by its opponents ; while on the other hand, there is no act, however immoral, however degrading to the national character, however unjust in itself, which will not be either applauded, justified or extenuated, by the editors of administration papers for the time being, according to the supposed various degrees of credulity in political partizans ; and generally there seems to be hardly any absurdity, however incredible and monstrous, which some editors will not be shameless enough to force into the mental repositories of their readers, and which, however difficult of deglutition, certain readers will not be willing to receive, as the richest intellectual food. It may be urged, indeed, that if delusion and error arise from these sources, it can happen to such only as prefer darkness and prejudice, to light and just perception ; because, on the supposition, that all party papers contain more or less sophistry and misrepresentation of facts, as well as carefully suppress the mention of all circumstances favorable to the views of their opponents, a person who makes it a rule to disbelieve totally whatever one party asserts to the disadvantage of the other, or in praise of its own leaders, unless established by proof, will not be liable to fall into any dangerous error or mistake. This however will be an insufficient protection for those simple persons, who, from whatever motive, confine their reading to the publications of the party whose livery they wear, and consequently are entirely in the power of the editors who furnish them with their daily portion of news and intelligence, and instruct them what ground they are to take in relation to all unexpected occurrences in the political world. For, such simple persons, having neither knowledge nor principles, by which to regulate their

own conduct, if any circumstance should be alleged to the disadvantage of their party leaders, would act imprudently, if they ventured to express any public opinion in relation to it, before they had received their direction from the view taken of it in the newspapers of their own party. But, as soon as this view is published, there will no longer be any danger of committing themselves; but, they will know at once whether to deny the fact charged, or, to justify or palliate it, or, to make use of recrimination.

If the freedom of the press consists in the right of publishing to the world our sentiments, on whatever subjects we please, this freedom will be found to be restrained by a variety of circumstances, altogether independent of any provisions of the law.

It has been suggested already, that if a person publishes any thing offensive to good manners, he may be indicted and punished for it as a crime, whether the fact alleged be true or not.

So, a person may be indicted for a libel on the character of an individual, and punished for it as an offence against the public peace. In such cases, the punishments imposed by law, operate as restraints upon the freedom of the press, by making publishers answerable for the consequences, and sometimes even for the tendencies of what they publish. But the restraints alluded to, are of a different nature from these, and operate *a priori*, to prevent publication directly, and not, to produce that effect merely by punishing such as ought not to be made. These restraints however are confined to newspapers and periodical journals: For instance; suppose an individual is desirous of publishing his sentiments on some subject, whether connected with religion, morals, political economy, or a mere party question; here it is obvious, with whatever justice, truth or ability those sentiments may be expressed and enforced, unless he is willing to go to the expense of publishing a book or pamphlet, it is quite uncertain whether he will be able to lay them before the public. For, if the editors of the journals or newspapers, to whom his composition is offered, should entertain a different view of the subject, and should be apprehensive that the communication would alter the opinions of the subscribers to their journals or newspapers, there can be but

little doubt that they would refuse to publish it, though perfectly free from the least tinge of irreligion or immorality. This would be most strikingly true, if the composition offered were of a political nature, but did not coincide with the opinions or prejudices of the editor, or those of his subscribers, or his party in general. And the more eloquent the composition might be, and the more convincing and persuasive his reasonings, if they tended to remove any of the foundations upon which the party was erected, the less probability there would be that the editor would consent to the publication. Because, however great a friend the editor of a party newspaper may be to truth and the interest of his country, or in other words, the general welfare of the whole, it cannot be doubted that he will prefer the interest of what he considers the better part, to wit, his own party.

These reflections are sufficient to make it apparent, that the public journals as at present conducted, are by no means so favorable to the propagation of truth and the diffusion of correct information, where political questions are concerned, as they are sometimes supposed to be. For, though a popular error or prejudice is already tottering on its foundation, as soon as the people are willing to hear it spoken against; yet, if the means of communication are kept from them, each individual must of course correct his own errors and mistakes for himself, and will derive no assistance from the superior ability or illumination of any of his neighbors. It follows, that so far as newspapers are concerned, the press is not free, but each writer or paragraphist must submit his piece for examination and license, not to a learned chancellor, not to a body of men selected for that purpose on account of their wisdom, virtue and integrity, but to the learning, political integrity, and impartiality of the editor of a party newspaper. Such freedom of the press is hardly worth the trouble of protection.

In order that the press should be free from any restraints but those of religion, decency and good manners, by which, it is hoped it will always be controlled, the management of a newspaper should be considered as a public employment, and the editor should consequently hold himself out to his fellow citizens, as pledged to no party or faction whatever, but, like

a common carrier, ready to receive all comers, who were willing to pay a stated reasonable compensation for the insertion of their communications, provided they were free from libellous matter of any kind. If the people at large were to make it an inflexible rule, to patronize by their subscriptions those newspapers only which should be conducted on this principle, it is believed it would be attended with the happiest political effects. For,

1. It would be impossible to corrupt any editors of newspapers with the prospect of deriving any advantage from it, without its being exposed at once ; since each individual would have an opportunity of inserting his communication, in its turn, in any of the daily newspapers, provided it had not already been published, and, if its publication were refused without the allegation of a sufficient satisfactory reason, the public would immediately perceive the true motive.

2. The demoralizing spectacle of the array of many of the newspapers in the country against each other, in the most indecent and ungentlemanly opposition, accusing each other of falsehood, bribery, corruption, &c. &c. would wholly cease. Each editor would consider himself officially neutral, like a judicial officer, and would hold himself in no manner accountable for the communications of his correspondents, any further than to see that they did not violate the dictates of good manners, and the laws of the land.

3. The editors of newspapers would then enjoy the highest degree of true independence and respectability. For, by the impartial discharge of their duty, it would be as much impossible that they should give offence to any reasonable man, by the insertion of communications which did not agree with his particular opinions, as it would for the owner of a public vehicle to give offence to some of his customers, by carrying others of different political sentiments.

4. They could never be accused of being the mere tools of a faction, when their papers were equally accessible to the communications of all persons, of all parties, or of no party.

5. The leaders of any party or faction would have no motive to attempt to hire or corrupt any press, because it could not remain concealed from the public, but would immediately

be detected and hooted at by the abused people ; the nature of the communications published, and those which would be rejected, furnishing conclusive internal evidence.

6. No editor of a paper would then ever feel compelled by interested considerations, to wear the livery of any party or faction whatever, and would be under no temptation to act from any other motives than a regard for truth, justice and the welfare of his country.

*For further remarks on the Liberty of the Press, and some adjudged cases as to the legal liability of Editors, see Chap. IV. of this part.*

### CHAPTER III.

#### *Of the Power of Courts to punish for Contempts.*

A CONTEMPT of court is some gross act of indignity or affront, offered to the court while in session, and which tends to hinder or disturb the administration of justice, or to bring it into contempt with the people. It may consist either in disobedience to some lawful command of the court, by wholly refusing to comply with it ; or, by doing the act commanded to be done, in an improper manner ; or, by acting in a manner contrary to some lawful prohibition of the court.

It may also consist in opposing or disturbing the execution of lawful process issued by the court. It is also a contempt of court to abuse its process, by wilfully doing wrong in the execution of it, as well as to do any act under the pretence of having authority from the court, but, in fact having none. It is a contempt of court also, in any person duly summoned as a witness and having had his fees tendered, to refuse to appear. So, it is a contempt of court, to practise upon a witness, who has been summoned to appear, whether by threats, bribery, &c. It has been held also, that after a dispute has been left to arbitrators under a rule of court, it will be a contempt of court, if one of the parties, without the consent of the other, should take away the papers from the arbitrators in order to stop proceedings. So, if a sheriff should grant a replevin of property, having express notice that it is irrepleviable. *See 1 Wils. 75.*

A gross attempt to impose upon the court, is also considered as a contempt ; for example, where a man aged sixty-three years, pleads infancy. *See 2 Buls. 67.*

Most of the instances of contempts specified above, to which many others might be added, are contempts of court merely by construction of law. And it frequently happens that the act complained of as a contempt, is susceptible of such ex-



planations, as to show that no indignity was intended to the court in reality. Where the act is not committed directly in the presence of the court, therefore, it is usual for the court to direct interrogatories to be administered to the party charged ; so that he may explain away the contempt if he can, and clear himself ; but if the act cannot be thus entirely explained away, he may avail himself of the opportunity, to make such concessions and apologies, as the nature of the case may admit or the court may require.

It must not be understood, however, that the court have any power or authority to compel any person, upon whom an act of contempt has been proved, to answer any inquiries in relation to the subject. Reason and the constitution equally prohibit any compulsion to a person arrested, to force him to answer any questions which may tend to criminate himself in any case whatever. But, when the act constituting the contempt has been proved, the contempt itself is also so far proved, that, if the person charged with the contempt, either will not or cannot give a satisfactory explanation, and thus show that no indignity was in fact intended, he will be held guilty of the contempt. The administering of interrogatories to him therefore is an act of indulgence ; because he is considered already as guilty of the contempt before the interrogatories are administered, and will be punished accordingly, unless he either clears himself of it, or makes a suitable apology.

Where the alleged contempt consists in some act done in the immediate presence of the court, the court if they see fit, may direct the offender to be imprisoned at once. Such acts are usually acts of gross indignity, or disorderly conduct, and, for the most part, seem to admit of no excuse or palliation but that of a total ignorance of the rules of decency and good manners. Such contempts may consist in a direct personal affront offered to the judges either by word or deed ; and of course hardly admit of apology or explanation. The court may therefore proceed at once to punish him. *Bl. R.* 640. *Bur.* 2129. Another contempt, though of a much less odious kind, is that of shouting, waving the hat, &c. at the termination of a trial, the result of which is particularly agreeable or disagreeable to the bystanders. This however is a contempt of court,

for which a person may be committed or fined, unless the court sees fit to accept his apology. *See* 6 T. R. 630.

Somewhat similar to this class of contempts, is the speaking of contemptuous or reproachful words, of the court to one of its officers while serving process.

At common law, the mere establishment of a court, without any express grant of a power to punish contempts, gives this power by necessary implication; so that there is no tribunal established, however inferior in its nature, but that may justly exercise this power, at least so far as may be necessary to preserve itself from annoyance or disturbance, while in the discharge of its official duties. Accordingly it seems, that every magistrate, while holding a court, has a right to order into custody any person who should disturb its proceedings, or should insult him personally, while in the discharge of his judicial duties, or should commit any such violation of decorum, as would tend to bring him or his court into contempt among the suitors. But, it would seem, that the inferior tribunals of justice, have no authority to commit for contempts, *not offered in their presence*, but must proceed by indictment. *See* 2 Bays R. 1.

In the case last cited, it was held, that a justice of the peace, while holding a court, may commit by summary conviction any person, who may offer him any insult by word or deed in his presence. It would seem, by the same case, that he is not answerable *in an action*, for what he does by virtue of his judicial power. But, if he should act corruptly or oppressively in his official capacity, he may be indicted for it, and punished by fine and imprisonment.

It seems a writ of error will not lie on a conviction for a fine on a contempt. *See* 3 Mod. 28. 1 Sal. 144, 263. *Ld. Raym.* 454, 1115.

The remedy for a person improperly detained in custody, in any such case, would be to apply for a *habeas corpus*. But the court would probably hesitate to release the prisoner, unless a clear case was made out in his favor, where he had been regularly committed for a contempt. In the case *Yates v. Lansing*, before cited, Platt, senator, remarks, that, 'The *habeas corpus* act is justly prized as one of the bulwarks of freedom, and can be endangered only by its misapplication and

abuse. Let us beware, that, in our zeal for securing our personal liberty, we do not destroy the virtuous independence and rightful authority of our courts of justice, and thereby subvert the foundation of social order. So long as our courts are pure, enlightened and independent, we shall enjoy the greatest of earthly blessings, a government of laws; but, whenever these tribunals shall cease to deserve that character, the standard of justice and civil liberty, must give place to the sceptre of a tyrant.'

If a prisoner, after an examination on a *habeas corpus*, should be remanded into custody, it seems to have been the opinion of some, that a writ of error might be brought, and if the judgment should be reversed, he might be discharged by the court having authority to correct the erroneous judgment. But the better opinion seems to be, that no writ of error will lie upon any proceedings on a *habeas corpus*. For, if a prisoner applies for a *habeas corpus*, and it is refused; or, if it is granted, and, on examination the prisoner is denied bail or enlargement, in which case he is remanded of course, there is no such final judgment, as will maintain a writ of error; for, any other court or judge having jurisdiction, may, at discretion, grant another *habeas corpus* and bail or discharge him upon it; or, if he applies for a *habeas corpus* in vacation, to one of the judges, and it is refused, he may renew his application in term time, to the whole court. On the other hand, if a prisoner is discharged on a *habeas corpus*, no writ of error will lie, though if such discharge is erroneous in fact, any court of competent jurisdiction may recommit him. See 6 Johns. 407, 427; *cites* State Trials, p. 90.

With regard to contempts of court, offered to the superior tribunals of justice, but not in their immediate presence, the law does not seem quite settled. It has been held, that it is a contempt of court either to scandalize the court itself, or any of the parties engaged in a cause, so as to prejudice others against them, before the decision of the case. See 2 Atk. 471. 2 Ves. 321, 520. And in England, where disrespectful words are spoken of the court, there will not be a rule upon the party to show cause why an attachment should not be granted against him, but an attachment will be awarded in the first instance. See Sayer's R. 114, 47.

Where a person attached for a contempt, declines answering proper interrogatories, or gives an unsatisfactory answer, he will be considered guilty of the contempt; but the mere refusal to answer improper interrogatories, is no contempt of itself. Bl. R. 637. Upon any reasonable objection to answer an interrogatory as it is framed, the court will direct it to be modified, or will accept of a qualified answer to it. See 1 Strange's R. 444.

Where a writ of *habeas corpus* issues, a proper return must be made to it, otherwise an attachment will immediately issue against the person to whom it is directed, without issuing an *alias*. The liberty of the people is concerned here. See 5 T. R. 89.

In England, it seems, a peer must obey the lawful process of the court of king's bench, or otherwise, the court may award an attachment against him for the contempt. Sayer's Rep. 50. For the same reason, Lord Preston was committed for refusing to be sworn before the grand jury. See 2 Sal. 278.

In ancient times, in that kingdom, contempts were sometimes punished with great severity; but the contempts so punished belong to a barbarous age, and there is no reason to suppose could have been restrained by milder punishments. For, where the voice of reason, and decency and good manners are disregarded, the moral sense being wanting, an appeal must of necessity be made to the animal part of human nature by corporal punishments, to keep the turbulent and disorderly within proper bounds. Where a party in a cause struck one of the jurors, who gave a verdict against him in Westminster Hall, it was awarded by the king's council, that he should forfeit his lands and goods, and *that his right hand should be struck off*. So, where one justled another over, maliciously in the presence of the court, and spurned him with his feet, it was held *that he should lose his right hand*, though he did not strike the other either with any weapon or with his hand. See 12 Co. 71.

In those states where there is no special provision by law for the punishment of contempts, the courts can only give judgment according to the common law, and punish the offender, by fine and imprisonment.

With regard to imprisonment, it would seem, that the courts have no authority to imprison for contempts for any longer time than during the term of the court, unless in the case of constructive contempts, by refusing to obey an order of a court of chancery, where the judgment would be, that the party be imprisoned until he obey the order. In the former case, the judgment will be, that the party be imprisoned during the pleasure of the court ; but if the court should adjourn without day, without making any order in relation to the prisoner, it would seem reasonable that he should immediately be discharged on a *habeas corpus*. For, otherwise he might be subjected to perpetual imprisonment. See Lev. 165.

Where any contempt or disturbance is committed in any court of record, the presiding justice may either fine, or commit the person for the contempt. See 8 Co. 38, 6. Owen, 117. Cro. Eliz. 581. And in default of another remedy to recover the fine, it may be recovered by an action of debt. Mo. 470.

Where an important criminal trial is going on, before a court having final jurisdiction, it does not seem quite settled, in this country, how far the court have any lawful authority to prohibit the publication of the proceedings from day to day before the termination of the trial. On such occasions, the curiosity of the public is on the stretch, and unless there is some well-founded objection in public expediency, or in the prevention of injustice to individuals, it ought to be indulged. If the court were able, by prohibiting the publication of the public proceedings, to prevent erroneous impressions from being made on the minds of the people, there would be a plausible ground for the exercise of such a power ; but this is wholly impracticable, because the people will inquire of each other, and, there can be no doubt, will receive much less accurate accounts and statements than the newspapers would exhibit, if they were not prohibited to publish the proceedings. If the design of such prohibition were to prevent the jury trying the case, from being influenced by such publications, it would be done much more effectually by directing the officer in attendance upon the jury, to prevent them from seeing any of the daily papers, until their verdict should be given. This would

be a very proper measure, and would wholly prevent any possible effect upon their minds, from publications or notices of any kind in relation to the trial. The court, it is obvious, would have a perfect right to adopt this course, from the same authority which enables them to exclude all direct communications between the jury and other persons, on the subject committed to their decision. But, if the court have any lawful authority to prevent the publication of the proceedings on a trial from day to day, on what reason can it be grounded, which will not equally extend to exclude spectators from attending the trial. For, if the court have no authority to sit with closed doors, it is because the people have a right to see that every one has a fair trial, and that justice is properly administered, or, if otherwise, that there shall always be witnesses, by which oppression, partiality or misbehaviour of any kind, in judicial officers, may be proved and punished. It is true, that when the evidence of the prosecution has been offered against a prisoner, who may be innocent, he will lie under the ill impression, which it may make upon the minds of those who have either heard it or read it, until he has produced the evidence in his favor. But this he will do immediately afterwards, and, in all probability, it will also immediately be communicated to the people after the lapse of one or two days, at farthest. But the verdict of the jury, it is very apparent can never be affected by it, if the daily papers are kept from the jury; so that in general, the cause of justice is not all concerned in laying any such restraint.

The publication of the records of a court, if done maliciously, and without the consent of the court, is a contempt of a different kind, and seems to admit of no such justification or apology. It is also held to be a contempt of the higher tribunals of justice, and punishable as such, to prejudice the world with regard to the merits of a case before trial, by publications in relation to it; as if the counsel in a case should publish his brief. Lord Chancellor Hardwicke committed two printers to the Fleet prison, for publishing a libel against parties to a suit then depending, &c. He observed on that occasion; 'Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented;

nor is there any thing of more pernicious consequence, than to prejudice the minds of the public, against persons concerned as parties in causes, before the cause is finally heard. That it had always been his opinion, as well as that of his predecessors, that such a proceeding should be discountenanced. But that, notwithstanding it should be a libel, yet, unless it was a contempt of the court, he had no cognizance of it; for, whether it was a libel against the public, or private persons, the only method was to proceed at law. That, upon the whole, there was no doubt this was a contempt of court.' See 20 Atk. 469. 2 Ves. 520.

With regard to the courts of the United States, the law concerning contempts of court is declared, by Stat. 1831, ch. 98.

In the first section it is provided,—

That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases, except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

The second and last section provides, 'that if any person or persons shall corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall corruptly, or by threats or force, obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished by fine not exceeding five hundred dollars, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offence.

The power of punishing for contempts, as it is not denied to the lowest tribunals of justice, it would be absurd to suppose denied to a legislative assembly, when in session, whether

belonging to the government of a state, or to that of the United States. In the case of *Yates v. Lansing*, before the supreme court of errors, of the state of New York, it is observed by Platt, senator, that 'the right of punishing for contempts by summary conviction, *is inherent in all courts of justice, and legislative assemblies*, and is essential for their protection and existence. It is a branch of the common law adopted and sanctioned by our state constitution. The discretion involved in this power, is in a great measure arbitrary and undefinable; and yet the experience of ages has demonstrated, that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice.' 9 Johns. 417.

It is obvious, that this power, to a certain extent, is absolutely necessary to the exercise of all those other powers, with which the people have seen fit to invest the deliberative assemblies of their state and general governments, and the proper discharge of the important trusts and duties, belonging to their respective offices; and so far, must be considered as incidentally conferred by the mere creation of those offices and the assignment of their duties. Every deliberative assembly acknowledged by law, while engaged in the discharge of its public functions, must therefore be considered as tacitly invested with full authority, to take into custody any individual who should disturb their deliberations, by any act of violence, insult, or indecorum, offered in their actual or constructive presence, and keep him in confinement without bail or mainprise, until their meeting adjourns. To admit him to make explanations, by administering interrogatories, or to afford him an opportunity of making an apology, and to discharge him from imprisonment, upon any promises which he may make of good behaviour for the time to come, are merely indulgences which they may grant at their discretion, but are under no obligation to do so. For, they have a right to take effectual measures to prevent interruption, and this can be done in no other way than by imprisoning the person of the offender. It is true, they may, if they see fit, direct their officer in attendance to carry him before a suitable magistrate on a complaint for a disturbance of the peace, and compel him to find bonds for his good behavior; but this remedy they have in common with private citizens, and is wholly collateral to the



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exercise of their own authority. Whether the legislature have an authority to fine for a contempt, does not seem settled, but there is not the same necessity for it, because they may secure their deliberations from disturbance without it, by keeping the offender in custody. If the legislature should adjourn without day, leaving a prisoner in custody, it would seem that he would immediately be entitled to his liberty, because his confinement would no longer be necessary. But, if the legislature have a right to fine and imprison for a contempt, in the same manner as a court of record, then they may imprison for a longer time than that of their own session. The distinction lies here, that where the legislature order an individual into custody for a contempt, it may be done, either as a mere measure to secure themselves from interruption, or, as a punishment inflicted on the offender for his contempt. In the former case, it is not necessary that there should be a formal judgment or decree, that the offender be imprisoned a certain number of days; but, in the latter case, if there is any judgment of imprisonment, the duration of it must be ascertained; for the law will not permit an indefinite judgment. If the prisoner is fined, the amount of the fine must be ascertained in like manner, and for the same reason; if left uncertain, it would be merely void; or, the payment of the smallest sum imaginable would discharge it. This leads to the final reason, why a prisoner left in custody by the legislature at the end of their session, for a contempt, without any limitation of the duration of his confinement, must be discharged; *i. e.* because the imprisonment ceases to be lawful, as soon as the authority which imposes it, is determined.

As it is considered of great consequence in a free government, that the legislative and judicial powers should, as little as possible, be exercised by the same hands; and as generally there seems to be no reason, why the legislature should have a power to punish for contempts, except that it does not seem consistent with their dignity, that they should be obliged to call on the judicial department for protection, it would seem no more than reasonable, that their power in this respect, should be limited by the necessity to which it owes its origin. Consequently, there seems to be no sufficient reason, why the legislature should ever pass a judgment of fine or imprisonment on an

individual for a contempt. To pass such a judgment, is in the first place, to make a certain act a contempt ; which, being done by a vote of the house, is an act of legislation, and such a law being passed after the commission of the act, seems liable to the exception of being *ex post facto*, and consequently unconstitutional. In the second place, the passing of such judgment is a judicial act of course. The legislature, therefore, so far becomes a court ; and the jurisdiction not being defined either by the common law, or by the general, or any of the state constitutions, is discretionary, and may become arbitrary and tyrannical. It is very clear that the legislature have no authority to enact laws, which is not given either expressly or by necessary implication, in the constitution, whence the legislature derives its own existence. Yet a law, though enacted by usurped power, would have one advantage over an arbitrary decree, made for a particular occasion. The former would be certain, and might be known, and the people would be on their guard ; but against a decree, grounded on the discretion or will of the house, as shown on a particular occasion, it is impossible that the people should be on their guard. These considerations are sufficient to show, that the legislature have no unlimited power, either to determine the extent of their own privileges by *ex post facto* laws, or decide from time to time as the case occurs, what shall, and what shall not be considered a contempt. Within their constitutional limits, without doubt, they may enact what laws they judge expedient in relation to both subjects. But, when a case occurs, offenders must be tried by the laws as they existed *at the time of the act committed*, and if by law it was not a contempt at that time, the legislature cannot, by any decree made afterwards in relation to it, constitute such act a contempt.

An imaginary, though not improbable case, may serve for illustration. Let it be supposed then, that the legislature of a state sit with closed doors, with the view of keeping their deliberations from the public, but the secret is suffered to leak out and is published in a certain newspaper. Suppose the legislature then send for the editor, and require of him to take an oath to answer interrogatories truly in relation to the subject of such publication, &c. and the editor refuses to take

the oath, and the legislature commit him for the contempt, or fine him ; is there any thing to be said to justify their proceedings? Certainly, nothing at all. For, unless some provision is made in the constitution, whence the legislature derives its authority, or, unless the legislature have *previously* passed some law making provision in such cases, it will be difficult to show, that the legislature have any power whatever to compel the attendance of any individual, who does not belong to their body, except as a witness on an impeachment. Where the legislature appoint a committee with authority to send for persons and papers, if the constitution and laws are both silent on the subject, it is merely the respect which a good citizen owes his rulers, which induces him to attend their summons, and not any *implied* authority over him in this respect. For, except in their capacity, as legislators, the legislative assembly have no higher authority than any other assembly of individuals of equal respectability.

When therefore the editor in the case put, is sent for by the house, unless *he is summoned in writing, and a sufficient legal cause for his attendance* is assigned in his notification, he is under no legal obligation to attend. If he should refuse to attend, therefore, and should be taken into custody, it would be a case of false imprisonment, for which he might have redress against the officer who attached him, and if he were imprisoned for the contempt and disobedience to the legislature, in such case he would be entitled to his release on a *habeas corpus* before a competent tribunal. For, a citizen can never be adjudged guilty and punished, for a peaceable assertion of his rights. But, on the supposition that he submitted to the order of the legislature so far as to attend, and he was then required to answer interrogatories under oath ; if he declined to take the oath, this of itself could be no contempt, unless an impeachment was then actually pending, and he was summoned to give testimony, or unless the legislature has a legal authority to resolve itself into a court of inquisition. For, it will hardly be pretended that, if the legislature should see fit to sit as a court, that they have authority to act in an arbitrary manner, and differently from all the regular tribunals of justice. If, however, the legislature should assume to themselves such a capa-

city, the person summoned should at least be informed that they are acting as a grand jury, in which case the person summoned to give testimony must submit to take the regular oath. If the editor were then asked, if he knew the author of a certain communication in his newspaper, and answered in the affirmative, and were asked again, who was the author, and refused to answer the question, he could never be punished for a contempt in such refusal, so long as he did not deny that he was the author himself, because the constitution protects every man from all attempts to compel him to give testimony against himself. But, if the legislature were then sitting as a grand inquisition, if the editor should once deny that he was the author himself, he would be guilty of a contempt if he did not answer and tell the name of the author, if he knew it, and were required to do so.

It has been suggested already, that where an individual is attached for a contempt, it is an indulgence shown to him to permit him to clear it by answering interrogatories under oath. It would be a perversion or misuse of this course, to use it as a means of proving the contempt upon the person in custody. It is true, if the act constituting the contempt, is clearly proved by other testimony, and the person in custody refuses to give such explanations under oath in answer to interrogatories, as would show there was no contempt in fact, he will be considered as guilty of the contempt; yet, if there is no satisfactory evidence of such act, he may, if he please, refuse to answer any interrogatories in relation to the subject. He may let the testimony against him remain as it is, without attempting to explain it away, and if there is not sufficient, the constitution will protect him from being compelled to confess under oath, which would be the consequence of answering interrogatories. As a matter of prudence, therefore, a person brought before the legislature for examination, should, before he takes any oath, ascertain for what purpose the oath is to be taken and the examination made, and whether his testimony is wanted to bring others to justice, or whether he is called on to answer interrogatories in relation to some supposed or alleged contempt in himself. To decline to take the oath until he is satisfied in relation to these particulars, ought not to be considered as a con-

tempt, because it may be necessary for the protection of his own legal rights.

In the case put, if an editor is asked the single question, who is the author of a certain communication, and answers, that he does not consider himself bound to answer the question, without more, it seems difficult to make a contempt of it; for, if he is the author, he is protected by the constitution from having the confession extorted from him, and it would be absurd to suppose, that in order to avail himself of this protection, he must first confess his guilt to the court, to show that his case comes within it, by intimating that he is not bound to criminate himself, &c. These few remarks are made here, because an individual taken unawares, or at short notice, and brought before the legislature, can hardly be expected to have the same self-possession, as when standing before the common tribunals of justice, with retained counsel, perhaps the best guardian of his civil rights ever devised, sitting by his side.

In the case of *Anderson v. Dunn*, it was held that either house of congress may arrest, at any place within the United States, any person who is guilty of a contempt to them, during their session, and imprison the offender until the end of it. See 6 Wheat. 232. The offence in this case, did not consist in occasioning any disturbance or direct interruption to the deliberations of congress, but, in offering a bribe by letter to one of the members. The power claimed and exercised therefore, was not limited to such direct contempts as might be offered to the house in their presence, but was extended to acts done out of the house, and where the offender might be at the utmost limits of the territory of the United States. It is impossible therefore but that such claim of power, where the occasions for its exercise, depending upon the mere discretion of congress to be ascertained by a vote, are indefinite and wholly unascertained by law, must excite great jealousy. For, in the first place, any individual may be brought from any part of the United States, in the custody of an officer, for any act whatever, which either house of congress may consider to be a contempt; and if an offer of a bribe to a single member is a contempt, what is to prevent the application of a similar principle, to other acts committed upon individual members? It

has never been contended, that a libel on a member of the legislature is a contempt to the whole legislature, and yet it is not impossible, that some legislatures may vote it to be so. But suppose congress should see fit to consider some severe animadversions on their political management, as a contempt offered to them, will it be contended, that they have a right to take the offender into custody from a distant part of the United States, to be tried before themselves, and punished by imprisonment during the sitting of congress, when the constitution guaranties to all persons accused, 1. a right to a speedy and *public* trial, 2. by an impartial jury, 3. of the state and district, wherein the crime shall have been committed? Certainly, if congress has this power; all these safeguards, provided by the constitution for the liberty of the citizens, become wholly unavailing. For, if congress have a right to punish an act by imprisonment, then such act must be a crime, and the party cannot legally be punished without a legal trial. But, as congress may sit with closed doors whenever they see fit, if they try the accused in this manner, he cannot with propriety be said to have a public trial. The constitution guaranties *an impartial jury*; but, in this case, the contempt is alleged to be committed against congress, yet the members are to sit in judgment on it, both as a jury though hardly an impartial one, to ascertain the commission of the crime, and afterwards as judges to award the punishment of imprisonment. The constitution guaranties a trial in the state or district where the crime is committed; yet, in this case, unless the crime is committed within the district of Columbia, it is possible that the accused party may be tried a thousand, or even two thousand miles from such place.

Further; the constitution provides that no person shall be put in jeopardy of life or limb, more than once for the same offence; now it is true, there is but little danger that a man will be put in jeopardy of life or limb at all, in a trial for any species of contempt whatever; but it is wholly inconsistent with the benignity of the common law, or any law in use in the United States, that an individual should in any case be punished twice for the same act; *i. e.* for the sake of example, in the case referred to, that he should be liable to be punished



for a communication in a newspaper, both as a contempt on the legislature, and as a libel on the same legislature—punished by the legislature for the contempt offered to them, and afterwards punished by a tribunal of justice, on an indictment for a libel on the same legislature. For, it will hardly be supposed, that a plea of *former conviction* made to the indictment, would be sustained by the commitment for a contempt by the legislature. It would be quite as great an absurdity, if he was punished for a contempt at Washington, and afterwards on a trial for a libel at Boston or New Orleans, should be acquitted of the charge, by giving the truth in evidence. It is true, Mr. Justice Johnson, in delivering his opinion in *Anderson v. Dunn*, observes, that ‘the most absolute tyranny could not subsist, where men cannot be entrusted with power because they might abuse it; and much less a government, which has no other basis than the sound morals, moderation and good sense of those who compose it;’ 6 Wheat. 232. But this will hardly hold as a sufficient reason, why congress should be considered as entrusted with implied powers, which are not necessary, from a mere confidence that such powers will not be abused. The true principle seems to be, that the people have entrusted congress with whatever powers they judged expedient, in the constitution of the United States. Congress therefore may exercise all powers expressly bestowed on them by that compact, and all such other powers, as are absolutely necessary to the exercise of those which are expressly bestowed, *but no other powers whatever*. The power to punish for contempts, in the extended view we have taken of it, is neither expressly given to congress in the constitution, nor is it necessary to the exercise of any powers which are *expressly* given. The legitimate conclusion then is, that congress can lawfully claim no such power. If it was intended that congress should extend their powers or privileges at discretion, why was it thought necessary to enumerate their powers and define their privileges in the constitution?

With regard to the powers of both houses of congress, as well as the state legislatures, in determining the extent of their own privileges, the remarks of Parsons, Ch. Jus. in the case of *Coffin v. Coffin*, in relation to the constitution of the state

of Massachusetts, may be considered as applicable by analogy. He observes, 'In this state we have a written constitution, formed by the people, in which they have defined, not only the powers, but the privileges of the house, either by express words or by necessary implication. A struggle for privileges in this state, would be a contest against the people, to wrest from them what they have not chosen to grant. And, it may be added, that the grant of privileges is a restraint on the rights of private citizens, which cannot further be restrained but by some constitutional law.' He remarks further in that case, 'if the house of which the defendant is a member, *had proceeded against the plaintiff for a contempt in suing this action*; whatever had been the result of its proceedings, this court could not have interfered, or granted any relief, until the sentence had been performed.' It will be recollected, that the plaintiff recovered judgment in this action, and according to the very opinion from which the above sentence is quoted. It is also clear that, in the opinion of this learned judge, if the house of representatives had imprisoned the plaintiff for contempt in bringing his action for redress against one of their members, the supreme court would have had no right to interpose. But it is much to be questioned whether this can be law.

In the case of *Queen v. Paty and others*, Ld. Raym. 1103. Sal. 503, the defendants were brought into the court of king's bench on a *habeas corpus*, having been committed to Newgate by the house of commons, for bringing an action in which they recovered, in contempt of what was alleged to be the privileges of the house of commons. Holt, Chief Jus., held, that the suit was no breach of the privileges of the house of commons, nor could their judgment make it so, nor conclude that court, (king's bench) from determining the contrary. 'When the house of commons,' he observes, 'exceed their legal bounds and authority, their acts are wrongful, and cannot be justified, more than the acts of private men. There is no question but their authority is from the law, and as it is circumscribed, so it may be exceeded. To say, they are judges of their own authority, and nobody else, is to make their privileges to be as they would have them.' This great judge however was overruled

by the other judges. It was held, that the house of commons was a court, and higher than the king's bench, and were exclusively the judges of their own privileges, &c. &c. But, however the law may be in England, it is believed, that under the constitution of the United States, as well as those of the several states, an act so arbitrary as that supposed by Chief Justice Parsons, would be decided to be illegal and void, by every supreme court in the union, and that either of them would not hesitate to assume jurisdiction and discharge the prisoner on a habeas corpus. Is the house of representatives above the law and the constitution? If they are not, then it is possible that they may commit a man to prison in violation of both. And shall it be endured, that a man shall be kept imprisoned within the United States in violation of law, for want of a tribunal of competent jurisdiction to release him?

It is true, that in ordinary cases, there would be but little danger, that congress would ever make an unwarrantable use of any powers, with which they might be entrusted, for the sake of oppressing an individual, and far less, that they would intentionally usurp power where none was intended to be given, with any such view. For, so long as an individual was not particularly out of favor with the people, the dread of doing an unpopular act would infallibly be sufficient, without any other consideration, to prevent any act of direct injustice or oppression, from being agreed on by a majority of any legislative assembly in a popular government. But what is to become of the rights of an individual who has no such protection? Suppose that he has rendered himself odious to the leaders of the prevailing party by opposition to their schemes. Suppose that he has rendered himself unpopular and hateful to the people, by resisting, what he may consider, their prejudices and erroneous opinions. Suppose that he has said something in disparagement of the great goddess Diana of the Ephesians, that came down from heaven; in any such case, if he may be brought from a distant part of the country for the contempt, to be tried before such a popular legislative body sitting as a court, what security can he have, that he may not fall a victim to political tinkers and coppersmiths?

It is not intended however to deny, that congress has full au-

thority to do any act, which may be necessary to free their deliberations from disturbance or constraint of any kind. This power is absolutely necessary to a faithful discharge of their public duties, as well as the exercise of all powers expressly delegated to them in the constitution. For, it was well supposed, that the utmost freedom of observation, discussion and debate would be fully repaid, by the greater wisdom and prudence of all measures which congress might adopt. The constitution accordingly provides, that 'for any speech or debate in either house,' no senator or representative shall 'be questioned in any other place;' the meaning of which obviously is, that he shall not be called to account for what he may have said in congress, either on a civil or criminal prosecution before any tribunal of justice; nor before any other legislative assembly, or public body having political power, as the legislature of any of the states; for, the common law is sufficient to protect him from being called to account by persons, having no lawful political power whatever.

If, however, either of the houses of congress should suffer its members to be threatened for any thing said in debate, or to be waylaid, and assaulted in going or returning, they would compromise their own dignity as well as the respect due to their constituents, in whom the national sovereignty undoubtedly rests in the last resort; and such forbearance on their part should be ascribed to anything, rather than to a want of authority to put a stop to such outrages. The reader will immediately perceive, that allusion is here made to the ferocious assaults, committed at different times during the present session of congress, on two of its members, by armed persons, in pursuance of threats previously given out by them, and the gross personal indignity offered to a third member of congress, by another individual, whose conduct in this instance alone, would suffice to show in what light he must be considered among civilized and respectable people. It must appear singular to reflecting persons, that congress could suppose that so mild a punishment as a gentle reprimand, which, whatever may be the case here, in fact is no punishment at all, except to those who have the feelings of gentlemen, or at least have some remains of character to preserve, would be sufficient to deter men who had made

up their minds to gratify their vindictive feelings, at whatever risk of life from their brutal attempts. What is worse, there does not appear to be any sufficient grounds in law, for the proceedings of the house of representatives in this respect ; for, the sentence of reprimand appears to be no less illegal, than the result shows, that it was ineffectual, when considered as a warning to others. One would naturally have supposed, that the proper course to be taken in any such case, until congress shall see fit to make provision in relation to the subject by law, would be, in the first place, as soon as complaint is made, to take the person accused into custody, and after hearing what he had to say, if he did not exculpate himself, to keep him imprisoned during the rest of the session, not, *as a punishment to him* ; but, *as a measure necessary to secure themselves from further annoyance by him*. This would not at all interfere with a prosecution before the tribunals of justice, on an indictment for a breach of the peace, nor with any process against him, for the purpose of binding him over to his good behavior ; in either of which cases, the house of representatives might, at their discretion, release the offender from their custody.

## CHAPTER IV.

### *Of the Law of Libel in relation to Public Officers, &c.*

ANY species of publication, of a more fixed and durable nature than oral communications, which are merely slanderous, tending either to bring the government, or the rulers for the time being, or public officers in general, or private individuals, into hatred, contempt, or ridicule, is a libel, and is generally actionable at the suit of the party injured, or indictable as a public offence.

It is actionable, on account of the damage which the party libelled, sustains in consequence of it; and therefore where the facts charged in the publication are true, there is generally no redress by action, unless perhaps in the case where personal defects or deformities are maliciously made sport of, where it is presumed the humanity of the law would not permit the truth to be a justification.

A libel is indictable, because of its tendency to lead to the breach of the peace. At common law, therefore, the truth of the libel was never considered as a justification, because the tendency to a breach of the peace would be the same, whether the publication were true or false. It is on this account; that a libel on the memory of a person deceased, is held to be a libel, because it has a tendency to excite the feelings of his children or kindred, and leads to acts of violence. If, however, a publication should be written as a matter of history and with a proper regard to historical or biographical truth, and without any malicious intention of defaming the dead, it would be justified, notwithstanding the facts which it contained, might impeach the character of the deceased.

In the case of the *Commonwealth v. Clap*, Parsons, Ch. Jus., assigns another reason, why the truth of a libel ought not to be received as a justification *on an indictment*. 'If the law permitted the truth of the libel to be given in evidence on an indictment, the effect would be a greater injury to the party

libelled. For, he is not a party to the prosecution, nor is he put on his defence, and the evidence at the trial might more cruelly defame his character than the original libel. See 4 Mass. R. 169. Because, he could have no opportunity to call witnesses to prove the falsehood of it. In general, a libel in a letter sent to the party himself, is not *actionable*; though there are contrary decisions. See 1 Term R. 110. 2 Esp. R. 625. 2 Starkie, 245: but it may be punished by indictment, on account of its tendency to produce a breach of the peace. *Ibid.*

Subject to these restrictions, it is both actionable and indictable as a libel, to charge a person with any act which is punishable as a crime; or, with criminal or vicious practices or propensities; or, with being a man of bad character or principles. So, it is libellous to reflect on him for any personal defect or deformity; to apply to him any contumelious or abusive epithet, as coward, villain, poltroon, &c.; to miscall him in his business, if done maliciously, for the purpose of degrading him, as to call a shoemaker, 'cobbler,' &c.; to charge him with having, or having had, any disgraceful disease. So, in general, it is libellous to charge a man with being deranged in mind.

To publish of a member of congress, who had left his seat in congress and accepted an office under the state government, 'He is a fawning sycophant, a *misrepresentative* in congress, and a grovelling office seeker; he has abandoned his post in congress, in pursuit of an office—was held libellous;' and without doubt either of the propositions contained in the above sentence, is sufficient of itself to constitute a libel. See 7 Johns. 264.

In the case of *Stow v. Converse*, it was held, that—

To ascribe to a person the expression of any blasphemous sentiment, or one 'irreverent toward the Creator and Governor of the world, and so analogous to the modes of thinking habitual to unbelievers and profligate men, (as that contained in the libel,) and which would disgrace any person who is not a professed infidel, must be considered libellous, if false; because, if believed, it can scarcely fail to deprive him of the esteem of mankind, exclude him from intercourse with men of

piety and virtue, and render him odious and detestable.' See 3 Con. R. 342.

To charge a senator with concealing from the senate his knowledge, that a bill contained a particular provision, when he knew that they were ignorant of that fact, by which they were led to pass the bill under false impressions, and under the concealment of what, it was necessary or proper that they should have been acquainted with, was held actionable as libellous. See 10 Johns. 259.

It is held not to be necessary, that the libel, in plain and express terms, should charge criminality ; but, if it necessarily implicate the conduct of the party concerned or referred to, it is libellous. 'The contrary doctrine,' in the words of Spencer, Ch. Jus., 'in *Van Ness v. Hamilton*, added to the acknowledged licentiousness of the press, would form a rampart from behind which the blackest scurrility, and the most odious criminations might be hurled on private character with impunity, and would indeed render the press both a public and private curse, instead of a blessing.' See 19 Johns. 372.

It is not necessary to constitute a libel, that it should be either written or printed. To set up any disgraceful emblem or symbol, having a personal application is libellous, and is actionable as well as punishable by indictment. Thus to hang a person in effigy ; to paint or engrave a caricature of him ; or, to exhibit it, or to expose it for sale, is libellous, and actionable and indictable as such, both in the painter and engraver, as well as in the booksellers, whose shop windows are disgraced with such exhibitions. From the instances last mentioned, it is apparent, that it is not the first contriver, inventor or author of the libellous publication, alone, who is punishable for a libel, by action or criminal prosecution ; but every one, who, in any respect takes an active part in giving it publicity, is liable. And therefore, where one person posted another in a newspaper, by a letter addressed to him, and subscribed with the writer's name, charging the person addressed with being a man destitute of honor and courage, it was held that the editor of the newspaper was answerable for the libel. The reason is, that the author may be a vagrant ; he may be out of the reach of process, or he may elude it ; or he may



be irresponsible; and, if the editor were not answerable, the person libelled would be without redress. So, it was held to be no legal excuse for a printer, in a civil action for a libel, that the libel was inserted and paid for as an advertisement in his paper, by one who subscribed his name to it. A printer, who, for so small a consideration, can consent to prostitute his paper for the gratification of private malignity, deserves no better. *See 3 Yeates. 518.*

In cases of this kind, it is recommended to the person injured by a scandalous libel, to make no inquiry for the author of the libel, but to commence his prosecution against the publisher of it. For, he who publishes a libel against his neighbor, without having previously ascertained the truth of it, though he may not be the inventor, ought to be held answerable for all damages arising from the calumny, which he has assisted to circulate. To prosecute the publisher therefore, notwithstanding he may be willing to disclose the name of the author, will be the most effectual way to put a stop to such libellous publications. Because, however large the damages may be, which he may be compelled to pay, he will have no legal right to call on the author for payment or contribution. On the other hand, where a publication will be justified if true, and the public good will be promoted by the publication, it is recommended to the publisher to assume the responsibility of authorship himself; in which case, if he is prosecuted as a libeller, he may do the public a service by proving the truth of the charge; for which purpose, he will have a legal right to resort to the testimony of the person, by whom the facts, constituting the charge complained of as a libel, were first communicated.

In order that an action may be maintained on a libel, it must have a particular personal application to the plaintiff. If it is uncertain who is intended by it, no action can be maintained. But, it is not necessary, that a person should be named expressly; the rule adopted by the court in this respect, is that of common sense: the court and jury will not affect to be blind, where every body else can see who is meant. Where a libel is of a general description, no action can be maintained upon it; though, in many cases, the libeller may be punished for it by indictment. *See 12 Johns. 478.*

No member of a legislative body will be liable to a prosecution, either civil or criminal, for any thing said or done in the regular course of any legislative proceedings. The freedom of debate, observation and discussion, in relation to all public measures, and the conduct of men in office, necessary to wise legislation, seems absolutely to require a total exemption from all such liability. This is the law of the English parliament, and is incorporated in the federal constitution, and, it is believed, is the law of all the states. See Starkie on Slander, 200. It has been held, however, that, if a member of a legislative body should *publish his speech*, it will be subject to the common rules as to libels, and, if any part of the published speech is libellous, he will be liable to prosecution for it. See 1 Esp. R. 226.

In Massachusetts, it is held, that for slanderous words uttered in the house of representatives, but not in the course of debate, an action for slander may be maintained. In the case of *Coffin v. Coffin*, Parsons, Ch. Jus., in the course of his opinion in favor of the plaintiff, observed,—

‘To consider every malicious slander, uttered by a citizen who is a representative, as within his privilege, because it was uttered within the walls of the representatives’ chamber, but not uttered in executing his official duty, would be to extend the privilege further than was intended by the people, or than is consistent with sound policy; and would render the representatives’ chamber a sanctuary for calumny; an effect which never has been, and I confidently trust, never will be endured by any house of representatives of Massachusetts.’ 4 Mass. R. 31.

In general, any one who republishes a libel, is answerable in the same manner as the original author, or first publisher. The rule proposed by the district court of Philadelphia is, to leave the motives of the *republisher* to the jury; and if they should infer that it was made without malice, let him be excused, if he gave the name of his author or authority at the time, so that the party injured may seek redress. But, if they should infer malice, let the original publication go in mitigation of damages. See 2 Bro. Penn. R. 79. But perhaps public policy, as well as justice to the party libelled, would

rather require that every one, who contributes to the circulation of a libel, whether it arises from malice, or from heedlessness, which frequently does more harm than malice itself, should be punishable for it on a civil or criminal prosecution. For, in one case why should that dull malice, which, incapable of inventing libellous matter itself, basely adopts it at second hand, escape more than the original propagator? On the other, a republication of a slander in a different place, may do ten times as much injury as the original publication. Thus, it is possible that a libel on a gentleman in Boston, published in Georgia, or in any other distant state, may do him no harm; but, if republished in Boston, may ruin him irretrievably; if he is to look for damages in Georgia, he can recover no more than such as he sustained by the publication in Georgia; if then, he can recover nothing for the republication, he must in effect go without any redress at all.

It is held, that the conductors of a press are entitled to no other indulgence, than any body else; and it is no invasion of the liberty of the press, that they should be held responsible for the truth of what they publish. See 7 Cowen, 628.

The case of *Southwick v. Stevens*, furnishes a salutary warning to those editors of newspapers, who are in the habit of indulging a propensity to sarcasm, misrepresentation and virulent controversy. The defendant in that case, had published a piece in his paper, representing the plaintiff as attacked with insanity, &c. The judge, in his charge to the jury, remarked in substance, that the publication held up the plaintiff in a ridiculous light, and was therefore libellous; that however, it was merely ironical, and in answer to a piece published by the plaintiff, in which the plaintiff had assumed a most singular style; that though libellous, it was written in the course of a newspaper warfare between the parties, and there was strong provocation to induce the ironical matter complained of, and that, in his opinion, the jury ought to find very trifling or nominal damages for the plaintiff. *The jury, notwithstanding this charge, found a verdict for \$640.* On a motion for a new trial on the ground of excessive damages, it was refused of course, because, in cases of personal wrongs, a new trial is never granted for this cause, unless the damages are absolutely enormous. See 10 Johns. R. 259, 449.

It seems no person will be liable to an action for slander or for a libel, for any thing said or done by him in the course of a legal proceeding ; as a judge, juror, witness, &c.

And therefore where charges were brought against a commanding officer, before a court-martial, and he was acquitted, and in the opinion of the court delivered on that occasion, the complainant was censured 'for endeavoring falsely to calumniate the character of his commanding officer,' it was held not actionable, being part of the judgment of acquittal. 2 N. R. 341. So, no action *for a libel*, will lie on a malicious prosecution ; however, the party injured in this case, has another remedy by a special action on the case for a conspiracy, or for a malicious prosecution, according to circumstances.

In England, where A. brought a writ of forgery against a peer, and the peer was found not guilty, it was held that the peer could not have a *scandalum magnatum*. 1 Vin. Abr. 390 ; cites Hob. R. case, 350.

So, where the defendant told a justice of the peace, that he intended to charge the defendant with felony for stealing, and requested a warrant against the plaintiff ; the court held that no action could be maintained. *Ibid*.

It is a general rule, that where the publication is made in support or furtherance of the interests of society, and not wantonly and insidiously for the gratification of private malice, the author is privileged. See Starkie on Slander, 262.

And therefore a petition for a redress of grievances, made to the proper authorities fairly and decently, can never be libellous, however offensive it may be to individuals. Accordingly, it is held, that an application for the removal of a public officer, made to the proper authority having the power of removal, is not a libel. Malice is never inferred in any such case from the mere act of publication. See 4 Serg. and Rawle, 420. This subject was thoroughly discussed in the case of *Thorn vs. Blanchard*.

In this case, it appeared, that twenty-four of the inhabitants of a county, had presented before the council of appointment of the state of New York, a petition for the removal of the plaintiff, who was a district attorney, alleging in substance that he was under the influence of improper motives, &c., and had

been guilty of improper management in his official capacity. It was proved that this petition was read before the council, and that immediately afterwards, the plaintiff was removed from his office of District Attorney. On the trial before the supreme court of New York, the charges contained in the petition not being proved, it was held, that the several matters were sufficient for the plaintiff to maintain his action for a libel. But, the cause being carried up on a writ of error to the court of appeals, the judgment was reversed. Clinton, Senator, in the course of his opinion, delivered in that court, speaks of the judgment reversed, as a hasty decision, 'which violates the most sacred and unquestionable rights of free citizens; rights essential to the very existence of a free government; rights necessarily connected with the relations of constituent and representative; the right of petitioning for a redress of grievances, and the right of remonstrating to the competent authority against the abuse of official functions, &c. &c.

In any such case, he considers it incumbent on the prosecutor, to prove express malice; to demonstrate that an evil intention existed; to show in the words of Hawkins, that the petition was entirely false, malicious and groundless, and instituted, not with a design to go through with it, but only to expose the prosecutor's character, under the show of a legal proceeding.—The presumption in any such case ought to be against malice.—The power of removal is not intended to punish the man, but to protect the public against official misconduct.—Though such council have no power to try; yet they are so far a proper forum, to receive a complaint for the removal of such grievances. He concludes with the remark, 'that whether the grievances were true or false, innocent or malicious, the powerful and commanding dictates of public policy, must merge and extinguish all individual claims, and all personal considerations. See 5 Johns. R. 508. Yet, it would seem, that if the charges in any such case are wholly without foundation, and *express* malice can be proved, the pretence of public policy will not protect a libeller from prosecution. In the case of *Gray v. Pentland*, Tilghman, Ch. Jus. remarks, 'in order to protect both the public and the officer, an accusation preferred to the governor, or other persons having the power of removal,

is so far of the nature of a judicial proceeding, that the accuser is not bound to prove its truth. If the jury are satisfied that it did not originate in malice and without probable cause, the defendant in the action will be excused. Yeates, Jus., in the same case, remarks, that 'wherever, under the insidious mask of consulting the public welfare, a citizen renders the investigation of the conduct of a public officer, the mere vehicle of private malevolence, and a jury on the trial shall be fully satisfied, that the publication was wanton and malicious, and without probable cause, he has no pretensions to escape unpunished. 2 Serg. and Rawle, 29. This is in accordance with the case cited in 1 Nott. and Mc. Cord, 426, where it was held, that false and malicious charges, made to a colonel of a regiment against a major in the militia, and praying for a court of inquiry, may furnish ground for a libel before a civil tribunal.

With regard to candidates for public officers, the law contemplates a certain freedom of remark, in discussing their characters and qualifications, which under other circumstances would unquestionably be libellous. This freedom however has its limits, and should always be accompanied with fair intentions, i. e., without malice towards the candidate, and with a view to the public good. To presume both in such cases, is contrary to the general rule in relation to libels, *that the falsehood of the libel, will lead to the inference of malice, unless circumstances are proved, to show that there was no malice.* Public policy however seems to require, that this indulgence should be shown to the defendant in such case, in order that those persons, who are public spirited enough to oppose the election of unsuitable candidates, may not be deterred by the apprehension of being prosecuted for a libel, from taking the steps necessary to prevent their election, by exposing their characters, or unfounded pretensions.

The general doctrine on this subject has been laid down thus : 'Where one becomes a candidate for public honors, he makes *profert* of himself for public investigation. All his pretensions become proper subjects of inquiry and discussion. He makes himself a species of *public property*, into the qualities of which every one has a right to inquire, and of the fitness of which

every one has a right to judge and give his opinion, &c. &c. See 1 Nott and Mc Cord, 348.

The case of *Lewis v. Few* ought not to pass unnoticed here, because the doctrine contained in it, is of very frequent application.

In that case, there had been an assembly of the people, for the purpose of selecting a candidate for the office of governor of the state of New York. At that meeting an address to the voters, containing libellous charges against the plaintiff, was read and unanimously accepted, and ordered for publication. The defendant was chairman of the meeting, and signed the address as such; the action for the libel was brought against him alone. Some remarks of the plaintiff's counsel are particularly deserving of attention.

‘It is the undoubted right of the people to assemble together, to discuss public measures, and the qualifications of candidates for public office. They may freely speak and publish the truth and the whole truth; but this cannot authorise them to publish *falsehoods*, and atrocious libels concerning public candidates. Political meetings are not to be sanctuaries for libelers and slanderers, from whence they may issue their calumnies with impunity.—

—The people, it is true, in their political capacity constitute the sovereign and supreme power of the state, &c. Who are the people? The great body of electors. But any assemblage of citizens, whether electors or not, for the purpose of promoting the election of a particular candidate, and of influencing the electors to vote for their favorite, is not *the people*, or sovereign, in this constitutional sense. It would be a most dangerous doctrine and productive of the greatest licentiousness, if such meetings were to be considered as *the people*, and possessing the attributes and immunities of sovereignty, &c. &c. —The situation of public magistrates, and public candidates would be deplorable, indeed, if the law afforded them no protection against the slanders uttered by such meetings. Individuals may be restrained by shame, fear, or personal considerations; but an assembly will not be influenced by such considerations. *A multitude never blush,*’ &c.

It was held by the court, that the circumstances of the case were no justification of the libel. See 5 Johnson's R. 22.

In the case of *The Commonwealth v. Clap*, Parsons, Ch. Jus., lays down, that publications of the *truth*, concerning the character of a public elective officer, and relating to his qualifications for such office, made with intent to inform the people, are not a libel. And every one holding such office, may be considered as a candidate for re-election, if he does not disclaim it.

On the other hand, he considers the publication of falsehood and calumny, against public officers and candidates, as a very high offence. See 4 Mass. R. 169. See also 3 Pick. 304.

In *Tillotson v. Cheetham*, it was held, that the public character of the plaintiff as an officer of government, is a consideration for giving exemplary damages. 3 Johns. 57.

But, as a publication, though false, will not always be a libel; so, on the other hand, the truth of a publication will not always be a justification of it.

The true legal criterion seems to be, what the jury, under the direction of the court, shall believe to be the intent with which the publication was made. For, it seems, even erroneous statements, made honestly and on occasions, where a person is called upon by duty, or, where he has a legal right to express his opinion, or, where considerations of public policy require there should be no such restraint, will be excused, though injurious to the character of another. The following distinctions in relation to this subject, it is believed, are well founded.

1. Where the publication is false, the jury are generally to presume it to be malicious, unless the defendant can show it to come within one of the above classes of privileged communications, in which case, to render it libellous, *express* malice must be proved, either by the declarations of the libeller, or by showing, that he knew he was publishing a falsehood.

2. Where the publication, though scandalous, is true, it is generally held that no action can be maintained for it; though perhaps there may be cases, as, if one should libel another on account of his personal deformity, with which the public have nothing to do, which is equally barbarous and unnecessary. But, for a libellous publication, though founded on fact, a man is punishable by indictment, unless it comes within some of the above classes of privileged communications.



On an indictment for a libel, if the publication is of a scandalous nature, the question whether it is true or false, according to the common law, ought never to be raised. For, if it is a privileged communication, it will be excused though false ; and, if it is not so privileged, it cannot be justified, though true. Comments on candidates for public offices, and on the conduct and character of public officers, must be considered as coming within the protection of privileged communications, and will not be libellous without proof of *express* malice, which will sufficiently appear, if the charges are groundless and without probable cause.

3. Where a publication is false, and does not come within any general class of privileged communications, though the jury ought generally to presume malice ; yet, if the defendant can show, from circumstances, that there was no malicious intention, he will be excused on an indictment, and it will go in mitigation of damages in a civil action. In 1 Hawks. 472, it was held, that where a libel is published, malice will generally be inferred from that act, but it may be explained away by evidence, to show, that in fact there was no malicious intention ; and the circumstance should be left to the jury.

4. A publication, relative to a candidate for public office, purporting to relate *facts*, of a libellous nature, and which the publisher must have known to be false, or which he had no reason whatever to believe to be true, will be presumed to be malicious in either a civil or a criminal prosecution. In 1 Nott and Mc. Cord, 268, it was held that facts and circumstances showing a ground of suspicion, though not amounting to actual proof of guilt, may be given in evidence in mitigation of damages.

5. It is laid down, and seems to be a safe proposition, that a publication simply denying charges imputed to the author, and confined exclusively to that object, is not a libel, whatever its contents may be. 4 Mc Cord, 322.

In 1 Nott and Mc Cord, 348, it is held in substance, that, ' to be actionable the libel must contain something, calculated to reflect shame or disgrace, or hold up the person libelled, as an object of *hatred, ridicule or contempt*. That if the words are not actionable *per se*, their being false and malicious does

not always necessarily render them so, even if special damage could be shown, because, if any such damage should arise from words absolutely innocent in their nature, though false (as to say of an attorney, that he was not witty) it would be *damnum absque injuriâ*; i. e. such a damage as the law does not notice as a wrong. And therefore it was held in the case cited, that where a private letter to a political friend, merely contained an opinion that a certain candidate for representative to congress, was *so frequently affected* in his mind, that he ought not to be supported for that situation, it was not actionable as a libel. The discerning reader will perceive in any such case, the necessity of attending to its peculiar circumstances, in order to determine, whether a communication is actionable or punishable as a libel, or not. In regard to all communications which are privileged, it will be most safe to give no more publicity to them, than is necessary to obtain those objects, on account of which alone, the law bestows the privilege. Any further publication will lead to the inference that there must have been some other motive for it, which if not shown to be innocent, the law will presume to have been malicious. It would be contrary to public policy, however, to punish any person as a libeller, merely for expressing in any of the public journals, a sincere belief that a certain candidate for public office, ought not to be chosen on account of certain facts, transactions, &c. &c. which the supposed libeller had *probable cause* to believe to be true. It has been held, however, that a publication of rumors, is not justified by the fact, that such rumors exist. See 1 Wendell, 456. A man's character ought not to be at the mercy of a mere scandalous rumor, which it is frequently impossible to trace to any responsible source. Yet in any such case, it seems, that the existence of such rumors will go in mitigation of damages.

In the case of *the People v. Croswell*, Kent, Jus., concludes his opinion with the following remarks. 'The founders of our governments were too wise and too just, ever to have intended by the freedom of the press, a right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men, to cherish for mischievous purposes, sedition, irreligion and im-

purity. Such an abuse of the press would be incompatible with the existence and good order of civil society. The true rule of law is, that the intent and tendency of the publication, is in every instance to be the substantial inquiry on the trial, and that the truth is admissible in evidence to explain that intent, and not in every instance to justify it. I adopt, in this case, as perfectly correct, the comprehensive and accurate definition of one of the counsel at the bar, (*General Hamilton*,) that *the liberty of the press consists in the right to publish with impunity, truth with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals.*' See 3 *Johns. Cases*, 394. This doctrine is expressly incorporated into the statute law of several of the states, particularly New York, Pennsylvania, and Massachusetts.

With regard to other publications, it may be remarked, that it is no infraction of law to publish temperate investigations of the nature and forms of government. *Commonwealth v. Dennie*, 4 *Yeates*, 267. Further than this the law does not seem to be judicially settled in this country. In the case of the *Commonwealth v. Dennie*, just cited, that distinguished writer was indicted for publishing the paragraph contained in the note below, and which, whether the result shall show his opinion to be well or ill founded, must be acknowledged to be equally virulent and unbecoming. *Yeates, Jus.*, in the course of his charge to the jury, remarked, in substance, There is a marked distinction between temperate investigations of the nature and forms of government, and those which are plainly accompanied with a *criminal intent*, deliberately designed to unloosen the social band of union, totally to unhinge the minds of its citizens, and to produce popular discontent with the exercise of power by the known constituted authorities. These latter writings are subversive of all government and good order. 'The liberty of the press consists in publishing the truth, from good motives, and for justifiable ends, though it reflects on government, or on magistrates.' (*Gen. Hamilton in Crosswell's Trial*.) It disseminates political knowledge, and, by adding to the common stock of freedom, gives a just confidence to every individual. But the malicious publications which I have reprobated, infect insidiously the public mind

with a subtle poison, and produce the most mischievous and alarming consequences, by their tendency to anarchy, sedition and civil war. We cannot, consistently with our official duty, pronounce such conduct punishable. The jury brought in a verdict of not guilty. See 4 Yeates, 267.\*

In England it is held, that any person may discuss the proceedings of parliament, even after they have become final, and express doubts as to their wisdom and policy. See Holt on Libels, 135. The law is the same here; this freedom of speech and of the press, without doubt is the peculiar object of the protection of the provision, contained in the first amendment to the federal constitution.

\* The paragraph for which Mr. Dennie was indicted, was as follows:

'A democracy is scarcely tolerable at any period of national history. Its omens are always *sinister*, and its powers are *unpropitious*. With all the lights of experience blazing before our eyes, it is impossible not to discover the futility of this form of government. It was weak and wicked at *Athens*, it was *bad* in *Sparta*, and worse in *Rome*. It has been tried in France, and terminated in despotism. It was tried in England, and rejected with the utmost loathing and abhorrence. It is on trial here, and its issue will be civil war, desolation, and anarchy. No wise man but discerns its imperfections, no good man but shudders at its miseries, *no honest man but proclaims its fraud, and no brave man but draws his sword against its force. The institution of a scheme of polity so radically contemptible and vicious, is a memorable example of what the villany of some men may devise, the folly of others receive, and both establish in despite of reason, reflection, and sensation.*'

There is nothing that can be said to excuse or palliate the public avowal and dissemination in this country, of such sentiments as those contained in the concluding part of the above paragraph, in italics. To publish them in periodical publications, seems almost as unjustifiable, as to attempt to overthrow a government with no better pretence, than that it cannot last. If the experiment is making, let it be made fairly.

Much of this writer's paragraph is sophistical. Our form of government is not the same with the democracy of Athens, or that of Sparta, or that of Rome, and has never been tried either in France or England; and all arguments drawn from experience must fail, when the experiment has not yet been made.

It has been found to have imperfections, it is true; some of which have been remedied by peaceable and deliberate amendments. In other countries a political reform of any kind, has seldom if ever been obtained, without a revolution, and not always, with one. Our frame of government has within itself a power to reform, without any danger to apprehend a civil war in consequence of it; which there is no reason to fear will ever take place, unless the constitution is either overstepped or violated.

So, it is lawful, with decency and candor to discuss the propriety of the verdict of a jury, or the decision of a judge. But, if the publication contains no reasoning or discussion, but only declamation and invective, and is written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in this country, they ought to be punished. *See 1 Cowp. 359.*

And generally, where any public grievance is exposed, whether by way of petition, remonstrance, &c., it seems, that any language, however strong, which is made use of to express the grievance, will be justifiable.

It is for the interests of literature, that a candid review of any literary work should not be esteemed libellous. Accordingly, in the case of *Sir John Carr v. Hood*, it was held to be no libel to expose a false literary taste, though by satire, burlesque, and ridicule. In that case it was held, that even a caricature of the author, *as an author*, and not *as an individual*, was not libellous; and the general doctrine was laid down, that no publication is a libel, which has for its object not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste, or to censure what is hostile to morality. *1 Camp. 350, 354.*

It may not be amiss to bear in mind, that a libel is a forfeiture of a bond for good behavior. *3 Yeates, 93.*

## CHAPTER V.

*Of the Rights of Juries.*

WHEREVER the trial by jury has been introduced, it has usually furnished a theme for unqualified admiration, on account of its wisdom, impartiality, and justice, and because it is thought to furnish the best security for the citizens, or subjects of the government, against public and private wrongs.

Its *wisdom* is apparent in this, that it is admirably contrived to render the people satisfied with the administration of justice. For, where a case goes to the jury by the common law, as it almost always may at the discretion of the defendant, no judgment can be given against any person either in a civil or in a criminal trial, unless after a verdict has been rendered against him, by them. Now, since all men of decent characters are qualified to serve on a jury, a few only being exempted or excluded from motives of public convenience or policy, or on account of the nature of their usual occupations, whether public or private; and as the jurors are commonly drawn by lot in each county, at regular periods, for the decision of causes arising within it, every qualified citizen has a chance of being called upon to serve in this office, and, consequently, to decide upon the law disputes of his neighbors, as well as upon all criminal charges prosecuted by the public. The people are aware of this, and are better satisfied to have their causes, or the question of their guilt or innocence of any such criminal charges, decided by men of the same rank, condition, and means of information as themselves, than they would be with the decisions of any judges, however learned and wise, the justice of which decisions they would seldom be able to perceive, because they would not readily understand or feel the weight of the reasons, which those judges would assign for their decrees.

Its *impartiality* is secured by the manner, in which the jurors, who are to constitute the jury for the decision of each cause,

are designated. For, the jurors names being usually drawn by lot, it is impossible to ascertain any considerable time before the trial, what persons will be returned to serve on the jury during the session of the court, or, out of that number, what individuals will be impannelled to serve in any particular trial. Consequently, it would seem impracticable for a party in a cause, or a prisoner on a criminal trial, to procure any particular individual to be returned as a juror, or to be impannelled on the jury. But, as it sometimes happens, that a person returned to serve on the jury, when the court directs a jury to be impannelled for the trial of a particular cause, is supposed by one of the parties not to be impartial, the law permits either party in a civil cause, to challenge any of the jurors, and have them removed from the jury box and others returned in their room, if he can assign any reasonable cause, why the jurors challenged, may be thought to be more likely to favor the party, who does not challenge them. Further, as no one who considers himself as having justice on his side, would be willing to have his case tried by persons, who were not men of fair character, every litigant has a right to challenge a juror, if he has been guilty of any infamous crime. This however he should be very cautious in doing; for, a challenge of this kind is not to be made lightly. As a matter of prudence, the suitor making it, ought to have the record of conviction in his pocket at the time; for, he has no right to put the question to the juror, or to examine him in relation to any matter, which may either charge him with a crime, or with misbehaviour, or expose him to shame or disgrace, in order to challenge him as a juror. *See 1 Sal. 153.*

In capital trials, by the common law, the prisoner has a right to challenge thirty-five jurors in succession, peremptorily, and without assigning any reason whatever for it. This indulgence is shown, that the prisoner may not be tried for his life, by any person whose appearance or character he may dislike, though such dislike may be the effect of mere prejudice, whim or caprice; and besides these thirty-five he may challenge as many more, as he can assign sufficient reasons for challenging.

The trial by jury is therefore *well calculated to do justice between the parties*, in criminal trials as well as civil causes.

But, besides, the jurors being taken from the great body of respectable citizens, and consisting of so large a number as twelve, one or more of them will be likely to be acquainted with all the general modes of business, the habits and practices and customs of society, as well as with the views and feelings of persons in the same class or business, with the parties in the case before them; they will therefore be well able to determine equitably and justly between them, as to the subject in dispute, the value of property, the extent of injuries, &c. &c.

*In protecting the citizens from private wrongs*, the lawful power of the jury, in assessing damages for injuries committed, is particularly observable. For, here they have a right to take into view, not only the amount of damage which the injured party has sustained, which is the least sum for which a jury can ever justifiably find a verdict; but, if the injury is of such a nature, that public policy particularly requires that it should be prevented from taking place again, the jury will be well warranted in giving what are called *exemplary damages*, as a warning to the defendant as well as to all ill-disposed persons in general.

The operation of this mode of trial in protecting the citizens from any species of public wrong or oppression, may be illustrated by numberless imaginary though not impossible, cases; *e. g.* suppose an unconstitutional and oppressive law to be enacted either by congress, or by the state authority, which however the courts, for whatever reason, see fit to sustain, if the jury were satisfied that such laws were unconstitutional and oppressive, they would have the power and the right, and, not only so, but it would be their solemn duty to acquit any prisoner, who might be charged with an offence against such law.

But in order to form a just estimate of the value of the trial by jury, it will be necessary to descend to further particulars. It is intended, therefore, in the course of this chapter, to consider the right and power of the jury in relation to their verdict: 1, in actions for breach of contract; 2, in actions for wrongs done maliciously, fraudulently or forcibly; 3, in criminal prosecutions. Before proceeding to these particulars,



however, it may be proper to remind the reader, that it is a general rule applying to all cases which are the subject of a jury trial, that it is the province of the jury to ascertain all facts upon which the decision of the case before them depends, while the law of each case is to be determined by the court. It is therefore considered the duty of the jury, to make up their verdict from the evidence exhibited to them at the trial, under the direction of the court as to the law applicable to the case. The law on this subject is thus laid down in *Plow. Commentaries*, 114. 'It is the business of the jury to inquire of matters of fact, and not to adjudge what the law is; for that is the office of the court. And, if the jury should find all the facts, and should further find that the law is *so*, when it is not so, the judges shall decide according to the matter of fact, and not according to the finding of the jury. For, the verdict will be good as to the fact found, but void as to their conclusion.'

But, as it sometimes happens, from the fallibility of human reason, from which experience has shown, that the most able judges are not always exempt, that the law is incorrectly *charged* to the jury; and as it is obvious, if the error is in a material point, and the jury are governed by the charge, they will give their verdict for the wrong party, and, in this manner, injustice will be done to him, this general proposition must be subject to some restrictions. For, there appears to be an analogy between the right of the jury to decide *as to the facts* from the testimony of the witnesses, and their right to form their opinion, as to so much of the law as is necessarily involved in a *general* verdict, from the charge of the judges. For, the duty of the jury requires them to bring in a verdict according to the law and the evidence in each case. In making up their verdict, therefore, so far as the facts are concerned, they are morally bound to believe the testimony of those witnesses whom the Court admit as competent, subject to these conditions: 1, that the facts sworn to, are not improbable; 2, that the testimony of the witness is consistent with itself; 3, that it is not contradicted by any other witness; 4, *that it is not contrary to what the jury themselves know to be the fact*; for, it is settled that the jury may give a verdict on their own knowledge,

though regularly every juror, having a knowledge of any facts, ought to communicate it to the Court and be sworn. 5. That there is nothing in the appearance or manner of the witness in giving his testimony, to lead the jury to distrust his truth or sincerity.

As the jury therefore may find the truth of facts on their own knowledge, and ought by no means to find a verdict contrary to what they *know* to be the case; so, *as to the law*, though they are bound to receive what the judges charge them, as the law by which they are to be governed in making up their verdict, so far as it is applicable to the case before them, yet this must be subject to the restriction, that they the jurors, do not know the law to be otherwise. In most cases, it is true, the jury are wholly incompetent to determine, without the assistance of the Court, what the law is in relation to the case before them. They have a right to presume therefore from the circumstance of a judge's appointment to office, and his learning and experience, that his charge is correct, unless they know or conscientiously believe to the contrary; and, if he should be incorrect, and the jury, confiding in the correctness of his charge, should bring in an erroneous verdict, no blame can ever rest upon the jury; since they have merely placed a proper confidence in the knowledge of a person, whom society or the constituted authorities of it, have appointed to be an official expounder of its various laws and ordinances. But this will not hold good, where the jury *know* the judge to be in an error, or what comes nearly to the same thing, where they are *thoroughly convinced* and *conscientiously believe*, that he has charged the law incorrectly. And, even in the cases, where the party injuriously affected by the verdict, may have a right to appeal; still, this circumstance will not discharge them from the strictest responsibility for the correctness of their own verdict; because the law confides, that in every stage of a cause, each individual, officially concerned in the administration of justice, will do his duty scrupulously and punctiliously, without relying upon higher tribunals to correct his mistakes. Besides, those who have a legal right to appeal, do not always find themselves in convenient circumstances to exercise it.

*1. Of the power and right of the jury, in making up their verdicts in civil actions for breach of contract.*

In actions brought for a breach of contract, where the performance consists in the payment of a precise sum of money, if the jury are satisfied that there has been a legal contract, which has not been performed, and no satisfactory excuse for non-performance is proved, they are bound to find a verdict for the precise sum due on the contract. Here they have no discretion whatever, and, if they should find a verdict for either more or less, the Court would set aside the verdict, and grant one or more new trials until this precise justice was done, unless it was adjusted by the consent of the parties.

Where the breach of contract consists in a failure to deliver certain goods or merchandize, the jury would have rather more latitude for the exercise of their discretion. For, though they would be bound to assess the damages at the true value of the goods, this of course must be understood as binding the jury according to the conscientious opinion of the jurors. But, as there would not be the same precise standard of value, in this case, as in the preceding one, and, as they might form their valuation upon the testimony of different witnesses, who did not agree precisely, the jury would have a legal right to adopt any valuation for the goods, between the highest and the lowest value, sworn to by the witnesses. But, if they should go beyond those limits on either side, and it could be made to appear to the court, the verdict would be set aside here also, and a new trial granted.

*2. Of the right and power of the jury in civil actions for wrongs done maliciously, fraudulently, forcibly, or carelessly.*

In these cases, the jury have a still greater latitude in assessing damages. But, where property is maliciously or wantonly destroyed, their verdict cannot, consistently with either law or conscience, be for a less amount than its value ; though, if there are any circumstances of peculiar aggravation, the jury will be warranted in law to assess a far greater sum. For, the rule in all cases of personal wrongs is, that the jury may decide at discretion upon the amount of damages, with no other restriction, than that they must not be absurdly small nor enormously large. For, in either case, it is not to be doubted that the

courts will grant a new trial for the purposes of justice. This power in the courts however will very rarely be exercised, because the design of it is not, to interfere with the power, which the law bestows on juries, of assessing damages for injuries at their discretion ; but it is intended to secure to the suitors the honest and conscientious exercise of the discretion of the jurors, and to protect the parties from the effects of partiality, prejudice, passion, weakness of understanding, corruption or mistake in the jury, to one or the other of which, an absurd and unreasonable verdict, if to a very great excess, must necessarily be ascribed, and for which, it would be a disgrace to the law to suppose it had furnished no remedy.

While on this subject it may not be amiss to remark, that the reason of the law in some cases of actions for wrongs, seems to be misapprehended, as it is sometimes applied. For, in such cases, and even where an injury has been done maliciously, testimony is sometimes admitted to show that the wrong-doer has but little property, as if this circumstance afforded an extenuation.

But, it must be apparent, in such cases, that the jury cannot consistently with their oaths, ever give a verdict for less than they conscientiously believe to be the amount of the damage, which the plaintiff sustains by the malice, or even carelessness of the defendant, whether the defendant has sufficient estate to respond damages or not. And why should the defendant be in a better situation than he would be, if he had given a promissory note, and through misfortune, had become unable to pay it ? In that case, the jury would not reduce the amount of the damages, merely because the defendant had not property enough to pay the whole. But, in the case of any wrong, there is still less reason for any such reduction. In cases of contract, a man must always take the chance of the insolvency of the person with whom he deals ; and, though he should never be paid, still he parts with his property voluntarily and takes that chance. But, when one man destroys the property of another, it cannot be pretended that the owner voluntarily gave it up, or consented to run any risk whatever. Being under the protection of the laws of society, he has a right to insist upon having damages for the full amount which the jury

shall conscientiously believe to be its value ; for, though the wrongdoer may not, at that time, have sufficient property to satisfy the whole judgment, it is very possible that he may have enough at some future time. But, the true reason, it is believed, why such testimony may sometimes be received, is because, if the defendant were very rich, and had committed the injury from [the insolent recklessness of consequences, which is sometimes seen to accompany the consciousness of being able to respond large damages without difficulty, the court would direct the jury to assess such exemplary damages, as the wrongdoer would feel, and as would serve as a warning to others. The defendant, therefore, upon any surmise that he had acted from any such motive, would be permitted to prove that he did not possess much property, in order to show, that he was not a fit subject from whom to require *exemplary* damages ; but never for the purpose of reducing the damages below the amount of the injury really sustained.

In cases of slander, libel, seduction, assault and battery without any mitigating circumstances as to provocation, oppression of any kind accompanied with an abuse of an authority given by the law, or any contumelious wrong whatever, the jury would do well to make the case of the injured party their own, and not by a mistaken sympathy for a disturber of the public tranquillity, add wrong to wrong, by giving a verdict for insufficient damages. For, the ill consequences of such a verdict, are very great ; because it does not furnish the redress to which the plaintiff is entitled, but on the contrary injures his character, and lowers him in the esteem of others. It tends also to bring the administration of justice into contempt. Lastly, it leads to violence and injustice two ways ; because, others seeing the impunity of the defendant, will not be deterred, but on the contrary will be encouraged in committing similar wrongs and outrages ; while the sufferers, seeing that they can expect no adequate redress from the tribunals of the law, will resort to direct violence to revenge them.

**3. *The right and power of the jury as to their verdicts in criminal prosecutions, &c.***

In criminal cases, the trial by jury is intended to afford to the person accused, not only a fair trial, whether innocent or

guilty ; but it is intended also to furnish, in an especial manner, every reasonable protection against the possibility of being convicted unjustly. Where therefore the jury consists of individuals possessing only a moderate share of abilities and knowledge of mankind, and such a share of integrity as is sufficient to resist the temptations, which may possibly be offered to induce them to pervert justice, if they will pay a proper attention to the proceedings before them, there can be but little probability, that innocence will ever suffer the penalty of criminality, or that *legal* guilt will ever escape with impunity.

To illustrate the justness of this remark, it will hardly be necessary to do more than allude to *the certainty*, which is required in the indictment, in describing the criminal charge, without which the prisoner cannot be convicted, even if the jury should give a verdict against him ; (*See the case of Mr. Rosewell, INFRA*;) the challenge of the jury with cause ; or, the peremptory challenge, without cause, before mentioned ; the inadmissibility of all proof of confessions drawn from the prisoner by promises of favor, or by threats of any kind ; the presumption of innocence, with which the law protects the prisoner, and renders it unnecessary for him either to justify, excuse or in any way exculpate himself, until a strong presumption of his guilt, is raised against him by the testimony of witnesses under oath ; and lastly, the humane principle, that even if such strong presumption should be raised in the first instance, if the prisoner can, either by other testimony, or by inferences drawn from circumstances satisfactorily proved, or by comparison of facts and conclusions, raise only a *reasonable* doubt, whether after all, he may not be innocent, the jury, according to the legal understanding of their oaths, will be bound to acquit him. By the English law, which is generally adopted in this country, a general verdict in criminal cases, must be either guilty or not guilty. By the law of Scotland there are three verdicts, viz., guilty, not guilty, and not proven. The last is given in, when there is not sufficient evidence to warrant the conviction of the accused, but the jury entertain doubts of his innocence. In such case, by the common law the jury are bound to acquit. If juries could always be depended on to make a proper distinction in their verdicts, perhaps this must be considered as an improvement on the common law.

It was on a humane principle, though sometimes barbarously abused by arbitrary judges in unsettled times, that the ancient common law did not allow prisoners counsel in capital cases, unless some matter of law, not already settled, should arise upon the facts found. It was supposed they could not need it for the facts; for, it was held, that if the evidence against them was not so clear, as not to be rebutted by any argument, they ought to be acquitted. Where the law applicable to the case, admitted of no doubt, it was the duty of the judges to be of counsel for the prisoner, *i. e.* to take care to give him notice of every fair advantage he might take, in challenging the jury, &c., and in general to take care that he should not be improperly convicted.

But, on account of the apparent hardship, and the occasional abuses which sometimes took place, the law has been altered. At this day, prisoners both in England and in this country, are permitted to retain what counsel they please, and in capital cases, poor prisoners have counsel assigned to them, on request, by the court.

To return; it is not enough, that the jury, after hearing all the testimony of the witnesses, the arguments of the public prosecutor, the defence of the prisoner both by himself and his counsel, and lastly the charge of the court,—are fully persuaded in their own minds that the prisoner is guilty; it is not enough that the jury, by their own natural sagacity, or, by the ingenious comparison of circumstances by the public prosecutor, are come to this conclusion. For, an *opinion* that the prisoner is guilty, thus formed, will hardly authorize the jury to find a verdict against him.

It is true, that it is the height of practical sagacity and wisdom, to be able to draw correct inferences from minute circumstances, which escape the observation of dulness,—from a partial view of facts, where it is impracticable to ascertain the whole truth; from premises wholly inadequate to the purposes of demonstration; this however, is only to be considered as a matter of prudence and caution for our own security; but, it would be the greatest injustice to apply such wisdom and sagacity, to the purpose of convicting a prisoner on merely probable surmise, when, according to the true intention of the

law, guilt must either be proved to a *moral* certainty, or, otherwise, must be allowed to escape with impunity. For,

Why is guilt punished at all? Is it not, for the sake of the security of the just? But, unless guilt is demonstrated, then it is possible, that innocent men may unfortunately fall into the same circumstances with the individual convicted, whether he be guilty or innocent in fact, and may have the same arguments from circumstances urged against them, and consequently, in the same way, may be convicted and punished. It is plain, therefore, that where even a guilty person is convicted and punished, without conclusive proof of his guilt, innocence itself is endangered, and the security of good men is not obtained.

In civil actions, if the jury should give a verdict, contrary to the evidence, that is to say, without any apparent evidence at all to support it, (for, it is not enough that it is found against the weight of evidence,) the court will set aside the verdict and grant a new trial. But the jury may give a verdict contrary to evidence if they see fit. See *Plowd.* 8. *Holt*, 404. *Vaugh.* 147.

So, in a civil action, if the jury should give a verdict, contrary to the direction of the court in matters of law, the court will set aside the verdict, and grant a new trial. But, as there are no new trials in criminal cases, if the jury should give a verdict, either against law or evidence, and notwithstanding the instructions of the judge, before it was recorded, to reconsider it, should persist in it, the verdict must stand, and there is no power to call the jury to account for it.

Since therefore this power is confided to the jury, it may not be amiss to consider what is their right and duty in this class of cases. This subject will be most conveniently illustrated by selecting a particular one. Suppose A to be indicted for a crime, and pleads not guilty, and after the witnesses for the prosecution are examined, he or his counsel argues to the court, *at the same time requesting the attention of the jury*, (as *Horne Tooke* was permitted to do, on his trial for a libel before *Ld. Mansfield*,) that the facts testified to, do not amount to the crime charged. Suppose that the court charge the law to the jury contrary to the prisoner's argument; here the jury,



if they are satisfied of the truth of the facts, and take the law to be as charged by the court, will be bound to find the prisoner, guilty. If they doubt, or cannot agree with each other, whether the law is correctly charged by the court; or, if they have any mistrust of themselves, that they shall not be able to apply the law correctly to the facts, they may find a special verdict, and thus submit the question of the prisoner's guilt, to the decision of the court. But if, after hearing the prisoner's argument, and the charge of the court, the jury should be *clearly of opinion*, that the law is according to the argument, and the judge's charge is wrong, it will be their duty to acquit the prisoner. If, in such case, they should find a special verdict, they would hardly do right, since they must be pretty sure the prisoner will be convicted, and yet, according to their own opinion, or rather according to the convictions of their own understandings, he is not guilty. If they should ask the court for further instructions in such case, before they made up their verdict, as they ought to do, because perhaps a few words of explanation from the judge will remove the difficulty in their minds, and they should still feel convinced, that the judge did not charge the law correctly, but, from a deference to his opinion, should find the prisoner guilty, they would violate their oaths.

If a barbarous or arbitrary law should be enacted, as for instance, if it should make mere words sufficient to constitute an act of treason, and any person should be indicted on such act, it would be the duty of the jury to acquit the prisoner, if, as in the case supposed, the law were unconstitutional; or, what is the same thing in effect, if the jury conscientiously believed the law to be unconstitutional, however it might be charged by the court. It is in this sense, probably, that the remark of Fortescue is to be understood; 'that the jury are not bound by the determination of the House of Commons, nor by any law in the world but their own consciences.' *Fort. de. Laud.* 117.

A distinction however may be taken here. 1. If the law were made to punish a man for doing anything, which it is his duty to do; or, which it is morally wrong to prevent him from doing; or, for not doing anything, which he ought not to

do, the law would be wicked and tyrannical, and such as no government has a right to make; and therefore the jury would do well in refusing to assist in enforcing any such law.

2. If the law should prohibit any thing, which a man would have a right either to do, or to omit, if not prohibited; or, command any thing to be done, which, if not commanded, any individual would, in like manner, have a right, either to do or to omit, and such law is not contrary to the constitution, though the penalty is excessively severe and out of proportion to the offence, still, the jury, in case of an indictment for a violation of it, will be bound by their oaths to convict a person who is guilty of such violation. They have nothing to do with the punishment.

With greater reason they will be bound to convict a person, who has committed an act wrong in itself, in violation of a law which prohibits such act, however severe the penalty may be.

The right of a jury to give a verdict, contrary to the opinion of the court on a point of law, can exist only, where they are fully satisfied that the court is in an error. For, if not thus satisfied, they ought to receive the judge's charge as correct. But, each juror ought in all cases, especially in capital ones, to act according to the dictates of his own conscience, and on his own moral responsibility in making up his verdict. The prisoner in a criminal case, and the parties in a civil action, are entitled to 'the exercise of his judgment, unbiassed by any consideration, that is not grounded either on the evidence in the case, or the law applicable to it. The jury in no case have a right to decide their verdict by drawing lots; it is always a misdemeanor, (*see* 1 T. Rep. 11;) to do it in a criminal trial would be inexcusable; and in a capital trial would in fact be murderous; because in this way an individual might be put to death, without any real consideration of his guilt or innocence. It is held, that if they cannot agree upon their verdict, they may agree to find their verdict according to the vote of the major number. *See* Sajs. R. 100. 1 Stra. 642. This however must be restrained to verdicts in civil actions, and can hardly be justified in law even there. For, the law requires unanimity in a jury, as a test of the truth and justice of their verdict. It means therefore unanimity brought about by discussion, and the exer-

cise of the understanding. But, the unanimity brought about by putting the subject to vote, is an evasion of the law ; for, this is not brought about by the exercise of the understanding, and it renders the verdict of the majority effectual, which at law would be wholly unavailing.

It has been held, that a jury may give in a verdict contrary to evidence. *See Plow. 8.* But, this is because it might be supposed, that they formed their verdict on their own private knowledge of facts. But a juror, who should thus bring in a verdict in either a civil action or in a criminal prosecution, would act improperly at least, and perhaps might occasion great injustice. In a civil action, if the jury should bring in a verdict grounded solely on their own private knowledge, it might appear to be given contrary to, or, without any evidence, and, if the court were of that opinion, it would be set aside and a new trial granted. If there was evidence given on both sides, the verdict would appear to be given contrary to the weight of evidence, and, in this way, though a new trial would not be granted, yet it would tend to bring the administration of justice into disrepute. The same consequence would attend the conviction of a person indicted for a crime, on the private knowledge of the jury. A greater injury however is done here ; because the prisoner is convicted on evidence which does not appear on the trial—evidence, of which he has no notice, and consequently has no opportunity to answer. The duty of a juror, who has a knowledge of any material facts, would therefore seem to be, to give notice of it, especially in a trial for a capital offence, so that he may be sworn, and the prisoner may have an opportunity of explaining away his testimony, and perhaps convincing that very juror that he is in an error. It would seem, also, very proper in the jury, in general, if one of their number should attempt to influence the rest by appealing to his own private knowledge of facts, to give notice to the court of the circumstance ; for, otherwise, the accused party does not seem to have a fair trial. But, it is held that where a person is about to be sworn on a jury, who has material evidence to give in the case, he ought to inform the court of it, before taking the oath. *Sal. 405.*

No juror ought ever to agree to bring in a verdict of guilty, against a prisoner, unless he is completely satisfied of his crim-

inality. Though the other eleven are agreed, if their reasonings do not convince him, and he should out of deference to their judgment, though sanctioned also with the opinion of the court, consent to such verdict, the prisoner's blood, if innocent, will rest upon that juror's head, and upon his alone; for, the rest conscientiously believe the prisoner guilty, according to the best exercise of their judgment; but he convicts, *while he doubts the prisoner's guilt*, and therefore violates his oath, neglects his duty and betrays his trust. Neither ought a juror ever to consent to find a verdict against a prisoner from the expectation, that he will not be capitally punished. For, the substance of the verdict of the jury, when they find the prisoner 'guilty,' is, *that he is PROVED to be guilty*; but, where they find him, 'not guilty,' the only rational meaning of the verdict, is 'that he is not proved to be guilty;' though the law permits it to be considered as a proof of innocence, so far that he shall never be tried again on the same charge, though conclusive evidence of his guilt should afterwards be discovered. If the jury cannot agree, they will be discharged after the court have kept them together long enough to ascertain, that there is no probability that they will agree.

On the other hand, if the juror is completely satisfied of the prisoner's guilt, and can trace that conviction to the effect of the testimony which has been given on the trial, he ought to find him guilty; without regarding those vain scruples, which sometimes afflict men of great sensibility, when discharging the plainest duty, *that though they are fully satisfied, after the most careful scrutiny, yet perhaps they may be in an error*. In such case, they should remember, if they are in an error, it is because they are fallible creatures, and not because they have not taken proper pains; but no man can be accountable for any thing more, than the honest exercise of such an understanding as nature has given him.

In all cases, both civil and criminal, if all the jury are satisfied and agreed, as to the facts of a case, but cannot agree as to the law, so that they are unable to make up their verdict, they have a right to call on the court to give them further instructions and explanations as to the law, to enable them to do so; or, they may bring in a written statement of all the facts

in the case, which will be reduced into proper form for them by the counsel in the case, under the direction of the court, and conclude with submitting to the decision of the court what their verdict ought to be. By this special verdict finding all the facts, the final decision is submitted entirely to the court ; so that if, after finding all the facts, they should conclude by giving a general verdict in favor of one of the parties, or of the prisoner as the case might be, the court would reject the conclusion as void, and would determine for themselves on the facts found in the verdict.

After the jury are agreed, and the foreman has delivered in the verdict, and the jury are asked the final question 'so you say all, gentlemen,' any juror may then dissent, if he has any scruple arise in his mind, and the court will then send the jury out again, to see if they can agree. And whatever their first verdict may have been, they are entirely at liberty to alter it as they see fit. This power they retain until their verdict is recorded. And therefore, where two were on trial for a conspiracy, and the jury came in with a verdict of guilty, against one, and were sent out again, because one alone cannot be guilty of a conspiracy, and on their return again, found both guilty, the verdict was held good. *See Plowd. 212.*

But, after the trial is over, and the verdict is once recorded, there seems to be no remedy, even though they have made a mistake in their finding, and make an affidavit to that effect. For, all mistakes ought to be corrected at the time of trial, and before the verdict is recorded. *See 2 T. R. 282.* If any alteration should be allowable after the jury had once been dismissed, it would furnish too many opportunities to attempt to tamper with them. It is for this reason, that all representations of jurors, contrary to their verdict, have been censured. *See 3 Bur. 1696.* This however does not apply to recommendations for mercy, made by the jury after conviction.

Jurors should be careful to attach no weight whatever to suggestions, made as to the probability or improbability that a prisoner, if convicted, will be punished. Their concern is with his guilt or innocence alone, and that question it is their sworn duty to decide, without any reference to the question, whether he will be punished or not, or, what his punishment may be.

In a capital case, within the recollection of the present writer, the public prosecutor expressed an opinion in the course of his argument, that the prisoner, if convicted, would not be punished capitally ; and the jury found him guilty ; but afterwards, eleven of them sent a representation to the Governor, stating that they should not have found him guilty, if they had expected he would be punished *capitally*, &c. ; but their petition was not granted, and the prisoner was executed.

The grossness of such conduct in the jury, is manifest from the consideration, that, unless it can be supposed, that they knowingly brought in a false verdict against him, for whatever reason, they would have found him *not guilty*, when in their consciences they believed him *guilty*, merely because they were unwilling, that he should suffer the punishment prescribed by law for the crime proved against him.

With regard to the efficacy of the trial by jury in protecting the citizens from public wrongs, whether consisting in the operation of laws grounded solely in usurpation, or, upon an abuse of a legal authority ; or, consisting in acts of arbitrary power committed by persons in authority, but without any legal warrant, it may be further remarked, that,

If acts of oppression should be practised upon an individual under pretence of a lawful authority, and an action should be brought for the injury, if the oppressor were a person of great political power or influence, it might happen that any one or two individuals, if they had the judicial power of deciding between the parties without the intervention of a jury, might be too much overawed and intimidated by the wrong doer, to do strict justice between them. But an independent jury in any such case, would make the plaintiff's case their own ; and keeping in mind the principle, that, *where one citizen is oppressed, all are threatened*, would take care to give a verdict against the defendant, for such exemplary damages, as would teach him, however high his rank might be, that the law is above him.

If the sovereign political power should fall into bad hands, and an attempt should be made to crush all those who were obnoxious to them, by the enactment of highly penal and unconstitutional laws, against acts wholly free from moral turpitude, and only prohibited, because *all freedom is dangerous to usurp-*

*ed power*, it would be the duty of the jury, by their verdict of acquittal, to rescue the persons accused, and show their detestation of tyranny and oppression.

If the time should ever arrive, when the members of the judiciary shall be dependent for their offices upon the other departments of government, and those other departments shall abuse their authority to violate the constitution, and crush such of the citizens as shall oppose their schemes; and, to carry their designs into effect, shall appoint to judicial offices such of their own adherents as will co-operate with them, by harsh and arbitrary misconstructions of penal laws, it is then that the excellence of this mode of trial, ought to be seen and felt as a guardian and protector of civil and political rights. How far is this supposition justified by the history of the past?

In the first year of Charles II. while public affairs were controlled by Cromwell, Lieut. Col. John Lilburne was indicted for high treason for publishing certain books and pamphlets, reflecting in the strongest manner upon that usurper. On his trial he made a very bold and eloquent defence, and though the court were unanimous against him, and seemed very desirous that the jury should convict him, yet he was unexpectedly acquitted, to the great joy of the people, who, it is said, shouted for half an hour without intermission, to the great terror of the judges. Within three years afterwards he was banished by a resolve of the Parliament, under pain of death. He was at the Parliament door the day after this resolve was passed, and was ushered into the bar, by the serjeant at arms. The speaker of the house twice commanded him to kneel to receive his sentence, but he replied that though he submitted to their sentence, he neither could nor would kneel. Being then sent out, he told the serjeant to inform the speaker, that when he should be brought up to receive his sentence, he should not kneel, if they should order the serjeant to beat his brains out with the mace; because such a gesture seemed to imply a consciousness of guilt. He returned from banishment, and was indicted for it capitally, on the resolve or act of Parliament, and was very unfairly used on his trial, but making an able and eloquent defence, he was again acquitted by the jury. The Parliament seem to have been greatly incensed at this, and passed an order to examine

the jurors, and make them give an account of their verdict. They were accordingly examined *separately*, and their answers were generally such as became men of integrity. The foreman's answer in substance was, 'that, in what he did, he discharged his conscience, and that he would give no further answer as to the grounds of the verdict, for reasons best known to himself.' Four of them answered, 'that they did it to satisfy their consciences,' &c. One answered, 'that he was not bound to give an account of what he did in that business, but to God himself.' Two of them said, 'that notwithstanding the court told them they were judges of the fact only, they considered themselves judges of the law also.' One doubted, whether John Lilburne, named in the act of Parliament, was the same John Lilburne, who was indicted, having never seen him before, &c.

It was soon found, therefore, that jury trials were not so much under the control of the powers of the government, that favorable results could *always* be depended on with confidence, even when the influence of the government was seconded in the strongest manner, by that of arbitrary and prejudiced judges. Yet, it is not to be wondered at, if in times preceding the revolution in England, when James II. abdicated or was dethroned, and William and Mary succeeded, the trial by jury was found a very inadequate protection for innocent persons, who had fallen under the displeasure of the court. For, in those times, the fairness of the trial depended almost entirely on the presiding judges, because they exercised a power over the jury, that has long since been done away. The jury therefore, being overawed by the judges, who sometimes did not hesitate to threaten those of the jury, who would not agree to such verdicts as they required, were often induced to convict persons of crimes, which were not sufficiently proved. For, how could a jury, who were not well acquainted with the law, who were exposed to the highly penal and infamous punishment of an attain, for a false verdict, or, as it has sometimes been held, for a verdict contrary to the opinion of the court; and, beside that, who were liable to be kept without food and refreshment at the discretion of the court, if they did not agree, as also to be carried round the circuits in a waggon to attend



the court until they did agree, exhibit the same independence as in later times, when all these absurdities are done away? Yet, though they took the further illegal advantage of controlling the sheriff in the return of the jurors, as sometimes was done by Cromwell, it so happened, by means of the prisoner's challenges, and because the character and opinion of every individual juror could not be certainly known to the sheriff, that, even in the worst times, there would occasionally be found one or more jurors, too honest and independent, to be either corrupted or intimidated, into a false and iniquitous verdict.

It was in consequence of such disappointments, as it is presumed, that very soon after Lilburne's first acquittal in 1650, it was thought a politic expedient to create new courts with the style of high courts of justice, which had authority and was made use of, to determine cases of treason, &c. without the intervention of a jury. Under this tribunal, though the number of commissioners amounted to forty, there seems to have been no difficulty in convicting any person on almost any kind of evidence, as a quorum consisted of seventeen, and the opinion of the majority was decisive. The proceedings were arbitrary and cruel, to a high degree. The first high court of justice, however, was erected for the trial of Charles I. and gave rise to the rest.

Among those who suffered capital punishment under this tribunal, and whose guilt is not satisfactorily made to appear, because they had not a fair trial, were Col. Andrews, Ch. Love, J. Gibbons, Dr. Hewit, Sir Henry Slingsby, and many others. John Mordant was acquitted, there not being a majority of the judges against him, and some being bribed. After the restoration of Charles II. the trial by jury was again permitted in such cases. But here the trial by jury was again found insufficient to protect the innocent, on account of the unfairness with which it was usually conducted in the time of Ch. Jus. Jeffries. Certainly it was a rare instance, indeed, when one indicted before the court of King's Bench, escaped, while this judge presided. He seems almost invariably to have had a strong bias against the prisoner, from the beginning of the trial; and being a man of great abilities, and assuming the part of king's counsel and uniting it with the authority of chief jus-

tice, he generally refuted or silenced the arguments of the prisoner, and overawed or convinced the jury with equal ease, whether there was or was not sufficient legal evidence of guilt. In illustration of these remarks, one or two instances may be given. In 1681 Stephen College was indicted for high treason, and, if allowance were not made for the age, the perusal of his trial, would be sufficient to give any one a distaste for the trial by jury. Because it seems impossible not to come to the conclusion, that he was the innocent victim of perjury in the witnesses, cruel and barbarous oppression in the court, and gross servility or excessive stupidity in the jury.

In the trial of Count Coningsmark and three others in the same year, for murder, in which there seems to have been no doubt that Coningsmark was the instigator, and that the act was perpetrated by one of three others in the presence of the rest, by his procurement, the Ch. Jus. Jeffries, for whatever reason, was resolved to save Coningsmark from conviction. For this purpose, evidence was withheld from the jury which would have tended to clear some of the prisoners, but would have endangered the Count. But no one can read the trial and doubt his guilt. In order to favor him the more, after the testimony was closed two of the prisoners who were foreigners and did not speak English, were not asked what they had to say in their defence, from an apprehension that it might lead to the Count's conviction. The jury therefore found him not guilty; but the three others were convicted and executed, one of whom, it is not unlikely, was innocent, or at least wholly ignorant of the intention of committing the crime of murder.

Joseph Hayes was also indicted for high treason, before that court; there was hardly any thing, which would be called legal evidence, offered against him. He conducted his trial with great boldness and spirit, and, notwithstanding a violent charge against him by Ch. Jus. Jeffries, was unexpectedly acquitted by the jury.

The trial of Thomas Rosewell, a dissenting Clergyman, for high treason, the overt acts of which consisted in delivering two discourses in the presence of a few persons at a private dwelling-house, and which discourses were said to contain the crime of imagining the king's death, deserves a more particu-

lar notice. The indictment against Mr. Rosewell was drawn up in Latin, agreeably to the law at that time. The treasonable words, charged to have been uttered by Mr. Rosewell, without the innuendos to point the application of them, were as follows :

‘That the people made a flocking to the king, upon pretence of healing the king’s evil, which he could not do ; but we are they to whom they ought to flock, because we are priests and prophets, who can heal their griefs. We have now had two wicked kings together, who have permitted popery to enter under their noses, whom we can resemble to no other person but to the most wicked Jeroboam ; and, if you will stand to your principles, I do not fear but we shall be able to overcome our enemies, as in former times, with rams’ horns, broken platters, and a stone in a sling.’

The witnesses for the crown were three women, whom, Mr. Rosewell, being conscious of his innocence of having ever uttered the expressions charged against him in the indictment, and apprehending that they would swear to the same story if questioned in each other’s presence, requested to have examined apart. This was accordingly done, but they agreed in their testimony in a surprising manner, though Mr. Rosewell cross-examined them with no small ingenuity. There can be no doubt therefore, that Mr. Rosewell did deliver two discourses at the times and places testified to by the women ; indeed, Mr. Rosewell never denied so much, and that the words charged in the indictment, were what they supposed Mr. Rosewell to mean.

After the evidence of the crown was closed, Mr. Rosewell, who was a good scholar, requested that the same passage in the indictment, just now quoted in English, should be read to him in the original latin, which was done as follows :

—‘*Quod populus coadunationem fecêre (anglicè, ‘made a flocking’) dicto domino regi nunc, sub pretextu sanandi morbum regni (anglicè, ‘the king’s evil’) quod ipse facere non potest ; sed nos sumus illi ad quos illi debent accedere, (anglicè ‘flock to,’) quia nos sumus sacerdotes et prophetæ, qui precibus dolores ipsorum sanaremus. Nos habuimus nunc duos iniquos reges insimul, qui permiserunt Romanam super-*

stitutionem (*anglicè*, 'popery') ingredi in eorum conspectu (*anglicè*, 'under their noses') qui assimilari possunt ad nullam personam, nisi ad nequissimum Jeroboam.—Et si ipsi ad fundamentalia ipsorum permanerent (*anglicè*, 'would stand to their principles') ipse non timebat, quin ipsi inimicos suos vincerent, sicut in pristino tempore cum cornubus arietum, patinis fractis (*anglicè*, 'broken platters'), et lapide in fundâ; (*anglicè*, 'sling') &c.

Mr. Rosewell before beginning his defence, made some exceptions to the indictment; and the following dialogue ensued between him and Ch. Jus. Jeffries.

*Rosewell.* If it please you, my lord, that which I object against, and desire to be satisfied in by your lordship, is this; I am charged with speaking words about flocking to the king to cure the king's evil; and it is in the indictment called, '*morbus regni anglici*,' that is, *the disease of the English kingdom.*

*Ld. Ch. Jus. Jeff.* No, no; it is *morbus regni*, *anglicè*, 'the king's evil.'

*Ros.* I do not understand how '*morbus regni*' can be 'the king's evil.'

*Ld. Ch. Jus.* Therefore, because there is no apt word in the law for that distemper, they help it up by the word '*anglicè*,' to show what they meant.

*Ros.* But, my lord, I understand there are proper words for the disease; as *struma* and *scrofula*; those are proper words for it; not '*morbus regni*.'

*Ld. Ch. Jus.* Not at all in law; those may be the words used among physicians; but in legal proceedings, we are to keep up exactly to the legal names and phrases; and where we have not an usual word, then we help it up by *anglicè*s, and so we here express that very distemper, which is called by the name of the king's evil, by a word framed as near to a law phrase as we can; and to show our meaning in it we add *anglicè*, *the king's evil.*

*Ros.* My lord, is that the phrase that is proper for it in law?

*Ld. Ch. Jus.* Yes, yes; it is very well expressed to show what is meant.

*Ros.* But, my lord, 'morbus regni' is in English, properly, *the disease of the kingdom.*

*Ld. Ch. Jus.* It is so; the disease of the kingdom; if they had gone no further, but left it there, it might have had such an interpretation put upon it. But because the words are so ambiguous in Latin, they are reduced to a certainty, by putting an anglicè to them.

*Ros.* I thought it had been 'anglici.' My lord, there is another phrase that I object against; it says '*nos habuimus nunc duos iniquos reges insimul*;' My lord, this cannot be understood of two kings, one after another; but '*insimul*' makes it to be both at once.

*Ld. Ch. Jus.* No; *we have had now together two wicked kings.*

*Ros.* That we do not use to express so in Latin.

*Ld. Ch. Jus.* The words do thus sound in English.

*Ros.* There are two words, *insimul* and *nunc*, that do signify the present time. My lord, I am now only speaking all this while upon the hypothesis, that these words were spoken by me; for I still do, and always must deny the thesis.

*Ld. Ch. Jus.* We take it so.

*Ros.* It should have been *successivè.*

*Ld. Ch. Jus.* Then it had not agreed with your words. For the witnesses swear that you said 'we have now had two wicked kings *together*, and not *successively*.

*Ros.* If that be an anglicism, this cannot be true Latin.

*Ld. Ch. Jus.* Nay; if it be a blunder in the Latin, it was a blunder of your making; for you spoke it so in English, and the indictment in Latin must exactly pursue the English.

*Ros.* Then, my lord, here is another expression, that they suffered '*Romanam superstitionem*,' 'Popery' to come in.

*Ld. Ch. Jus.* Aye; is not that well expressed?

*Ros.* My lord, there may be superstition in the worship of the Church of Rome, and yet not be the thing we call Popery.

*Ld. Ch. Jus.* There may so, you say right; but then this comes under the same reason, as the former phrase you objected against, '*morbus regni*.' Because '*Romana superstitio*,' is such a general word, and because there are several supersti-

tions in the Romish Church, abundance of them ; and this may make it uncertain ; and because we have no other word to express what we call Popery by, therefore there is an *Anglicè* put in, to show what is meant.

*Ros.* Then, my lord, it is said, '*in eorum conspectu,*' is that right, my lord ?

*Ld. Ch. Jus.* Yes, *Anglicè under their noses.*

*Ros.* That is *in their sight.*

*Ld. Ch. Jus.* Pray, how would you put that in Latin, *under their noses.*

*Ros.* My lord ; if I should speak according to the other parts of the Latin of this indictment, which your lordship says must exactly pursue the English, I would render it, '*sub naribus illorum.*'

*Ld. Ch. Jus.* Such people suffer conventicles under their noses, '*in eorum conspectu.*'

*Jus. Holloway.* It is not your nose, that sees.

*Ld. Ch. Jus.* Suffer rebellion under your noses ; are these things, '*sub naribus,*' or '*in conspectu ?*'

*Ros.* My lord, this could not possibly be spoken of the late king and this king ; when the precedent king died a professed zealous protestant, and his present majesty has so often, and earnestly declared against it.

*Ld. Ch. Jus.* We know that very well ; but yet withal we know, it was the pretence of Popery and arbitrary power, and those things, that brought that blessed martyr to the scaffold ; and the great cry now at this day, by all factious and seditious busy fellows, is against Popery ; as if it were just breaking in upon us, and the government abetted it ; when it is all false, nothing more untrue ; the indictment calls it so, says these words are spoken '*falso et malitiose ;*' and all treasons are so.

*Ros.* Then, my lord, there is another thing, '*si ipsi starent ad fundamentalia eorum,*' *Anglicè,* 'would stand to their principles or principals ;' for, I know not how it is in the indictment. Pray, my lord, how comes '*fundamentalia,*' to signify, '*principles.*'

*Ld. Ch. Jus.* Their principles, that is, their foundations or fundamentals. 'If the foundations are destroyed, what can the righteous do ?' says the Psalmist. The Latin bible expresses it by '*fundamentalia.*'

*Ros.* Then it is, 'si ipsi' in the third person; now my lord, in common sense, that must needs refer to the two wicked kings that were spoken of just before, or to the king and his subjects spoken of afterwards; and then sure it cannot be treason.

*Ld. Ch. Jus.* No; 'they,' that is, I and you that are here. It was spoken to your congregation. If they would stand to their principles; then come 'the broken platters,' &c.

*Ros.* If it were spoken to them and of them, it must have been 'you' or 'we.' Then, it is added in the end, my lord, '*fractis patinis*,' 'broken platters,' your lordship has remembered me of that word. My lord, I did hear, that Mrs. Smith, did swear at Kingston assizes, it was '*pewter platters*.'

*Ld. Ch. Jus.* I do not know what she swore there; now I am sure she swears as it is in the indictment, &c. &c.

After some further criticisms, Mr. Rosewell commenced his defence, and, that the ridiculous expressions charged against him and absurdly made the foundation of an indictment for high treason, were never used by Mr. Rosewell, was conclusively proved by the testimony of a great number of witnesses, who agreed in their account of the discourses, denied that he uttered the words charged, stated the language which he did use, and made it quite clear, that it was entirely owing to a misapprehension of his meaning, that the women testified as they did. For, according to these witnesses of Mr. Rosewell's, some of whom, being in the practice of taking notes, had committed to writing some parts of his discourses, what he really did say, was in substance as follows, and was delivered by him while expounding the 20th chapter of Genesis. After reading some of the first verses of that chapter, he took occasion to observe, from the conduct of Abraham there mentioned, that a good man might fall into the same sin, again and again. One instance, which he mentioned was that of Jehoshaphat, who sinfully joined with two wicked kings, first with Ahab, and afterwards with Ahaziah. On the seventh verse, he observed that the prayers of the prophets have been very prevalent for the healing of others. He instanced the prophet who rebuked king Jeroboam, and when the king's hand became withered, because he threatened the prophet with it, and the king

intreated the prophet that it might be restored, it was healed at his intercession. Mr. Rosewell in his discourse then quoted from an annotator on the bible, 'that a godly man's prayer is a sovereign cure of the king's evil,' not meaning the scrofula, but any disease which a king might happen to have, &c. 'There was nothing said about 'flocking to the king' at all.

In his second discourse, he expounded Heb. 11. v. 12. which alludes to Abraham's having a son in his extreme old age, from whom a great multitude of descendants sprung. He took occasion to observe, that God could effect great matters by very small and improbable means. He instanced the throwing down of Jericho by the sound of rams' horns, the destruction of the Midianites by Gideon, with a few broken pitchers, and the killing of Goliath by David with a sling.

It seems probable, these women, immediately after they heard these discourses of Mr. Rosewell, had conversed together in relation to them, and had agreed in putting their own erroneous interpretation upon them, and through the effect of imagination, had come to the belief that he had actually made use of the expressions charged, because they expressed the meaning, which, on a conference with each other, they concluded was intended by Mr. Rosewell. Mr. Rosewell's loyalty and innocence of any treasonable intention was established in evidence by a great number of witnesses, who testified particularly to his uniform practice of praying publicly for the king. On one occasion he was overheard praying for him in secret prayer, by one of his servants. He was however found guilty of high treason, and would have been executed, if there had not been a want of technical certainty in the indictment, in describing the charge. As soon as Mr. Rosewell made the exception, it was readily entertained by Ch. Jus. Jeffries, who stood firmly by *the law*, and seemed disposed to sustain the exception. But, in all probability, it was thought to be bad policy to let a prisoner off, by a motion made in arrest of judgment for a defect in the indictment, which, it does not appear, could have been avoided, and Mr. Rosewell was therefore pardoned.

After the exception to the indictment for want of certainty, was made by Mr. Rosewell, the Chief Justice assigned Mr.



Pollexfen to be his counsel to argue the motion in arrest of judgment ; Mr. Pollexfen then moved for a copy of the indictment, because it might be necessary to know its precise tenor. The Ch. Jus. would not grant it, but expressed his opinion of the unreasonableness of withholding it, in the following terms.

‘ Why look ye, Mr. Pollexfen,—If you speak to me privately as to my own particular opinion, it is hard for me to say, that there is any express resolution of the law in the matter ; but the practice has always been to deny a copy of the indictment. And, therefore, if you ask me as a judge, to have a copy of the indictment delivered to you in a case of high treason, I must answer you, show me any precedents where it was done. For, there are abundance of cases in the law, which seem hard in themselves ; but the law is so, because the practice has been so, and we cannot alter the practice of the law without an act of parliament. I think it is a hard case, that a man should have counsel to defend himself for a two-penny trespass, and his witnesses examined upon oath ; but, if he steal, commit murder or felony, nay, high treason, where life, estate, honour, and all are concerned, he shall neither have counsel, nor his witnesses examined upon oath ; but yet you know as well as I, that the practice of the law is so ; *and the practice is the law.*’

It is very plain from many other cases, besides those which have been named, that it is too much to expect of the trial by jury, that it should always guaranty a fair trial to the prisoner, even if the jury are free from all responsibility for the correctness of their verdict, unless the prisoner has secured to him, the right to a copy of the indictment, that of being heard by his counsel without any restrictions whatever as to questions of law ; the right to compel the attendance of his witnesses, and that of having them put on oath, all which were formerly withheld.

But so long as juries shall be protected in the free exercise of their understandings, as they now are in this country, it will be impossible for any government to practise any very gross oppression upon the citizens in general, under the forms of legal trials.

It is on this account, that the people should carefully guard this mode of trial from change or alteration. For, as it is one

of the strongest safeguards of the civil rights of the people ; it will be one of the first upon which lawless power will desire to lay its hands, under the pretext of improvement. But, here at least, it is hoped, the hand of innovation will be prevented from any modifications which will affect its sense of common interest, its impartiality and independence.

It is true, juries are very properly under the control of the court in many respects ; and may be punished for a contempt, if they neglect or refuse to perform their duty ; if they refuse to submit to the lawful direction of the court as to their behaviour during a trial ; as, for example, if they should refuse to come in or to go out at the request of the court, or should persist in disturbing the course of a trial by grossly disorderly conduct, persisting in asking illegal questions after notice from the court, or any other similar absurdities or improprieties. And therefore it has been held, that, if the jury separate improperly, they may be punished at the discretion of the court, as for a contempt. 2 B. & Al. 462. So, if they should eat or drink without the direction of the court, before finding their verdict, even if it be at their own expense ; but, for a stronger reason, if at the expense of one of the parties. See Vaugh. 153. In Plowd. 518, a case is mentioned of a juror, who was fined twenty shillings for having sugar candy, &c. found upon him. So, they are fineable, if they are unlawfully dealt with. See 1 Dyer, 55. pl. 8. And a juror who has been challenged and taken from the pannel, is punishable for speaking with the rest after departure from the bar. 2 Ro. 85.

But, juries are left entirely free from any other motives to agree upon their verdicts, than those of reason and conscience, and a regard for truth and justice. Where there is no probability that they will agree, it would be an act of oppression to keep them together an unreasonable time. And there is no reason to do it in modern times ; since it seems to be quite settled, that even in a capital case, if the jury cannot agree, they may be discharged, and the proceedings may be repeated before another jury, *toties quoties*, until a jury can be found who will agree in their verdict.

It ought not to be dissembled, however, that doubts have been entertained, whether in general the merit of this popular

mode of trial is not greatly overrated. On this account it was intended to notice some of the exceptions, to which it seems most exposed. But, as this chapter has already overrun its assigned limits, it must suffice merely to allude to some of the more prominent ones, and to submit them without comment to the intelligence of the reader.

1. It has been thought incongruous, that though juries have no adequate knowledge of the law independent of the charge of the court, yet they may, if they please, decide directly contrary to it ; and thus, while they have not discernment enough to do right, they are entrusted with a power to do wrong.

2. Where damages are certain, all juries must decide alike ; when they are uncertain, no two juries would give the same verdict.

3. In cases, where questions of party politics have been brought up, it has frequently been found, that the jury has divided in opinion according to the politics of the jurors.

4. In cases where local interests, or popular prejudices or feelings, are concerned, a stranger, or one who is not of the tribe or clan, must rest satisfied with very meagre justice.

5. Juries are affected by circumstances of pomp, display, plausibility, vain glory ; and are influenced by eloquence, authority and reputation, as much as by considerations of truth, and justice. It is easier to persuade them, by an appeal to their sympathy, than to convince them by argument.

6. They are usually more merciful than judges, though not always ; but not so just. Yet the jury decides whether a crime has been committed or not, which would seem to require the most exact justice ; while the judge frequently determines the amount of punishment, which would seem to afford an opportunity for the exercise of mercy.

Whatever may be thought of these exceptions, it is clear that the value of the trial by jury, must always depend upon the degree of virtue and intelligence prevalent among those citizens, from whom juries are selected.

## CHAPTER VI.

*Of the Rights of Witnesses.*

As society is organized for the protection of the persons, and the security of the property and rights of its members, each individual may be considered as undertaking on his part, to conform to all the regulations, which the government may think it expedient to introduce, for the more readily obtaining of those important objects.

Among these regulations may usually be found one, which gives every individual a right to call on others to give testimony, in any cause which may arise before the tribunals of justice, in which his rights are concerned.

This right of calling on witnesses, is one of the greatest importance ; because, without it, no man would be able to obtain redress by law, for any injuries which might be offered to him, for want of evidence ; unless he was so fortunate as to find volunteers, who would step forward of their own good will to give testimony in his favor. The law therefore provides a process, by which a party in any cause may compel the attendance of witnesses, so far as may be thought necessary to secure their testimony. But, as it would be unreasonable to compel a witness to neglect his own affairs, and to be at the expense and trouble of going from his place of residence, and living at board during his attendance on the court, provision is made by the law for the indemnity of the witness in all these respects.

A witness therefore is under no obligation to attend court at all, unless he is summoned by a regular subpoena, stating the cause in which his testimony is wanted, and served by a regular officer, and also has sufficient money tendered him to defray his charges, or, at any rate, such allowance as is provided by the statute law, whether such allowance is more or less. If such a sum is tendered him, he will be obliged to attend so many days as it is a legal allowance for, unless he is sooner

dismissed. But, it seems, he is under no obligation to make advances ; and therefore, after the money which has been paid him is expended, or rather, after the time has elapsed, for which the money so paid is a legal allowance, he is under no obligation to remain in attendance upon the court, unless a further advance is made to him.

Though a witness, when summoned, is obliged to attend court if his expenses are tendered, yet the notice ought not to be so short that, in order to comply with it, he must break off suddenly from his business ; the notice should be a reasonable one, so that he may not be put to any inconvenience from the mere circumstance of its being unexpected.

So, a witness is entitled to a reasonable time to convey himself from the place where he is summoned, to the court which he is to attend. As there is no allowance made him by law, for coach hire, turnpikes, &c. it would seem that he is under no obligation to pay such charges ; indeed, he may be unable to do it. Unless therefore some suitable conveyance is provided for him, he can be under no obligation to go any otherwise than on foot, and on the common county road. And as the law estimates a day's travel on foot, at a certain number of miles, (say twenty) if the witness, as soon as he is summoned and receives his advance, sets out and travels at the rate of twenty miles per day towards the place where the court is sitting, it will be difficult to make out against him a case of contempt for not attending at an earlier day, though perhaps he might have arrived in half the time by taking the stage coach. The default is in the party who summons him ; for, either he should have given an earlier notice, or furnished the witness a suitable conveyance, or advanced him an additional sum for that express purpose.

A witness is usually allowed for a day's attendance, though he may not actually attend in court five minutes ; and if he is obliged to attend court on two or three different days, he is entitled to one full day's attendance on each.

A person must be summoned, in order to be subject to examination as a witness. And therefore, if an individual should happen to be in court, without having been summoned, and one of the counsel in a cause should call upon him to be

sworn and give his testimony, he may refuse to be sworn, without being guilty of any contempt, and has a right to depart without molestation.

Where a married woman is summoned, the fees must be tendered to her, and not to her husband.

A witness summoned to attend court, is entitled to the protection of the court, against all arrests, while going to court, or attending upon it, and in returning, if he uses common diligence and expedition, without being obliged either to take the shortest road, or to make use of more than ordinary dispatch.

This protection will be granted, either by a writ of protection, which the witness may have by asking for it, and which it will be a contempt of court for any officer to disobey, by arresting the witness after it is shown to him ; or, if the witness has never applied for the writ, and is arrested, the court, on motion, will discharge him. This protection, however, is afforded against arrests on actions brought for causes of a civil nature only, but will not protect the witness from arrests, on warrants for breaches of the peace, &c.

A witness, when called upon to testify, is supposed to be entirely disinterested, because the smallest pecuniary interest in the event of the cause, will be a sufficient cause of exception to disqualify him as a witness. To ascertain whether a witness is interested or not, he may be asked that question, or the testimony of others may be brought to prove it. But, if the question is made to the witness, and he denies it, it is not permitted afterwards to introduce the testimony of others to contradict him.

As no person will be permitted to give testimony, by which he will discharge himself from any species of legal accountability by throwing that burthen on another ; but, if he is wholly and absolutely discharged himself, from such accountability in any legal way, will immediately become a competent witness, it has become a common practice to qualify an interested witness, by releasing him, if there is a cause of action against him, so that he becomes entirely indifferent to the result of the suit.

It frequently happens, also, where an action is brought against a wrong party by mistake, either of the law or the fact,

that the person against whom the action ought to have been brought, if used as a witness, would clear the defendant by making himself chargeable. To the competency of such a witness, the plaintiff in such case can never make any valid objection, because he is called upon to swear against his own interest.

But, it may be asked, is a witness bound by law, to testify against his own interest in this way? May he not decline to answer any questions, the answers to which may be given against him either in a civil action, or on a criminal prosecution?

With regard to such questions, as if answered one way, tend to *criminate* the witness, he is entirely at liberty to decline answering them. But, this is held to be the privilege of the *witness* alone. The counsel of the parties have no rights on this subject. The witness may refuse to answer the question or not, at discretion. As a matter of prudence, however, the witness ought to take care to object to answering the *first* question in relation to such objectionable subjects of inquiry; for, it has been held, if he answers to part, he may be compelled to answer to the whole, whatever the consequence may be. See 1 Moody and Mal. 47.

This doctrine however seems to be laid down too broadly; for, the only reason why a witness who has answered to part, shall be compelled to tell the whole, is, that a partial statement may do great injustice to one of the parties. But, the answer is, that, where part is told, and the rest is inaccessible, the part told is no evidence at all to the jury. Thus, the court will not suffer part of a deed, where the rest is torn off, to be shown to the jury as evidence of a contract; because it is impossible to tell what the effect of the *whole* would be. Suppose a witness, after he had been examined originally, should die in a fit before his cross examination, would not the court generally instruct the jury to pay no regard to his testimony, though possibly there might be some excepted cases? The doctrine of the case cited, it would seem, ought to be restricted to cases, where a witness, with a full knowledge of his rights, to refuse to answer all questions tending to criminate himself, voluntarily testifies to part of a transaction, &c.

Here he may be compelled to answer to the whole, without any violation of principle ; since, by answering the first question, he, of his own accord, relinquishes the protection which the law affords him. *Ld. Ellenborough*, in the case *Jean Peltier*, remarks : ‘ I think it is the office of the judge to suggest to a witness, that he is not bound to answer anything which will criminate himself ; and if a judge were not to remind a witness of that circumstance, he would neglect his duty.’ It would therefore be a good rule to establish, that a witness does not relinquish the protection of the law in any case, by a partial answer, unless the court has given him notice in the manner suggested by *Ld. Ellenborough*.

It is held, that questions may be put to witnesses on a cross examination, tending to degrade them, for the purpose of trying their characters, unless the answers to such questions may expose them to punishment. *1 Moody and Mal. 108.* The inference is, that the witness will be bound to answer any such questions. In New York, however, it has been held, that a witness is not only not bound to answer any questions, the answers to which may expose him either to a civil or criminal prosecution ; but, it seems, he is under no obligation to answer any questions, the answers to which may have a tendency to degrade or disgrace him. *See 1 Johns. R. 498.* Whether such questions ought to be permitted to be put, does not seem clearly settled. For, it is not the same thing to allow the question to be put, and leave the witness to answer, or not, at discretion, and to refuse to permit such questions to be put at all. The decisions on this subject cannot easily be reconciled with each other. In one case, the court would not suffer the question to be put to a witness on a cross examination, whether he had not been put in the house of correction. *4 Esp. R. 225.* On the trial of *James Watson* for high treason before the king’s bench, the general doctrine in relation to this subject, was held to be : 1. That if any question is put to a witness to shake his credibility, he may refuse to answer it. If he answers, you must take the answer, and will not be allowed to impeach it. A witness who has received a pardon for a crime, or who has been prosecuted, and the prosecution is put an end to, is not bound to answer any questions in relation



to the subject. No evidence will be received to show that a witness has committed infamous crimes, for the purpose of impeaching his character and testimony, short of the record of conviction; because the court will not try collateral issues, which might be endless. If a question is asked a witness, whether he has not committed a particular crime, and he refuses to answer; though this may have its effect on the jury, yet it is not sufficient to discredit him in law, or render him incompetent. It seems to be the settled practice in England to permit such question to be put, and leave the witness to answer or not, as he pleases.

In Phillips' treatise on evidence, however, a case is mentioned where, a witness being asked on a cross examination, whether he had not been tried for theft, refused to answer, and appealed to *Ld. Ellenborough*, whether he was bound to answer. *Ld. Ellenborough* said, 'If you do not answer I will commit you,' adding, 'you shall not be compelled to say, whether you were guilty or not.' 1 *Phil. on Evi.* 269, *in notis*. In New York, it seems, no public officer is bound to answer any questions in relation to his official conduct, the answer to which may tend to impeach his integrity. See 1 *Johns.* 498.

Whether a question tends to criminate a witness or not, it is held, not to belong to the court to decide, but to the witness himself. Because, the court cannot know beforehand the facts and circumstances, which may be necessary in order to decide whether it may or may not, have such a tendency. For, though a question apparently may not have that tendency at first, yet, it may be the first link of a chain which has. See 2 *Nott. and Mc. Cord.* 15. In *Burr's trial*, it was held, that a witness may be required to answer on oath, whether he thinks answering a question will tend to criminate himself, before he will be allowed to decline to answer it. With regard to questions, the answers to which may expose the witness to a civil action, or may be given in evidence against him, in any action, which may afterwards be brought either by or against him, the law does not seem finally settled. Under this general class, a variety of cases are comprehended, which, in their decision, would seem to involve very different considerations. For,

first—the answer to the question may be obviously and indispensably necessary to the plaintiff in the action, for the maintenance of his suit, or, it may be thus necessary to the defendant's defence, in a civil action, or the prisoner's defence, on a criminal prosecution; if it is not answered, therefore, there must be a failure of justice. Second—the answer, though it may be directly injurious to the interest of the witness, may be wanted by one of the parties, for the mere purpose of strengthening an argument of the probability or improbability of a certain fact, which is material to his cause. Here there is a greater or less probability, according to the circumstances of each particular case, that there may be a failure of justice in consequence of not obtaining an answer from the witness. The rule, in these cases, it is obvious, must be grounded on the same principle. It may be remarked here, that, in these cases, if the witness is compelled to testify, no injustice can be done to him by it in fact, because he is bound to answer nothing but the truth. He does not therefore create a cause of action against himself, but merely furnishes evidence against himself, by which an action may be maintained against him. But, however, it has been held, that though one who conveys land, may be a witness to prove that he had no title, he is not compellable to give such evidence. 2 Ld. Raym. 1008. By the law of Scotland, it seems, a witness is not held to answer against his interest; and in such case, it is held to be the duty of the presiding judge, to inform him of his right. Tait on Evi. 429. In Pennsylvania it has been held, that a witness is bound to answer any questions the answers to which do not render him liable to a criminal charge, or tend to degrade him. In the case of *Baird v. Cochran*, Tilghman, Ch. Jus., ruled the law to be so, and observed, that 'every man may be compelled on a bill filed against him in equity, to declare the truth, though it may affect his interest; why then should he not be compelled at law, except where he is a party to the suit'? This is a most unfortunate *analogy*, or rather there is a great want of it in the two cases. A man who has a bill filed against him in equity, is compelled to disclose; to maintain the analogy, a defendant in an action at law, ought to be compelled to disclose. This, however, is not contended for; but it is contended, that a witness ought to dis-

close his interest, in an action at law between third persons: there would be some ground for analogy, if a third person were compelled to disclose his interest in a suit in equity between third persons. But the true ground of the argument is, that as a person may be compelled to disclose in equity, by bringing a bill in equity against him, there is no hardship in compelling him to disclose the same interest, in an action at law between third persons. But there is a striking difference between being compelled to answer questions on a cross examination, as a witness on the stand, and giving answers to interrogatories, with the direction and assistance of legal counsel at the elbow.—*See 4 Serg. & R. 397.*

In Connecticut, it is settled, that a witness shall be protected from answering questions, which subject him to a civil suit or debt. *See More v. Hathaway. 3 Con. R.*

Third—the question may be wholly immaterial to the issue, so that, whether it be answered affirmatively, or negatively, or not at all, it will have no effect whatever on the result of the action or prosecution. In this case, it is obvious, there will be no failure of justice in the cause then in hearing, if the witness should decline answering. It may be remarked, also that, if the witness should see fit to answer, he cannot be convicted of perjury, though he should swear falsely; because perjury can only be committed by swearing falsely in relation to something which is material to the issue. For, though it is settled that perjury may be in a mere circumstance, yet it must be one that is material to the issue, though it is not necessary that it should be decisive. *So held by Ld. Holt. See 10 Mod. 195. Carth. 422. 2 Ld. Raym. 889.*

It has been held, that a *subscribing witness* to a note, may be compelled to testify to that fact, though he may be bail for the defendant; but, if he is not a subscribing witness, he would be at liberty to testify or not. *See 1 Strang. 406.* This is on the principle, that a subscribing witness undertakes to testify when called on, and cannot by *his own act* destroy the party's right to his testimony. As to the question, what papers or documents a witness, who has been summoned by a *sub-pœna duces tecum*, is bound to produce, no general principle appears to be settled, which will apply to every case that may arise. It seems, however, that a witness is not bound to ex-

pose his own title deeds. Such is the settled law in England, because, by exposing his deeds, he may disclose a flaw in his title. The same reason does not seem to apply in places where title deeds are recorded ; but, as a copy of a title deed may at any time be had by applying to the registrar, there seems to be no reason, why a person should be compelled to produce his title deed, unless there is some other object, than to obtain a knowledge of its contents. So, it is held that a witness ought not to be compelled to produce his private books, relating to his private transactions. See 1 Str. 646.

So, a trustee, to whom it is suggested the plaintiff has conveyed his estate in trust, may demur to the production of the title deeds. 2 Stark. R. 203.

So, a solicitor to a third person will not be compelled to produce the deeds of such third person, where it may be prejudicial to his interest. 1 Starkie, 95. For, generally, an attorney is not at liberty to disclose communications made to him by his client, whether the client is or is not a party to the cause before the court. See 2 Camp. 578. In these cases, it may be remarked, that this is the client's privilege ; and, it will seem that, where any such confidence is recognized by the law, the witness will not be called on to testify, nor even permitted to do so. And therefore the client's interpreter cannot be examined as to communications, made through him to his counsel. And, from a regard to a similar principle, a woman after her husband's death shall not be examined as to conversations, had between herself and her husband during his life time. And for the same reason, a woman, after a divorce, cannot be called on to give evidence of conversations previously had between herself and her husband. See 1 Ryan and Moody, 198.

It has been held, that, under a subpoena *duces tecum*, a witness is under no obligation to produce private papers in his custody. 1 Esp. N. P. Cases, 405. In the case referred to, Ld. Kenyon denied the general position, that, in such case, a witness might be required to produce every paper in his possession, which did not tend to criminate him, because it would ruin millions. See 1 Esp. N. P. Cas. 405. However, it seems impracticable, to lay down any general rule or princi-

ple as to the production of papers and documents. In *Amey v. Long*, Ld. Ellenborough observes, that 'though it will always be prudent and proper, for a witness served with such a subpoena, to be prepared to produce the specified papers and instruments at the trial, if it be at all likely, that the judge will deem such production fit to be there insisted upon; yet, it is in every instance a question for the consideration of the judge at *nisi prius*, whether, upon the principles of reason and equity, such production should be required by him; and, of the court afterwards, whether having been there withheld, the party should be punished by attachment.' 9 East. 485. The question as to the obligation of the witness to produce papers, is therefore to be decided by the court, according to the circumstances of each particular case. But, this is to leave the subject wholly unsettled, because the opinion or discretion of different judges, as to the same facts or circumstances, is found to be different, and indeed the same judge is sometimes found to entertain different opinions at different times. Thus, when the question was made on the trial of Ld. Melville, whether a witness was bound to answer a question, the answer to which would subject him to a civil action, four judges held that he was not, and eight judges held that he was. As this is a case, where a similar principle is involved, if it had come up at *nisi prius*, the witness might or might not have been held to answer; according as one of the four, or one of the eight judges happened to preside. If the law is so unsettled, therefore, on this subject, and a case should occur, where the witness should be called upon to violate the sacredness of private confidential correspondence, or, to render himself liable to a civil action, it might be well for him not to be too hasty, either in the answering of questions, or in the production of papers. It has been said, and there seems to be no improbability in it, that Ld. Keith, in his answer to a question proposed to him, as a witness in an insurance case, subjected himself to damages to the amount of ten thousand pounds sterling. If a case of any considerable importance, therefore, should arise, the witness must by no means rely upon the court to protect his rights, *unless he claims them*. For, if he neglects to assert his rights, the court will take for granted that he waives the objection,

and consents to produce the letters, and to answer the objectionable questions. Many things take place in this way, in the course of a trial, which would immediately be overruled by the court, if an exception were taken to them, regularly and in season. But, in most cases, the witness not being acquainted with the precise extent of his rights, does not know what he may legally insist on, and what he cannot. Sometimes, therefore, it happens, that no objection is made, and the irregularity passes off without notice, as if done by consent. In any such case, therefore, the witness should state his objection to the court, and if of great consequence, should request delay, in order to obtain the advice and assistance of counsel to argue it, and, if it should be overruled by the court, and it becomes necessary for the protection of his rights, and the court is one of inferior jurisdiction, he may appeal, and if his appeal should not be allowed, and he is confident that his objection is a legal one, he may take the hazard of disobeying. For, if he is committed in consequence, he may bring his *habeas corpus*, when, if his objection is legal, he will be discharged. If a witness should be called on to produce papers, put into his custody by a third person, who had a right to call for them when he pleased, it would be very proper to give immediate notice of the subpoena, to such third person, that he might adopt such measures as he saw fit. If in consequence of it, the owner were to replevy them (though it has been held that at common law replevin does not lie for charters) there does not appear to be any way of coming at them. But the law does not seem to be settled.

It is apparent that the rights of witnesses in some respects, are not so much regarded, and consequently, not so well protected as they ought to be, from whatever cause it may arise. No reference is here had to the circumstance, that a witness is compelled to neglect his own affairs, for the purpose of travelling to and attending upon the court, to give testimony in a cause in which he has not the slightest concern; because this is for the benefit of one of the parties in the cause, and, is the consequence of a regulation, of which he will have the advantage himself, if he ever has a cause in court. But, it is intended to allude principally to the mode of examining witness-

es, by way of cross examination, as it is sometimes seen practised, and, for any thing that appears, may always *legally* be done, but seldom *justifiably*.

The legitimate objects of a cross examination, are among others, 1. To enable the party against whom a witness is brought forward to testify, to elicit from him any circumstances which attended the transactions to which he may have testified ; but which he may have omitted, or had no opportunity to mention on his direct examination. 2. By a series of close and judicious interrogatories, respecting the minute circumstances attending such transactions, to ascertain whether the witness is testifying to a story, which he has either fabricated himself or concerted with others. 3. To determine in the same way, supposing the witness to be honest, how far his observation, memory, and discrimination can be depended on. 4. On the supposition, that he is a dishonest witness, to exhibit him in that light to the jury ; by compelling him to invent new falsehoods at every question, in order to keep his story consistent with itself, until he is involved unconsciously, in absurdity, impossibility, and self-contradiction. The advantages of a cross examination in all these respects, are obviously very great. In an examination in chief, it is a general rule, though there are some exceptions, that the questions should be very general, so as not to intimate to the witness what he is desired to say, nor to prompt him, nor to lead him, nor to put answers in his mouth. After the direct examination is finished, which terminates as soon as the witness has testified sufficient for the examiner's purpose, because it is part of the professional tactics, observed on such occasions, not to push to the inquiry further, as well because it is unnecessary, as because something unfavorable may come out, the cross examiner considers it his duty to draw out what has thus been omitted, which frequently gives a different color to the case. On a cross examination, therefore, the advocate has a right to make use of questions of a much more direct and particular nature, than are usually allowed on an original examination. The advantage of this mode of examining a witness, in detecting a concerted story, sworn to by the witness on his direct examination, is very great ; a few moments of well directed cross examination, being sufficient to expose

the most ingeniously contrived fabrication. This is done by a close inquiry into minute circumstances, without which no real event ever happens, and which, if remembered, may readily be sworn to by an eye witness. But minute circumstances are seldom concerted in a false relation, and the witness, if interrogated in relation to them, is obliged to rely on his power of extemporaneous creation, to keep his testimony consistent. The consequence is, that the consciousness of adding falsehood to falsehood, accompanied with the fear of detection, exposure and punishment, soon throw him into a state of perceivable embarrassment, and perhaps inextricable confusion. A witness sometimes falls into a similar situation, from having answered a question on his direct examination, with too little precision, either from heedlessness or vanity, though without any unfair intention whatever. In a case of this kind, which occurred on the trial of Hardy, for high treason, a witness, who was a dancing master, being asked whether there had been a subscription for a certain individual imprisoned; answered, 'Yes; perhaps I gave a shilling or half a crown, or a guinea or five guineas towards his relief.' Being afterwards cross examined down to, 'but I might have given half a crown,' and being further urged with perplexing questions on the subject, he said, 'I would as soon give one as the other for a poor family in distress.' Ch. Jus. Eyre then gave him the following reproof and caution. 'You have brought yourself into a scrape, only for the sake of a flourish. When you are upon your oath, if you would only speak plain English, you would be under no difficulty. There is a great difference between a shilling, and a guinea, and five guineas, therefore you should not have conveyed an idea, that you did not know whether you gave one shilling, two shillings, one guinea or five guineas. I would advise you, when you are upon your oath, never to speak by metaphor,' &c.

With regard to the mode of examining witnesses, it may be further remarked, that it is not considered proper, though it is a very common practice, to state direct propositions to a witness, with the tone of a person asking a question, and to require an answer to it, as if it were really a question. On this account, Mr. Justice Abbott checked the examining counsel in the trial of Isaac Ludlam for sedition; 'You must not,' says



he) be angry with the witness, if what he says is not an answer, when you do not put a question.' It is also a frequent practice in cross-examining a witness, to state interrogatively to him, propositions consisting of a variety of circumstances, some of which are true and some false. This is unfair and ensnaring; for, if he gives a general denial, intending that the *whole* is not correctly stated, it may be argued, that he has denied that part which is true. On the other hand, if he gives a general assent, intending it only for that part which he thinks material and which is strictly true, if the slightest inaccuracy can be detected in the *whole* proposition to which he has assented, it may be urged against him to impeach his credit. A witness for his own security, in any such case, would do well, to make no reply to propositions which are not questions, and, where the question is embarrassed with a variety of particulars, should request the examiner to simplify his question, or should ask, 'what is the question,' which will induce him to put it in a more simple form, and directly to the purpose. It is a common practice also with some, when examining a witness, to interlard their questions with comments and observations. This irregularity is also much censured by the court; particularly by Ch. Jus. Eyre, and Ld. Ellenborough. It is also considered unfair and a breach of decorum, while the counsel on one side are examining a witness, for the counsel of the opposite party to make use of grimaces or gesticulations, expressive of surprise, as holding up the hands, &c. In Watson's trial for high treason, the court declared, that they would animadvert very severely upon such conduct. In the course of the same trial, Ld. Ellenborough checked Mr. Wetherell for improper treatment of a witness, and observed that he would not suffer injustice to be practised upon a witness by counsel. Mr. Jus. Abbott, also remarked on another occasion during the same trial, 'Every witness is entitled to the protection of the court from insulting questions and observations.' 32 St. Tr. 291, 298.

It sometimes happens, that the result of a trial depends upon a particular fact, which is sworn to by a single witness only. When this is the case, every legal measure possible is resorted to, for the purpose of impeaching his credit with the

jury, so that they may set his testimony aside, and find their verdict for the party against whom he testifies.

For this purpose, persons may be called to testify, that the general reputation of the witness for veracity is bad. But they can only be asked general questions in relation to the subject, *i. e.* as to their opinion of his character for truth, and the grounds of that opinion; but, it would seem, that they ought not to be permitted to state particular facts against the witness. *See 2 Starkie, 241.*

The testimony of the witness may also be impeached by showing, that he has previously done or said something, inconsistent with what he now testifies. But, before introducing testimony of this kind, the witness must be asked, whether he has said or done that particular thing, so that he may have an opportunity to deny, or admit and explain it; and contradictory testimony ought not to be admitted until he has had this opportunity. *See the opinion of Abbott, Ch. Jus., in the Queen's Case; 2 Brod. and B. 312.*

A witness cannot be cross-examined as to any collateral independent fact, irrelevant to the matter in issue, for the purpose of contradicting him, if he answers one way, by another witness, in order to discredit his whole testimony. In such cases only general questions can be put. If, however, the witness should answer, his answer cannot be contradicted by other witnesses. For, this would lead to the trial of collateral issues, and might be endless. *See 7 East, 108. 2 Campb. 637.*

Nor can a witness be cross-examined as to facts not in issue, if such facts are injurious to the characters of third persons, not connected in the cause. *1 Car. and P. 100.*

The court will protect a witness from questions put through impertinent curiosity, and much more, if it seems probable, that any unfair use may be made of them. *See the opinion of Tilghman, Ch. Jus., in the case of Baird v. Cochran. 4 Serg. and R. 397. See also, 1 Car. and P. 363.*

Every witness is entitled to ordinary civility, at least, from the examining counsel; since, whether he is willing or not, he may be compelled to attend the trial by the process of the court, and if he refuses to answer proper questions, may be fined

and imprisoned for the contempt. He is not at all, in legal contemplation, under the control of the examining counsel, except so far as the court sanctions and authorizes the questions put by him, and, in case of any illiberal treatment, has a right to claim the protection of the court, which is readily afforded when there is a suitable occasion for it and it is claimed decently and respectfully. If the ill treatment is gross, or the witness does not seem to be aware that he has a right to this protection, the court will interfere of their own motion, as where any opprobrious epithet is bestowed on a witness, whether merited or not. It would certainly be singular, if the judges should permit their court to exhibit a scene of indecent altercation between the examining counsel and a witness. In the trial of Mr. Hardy, both Mr. Erskine and Mr. Gibbs were checked by Ch. Jus. Eyre, for addressing the witness by the epithet of spy, though he was in fact a government spy, and an informer. 24 St. Tr. 751.

It is plain, therefore, that those professional gentlemen mistake the purpose of a cross-examination very much, who waste the time and patience of the court, jury and witnesses, by asking a thousand frivolous and unmeaning questions, which have no bearing on the merits of the cause. When such questions are asked, the court cannot always stop them, because they cannot tell beforehand, whether something may not be made of them in the address to the jury. If therefore they are not absolutely illegal questions, and the witness makes no objection, the court commonly does not interfere. It frequently happens, in consequence, that the witness not knowing his own rights, and believing himself bound to answer every question whatever that is put to him, makes no objection to answer, and if he finds himself insulted by an offensive question, instead of asking the opinion or protection of the court, resorts to ill-tempered and petulant answers. But, when it is found that, after all this parade of questioning, no use can be made of the answers, let them be made which way they may, being wholly foreign to the case before the court, the judges and jury very naturally feel disgusted, because they perceive their attention has been kept in suspense without any other object than the gratification of the examiner's vanity, in having all eyes directed towards him during the examination. These useless questions

furnish the occasion for the sarcasm of Swift, which is in substance, that if an action at law is brought for a cow, the decision of the case does not depend upon the inquiry, whether the cow belongs to the plaintiff or to the defendant, but whether the cow is a black cow or a red cow, or has long or short horns.

It is to be much wished that the law, with regard to the examination of witnesses, were altered in the respects following, viz :

1. That witnesses should never be called for the purpose of impeaching the testimony of a witness, by giving testimony against his character for veracity. This is a most unjust practice, and though sanctioned by long usage, is contrary to legal analogy. For, in this way, the reputation of the witness is attacked in a suit between third persons, in which he has been compelled to testify, and, for aught that appears, may have told the exact truth. This is done without any previous notice to him ; and, if he had received notice, he is entitled to no process to compel the attendance of his witnesses, not being a party to the suit. If his enemies are summoned as witnesses against him, they have an opportunity of aspersing or disparaging his character in this respect, with perfect impunity. The defence of his character, is left entirely with one of the parties in the suit, whose principal if not sole object, is merely to gain his own cause, and who may or may not feel interest enough to endeavor to establish it. His feelings and character may therefore be grossly injured without the possibility of redress.

2. That all questions, the answers to which tend to disparage a witness, should be overruled by the court ; for, if the subject of the question is known, it may be proved by others ; and if unknown, the witness is tempted to perjure himself, and thus preserve his character. But, if he acknowledges what is insinuated against him, then he establishes his veracity, instead of destroying it ; because a person who will not be guilty of falsehood for his own sake, can hardly be supposed willing to practise it for the sake of another.

3. That personal questions, addressed to the witness relative to his private affairs, should not be put until the examiner has made it appear probable, that the ends of justice cannot be obtained without an answer to them.

4. That witnesses should never be examined under oath, but each witness should be affirmed under the pains and penalties of perjury. There could then be no objection to the competency of atheists ; nor of children, however young ; but the credit of the witness, in every case, would be left where it ought to be left, with the jury, and crimes, which may now go unpunished on account of the inadmissibility of certain testimony, would then be subject to legal animadversion.

## CHAPTER VII.

*Of the mode of obtaining redress for any infringement of civil or political rights, committed either by the officers of the General Government, or of any of the State Governments.*

UNDER a frame of government voluntarily adopted by the people ;—under laws for the protection of the rights of the citizens, enacted by legislators of their own choice, and executed by public officers, whose offices, either directly or indirectly, depend also upon the choice of the people, and who, at any rate are responsible to them for any neglect of duty or other official malversation, it would be incongruous to suppose, that any of the civil or political rights of the citizens could be infringed by the public officers themselves, either with impunity to the transgressor, or without ample means of obtaining adequate redress to the injured party. And, it is true, that the people of the United States, in the frame of the General Government, as also in those of the respective state governments, have endeavored to make ample provision against such evils, by defining, with as much precision as the nature of the case would admit, the duties of all the public offices, which they have thought fit to create, and by restricting the powers of the officers, to such only as are absolutely necessary to the faithful and effectual discharge of those duties. This remark applies equally to the highest, as well as to the humblest offices and officers in the government. Within the limits of their respective powers, all officers, from the President of the United States, downwards, ought to be submitted to and obeyed ; but, if they should overstep the limits of their official authority ;—if they should usurp powers not delegated to them by the constitution, or by some law made in pursuance of it, they would cease to be under the protection of their offices, and would be recognized merely as private citizens ; and, for any act of injustice or oppression which they might commit, would be liable to a civil or criminal prosecution, in the same manner as a private cit-

izen ; with this distinction, that if the wrongdoer has availed himself of his official character, or, of the opportunities which his office affords him, to commit acts of injustice or oppression, it will be considered as a great aggravation of his guilt, in a criminal prosecution, and will be a ground for the jury to find exemplary damages, in a civil action. Because, private injury is here connected with an abuse of the public confidence.

So far as the subject of the present chapter is concerned, such is believed to be the true intention, and theory of the Federal Government, as well as of that of each of the states. And where the wrongdoer is a public officer, to whose office the exercise of political power is not attached, there can seldom be any difficulty in obtaining redress for any wrong done by him. A resort to the tribunals of justice, either of the states, or of the United States, according to circumstances, will usually be sufficient for this purpose.

Cases however are occurring frequently, in some of which the means of redress are not sufficiently easy, or do not seem adequate to the purposes of justice; and, in others, which however it is a consolation to think are much more rare, it seems difficult to say with certainty in what manner and to what extent, a person injured, may find a remedy for the wrong which he suffers.

1. Suppose one of the states should enact an unconstitutional law, forbidding under very heavy penalties an act which, before the enactment of the law, was entirely innocent; suppose that a citizen of another state should happen to be the victim of such law, being apprehended within the territory of the former state, and violating such unconstitutional law, and tried, sentenced, and imprisoned under it; this, without question, would be a great hardship upon him: but what remedy can he have? It may be answered here, that, according to the true theory of the federal system, there should be no difficulty at all in this case; because, in the first place, the judges of the state court before whom such prisoner would be brought for trial, would have full authority as well as a perfect right, to decide the law to be unconstitutional, if they thought so, and to discharge the prisoner. But, if the same considerations which induced the legislature of such state to enact the law, or any others, should

induce the judges of the court to decide, that the law was constitutional, the prisoner would have a right to bring his case before the Supreme Court of the United States, by a writ of error, and the judges of that court, if they considered the law unconstitutional, would reverse the decision of the State Court and would issue a mandamus accordingly. If the State Court disregarded the decision or mandate of the Supreme Court of the United States, and, on a second writ of error, that court should attempt to execute its own decree and the execution of it should be resisted by the State Government, and the marshal of the district should be unable to raise a sufficient force to release the prisoner,—it would then become the duty of the president to interpose ; because the constitution of the United States makes it his duty ‘to take care that the laws are faithfully executed.’ If he should omit to do this, he would violate his oath. If the president should avow the doctrine, that a president is under no obligation to execute any law, which he does not think constitutional, and should declare that he did not think such decision to be so, and therefore should not assist in executing it, it would seem to be a great usurpation of power ; because, under this pretence he might refuse to execute any law, which did not please him, even though it were sanctioned by the votes of two thirds of the senate and house of representatives. In any such case, he might well be impeached for neglect of duty, from whatever cause it might arise ; because, it would become useless for congress to enact laws, if the president would not do his duty in the execution of them, where it required a greater power for that purpose than the marshal could raise. This is the very case particularly contemplated in the constitution, where it requires the president to take care that the laws are faithfully executed. If however a majority of the house of representatives would not agree to an impeachment, the subject must be left to the decision of the people at the next election for president ; and, if he should then be re-elected, his doctrine would be sanctioned, and the effect of it would be, to alter the frame of government from a republic to an elective monarchy, the term of office being four years, renewable at the will of the people. The president would then virtually have an unqualified veto



upon all laws ; because, no state could be compelled to submit to any law, which was passed without the president's sanction, though by two thirds of congress. Such an unqualified veto is a greater power, than any but kings pretend to claim, and would render the provisions of the constitution on this subject useless. In fact the constitution would become like some ill-contrived instrument, which has strength enough to overcome inconsiderable obstacles, but, when opposed to any weighty ones, *flies off the handle*. Rational liberty and good order, under a government of laws, would then become a mere farce ; and is there not danger, that it might be followed, in the inverse order of theatrical representations, by the tragedy of revolution, anarchy, and military despotism ?

A case, where the citizens of one or more of the states should be oppressed by an unconstitutional law of another state, after the Supreme Court of the United States had decided such law to be unconstitutional, one would naturally suppose to be too improbable to deserve a moment's consideration ; since, in general, it is matter of boast, that, in no country in the world, are the rights of the citizens better protected than in the United States. Yet, in what respect does this imaginary case differ from that of the two American citizens now imprisoned in the state of Georgia ? These citizens, at the time of the passage of the unconstitutional law alluded to, were residing within the Cherokee Territory ; and because they continued to reside there without complying with the requirements of a certain act of the state of Georgia, which the Supreme Court has decided to be unconstitutional, they are sentenced to hard labor in the penitentiary, or state prison, of that state, for four years ; and notwithstanding such decision of the Supreme Court, they are still detained in ' *durance vile*,' among malefactors and felons. This seems to be a case of peculiar hardship upon these citizens. For, they depended on the laws and constitution of the United States for protection, and have committed no crime ; yet they are not protected.

It seems singular, that though Congress was in session when the decree of the Supreme Court of the United States was pronounced, and received notice that the decree would not be obeyed, and knew, that, owing to the adjournment of the

Supreme Court, which sits only once a year, these persons can have no relief by the intervention of that court, until the next session, yet they did not adopt any measures to procure the release of these persons from imprisonment. It seems singular, too, that though Congress must be aware of the intention of the state of Georgia, not to obey the decree, nor to suffer it to be executed by the Supreme Court, which, having no political power, in all probability will not be able *of itself* to execute its own decree in this case, should have adjourned without coming to any resolution on a subject, in which the honor of the United States seems concerned. It is true, some may imagine, that, by this delay, a collision with the state of Georgia may probably be avoided, because, it is not improbable, that the hardships of imprisonment, might induce the prisoners to make concessions, and petition for their pardon and release. But, if they should adopt this course, and should actually be pardoned upon their submission, it would stamp indelible disgrace upon the Union ; because it would then be apparent, that though they were citizens of the United States, and had committed no crime, yet the government either could not or would not protect them ; and, besides being unjustly punished, these persons would be obliged to succumb to their oppressors, in order to obtain their release before the whole term of their imprisonment expires. A temporizing policy is sometimes prudent, wise and humane, but never can be honorable when it is at the expense of an injured person, who is suffering imprisonment, disgrace, ignominy, and other hardships, by the delay.

2. Another class of cases, but of a totally different kind, in which injury may be inflicted by persons in authority, and where the remedy is not always so easy, as it is desirable it should be, is where a military commander avails himself of the force under his command, and the discipline of the camp, and the habits of implicit obedience of his troops, to commit acts of oppression upon the citizens. Such oppression may be practised in a great variety of ways ; as, by seizing upon supplies without necessity, and in an arbitrary manner not warranted by law ; by quartering his troops upon the people in a manner, which the law does not permit ; by not restraining

his troops from ill-treating the people, and committing gross irregularities or excesses among them ; by abusing the power, which the force under him, enables him to exercise, by declaring and enforcing martial law, to the disturbance of the jurisdiction of the civil tribunals, and to the oppression of the citizens, without any legal authority whatever ; by arresting and imprisoning or sending away the citizens, without any justifiable cause. Recruiting officers also, sometimes, are guilty of oppressive acts in the fraudulent enlistment of persons under age, and by taking an unfair advantage of persons, whom they have found in a state of intoxication, or have entrapped into it. In most, if not all of these cases, the law provides a remedy, but it is not always effectual ; for, the military commander will sometimes set the process of the courts at defiance, at least for a time, by means of the force under his command. Besides, the remedy is not sufficiently speedy, being designed rather to give damages, or to punish for an injury, than to interpose, and prevent its infliction or continuance. Acts of oppression are also sometimes committed by courts-martial, either from a mistake of their proper jurisdiction, or some other less excusable motive. In any such case, however, the sentence of the court will be no protection to the officer who executes it, but the court and the officers will all be trespassers, and an action may be maintained against them as such. *See Cranch, 330.*

But there is reason to apprehend, that persons not liable to be tried by martial law, may sometimes be punished, and even capitally, by the sentence of a court-martial, which has no legal authority. In this case what is to be done ? In Dec. 16, 1814, General Jackson proclaimed martial law at New Orleans, and expressed his determination rigidly to enforce the articles of war. The effect of any such illegal measure would naturally be, to make the private citizens, who neither belonged to the army nor were embodied in the drafted militia, liable to be tried by a court-martial, and in some cases punished capitally for offences against a law, designed only for the regular army and the militia in actual service. *See also the case of Stacey, INFRA.*

3. Another class of cases, where the citizens might be oppressed, without having any sufficient, prompt remedy, redress

or reparation, would result from an oppressive exercise of the power of committing for contempts, by either house of congress, or of the state legislatures ; or, by any of the tribunals of justice.

So far as it relates to contempts of court, offered by persons, who are neither officers of court, suitors nor witnesses, and committed out of the presence of the court, there does not seem to be any settled law, in the courts of common law. It would be well, if any such power were disclaimed by the courts, so that the statute of the United States might be considered as declaratory of the law recognized in the state courts, on this subject ; and, in case any act were committed, tending to bring the administration of justice into contempt, the guilty person were proceeded against by way of indictment for misdemeanor.

With regard to witnesses, as the law is settled, that the court may commit to prison, any witness who refuses to testify or to answer what the court consider a legal question ; and, as different judges may and do entertain very different opinions as to the legality of the same questions ; and, if a witness should be thus compelled to answer a question, which in fact is illegal, it does not appear how he can avoid the ill consequences which may arise,—it might not be amiss to make some legislative provision on the subject, so that the law may be certain, and as little as possible left to the discretion of the presiding judge.

For an abuse of the power of committing for a contempt, by a court of competent jurisdiction, however arbitrary, and oppressive in its effects, it does not appear, that a party injured can have any redress, unless express malice can be proved, and the total want of probable cause or legal grounds for the commitment. The justices of inferior tribunals indeed may be indicted for such oppression, and there seems to be no sufficient reason, why those of the superior courts should not be liable to similar prosecutions, in case of express malice and gross abuse of power. But the judges of courts in general are not to be called to account for what they do, acting judicially within their jurisdictions, however incorrect and mistaken their opinions may be. In the case of Charles Knowles, who was indicted before the King's bench for murder, he pleaded that

he was Earl of Banbury. The attorney general, replied that he had on a former occasion claimed the privilege of peerage before the house of peers, but they had dismissed his petition. The defendant demurred, and the court sustained the demurrer and quashed the indictment. This was considered as an infringement of the privileges of the house of lords. Ch. Jus. Holt, being called before the house of lords, and desired to give an account of the reasons of the proceedings of the court in that case, answered: 'I gave judgment as it appears on the record. It would be submitting to an arraignment for having given judgment, if I gave any reasons here. I gave my reasons in another place at large.—

'I am not to be arraigned in any way for what I do judicially. The judgment may be arraigned in a proper method, by writ of error. I might answer, if I would, but I think it safest for me to keep myself under the protection the law has given me. I look upon this as an arraignment; I insist, if I am arraigned, I ought not to answer.' 12 St. Fr. 1179.

But an abuse of the power of committing for contempts, may be the ground of an impeachment. This subject was much discussed in the impeachment of Judge Peck; and it was thought expedient to declare the law on the subject, by statute. See *ante*, p. 240. It may not be amiss to remark here, that the courts, both in England and in this country, claim and exercise the power of suspending attorneys and counsellors, from practice in their courts, either for professional misbehavior, or for gross contempts. An alleged abuse of this power, was one of the grounds of impeachment in the case of Judge Peck. How far the courts have a power to suspend counsellors from *practice*, for a contempt, in those states where the people, by statute law, have a right to appoint whom they please, to prosecute and defend for them, by a special power of attorney, does not seem clear. It seems doubtful, whether the court can deprive the people of their statute privilege in this respect, by any mere act of their own, even though the contempt should be so gross as to deserve fine and imprisonment. In the trial of John P. Zenger, a printer of New York, in the year 1735, for a libel against the government, his counsel, James Alexander and William Smith, excepted to the

power of the Ch. Justice, James de Lancey, to sit in the cause, on account of alleged informality in his commission, in various respects, especially, because it was granted, *during the king's pleasure*, instead of *during good behavior*. The court intimated to them what they intended should be the consequences of making such exceptions, but they persisted in filing them; the court then immediately struck them off the roll of attorneys and excluded them from their whole practice as attorneys and counsellors, and would not even suffer them to take minutes of the trial in writing. This was an, unwarrantable abuse of power, against men, who had done nothing more than urge an embarrassing exception to the validity of the Ch. Justice's commission.\*

\* The defence was afterwards conducted by Andrew Hamilton, an eminent barrister of Philadelphia, and a Mr. Chambers. The argument of Mr. Hamilton displays great abilities and learning, as well as eloquence, and is particularly deserving of observation for his setting the rights of juries, in cases of libel, on the same basis which was adopted by Mr. Erskine half a century afterwards, in his argument on the trial of the Dean of St. Asaph, and which is now the settled law of the land, in England and in this country. He also most strenuously advocated the doctrine of giving the truth, in evidence, &c. The peroration of his argument is here inserted, partly for its manly sentiments, and partly as a specimen of the eloquence of the Philadelphia Bar, a century ago.

'Power may justly be compared to a great river; while kept within its due bounds, it is both beautiful and useful; but when it overflows its banks, it is then too impetuous to be stemmed; it bears down all before it, and brings destruction and desolation wherever it comes. If then this is the nature of power, let us at least do our duty, and like wise men who value freedom, use our utmost care to support liberty, the only bulwark against lawless power, which in all ages has sacrificed to its wild lust, and boundless ambition, the blood of the best men that ever lived.

'I hope to be pardoned, Sir, for my zeal on this occasion; it is an old and wise caution, 'that when our neighbor's house is on fire, we ought to take care of our own.' For though, blessed be God, I live in a government where liberty is well understood and freely enjoyed, yet experience has shown us all, (I am sure it has to me,) that a bad precedent in one government, is soon set up for an authority in another, and therefore I cannot but think it mine and every honest man's duty, that, while we pay all due obedience to men in authority, we ought at the same time to be on our guard against power, whenever we apprehend that it may affect ourselves or our fellow subjects.

'I am truly very unequal to such an undertaking, on many accounts. And you see I labor under the weight of many years, and am borne down with great infirmities of body; yet, old and weak as I am, I should think it my duty, if required, to go to the utmost part of the land, where my

But on this subject, further remarks are superfluous, as it is believed, few cases will ever arise, which will make it necessary to draw any lines, more distinct than those, which seem to be understood and observed throughout the courts of the United States; as well as those of the respective states; viz. friendly indulgence on the part of the court, and respectful consideration on the part of the bar.

With regard to the remedy, if either house of congress, or, the senate or house of representatives or delegates of either of the states, should oppress a private citizen, by committing him to prison under pretext of a contempt, when he had been guilty of none, and perhaps in fact had done nothing more than exercise his legal right, the law does not seem settled. *See ante p. 248, &c.* In England, the law in general seems clear, that either house of parliament has the exclusive cognizance of its own privileges, and consequently of all contempts against itself; so that, whatever the opinion of the court of king's bench may be on the subject, the judges have no power to discharge the person in contempt, from imprisonment. *See infra, under habeas corpus.* A few remarks have already been made on this subject in a different connexion.

service could be of any use, in assisting to quench the flame of prosecutions upon informations, set on foot by the government, to deprive the people of the right of remonstrating, and complaining too of the arbitrary attempts of men in power. Men who injure and oppress the people under their administration, provoke them to cry out and complain; and then make that very complaint the foundation for new oppressions and persecutions. I wish I could say there were no instances. But, to conclude, the question before the court, and you, gentlemen of the jury, is not of a small nor private concern. It is not the cause of a poor printer, nor of New York alone, which you are now trying. No: it may in its consequence affect every freeman that lives under a British government on the main of America. It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not only entitle you to the love and esteem of your fellow citizens; but every man who prefers freedom to a life of slavery, will bless and honor you, as men who have baffled the attempt of tyranny; and by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors, that, to which nature and the laws of our country have given us a right—the liberty, both of *exposing* and *opposing* arbitrary power, in these parts of the world at least, by speaking and writing truth.'

The jury brought in a verdict of *not guilty*; and Mr. Zenger was discharged from his imprisonment.

See ante, p. 240, &c., in which it is contended, that no such *unlimited* power is possessed by either house of congress, and whether the legislature of any particular state, or either branch of it, possesses such power, must depend upon the proper construction of the constitution of such state. If a case of oppression by the abuse or usurpation of such power, by either house of congress, should ever arise, it would be most agreeable to the spirit of the federal constitution, to consider the supreme court as having full power to decide according to the constitution, the law, and natural right, and consequently having authority to discharge the prisoner from his illegal and unconstitutional imprisonment. For, the analogy between the relations existing between the court of king's bench and parliament, in England on one side ; and between the supreme court of the United States and congress, on the other, does not hold good in all particulars. The difference is, that the court of king's bench is an inferior court, not only to the high court of parliament, but to each of the houses of parliament, when sitting as a court, for the decision of questions in relation to its own privileges, in which case, it is a court of record. But the supreme court of the United States, is the highest tribunal, acknowledged by the constitution, for the decision of constitutional questions, and cannot be controlled by congress in any other way, than by altering the law, *for the time to come*, by legislative acts made agreeably to the constitution. The right of defining their own privileges, therefore ought to be exercised by statutes. The liberties of the citizens would then be secure, because both houses of congress must concur to enact a law, and it must have the sanction of the president. Even then, however, it must be agreeable to the constitution, or it will be void ; and the supreme court of the United States has jurisdiction to determine it to be so. But, if each house of congress has the power to determine its own privileges, whenever a case arises, without any previous law, by a decision, which, whether constitutional or not, must be submitted to without a right to appeal to the supreme court, then such declaration of their rights by one of the houses of congress, and without the ratification of the other, or the president's signature, will have more power than a statute of the United States, regularly enact-



ed by both houses of congress, and ratified by the president. Besides, if congress, or either house, have such an unqualified power of declaring their own privileges, and of punishing for contempts, without revision by another tribunal, then they are in effect above law, and consequently *without* law, and possess the omnipotence, as it is called, of the British parliament. The consequence may be, that, under the specious pretext of punishing for contempts, which in fact may only be committed in resisting usurped and unconstitutional privileges, they may destroy the freedom of the press, and with that, every other civil and political right, by oppressing all those, who venture to exercise such rights, in an unacceptable manner. The same arguments apply by way of analogy, to the legislatures of the states, and the supreme courts of such states, respectively. In this way, by considering such courts as having authority to examine into the nature of the contempts alleged as causes of commitment, and to discharge the prisoner, when the causes are insufficient, there will remain no room for the practice of oppression, against which there can be no remedy. *See further on this subject* *INFRA* ; *in this chapter.*

4. From the government itself, though bound to show a parental regard to the rights and interests of the people, the protection of which is the principal ground of its establishment, individuals or certain classes of the citizens, sometimes suffer, what they feel to be a hardship, but, which coming from their rulers, they are unwilling to think an act of absolute injustice. This is seldom done by the direct infliction of wrong ; but, when it happens, most usually consists in delaying the hearing, allowance or adjustment of the claims of the citizens, either of which must be considered a denial of right. Those American merchants who have claims for spoliations, committed by France previous to 1800, in satisfaction of which, when proved in the manner stipulated in the conventions made between France and the United States, the French government agreed, that a sum not exceeding twenty millions of francs, might be reserved by the government of the United States, out of the purchase money to be paid for the purchase of Louisiana, but which claims have not yet been settled, consider themselves as suffering a hardship of this kind. From the

lapse of time, many of those merchants, whose property was thus confiscated or condemned by France, have now deceased. In the same way, probably, has resulted the loss of many of their documents and papers ; so that the establishment of their claims becomes every day more difficult. The families of some of these claimants, also, are reduced to indigence ; and, though the government will probably soon be compelled to reduce its revenue, for want of some constitutional mode of expenditure, yet these claims are not paid or allowed, and indeed have never been heard any further than by petition and remonstrance, not finally acted upon.

This delay occasions another hardship to these claimants in this, that so many political generations of members of congress have succeeded each other, during the interval between the convention with France and the present day, that those, who are now members, do not seem so well acquainted with the equity of these claims, and do not seem to feel so much sympathy for the claimants, as might naturally be expected. For, a certain member, it is said, has expressed an opinion, that he should not vote that the *whole* of these claims be allowed. Why not ? Is this sound doctrine ? It cannot be supposed, that he meant, that the merchants should be allowed no more than they furnished reasonable evidence to prove. For, that is the whole of what they claim. But, after the claim is proved, what distinction can be made between the part to be *allowed*, and the part to be *rejected* ? The rule must be to pay so much as is satisfactorily proved, and no more. For, congress has no right, either to bestow money upon the merchants on a groundless claim, or to withhold any part of what is justly due to them. It is hoped, that no member of congress, can have so degrading an opinion of his constituents, as to suppose, that the allowance of *the whole* of a *just* claim can be unpopular with them ; for what is this, but to suppose, that they are actuated by the low envy, which illiberal minds are prone to indulge, at seeing a large sum paid to others, though it is justly their due ? For, a disapprobation of the allowance of any *just* claim, can be imputed to no better motive.

5. It may not be amiss to remark, though in strictness it does not fall within the subject of this chapter, that the peaceable

citizens do not always seem to have adequate protection against the disorders and outrages of mobs and rioters. There is hardly a year passes, that complaints are not made, in some place or other within the United States, of injuries done to the property of individuals by disorderly assemblies of ignorant and profligate persons. It is true, they sometimes are actuated by a desire to reform abuses, to remove nuisances, to right the injured, and to punish wrong doers ; but, notwithstanding these chivalric intentions, their proceedings, which are nothing better than acts of violence and disorder, are not only illegal but highly criminal. For, the law has provided a regular course of proceedings for the correction and reform of all abuses, and has appointed police officers both capable and trustworthy, who will perform all such duties in a regular and proper manner ; so that there is never any occasion for the assistance of mobs, which are proverbially cruel, faithless, rash and cowardly. Those persons, who are fond of acting in their own person, though without a legal warrant, in the reform of abuses by summary process, should be informed, that as their conduct is unlawful, if any person should unfortunately be killed in resisting their acts, it will be murder, not only in the immediate killer, but in all who have assembled with a design to carry their attempts into execution, by force. For, the rule of law is settled, 'that if two, three or more are doing an unlawful act, as abusing the passengers in a street or highway, and one of them kills a passenger, it is murder, *in all*.' See the opinion of *Ch. Jus. Holt*, 12 Mod. 156. For the same reason, when *Ld. Dacres* and some others, went into a park to hunt, and agreed to kill all that should resist them, and one of them in the absence of *Ld. Dacres*, and when he was a quarter of a mile off, killed a person who asked him 'what business he had there,' it was adjudged murder, in all ; and *Ld. Dacres* was hanged. *Kelyngs' R.* 87.

There is frequently too great indulgence shown by the magistrates to tumultuous assemblies of profligate persons. To suppress them, at once, on the first appearance of disorder and irregularity, by arresting their ringleaders, and, where necessary, by exhibiting to them a force which they dare not look in

the face, is the best policy ; because it is not only a decisive step, but it is also the most humane that can be adopted. For, mobs and rioters are almost always encouraged in their outrages, by the forbearance of the police, which they generally ascribe to timidity. And thus the magistrates, who perhaps, at the beginning of the tumult, thought it too harsh a measure, to send a disorderly individual to prison, have afterwards been compelled, in self-defence, to shed his blood, and perhaps that of others beside.

Such disturbances of the public peace, perhaps may sometimes be ascribed in part to the prevailing influence of erroneous opinions ; and because, according to the democratic theory, the supreme power in the last resort, belongs to the people, an assembly of ignorant and profligate persons, under pretence of being *the people*, will think themselves justified in whatever excesses or outrages they may commit. It is probably from the supposed toleration and impunity of such licentiousness, that Democracy is so great a favorite with such persons. But no regular government can be safe for a moment, if those who entertain such erroneous notions, and bad principles, should ever obtain a commanding influence in society, whether through the force of terror or delusion. Cataline, Cæsar Borgia, Masaniello, Jack Cade, &c. are the only ones, who can expect to be popular with disorderly persons of such principles, and, if not put down in season, society must suffer the horrors of revolution and anarchy.

But, in fact, even the magistrates themselves seem sometimes to labor under the delusion, that a multitude of disorderly and riotous persons are *the people*, and therefore are not to be restrained in any excesses or breaches of social order, that do not amount to enormous outrage. But in fact, such persons are not the people, and have no greater claim to that appellation, than an equal number of convicts from the state prison. For, the convicts are punished for violations of social order, committed individually, and for the most part, in secret. And such flagitious persons are actuated by the same motives, but they are more dangerous, because they act in greater numbers, and set the regulations of society at *open* defiance.

In order to ascertain, who are *the people*, it is only necessary

to consider by whom are the constitutions of society established—under whose authority laws are enacted. The legislators and magistrates are the ministers of the people; and the laws are enacted by persons chosen by the people. The laws and constitution are therefore the declared will of the people, and those persons who oppose either the laws, the constitution, or the magistrates, whether such persons are demagogues, or whether they are the ignorant or profligate attendants upon demagogues, are *the enemies of the people*, and disturbers of the public peace. But, if such persons were the people, indeed, and the sovereign power were lodged in their hands, then of all governments, democracy would be the most arbitrary and tyrannical, and, at the same time the most degraded and base.

As individuals who are injured in their persons or property, by unlawful assemblies of rioters, frequently are unable to obtain any redress, because of the disguises which are used on such occasions, it would be good policy to give them a remedy by action, against the town in which the outrages are committed, for the full amount of damages sustained, and to let the towns have a remedy over against the rioters. This responsibility for the misbehavior of others, would induce the orderly and peaceable inhabitants of towns, to provide an efficient police, that would put an immediate stop to every species of tumultuous assembly or riot, before it had time to commit any serious injury.

*Of the privilege of the writ of Habeas Corpus.* The great security of the citizens against unlawful imprisonment, is the process of habeas corpus. This writ is a writ of right, which any individual held in confinement, without a legal warrant, has a right to demand, for sufficient cause shown, verified by affidavit. The issuing of it, is regulated by Statute Law; and it may usually be had in vacation, from any of the justices of the superior state courts, or, where the imprisonment is under colour of the authority of the United States, or, of some of the courts of the United States, the writ of habeas corpus may be issued by the Supreme Court of the United States, or, in vacation, by one of the justices of such court. But this writ is not a writ of course; for, the court will not grant it except for probable cause, verified by affidavit. See 3 B. and Al. 420. Nor will they grant it in any case, where they

perceive beforehand, that the person if brought up, must be remanded. *Ibid.* See also 3 Peters, 200. The writ will be issued, either at the motion of the party imprisoned, or at the request of any person, who has a right to the custody of such party; as, a father may have this writ for his son, who is a minor; a husband may have this writ for his wife; a guardian, for his ward; a master, for his apprentice. &c. See 1 Cook, 143. Where a woman is ill treated by her husband, or improperly confined, the court will grant a habeas corpus, and if she swears the peace against him, she will not be put in his custody again, nor will he be suffered to take her. 2 Bur. 1115. And, generally, where a person is discharged on habeas corpus, he is of course entitled to protection on his return. 1 Wm. Bl. 410.

The writ is directed to any person, whether an officer or a private individual, who has another in his custody, or under his control. Godb. 44. And the return to the writ must be made by that person.

The prisoner is usually brought in, with a return in writing, containing the causes of commitment or detention. Sometimes however, the writ is returned without bringing in the body, but the causes of commitment are assigned. In the former case, if the causes of detention are not sufficient, the prisoner will be discharged. In the latter case, if the reasons of commitment are insufficient, and no good excuse is assigned for not bringing in the body, the court may at discretion award an alias habeas corpus, or issue an attachment against the person so detaining the prisoner in unlawful confinement. See 5 T. R. 89. Sal. 350. The court will also grant an attachment against any gaoler, who uses a prisoner barbarously or inhumanly. 6 Mo. 137.

If the prisoner is too weak to be brought in, the court will direct all persons interested, as relations, servants, physicians, &c. to have access to him; but not mere strangers. 2 Bur. 1099.

The object of the writ of habeas corpus being the liberation of such persons, as are imprisoned without sufficient cause, persons committed for treason or felony plainly expressed in the warrant of commitment, as also persons convicted or in execution, are not entitled to the benefit of this writ from the Su-

preme Court of the United States. *Ex parte Tobias Watkins*, 3 Pet. 203. The rule is presumed to be the same in most of the state courts. But, with regard to the power of the state courts to interfere, where there has been an abuse of an authority given by the United States, the decisions in state courts have not been uniform. In New York, a habeas corpus to bring up a soldier enlisted in the army of the United States, was refused. 1 Johns. Cas. 137. In the matter of *Ferguson*, Kent, Ch. Jus. held, that, if a soldier be detained against his will, knowing him to be an infant; or, if though an adult, he has been compelled to enlist by duress or violence, it is a public offence, but an offence of which the supreme court of the state of New York cannot take cognizance. The reason assigned is; that an abuse of an authority of the United States, is an offence against the United States, and exclusively cognizable in their courts. 9 Johns. 240. The habeas corpus was therefore denied in that case, though it appeared by affidavit, that the applicant was a minor of the age of seventeen years and some months. But, in Massachusetts, it has been held, that a state court may discharge, on habeas corpus, a minor who has enlisted into the army of the United States, without the consent of his parent or guardian. 11 Mass. R. 63. The same rule applies, if the minor has neither parents, guardian or master; the minor may be brought in, and discharged at his own request on a habeas corpus. *Ibid.*

The return of the habeas corpus should express the cause of commitment or detention, with the same certainty as the warrant. But, if a good cause of detention is expressed, though without technical formality, the court will not discharge the prisoner. Where it appears by the return, that the commitment is made by one who has no authority or jurisdiction, or is for a matter, for which by law no man ought to be punished, or, is otherwise illegal, the court will discharge the prisoner. So, if the cause of commitment is alleged so loosely, that the court cannot adjudge, whether it be a reasonable ground of imprisonment or not. See *Bushel's Case*. Vaugh. 137. In this remarkable case, Mr. Bushel was one of the jury, who tried William Penn, the colonist, and a Captain Mead, for assembling unlawfully and tumultuously; the jury,

though many attempts were made to awe and intimidate them by the Mayor of London, who presided at the trial, acquitted the accused. For this independence, they were fined forty marks a-piece, and were committed to prison for nonpayment of it; but applying for a habeas corpus, and sufficient matter not appearing on the return, the commitment was decided to be illegal, and Bushel was discharged.

The rule in the United States is conformable to the spirit of this decision. For, if the warrant of commitment appears to be illegal, for want of stating some good cause certain supported by oath, the court of the United States will discharge the prisoner. 3 Cranch, 453.

And therefore, when General Wilkinson, in 1807, with an armed force arrested Mr. Alexander, a gentleman of the bar, at New Orleans, and two other gentlemen, Messrs. Bollman and Swartwout, and sent them to Washington, Mr. Alexander was immediately discharged by a justice of the circuit court, and the two others by the supreme court, on a habeas corpus, their arrest being illegal. See 4 Cranch, 75. But the court will look no further, than to see that a sufficient probable cause is contained in the warrant of commitment. 4 Dal. 412.

In the case of Samuel Stacey, a habeas corpus was issued by a commissioner of the state of New York, directed to Com. Chancey and General Lewis, commanding them to bring before the commissioner the body of Stacey, with the cause of detention. General Lewis returned, that the body was not in his custody, &c. The return was considered by the supreme court of that state, to whom the subject was submitted, to be insufficient upon the face of it, because it did not say, that Stacey was not in his possession or power. It was therefore considered evasive and a contempt of process, and an attachment was immediately issued, without any previous rule to show cause. In this case, Chief Justice Kent in the course of his opinion made the following remarks. 'This is a case which concerns the liberty of the citizen. Stacey is now suffering the rigor of confinement in close custody, at this unhealthy season of the year (August 1813,) at a military camp, and under military power. He is a natural born citizen, residing in the state. He has a numerous family dependent upon



him for their support. He is in bad health, and the danger of a protracted confinement to his health, if not to his life, must be serious. The pretended charge of treason (for upon the facts before us we must consider it as a pretext,) without being founded upon oath, and without any specification of the matters of which it might consist, and without any color of authority in any military tribunal to try a citizen for that crime, is only an aggravation of the oppression of confinement. (There was an affidavit that, *General Lewis had expressed an opinion, that a court-martial was the proper tribunal to try Stacey.*) It is the indispensable duty of this court, and one to which every inferior consideration must be sacrificed, to act as a faithful guardian of the personal liberty of the citizen, and to give ready and effectual aid to the means provided by law for its security. One of the most valuable of these means is this writ of habeas corpus, which has justly been esteemed the glory of the English law; and the parliament of England, as well as their courts of justice, have, on several occasions, and for the period, at least, of the two last centuries, shown the utmost solicitude, not only that the writ when called for should be issued without delay, but that it should be punctually obeyed. Nor can we hesitate in promptly enforcing a due return to the writ, when we recollect, that in this country the law knows no superior, and that in England, their courts have taught us, by a series of instructive examples, to exact the strictest obedience, to whatever extent the persons to whom the writ is directed may be clothed with power, or exalted in rank.

‘If ever a case called for the most prompt interposition of the court to enforce obedience to its process, this is one. A military commander is here assuming criminal jurisdiction over a private citizen, is holding him in the closest confinement, and contemning the civil authority of the state. The parties are also at so great a distance, that no rule to show cause could be made returnable at this term, &c.’ The court ordered that an attachment be issued, against General Lewis, unless he obeyed the habeas corpus, or discharged Stacey. See 10 Johns. R. 333.

It has been laid down generally, that no one can in any

case, controvert the return to a habeas corpus, or suggest any thing contrary to it. It is held, that if a false return is made, suggesting a sufficient cause of detention, the court will not inquire into it, but will remand the prisoner, though he be prepared to show that it is false. It is held further, that he can have no other redress, but by an action on the case for a false return, or an action of trespass for the false imprisonment. *See* 11 Co. 99 b. *Bagg's case*. Godb. 198. .

There are some opinions however to the contrary; *See* *Bac. Abr. Habeas Corpus, (C.)*; and certainly, the writ of habeas corpus must be deprived of much of its utility and importance, if the person to whom it is directed, can avoid delivering up the prisoner, by a false return of a good cause. To render this process dependent upon the aid of the auxiliary actions of case or trespass, is to render it comparatively ineffectual.

During the last war, a citizen of Maryland was seized by a military recruiting party, under pretence of enlistment. He applied for a habeas corpus, and the officer returned that the enlistment had been regularly and fairly made. The citizen had abundance of testimony to prove, that there had been an attempt to impose the bounty on him, which he immediately spurned at, and that he had done no act whatever, by which he could be considered as having enlisted. But the judge decided that he could receive no evidence to contradict the return, &c. A more flagrant case could not well be imagined. The consequence was, that the legislature of that state immediately passed an act declaring the law in relation to this subject, authorizing the complainant to controvert the truth of the return. *See* 5 Hall's Law Jour. 486.

Though the law was very properly declared by the legislature of Maryland, for the satisfaction of doubts, it may well be questioned whether the decision of the judge, in the case referred to, was correct. The reason why returns in general cannot be contradicted is, because they are usually made by proper officers, appointed by the public. But the return of a private citizen to a habeas corpus, directed to him, is entitled to no such respect, and a recruiting officer in this particular is entitled to no higher consideration than any other citizen. None

But officers entrusted by law with the custody of persons, such as gaolers, sheriffs, &c. &c. can come within the reason of the rule, which does not permit returns to be contradicted. Suppose a man should have the person of a female in his custody, and a habeas corpus being directed to him, returns that she is his wife, or his daughter, or his ward, will the court suffer her to remain in his custody when she may be able to prove the return false. Suppose a man-stealer to have the person of another in his custody, and on a habeas corpus, returns that the prisoner is his slave, will the court permit him to carry off his victim, without hearing the evidence which he may offer to prove the return to be false? For, color alone is no safe criterion; since many blacks are free; and there are some slaves, especially children, whose complexions cannot be distinguished from that of the whites.

To make the writ of habeas corpus an effectual remedy for illegal imprisonment, the prisoner ought to be permitted to controvert the truth of the return, in all cases where the person is not a civil officer, entrusted officially with the custody of prisoners. This, on principle, is believed to be the true law on the subject. In all other cases, no other excuse for not bringing in the body ought ever to be received, but, either, that the prisoner could not be removed on account of sickness, or, that he was not then and had not been in the custody of the respondent, or, that he had made his escape, &c.

If a person should be committed for a contempt, by a court of competent jurisdiction, the liberty of the citizen would seem to require, that the matter or act constituting the contempt, should be returned, in order that there might appear to be sufficient cause for the imprisonment, of which the court having authority to issue the habeas corpus, might judge. But, as every magistrate may by law commit for a contempt founded on sufficient cause, the matter of the contempt ought to appear both in the commitment and on the return to the habeas corpus; otherwise, under a loose charge of contempt without further specification, any citizen may be imprisoned without remedy. And therefore, if either house of congress, or of either of the state legislatures, should commit for a contempt generally, without specifying the particulars of the contempt,

a regard for the liberty of the citizens, requires, that the supreme court of the United States, or the supreme court of the particular state, according to the circumstances of the case, should discharge the prisoner on account of the looseness and generality of the return. But, in case of such commitment, if, the particulars of the contempt were specified, and the court should be of opinion that the cause of detention was not sufficient, being grounded on a mere usurpation of power, in violation of the constitution of the United States, or, of that of the particular state, according to circumstances, they ought, without hesitation, to discharge the prisoner. This doctrine seems to be supported by the remarks of Ld. Ellenborough in the case of *Burdett v. Abbott*, so far as to discharge a prisoner where an insufficient cause of commitment is assigned in the warrant, but is at variance with it in other respects. But, as imprisonment is only justifiable on a warrant expressing a certain sufficient cause, and as it does not consist with the nature of our constitutions and laws, that any body of men, though in authority, should have the power to imprison the citizens arbitrarily, by the simple expedient of assigning any cause in such general terms, that no other tribunal can determine whether it is or is not sufficient, it is presumed that the qualification of Ld. Ellenborough's doctrine, would not be sustained here. In delivering his opinion in the case referred to, his lordship remarks: 'If a commitment appeared to be for a contempt of the house of commons generally, I would neither in the case of that court, nor of any other of the superior courts, inquire further; but, if it did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the court committing, but a ground of commitment, palpably and evidently arbitrary, unjust and contrary to every principle of positive law or rational justice; I say, that in the case of such a commitment (if it ever should occur, but which I cannot possibly anticipate as ever likely to happen) we must look upon it and act upon it as justice may require, from whatever court it may profess to have proceeded.' See 14 East, 1. But the subject is submitted to the intelligent reader.

The writ of habeas corpus cannot be suspended except by congress, and by them, in cases of rebellion or invasion only, when the public safety may require it. When, therefore, General Jackson, in Dec. 1814, undertook to suspend the privilege of habeas corpus, and proclaim martial law, he betrayed a great misapprehension of the extent of his own authority. It is to this cause, it is believed, and not to any intention of usurping power not delegated, that these measures should be ascribed. But, as he afterwards enforced his illegal proclamation, by means of the armed force under his command, it shows the great inconvenience of entrusting the control of a large military force, to persons who are unwilling to acknowledge, or unable to distinguish the proper limits of their own authority. For this invasion of the rights of the citizens he was fined \$1000. See 3 Martin's Reports, 530.

It may be remarked, in conclusion, that in all cases, where a person is brought up on a writ of habeas corpus, and a sufficient cause of commitment is returned, if he is charged with any crime which is not capital, he may be bailed. But, if he is charged with a capital offence, he will be remanded.

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## **PART III.**

**OF THE POLICY WHICH OUGHT TO BE PURSUED BY THE  
GENERAL GOVERNMENT IN RELATION TO AGRICUL-  
TURE, MANUFACTURES, AND COMMERCE.**

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## PART III.

OF THE POLICY WHICH OUGHT TO BE PURSUED BY THE GENERAL GOVERNMENT IN RELATION TO AGRICULTURE, MANUFACTURES, AND COMMERCE.

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### CHAPTER I.

#### *Agriculture.*

To discover that condition of a country which contributes, in the highest degree, to the numbers, happiness and security of its inhabitants, is the principal object of political economy.

To consider the local and accidental advantages and disadvantages of a country, and by making the best use of the former, and by obviating the latter as far as practicable, to adopt such public measures, as shall place the country in the nearest approximation to such desirable condition, is the office of wise statesmen in authority.

Where the people of a country are as numerous, as the territory, under the best system of cultivation can support, and consequently every individual has an opportunity of earning a decent living by honest industry and moderate exertion, free from overburthening taxes; where justice can be had at an inconsiderable expense, and is administered promptly and impartially to all, so that the most powerful dare not attempt to practise oppression, and the humblest may, without danger or apprehension, assert his rights and enforce reparation for wrongs; where suitable schools for instruction in all the necessary branches of learning, are provided at the public charge, in order that the people may find it for their interest, as it is their duty, to see that all under their care should be so



far instructed; where, on account of the justice, energy and respectability of the government and men in power, the citizens are well treated in foreign countries, and suffer no political oppression from petty domination within the territory of the nation, and consequently the nation is at peace abroad, and the people are in tranquillity at home;—the condition of the country may be considered to be as happy as the lot of humanity permits.

If, however, any of these circumstances are wanting, the deficiency, as soon as perceived, points out the mode in which the condition of the country may be improved.

But, though it is the duty of the statesman, as it is the aim of a philanthropist, to fill the country with as many intelligent, virtuous and happy people as possible; yet, if, to increase the population of a country, is only to add to the number of those who are sunk in ignorance, vice and misery, no purposes of human wisdom or benevolence will be answered by any such accession; since neither the sum of human happiness will be enlarged, nor will augmentation result from it, either to the honor or the effective force of the nation. On the contrary, it is rather to be apprehended, that the consequence will be, that corruption in the rulers, and insubordination, profligacy, fraud and violence in the people, will ferment together, until the whole body politic has become a mass of abomination.

And, though in general, it should be the aim of a statesman to increase the wealth of the nation; yet, if it cannot be done without making a very unequal division of property, so that while a few live in magnificence and splendor, and perhaps riot in luxury and licentiousness, the rest suffer every species of hardship and privation,—it would be better to leave the nation in a state of mediocrity, with less difference in this respect. For, a people suffering such an inequality of condition, however opulent as a *nation*, is in fact miserable and debased.

The importance of inculcating religion and morality to the welfare of a people, cannot escape the attention of any friend to his country or to mankind. For, though a nation should be blessed with an abundance of all the necessities, conveniences, and elegances of life, and should have a numerous

population well educated in every respect except those of religion and morality ; yet, it is probable, that the influence of bad principles would incline them to be profligate and faithless as individuals, and, as members of society, from too great a fondness for licentiousness under the pretence of liberty, would render them prone to excite public disturbances, insurrections and revolutions, so that the public mind could never hope to remain tranquil any considerable length of time. The destruction of life which results from these causes, seems to be a check, provided by nature to set limits to the multiplication of the worthless and depraved, which seems conformable to the common opinion, that everything bad tends to its own destruction, while everything good tends to continue itself. An increase of the population of a country, however, though it may be favored by the intelligence and virtue of the people, yet indirectly leads in the same proportion to an increase of vice and profligacy, which, having gained a certain height, again reduces the number of the population. And thus the progress of society completes its circle.

The happiness of society consists in the happiness of the individuals which compose it. In order to secure this desirable object, an instinct is implanted in each to induce him to provide for his own welfare. If he is able to do this, then the whole are happy. But as an individual, while pursuing his own happiness, is apt to forget that of others, the restraints of religion, justice, and general expediency are necessary for the equal protection of the rights of all.

To make each individual happy, the readiest way which can be adopted by the government, would seem to be to leave every one to exercise his natural liberty, of consulting his own feelings or taste, subject to those three restraints, viz., that he should do nothing contrary to religion ; nothing that shall infringe the rights of others ; nothing which the government has forbidden to every one, because contrary to the real or supposed interests of the whole society.

It is true, there are some persons so badly brought up, that they mistake what makes for their true interest ; or, else, whose passions are so strong, that they readily fall into any snare which opportunity enables their propensities to set for

their judgements ; but, for persons subject to such frailty, so long as they keep themselves from crime, government is seldom intrusted with a power to provide any further restraint than what consists in removing, as far as practicable, all occasions for improper indulgences and pursuits ; and for the ignorant, government cannot possibly do any thing better than establish institutions for education, in which all who are disposed may be suitably instructed in knowledge, wisdom, and virtue.

In order that the population of a country should be contented with their condition, and should increase in number, it is indispensably necessary that they should have in their power the means of supplying themselves with all the necessities and conveniences of life, without being compelled to labor beyond their strength. It is true, the population may continue, under a dearth or scarcity of food ; but they cannot increase permanently ; a temporary increase converts the inconveniences and privations of scarcity into the extremities and horrors of famine, which checks the growth of the population, by introducing new diseases, and an increased mortality. That countries do sometimes languish in this manner, is not to be denied ; and, it happens on account of the unequal distribution of property, resulting from impolitic regulations ; in consequence of which, the people, in such countries, instead of being on a level with each other, or, an approximation to it, are divided into three great classes, viz., those who are very rich, those who are in a state of mediocrity, and those who suffer extreme hardship and privation. It is true, these three classes will exist in a greater or less degree in all societies ; but those societies will always be most happy, and will increase most in numbers, in which the level of equality as to property is most nearly preserved. In countries suffering under the effects of such impolitic regulations, no remedy can be had, because the political power is in the hands of the two higher classes ; the first of whom adopt such regulations, to keep up the splendid establishments of their families ; the second make no objection, because they suffer little or nothing from the consequences.

It is a remark of Machiavel, that, ' in the capacities of mankind, there are degrees ; one man understands things by his

own light, another understands things when they are explained to him; and a third neither can understand them of himself, nor when they are explained to him by others. The first are rare and excellent; the second have their merit, but the last are good for nothing.'

It is apparent, that the great mass of the people in all countries, according to the opinion of this modern Abithophel, may be distributed into the two last classes. In all popular governments, therefore, like that of the United States, where the control of public affairs is left in the hands of rulers chosen by the people, if a bad policy is pursued for any considerable length of time, it can only be ascribed to the numerical majority of the third class, who, on account of their want of intelligence and information as to their true interests, are decreed to be the dupes and natural prey of political impostors. For, otherwise, if public affairs were badly managed, the majority, if consisting of the second class, would immediately perceive it, when pointed out to them, and would elect other rulers.

In this and the following chapters, the inhabitants of a country will be considered as classed under the heads of persons engaged in, 1. Agriculture: 2. Manufactures: 3. Commerce, and 4. all other pursuits, &c. Each of these classes bears a certain proportion to the rest, which however varies with the changing circumstances of a country, to which its number soon conforms. The whole population have a general interest in the prosperity of each of these classes; and yet, in certain particulars, the interest of each of these classes, is more or less at variance with that of the whole. This circumstance does not appear to have attracted much notice, though a disregard of it, would naturally occasion much doubt, perplexity and apparent diversity of opinion. Thus, it is for the interest of all persons engaged in agriculture, that the price of the produce of their labor should be as high as possible; and for this reason, they naturally wish to obtain as extensive a market for it as they can; for the same reason, they would naturally wish to prohibit the importation of the necessaries of life from foreign countries, in order that they may secure the home market to themselves.

But, in some of these respects, the interests of the rest of

society are contrary. For, they very naturally desire that the produce of the soil and all the necessaries of life should be as cheap as possible ; and consequently, when agricultural produce is cheaper abroad than it is at home, it is for the general interest, that it should have a free admission into the ports of the country.

It is for the interests of persons engaged in agriculture, as well as all the rest of society, that their produce should be consumed within the country, if the producer can realize an equal value for it, on account of the ulterior advantages. But whether he realizes an equal value for it or not, it is for the interest of the rest of society, that it should be retained within the country, because it will render the necessaries of life cheap.

As the strength of a country depends upon the number of its inhabitants, and as the population cannot increase without a sufficient supply of the necessaries of life, an abundant supply of such necessaries, constitutes the true wealth of a country, because it constitutes a fund to support a population in proportion to it. In comparison with this object in a national point of view, the accumulation of money, or any other articles, however difficult to be obtained, and of whatever price, is of no real importance. But, where there is a great abundance of those necessary articles, they become proportionally cheap, so that the producer, with an equal quantity of them, is also proportionally less rich. To make the interest of the producer consistent with that of the rest of society, there is no other way, than to provide him with a home market, sufficient to engross all the surplus produce beyond what he raises for his own consumption. For, if any part of the necessaries of life raised in this country, are consumed abroad, it is demonstrable that the country does not maintain at home so many inhabitants as it might, by the precise number of those persons who are supported abroad by such supplies.

The effect of a surplus produce of the necessaries of life, which is not exported, is to keep the price of provisions low. This will favor an increase of population, because the cheapness of the necessaries of life will render it so much the easier to support a family ; if therefore no other home market is

found, the increase of population will supply one, by keeping pace with the surplus production ; on the supposition that the course of public measures is not changed suddenly.

As the people of the United States possess a new country, having in general a fertile soil and a healthy climate, it would seem unnecessary to make use of any other measures, to induce a proper proportion of the people to cultivate the soil, than to take off every species of check, discouragement or hindrance whatever, which could deter them from undertaking a business, in which their own interests as well as the interests of the whole, are so deeply concerned.

For, as it is calculated, that a man engaged in agriculture may, by his own labor alone, support from four to eight persons besides himself, according to circumstances; nature here performing from three fourths to seven eighths of all the work, a farmer skilful, temperate, industrious and prudent, having made a judicious choice of his land, will be pretty sure of getting a good living, and perhaps even of growing rich in *property*, whether he can sell his surplus produce or not.

It would seem therefore to be the true policy of a country thus situated, to render the price of land as cheap as possible to actual settlers, to whom it is apparent, one half of all the unsettled lands belonging to the United States, might even be given away, if managed judiciously, without any loss ; since the alternate lots or tracts would rise in value in consequence of the settlements, so that from them the United States would ultimately realize more in value, than they will from the whole, at the rate at which government lands are now selling.

To render the price of land cheap, no measure however should be adopted, which effects this purpose by reducing its *value*. To lay a heavy land tax would render it cheap, but it would be because it would reduce its value. This would be bad policy. It would operate as a discouragement to agriculture. It would be far better to exempt all government lands sold to actual settlers, from all taxes for a certain number of years.

To render valuable land cheap, land speculators and monopolizers should be discountenanced as much as possible, because, being usually wealthy men, and having in their power

the means of ascertaining pretty accurately the relative value of lands in different parts of the territories of the United States, they may buy up the most valuable tracts, for the purpose of selling them out again, at a great advance to actual settlers. This consideration will be of more importance at a future period, when public lands are more scarce than they are now. Land speculators should also be discountenanced, because they discourage agriculture, by raising the price of land, yet keeping it idle and unproductive.

But the encouragement of agriculture, after settlements are once made, seems to come more properly within the province of the state or local governments. The variety of soil and production in different states and territories, would render any general regulations, if congress could be considered as having any authority to make them, impracticable, or partially inapplicable. The policy of the states and territories would naturally be to render the partition of lands among heirs, as speedy and as little expensive as possible ; because undivided estates are much less likely to be put in a high state of improvement, than those which are owned by a single individual. The same remark applies to the lands of minors, which, it would be for their interest as well as that of the public, to have sold, and the proceeds invested. The minors in this way, would receive a greater income, and the land would be improved by the interested enterprise of an owner, instead of languishing under the care of a guardian or trustee.

Until the supply of the necessities of life is sufficiently abundant not only to provide for the present population, but is in a train to keep pace with the regular increase of such population ; and, until there is an abundant supply of all the raw material, which the people may manufacture to advantage, and which the country is well adapted to produce, it is not for the interest of any state, that any portion of its labor should be applied to the raising of any raw material for the foreign market. Because, it is better for the country rather to encourage home manufactures than foreign ones, when they come in competition. It is not intended to deny, however, that cases may exist, where it will be for the interest of individuals to raise the raw material for foreign manufactures.

For a similar reason, it can never be for the interest of a *state*, that any part of its soil should be used to raise articles of mere luxury, either for home consumption, or for exportation. In either case, neither the wealth nor the population of the country is increased by it. It is true, as in the former case, *individuals* may enrich themselves by it; but the advantage which they will derive from such an application of their labor, and of the soil, will be far less than *society* would derive from an application of their labor to the production either of the necessaries of life, or the raw material for home manufactures. If any such use of the soil tends to exhaust it, and after a few years render it barren and unproductive, the state will be rather impoverished than enriched by such a misapplication of its natural resources.

The effect of an abundance of provisions and of the necessaries of life, is to render the price of labor cheaper with regard to every thing but those necessaries. The consequence of this cheapness of labor would be, that more laborers might be employed in manufactures, for the same amount of wages; it would then follow, that manufactures also would become abundant, and, of course, would grow cheaper, until they found their level in this particular with the produce of agriculture;—every other product or application of labor would also find its level in the same way. But if so, it may be asked, what advantage would follow? The answer is, that two advantages would result. 1. The population of the state would equally enjoy an abundance of every thing raised or produced within it, until it had increased so much, as, by its increased consumption, to raise the price of every thing again. But, if the increase of population were distributed among the various employments existing in the society, according to the existing proportion, and the same judicious measures were continued, the production of the necessaries of life would still keep in advance of consumption, until the territory of the state contained as many inhabitants as it could support. 2. The cheapness of labor, would render manufactures cheaper *in comparison with foreign manufactures*, so that there would be less occasion for protection by imposts, against their competition in the home market; it would also better enable home manufactures



to enter into competition with foreign manufactures, in the various foreign markets abroad.

In order to secure these advantages, it would be good policy in an agricultural state, to adopt some such measures as the following: 1. To remit the land tax entirely in favor of all lands employed in the production of the necessities of life: 2. To discourage all manufactures which have for their object, to convert any agricultural product, used for food and constituting one of the necessities of life, into an article incapable of sustaining it, whether for home consumption, or for exportation: 3. To discourage the exportation of all articles capable of sustaining human life, and commonly used as food.

For, in order to insure an abundance of the necessities of life, it is not enough to encourage agriculture; because, however abundant production may be, if it is either wasted, manufactured into a useless article of mere luxury, whether for home consumption, or to be sent abroad, and the price returned in similar articles of luxury, the state will derive no advantage from such abundant production; since the scarcity, and the high prices will be the same to the people of the state, as if less land had been cultivated, or the crops had been bad in proportion. It is not however intended to deny, that the producer or the manufacturer in such case, might have an opportunity of indulging himself in luxury and extravagance, or, if he were prudent, might enrich himself; the subject under consideration is the policy of the state.

On the contrary, where an adequate supply of the necessities of life cannot be obtained, not only the irregularity in the transaction of business, but the misery and suffering occasioned by it, are necessarily very great. The weakest and humblest class of society, is that which feels it first. For, the day laborer will soon find that by working all day, he will not be able to earn wages enough to purchase the necessities of life; and, if the evil continues long, the consequence will be, that deficient and improper food will bring on an increased mortality upon the sufferers, until their numbers are reduced to correspond with the produce of the country, which is applied to the support of life. During such a period of distress, the

price of labor becomes reduced to its lowest rate, because many persons will resort to day wages for the purpose of earning sufficient to sustain life. But, on this very account, as well as because many persons will then do their own work, who, if times were better, would hire it done, the demand for labor will be very small. And though, as a general rule, men will not work for less wages than are sufficient to furnish them with the necessaries of life; yet, under such circumstances, they will labor for whatever price they can obtain, in the attempt to shun famine and starvation. All other products of labor then immediately become very cheap, and yet the production of them diminishes, because no one can obtain a living by producing them. Where the necessaries of life are abundant, all other products of labor also will gradually become cheap, on account of their abundance. Where there is an extreme scarcity of the necessaries of life, all other products of labor will also become cheap, on account of their little value in comparison with those necessaries. In this latter case, these products of labor will be cheap, even though they may be scarce, and they will grow more scarce until they are reduced to a *minimum*. In the former case, they will still be produced, notwithstanding their cheapness, and while the same cause continues, will rather increase in production, to a *maximum*.

But, in any state within the United States, long before coming to any such extremity, a very different scene will be presented. For, as soon as all the lands are taken up by private proprietors, and from whatever cause, whether the unproductiveness of the soil, or misuse of produce, the necessaries of life become scarce and proportionally dear, those persons who cannot obtain a living by moderate exertion, and especially if they are bold and enterprising, will immediately remove to some of the new states, where the means of subsistence can be had with less labor, and where competency and independence will be more within their reach. The bad consequences of the impolicy before suggested, will here be very striking; because, the emigrants are in the vigor of life, and each carries more or less property with him. There is therefore a double loss to the state from which they emigrate.

## CHAPTER II.

*Manufactures.*

IN the progress of society, manufactures naturally follow agriculture. For, when society begins to advance from its rudest beginning, it is found that other things are desirable beside mere food, lodging and clothing, and, at the same time, that improvements are making in relation to these three subjects, it is discovered, that, as soon as provision is made for the necessities of nature, those of the imagination must also be provided for. A boundless field is therefore opened at once for the utmost exertion of human industry and ingenuity.

By the census of the United States, it appears that more than one fifth of the whole population is engaged in agriculture. As there is a considerable exportation of agricultural products capable of supporting human life, it is very probable that every person employed in agriculture, is able to support a considerable number of persons beside himself; it is not easy, however, nor is it necessary here to ascertain precisely how many.

If therefore a colony, consisting merely of persons whose usual occupation was to cultivate the soil, should settle in a new country, though they might have a great abundance of the immediate means of subsistence; yet they would be in want of numberless necessities and conveniences. A blacksmith, house-wright, mason, &c., would, therefore be an invaluable accession to their number, and, on account of the great demand for their services, such persons would have it in their power to extort almost any wages, which they thought fit to demand. It is obvious, therefore, that the business of any such mechanic, would be more profitable than that of a husbandman; because the same labor bestowed in such business, would earn many times as much agricultural produce, as it would raise, if employed in agriculture. Common sense would therefore immediately prompt the farmers to bind their

sons, apprentices to such trades, until the colony contained a sufficient number of mechanics to supply all its wants.

Manufactures derive their origin from the mechanic arts. They first provide for the demands of necessity, then those of convenience, and terminate in luxury ; and though it is not easy to draw the line where each begins and ends, all manufactures may be classed under these three heads.

Those manufactures, which are matters of necessity, are few, and may usually be obtained at a moderate expense, and in great abundance. But, as the demand for them is very great and uniform, the trades which produce them are deservedly great favorites with the people. Because, for the most part, they require but little skill, and every man having a healthy constitution, and a moderate share of bodily strength, if he is industrious and temperate, is pretty sure of getting a good living by following one of them.

Those manufactures, which are matters of convenience, are more numerous. As society advances, they come to be regarded as absolutely necessary. They are greatly diversified, and the demand for them is constant ; persons engaged in them easily obtain a good living, but usually, though they require more skill, they do not call for so much severe and unremitted labor as the first class. Those trades which supply such manufactures, are therefore more apt to be crowded ; and the price of the product in consequence of competition, is frequently low, in comparison with the time bestowed in manufacturing it.

Manufactures for the supply of luxury, though they are the product of labor bestowed in particular trades, yet are almost infinite in variety. They are sometimes boundless in extravagance ; frequently of very inconsiderable utility, or, all the real use may be supplied with articles of much less price ; and sometimes are pernicious to the public, because hurtful to the health or estate of imprudent individuals. Great skill is sometimes required in the manufacture of them, and there is also a chance of failure. Their price in such cases, is very high, in comparison with the labor bestowed on them ; because those which succeed must compensate for the loss on those which fail. In some, their value and consequently their

price depends upon novelty, having therefore but little intrinsic value, as soon as the fashion changes, they become worthless and cheap, though their real utility remains the same.

If a farmer should give two bushels of corn for a pair of shoes, he might be considered as acting under a species of moral necessity, because his health might be concerned in the purchase ; if he should give a third of that value for a razor, he would consult his comfort or convenience ; in either case, if the price was agreeable to the usual market valuation, he could not be blamed for imprudence. But, if he should give a hundred bushels of corn for a cashmere shawl, it would be useless extravagance, though the actual price in the market were twice what he gave for it. Or, if he gave a ton of carrots for a pair of ear-rings, or for any fashionable article, which in six months time would be out of fashion, and would not bring one half of the price which he gave, though its real value was not at all diminished, he would commit an act of expensive vanity.

If all the lands in any community were distributed among husbandmen, and cultivated by them to the highest degree, and all the necessities and conveniences of life, beside what they raised by their own labor, were furnished them by mechanics and manufacturers, before the introduction of the inventions and discoveries of luxury, it is plain, that independently of foreign commerce, such community might attain to a great height in the number of its population, all of whom might be as comfortably situated, as the reasonable satisfaction of moderate wishes would require. For, as all the farmers would equally have occasion for the products and labor of manufacturers and mechanics, these classes would receive in exchange from the farmers, so much of their produce, as their own labor would have produced, if employed in agriculture. Because, agreeably to the general rule, the demand would regulate the supply ; and the number of apprentices bound to a trade, would depend upon their prospect of earning a good living, when they should become master workmen.

But, as soon as society advanced one step further, it would be discovered, that agriculture could support within the coun-

try a greater number of persons, than could find employment within it, taking all the various occupations of agriculture and manufacturers together. For, not many more persons would engage in agriculture, than would be sufficient to supply the whole community with agricultural produce. And, as it would by no means take all the rest of the people, to supply the whole community with every species of necessary convenience, or even domestic luxury, that might be called for; it would immediately become necessary to find some means of employing the supernumeraries, so as to enable them to support themselves; since otherwise they would become a burthen upon the rest of the community. And it would soon be perceived, that this could be done effectually, and perhaps without changing the nature of their usual employments, by finding another market for the products of their labor. As the home market would already be taken up, another market for the surplus of home production, must therefore be looked for, abroad. This would introduce foreign trade and navigation. For, the manufacturer by means of the merchant, and with the use of shipping, would send abroad all the surplus produce of his labor beyond what was called for to supply the market at home; and receiving his returns from abroad either in money or in some foreign article of luxury or variety, which he could not obtain at home, and exchanging it in whole or in part for the necessaries or conveniences of life, would thus be enabled to get as good a living as his neighbors. By the introduction of the various employments of commerce and navigation, the means of obtaining a good living, would also be furnished to another numerous class of people, who would be supported by and consequently would furnish a market for a large amount of agricultural produce. Thus the various classes of society would mutually assist, and at the same time, balance each other. The exigences of society however would introduce various other classes of persons, whose occupations and employments are of the highest necessity and utility, such as the makers, expounders, and ministers of the laws, the members of the various professions, teachers of youth, &c. &c., all of which, so far as political economy is concerned, must be considered in the inoffensive and strict sense of the term, as *par-*

*artificial*. For, these classes derive their existence merely from the use they are of to society, to prevent or remove evils, inconveniences and disadvantages, which otherwise it must necessarily suffer. This is obvious; because if the people were peaceable and just in all their dealings, there would be but little necessity for rulers, legislators, &c. &c. If they were always in health, there would be no occasion for physicians, surgeons and apothecaries. If knowledge were either intuitive, or were unnecessary, there would be no occasion for teachers of youth, &c.

As the manufactures, which are necessary to supply the home market, employ a great many persons who consume a large proportion of agricultural produce, the interests of agriculture and manufactures are intimately connected; they are reciprocally advantageous; and whatever encourages or discourages either, for the most part affects the other in a similar manner.

So long as the necessaries of life raised by the husbandman, are exchanged for home manufactures, even though they should be merely articles of luxury, if not absolutely pernicious, there will hardly be any subject for legislative interference; because, those necessaries being consumed within the territory, the country will always sustain as great a population, as its actual production will enable it to do at the time. No check will therefore be offered to the increase of its population. And even although the consideration, which the husbandman should receive from the manufacturer, should be nothing more valuable than trinkets and baubles of *his manufacture*, the interests of the country will not be directly concerned in it. For, the whole amount of property in the community will remain the same as before, notwithstanding such exchange; there being no difference, except that the manufacturer has supplied his occasions with agricultural produce, and the husbandman has gratified his vanity with the possession of finery of little value. The tendency of such a barter, however, is very injurious. For, as soon as it is discovered, that more of the necessaries of life can be earned by a little easy labor, bestowed in manufacturing articles of such inconsiderable value, than by a great deal of hard labor employed in till-

ing the ground, there will be too many apprentices bound to learn the trade of manufacturing such articles, and agriculture will be less followed. The evil may, or may not, cure itself. Agricultural produce without doubt, would rise; and when the country was once deluged with such baubles, their price would probably fall, to conform to their real value; but invention is infinite, and for aught that appears, there might be new patterns and new fashions in perpetual succession forever, to the great impoverishment of the agricultural class and consumers generally.

But, as society is at present constituted, it seems impossible for the legislative power to interpose, without infringing what the citizens consider their reserved rights. For, they would hardly consent, that they should be deprived of the privilege of consulting their inclinations in the purchase of any articles, however useless, extravagant, or even pernicious, by the operation of sumptuary laws. Such matters, therefore, must be left to the discretion of each individual, being matters of private economy.

But, it is quite clear, that, while the manufacture of articles of real utility, should meet with every encouragement that the legislative power of the country has a right to bestow, sound policy requires that any manufactures of the nature just referred to, should receive no encouragement, for the plain reason, that they consume the means of subsistence for a class of manufacturers of greater utility. But, when all the useful and necessary occupations in society are filled with tradesmen, artists and manufacturers, no objection ought to be made to the setting up of any such manufactures, or any of the various fine or ornamental arts. Because to check or prohibit these, is to stop the advance of society in civilization and refinement; and is to require, that wealth, which is the proper reward of skill and industry, should forego those innocent and proper indulgences, which furnish the strongest motive for its accumulation. And the fine arts, though they make no pretensions to be the foundations of society nor add any thing to its strength, still must be considered as contributing greatly to its felicity, and constituting the most brilliant gems that adorn its crown. Another principal reason, however, why encourage-



ment should not be held out to them, in the first instance, is, that, out of the number of aspirants to distinction among them, a comparatively small number meet with any considerable success ; for, as in them anything short of excellence, is but little regarded ; and, as excellence is always comparative, a few only can be rewarded with a prize, which, though an ample one, is always bestowed at the expense of the unsuccessful competitors, who in consequence, frequently languish in indigence and obscurity.

Manufactures, which convert the necessities of life into an article incapable of sustaining it, and, which being of but little use at best, in fact, sometimes, become the ruin of numberless people from the temptations to excess which they offer, should be wholly abolished. Because they check population, by wasting food capable of sustaining life ; destroy health ; lessen industry ; and introduce directly or indirectly every species of vice.

As some of the United States possess great natural advantages for the establishment and carrying on of manufactures ; but others are less favorably situated for this purpose, the following questions, being subjects of general interest, naturally present themselves for consideration.

1. Is it advantageous to the interests of any manufacturing state, that foreign goods, which come into competition with its manufactures, should be either partially or wholly, excluded from its market, by protecting or prohibitory duties ?

2. Is it disadvantageous to the interests of any non-manufacturing state, that foreign manufactures usually consumed within it, and of a similar kind to goods manufactured in some of the other states, should be either partially or wholly excluded from its market, by protecting or prohibitory duties ?

3. Is it, on the whole, a *national* advantage to the United States, that duties should be laid on foreign goods, of a similar kind with goods manufactured in some of the states, for the purpose of securing either a monopoly, or equal competition for the products of the industry of the manufacturing states, against those of foreign industry ?

4. Has the congress of the United States any authority under the federal constitution, either to prohibit, or to impose du-

ties upon the importation of foreign goods, for the *sole* purpose of securing the whole market of the United States, to the products of the industry of the manufacturing states, and, when there is no constitutional call for the expenditure of the money to be raised by the collection of those duties ?

It may be remarked, that, though a state which has manufactures largely established within it, is here called a manufacturing state, it is by no means so called because those manufacturing interests are paramount to all the other interests in such state ; for, it is believed, that there is hardly a state in the Union, in which there is not some interest within it, either of agriculture or commerce, paramount to that of manufactures. But this epithet is bestowed on it here, merely to distinguish such states, from those which have not introduced manufactures among them. It would be a great error in politics, therefore, to wish to introduce any regulations into a state for the encouragement of its manufactures, without previously considering how such regulations consist with the interests of the state at large, that is, the interests of the rest of the inhabitants. Laying this foundation, it may be answered,

1. *With regard to the first question ;* the direct consequence of a *prohibition* of foreign manufactures, is to raise the price of domestic ones of the same kind and quality. This price will then depend upon the proportion between the demand and the supply. If the supply is not equal to the demand, the price will rise very high, and the manufacturers will realize a great profit, but the rest of society will be put to great expense and inconvenience in furnishing themselves with goods, which they will be compelled to do at such prices, as the manufacturers think fit to demand. The tendency of high prices will be to encourage smuggling. Affairs, however, will not remain long in this state. As soon as it is discovered, that manufacturers derive great profits from their business, so many will embark in it, that the market will be abundantly supplied with goods, which will therefore fall in price ; and notwithstanding the goods of foreign manufacture are excluded, and the monopoly of the home market is secured to the domestic manufacturers, their competition with each other will soon render their prices as moderate, as they are in all other

kinds of business ; that is, as low as they can sell them and make a reasonable profit, in proportion to the profits of other kinds of business. It is very clear, therefore, that the manufacturers, as individuals, will derive no permanent gain from a prohibition of foreign goods, which will give them an advantage over persons engaged in other occupations ; though, if such prohibition should once be made, and any persons should enter largely into manufactures, under an opinion that it would be continued, they might very probably be ruined, if the prohibition should then be unexpectedly withdrawn.

It must not be overlooked, that, if the price of labor, in any country from which the importation is prohibited, is so much lower than it is here, that the foreign manufacturer, if he could have a chance to introduce his goods into this country, would, notwithstanding freight, insurance, and other charges, be able to realize a profit by selling them at a price lower than our manufacturers could afford, the competition of domestic manufacturers, will never of itself compensate to the consumers in the home market, for the high prices which, it is obvious, they will be obliged to pay, when the prohibition is first made. The reason is, the home manufacturer cannot afford to sell his goods for less than they cost him. But, as they cost the foreign manufacturer less than they cost our manufacturers, he can afford to sell them for less. The support of manufactures, therefore, under such circumstances, will always, in this respect, be a tax on the consumers of the goods in this country ; which tax will amount precisely to the difference between the price of a home-made article, and that which a foreign one would cost here, *if it were not prohibited.*

There are several circumstances, however, which, though indirectly and circuitously, would overbalance this disadvantage to the state at large ; 1. By prohibiting foreign manufactures, an opening would be made for a very extensive business, capable of affording as good a living as any other in society. On the supposition that its market was confined to this country, still, it is obvious, that the supply of the home market must employ a considerable number of persons. The population of the state would therefore, sooner or later, be increased by the number of persons, who, in consequence of the prohibition,

would engage themselves in manufactures. For, it is admitted in political economy, that the number of the people soon increases or decreases, so as to have a correspondence with the means of earning a subsistence. 2. The market for the supply of these manufacturers, would be secured to the producers in this country. This would increase the demand for agricultural produce ; and, it is *very* probable, that the farmer, who, perhaps, before the prohibition, when the market for the sale of his own produce was dull, might purchase foreign goods at a cheap price ; afterwards, when the prohibition was laid, and the market for the sale of his produce had become high, might better afford to give a considerably dearer price for domestic goods. 3. By purchasing foreign goods, our own country would contribute to support the manufacturers of that country from which they come. The number of manufacturers, who are supported abroad by the profits which they derive from the sale of their goods here, is the same that we should support at home, if foreign goods were prohibited. But, if the manufacturers are supported here, they increase the number of our own population, and bear their proportion of the general burthens, and add to the effective force and respectability of the nation.

The effect of protecting duties, would, in some respects, be similar to that of a prohibition ; because it would bring domestic manufactures into the home market, on the footing of competition, and would furnish a check to those of foreign fabric. It, of course, would be less advantageous to the interests of domestic manufactures, than a prohibition ; because, the latter would secure to them the exclusive possession of the home market, which the former would be unable to do. The competition, however, would be more favorable to all consumers of foreign goods ; because they would have it in their power to purchase them at a cheaper rate, than they could do under the monopoly occasioned by a prohibition.

It would also be more advantageous in some respects to the government, to lay an impost, rather than a prohibition. Because, if the impost were adapted to the circumstances of the foreign manufacturer, he would be compelled to pay the whole of it. For, the market in this country would be profitable

enough to him, to induce him to send his surplus, which otherwise would perish on his hands ; but, in order to sell it, the price must be reduced so low, as to compensate to the consumer for the amount of the duty. So much of the reveau must, therefore, be paid by the foreign manufacturer, and he will find it for his interest to do it for that part of his produce, for which he can find no other market.

In illustration, let a case be supposed. If a farmer, when home-made shoes are worth two bushels of corn a pair, can buy a pair of foreign made shoes of equal quality for one bushel of corn, it is not to be doubted that he will buy the foreign shoes ; and if all the other consumers in the state act on the same principle, the shoemakers, finding, that they cannot get enough for their labor at the same price, to enable them to live, will leave the business, or, it will be so bad that no more apprentices will be bound to it ; so that finally it will be discontinued. The state will then support its shoemakers in a foreign country. And the means of subsistence being sent abroad, the state will not be able to support so many people, by that number. If the shoemakers discontinue their regular business, they will be distributed among the other classes in society. It is worthy of remark here, that, by carrying on any other business in any such case, they will be able by the wages of their labor, to purchase a greater number of shoes, than they could have manufactured at their regular business. For, when shoemakers, suppose they manufactured 10,000 pair of shoes, equal to 20,000 bushels of corn raised by an equal number of farmers ; then, becoming farmers, they produce 20,000 bushels of corn ; 10,000 bushels of which will give them 10,000 pairs of shoes ; and then they will have 10,000 bushels of corn left. If then a shoemaker could *buy* a pair of shoes, supposing them equally good with what he produces by six hours labor in the field ; would he be willing to work twelve hours equally hard in his shop, in order to *make* them ?

Under these circumstances, if a duty should be laid of fifty per cent., it would tend to lessen the price, which the foreign manufacturer would expect to receive for his shoes ; because it would lessen the demand for them, by introducing competition into the market. The domestic manufacturer would then

be able to live ; but all consumers would be compelled to pay a higher price for shoes, by the difference between the price of foreign shoes before the duty was laid, and the price afterwards.

But, it must be remarked, here, that if we have no manufactures among us, foreigners, knowing that we must have a supply from some quarter or other, will have it in their power to compel us to receive goods of whatever quality, and at whatever price, they please.

Suppose then our shoemakers have abandoned their business, and left the market to foreigners, what will the consequence be ? Shoes of the worst quality will immediately be sent here, and if we are not compelled to pay a higher price for them, than we refused to pay our own shoemakers, we may think ourselves fortunate. In all such cases, therefore, we must choose between the two evils ; and, if we wish to have manufacturers among us, we must lay such a duty on foreign goods, as will enable our own, to meet them fairly in our own market. But, we must not take off such a duty on the vain supposition, that goods will remain permanently cheaper ; for, as soon as we have broken up our own manufacturers, we shall, in this respect, immediately become at the mercy of foreigners.

2. Is it disadvantageous to the interests of any non-manufacturing state, that foreign manufactures usually consumed within it, and of a similar kind to goods manufactured in some of the other states, should be either wholly or partially excluded from it, by the operation of protecting or prohibitory duties ?

An absolute prohibition of foreign goods, would seem to compel the non-manufacturing state to purchase such articles as it needed, even though inferior in quality to the foreign ones, at whatever price, the home manufacturer saw fit to demand. There would be two checks, however, to any exorbitant increase of price. 1. The manufacturers having principally to depend upon the market of the United States, would be under as great a necessity to sell, as the consumers would be to purchase. 2. The competition among the manufacturers themselves, which, on account of their increase of numbers, would be continually growing greater, would keep the prices of their

goods down, to an average with the products of other kinds of labor.

But there would remain two disadvantages. 1. As long as the price of labor and of subsistence, are so much lower in a foreign country than here, as to outweigh the freight, insurance, &c. for transporting foreign goods to this country, the foreign manufacturer will always be able to undersell ours in our own market, if not protected by a duty. Consequently, if the foreign goods should be excluded, no competition among the home manufacturers, will ever reduce their goods to as low a price, as those of foreign goods would be, if there were no duty.

2. If foreign goods are prohibited, the nonmanufacturing state will suffer a loss by the prohibition, precisely equal to the difference in price, between what the same goods could be bought for before the prohibition, and what must be given for them afterwards. The consequence of this loss, will be that the non-manufacturing state will not be able to sustain as great a population by so many persons, as that difference would support. For example, let it be supposed, that the non-manufacturing state before the prohibition paid \$50,000 per annum for foreign goods, and afterwards paid for similar goods, to a manufacturing state \$60,000; then it is plain, that so many persons as derive their subsistence from the difference, viz. ; \$10,000 per annum, are gained by the manufacturing state, and lost by the non-manufacturing state. This is evident, because, whatever tends to increase the consumption of a state, without tending also to increase the population, not only checks population, but diminishes the capability of the state, so long as the cause exists.

To counterbalance these disadvantages, there are some circumstances which deserve consideration. 1. The increase of population in the manufacturing state, will increase the home trade between the two states, not only in relation to the sale and purchase of the particular goods of the manufacturing state, but, in all articles which may be received in barter for them; in this way, it is not unlikely, that the manufacturing state may be the customer of the non-manufacturing state, to an amount equal to the price of the manufactures.

This compensation would be much more complete and direct, if the raw material used by the manufacturing state were the growth of the other, and was bartered for the manufactured goods. But, on the other hand, if the non-manufacturing state were compelled by the prohibition to purchase goods of a manufacturing state, which either could not or would not purchase the raw material in return, it would operate very injuriously to its interests. Because, 1. The non-manufacturing state would more or less lose its market for its raw material with the foreign manufacturer, in consequence of not buying of him; 2. Would be compelled to pay to the manufacturing state a higher price in money, for whatever goods it purchased. 3. Its raw material would fall in price on account of the difficulty of finding a market for it. Under these circumstances, a prohibition would be entirely to the advantage of the manufacturing state, and to the disadvantage of the other.

The effect, which duties imposed on articles of foreign manufacture, for the purpose of protecting the manufacture of similar goods in a manufacturing state, would have on the interests of a non-manufacturing state, must be analogous to a prohibition. Some consequences, however, would be more favorable in the latter. 1. Though the protecting duty would naturally tend to raise the price of the manufactures to the consumer; yet, it would by no means have so great an effect, in this respect, as a prohibition. The rise probably would not be so great as the whole amount of the duty. For, by encouraging the domestic manufactures of another state, though by the supposition, it would not wholly expel the foreign manufacture, yet a competitor would be introduced into the market, who would lessen the sales of the foreign article. The diminution of the sale, would, for a time, at least be accompanied with an accumulation of the foreign goods. It is very possible, that this might become so great, as to compel a sacrifice at a price below the usual one before the duty was laid. The duty of course would cease to be a protection for a season. For, large sales of foreign goods, would bring down the price of the manufactures intended to be protected, so low, that they could not be manufactured and sold in their own state and, with greater reason, could not pay for freight



&c. to the non-manufacturing state, with any reasonable expectation of profit. This effect, however, would be only temporary. The foreign manufacturer, or merchant, after so great a sacrifice, would send fewer goods; and fewer would be ordered from this country. It is very possible, however, that any person, not knowing the nature of the cause of the disturbance of the market, might suppose it to be permanent, and conclude that the various manufacturing establishments would be ruined, unless heavier duties were imposed.

2. During this struggle for the market, the consumers in the non-manufacturing state, would enjoy the advantage of purchasing goods at extremely low prices. The public revenue also would be levying a heavy contribution, which would fall either on the merchant, in whose hands they happened to be at the time of the pressure, or else on the foreign manufacturer, but not on the consumer, as some imagine. It is true, when foreign goods, subject to duty, are imported in the regular course of trade, the duty is added to the cost of production and the freight, &c., and the whole constitutes the price, all of which in ordinary cases is paid by the consumer, and the duty goes to the government. But, where the duty is laid to protect a domestic manufacture, the foreign manufacturer is obliged to reduce his price, to the importer, as much as possible; otherwise the protecting duty will drive him from the market as effectually as a prohibition would do. This reduction of price goes to pay the duty, and, in case of a glut of the market arising in the manner before suggested, may amount to more than the whole duty. The cheapness of the price in this case, notwithstanding the duty, clearly shows that the duty is in effect paid by the foreign manufacturer. But, as the foreign manufacturer, in consequence of his loss, or the low price of his goods, arising from the accumulation of them, would afterwards receive orders for fewer goods; the price of such articles, whether manufactured abroad or at home, would soon rise again in the market of the non-manufacturing state, until they settled at that price, at which the home manufacturer could afford to sell them and make an average profit with other kinds of business. To this price the foreign manufacturer must conform, or otherwise his goods must leave the

market. Whether such a protecting duty would or would not be a disadvantage on the whole to a non-manufacturing state, no infallible criterion appears, applicable to all cases. It must depend in every case upon the balance of the various advantages and disadvantages necessarily involved in it. In some cases, there can be no doubt. For instance, if the effect of a protecting duty is to create a permanent rise in the price of the manufactured articles, in comparison *with the products of the non-manufacturing state*, which either directly or indirectly must pay for them, it would be a disadvantage equal to the difference of price ; because it would be a proportionate check to an increase of population. But, though the price *in money* should be raised, it does not follow, from this circumstance alone, that the protecting duty must necessarily be disadvantageous to the non-manufacturing state ; because the product of such state may also have risen in price, in proportion.

So, if the non-manufacturing state, in consequence of the protecting duty, should be placed in a dilemma, where it either must lose the market for its raw material, with the foreign manufacturer, by purchasing of the manufacturing state which does not purchase the raw material in return ; or, otherwise must pay an increased price for the foreign articles, in order to sell its raw material to the foreign manufacturer, the protecting duty will be proportionally injurious to the non-manufacturing state.

3. Is it, on the whole a *national* advantage to the United States, that duties should be laid on foreign goods of a similar kind with goods manufactured in some of the states, for the purpose of securing either a monopoly, or equal competition for the products of the industry of the manufacturing states, against those of foreign industry ?

A few remarks have already been made, to show that the encouragement of manufactures by a protecting duty, is advantageous not only to the manufacturers themselves, but, independently of their particular interest, to the whole of a manufacturing state ; it has also been shown that, in some cases, the imposition of such a duty is injurious to a non-manufacturing state ; that where it is not so, it is because incidental circumstances sometimes afford an indirect compensation ; the

disadvantage however, where it exists, is direct and obvious; but the effect of the compensating circumstances, can seldom be clearly shown.

It is apparent here, that the determination of the present question, must depend upon a comparison of the advantages, which the encouragement of manufactures affords the manufacturing states, and the disadvantages which they will suffer, if protection is withheld, with the injurious effects that the imposition of protecting duties, &c. will have on the non-manufacturing states, and the advantages which they will derive from a free trade in these respects, if the duties are taken off. The difficult task, however, of striking a balance between present and actual advantages and disadvantages, and those which are future and contingent, will not be attempted here; because, it is believed a proper answer to the next question, will render a further consideration of the present one, wholly unnecessary. It is an ancient saying, that, *consilium non est eorum quæ fieri nequeunt*, which, for the present purpose, may be rendered, 'that it is useless to consider the expediency of measures, which we have no right to adopt;' for, it is hoped, that the government of the United States will always consider the want of right as the same with the want of power, in relation to this and every other subject.

4. Has the congress of the United States any authority under the Federal Constitution, either to prohibit, or, to impose duties upon the importation of foreign goods, for the sole purpose of securing the whole market of the United States, to the products of the industry of the manufacturing states, when there is no constitutional call for the expenditure of the money, to be raised by the collection of those duties?

Some observations on this subject have already been made, in commenting on the constitutional powers of congress. See *ante*, p. 99 to 109. But, as the committee of congress on manufactures, have expressed a decided opinion, that the power in question is bestowed on congress by the constitution, a few further remarks are here submitted to the discerning reader, for the purpose of noticing the grounds on which such opinion is placed.

The chairman of the committee, in his letter to the speaker

of the house of representatives, says that Mr. Madison entertains the opinion, 'that the power of congress to protect domestic, by taxation upon foreign industry, is *implied* in the power to regulate commerce,' and expresses his assent to the doctrine. He adds, that it is also contained in the grant of power of taxing '*to provide for the common defence and general welfare.*' But, in the opinion of the supreme court of the United States, the power to regulate commerce, does not comprehend the power to lay duties or imposts on exports or imports. See 9 Wheat. 209. Yet, it is in this connexion, that one would naturally have expected to find such power expressed, if it had been granted in direct terms in the constitution; and, if not contained here, it would very naturally be supposed, that it was not intended to grant it at all. It may be remarked, that though the chairman agrees with Mr. Madison, in thinking the power is implied in that of regulating commerce; yet, it by no means appears, that Mr. Madison agrees with the chairman, in believing that such protecting power is contained in the power to tax, '*to provide for the common defence and general welfare.*' The circumstance, that this power may equally be inferred from two several grants, made in different places in the constitution, of very different powers, shows clearly, that there is no *necessary* inference of any such power in either grant.

The importance of this power in the hands of congress, to the interests of the manufacturing states, and perhaps also to the interests of the United States, considered as *one* great nation, would naturally create a wish in the minds of statesmen, that the states had agreed to confer it on congress, by the national compact; in others, the necessity for it seems to have furnished the only ground for a belief, that it is actually granted; in others, there seems to exist a pre-determination to find such power granted in the constitution, and the only question with such, is, under what clause or article it is contained, or under what general expression, will it be best to consider it comprehended. Any such previous bias; or predetermination, however, is not at all favorable to an impartial examination of the question, whether it really is contained in the constitution or not.

The power in question, it is pretty clear, if it exists at all, is an *implied* one. But, if valid as an *implied* power; then according to the general rule, it must be absolutely necessary to the exercise of some power *expressly* given. If it is thus necessary to any *express* power, what is that express power?

If it should be answered, that it is necessary to the exercise of the express power of providing for the common defence and general welfare; the reply is, that a power to provide for the common defence and general welfare, is not given to congress in *express terms* in any part of the constitution. If such power had been given in *express terms*, there would have been no necessity of enumerating particularly in the constitution, the various powers intended to be bestowed on congress; for, congress might then have done whatever they considered for the general welfare, provided they did no act which is expressly prohibited in the constitution. A power to provide for the general welfare, which would comprehend, with a few exceptions, an unlimited grant of power, is not granted in it at all, in express terms; but, to provide for the general welfare, is *the purpose* for which, and for which alone all the powers were granted. It is not a power of itself, however, and consequently does not alone authorize any act, which does not result from the exercise of some other power, either given in *express terms*, or necessary to the exercise of some power, which is given in *express terms*. Instead of being an independent, unlimited power of itself, it is rather a restraint upon all the express and implied powers contained in the constitution; since it would be unconstitutional to exercise any of those powers for any purpose, that does not in some way contribute to the general welfare.

If it should be said, that this protecting power is contained in, or is part of the express power to impose duties for the purpose of providing for the general welfare; the reply is, that no one can well entertain this opinion, who considers it an *implied* power. There is an apparent incongruity in supposing an implied power to be either contained in, or to be part of an *express* power; agreeably to the maxim, *expressum facit cessare tacitum*; the purport of which is, that where the intention is

express, there is no room for implication. That it is not an express power, and is not granted in effect, is apparent from what must then be the necessary consequences. 1. For, congress would then have a right to impose a tax for any purpose which they think will conduce to the general welfare, provided such purpose is not *expressly* forbidden in the constitution; which would enable congress to do what they pleased, if not thus *expressly* prohibited. For, we cannot suppose, that congress have a constitutional power to impose a tax for the purpose of doing an act, to do which would be an infringement of the constitution.

Can it be said, that under the power, 'to impose taxes in order to provide for the common defence and general welfare,' congress has a power to impose duties, in order to promote the sale of domestic manufactures by the partial exclusion of foreign ones, because such encouragement to domestic manufactures is one of the means of providing for the common defence and general welfare? It is true, the chairman puts it on the ground, that defence in the constitution, means 'defence against every danger, and every foe;—defence against all hostility and from every evil which may bear on the whole community and menace the general welfare,' &c. But dangers and foes, which are so merely in a figurative sense, it is supposed, are not intended by the constitution; otherwise an inconvenient and ludicrous latitude of interpretation must follow. In fact, at the time of framing the constitution, the nation had just emerged from the dangers and troubles of a long and cruel war, in which the national existence was at hazard, from the greatness of the invading force of the enemy,—their fleets and armies. The articles of confederation had been found inadequate to the various emergencies which had taken place, among other respects, because it did not bestow a power of direct taxation. In forming the constitution, the states therefore agreed that congress might impose taxes for the purpose of providing 'for the common defence;' i. e. by expending the money during hostilities, in fortifications, in ships, in armies, &c. &c. But it is not believed, that in using the expression, *common defence* it ever occurred to the states, that they were bestowing on congress the power of taxing foreign goods, for the purpose

of encouraging home manufactures. For, what is the *common defence* in this case? It is nothing more than compelling our own citizens to buy home-made articles, by raising the price of foreign ones in our market. And, who are the enemies, against whom we are to defend ourselves in a time of profound peace? Our own merchants, who, in consequence of the rise of foreign goods, will be less inclined to order them. And how is the *common* defence to be provided for, and the *general* welfare to be consulted? By making the rest of the people, who are twenty to one of the manufacturers, pay a greater price for their goods, in order to encourage these last in their business. For, no one will pretend, that the exclusion of foreign goods, is for any other purpose than to encourage home manufactures. It is very figurative language indeed, to call this, *common* defence and *general* welfare; but, if it be proper to use it on popular occasions, it by no means follows, that it may be assumed as the basis of legislative measures and proceedings.

But, if the states intended, by these expressions in the constitution, to grant this power to congress, then section 8 of the first article, which specifies many powers of the highest importance to the public defence and general welfare, is wholly useless and superfluous. The power to coin money, to establish post offices, to fix the standard of weights and measures, &c. are given in direct terms; so, the power to raise armies; to maintain a navy; to provide for calling forth the militia, &c. are all expressly given to congress. Are not these necessary to the common defence and general welfare? Now, is this power of taxation for the sake of giving the monopoly of the home market to our own manufactures, of so much more necessity than these powers, that it shall be considered as granted, though not named, and though it was thought necessary to name these?

Further; if, under *the power to impose taxes to provide for the common defence and general welfare*, congress have not a power to do *every* act not expressly prohibited in the constitution, which they may think necessary to the common defence, &c., then, for the same reason, they have no right to impose a duty on foreign manufactures, for the *sole* purpose of encouraging domestic manufactures. There can be no medi-

um, and the chairman expressly disclaims any such indefinite grant of power. *See his letter to the Speaker of the House of Representatives.* His conclusion, therefore does not follow. For, how can a power to impose a duty for such a purpose, be contained in, or inferred from a power to impose taxes for the common defence, &c., unless congress have a power to lay taxes for all purposes, which they judge necessary, to the common defence, &c. and which are not expressly forbidden in the constitution?

In the report of the committee on manufactures, it is further urged, that the first act of the first congress organized under the constitution, was to pass a law, containing the following preamble; 'Whereas it is necessary for the support of government, for the discharge of the debts of the United States, *and the encouragement and protection of manufactures*, that duties be laid on goods, wares and merchandizes imported;' and the argument is, that it is impossible to deny the power of congress to levy duties for the protection of domestic manufactures, without pronouncing this act to be unconstitutional. But the conclusion does not follow; for, allowing this act to have all the authority of a precedent, though American manufactures at that time were of comparatively small account, and it does not appear, that the present subject was considered at all, at that time; two circumstances which wholly take away its authority as a precedent; still, it can have no authority, except when the country is under similar circumstances. This act was passed while the United States were laboring under a heavy public debt, which could be discharged in no other way but by a tax on the people, to be levied in some mode or other. This constitutional ground, for the imposition of the tax, together with that of the necessary support of government was therefore laid in the first part of the preamble; and, in what follows, it appears congress was governed by considerations of sound policy, to lay the duties on imported goods; because such duties, whether similar articles were then manufactured in the country or not, would offer a proportionate inducement or encouragement, to enterprising persons to undertake, or to carry on manufactures; and it is very possible, that the words in italic were introduced, in order to



lessen the unpopularity, which invariably attends an act laying a tax, by holding out to the people the hope of deriving some advantage from a source, whence they expected only to feel a burthen. For, in any other view, the words in *italic* are wholly superfluous ; since the law is constitutional without them.

But, this supposition is by no means necessary, as the public debt contains a sufficient ground for the tax ; and political expediency is the reason for imposing it on foreign goods imported. The precedent therefore loses its authority for the purpose, for which it is adduced. For, it does not follow, because congress, when the United States are in debt, has authority to lay a duty, which, for the encouragement of domestic manufactures, is imposed on *foreign* manufactures, that congress has authority to impose a duty on foreign goods, when the United States are not in debt, for the mere purpose of encouraging *domestic* manufactures. Besides, it ought to appear, that congress would never have inserted the words in *italic*, unless they had believed, that they had authority to impose taxes for *the sole* purpose of encouraging domestic manufactures. Less than this will not answer, because it will be irrelevant to the present inquiry ; and this does not appear at all.

Further ; why did not congress in this act, make use of the language of the constitution, to express the ground of the exercise of their constitutional authority, if they did not think the payment of the public debt sufficient ? If the encouragement of domestic manufactures is a sufficient ground, and is couched under the words, 'to provide for the common defence and general welfare,' why was not this constitutional language used ? But it was not used ; it is plain, therefore, that the payment of the public debt, &c. was considered sufficient without it, and the encouragement of manufactures, was inserted as a matter of policy.

Lastly ; if congress, under the power to provide for the general welfare, have the power thus to impose duties on foreign manufactures, still there will be no room for the exercise of it, unless the object is of a *general* nature. If the object, instead of consulting the *general* welfare, is absolutely injurious to the interests of one or more of the states, though highly advantageous to the rest,

it will afford no pretext for the exercise of such power. By the *general* welfare, here, is not meant the interest of a majority merely of the states, to which they may sacrifice the interests of the rest; but, it should embrace the interests of a majority of each of the states. For, twenty-three of the states may possibly think it would contribute to their general welfare, to partition the twenty-fourth among them. But this is not such a general interest, as is intended in the constitution, which, though it may extend so far as to authorize a law which being favorable to all, is more so to some than to others, could never have been intended by the framers, to justify a sacrifice of one, for the advantage of the rest.

The inference seems to be, that so long as the country is in debt, it is both constitutional, and good policy, to tax foreign manufactures; but, as soon as the country is free of debt, and there is no constitutional call for the expenditure of the money, to be raised by an impost on foreign goods, such impost cannot be laid for the sole purpose of protecting or encouraging domestic manufactures, without overstepping the limits of the constitutional authority of congress.

**NOTE.** A few desultory remarks, which could not well be interwoven in the text without interrupting the train of reasoning, are here subjoined; and, in order to place two different views of the same subject, in stronger contrast, they are introduced in the form of a conference between a manufacturing and a non-manufacturing state.

*Manufacturing State.* Why do you oppose the tariff?

*Non-Manufacturing State.* Because I can never assent to a law, which compels me to pay a higher price for goods imported, when the revenue, arising from the duty imposed by it, is not wanted for any constitutional purpose.

*Man. State.* Why then will you not buy your goods of me?

*Non-Man. State.* Because, if I should buy of you, importation will cease. You will then have the monopoly of my market, and I must be more or less at your mercy as to the price of your goods. But, I ask in return, why do you wish to have the duties continued?

*Man. State.* Because of the great benefit I derive from the

law, and the immense advantage, it is or will be, to the prosperity of the United States, in the protection of American industry.

*Non-Man. State.* Call it, if you please, the protection of a particular portion of American industry, for which protection, the other, and I believe much the largest portion of American industry, is compelled to pay, in the shape of higher prices for the goods they want. The number of persons in the United States, engaged in manufactures, probably does not exceed a half million, out of twelve or thirteen millions, the rest of whom probably are as industrious as the manufacturers. Our state is engaged in agriculture and commerce, and the inhabitants are as industrious as they choose to be, and follow whatever calling they please, which, I take it, is all that any one has to do with the subject. But, waiving that; the tariff occasions a loss to me, equal to the additional price, which I am obliged to give for goods subject to the duty. This tariff was imposed at your request, and you derive all the benefit of it, while I suffer all the loss. Why then, if you wish it to be continued, and are actuated by motives of justice, will you not allow me, out of the great profits you derive from the tariff, the amount of duties, collected in the ports of our state, on the foreign goods subject to them?

*Man. State.* It is impossible you can be serious; all the profits, which I derive from the sale of a quantity of goods equal to those which pay duties in your state, I presume would pay but a small part of those duties. If this was required, all my manufacturers would be ruined. But you mistake the matter greatly. Look at the price of our stock; it is not so very much better than other stock in general. We sell our goods as cheap as we can afford.

*Non-Man. State.* It is pretty clear, then, that though my loss by the tariff is great, yet your gain by it is small. For, if you get ten or even five *per cent.* more by manufacturing, than you could do in other business, you consider yourself as doing well. Now, on all goods, the price of which is raised by the tariff, my loss is the rise in price. For, if the goods are raised thirty per cent, then I can get no more goods for 130 bales of cotton, than I could for 100, if there were no tariff. Then I must lose thirty per cent. on my exports, in order that you may get five or ten per cent. more on your labor and capital, than you can do in other business. For, I presume you would not carry

on manufactures unless you made some profit. Why then is your interest so much to be preferred to mine, that I must bear this heavy loss, in order that you may realize this comparatively inconsiderable gain?

*Man. State.* You mistake again. This duty is not imposed to favor manufacturers, as a class; but, to encourage manufactures, as an employment. It is not thought good policy, for the United States to depend on foreigners for their manufactures; but the people of the United States cannot afford to manufacture, unless they have the advantage of a protective duty. This duty being imposed, many persons have engaged very largely in this business, whose establishments will be ruined, if the protection is withdrawn. But, why do you not set up manufactures in your state?

*Non-Man. State.* And commit a similar act of imprudence? How could they so rashly embark so much capital on the faith of a law, which they ought to have foreseen, must inevitably be repealed, as soon as the Constitutional ground of it should be removed, unless the government of the United States should see fit to violate the constitution, or we should always remain in ignorance of the interests of our state? But, in answer to your question; we cannot manufacture, because we cannot hire laborers whom we can trust, without giving higher wages than you do. Besides, I believe you have many local advantages over us in this respect, so that you would always undersell us. Further; we rather prefer to import goods than waste labor in manufacturing what we can purchase with the earnings of part of that labor, employed in some other way. I protest, however, against any such right as your question implies, of compelling us to turn manufacturers in order to free ourselves from paying this duty.

*Man. State.* No offence was intended. But, as the encouragement of manufactures is admitted to be of the highest importance to every nation; and, as the United States derive, or soon will derive, the greatest benefit from them, I suggested, that you might have the same benefit that we have from setting up manufactures in our state.

*Non-Man. State.* I have stated the reasons why we cannot do it, to any advantage. If therefore we are compelled to pay this duty, we are made a sacrifice.

*Man. State.* Not for our interest alone, however. This tariff is imposed out of regard to the greater good of the whole,

which requires that manufactures should be established within the United States.

*Non-Man. State.* If so; consider, either the advantage to the United States is greater than the loss which I must suffer by it, or it is not. If it be not, it is hardly worth while, that I should be compelled to make a great sacrifice, in order that the United States should derive a less advantage. This would be impolitic as well as ungenerous. If it is more advantageous to the United States, than it is injurious to me, let compensation be made to me, by directing the custom houses in our state, to pay over to the state treasury the amount of all protecting duties collected at them, and I will undertake to satisfy my citizens.

*Man. State.* It cannot be done; for, if compensation is made to you, it must also be made to all the non-manufacturing states; this would devour all the revenue arising from the protecting duties.

*Non-Man. State.* And so it ought, if it is not wanted for any constitutional purpose, and the duty is consequently imposed for the benefit of home manufactures solely, while we sustain all the loss.

*Man. State.* But it is impracticable; because, if the duty operates as a prohibition, no collection will ever take place, because no goods will be imported. If it is merely protective, and the United States permit you to draw back the duty into the state treasury, the law will be inoperative in effect, and importations will remain as before.

*Non-Man. State.* It is unjust in itself, without any compensation, to make my interest a sacrifice for the advantage either of any particular class of people, or of any particular state or states, or of all the rest of the United States. Even in time of war, the government of the United States cannot, without violating the constitution, deprive an individual of his property for public uses, in cases of the utmost extremity, without full compensation. Why then is the interest of our state to be thus sacrificed in time of peace? How can it be done without violating the constitution?

*Man. State.* Though your interest, at first sight, may appear to be sacrificed, yet, I doubt whether it be so in fact, on account of the advantages, which the United States will derive from the encouragement of manufactures, in which, it is believed your state will participate, either directly or indirectly, in a greater or less

degree, whether you undertake to manufacture or not. But, however this may be, suffer me to remind you, that when the constitution of the United States was formed, the several states made a mutual compromise of their respective interests, and entrusted congress with a power, to lay taxes to provide for the general welfare. Under this power, congress has authority to make an inconsiderable state interest give place to the greater interest of the Union. The exercise of this power must depend upon the discretion of congress, who, coming equally from all the states, can have no interest to sacrifice any particular state for the advantage of the rest. But, where a public measure is of the greatest possible importance to the public welfare, congress ought not to neglect it, merely because it may interfere, in some inferior respect, with the interest of some particular state. Without a compromise of this nature, the constitution never could have been agreed to, because, it is obvious, that no general measure can ever be adopted under it, which will not be more favorable in its operation to some states than to others. The constitution is not a subject for a strictly literal construction; if it were, I should admit that no such power as we contend for, is contained in it; and Mr. Madison, to whom the country is under so great obligations for the part which he took in framing and procuring the adoption of that instrument, is of opinion, that congress possesses the power of imposing duties, under the power to regulate commerce.

*Non-Man. State.* The greatest deference, without doubt, is due to the opinion of the eminent statesman whom you name; but, in political affairs, there can be no authority but truth, justice, and the stronger argument. Under a power to regulate commerce, it cannot be doubted, that congress has a power to impose such petty exactions, as may be found necessary to effect this constitutional purpose. But, a power to impose duties for the sole purpose of encouraging manufactures, cannot be brought within this power, by any logical deduction, and the power to impose duties, according to the opinion of the supreme court, is part of the taxing power. The powers, which the states have conceded to the general government, it would be very dangerous to extend by construction, or to interpret by opinion. By straining the bands of power, they will break; the states disgusted at the attempt to usurp authority, will consider themselves no longer bound by them; and there is danger that the Union may be dissolved. It would be better, therefore, for congress never to

attempt to exercise powers, of the constitutionality of which, there remains a doubt. Instead of strengthening the arm of the general government, such attempts palsy it by the mistrust, disaffection and rancor, which they occasion in all who find themselves aggrieved. There can be no other way to ascertain the meaning of the parties to the constitution, than to apply its language to the situation and circumstances of the country, when it was adopted; for, the constitution, I apprehend, is to be construed according to the real intention of the parties at the time of its adoption; and, if a certain construction will lead to a conclusion, which the states could never have intended, such construction must be abandoned, even though it may seem not inconsistent with the literal meaning of some general expressions contained in it. It is impossible to suppose, that any state adopted the constitution for the sake of accommodating the interests of the other states, without consulting its own. It is conclusive, therefore, that no state ever contemplated making an agreement, by virtue of which its own interest should be gratuitously sacrificed either for the welfare of the rest, or of any particular state. How then can it be consistent with the true intent of the constitution to enact laws, laying a duty upon foreign goods imported into a non-manufacturing state, merely in order to encourage manufactures in other states?

*Man. State.* The constitutionality of a law, you will recollect, is to be decided by the supreme court of the United States, and is not a subject for the decision of any other judicial tribunal. Your opinions, though I do not agree with them, may be sound, but, if the supreme court should decide otherwise, they will be unavailing. It is true, however, the case has never been decided by them, and nothing more than an *obiter dictum*, by which no one will legally be bound, can be had from that tribunal, until the case occurs. But, if it should be decided against you, there is no appeal to any earthly tribunal, except one, which I should be the last to allude to, if we were not continually reminded of it by certain of your citizens.

*Non-Man. State.* And upon whom must rest the responsibility? If the government of the United States, in violation of the constitution should enact laws, by which we shall feel ourselves oppressed, should we not resist?

*Man. State.* I think not. For, if the supreme court should decide the laws to be unconstitutional, they become void from that moment. On the other hand, if they decide the laws to be con-

stitutional, you are bound to submit. Will you not submit to the decision of the tribunal, which you have agreed, with the other states, to establish, for the very purpose of settling differences, arising among the states, which can be determined in no other way? If the decision should be in your favor, even contrary to your opinion, I have not so much charity, as to believe, that you will find fault with the decision on that account, or, that you will not think the other states are bound to submit to the decision. If the decision is against you, and you should believe it to be incorrect, will you resist this decision, because you did not find the tribunal, you agreed to establish, infallible? But, though the judges of the supreme court should even be infallible, unless you are so too, which I presume you do not arrogate to yourself, there is no certainty that your opinion will agree with theirs. Is it not better then, that a doubt should be settled by a decision, even though incorrect, than remain a perpetual source of disagreement and ill will?

*Non-Man. State.* Admitting what you say to be just; the decision of the supreme court will be binding no further, than to settle the legal question; but will by no means determine the political one: that is to say; after the decision of the supreme court against me, I must acknowledge, that I shall have no right whatever, to deny the constitutionality of the law for the purpose of opposing the execution of it; but, if I am fully persuaded, that the decision is contrary to the true intention of the parties to the constitution, and so repugnant to our interests, that the objects which we had in view in adopting it, cannot be obtained, I shall think myself justified in requesting permission of the other states, to withdraw from the Union, peaceably and on equitable terms. For this purpose, if it should ever become necessary, I would not hesitate to call a state convention. I will proceed no further.

*Man. State.* Permit me then to begin where you leave off. Suppose you call a state convention for the purpose of deliberating on this question; how can you obviate the difficulties, that will meet you at every turn? Suppose a majority of your citizens should be in favor of an application to congress, to obtain the consent of the other states to your secession from the union. Has congress any constitutional authority to act on this subject? Ought not the application to be made to the other states? Yet the state legislatures have no authority on this subject. But, if congress should consider themselves authorized to act on this



subject, can you suppose that they will abandon the minority in your state, who wish to abide with the Union? To act on this subject, how can any authority be derived from the people, without resolving society into its original elements? For, as respects all powers not delegated either to the state governments, or to that of the United States, the people are independent of each other. Whence then can the majority derive any right to govern the minority in cases, not provided for either in the constitutions of the states, or in that of the United States? Is it not clear then that those citizens of your state, who wish to remain under the authority of the United States, have a perfect right to do so, and cannot be controlled in this respect, by any act or resolution of a majority of a convention of your citizens? If, therefore, the United States should be perfectly willing that you should withdraw from the union, they will still be bound to protect the dissentients. Will you then partition your state? Certainly not; even the majority, who might be desirous to secede from the Union, if all were unanimous, will be averse to do so, if they find a respectable minority opposed to the measure. In such an extreme case, can you suppose, that you may safely rely on the wisdom, fortitude, perseverance, and disinterested generosity of *state heroes* who appear so desirous of opposing the execution of the laws of the United States? *orators*, who, in order to magnify themselves in the eyes of those who are so simple as to be their dupes, make the dissolution of the Union, notwithstanding the awful consequences that may result from it, a theme for gasconade and brava-do in the irregular assemblies of the people; *turbulent champions*, who, for greater personal security, carry concealed weapons in time of peace, and bluster in patriotic bombast, at public dinners? Such as these never yet did any thing deserving praise or honor. They know better how to keep their own persons out of danger, than how to secure the welfare of the public. The part of Decius or Leonidas, though often mentioned in holiday orations, and the exercises of the academies, is never performed in our days, except upon the stage. And modern orators, for the most part are proved by experience to be but shallow statesmen; since their influence over the people, gained by their persuasive but superficial accomplishments, is seldom productive of any effect of general utility; and, while deluding themselves, as well as others with their own eloquence and sophistry, are too ingenious in apology ever to be martyrs; and, being rather inclined to discourse than to act, are totally unfit either for generals or soldiers.

Excuse me;—but, it is to be hoped, that you will not suffer yourself to be under the influence of any such counsels, which, at best can result from nothing better than the vapoing effervescence of patriotic, but mistaken zeal for state interests.

*Non. Mane. State.* I readily accept your apology; but the volley, which you have just discharged, really excites my admiration. I should have thought, that you had just risen from the perusal of the never-ending, grave and pompous speeches of your own delegation. But, I know it is much easier to praise, than to read those elaborate disquisitions.

But, to return to the subject of discussion, which, in its result, may be of the most unhappy consequence to me, though certainly, if I am wronged by a violation of the constitution, the injury will be felt by all. You are aware of the embarrassment of our situation: The uncertainty whether we shall not, by attempting to obtain redress, put ourselves in a worse condition, than we now are, only aggravates the evil. What are we to do?

*Man. State.* I do not admit that you suffer any wrong whatever. But, on the supposition, that the policy of the general government is none of the best; yet have patience, and they will eventually come to the same correct views, which you suppose yourself to entertain, and the injurious laws will then be repealed. Or, if they are right, and their measures are really promotive of your true interests, though they subject you to some temporary disadvantage, be not envious, if these measures appear to you calculated to enrich our state, by enabling us to make the most of those advantages, which nature, in your opinion has afforded us. While a mere majority is sufficient to enact a law, our institutions will never rival those of the Medes and Persians. The redoubled efforts of a large and energetic minority, always has a tendency to keep those public measures, which are of a revocable nature, in a state of oscillancy and equilibration, very favorable to the views of those who think they suffer by them.

But, if the Union should be dissolved, shall we then be safe from each other's injustice, when we complain while we are united? Can each of us alone resist the attacks of a foreign power? Must we again become provinces?—If we dissolve the Union, such must be our fate, unless we form a new Union. Let us then adhere to the present one. At any rate, let us not be rash; the national debt is not yet paid; and until it is, there is no *constitutional* ground for controversy in relation to this subject.

## CHAPTER III.

*Commerce.*

ON this exhaustless subject, a few passing remarks only will be hazarded. Not because, as some suppose, the principles of science in relation to it, can be comprehended by merchants only ; but because the minute details, which alone require prolonged discussion, are of little consequence to general readers, and yet can only be obtained by a practical acquaintance with trade.

It is somewhat singular, that merchants of long experience and supposed sagacity, who have acquired and amassed great fortunes in youth, sometimes lose their property and fail, at a time of life, when, if ever, the judgment ought to be in its highest perfection. On the other hand, it is not less singular, that some persons of small acquirements and very moderate capacity, sometimes acquire great wealth by commerce in a very few years. The bad result in the former case, and the good one in the latter, however, are sufficient to show, that, in commerce, sagacity and experience, are not absolutely necessary to obtain success, and, what is worse, are not sufficient to insure it. It follows, that no infallible principles are derivable from mercantile experience, which will guaranty invariable prosperity even to the merchant's private affairs ; and much less, to those of the public.

The reason is, that the knowledge acquired by experience, consists only of those facts and details, which are necessary to carry on the particular branch of trade in which the individual happens to be engaged, but which have no general application to the interests of the public. For, the interest of the merchant, and that of the public are two different things, having no necessary connexion, any further than that the wealth of a merchant is a constituent part of the whole wealth of the community, of which he is a member.

In order to have distinct ideas on this subject, as well as to

form a correct opinion how far commerce is advantageous to a country, it will very shortly be considered under the heads of *domestic trade, importation, exportation, and the carrying trade*. These will be considered as entirely distinct, though it may very well happen, that two or more of these operations, may be performed in any single extensive commercial transaction.

1. *Domestic trade* is obviously of the highest importance to a community. Without it society could not well continue at all, but men would exist merely as solitary savages, in a state of perfect independence. For, it is almost impossible, that intercourse should be kept up among mankind, without those mutual dealings and contracts, in all of which some principle of exchange and barter, is necessarily more or less involved. If a hatter should barter a hat to a shoemaker for a pair of shoes; if a carpenter should contract, with a farmer to build him a shed, for a certain number of bushels of wheat; or, if two farmers should agree to exchange work, it might be considered as constituting an operation of internal trade, as much as a direct purchase for money.

It is of the utmost consequence to society, that this home trade should be as free from restraint as possible; because it is more convenient, that the citizens should supply each other with the respective products of their labor, than that each individual should undertake to be his own carpenter, hatter, blacksmith, &c., and thus vainly attempt to supply his wants by his own personal labor in those various trades. For, in this way, each individual would be able to do but little work, and that would be done badly. But the division and distribution of labor, enable each individual to have an abundance of every kind of work, and well executed. The policy of taxing sales by auction, or of licensing auctioneers, retailers, innholders, pedlars, &c., does not come within the scope of this work. On the subject of home trade, therefore, it seems superfluous to enlarge, because, with the above suggested exceptions, it is left in perfect freedom.

2. *Foreign trade; exportation, &c.* With regard to foreign trade, its value to the country depends entirely upon the comparative value in use, between the articles exported and those imported in return.

In commerce, exportation as well as importation may be either advantageous or disadvantageous to the country; and consequently in a single exchange of exports for imports, either a double loss, or a double gain may arise to it.

The most disadvantageous trade to a state that can be carried on, is where the exported articles are the necessities of life, and the imports are not only incapable of supporting life, but tend to destroy it. It is not to be expected, that any country will long continue to increase in population, where a trade of this kind is carried on. If, therefore there should be exported from a country beef, pork, fish and corn, though, at the highest price in money, and that money should immediately be re-invested in brandy, wine, rum, gin, and other things equally incapable of supporting life, and equally injurious to health which should be brought back for home consumption, though at the cheapest rates, such commerce would be the most destructive to the prosperity of a state, that can be conceived. It is true, the merchant might be accumulating immense sums from such a business, and might suppose, from his own prosperity, that he was doing the public a great service; but, it is equally true, that he could not, if he were disposed, do a greater mischief to the public, than to buy up the necessities of life and ship them abroad, and bring back such articles as have been named and expose them for sale throughout the country. In such a case as this, the merchant, if he grew rich, would fatten on the ruin of his country. For, by buying up the necessities of life, and paying for them, directly or indirectly, in such commodities, supposing them to be merely useless, though they are in fact pernicious, he renders the production of the necessary articles exported, wholly vain, the labor bestowed on them being thrown away. The delusion which the producer would labor under would be this, that he should get a high price for his produce; but he forgets that it is paid in an article which is worthless in use. If it should be replied, that he can sell it to his neighbor and get a high price for it; still it is obvious the injury to the state is the same, though the loss falls on the thoughtless, and not on the designing and guarded. Any rich and powerful state, that finds its population at a stand, or increasing in too slow a ratio on account of emigration, would

do well to look to this. For, in no case whatever, is the prosperity of the merchants, a test of the advantage of trade to the country. But this test will always be found in the consequent prosperity of the producer of exported articles, whether manufacturer or husbandman, &c., and the prosperity of the consumers of the imported ones.

That the prosperity of a merchant, is no test of the advantage of the trade he carries on, to the state, may easily be shown; because, however profitable a trade might be to the state, all the merchants concerned in it may lose money by it and be compelled to abandon it. On the other hand, however ruinous any trade may be to the state, it is very possible that the merchants may grow rich by it. The direct foreign trade, therefore, ought never to be encouraged for the sake of the interest of the merchants, but, for the sake of the public interest, which are two very distinct things. Where they are compatible—where the trade is for the advantage of the public, it should be encouraged; but, where incompatible, and where the trade is pernicious to the public interest, the interests of the state ought not to be sacrificed to favor those of a comparatively small number of persons. The hackneyed expression, *laissez nous faire*, in this case, would be as absurd as unbecoming; the merchant here is a mere carrier, and not a party in interest, any further than his commissions or profits are concerned. The trade is carried on for the advantage of the community, and not for the sake of giving him an opportunity to make money.

2. Where the merchant exports the surplus manufactures of a country, beyond what is necessary for home consumption, and brings back the necessities or conveniences of life, he carries on a trade which is highly advantageous to the country. In the first place, he increases the demand for the home manufactures; consequently he enables more persons to support themselves by manufacturing; in this way, he increases population. In the next place, by bringing back the necessities of life, he increases the supply in the state, which operates in the same manner as a blessing would do, which should increase the annual produce of the soil; this also would tend to increase the population; for, wherever the necessities of life are cheap, pop-

ulation will increase. If it should be said, this would discourage agriculture ; the answer is, it would not prevent any man from cultivating his farm. On the contrary, as he found produce cheap, he would endeavor to raise more, so as to compensate in quantity for the lowness of the price ; its tendency, therefore, would rather be to increase the production of agriculture. But, if the products of agriculture, on account of their abundance, became very low in price, many persons, who otherwise would have engaged in it, will betake themselves to other occupations, as the various trades, or manufactures, or commerce, which, in consequence of the cheapness of necessary articles, would afford them opportunities of getting a living with very moderate labor. Thus, there would be a permanent increase of population, distributed equally in all the various classes of society, which always soon finds its level in this respect.

For, the high price of manufactures is attributable in part, at least, to the high price of labor ; the high price of labor is owing to the high price of the necessaries of life. The high price of the necessaries of life, must necessarily follow extensive purchases of them for exportation and returns made in luxuries, superfluities or foreign goods generally, not being necessaries. If then the necessaries of life are retained, labor will become cheap in comparison with every thing but those necessaries. Consequently manufactures will grow cheaper, and there will be less necessity for protection against the competition of foreigners. Manufacturing companies therefore ought not to despair, even if the tariff should be taken off, as a measure might be suggested, which it is thought would be a palliative for its removal, if not a substitute for its continuance.

But, though such a trade would be highly advantageous to the state, it obviously might or might not, be ruinous to the merchants engaged in it, according to the state of the markets at home and abroad, and their prudence or imprudence in the management of their business. This is another proof, that the prosperity of the merchant, is not the slightest test of the public benefit of the trade, in which he is concerned.

Whence does the merchant derive his wealth in this case ? Certainly it consists in the profits, which he receives from the consumer of the goods which he imports. The consumer en-

endeavors to obtain the foreign goods as cheap as possible, the merchant endeavors to obtain for them as high a price as possible. In this particular the interests of the two are incompatible, and either may grow rich at the expense of the other. But, it is the interest of the state, that the surplus over consumption should be exported, and a return made of other articles, of equal utility, and not easily obtained otherwise. In this respect the interests of the merchants, and those of the producers of exports, and the consumers of imports, and consequently, of the whole state, strongly coincide. Commerce is here of the highest importance. It creates a new value. It performs in effect the operation of production. There is no measure of encouragement or protection, that commerce of this kind can reasonably require, that should not immediately be bestowed; and, here there is no danger, that *laissez nous fuire*, would ever be heard.

But, a duty on the necessities of life, imported from abroad, is a very great absurdity. For, what can be the object of it? Political partizans perhaps will say, that it is laid for the purpose of protecting national industry from the competition of foreigners. This is done by laying so heavy a duty on foreign production, that it will be wholly excluded from the market, and thus domestic produce will have the whole market secured to itself. But, the consequence will be, that the prices of the necessities of life, will rise higher than before. The farmers will sell their produce at almost any price they please, unless the competition among them keeps it down. It will gradually, however, come to a level with other kinds of business; because so many will betake themselves to the cultivation of the soil, that they will fully supply the market, if the territory of the state, which can be come at, is sufficient for that purpose.

The farming business, in this case, will have a great advantage secured to them in this monopoly; but, it will be at the expense of the manufacturers and the rest of society. This is clear; because, if foreign produce were admitted, the domestic produce would conform to it in price. But, if the foreign is excluded, then domestic produce rises to whatever the producers shall agree among themselves to demand. For, the necessities of life must be had, if possible, from some source or



other. And this necessity, if the producers can agree in demanding an exorbitant price, will put the rest of society at their mercy. For, the tendency of such a law is to reduce the rest of society under the control of the producers, in the same manner as the whole nation of the Egyptians were reduced by the policy of Joseph.

It is inexpedient, therefore, to impose any duty on foreign produce of the necessaries of life, because it so far checks an increase of population. Further, if home production is sufficiently abundant, then such an import would be superfluous ; because, then the price of foreign produce would not pay for importing. On the other hand, if the price of foreign produce would pay for importing, then the domestic must be proportionally scarce. But true policy requires that the *necessaries* of life, should be as cheap and abundant as possible.

There is a strange error prevailing in the minds of some politicians, who assume that whatever increases consumption, increases production also, in the same proportion. For, they reason thus, whatever consumes an article in the market, raises the price of it. The increase of price, enables those who produce the article, to get more money for their labor than they can in other productions ; they therefore bestow more labor in producing it, and others also are induced to neglect other business, and to bestow their labor in the same way, and with the same expectations. But, notwithstanding this plausible theory, if the consumption is not for some valuable purpose, the labor of producing what is consumed, is entirely thrown away. The production consequently is of no use whatever. Suppose a state, capable of producing the necessaries of life, for 10,000,000 of people, were unhappily bound by a necessity to export 9-10ths of its whole produce, and receive a return in imports of jewelry, brandy, rum, wine, and other articles not capable of sustaining life, is it not clear that such commerce, though it might enrich the inhabitants with an abundance of expensive and perhaps ornamental articles, would yet so completely check its prosperity, that it could never reach more than one tenth of the population, which it could sustain. Such commerce would therefore be highly ruinous to the state, though the merchants, if they carried it on

would grow rich by the profits they made by it. But though such state would thus check its growth and throw away the advantages which nature had given it, by selling its birthright in effect like the ignorant Indians for a string of beads, or a cask of brandy, the foreign producer or manufacturer of such worthless articles, would fatten on the folly or wretchedness of the inhabitants of such state. For, the population which might be sustained here, would be supported abroad by supplies drawn from this country. And the seven lean kine would thus devour the seven well favored; and the most barren and unfruitful country, incapable of itself of sustaining a single inhabitant, might by such commerce, become as populous as China, and the country with which it traded, though as fertile as the garden of Eden, would never contain more inhabitants, than enough to till it for the sake of those foreign consumers.

To what extent these remarks are applicable to the commerce of any of the United States, let each reader judge for himself.

In 1822, there was exported from the United States, in fish, \$930,000; in flour, \$5,300,000; in rice, \$1,600,000; in pork, 1,400,000; in corn, meal, rye, &c., \$1,100,000; in butter and cheese, 220,000. Total \$10,550,000.

In the same year there was imported into the United States, exclusive of what was re-exported, in wine, \$1,700,000; in spirits, \$2,300,000; in teas, \$1,200,000; in cigars, \$174,000. Total \$5,374,000.

As these last articles were the balances remaining after re-exportation, they must be considered as designed for consumption. Now, to the United States, it is of no sort of consequence whether these imports were purchased with the proceeds of those exports or not, because, the result is the same. For, so far as the exportation of these necessities of life, and the importation of these pernicious or useless articles, the produce of the United States is wasted; the productive labor has been employed for the mere benefit of those foreigners whose wines, &c., have been purchased, and who have been supported abroad, instead of an equal number of people who would be supported in the United States, if the necessities of life

had not been exported. This species of commerce, it should be remembered, is to be considered as perpetual ; consequently the United States are always to be taxed in this extraordinary manner for the support of foreigners, and the fertility of the soil is to be changed for sterility, and sterility upon which annual labor is thus thrown away.

3. There is another species of commerce, which consists of what is called the carrying trade. Though this is usually combined with the other operations of exporting and importing, yet, as it is so far subject to the remarks made in relation to them ; and, as it may be carried on in a manner entirely independent of those operations, so far as the merchant's own country is concerned, it will here be considered simply as the carrying trade.

Where a merchant in this country employs his capital in carrying merchandize backwards and forwards between two foreign countries, the public here derive the following advantages from it. 1. Though he makes his money abroad, yet he spends it here ; as he increases in wealth, therefore, he adds proportionally to the wealth of the state where he resides, without any drawback whatever on the part of the state. 2. All those citizens, whom he employs in the management of his affairs at home or abroad, he supports out of the profits of his trade. He, therefore, so far increases the population of the society, by furnishing these citizens with the means of earning a living, without the least expense whatever to the state. This is evident, because if he saw fit, he might remove to some other country and employ others in their room ; in which case, those citizens who are now employed by him, would be obliged to derive it from some other source either at home or abroad. If at home, they would be obliged to come into competition with others. If abroad, the population would be diminished by their number. Merchants so circumstanced, it is obvious, deserve every countenance and encouragement to reside in the state. Because their prosperity or adversity, to a certain degree, affects that of the state ; and they bear part of its burthens, but add nothing to them.

## CONCLUSION.

*On the Future Prospects of the United States.*

PERHAPS no country can, with more propriety, be said to have its destiny in its own power, than the United States. Having a *local situation*, remote from all nations, which are sufficiently powerful to endanger its independence; a *population* already sufficiently numerous for a great empire, yet rapidly increasing and spreading over its extensive territory; a *climate*, temperate and generally salubrious; a *soil*, fertile, and abundant in variety and production; a *people*, bold, enterprising and intent upon their interests; a *frame of government*, in which the choice of rulers depends on popular suffrages, and mild and indulgent; containing within itself a power to reform and amend, without any necessity of resorting to primary assemblies; which imposes few or no restraints, merely arbitrary, or which are grounded on policy alone; and consequently secures to its citizens the enjoyment of liberty to its utmost rational extent; under such circumstances, it would seem impossible that the United States should ever fall from their elevated rank among nations, into a state of weakness and contempt, unless they should occasion their own decline, by the imprudence or rashness of their national policy, or should bring upon themselves ruin and destruction, as a judgment from heaven.

The advantage which a free elective government has over others, presupposes, in the majority of the electors, sufficient discernment to compare the characters and capacities of candidates for office, and requires, that in making a selection, they should be actuated by proper motives. If the former is wanting, there can be no certainty that they will elect the best candidate; if the people vote under unsuitable influence, it is almost certain that a bad choice will be the result.

Among the motives which frequently govern the popular choice, perhaps there is none worse than the influence of par-

ty. For, it is characteristic of this influence, as sometimes exhibited both in elections by the people, and appointments by rulers, that it does not seek either for a man of talents, and integrity, great acquirements, or industry, or well acquainted with the duties of the office. Such qualifications without more, though amply sufficient for the purposes of the public, are no qualifications at all in a party view. For, *here* the only necessary qualifications are, that the character of the candidate should not be so bad, nor his incapacity so flagrant, as to disgrace his party ; but he must be the right kind of man to serve the turn of the party, and in case of appointments through party influence, he must either have rendered party services, or be recommended by some one who has, &c.

The country of a partizan, to which he considers himself as owing the duty of patriotism, will be found, on examination, to mean nothing more than the party to which he belongs. It is this false god, that, in political affairs, governs his conscience, and constitutes his standard of right and wrong. The mental subjection of the followers of party, is therefore most miserable. For, until they know what their leaders think, they must not venture to form an opinion for themselves, for fear they may afterwards be obliged to recant it. Their ruling principle therefore is, neither truth, justice, or the interests of the country, but it is, **TO BE TRUE TO THE PARTY.**

And by what motives does party induce the citizens thus to follow her through right and wrong indiscriminately ? The leaders are actuated by the hopes of personal distinction, or other advantage ; the partizans are governed chiefly by the gregarious principle, though the personal influence of those leaders, exerted in numberless ways, must not be omitted. But, it may be asked, may not the citizens unite together for the purpose of attaining some object of *general* utility, without being obnoxious to the charge of forming a party or faction ? Undoubtedly they may do so ; for their acts are then for the good of the *country* ; and not for the advancement of party purposes ; and therefore in such a case there is no necessity for *party* names or distinctions.

In many instances, parties have originated with ambitious individuals, who, conscious of a want of desert for the distinc-

tions at which they aim, have resorted to cabals and intrigues to induce persons who were not well informed, to join themselves to them as his followers. One of the earliest factions on record, is that of Abimelech. See Judges, Ch. ix. The direful effects of factions and parties in Rome, Carthage, Jerusalem, &c. in ancient times, and in Italy, France, England and Ireland, &c. from the middle ages down to the present day, warrant the opinion, that as they are almost inseparable from governments under which any portion of liberty is enjoyed, and are violent in proportion to that liberty, so they are one of the greatest evils that can infest society.

As soon as any combination of persons become a permanent body, begin to act separately from the rest of society, assume a peculiar designation, are organized with officers, and under the guidance of leaders, they are factious, and are dangerous to the public tranquillity according to the proportion which their numbers bear to all the rest of society. It is true, so long as there is nothing more to excite them, than the usual contests at elections, they may do no great harm; but, experience shows, that whenever anything uncommon occurs, to rouse their passions, there is no act of violence or excess, to which they may not be incited. And whenever the country shall be so completely divided into factions, that every one shall find himself compelled to side with one or another, in order to escape incivility, the moral sentiments of society will be proportionally degraded and debased. Should its violence ever rise to a great height, the only safety for the peaceful citizens will be to stand by the constitution and laws, and take care that they are not violated, under a pretence of reforming abuses.

What palliative can be found for this evil? Take away from the president the sole power of removing, appointing or even nominating public officers, any further than it is expressly bestowed in the constitution. Disqualify members of congress for all other public offices, during the term *for which they are elected*, not merely during their term of office. Suffer no removals from one public office to another.

These regulations would diminish in some measure the prize of ambition, would take away some of the subject matter of

promises, intrigue and corruption, and consequently would cool the patriotism of the leaders of factions, and perhaps hush that eloquence, which so much attracts the less informed part of the people.

So long as the different parties are completely intermingled with each other throughout the country, there will be but little danger of public commotions from factions, however unfavorably the peace and tranquillity of private intercourse may be affected by angry discord ; but, as soon as the parties come to be defined by the limits of states and territories, there will be immediate danger of public disturbances. The minority, out of power, in any such case, will always be apt to consider the public measures of the majority, in power, as tyrannical and oppressive, and contrary to law and the constitution ; and when things have come to this pass, there never will be wanting demagogues to excite sedition, insurrection, and civil war, and dupes and disorderly persons, to follow such leaders in their career of violence and wickedness, from a hope of obtaining that distinction, in times of public disturbance, *which* they are conscious will otherwise be unattainable.

It is the duty, therefore, of every conscientious citizen, and the interest of every peaceable one, to discountenance, as much as possible, all party distinctions and divisions generally ; but especially, to prevent their becoming sectional. It is for this reason, the majority in congress, when not urged by some paramount obligation of justice, should be extremely cautious of exercising any power, of the constitutionality of which there exists a doubt, from mere considerations of general expediency, when the minority consists of one or more states, the citizens of which may consider themselves injured by it. For, if such a case should ever occur, there is hardly an argument, that was formerly urged against the oppression of the British government before the revolution, which state patriots will not revive, and apply, whether right or wrong, to excite the people of their states to resist the general government. The people also would do well, to thrust back into private life those office seekers, who personally, or by the agency of political partizans, under patriotic pretences, obtrude themselves upon the citizens, and seek their suffrages at elections, but who care not what

evils they bring upon their country, so that they obtain their own ends. But though, agreeably to the *theory* of the admirable constitution under which we live, every fault in legislation, and every deficiency in itself, may be easily corrected or amended, without disturbing the public tranquillity; yet, *in practice* a degree of intelligence is required in the people, to perceive the necessity of such amendments and corrections, and agree in the choice of legislators who will make them, that history and observation teach us, is too much to expect of a numerous population. This defect, therefore, where it exists, will probably be found incurable; because the want of intelligence and discernment is not obviated by the mere exercise of the will. For, it is not unfrequent to find that individuals, of contracted minds and small information, take an envious satisfaction in opposing the measures of persons, whom they know to possess more discernment.

It is on persons of such a character, as well as the ignorant and imbecile generally, that designing men operate, by flattering their prejudices, tantalizing their envy, and exciting their suspicions; and by such arts become popular with them. If the time should ever come, therefore, when the majority of the people shall be of this class, and be under such guidance, how will it be possible, that any fault in its legislation, or defect in its frame of government should be remedied, when the very defect itself, will furnish food for the ambition of the leaders of the majority and the means of rewarding their followers? For, that no such defect will ever be corrected or amended, where those, who have the power, consider it inconsistent with their interests to do it, requires no proof. Let us turn our eyes abroad. The British empire has been for many years laboring under the pressure of a number of great political evils and embarrassments. Yet, instead of removing the true causes of those evils, they have been endeavoring to procure a reform of certain minor abuses and corruptions, which, if removed, will improve the condition of the country in a small degree only. Yet this inconsiderable reform has been most strenuously urged and opposed, and great eloquence and oratory has been exhibited on both sides.

But measures, the policy of which is obvious to every



intelligent person, and which would remedy many of the evils under which that mighty empire languishes, are hardly mentioned. To pay the national debt of Great Britain; abolish tythes; enable the industrious to earn a living by moderate labor; to improve the pauper system, by employing the poor in such a manner as to support themselves; to reform the cruel criminal code, and at the same time render it unnecessary; to convert the vicious population of the larger cities into honest and industrious citizens, by furnishing them with sufficient employment; measures which would naturally assist each other and contribute to the same end, one would suppose to be such that in comparison with either of them, a reform in parliament, would amount to nothing at all. Yet, if the parliament were willing that these measures should be adopted, it is believed these objects might all be effected within a moderate number of years. Tythes might be gradually and completely abolished in one generation, by passing a law to discontinue them at the death of the present clerk of each parish respectively. The evils arising from an unequal distribution of property, would be gradually diminished by enabling all children to inherit equally. The application of a just principle, but which perhaps is not thought of, would immediately put the British National Debt in a state of liquidation; to the great relief of the nation's taxes, yet without defrauding the public creditor of one farthing of his due, &c. But, if measures like these, should be repugnant to the feelings, or considered inconsistent with the interests of men in power, it would be vain to expect they would be adopted, though they would cause the British nation to be one of the happiest as well as most powerful on earth, and would render the reign of William IV. the most glorious since the conquest.

The case in this country is analogous. The people will never be able to get back power or influence from the hands of their rulers, if once intrusted with it. For, abuses, corruptions, &c. always tend to continue themselves until they destroy their subject, and then all perish together. For instance, suppose the people should think the president's official patronage conferred on him by the laws of the United States, too great and of a pernicious tendency, how can they take it away?

By law? The president may not consent, and the direct or indirect influence of that very patronage, may very possibly prevent the passage of the law by a majority of two thirds. This demonstrates the propriety of rendering all members of congress, incapable of any other office during *the term* for which they are elected, which would render them entirely free from the slightest bias. But will the people ever be able to induce the members of congress, to consent to make this alteration? On the contrary, though the expediency of it is evident to every person of ordinary information, the people will sooner be persuaded by their representatives, that such alteration would be bad policy. For similar reasons, it is hardly to be expected, that any president will ever consent that his power of removal from certain offices, should be taken away from him; or, that the people should ever be able to choose legislators, the majority of whom will be sufficient to effect that measure. For, office seekers, who, indirectly or directly, manage so as to control the voice of the people of their party, would lose all motive to elect or to remove any president, if the office of president should lose the power of removing officers; because a new president would have no offices to distribute among his supporters.

If, therefore, the people would wish to be liberated from indirect thralldom of this kind, by which they so often find themselves hampered and shackled, without knowing how it happens, or in what it consists, they must throw off the livery of party, and not suffer office seekers or office holders, to influence their conduct; and, if ever an opportunity presents to reclaim those powers, take care for the future to grant no more such.

An unfortunate circumstance, attending all popular governments where the people choose their own rulers, is, that the choice is frequently grounded on no other merit or qualification, than an acceptable manner of haranguing the populace. It is very singular that volubility, fluency, and loquacity, which, with men of observation, are considered a proof of any thing but wisdom or ability, should be the only criterion of those qualifications, which the people have. In consequence of this wrong estimate, these accomplishments are made too much the objects of ambition, and any further knowledge and acquirements

than may be used in flights of óratory, are considered superfluous. Those persons, however, who expend so much time in learning to speak well, must evidently do it at the expense of more valuable acquisitions. And what would be the consequence if all members of the general legislature, were great orators?

1. The sessions of congress would be very much prolonged, because every member must have an opportunity of making one or more, vainglorious speeches. 2. Business would consequently be delayed ; yet finally be hurried through, or else left half done and postponed to the next session. 3. Emulation, degrading strife, and angry and indecent contention would unnecessarily consume a great part of the time, which should be devoted to the public service. 4. Though many long speeches would be made, *about* a subject, yet there would be very little discussion, because declamation is altogether unfavorable to rational investigation. No one, therefore, would ever be convinced by, or be the wiser for tiresome harangues ; on the contrary, as the speeches were longer, the impressions would grow fainter and less distinct. For, it is found that the excitement occasioned by the most impassioned eloquence, lasts but a short time, and, when it has once begun to subside into languor and apathy, cannot be renewed by a mere fountain of lofty words, even though inexhaustible and though animated by the most spirited action, and uttered in a loud voice and with energetic gestures. The characteristics of eloquence itself seem to be very much changed from what they formerly were. It no longer consists of just arguments forcibly expressed, but of pointless descant, dealt out without any other limits than such as nature has set to the continuance of all bodily exertion ; for, though the time of congress ought not to be valued at less than \$200 or \$300 per hour, yet those, who wish to be considered as eminent speakers, seldom declaim less than three or four hours ; though probably there never was a speech more than half an hour long, that would not be improved by reducing it within that compass. What an ungrateful advantage then does a declaimer at irregular assemblies of the people, take of the patient admiration of his followers, when he keeps them in a state of petrification for a whole evening, with polished periods and rhetorical flourishes, pronounced with dignified self-complacency !

There is another mistake, that is sometimes made by the people. They are afraid to elect to office a man of superior abilities for fear he should not be honest ; and prefer to him some person of correct character as far as the public knows, but of very moderate capacity, on the supposition that he will be more likely to be honest than the other, and, at any rate, will not be able to do much mischief. Experience shows, that such suppositions are frequently very incorrect. The ruling passion of men of great abilities, is ambition ; that of men of small abilities who are conscious of it, is either envy or avarice. The sense of character of the former, will therefore preserve them honest, unless this quality should be in the way of their advancement. But honesty is necessarily at continual war with avarice. There is, therefore, great odds, that men of moderate abilities will sooner be dishonest, than those of great talents. For one Lord Bacon, there have been thousands of persons of moderate abilities, who have been corrupted, or, would have been, if they had been thought of sufficient consequence. It is true, that men of small abilities can do no great harm *directly*, and can do no great good, at all, unless, by accident ; but, they may by their vote, prevent a great deal of good, and thus *indirectly* do much mischief. But, such persons are always a dead weight upon the public councils. If ignorant, *every thing must be explained to them* ; if conceited, slow of apprehension, uncomplying and obstinate ; *nothing must be done without their seeing, knowing, attempting to understand, and expressing an insipid opinion upon it*, whether they understand it or not. When envious of superior abilities in another, as is frequently the case, their sole aim is to create difficulties, in order to make themselves of consequence. In order to obtain a character for discernment, and because conscious of their ignorance and imbecility, they are full of suspicion and mistrust ; and, from want of knowledge, often halt most miserably, between the extremes of credulity and incredulity ; sometimes believing falsehood and ridiculous absurdities, and frequently disbelieving probability, truth, and even demonstration itself, because they cannot understand it. Their whole ability may be reduced to one single measure. They find out what others are desirous to effect, and oppose it for that reason. When they

practise deceit, they use direct falsehood, and, in this way, they often succeed with persons, whom they never could have overreached by subtility. Such is the man of moderate abilities and noiseless character, that sometimes creeps into office instead of a man of talents and experience ; and, if he has an occasion, will sacrifice not his country only, but even his party, to gain his own ends.

It was remarked, that the United States seem to have their destiny in their own hands. If they would become a great nation, they must continue united. If they should separate, their importance would immediately vanish ; and their jealousies and dissensions with each other, if they did not break out into border wars and predatory incursions, would render each of them comparatively weak, and little regarded with other nations ; and would cause them to be less willing to assist each, and at the same time less able to stand alone. The necessity and advantage of union, will however never be able to preserve it, if injustice is practised by the United States upon one or more of the individual states, or, what will, in the result, amount to the same thing, if the influential men in any state, with whatever views, can persuade the people of their state, that such is the case ; and, it is apprehended also, that if the leading men of any state should feel satisfied, that, by seceding from the Union, they will be able to gain distinction and power among their own citizens, in consequence of supposed advantages resulting to their state from such measures, a patriotic pretext will never be wanting for that purpose.

The states are advancing so rapidly in population, wealth and power, that there is great danger that the common bond of union, the constitution of the United States, though sufficient, when the country was less flourishing, and there was more danger from foreign powers, than at present, will be found too weak to hold the states together much longer. The wise citizens, therefore, and those who have a regard for the true interests of the country, at the same time that they support the constitution, and endeavor to give it additional strength by amendments, will be very cautious of giving cause of disaffection, by attempting to increase its power by doubtful *constructions*. But, there is good reason to believe, that there is a

faction already formed within the United States, whose aim is to separate themselves from the Union ; and, if they can bring the people of the state to which they belong, to believe that the constitution is violated, and that they have a right to resist, their object so far will be obtained. To strain the powers of the constitution by a doubtful construction, is to do half of their work for them. It is true, if such is their object, they will unquestionably persist in it, though every possible cause of jealousy should be removed, and every thing that they ask, should be conceded ; because any pretext, however groundless in reality, if sufficient to persuade the people of their state, will answer their purpose. Still, if, by avoiding every act that can furnish occasion for complaint, the wiser citizens among them can be induced to see, that there is no just cause for it whatever, it is hoped, they will have sufficient influence over the rest, to counterbalance that of unprincipled and designing demagogues. In this way the evil day will be postponed, and such persons will be left without any excuse or extenuation for their conduct.

Before taking leave of his readers, the author will submit one further consideration, which, though it would come with far better grace from a teacher of religion, he hopes will not be considered improper in one who is a firm believer in christianity ; since it is addressed to those only, who make the same profession.

It is remarked in substance by Bishop Atterbury, that one of the reasons of God's interposing so remarkably in the sudden depression or advancing of kingdoms and states, is because this conduces to the manifestation of his political justice, towards public bodies and communities of men ; and which is very different from that, by which he punishes the sins or rewards the virtues of private persons. The justice of his dealing with particular men may be manifested here or hereafter, as he thinks fit ; for their duration is eternal, and should their successful crimes or unmerited afflictions be winked at in this world, it suffices if such irregularities are set right in another. But, as to the societies, and combinations of men, the justice of his administration towards them, must be manifested either in this world, or not at all.

If, therefore, borrowing the hint from this excellent divine, we contemplate the fall of the ancient empires, which once flourished in the highest state of splendor and magnificence, but are now almost forgotten, in connexion with the reasons assigned by the inspired writers for their destruction, and keep in mind the immutability of the divine nature, it will furnish no irrational or unphilosophical ground, to conjecture the fate of any nation, which shall transgress in a similar manner. \* \* \*

It is the opinion of many very worthy and conscientious persons, that, from the first settlement of this country, the Indians have had great cause of complaint against the white inhabitants; and, if there does not appear in the history of early times any particular instances of ill treatment, fraud, injustice, or imposition upon them, it is ascribed to the partiality of the historian, or his ignorance of the real causes of Indian aggressions, which, on account of the omission of their causes, sometimes appear to be wholly unprovoked and most barbarous. But, in later times, we cannot so easily shut our eyes to the light. For there is an internal evidence in certain transactions, which he must be a very inattentive observer, who cannot perceive. The United States have purchased or extinguished the Indian title to 200 millions of acres of land, for less than four millions of dollars. The lowest price which the United States demand for these lands, at the rate of \$1,25 per acre, is 250 millions of dollars. The Indian nations are in a state of pillage, or under guardianship to the United States, a relation which is regarded with so much suspicion by a Court of Equity, that it sets aside all purchases made by a guardian of his ward, because of the temptation the former is under, to take an unfair advantage of the latter. These treaties, however, though so advantageous to the United States, the Indians complain have not always been so scrupulously observed, on the part of the white inhabitants, as they ought to have been. Previous to the independence of the United States, the intrusions upon the Indian lands by new settlers of the most lawless character, was a frequent subject of complaint by the Indians from the year 1768 at least, when the six nations remonstrated to the commissioners of Pennsylvania, that, *it would be time enough to settle their lands, when they had purchased them, &c* ;

and, afterwards, when the Delawares and other tribes thus pathetically, but fruitlessly remonstrated with the Governor of Pennsylvania, 'We want to live in friendship with you : you have always told us you have laws to govern your people by ; but we do not see that you have : we find your people very fond of our rich land ; we do not know how soon they may come over the river Ohio and drive us from our villages ; nor do we see you, brothers, take any care to stop them.' - What the conduct of the settlers was, is clearly shown by the report of the commissioners for trade and plantations, in which they remark, 'if the settlers are suffered to continue in the lawless state of anarchy and confusion, they will commit such abuses as cannot fail of involving us in quarrels and disputes with the Indians,' &c. There is reason to suspect, that in all the Indian wars which have taken place, from the confederacy under King Philip to the war with Black Hawk, which is just concluded, the first provocation consisted in some act of injustice, fraud, imposition or violence, perpetrated by some of the white inhabitants. But the truth will never be come at, by hearing one side only.

About the year 1771, the white settlers infringed the Indian boundary and killed several Indians, and encroached on the lands on the opposite side of the Ohio. The intruders could never be effectually removed. Governor Gage twice sent parties of soldiers to remove them from Redstone Creek, but in vain. That Indian wars should arise in this way, is not to be wondered at. But, when they do arise, it would be much more humane to send commissioners to the Indians, to demand their grievances, make them reparation and punish all who molested them, rather than to march troops against them to destroy them, right or wrong. It would also be more magnanimous in a nation containing twelve millions of people, against a few thousands, the remnant left by the evils brought on them by the whites, ardent spirits, and the small pox ; to say nothing of the slaughter of them, which is frequently made a subject of boast, without much reason.

Some of the Indian tribes make grievous complaints, that their treaties are violated. Are not the bargains made with them advantageous enough, without resorting to such measures



as these? They have appealed to the government of the United States,—they have appealed to the people of the United States, for redress. Shall it be in vain? Let no presumptuous confidence in the consciousness of superior power, and their comparative weakness, dictate the answer. The Amalekites, who were the first of nations, were sentenced to be utterly put out under heaven, because they attacked the Israelites when on their march, faint and weary, and slew those who were in the rear, and ‘feared not God.’ Exo. ch. xvii. v. 14. Deut. ch. xxv. v. 18. If any one should answer, that the Israelites were under the immediate protection of the Deity; the reply is, that Babylon, the wonder of the world for its magnificence, was brought to utter ruin for the pride and arrogance of the people and rulers, *and the oppressions* which they practised on other nations.

What was the cause of the judgments denounced against Damascus? It was, among other things, because they had threshed Gilead with threshing instruments; which is supposed by interpreters to mean, that they had greatly oppressed the Hebrews on the east of Jordan.

What was the cause of the judgment against Tyre? Was it not for cruel treatment of the Hebrews, and ‘*because they remembered not the brotherly covenant?*’

What was the cause of the judgment against Edom? Was it not pitiless cruelty and unceasing revenge and hatred of the Jews?

When Saul slaughtered the Gibeonites *in violation of the treaty*, made with them in the time of Joshua, he committed an act highly offensive to the Supreme Being, which was followed many years afterwards, in the time of David, by the infliction of a famine for three successive years, until atonement was made. When David sinned in numbering the Israelites, there was a pestilence sent on the people from Dan to Beersheba, and seventy thousand of them died. These instances are deserving attention, because in them, it appears, the people were afflicted for the wickedness of their rulers, though they had no control over them whatever. As respects *the people*, therefore, in these instances, the infliction must be considered as merely *natural evil*, though brought on by the crimes of their rulers. But, if the

people choose their own rulers, and thus sanction their measures with their approbation or tacit acquiescence, if those measures are unjust, wicked and oppressive, with how much less reason can they hope to escape, under the pretence that those measures are the acts of the government, and not the acts of the people. For, that those, who adopt the unjust act of another and screen him from punishment, are made answerable for his sins, is apparent from the narration of the Levite's wrong mentioned in JUDGES, ch. xx., where it appears, that when the Israelites demanded, that the perpetrators should be delivered up, but the Benjaminites would not suffer them to be punished and took up arms to oppose the Israelites, the whole tribe was exterminated with the exception of six hundred only.

In these general visitations it must be an unwarrantable presumption to hope to escape, from a mere supposition that innocence will be a protection ; since this would be to expect a miracle to take place. It is therefore made the *temporal* interest of every one, to endeavor to prevent injustice from being committed by his rulers ; since he may suffer the infliction of *natural* evil, if he is entirely free from participating in the unjust act, for which the nation is punished.

If the United States therefore should commit acts of injustice and oppression upon the Indians, upon what ground can they hope to escape a visitation for it ? If the rulers oppress them, or suffer any of their agents or any of the people under their government, to do so, it is national sin, and, if visited by some national calamity, what individual has a right to expect that a miracle shall be wrought to save him from it ? He may be innocent or he may not be so ; but when the pestilence comes, or the earthquake, or tempests, or floods, or famine, or foreign war, or civil commotions, sent as judgments upon the whole people for national transgressions, he must bear his lot, whatever it may be. For, there is no pretence, that those upon whom the tower of Siloam fell, were worse than others.\* \*

It is a sufficient refutation of the fatal error of those persons, who suppose they may commit wickedness with impunity in this world, by using proper precautions, and so avoiding those direct, probable, and natural consequences, which they foolishly believe are the only punishments to be expected for their flagi-

tiousness, that those immediate consequences are rather to be considered as warnings to desist from offending, than the punishments of offences. If these consequences are avoided, and the warning is not taken, and the offender hardens himself in the confidence of impunity, the result will infallibly show, in the language of revelation, that 'God is not mocked;' and the offender will find in the result, that though for a time, he goes on in a course of unrivalled prosperity, and, from all appearances, might seem to be favored above others, yet in reality he is but adding wrath to wrath, until his iniquity is filled to the full; when he will find destruction come suddenly upon him from a quarter, whence it was least expected. Such was the fall of Haman, and the Amalekites with him.\* \* \*

Is it not then worth while for the people of the United States to examine, whether they have always acted justly, mercifully and humanely towards the Indian tribes; or, whether they have not directly or indirectly, by their agents, or, by not restraining lawless intruders, or, by not observing the Indian treaties, grievously oppressed them? Are the honest and worthy citizens of the United States, willing to run the risk of suffering some infliction of the divine displeasure, rather than that such violaters of the public peace, should be controlled or punished?

It is true, that, while the Indians remain not wholly driven out or exterminated, it is possible, that no severe requital may be made; because, a season for a change of conduct, may perhaps be mercifully allowed. But, after the Indians are dispersed or annihilated, and there is no longer any opportunity remaining to do them justice or to make reparation for their wrongs, it is then, in the false security of worldly prosperity, that there will be most reason to dread a day of evil visitation.\* \*

Are there not sources enough, from whence such an evil may come, notwithstanding the present apparent prosperity of the United States, without the necessity of going out of the ordinary course of nature? This nation introduced ardent spirits and perhaps the small pox too, among the Indians. Have they not suffered by intemperance and pestilence, themselves? Is it not possible, that the same disposition, that can countenance a violation of Indian treaties, may lead to a violation of the

constitution, and that the consequences of the latter may be a most awful infliction and retaliation for the former?

What then does prudence, as well as, religion, justice and humanity dictate with regard to the treatment of the Indians. Fence off the Indian territories with a wall of iron against lawless intruders. Send missionaries among them, men, who, as experience shows, may be depended on, in whatever they undertake, to instruct, and with power to protect them. If hostilities arise, instead of marching an armed force to massacre them, send commissioners with power to hear their complaints, redress their wrongs and relieve their necessities. This is all that is asked, and it will cost the United States nothing in comparison with the profit, derived from the purchases already made of the Indian territories. But, until this is done, it does not look well to speak of Russia and Poland ; nor, it is believed, will a national fast be of any avail to avert any infliction, if it should be a punishment for injustice, so long as the injustice is continued.

Let not then the appeal of the Indians to the citizens of the United States be made in vain, lest they be compelled to appeal to a tribunal, from which it is believed they will not be sent away unredressed ; but whatever shape it may appear in, whether war, pestilence, famine, civil commotions, or insurrection, the injured sooner or later will be avenged, and the justice of heaven vindicated.

**FINIS.**





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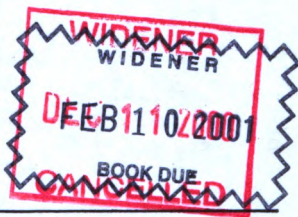


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